

(1968) 10 KL CK 0013

In the High Court Of Kerala

Case No : Appeal Suit No's. 105, 124, 125, 133, 134, 137, 139 and 140 of 1963 and 426 of 1964

K. Nagendra Prabhu and Others

APPELLANT

Vs

Popular Bank Ltd. and Others

RESPONDENT

Date of Decision : 29-10-1968

Acts Referred:

Banking Regulation Act, 1949 — Section 45U
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 6
Companies (Court) Rules, 1959 — Rule 44, 6
Companies Act, 1956 — Section 483, 542, 542(1), 543

Citation : AIR 1970 Ker 120

Hon'ble Judges : V.P. Gopalan Nambiyar, J; V. Balakrishna Eradi, J

Bench : Division Bench

Advocate : K.V. Suryanarayana Iyer, C.M. Devan, N.N. Venkitachalam, K.V. Suryanarayana Iyer, C. Ravi Namboodiri, C.K. Balan, V. Rama Shenoi, R. Raya Shenoi, S. Narayanan Potti, P.C. Chacko, in Nos.133/63 and 134/63, T.N. Subramonia Iyer, P. Krishnamoorthy, C.K. Sivasankara Panicker, P.G.P. Panicker and K.S. Parameswara Iyer, for the Appellant; Mani J. Meenattooor and P.C. Chacko in A.S. No. 426/64, for the Respondent

Judgement

1. The Popular Bank Ltd., now in liquidation was incorporated in 1944 with head-office in Alleppey. It established three branch offices at Vaikom, Shertalai and Kuthiathode respectively. The Bank suspended business on the 16th August 1956. A petition for winding up the Bank was presented in this Court and was ordered on the 19th December 1956. Thereafter, two applications were made by the Official Liquidator of the Bank. Application No. 1 of 1959 from which these appeals arise, was u/s 542(1) of the Companies Act 1956, read with Rules 260 to 262 of the Companies Court Rules 1959. Application 2 of 1959 from which the connected appeals heard along with these arise, was u/s 543 of the Companies Act, read with section 45H of the Banking Companies Act 1949. These were disposed of by our learned brother Raghavan J.

2. Except where expressly indicated, reference hereinafter would be to the ranks

of the parties as in application No. 1 of 1959 which appears to have been treated as the main application by the learned Judge, and a copy of the judgment in which, was ordered to be appended to the judgment in Application No. 2 of 1959. Respondents 1 to 8 and the deceased Damodar Pai were the Directors of the Popular Bank Ltd. Of these, respondents 1 and 8 were in Trivandrum and the rest were in Alleppey. The first respondent was the Chairman of the Board of Directors. The 9th Respondent was appointed General Manager of the Bank on 21-11-1955 in pursuance of a resolution dated 10-11-1955. The 10th respondent was the Manager of the Bank from its inception till the appointment of the 9th respondent, after which he was made to work as Secretary, under the 9th Respondent. The 11th Respondent was a clerk under the 10th respondent. The 8th respondent is the son-in-law of the 1st respondent, the 5th respondent is the brother-in-law of the 1st respondent being the 1st respondent's wife's brother.

3. The learned trial Judge. Raghavan, found that the business of the Bank was carried on with intent to defraud the creditors of the Banking Company, and, at any rate, for other fraudulent purposes as contemplated by section 542(1) of the Companies Act, that respondents Nos. 1 to 8 and 10 and 11 were knowingly parties to the carrying on of the said business in the manner aforesaid, and that the 9th respondent was not knowing party to such carrying on of the business. He further held that Respondents 1 to 8 and 10 were personally liable without any limitation of liability for the debts of the Company. The learned Judge found that the Popular Bank is an insolvent-company and the deficiency in its assets to pay the creditors in full is Rs. 6,50,000/-. He directed that the Liquidator may sell by public auction or otherwise the assets belonging to the Company which are considered unrealisable and that the amounts realised will be applied in reduction of the decree amount and in proportionate reduction of the liability of the Directors as settled by the decree. Subject as above the learned Judge found respondents 10 and 11 jointly and severally liable for the entire amount of Rs. 6,50,000/-. This was apportioned between the various respondents as follows The 3rd respondent was found liable for a sum of Rs. 2,00,000/-; Respondents 1, 4, 5 and 7 were made liable for a sum of Rs. 75,000/- each, and Respondents 2, 6 and 8 were held liable for a sum of Rs. 50,000/- each. The Liquidator was held entitled to his costs from the Respondents in proportion to their liabilities.

4. Respondents 1, 6 and 8 through a common counsel have preferred A. S. Nos. 140 of 1963, 137 of 1963 and 139 of 1963 respectively, against the order. A. S. No. 105 of 1963 is by the 7th Respondent; A. S. No. 125 of 1963 and A. S. No. 124 of 1963 are respectively by Respondents 4 and 5; A. S. No. 133 of 1963 is by the 2nd Respondent; and A. S. No. 134 of 1963 is by the 3rd Respondent A. S. No. 426 of 1964 is by the present Joint Commercial Tax Officer, Tirunelveli who is not a party to Application No. 1 of 1959, but who feels aggrieved by certain directions made by the learned Judge, and who has filed the appeal with the leave of Court. A. S. No. 426 of 1964 is dealt with separately at the end of this judgment, and all the other appeals by the Directors are treated together.

5. No appeals were preferred by Respondents 10 and 11. The 10th Respondent did not file any defence and was examined as PW 22, on the side of the Liquidator. The whereabouts of the 11th Respondent were unknown and substituted service was ordered and effected on him.

6. The Official Liquidator has accepted the order of the learned Judge and has not filed any appeal, nor any memorandum of cross-objections. In each of the appeals preferred by the various Respondents, the Official Liquidator alone has been made a party. In A. S. No. 426 of 1964, in addition to the Official Liquidator, the 3rd respondent is also a party.

7. The 1st respondent and the 6th respondent died subsequent to the order of the learned Judge and after the filing of the appeal their Legal Representatives have been impleaded. After arguments in these appeals and the connected appeals against Application No. 2 of 1959, were closed on 4-7-1968 and judgment -was reserved, the 3rd Respondent died on 10-7-1968. C. M. P. No. 7081 of 1968 was filed on 16-7-1968 to declare the proceedings initiated by the Liquidator as having ended with the death of the 3rd respondent as far as he is concerned, and to record that the claim against him had abated. On this petition the appeals were reposted and arguments on the matter raised by the petition alone were heard on 25-7-1968. At the request of counsel the matter was adjourned to 31-7-1968, and after further submissions and arguments on the C M. P., orders thereon were reserved.

8. We shall proceed to consider at the outset certain preliminary questions, generally affecting all the appeals, and which do not depend on the facts. It was contended that section 542 of the Indian Companies Act 1956 introduced for the first time on and from 1-4-1956. cannot be given retrospective operation so as to permit of an enquiry into the fraudulent trading of the Company or the fraudulent acts of its Directors during a period prior to the coming into force of the section. The argument seems to us to proceed from a misunderstanding of the provisions of the section and the rule of retrospectively. Section 542 of the Act reads:

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

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

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

(b) In particular, the Court may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf.

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

(d) For the purpose of this sub-section the expression "assignee" includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration (not including consideration by way of marriage), given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is earned on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both.

(4) This section shall apply, notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made."

We are clear that in order to attract Sub-clause (1) of section 542 it is enough, if, as stated therein, it "appears" that any business of the Company "has been" carried on with the requisite intent of and for the requisite purpose mentioned in the Sub-section. Once it is so made to "appear" in the course of winding up of a Company subsequent to 1-4-1956. to make the facts and circumstances prior to that date the foundation of the proceeding or order, does not amount to giving retrospective operation to the section. Conduct in the past, is made the cause or the reason for the action subsequent to 1-4-1956. We may contrast the expression "has been" used in relation to carrying on of the business of the Company in Sub-section (1) of Section 542 with the expression "is" occurring in subsection (3) thereof,

9. The ambit of the liability sketched by the section was next debated before us. The section has been copied from Section 275 of the English Companies Act, 1929, corresponding to Section 332 of the English Act 1948. It has its parallel in Section 281 of the Western Australia Companies Act of 1943. There was no similar provision in the Indian Act of 1913.

10. Our attention was called to the decision in *William C. Leitch Brothers Ltd. In re* 1932 2 Ch 71 and *In re, Patrick and Lyon Ltd.* 1933 Ch 786 rendered with

respect to the provision of English Act and to *Hardie v. Hanson* 105 Com WLR 451, rendered with respect to the Australian Section. The section appears to make the Directors liable in disregard of the principles of limited liability. It leaves the Court with a discretion to make a declaration of liability, in relation to "all or any of the debts or other liabilities of the Company". The English case in 1932 2 Ch. 71, itself recognises that the order would, in general, be limited to the amount of the debts of those creditors proved to have been defrauded by the acts of the Directors in question. In the Australian decision Dixon C. J. more explicitly stated the position thus:

"To me it seems difficult to suppose that it was intended that the Court should, in exercising this power of direction go outside the debts and liabilities, the existence of which was in some way attributable to the carrying on of the business with the requisite intent to defraud."

According to the above view the section seems to postulate some nexus between the fraudulent trading or purpose and the extent of the liability of the Directors or other persons.

11. In the English case 1932 2 Ch 71 *Maugham J.* laid down the dictum that:

"If a company continues to carry on business and to incur debts at a time when there is, to the knowledge of the Directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general a proper inference that the Company is carrying on business, with intent to defraud."

It was argued before us that the proposition in the above terms has been stated too widely, and that it has been dissented from in the Australian case. Neither of these submissions is justified. The proposition in the English case has been put guardedly. It is one of proof or evidence, not of substantive law. Even so, it is one of inference regarded as proper, generally, and not universally. In the Australian case Dixon C. J. said nothing against the dictum. Kitto J. stated that the generalisation ought not to be sustained as a valid starting point for consideration of the evidence arising under section. But the learned Judge did not proceed to elaborate why it should not, at least generally be so treated. Menzies J., the third learned Judge in the Australian case, with whose reasons Dixon C. J. concurred, said nothing about the dictum of *Maugham J.* We see nothing in the Australian case to whittle down the dictum of *Maugham J.* in the English case. As an exposition of the parent section from which our provision has been copied, we feel, it is entitled to respect. We further feel that it lays down a safe working rule to go by, in applying the provisions of the section.

12. We shall here deal with the objection raised by the counsel for the 3rd Respondent--the appellant in A. S. No. 134/1963 that the proceedings initiated by the Official Liquidator u/s 542 of the Companies Act, terminate and abate with the death of the 3rd Respondent. It has been recognised in a number of authorities that proceedings u/s 235 of the Indian Companies Act 1913 (corresponding to Section 543 of the Act of 1956), terminate with the death of

the person sought to be proceeded against and cannot be continued against his legal representatives. It is enough to refer to the decision in *Peerdan Juharmal Bank Ltd.*, In re AIR 1958 Mad 583 where previous decisions have been reviewed. It was accepted before us that the same principle applies to proceedings under] Section 542. The decisions to which our attention was drawn were all cases where" the proceedings had not crystallised into an order or decree against the delinquent party. Once this has happened, as in the present case, and the delinquent party dies thereafter, it appears to us that his liability under the decree or order cannot stand automatically vacated. Abatement, if at all, in such circumstances, can only be of the proceedings by way of appeal, but not, of the original proceedings, which have merged in the decree or order. The distinction in this respect has been clearly pointed out by Mulla in his 13th Edition of the CPC (See Vol. 2 page 1231).

13. Besides, the death of the 3rd Respondent occurred on 10-7-1968, after the hearing was concluded and judgment was reserved on 4-7-1968. Such a situation is provided for in Order 22, Rule 6 of the CPC which reads as follows:

"Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death, and shall have the same force and effect as if it had been pronounced before the death took place".

We entertain no doubt that the above provision is applicable to these proceedings by reason of Section 483 of the Companies Act read with Rule 6 of the Companies Court Rules 1959, and Rule 44 of the Rules framed by the Travancore-Cochin High Court under the Banking Regulation Act 1949. The result is that our judgment in the appeal preferred by the 3rd respondent, would have the same force and effect as if it had been pronounced before the death of the 3rd Respondent. But to say this, is not to state that, should any re-investigation into the liability of the 3rd Respondent become necessary by reason of any order of remand, the proceedings to the extent remanded would still be open. It was admitted before us that in such a case, the proceedings, to that extent, would lapse as against the deceased respondent.

14. Before leaving this aspect of the case, we wish to record that although respondents 1 and 6 are in the same position as the 3rd Respondent, no arguments were addressed on their behalf at any time, that the proceedings Initiated by the Official Liquidator would stand terminated by their death, pending appeal, and after the decree or order passed against them by the learned trial Judge. On the other hand, they were strenuously seeking to get rid of the liability imposed on them by the decree or order under appeal.

15. We may also observe that, as a petition, C, M. P. No. 7081 of 1968 can have no legal existence, as it purports to have been filed by a party who is dead. We

have dealt with it as a memo intimating to us the death of the 3rd Respondent.

16. We may then note the argument advanced by some of the counsel that unless the persons sought to be proceeded against u/s 542 of the Act had the "primary" intent to defraud creditors, liability u/s 542 would not be attracted. We are unable to see any warrant for introducing this refinement into the terms of the Section. The section speaks of the business of the company having been carried on "with intent to defraud creditors of the Company, or for any fraudulent purpose." If, on an assessment of all the facts and circumstances, the fraudulent intent or the fraudulent purpose is made out, liability must follow, as much as, a contrary conclusion should result, if neither the intent nor the purpose could be said to be fraudulent.

17. We have so far cleared some of the general arguments addressed to us and the particular argument addressed in A. S. No. 133 of 1963. We may now get down to brass tacks and proceed to deal with the concrete facts and details of the various claims against the Respondents. In doing so, we may conveniently refer to a few land-marks in the history and management of the Bank. From the inception of the Bank in 1944 there was in existence an executive committee to sanction loans etc. in the Bank. Some of the powers of the Board of Directors had been delegated to the Committee. In 1951, there was an intimation or advice by the Reserve Bank that the advances of the Bank showed an over extended position. The Directors of the Bank would disclaim knowledge of this directive or advice from the Reserve Bank (except after seeing the latter inspection report of the Reserve Bank in 1954), and there is no clear evidence that they had been apprised of it, although it is highly probable that they were. On 6-9-1953, the Executive Committee was reconstituted with Respondents, 4, 5 and 7 as its members. By proceedings of the Board of Directors of the same date, the Manager was directed to call a meeting of the Committee at least once a month and act only on its orders in all matters of advances and credits. (Vide Ext. P58). Sometime in January 1954 there was an inspection of the Bank by the Reserve Bank and the Inspection Report (Ext. P62) was received in the Bank in May 1954, and placed before the Executive Committee, in July of the same year. One of the points made in the Inspection Report was that the Board of Directors did not appear to have sufficiently interested itself in the working of the Bank, and, although it had constituted committees from time to time for the purpose of sanctioning and reviewing the advances, these Committees did not function properly. Nor did the Board either define the powers of the Manager or review the advances granted at his discretion. The Report also pointed out that the Head-Office did not obtain periodical statements from the Branches regarding full particulars of advances outstanding in the names of individual borrowers such as the nature and value of the securities, the worth of the parties etc. On 20-8-1954 the post of a separate Agent was sanctioned for the Alleppey Office and the 11th respondent was appointed to the post, to enable the Manager to concentrate on the recovery of monies advanced. On 26-12-1954, one of the members of the Executive Committee (4th Respondent) was appointed

Supervisory Director and his written consent had to be taken in all urgent cases where it was difficult to get at the members of the Executive Committee. This step was consequent on the discovery of a few transgressions of the directions of the Executive Committee. On 20-8-1955 when the cash position of the Bank became acute, the 10th Respondent reported the same to the Directors. They called for a report from the 10th Respondent, and certain changes in the organisational set up of the Bank followed (consequent on the admission of their irregularities by the 10th and 11th Respondents), resulting in the demotion of the 10th and 11th Respondents and the appointment of the 9th Respondent as General Manager by a resolution of the Board dated 10-11-1955. On the same date, the Executive Committee was re-constituted to consist of Respondents 2, 4 and 5. These will be referred to in detail later.

18. We shall next refer to certain orders passed in the course of these proceedings. By order dated 13-6-1955, public examination of Respondents 10, 11 and another was directed by Raman Nayar J. Exts. P55 and P71 are certified copies of the depositions of Respondents 10 and 11 in public examination. After their examination, on further report of the Official Liquidator for public examination of Respondents 1 to 9, the learned Judge by order on C. M. P. No. 113 of 1958 dated 19-10-1959 directed their public examinations. Appeals against the said judgment were allowed by a Division Bench of this Court, on the ground that the order for public examination, was, in the circumstances, violative of Article 20(3) of the Constitution. Further appeals -- C. A. Nos. 603 to 608 of 1961 -- were preferred by the Liquidator and these were allowed by the Supreme Court by its judgment dated 17-8-1964, restoring the order of Raman Nayar J. By that time. Applications 1 and 2 of 1959 had been heard and disposed of on the merits by the learned trial Judge. The Liquidator then filed statements in these applications that the order for public examination restored by the Supreme Court, would be availed of, if necessary, in the event of any possible remand by any order passed in the appeals preferred.

19. With the background thus sketched, we may proceed to examine the various heads of claim made by the Official Liquidator against the Respondents. After formulating the points for determination, the learned Judge set down nine heads under which counsel for the Liquidator had arranged and presented his case. We shall refer to these heads of claim as noticed by the learned Judge, and with respect to which arguments were advanced before us.

20-36. * * * * *

37. Counsel for the Liquidator sought to fasten knowledge on the 3rd Respondent also from the fact that, although he was not present at the meeting of the Board of Directors on 10-31-1955 when Ext. P. 61 list was ratified, he was present at the next meeting of the Board on 30-3-1956 where the minutes of the previous meeting were read and passed and approved. If the Liability of the 3rd Respondent were to be rested merely on his adoption at the subsequent meeting of the proceedings of the Board of Directors dated 10-11-1955, we would have

hesitated to endorse the claim of the Liquidator. The decision in *Burton v. Bevam*, 1908 2 Ch. 240 cited by counsel for the 3rd Respondent seems to be against spelling out liability by mere adoption at a subsequent meeting of the proceedings of a previous one. But, for reasons noticed earlier, and from his conduct to be noticed presently, we are of the view that the 3rd Respondent also had the requisite knowledge of the true position of the Bank.

38-47. * * * * *

48. The evidence in regard to the canvassing of deposits is afforded by P. Ws. 2, 12, 19, 20, 22, 23 and D. W. 2 and by Exts. P67 to P70. P85 and P86. Exts P67 to P70 are circulars issued by the 9th Respondent (D. W. 2), to the branches calling upon the staff-members to canvass deposits. D. W. 2 deposed that while in the employ of the Travancore Bank before he joined the Popular Bank, he used to get such circulars from the head-office of the Travancore Bank and that he followed the practice after joining the Popular Bank. He further deposed that the Directors instructed him to issue such circulars and requested him to canvass deposits. He stated that the Directors were also canvassing deposits to his knowledge. Exts. P85 and P86 written by the 1st respondent to D. W. 2 afford clear indication of the 1st Respondent's eagerness to canvass deposits. Ext. P86 dated 26-4-1956 indicates that the 1st respondent and 5th Respondent wanted to go over to canvass deposits. D. W. 2 offers evidence about the reference to the 5th Respondent in Ex. P86, and that in pursuance of Ext, P86, 1st Respondent actually canvassed deposits. As far as the Directors are concerned. P. W. 19 implicates the 4th Respondent, and P. W, 23, the 5th respondent in the matter of canvassing deposits. The 1st respondent as D. W. 1 denied having canvassed deposits, or having known other Directors having done so. The first part of his denial cannot be accepted in the face of Exts, P85 and P86. Strangely enough, these documents were not put to the 1st respondent or proved through him when he was in the box, but were proved only through the 9th Respondent as D. W. 2, in the course of his cross-examination by the liquidator. The explanation on behalf of the Liquidator is that these documents were made available only when D. W. 2 stepped into the box. Whatever that be, there is no denial either by cross-examination or by further evidence on behalf of the 1st respondent, of these letters. There is also the fact that when the 1st respondent was examined as D. W. 1 he was asked in cross-examination by the Liquidator whether he had not sent a letter dated 23-3-1956 to the 9th respondent asking him to canvass deposits, and he replied "I do not remember", (the date of Ext. P85 is 24-3-1956 and not 23-3-1956. if the suggestion was about the said letter). In these circumstances, we find no reason to reject the evidence afforded by Exts. P85 and P86. There is no reason also to disbelieve the evidence of D. W. 2 that the circulars Exts. F67 to P70 were issued under the instructions of the Directors and that the Directors requested him to canvass deposits and were doing so to his knowledge. There is no effective cross-examination on these aspects. No reasons have been made out to discredit the evidence of P. Ws. 19 and 23. We hold that in pursuance of the circulars Exts. P67 to P70 issued at the

instance of the Directors, there was canvassing for deposits; that some at least of the Directors namely Respondents, 1, 4 and 5 are shown to have canvassed deposits; and that the Directors requested D. W. 2 to do so all at a time when they knew that the affairs of the Bank did not justify the canvassing for or the making of deposits in it. The action of the Directors here summarized amounts to carrying on the business of the Bank with the requisite fraudulent intent or purpose required by Section 542 of the Companies Act. Such intent or purpose appears to us to be a reasonable inference, in the circumstances, from the financial state of the Bank as known to the Directors. (Vide 1932-2 Ch. 71).

49-52. * * * * *

53. From our discussion, of Heads (1) to (6) and (8) we have no hesitation in holding that the business of the Bank was carried on with intent to defraud creditors or other persons, and certainly, with a fraudulent purpose within the meaning of Section 542 of the Companies Act. We also have no hesitation to hold that the Directors (Respondents 1 to 8) were knowingly parties to the carrying on of the said business.

54. The defence to these proceedings that has been relied on by all the Directors generally, and by those of them who were not in the Executive Committee at the relevant period, was that they placed implicit trust and confidence in respondents 10 and 11 and in the members of the Executive Committee to whom the power of managing the affairs of the Bank, and of granting and reviewing loans and advances had been delegated, and that they cannot be held responsible if things went wrong. The defence is based on, and inspired by, the decision in *Dovey v. Cory*. 1901 A C 477 We are unable to endorse the broad submission that irrespective of the size and standing of the Bank, the volume of business transacted therein, and the efficiency, and trustworthiness of the persons to whom responsibilities were entrusted, a delegation of functions would per se carry with it a denudation of responsibility. In the present case, we have noticed that as early as 1954 the Reserve Bank in Ext. P62 Report commented on the laxity of supervision of the Board of Directors and of the Committees constituted for the purpose of sanctioning and reviewing the advances, and the impropriety of leaving these matters to the uncanalised discretion of the Manager. The resolution of the Board of Directors on 6-9-1953, by which the Manager was directed to call a meeting of the Committee at least once in a month and to act only on its orders in all matters of advances and credits was" hardly adhered to especially after 1954. The laxity of supervision and the uncanalised powers of the Manager were allowed to continue. Even after their knowledge on the last Friday in July 1955 that the affairs of the Bank had been brought to a said impasse by reason of the defalcations and malpractices of Respondents 10 and 11 the Directors still continued them in the service of the Bank. They connived at and were parties to, covering up the misappropriations by manipulation of entries in the accounts of the Bank. Even after the confession of guilt by respondents 10 and 11 in Exts. P59 and P60 the Directors had no hesitation in ratifying Ext. P61

list, without any scrutiny or check-up. There was no effort and no attempt on the part of the Directors at any time to see that Respondents 10 and 11, or the Executive Committee, functioned properly and discharged their functions satisfactorily. In the circumstances, we cannot accept the defence of the Directors that they should be excused from liability by reason of the trust, and confidence reposed in respondents 10 and 11 by all of them, and in the members of the Executive Committee of the Board, by the rest of the Directors.

55. It was argued that the conduct and course of dealing of the Directors coupled with their respectability and status were quite inconsistent with the acts of fraudulent trading and the fraudulent purpose attributed to them, and that they had acted only with the bona fide object of helping the Bank to tide over its difficulties. It was stressed that the majority of the shares and deposits in the Bank were, at the relevant time held by the Directors and their near relations and it was hardly conceivable that they would bring the Bank to grief by the action attributed to them. We need not dwell on these aspects at length, as the improbability of a course of action or conduct seems to us of no avail against the proved facts. As a circumstance it cannot outweigh the proved facts to which we have fully adverted.

56. Some complaint was made before us that the pleadings were not sufficiently clear and specific. The substance of the case was contained in the Points of Claim. Its elaboration in matters of detail was attempted in the evidence. We see no complaint before the learned trial Judge of deficient pleading; nor do we see any case of prejudice by evidence spring unsuspectingly by the Liquidator.

57. We may now sum up our findings regarding the liability of the Directors on the various heads of claim. On the First head we find that amounts were withdrawn by the Bank from its Accounts with other Banks without accounting for them in the books of the Bank, and had been misappropriated by the Officers of the Bank. These withdrawals as listed in Schedule II, range from 3-8-1954 to 9-7-1955. As the Directors had knowledge of the misappropriation only on the last Friday of July 1955, they cannot be said to be "knowingly parties" to these withdrawals and misappropriations when they were made. On the second head of the claim, we find that the Directors cannot be held liable for the Fixed Deposit amount of Rs. 10,000/- by Sri Narayanaswamy, received on 19th June 1955, and not brought into account in the books of the Bank till 2-9-1955. On the Third and Fourth heads we find that misappropriations were covered up by manipulating the Bills purchased and Negotiated Accounts and by false and fictitious entries in the Books of the Bank as advances to different customers, and that these fictitious entries were made by respondents 10 and 11 with the knowledge and approval of respondents 1 to 8. On the Fifth head we find that the Directors ratified Ext. P61 list with knowledge of the fictitious nature of the advances in Schedule I of the Points of Claim. The entries in Schedule I range from 30-8-1955 to 5-9-1955 and total to Rs. 1,99,000/-. The entire period covered is subsequent to the knowledge of the Directors and they are responsible for the

entire claim. On the Sixth head of the claim, we hold all the Directors except the 7th respondent, responsible for passing the balance-sheet of 1955, and the declaration of dividend for that year, at a time when the Bank could not to their knowledge have made any profit. We further find that the Directors had issued instructions to D. W. 2 for canvassing deposits and that at least some of them, (viz. respondents 1, 4 and 5) actually canvassed deposits, and that they requested the 9th respondent too do so--all at a time when they knew the affairs of the Bank did not justify their action. On the Eighth head of claim we find that there was fraudulent preference in regard to items 12 and 15 of Schedule VI of the points of claim, amounting in all to a sum of Rs. 10,500/-.

58. The apportionment of liability made by the learned trial Judge between the Directors, as such, was not attacked before us except by the 3rd respondent, who complained against his being debited with the major share of the liability. We do not think that the learned Judge was wrong in debiting the 3rd respondent with the major share of liability. As we are ultimately remanding the matter to the trial Judge further discussion of this aspect is not called for.

59. What then, is the decree or order to be passed? Section 542 of the Companies Act makes the Directors who are knowingly parties to the carrying on of the business of the Company with intent to defraud creditors or any other person or for any fraudulent purpose personal responsible "for all or any of the debts or other liabilities of the Company as the Court may direct". That raises two questions: First: What is the totality of the debts or other liabilities of the Company?; and second: should the Directors be made liable for the totality of such debts or other liabilities, and if not, for what portion of them?

On these matters we have found the pleading and the evidence deficient and we are unable to record any definite finding. In paragraph 3 of the points of claim the Liquidator alleged that the estimated deficiency of the Company according to information gathered by him is Rs. 6,50,000/-. In paragraph 6 (d) the Liquidator prayed:

"(1) a declaration that the respondents are liable without any limitation of liability for all the debts of the Company amounting to the sum of Rs. 13,97,300/-.

(2) A declaration that the respondents are jointly and severally liable to pay to the Official Liquidator sums amounting to Rs. 6,50,000/- being the balance amount required to pay the creditors of the Company in full after realising the available assets of the Company.

(3) If necessary, an account of the debts of the Company be taken.

(4) Payment by the respondents to the Official Liquidator of the Company of the said sum of Rs. 6,50,000/- or such other sum for which the respondents may be found liable on the taking of accounts.

(5) An order that the respondents do pay to the applicant costs of and incidental

to the application.

(6) Such other order in the premises as the Court shall think fit to make". In traversing this, in paragraph 33 of the 1st respondent's defence, he stated:

"It is not even known how and why a declaration of liability to the extent of Rs. 13,97,300/- has been claimed which has later been limited to Rs. 6,50,000/-."

In paragraph 21 of the defence this was repeated, and the Liquidator was put to strict proof of establishing the deficiency and its quantum. The points of defence of many of the other respondents followed on the same lines.

60. There is not even formal evidence on the side of the Liquidator, either as to how the deficiency was estimated at Rs. 6,50,000/- or as to the totality of the debts or liabilities of the Company. Nothing was said in the Liquidator's evidence as P. W. 24, or on his behalf, in support of the quantification of all the debts of the Company in the Points of claim at Rs-. 13,97,500/-. As P. W. 24 the Liquidator only stated that he has claimed Rs. 6,50,000/- as deficiency for paying creditors in full.

61. The learned Trial Judge while rightly noticing that the Court had a discretion in assessing and fixing the liability of the persons concerned, recorded his opinion that respondents 1 to 8 are liable "for all the liabilities of the Bank" (vide page 22 of the printed judgment). At that stage there was no attempt by the learned Judge to quantify "all the liabilities" of the Bank. At pages 24 and 25 of the judgment the learned Judge recorded that the Liquidator claimed a sum of Rs. 6,50,000/- to meet the deficiency in the assets of the Company to pay the creditors in full. On issue No. 1, the learned Judge found without any consideration or discussion that the deficiency in the assets of the Company is Rs. 6,50,000/-.

62. With respect, we are unable to accept this finding. We have already posed the aspects which appear to us to be germane to the question. We are not to be understood as saying that if the nature and extent of the fraudulent trading was responsible for all the debts and liabilities of the Company, a decree for the same cannot follow. But these matters have neither been adverted to nor found. The extent of the fraudulent trading of the Directors in regard to the claim made in the various Schedules of the Points of claim will have to be reassessed in the light of our finding as to the Directors' knowledge of the true position of the Bank. Again, in schedule VI, the Liquidator pressed before us, and we have found, the liability of the Directors only for items 12 and 15. In the light of these, and the other findings that we have recorded the extent of liability of the Directors will have to be re-estimated and appropriate orders passed.

63. We therefore, set aside the decree of the learned Trial Judge in so far as respondents 1 to 8 are concerned, and remit Application No. 1 of 1959 back to the Trial Judge for the limited purpose of: (1) deciding the extent of all the debts or liabilities of the Bank; and (2) considering and deciding in the light of our

findings whether the Respondents-Directors should be made liable for the totality of such debts, and if not for what portion of the same. The parties are at liberty to adduce additional evidence limited to these points. As the appellants-Directors have substantially failed in their contentions, we direct that they pay one-half of the costs of the Liquidator in Appeals 137, 139, 140, 105, 124, 125, 133 and 134 of 1963, and bear their own. Costs before the learned Trial Judge both before and subsequent to this remand will be provided for in the final order to be passed by the learned Judge.

A. S. No. 426 of 1964.

64. This is an appeal by the present Joint Commercial Tax Officer, Tirunelvely, who was the Sales-tax Officer, 1st Circle, Alleppey, till 2-7-1955. He was not a party to Application 1 of 1959, but feels aggrieved by certain observations made by the learned Judge about some writing, signature and seal made and affixed by him as Sales Tax Officer in two of the Account Books produced by the 3rd Respondent, namely Exts. D8i and D87. In effect, he seeks to expunge the observations made by the learned Judge.

65. Discussing the case of the Liquidator and of the 3rd Respondent regarding the alleged entrustment of the letter's "unaccounted money" to the 10th Respondent and its re-payment, we have had occasion to refer to the 3rd Respondent's case that no payments by cheque were made to him by the 10th respondent and that there were payments in cash on the relevant dates, as seen entered in the 3rd Respondent's Account Books, Exts. D80 to D82. Ext. D87 is a ledger of the 3rd Respondent for the year 1130 and was tendered for the only purpose of showing that it bears the signature, writing and seal on 13-10-55 of the same Sales-tax Officer, as the one whose signature, writing and seal are to be found in Ext. D81. The only purpose in producing D. 87 seems to have been to add authenticity to Ext. D81 by reason of the presence in the latter of the same signature, writing and seal, and of the same date as in Ext. D87. The learned Judge discussed the matter and recorded his conclusion thus:

"The 3rd Respondent has produced another Account Book Ext. D87 to prove the genuineness of the accounts. Page 739 of this book contains the seal of the Deputy Commercial Tax Officer. Special Circle Madras with the date 30th January 1957. A little below that appears "Checked" with initials underneath and date: "26-7-1957, A. C. T. O. Madras". In between these two, I mean the seal of the Deputy Commercial Tax Officer, and the endorsement and initials of the A. C. T. O. there is a little space and therein appears the seal of the Sales-tax Officer, 1st Circle, Alleppey. About this seal and below the seal of the Deputy Commercial Tax Officer already referred to, there appear "Examined" and the signature of the S. T. O. with the date "13-10-55". The same seal of the Sales-tax Officer and the word "Examined" with his signature and dated "13-10-55" appear on page 374 of Ext. DR1. The case of the 3rd Respondent is that Ext. D81 is genuine because the same seal of the sales-tax Officer and the same signature and date 13-10-55 as appearing in Ext. D87 appear in Ext. D81 also. In other words, the argument

is that since Ext. D87 is undoubtedly genuine as the seal of the Deputy Commercial Tax Officer and the initials of the A. C. T. O. Madras will indicate and since the same seal and signature of the Sales-tax Officer, Alleppey, as contained therein appear in Ext. D81 also, Ext. D81 must be genuine too.

I have closely examined the word "Examined" with the signature of the S. T. O. and dated "13-10-55" under a magnifying glass. It is very clear that the word "examined" overlapping the seal of the Deputy Commercial Tax Officer, Madras, bearing the date 30th January 1957 is on or above the seal. From my examination under the magnifying glass, it is clear too me that the seal of the Deputy Commercial Tax Officer with the date 30th January 1957, was affixed earlier and the word "Examined" was written above it after the seal was affixed and the date "13-10-55" and the signature of the S. T. O. were also put subsequently. It appears to be clear that this alleged examination by the S. T. O. is a subsequent invention, subsequent to 30th January 1957 with an earlier date put thereon. Therefore, I have no hesitation in holding that Ext. D81 is an account subsequently written up and the seal and the signature of the S. T. O. with an earlier date produced for the purpose of this case. The same seal and signature etc., of the same S. T. O. have been procured on page 739 of Ext. D87 also.

(This is a matter for the Government to take up and it is for the Government to decide what action they should take against the Sales-tax Officer responsible for this. A copy of this judgment may be sent to the Government. The Registrar will keep Exts. D81 and D87 in safe custody and these account books will not be returned without orders of this Court)."

In pursuance of these observations of the learned Judge it appears that on 23-1-1964, the Board of Revenue, Commercial Taxes, Madras, served on the appellant in the above appeal, a notice calling upon him, to explain the irregularity committed in his capacity as the then Sales-tax Officer. 1st Circle, Alleppey, The show cause notice is stated to have quoted the first two out of the three paragraphs of the learned Judge's order, which we have extracted, above. Thereupon the appellant filed this appeal.

66. We have examined the two account books Exts. D81 and D87 and also the signature, writing and seal and the juxtaposition of these. In spite of the challenge made by counsel for the appellant and for the 3rd respondent from specimen demonstrations before us, that it was impossible to be dogmatic in any given case from mere examination with the naked eye or with a magnifying glass, as to whether the seal is over the writing, or the writing over the seal, we are not satisfied that the observations made by the learned Judge are unjustified. Our own examination of the seal and writing only confirmed the learned Judge's impression and observations.

67. The appellant before us has only been issued a show-cause notice in pursuance of the observations made by the learned Judge in his judgment. He would hereafter have sufficient opportunity to explain, as he has attempted to do

before us, that he was not a party to Application No. 1 of 1959, nor even a witness therein and had no occasion to explain the nature of the writing, signature and seal, or the circumstances under which they happened to be made and affixed.

68. We dismiss this appeal, but without any order as to costs.