

(1943) 09 BOM CK 0007

In the Bombay High Court

Case No : Criminal Revision No. 342 of 1943

P.D. Shamdasani

APPELLANT

Vs

The Central Bank of India Ltd. (No. 1)

RESPONDENT

Date of Decision : 02-09-1943

Acts Referred:

Companies Act, 1956 — Section 151
Criminal Procedure Code, 1898 (CrPC) — Section 432

Citation : AIR 1943 Bom 184 : (1944) 46 BOMLR 70

Hon'ble Judges : Rajadhyaksha, J; Lokur, J; John Beaumont, J

Bench : Full Bench

Judgement

John Beaumont, Kt., C.J.—This is a revision application against an order of acquittal, and the Court does not readily entertain such applications. For one reason, because u/s 439 of the Criminal Procedure Code, 1898, we cannot turn an order of acquittal into an order of conviction, and for another reason, because generally, if an order of acquittal seems open to criticism, it is for Government to appeal. In this case the prosecution was u/s 133(3) of the Indian Companies Act, 1913, and the allegation in substance was that the Central Bank and its officers and auditors, who are the accused, had issued a false balance sheet. The learned Magistrate came to the conclusion that the balance-sheet did not make full disclosure of book debts and the provision made to meet bad and doubtful debts, but that the omission to make those disclosures was justified by a notification issued by the Central Government on January 17, 1937, u/s 151 of the Indian Companies Act, that notification being exhibit No. 3.

2. The complainant, Mr. Shamdasani, asked the Magistrate to state a case u/s 432 of the Criminal Procedure Code, raising the question whether the notification, exhibit 3, was valid. But the learned Magistrate in the exercise of his discretion considered that there was no difficulty which he need refer to the High Court, and, therefore, he refused to state a case, and acquitted the accused. This Court considered that there was a serious question of law which required to be considered. We have, I think, no jurisdiction to direct the Magistrate to state a

case u/s 432, if in his discretion he does not desire to do so, and in any case we could not direct him to state a case after recording an order of acquittal. But we admitted the application against acquittal in order that the point of law might be considered.

3. It has been the policy of the Legislature, both in England and in this country, for many years past, in successive Acts relating to companies, to require a company to keep proper accounts, and to issue a proper balancesheet. The provisions in the Companies Act of 1913, as amended by the Companies Act of 1936, are contained in Section 130 and the following sections. Section 130 requires every company to keep proper books of account with respect to the matters specified therein. Section 131 provides that the directors of every company shall, within the time specified, lay before the company in general meeting a balance-sheet and profit and loss account. Sub-section (2) provides that the balance-sheet and the profit and loss account shall be audited by the auditor of the company, and under Sub-section (3) a company has to send a copy of the balance-sheet and profit and loss account to the registered address of every member of the company before the meeting at which the balance-sheet is to be laid before the members of the company. The powers and duties of auditors are dealt with by Section 145, but nothing turns on that section. Then Section 132 is an important section for the present purpose. Sub-section (1) provides that the balance-sheet shall contain a summary of the property and assets and of the capital and liabilities of the company giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at. Sub-section (2) directs that the balance-sheet shall be in the form marked F in the third schedule or as near thereto as circumstances admit. An additional Sub-section (3) was added in 1936, which it is not material to state. Section 133 directs that the balance-sheet and profit and loss account shall in the case of a banking company be signed as therein directed, and in the case of other companies in a different manner. I only notice that in order to observe that that section draws a distinction between banking companies and other companies. Sub-section (3) is the penal section, under which this prosecution was launched, and it provides that if any default is made in laying before the company or in issuing a balance-sheet and profit and loss account as required by Section 131 or if any balance-sheet and profit and loss account is issued, circulated or published which does not comply with the requirements laid down by and u/s 131, Section 132, Section 132A and Section 133, the company and every officer of the company who is knowingly and wilfully a party to the default shall be punishable with fine. The only other Section I need notice is Section 151, which provides in Sub-section (2) that the Central Government may alter any of the tables and forms in the first schedule, so that it does not increase the amount of fees payable to the Registrar in the first schedule, and may alter or add to the forms in the third schedule. Sub-section (3) provides that any such table or form, when altered, shall be published in the official Gazette, and on such publication shall have effect as if enacted in the Act.

4. Form F, which is referred to in Section 132(2), is one of the forms in the third schedule, and, therefore, it may be altered or added to by the Central Government u/s 151. In that form, under the heading "Capital and Liabilities " there is a sub-heading " Provision for bad and doubtful debts " and under the heading "Property and Assets" there is a sub-heading "Book debts ". Exhibit No. 3, which is the notification issued on January 16, 1937, by the Central Government as purporting to act u/s 151, as published in the Gazette of India, contained this provision :

In the column headed " Capital and Liabilities", to the sub-head " Provision for bad and doubtful debts", the words and brackets " (in the case of companies other than banks) " shall be added.

(2) In the column headed " Property and Assets", to the sub-head " Book-debts" the words and brackets " (other than bad and doubtful debts of a bank for which provision has been made to the satisfaction of the auditors) " shall be added.

5. The real question is whether the Central Government u/s 151 can so amend form F as to differentiate between one class of companies and another.

6. The position with regard to banks and their obligations under Sections 131 and 132 and form F, is rather curious. Under the Companies Act of 1882, the form of balance-sheet was simpler than in form F, and there was no distinction between banks and other companies. In the Act of 1913, form F, as originally published, contained immediately below the sub-heading " Book debts " under the heading " Property and Assets " this note :

(Distinguishing in the case of a bank between those considered good and in respect of which the bank is fully secured and those considered good for which the bank holds no security other than the debtor's personal Security, and distinguishing in all cases between debts considered good and debts considered doubtful or bad. Debts due by directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated in all cases.)

That note extended the heading " Book debts " by showing what information was to be given, and the obligations imposed upon banks were slightly more onerous and required rather fuller information than in the case of other companies. In the year 1926 the Central Bank and its officers were prosecuted by Mr. Shamdasani in circumstances somewhat similar to those in the present case, and the learned Magistrate acquitted. But on an application in revision to the High Court in P.D. Shamdasani Vs. S.M. Pochkhanavala, , this Court came to the conclusion that the company had not sufficiently disclosed the book debts under form F of Section 132. At the end of the judgment the Court observed that if their conclusion operated so as to cause undue inconvenience to banks, it was open to them to move the Governor General to amend form F under the power conferred upon him u/s 151 of the Indian Companies Act, 1913. It is not unusual for Courts to direct the attention of the Legislature to what appears to be a defect in the law,

and to suggest that the defect might be remedied. But it is obviously not the business of Courts to indicate to the Legislature or the Executive the method of remedying any such defect, and the suggestion that the matter should be dealt with u/s 151 was no more than an indication of the Court's opinion on the subject. However, the Central Government adopted the suggestion of the Court, and accordingly on March 31, 1927, issued in the Gazette of India a notification in exactly the same terms as exhibit No. 3, so that thereafter under the heading "Book debts" there was a note in parenthesis " (other than bad and doubtful debts of a bank for which provision has been made to the satisfaction of the auditors) " followed by the original note in form F which I have read. How far that alteration in the form was justified, it is not necessary to consider, because the matter was dealt with afresh by the Amendment Act of 1936. In 1936 the Legislature having before it the two notes under the head " Book debts", and also the exception of banks under the head " Provision for bad and doubtful debts " by which a distinction was made between banks and other companies, omitted in the amended form F any reference to such distinction. The two additions made in 1927 were omitted, and the only note under the head " Book debts" was in these terms:

(Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security, and distinguishing between debts considered good and debts considered doubtful or bad. Debts due by directors or other officers of the company or any of them either severally or jointly with any other person to be separately stated).

That is a general direction to all companies as to what they are to include under the head " Book debts ". It seems clear that the Legislature was not prepared in the Act itself or in form F to draw any distinction between banking companies and other companies. Why they were not so prepared, we do not know. It may possibly be, as Sir Jamshedji Kanga has suggested, that the Legislature thought that the Act itself and the forms should treat all companies alike, leaving it to the Central Government u/s 151 to draw a distinction in the case of banks if thought proper. On the other hand, it may be that various interests in the Legislative Assembly were opposed to granting any special consideration to banks, and thought that the same rules should apply to every company, and the bill would not have been passed in a form which gave special relief to banks. We do not know what the reasons were. All we do know is that any distinction between banks and other companies was omitted from form F. But the day after the amending Act came into operation the Central Government issued exhibit No. 3, restoring to banks the favourable position which they had secured in 1927. The question is whether that notification is valid.

7. It is to be noticed that if the Central Government can make an exception in form F in regard to banks, it can make it in regard to other classes of companies too, and if it can make a distinction in respect of a class of companies, I see no

reason why it should not make a distinction in the case of a particular named company. Moreover, if the Central Government can direct that provisions in relation to " Book debts" are not to apply to a particular company or a class of companies, it can direct that other provisions also in form F are not to apply, and can in effect destroy the obligation of the favoured companies to issue a balance sheet in the form which the Legislature thought proper to enact. No doubt, we may assume that the Central Government will act reasonably and properly. We may assume that any advantage conferred on any company or class of companies will be based on considerations of what the Central Government believes to be for the public interest. At the same time, in considering the extent of a power conferred by the Legislature, we cannot overlook, in construing the legislative enactment, the implications of that power on a certain, construction. We must recognize that if the notification, exhibit No. 3, is valid, a much wider alteration in form F could be made under the provisions of Section 151.

8. To my mind, the Central Government, although it may alter or add to form F, is not entitled to introduce a new form, nor is it entitled to amend the substantive provisions of the Companies Act; and it seems to me that directly the Central Government distinguishes between one company and another, it is in effect introducing a new form, and is altering the provisions of Section 132. Sections 130 and 131 in terms apply to every company, and the balance sheet mentioned in Section 132 is the balance sheet to be submitted by the directors u/s 131 in the case of every company. So that Section 132 in effect provides that every balance sheet shall contain a summary of the property and assets and of the capital and liabilities, and if certain companies are entitled to omit to mention " Book debts ", or some book debts, those companies are excused from making the disclosure required by Section 132 (1); nor are they making such a disclosure, if they omit to mention the provisions for bad and doubtful debts, which form part of the assets of the company. Sir Jamshedji Kanga has argued that bad and doubtful debts are really of no value. But unless a debt is definitely written off as bad, for instance, if owed by a company which has been wound up or by an insolvent, or something of that sort, it cannot be said to be of no value. There must be at the present moment a great many persons who are able to pay debts which they could not have paid three years ago, before the war brought commercial prosperity, and the omission to declare bad debts is an omission to declare part of the assets of the company. There is an even more important alteration introduced by exhibit No. 3 in Sub-section (2) of Section 132. Read with the preceding sections and Section 151 that sub-section provides that the balance sheet of every company shall be in the form marked F in the third schedule or as near thereto as circumstances admit, with such modifications as may be introduced u/s 151. But it is every balance sheet which must be in that form, and directly one excepts a particular company or class of. companies, that company or class of companies is not bound to issue a balance sheet in the prescribed form ; they then will have to issue a balance sheet in a different form, which might be separately set out in the schedule as form F-I, or might be

indicated toy alterations in form F; that is a mere matter of drafting. But the substance of the matter is that directly you differentiate between one class of companies and other companies, there are in fact two forms, one applicable to the excepted companies, and the other to the remaining companies. In my opinion, the Central Government has no power u/s 151 to alter form F in such a way as to differentiate between companies, because that involves in substance an alteration of Section 132 of the Act.

9. A second point was taken by the applicant, and that is that the publication of notification, exhibit No. 3, is not a compliance with Sub-section (3) of Section 151. That sub-section provides that any form in the third schedule, when altered, shall be published in the official Gazette, and on such publication shall have effect as if enacted in the Act. Now, it is quite clear that the form as altered was not published. What was published was the alteration made by the notification, and to anybody who had not got a copy of form F available the alterations made in the form as published in the Gazette would mean nothing. Sir Jamshedji Kanga has argued that if the whole altered form was published, unless the alterations were distinguished in coloured ink or by some other distinctive mark, which is not made compulsory, it would be very difficult to find out what the alterations were, and that publishing the alterations, instead of publishing the whole altered form, would be the best way of giving publicity to the world as to what alterations had been made. That may or may not be so, but the answer is that, there being two methods of publication, the Legislature has chosen one, and not the other. What has to be published is the altered form, and it is no good affirming that what has been published is just as good, or even better. It is only upon the publication required by Sub-section (3) that the altered form takes effect as part of the Act, and in my opinion Sub-section (3) of Section 151 has not been complied with. But, of course, that difficulty could be overcome for the future, if the notification was otherwise valid, by publishing the altered form.

10. In my opinion, therefore, the acquittal of the accused on the ground on which it was based, namely, that the Act had been complied with, cannot be justified. But u/s 133 the officers of the company must be knowingly and wilfully a party to the default charged. It is clear that the Bank and its officers and auditors prepared this balance sheet, and, no doubt, future balance sheets up to the present date, bona fide believing the alteration in form F effected by exhibit No. 3 to be valid, and, that being so, it seems to me quite impossible to suggest that there has been any knowing and wilful default on the part of any of the officers of the bank. A company can only act by its agents, and if the agents are innocent, it is not likely that a heavy fine could be imposed on the company. There is no case therefore to interfere in revision against the order of acquittal. In the case of balance sheets issued after the bank has notice of this judgment, different considerations will apply. As long as the alteration in form F was not challenged successfully in a Court of law, banks were entitled to act on the assumption that it was valid.

11. We, therefore, do not propose to interfere with the order of acquittal.

12. Rule discharged.

Lokur, J.

13. This is an application for revision of an order passed by the Presidency Magistrate, Second Additional Court, Bombay, acquitting the opponents, who are the Central Bank of India, Limited, and its chairman, directors, manager, sub-manager, accountants and auditors, in a trial held on the complaint of the petitioner Mr. P.D. Shamdasani. His complaint was that the balance sheet of the said Bank as at December 31, 1939, and its profit and loss account for the year ended December, 1939, issued, circulated and published by the Bank, did not comply with the requirements laid down by and under Sections 131, 132, 133 (1) and regulation 107 in table A of the first schedule of the Indian Companies Act, 1913, and that the opponents, being parties to the default knowingly and wilfully, had thereby committed an offence punishable u/s 133(3) of the Indian Companies Act, 1913, read with Section 109 and/or s.114 of the Indian Penal Code, 1860.

14. As regards the alleged omission to comply with the requirements of regulation 107 in table A of the first schedule, it is enough to say that it is not made penal by Section 133(3) of the Act. Table A contains Regulations for management of a company limited by shares and Rule 107 states what matters the profit and loss account of a company should contain in addition to the matters referred to in Section 132(3). That sub-section was added to Section 132 by Act XXII of 1936 to indicate what matters should be included in a profit and loss account, and the Legislature did not purposely include in them matters referred to in Rule 107. Section 17(2) of the Act requires that the articles of association of every limited company may adopt all or any of the regulations contained in table A in the first schedule, but must contain regulations identical with or to the same effect as certain specified regulations, including Rule 107. It is argued from this that every profit and loss account is bound to contain the matters referred to in the regulation. There is no doubt about this, but the question is whether a default in this respect is punishable u/s 133(3). According to Section 21 (1), the articles of association constitute a contract between each member and the company, and regulate their rights inter se. Hence the requirements of Rule 107, which is embodied in the articles of association of the bank, are not to be deemed to be a part of Section 132(3), and Section 133(3) does not refer in terms to Rule 107. It is not disputed that the impugned profit and loss account does not offend against Section 132(3), and even if it be proved that it does not fulfil all the requirements of Rule 107, the default is not punishable u/s 133(3).

15. The complaint in respect of the balance sheet is that it does not disclose bad and doubtful debts under the heading " Property and Assets" in the right hand column, nor the provision made for them under the heading "Capital and

Liabilities" in the left hand column. This omission is not. denied by the opponents, but it is contended that it is authorised by a notification issued by the Governor-General-in-Council in 1937, and that contention found favour with the learned Magistrate. A brief history of the genesis of that notification will not be beside the point.

16. Section 130(1) requires every company to cause to be kept proper books of account with respect to (a) all sums received and expended and the matters in respect of which the receipt and expenditure take place, (b) all sales and purchases of goods by the company and (c) the assets and liabilities of the company, and Section 131 requires that the balance sheet and the profit and loss account or income and expenditure account shall be audited by the auditor of the company and that such audited balance sheet shall be duly published as set out therein. What the balance sheet is to contain is laid down in Section 132(2). It says :-

The balance sheet shall contain a summary of the property and assets and of the capital and liabilities of the company giving such particulars as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived at.

17. Section 132(2) requires that the balance sheet must be in the form marked F in the third schedule or as near thereto as circumstances admit. One of the items in the right hand column of that form is " Book debts " under the heading " Property and Assets", and there is a corresponding item in the left hand column " Provision for bad and doubtful debts" under the heading "Capital and Liabilities". Under the old Companies Act, 1882 (Act VI of 1882), both these items were to be shown in lump sums. But in the form in the Act of 1913 (Act VII of 1913), the following clause was added in brackets after the words " Book debts " in the right hand column :-

Distinguishing between those considered good and in respect of which the company is fully secured and those considered good for which the company holds no security other than the debtor's personal security, and distinguishing between debts considered good and debts considered doubtful or bad. Debts due by Directors or other officers of the company or any of them either severally or jointly with any other persons to be separately stated.

18. Thus bad and doubtful debts had to be shown separately by the banks. In spite of this, the banking companies continued the practice of not disclosing, in the balance sheets, their bad and good debts, and the provision made for them. The petitioner, Mr. Shamdasani, therefore, filed a complaint against certain officers of the bank, and when the matters came to the High Court, it was held in P.D. Shamdasani Vs. S.M. Pochkhanavala, that bad debts due to the company shown in the books must be included in the total entry against the item " Book debts", that the debt was nonetheless a debt though there might be little prospect of its recovery, and though the creditor might have the means of

covering the deficit if it was not paid. It is also observed there that it is always open to a company to write off debts which in its opinion are entirely irrecoverable, and on this being done, such debts cease to be Book debts ". In the course of the judgment the following observation was made on p. 732 :-

If our conclusion operates so as to cause undue inconvenience to banks, it is open to them to move the Governor-General-in-Council to amend the form under the power conferred on him by Section 151 of the Indian Companies Act, 1913. But, as the form stands, effect must be given to the plain meaning of the language used in it.

19. This suggestion was taken up by some of the banking companies and at their instance the Governor-General-in-Council issued a notification on March 24, 1927, amending form F in the third schedule in the case of banks by permitting them not to show bad and doubtful debts for which provision had been made to the satisfaction of the debtors and also the provision so made. That notification was similar to exhibit 3 in the case. On the strength of the alteration thus effected by this notification in form F, the banking companies continued their old practice of not disclosing in the balance sheets their bad and doubtful debts as well as their secret reserves intended to provide for them. When the Act was amended by Act XXII of 1936, the clauses in the brackets in form F were extended to all companies by the omission of the words " in the case of banks " ; but the banks were not exempted from disclosing all book debts including bad and doubtful debts and the provision made for them. Thus the detailed information required by the parenthetical clause was extended to all companies and the notification of the Governor General issued in 1927 was not embodied in it. This Act came into effect on January 16, 1937, and on the very next day a notification similar to that of 1927 was issued by the Governor-General-in-Council and the practice of not disclosing the bad and doubtful debts and the provision made for them in the balance sheet has been continued till now.

20. The petitioner now contends that the notification of the Governor-General-in-Council is ultra vires and also that it has not been duly published as required by Section 151 (3), that it is, therefore, ineffective and that form F must be deemed to stand as it was before the notification of 1927.

21. Section 151(2) empowers the Central Government to alter or add to the forms in the third schedule, and Sub-section (3) says that any such form, when altered, shall be published in the official Gazette, and on such publication shall have effect as if enacted in the Act. Thus what is required to be published is the altered form itself, but the notification of 1937 (exhibit 3) merely says what the alterations are, without publishing the entire form as altered by it. I think that this defect, though technical, is nonetheless real. It is true that one cannot know what the altered form is without having the original form before him, but at the same time if only the altered form is published, one will not know what the alteration is without the unaltered form before him. It is certainly more important to know what is the alteration that is effected by the notification and, therefore,

it is more useful to publish the alterations than the whole of the form as altered. That is the system usually adopted when Legislative Acts are amended. But Section 151(3) specifically required that the form when altered should be published in the official Gazette. However, if the decision on the point were to turn on this point alone, I would have been inclined to hold, though with some hesitation, that a publication of the alterations effected by the notification in the official Gazette may be regarded as an indirect compliance with the requirements of Section 151(3) of " the Act, But there are other strong reasons why the notification is to be regarded as ultra vires and invalid.

22. The notification is said to be ultra vires of the Central Government on three grounds, viz, (1) that it cannot prescribe one form for banking companies and another for other companies, (2) that it purports to add one more form to the forms prescribed and does not merely alter the existing form F, and (3) that it is repugnant to Section 132 (1). In my opinion the notification is invalid for all these three reasons.

23. Section 131 requires every company to publish its audited balance sheet every year and Section 132(1) prescribes what that balance sheet is to contain. These sections make no distinction between a banking company and other companies, and by Section 132(2) a form is prescribed for all companies alike. The balance sheets of all companies must conform to form F in the third schedule as nearly as circumstances permit. The Central Government is empowered by Section 151(2) to "alter or add to the forms in the Third Schedule ", but the form as altered or added to will be applicable to all companies u/s 132(2). To differentiate between one class of companies and another would be amending that section itself and the power of legislating is not conferred upon the Central Government by Section 151. So long as Section 132(2) stands as it is, prescribing only one form of balance sheet for all companies, the Central Government cannot usurp the power of the Legislature by issuing a notification that there will be a different form for banking companies. Section 151(2) does not confer any such power upon it.

24. The second ground mentioned above is only a corollary from this. Section 151(2) empowers the Central Government to alter or add to an existing form in the third schedule, but not to add one more new form to the schedule. But the impugned notification maintains the existing form as it is, and adds one more form, with certain items omitted, for banking companies. Section 151(3) requires the altered form to be published in the official Gazette, but not any new form that is added to the third schedule. For this reason also the notification is ultra vires of the Central Government.

25. Lastly, the notification is repugnant to Section 132(1) which peremptorily requires the balance sheet of every company to contain a summary of its property and assets and of its capital and liabilities. A company may value its property as it likes, making allowance for depreciation, etc. But the assets and liabilities must be shown according to its books. Section 130 requires every

company to maintain books of account with respect to its assets and liabilities and those words used in Section 131 (1) have the same meaning as the words used in Section 130(1)" (c). Hence in the form prescribed, form F in the third schedule, the expression used under; the heading of " Property and Assets " is " Book Debts ", which expression, according to *Shamdasani v. Pochkhanavala*, means "debts owing to the company and so shown in the books of the company ", Hence all debts due to the company shown in the books must be included in the total entry against this item. Sir Jamshedji Kanga's contention that while in Section 130 the words "assets and liabilities" mean all assets and liabilities, in Section 132(1) they mean "real assets and liabilities" cannot be accepted for obvious reasons. If the Legislature wanted to make any such distinction, the word " real" would have been used in Section 132(1). Without such qualifying word, the words "assets and liabilities" must, according to canons of interpretation, be taken in the same sense in" both the sections.

26. This statutory requirement about the contents of a balance sheet cannot be altered by the Central Government by altering form F in the third schedule. Whatever be the form of the balance sheet, it must show the total book debts in the assets and all the provisions made for them in the liabilities. The last part of Section 132 (1) says that such particulars about these should be given " as will disclose the general nature of those liabilities and assets and how the value of the fixed assets has been arrived ", and for this purpose form F is prescribed, showing the particulars that are required to be given. After all it is only a form and Section 151(2) empowers the Central Government only to alter or add to the " form ", but not to alter the substance. What is required to be disclosed must be disclosed in the balance sheet; only the form regarding the particulars can be altered, but not so as to permit concealment of any assets or liabilities. By the notification the Governor-General-in-Council has permitted such concealment by the banks and, therefore, it is repugnant to Section 132(1) and is ultra vires.

27. Sir Jamshedji Kanga points out that although the corresponding sections of the English Companies Acts of 1908 (8 Edw. VII, c. 69) and of 1929 (19 & 20 Geo. V, c. 23) are similarly worded, there has been a longstanding practice of the banks in England not to disclose in their balance sheets bad and doubtful debts or the secret reserve fund. There is no doubt that such a practice does exist in England. There is no form in the English Act corresponding to form F and no distinction is made in the Act itself between banking companies and other companies in regard to the contents of balance sheets Yet a practice has arisen whereby only banking companies have been allowed the privilege of concealing their bad and doubtful debts and their secret reserve. There is a considerable difference of opinion among experts as to the advisability of allowing this practice. Although the creation of a secret reserve fund may be desirable, especially in the case of financial concerns like banks, yet it is not fair to the shareholders to keep them in the dark as to how much reserve fund there is and how it is utilised. Another objection is that if such reserve is created in excess, the market price of the bank's shares may be much lower than what it should

be, to the detriment of the shareholders, and it is possible that the directors, who are in the know. may buy a large number of shares when lower dividends are paid by reason of the creation of an abnormal secret reserve fund and the market gets depressed, and thereafter raise the market price of the shares during a subsequent year by bringing into account the secret reserve fund. It is true that the auditors who are entitled to have access to all books of accounts are expected to see that such a fraud is not committed, but it is possible for the directors, if they want to be dishonest, to manipulate the accounts by falsely showing larger bad and doubtful debts and the need for a larger reserve fund. Apart from the ethics of creating secret reserve, the fact that the practice of creating it and concealing it from the public and from the shareholders does exist in England is beyond doubt, and is even judicially recognised in *Newton v. Birmingham Small Arms Company, Limited* [1906] 2 Ch. 378. That is a solitary case on the point, and it was u/s 23 of the English Companies Act of 1900 which has been considerably altered by the Act of 1908. The position of law may still be regarded as uncertain there, though the practice has not been challenged in a Court of law since then. In India too that practice does exist and it existed even before the notification of 1927. It was in accordance with that practice that the Central Bank, Ltd., had prepared its balance sheets in 1925 and 1926, and, when they were challenged by the petitioner, this Court held in *Shamdasani v. Pochkhanavala* that bad and doubtful debts and the secret reserve must be shown in the balance sheets by banking companies, and no special favour was shown to them by reason of the longstanding practice. Practice, however long, cannot override the law, and if it be repugnant to statutory provisions, Courts of law will refuse to recognise it and will not allow a breach of the law to be; perpetuated.

28. It is argued that this will greatly upset banking business, since laymen may be alarmed by the presence of bad and doubtful debts without realising that they are provided for by a secret reserve. This can be avoided by a note in bold type at the foot of the balance-sheet explaining the real position. Any way when the law is clear, a judicial decision ought not to be influenced by what is likely to result if effect is given to it. Courts are bound to administer the law as it is, and it is open to those who are aggrieved by it to take steps to have the law amended.

29. Sir Jamshedji Kanga points out that when the difficulty of the banks was brought to the notice of this Court in *Shamdasani v. Pochkhanavala*, they were advised to get the form F altered by the Governor-General-in-Council under the power conferred on him by Section 151, and that when they got it amended, they are told that the Governor-General-in-Council had no power to amend it. It is so, but this Court was not bound to point out the way out of the difficulty, and any suggestion made was only obiter. It is significant that when the Legislature made substantial amendments in the Act by Act XXII of 1936, the ruling in *Shamdasani v. Pochkhanavala* and the subsequent notification of 1927 were before it, and yet it did not think it right to make any exemptions in Section 132

in the case of banking companies. It is strange that on the very next day after the Act was passed, the old notification was renewed by a similar notification. It is not unlikely that the Legislature was not prepared to show any special favour to banking companies, but its provisions were sought to be circumvented by a notification, possibly to give effect to the longstanding practice, or it may be that it was taken for granted that under the powers conferred upon the Central Government by Section 151 the required alteration in favour of banking companies could be made by a notification amending the form. But as such a notification contravenes the express provisions of the Act, it must be held to be ultra vires and ineffective.

30. It follows, therefore, that the officers of the Central Bank, Ltd., were bound to prepare its balance-sheet in the form F in the third schedule without any alteration in it, and this they have not done. But the default was not wilful, since they had no idea that the notification issued by the Governor General would be held to be ultra vires. The balance-sheet was prepared by them according to what they honestly believed to be the form applicable to banks. Similar defaults in balance sheets of banking companies prepared before the pronouncement of this judgment can hardly be regarded as committed knowingly and wilfully. Section 133(3) renders such a default punishable only if it be committed knowingly and wilfully. On this ground the acquittal of opponents Nos. 2 to 15 is justified. The bank can act only through its officers, and as the acquittal of those officers is being upheld, there is no case for interference in revision with the acquittal of accused No. 1 also. I, therefore, agree with my Lord the Chief Justice that the rule should be discharged.

Rajadhyaksha, J.

31. I agree with the order proposed by His Lordship the Chief Justice and wish very briefly to state my reasons for so doing.

32. This is an application in revision against an order of acquittal. u/s 439 of the Criminal Procedure Code it is not open to us sitting in revision to convert an order of acquittal into one of conviction. On merits also, even assuming that the notification of the Governor General in Council is beyond his powers and of no legal effect, it would clearly be impossible to hold the opponents (Nos. 2 to 15) guilty u/s 133(3) of the Indian Companies Act. So long as the Notification was there and was not declared by any competent Court to be ultra vires and of no effect, the opponents were bound to prepare the balance-sheet in conformity with the direction given therein, and it could not possibly be held that they made a default knowingly and wilfully. The bank (opponent No. 1) can only act through its officers and agents and as the acquittal of opponents Nos. 2 to 15 is correct, there is no occasion for interfering with the order of acquittal in respect of opponent No. 1 also. This would apply to all balance-sheets which have been issued so far. That being so, the order of acquittal is clearly right, and the rule must be discharged. Of course, in the view we take of the notification, this defence will not avail in respect of balance-sheets issued hereafter.

33. In this view of the matter, it may strictly not be necessary to decide whether the notification is or is not ultra vires. But as arguments have been addressed to us on an important point of law, it is right that we should express our opinion in the matter.

34. Two points have been argued before us :

(1) that in preparing the profit and loss account for the year ending December 31, 1939, the requirements of law were not obeyed ;

(2) that the balance sheet for that year is not in the form F of the third schedule.

As regards the first point there) is, in my opinion, no substance in it. There is no form prescribed in which the profit and loss account should be prepared. The particulars required to be included in such an account u/s 132(3.) have been included in the impugned profit and loss account. It was argued that under Rule 107 of the first schedule, which by reason of Section 17 is deemed to form part of the articles of association, certain further particulars should have been included in the profit and loss account. It is not clear which particular requirement of Rule 107 has not, according to the applicant, been complied with in the present case. In any case the non-fulfilment of this requirement of Rule 107 cannot give rise to a default so as to attract the provisions of Section 133(3) of the Act. Regulation 107 continues to be a part of the articles of association only, and Section 133(3) makes punishable the defaults in fulfilling the requirements of Sections 131, 132 and 132A only. There is no reference to Rule 107. Therefore, non-fulfilment of the requirement of Rule 107 cannot constitute an offence u/s 133(3) of the Act.

35. The more serious objection however is with reference to the balance sheet. It is a fact that the Central Bank in its balance sheet for the year 1939 did not show on the liabilities side " Provision for payment of bad and doubtful debts " and on the assets side " Bad and doubtful debts for which provision has been made to the satisfaction of the auditors." The learned Magistrate has also found that there were in fact some bad and doubtful debts. The question is whether this can be regarded as default on the part of the opponents in the preparation of the balance sheet. u/s 132(2) of the Act, the balance sheet has to be in the form F of the third schedule or as near thereto as circumstances admit. Form F requires that on the liabilities side should be shown " Provision for bad debts " and on the assets side, " The book debts." After the heading " Book Debts " there is a remark to the following effect:

Distinguishing between those considered good and in respect of which the Company is fully secured and those considered good for which the Company holds no security other than the debtor's personal security and distinguishing between debts considered good and debts considered doubtful and bad. Debts due by Directors and other officers of the Company or any of them either severally or jointly with any other person to be separately stated.

In the balance-sheet for the year 1939, these provisions were not complied with

and the opponents rely on the notification issued by the Governor General in Council on January 16, 1937, u/s 151 of the Act amending the form F so far as the banking companies are concerned.

36. This notification has been challenged on two grounds. Firstly, it is said that it is not a good notification u/s 151 of the Act. Under that section the Governor General in Council is given power to alter or add to the form in the third schedule. u/s 151(3) any form when altered has to be published in the Gazette of India, and on such publication has the effect as if enacted in the Act. In the present case, not the form as amended but the amendment itself was published in the Gazette of India. The notification stated that the form F in the third schedule shall be amended in the manner specified therein. Although this is not a strict compliance with the requirement of Sub-section (3) of Section 151, I should be prepared, if it were necessary to do so, to hold that there is substantial compliance with it, and that the notification is not defective on that account.

37. There is however a more important point in connection with the notification which, in my opinion, invalidates the notification. The really serious obstacle in the way of the validity of the notification is that in amending the form in this manner, the Governor General in Council has in substance affected the provision of the Act itself and has gone beyond the powers granted to him u/s 151(2) of the Act. The short point for our decision therefore is whether the notification of the Governor General dated January 16, 1937, is ultra vires the power of the Governor General in Council. The notification adds the words and brackets " (in the case of Companies other than banks)" after the words "Provision for bad and doubtful debts" in the column headed " Capital and Liabilities " in form F. It also adds the " words and brackets " (other than bad and doubtful debts of a Bank for which provision has been made to the satisfaction of the Auditors)" to the sub-head " book debts " in the column headed " Property and Assets." The effect of this is that in the balance sheet of a Bank it is not necessary to show on the assets side " bad and doubtful debts for which provision has been made to the satisfaction of auditors," and on the liabilities side the actual " provision made for bad and doubtful debts." The question is whether it is intra vires of the Governor General in Council's power to amend the form in this manner.

38. The question is not free from difficulties, and it is with some hesitation that I have come to the conclusion that the notification must be held to be ultra vires. It is clear that the Governor General in Council has power to alter the form. It can be argued that in exercising this power it is open to him to delete certain items from the form F. I was at first inclined to the view that the notification merely makes an alteration in the form, and that the larger power to delete, if necessary, certain items in the form; includes the smaller power to limit their operation to certain classes of companies only. But on further consideration, particularly of the effect of such an amendment, I am of opinion that it is not competent to the Governor General in Council to make an amendment of this type u/s 151(2).

39. u/s 132 of the Act the balance sheet of a company has to contain a summary of the property and assets and of the capital and liabilities of the company giving such particulars as will disclose the general nature of those liabilities and assets. Under Sub-section (2), the balance sheet has to be in the form F in the third schedule or as near thereto as circumstances admit. The express direction given by the Legislature in Section 132(1) that a balance sheet should disclose the general nature of the assets and liabilities is carried out by prescribing a form F which shows the details that should be included in every balance sheet. One of the items in the form is the provision for bad and doubtful debts on the side of liabilities and the book debts (including bad and doubtful debts) on the side of assets. The notification exempts the Banks from the necessity of showing these items, which are essentially part of the assets and liabilities of the company and to that extent is in conflict with the provision of Section 132(1) of the Act. If what is sought to be done by the notification was done by the Legislature itself, then we should have had to read Section 132(1) as controlled by form F.

40. Secondly, u/s 151 the Governor General in Council is given the power to alter or add to the forms in the third schedule. It is in exercise of this power that the notification in question was issued. Undoubtedly, it alters the form by adding certain words to the form. To this extent the amendment would appear to be covered by the authority given by Section 151 of the Act. The effect of this notification, however, is that the form F as it stands would apply to all companies except banks, and the banks would be required to prepare their balance sheets in a modified form. The question is whether the legislature contemplated different forms of balance sheets for different classes of companies. In England this question does not arise as, under the Companies Act, 1929, no particular form of balance sheet has been prescribed. When the Legislature enacted Sub-section (2) of Section 132 and prescribed the form, it intended to secure uniformity in respect of all the companies. The words "as near thereto as circumstances permit" do not mean that different forms may be prescribed. Their meaning has been explained by Sir Charles Fawcett in the case of P.D. Shamdasani Vs. S.M. Pochkhanavala, . He observes (p. 731):

It was contended that such a deviation from the provisions of the note in the form might be justified by Sub-section (2) of Section 132 which says that the balance-sheet " shall be in the Form marked F or as near thereto as circumstances admit. Obviously, this elasticity is intended for cases where the circumstances of a particular company make any part of the form inapplicable to it.

Except to this extent, the balance sheets have to be in the form F in the Third Schedule. The words " add to the Forms in the Third Schedule " which occur in Section 151(2) do not mean that new forms may be prescribed ; but merely mean that any additional items may be added to the prescribed form F or any alteration may be made to the wording thereof. Such additions or alterations, however, cannot have the effect of prescribing different forms for different

classes of companies. This is clear from Section 151(3), which refers only to the [publication of " altered" forms. The " addition " referred to in Sub-section (2) is really in the nature of an alteration to the existing forms. It is impossible to accept Sir Jamshedji Kanga's contention that the notification does not in effect prescribe two kinds of forms for balance sheets-one for banks and another one for companies other than banks. It is immaterial that the form for banks, viz., form F, read with the Governor General in Council's notification, discloses the general nature of the liabilities and assets of the companies. The strict requirement of the law has to be complied with even though, otherwise, the form may be said to disclose the assets and liabilities of the companies generally.

41. The third point on which, in my opinion, the notification must be deemed ultra vires arises in this manner. Under the Companies Act of 1913, the form F included the item "book debts", and there was a note appearing immediately thereafter which stated :

Distinguishing in the case of a Bank between those debts considered good and in respect of which the Bank is fully secured and those considered good for which the bank holds no security other than debtor's personal security and distinguishing in all cases between debts considered good and those considered doubtful.

Thus the form, as it stood, required all the companies to show good and bad debts ; and there was an additional obligation on the banking companies to show debts which were considered good and fully secured and debts which were considered good and which were covered by personal security of the debtors. In spite of this banks did not show bad and doubtful debts on their balance-sheets. This was presumably in accordance with the practice of banks both in this country and in other countries, as stated in the Communique of the Government of India in the Commerce Department, dated March 29, 1927. The matter was brought to the notice of this Court in the case of Shamdasani v. Pochkhanavala. It was held by this Court that it was necessary for the banks to show all the bad and doubtful debts. A suggestion was made in the closing paragraphs of the judgment that if the conclusion of this Court operates so as to cause undue inconvenience to banks, it was open to them to move the Governor General in Council to amend the form under the powers conferred on him by Section 151 of the Indian Companies Act of 1913. It does not appear whether the question as to the competence of the Governor General in Council to amend the form in that manner was considered in that case. Accepting the suggestion made in that judgment, a notification was issued by the Governor General in Council on March 29, 1927, the effect of which was that only the companies, other than banks, were bound to show in their balance sheets bad and doubtful debts. This is how the matter stood from 1927 till 1936 when the Act was amended. In the amending Act the note which appeared in the column " Book Debts " was altered, and the requirements which were originally imposed only on the banking companies were imposed on all the companies. All the companies were made

liable to show good debts which were fully secured and good debts for which there was the personal security of the debtor only. But in amending the form the words by which a concession was given to the banks under the notification of 1927 and by which they were exempt from the liability of showing bad and doubtful debts were not reproduced in the new form ; but on the very next day after the amending Act came into force, the Governor General in Council issued the impugned notification which is substantially in the same form as the notification of 1927. By that notification exemption was given to banks from the liability of showing bad and doubtful debts. Such an exemption is essentially a matter of policy and should ordinarily be embodied in the Act itself or at least there should be specific provision authorising the Governor General in Council to make such changes in the form. If the Legislature wanted to give its recognition to the practice prevailing in this country and in other countries of exempting the banks from showing in their balance sheets bad and doubtful debts, I can see no reason why the amendment in the form, effected by the notification of 1927, was not embodied in the Act by making the necessary addition to that form itself. It is impossible to accept Sir Jamshedji Kanga's contention that this was due to oversight. It is possible to argue, as Sir Jamshedji did, that the Legislature may have felt that, as in the previous case, the form should be left to be amended in favour of the banks by a notification of the Governor General in Council. If such matters of policy were to be left to be legislated for by notifications, I cannot see why the change made in the note below the item " Book debts " by the Act of 1936 by which all companies were made liable to show fully secured and personally secured debts could also not have been brought about by an amending notification. But the Legislature thought it fit to legislate definitely on the subject, and the pointed omission to insert a saving clause in favour of the banks with respect to bad and doubtful debts would more properly lead to an inference that the Legislature did not intend to make such discrimination. In this view also, the notification would appear to be ultra vires.

42. Sir Jamshedji Kanga argued that a notification u/s 151(2) after publication forms a part of the" Act. It is undoubtedly so; but before it can have this legal effect it must be a notification, which the Governor General in Council had power to issue.

43. In any view of the matter, therefore, it seems to me that the notification in question: must be held to be ultra vires.