

(1960) 12 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Original Order No. 76 of 1956

Raghubar Narayan Singh, alias R.N. Singh

APPELLANT

Vs

Pacific Bank Limited (In Liquidation) and Another

RESPONDENT

Date of Decision : 21-12-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 48

Citation : 65 CWN 820

Hon'ble Judges : Lahiri, C.J.;Bose, J

Bench : Division Bench

Advocate : Sidhartha Roy, Dipankar Gupta, for the Appellant;Sabyasachi Mukherji, S. Dutt, for the Respondent

Final Decision : Dismissed

Judgement

Lahiri, C.J.—This appeal arises out of an order made by S.R. Das Gupta, J. (as he then was) in a misfeasance proceeding u/s 235 of the Indian Companies Act of 1913, by which he directed that the appellant Raghubar Narayan Singh and one A.K. Das (respondent No.3) do jointly and severally contribute to the assets of the respondent bank a sum of Rs.4,97,000/- and further that the appellant do restore to the assets of the respondent bank another sum of Rs.2,82,682/-. The respondent bank which was a public limited company was incorporated in the year 1934 and it was ordered to be wound up on March 31, 1947 and Mr. Sidhartha Kumar Ghosh, Chartered Accountant, was appointed Liquidator. On December 4, 1947, an application was filed u/s 153 of the Indian Companies Act of 1913 for sanction of a scheme and an interim order was made for stay of proceedings in winding up with certain exceptions. On July, 29, 1948, the application u/s 153 was dismissed and the order of stay was vacated. On April 6, 1951, the Liquidator Sidhartha Kumar Ghosh took out a Master's Summons praying for a direction upon the appellant and the third respondent A. K. Das to contribute to the assets of the bank the various sums mentioned in the prayers and also for various other reliefs with which we are not concerned in this appeal.

There is an endorsement upon the summons to the effect that the application was noted as made on the 6th April, 1951. The ground in support of the summons is stated to be the petition of Sidhartha Kumar Ghosh, Official Liquidator of the respondent bank verified by his affidavit affirmed on April 3, 1951.

2. As the only question argued before us at considerable length in this appeal is the question of limitation, I should mention at this stage that on the date the Master's Summons was taken out the application of the Official Liquidator was out of time by four months and 10 to 12 days, because the period of limitation prescribed by Section 235 of the Indian Companies Act, as it stood at the material time, was 3 years from the date of the first appointment of the Liquidator in winding up. As I have already said in the present case, the Liquidator was appointed on 31st March, 1947 and the period of 3 years would expire on the 20th March, 1950; but the Liquidator is entitled to add to this period a period of 7 months 25 days, for which further proceedings in winding up were ordered to be stayed. If this period is added to the statutory period of 3 years the last day of making the application would expire on the 25th of November, 1950, whereas the application was filed on the 6th of April 1951.

3. To avoid the bar of limitation the Liquidator stated in his original petition that he requested the appellant and other officers of the company to submit a statement of affairs of the company u/s 177A of the Indian Companies Act, but they "refused and/or failed and neglected to do so." Rule further stated that he had definite knowledge about the fraud committed by the appellant in carrying on the business of the company in or about October, 1950 in the course of the private examination of the appellant u/s 195 of the Indian Companies Act. On May 14, 1953 the Liquidator filed a supplementary affidavit with leave of the Court in which he definitely made out a case u/s 18 of the Indian Limitation Act by alleging that he was kept from the knowledge of his right to make the application by deliberate and active concealment of facts and circumstances relating to the affairs of the company and that he was not aware of the fraud prior to the private examination of the appellant in the month of October, 1950. It appears that upon the application of the Liquidator for examination of the appellant u/s 195, the private examination of the appellant was held on the 6th and 15th October, 1950. the Liquidator claims in the supplementary affidavit that he was kept from the knowledge of his right by the fraud of the appellant till those dates and the starting point of limitation should be taken as the 15th October, 1950. During the pendency of the proceeding Section 45(O) of the Banking Companies Amendment Act (Act LII of 1953) came into operation on the 30th December, 1953. Section 45(O) (ii) as it stood on that date provided that notwithstanding anything to the contrary contained in the Indian Limitation Act or Section 235 of the Indian Companies Act, the period of limitation in a misfeasance summons shall be 12 years from the date of accrual of the claim. The provisions of this new Section 45(O) were also called in aid by the Liquidator to get rid of the bar of the limitation. On the merits of the case the learned trial

Judge was satisfied that the appellant was guilty of the various charges of fraud levelled against him and that he had misappropriated large sums of money belonging to the bank by making various false and fictitious entries in the account books of the bank between December 27, 1940 upto the month of December, 1946. No argument has been advanced before us on behalf of the appellant that this finding of the learned trial Judge on the merits of the case is wrong. On the question of limitation the learned trial Judge has held that the Liquidator has failed to bring the case within the purview of Section 18 of the Indian Limitation Act; he has held in favour of the Liquidator that the present case is governed by the amended Section 45(O) of the Banking Companies Act, which came into operation on the 30th of December, 1953.

4. In the arguments before us the learned Counsel for the appellant has challenged the decision of the learned trial Judge on the question of the applicability of the amended Section 45(O) of the Banking Companies Act and the learned Counsel appearing for the respondent has supported the decision about the applicability of amended Section 45(O) of the Banking Companies Act and he has also attempted to support the order made by the learned trial Judge by challenging his decision u/s 18 of the Indian Limitation Act. Upon the arguments advanced before us, therefore, the two questions which arise for our consideration are:

1) Whether the learned trial Judge set aside right in holding that the Liquidator had failed to prove facts necessary to attract the operation of Section 18 of the Indian Limitation Act.

2) Whether the learned trial Judge was right of holding that Section 45(O) of the Banking Companies Amendment Act of 1953 is retrospective to the extent that it affects even pending proceedings.

5. I shall now take up the first point for consideration. The case of the Liquidator is that the fraud committed by the appellant in respect of the assets of the bank consisted in a chain of false and fictitious credit and debit entries in the account books of the bank between the 27th of December, 1940 upto the end of December, 1946, during which period the appellant was the Managing Director of the bank. It appears to be an admitted fact that the appellant became the Managing Director of the bank on the 14th of September, 1939 and that he continued as such upto the date of liquidation (see the statement in paragraph 8(a) of the petition and the appellant's answer to questions Nos.220-222 in the course of his private examination held on the 12th October, 1959). The second act of fraud which according to the Liquidator kept him from the knowledge of his right is the failure and/or refusal of the appellant to submit a statement of the affairs of the bank u/s 177A of the Indian Companies Act. The Liquidator states that he came to know about the false and fictitious nature of the credit and debit entries for the first time in the month of October, 1950, when the appellant admitted those entries to be false and fictitious in the course of his private examination u/s 195 of the Indian Companies Act. S. R. Das Gupta, J. has

decided this point against the Liquidator on four grounds.

1) Sometime in September, 1949, there was a compromise between the appellant's father Dalip Narayan Singh who was for sometime the Chairman of the Board of Directors of the bank and the Liquidator as a result of which the Liquidator received from the said Dalip Narayan Singh a sum of Rs.1,25,000/-. The learned Judge observes that at the time of compromise the Liquidator either had or could have had the necessary information from the said Dalip Narayan Singh about the false and fictitious nature of the credit and debit entries and therefore the Liquidator can not claim extension of time beyond the date of that compromise. The circumstances under which the compromise was effected are set out in detail in paragraphs 11-15 of the affidavit of the Liquidator affirmed on the 9th September, 1949 and printed at page 467 of Part II of the paper book. The first ground for deciding the question u/s 18 of the Indian Limitation Act against the Liquidator, therefore, is that in or about September, 1949, the Liquidator had notice of facts from which he could with due diligence have discovered the nature of the fraud.

2) The second ground given by the learned Judge for deciding the question of the applicability of Section 18 of the Limitation Act against the Liquidator is that on April 3, 1950 the Liquidator applied for the examination of the appellant u/s 195 of the Indian Companies Act and for compelling him to file a statement of the affairs of the bank u/s 117A of the Indian Companies Act. The learned Judge observes that the affidavit in support of the application was affirmed by the Liquidator on the 3rd April, 1950 which was more than three years before the date of the present application. There is a slight inaccuracy as to the date on which the affidavit was affirmed, because I find that the affidavit was affirmed not on the 3rd April, 1950 but on the 25th March, 1950. But this is a point in favour of the appellant because it shows that the Liquidator had knowledge of the fraud on an earlier date, that is to say, the 25th March, 1950. S.R. Das Gupta, J. points out that in paragraph 12 of the aforesaid affidavit the Liquidator sets out all the facts which form the subject matter of enquiry in the proceeding u/s 235 and consequently, the Liquidator cannot claim any extension of time beyond the 25th of March, 1950.

3) The third ground given by S.R. Das Gupta, J. in support of his conclusion is that the appellant is not guilty of any fraudulent concealment of facts which kept the Liquidator from the knowledge of his right to apply because under the law the appellant's only duty after liquidation was to file a statement of the affairs of the company u/s 177A of the Indian Companies Act, which the appellant could not file because of the refusal of the Liquidator to give the appellant an inspection of the account books of the company. It is pointed out by learned Judge that on June 6, 1950, the Liquidator was directed by the company Judge to give the appellant an opportunity to take inspection of such books and records as he might require to enable him to furnish a statement u/s 177A; but in spite of that order the Liquidator failed and neglected to give inspection to the

appellant, as a result of which the appellant was released from the duty of filing a statement u/s 177A by the Company Judge by an order dated June 23, 1950. In these circumstances, according to the learned trial Judge the appellant was under no obligation to file a statement u/s 177A of the Companies Act and his failure to do so did not amount to fraud within the meaning of Section 18 of the Indian Limitation Act.

4) Upon the correspondence that passed between the Liquidator and the appellant the learned trial Judge holds that the appellant asked for an opportunity to look into the account books to enable him to furnish a statement u/s 177A; but the Liquidator admitted in his evidence before the Court that no inspection was offered to the appellant and consequently, the appellant cannot be held to have been guilty of fraudulent concealment in not filing the statement u/s 177A.

6. With great respect to the learned trial Judge I am entirely unable to accept any of the reasons given by him in support of his conclusion that the Liquidator had failed to prove facts necessary to bring the case u/s 18 of the Indian Limitation Act. With regard to the first two grounds namely, that the Liquidator cannot claim any extension of time beyond the month of September, 1949 (when the compromise between the Liquidator and Dalip Narayan Singh took place) or the 3rd April, 1950 (when the application for the appellant's examination u/s 195 of the Indian Companies Act was filed), I fail to see how the present application can be held to be out of time even upon those findings. It is possible that the learned trial Judge thought that the date on which the present application was filed must be May 14, 1953, when the Liquidator filed a supplementary affidavit expressly claiming the benefit of Section 18 of the Indian Limitation Act. There is no clear finding in the judgment as to the date when the application u/s 235 was filed, but the conclusion of the learned trial Judge on the first two points can be explained only upon the hypothesis that the present application was filed on May 14, 1953. It is, therefore, necessary for me to address myself to the question as to the precise date on which the application u/s 235 was filed and I have no doubt in my mind that the application in the present case must be deemed to have been filed on May 14, 1953, but on April 6, 1951, on which date the Master's Summons was taken out by the Liquidator with an endorsement that the application was noted as made on that date. Under Rule 209 of the Rules framed by this Court under the old Companies Act, applications u/s 235 are made on summons to be served with a copy of any affidavit intended to be used in support. According to the language of Rule 209 as soon as the summons is taken out limitation stops running. Mr. Mukherjee appearing for the Liquidator has very ably pointed out that there is some difference as to the procedure to be followed in this matter under the English law and the new Company Rules framed by the Supreme Court on the one hand and Rule 209 of the old Company Rules on the other. According to Rule 209 the grounds in support of the summons form no part of the summons itself, but according to English practice and also according to Rule 260 of the new Company Rules framed by the Supreme Court under Indian Companies Act of 1956, the

summons shall state the grounds of the application (see Palmer's Company Precedents, Vol. II, 17th Edition 505 and Rule 260 of the new Company Rules framed by the Supreme Court under the Indian Companies Act of 1956). As the present case is governed by the old Company Rules framed by this Court the application u/s 235 must be deemed to have been made on April 6, 1951, when the Master's Summons was taken out by the Liquidator. In fact, this point was not seriously disputed by Mr. Ray in the course of his able arguments in support of the appeal. It is to be noted that even in the original petition which was filed by the Liquidator to support of the summons there are allegations in paragraphs 3 and 11 which attract the operation of Section 18 of the Indian Limitation Act, although Section 18 is not specifically pleaded therein. The supplementary affidavit filed by the Liquidator on May 14, 1953, with leave of the Court, is, in my opinion, nothing but a statement of further and better particulars in respect of the fraud alleged in the original petition. If, therefore, the present application u/s 235 of the Indian Limitation Act is to be deemed as having been filed on April 6, 1951 as I hold it to have been filed on that date, it is within a period of 3 years from September, 1949 or the 3rd April, 1950, on which according to S.R. Das Gupta, J. the Liquidator had knowledge of facts which entitled him to file the application.

7. Mr. Mukherjee has further contended that the learned trial Judge was in error in holding with regard to the compromise between the Liquidator and Dalip Narayan Singh that at the time of the compromise the Liquidator either had or could have had the necessary information from Dalip Narayan Singh from which he could have got information of the false and fictitious nature of the transactions. The argument is that it is not sufficient for the persons charged with fraud to prove that the Liquidator had clues and hints which, if vigorously and acutely pursued, might have led to the discovery of the fraud; but it is necessary to prove affirmatively that the Liquidator had definite knowledge of the fraudulent nature of the impugned transactions within the period of limitation provided for by law. In support of this proposition Mr. Mukherjee has relied upon the cases of *Rahimbhoy v. C.A. Turner* (1) 20 IA 1 and *Biman Chandra v. Promotha Nath* (2) ILR 49 Cal 886. These rulings undoubtedly support the argument advanced by Mr. Mukherjee and I hold upon the authority of those cases that S.R. Das Gupta, J. was wrong in holding that the Liquidator had knowledge of the fraud in the month of September, 1949, when the compromise between the Liquidator and Dalip Narayan Singh took place. The circumstances under which the compromise took place as detailed in the Liquidator's affidavit affirmed on the 9th September, 1949 and printed at page 467 of Part II of the paper book might at best be said to give the Liquidator some notice of facts which might if vigorously pursued, have led to the discovery of fraud; but they cannot certainly be treated as positive evidence which gave the Liquidator a notice of the fraud alleged by him. The finding of S.R. Das Gupta, J. to the effect that the Liquidator had knowledge of the fraudulent transactions which form the subject matter of the present proceeding on the date on which he filed the

application for the private examination of the appellant u/s 195 of the Indian Companies Act appears to me to be quite correct. That application was affirmed by the Liquidator on March 25, 1950 and it was actually filed on April 3, 1950. As the material allegations in that application are substantially the same as in the application u/s 235, I have no hesitation in holding that the Liquidator came to know about the fictitious nature of the entries in the account books of the bank on the date on which the affidavit in support of that application was affirmed, that is, on March 25, 1950. This however, does not lead to the conclusion that the application u/s 235 is barred by limitation, because it is within 3 years from April 6, 1951, which, as I have already pointed out, is the date of institution of the present proceeding.

8. The most important question on the applicability of Section 18 of the Indian Limitation Act is whether the Liquidator was kept from the knowledge of his right to make the application by the fraud of the appellant. According to the Liquidator the fraudulent act of the appellant which stood in the way of his making an application on an earlier date was "deliberate and active concealment of facts and circumstances relating to the affairs of the company" and failure to submit the statement u/s 177A of the Indian Companies Act in spite of repeated demands. Mr. Ray appearing in support of the appeal has strenuously contended before us that the Liquidator has totally failed to prove this part of the case. He has argued that the concealment amounts to fraud only when there is a duty to disclose. It is pointed out that in the present case though there was a statutory obligation on the part of the appellant to file a statement relating to the affairs of the company u/s 177A of the Indian Companies Act, the appellant was prevented from performing that statutory duty by the refusal of the liquidator to offer the appellant an inspection of the account books of the company. Strong reliance is placed upon the fact that though the Liquidator was directed to give the appellant inspection of the books of the company by an order of Bachawat, J. dated the 6th of June, 1950, the Liquidator deliberately refused to give inspection and eventually took a consent order from the Court on June 23, 1950 releasing the appellant from the duty to file a statement u/s 177A of the Indian Companies Act. It is contended that in view of this conduct of the Liquidator he cannot be heard to say that he was kept from the knowledge of his right to file the application u/s 235 of the Indian Companies Act by any fraudulent suppression of the affairs of the company by the appellant. I am afraid I cannot accept this contention as sound. As I have already held that the Liquidator had knowledge of the fraud on March 25, 1950, anything that happened after that date is, in my opinion, wholly irrelevant on the question of fraudulent suppression on the part of the appellant. The Liquidator might be unwilling to give inspection in terms of the order of the Court dated the 6th of June, 1950, because he had already got knowledge of the fraud of the appellant or his refusal might be due to the fact that this purpose would be served by the private examination of the appellant u/s 195 of the Indian Companies Act; but that is a matter of speculation which has hardly any bearing on the question whether the

Liquidator had been kept from the knowledge of his right before March 25, 1950.

9. The more important question, therefore, is whether the Liquidator was kept from the knowledge of his right till March 25, 1950. On this point I shall have to consider the correspondence that passed between the Liquidator on the one hand and the appellant and/or A. K. Das on the other. It appears that very soon after the winding up order the Liquidator addressed one letter to A.K. Das on April 21, 1947, requesting him to furnish a statement of the affairs of the company u/s 177A of the Indian Companies Act. This letter was addressed to A.K. Das and some other Directors of the bank; but the appellant's name does not appear therein. Another letter was written by the Liquidator to A.K. Das alone on May 6, 1947 requesting him to furnish particulars about six loans aggregating to about Rs.7,47,000/- purported to have been granted by the bank to various persons between March 29, 1946 and August 26, 1946. The reply to A.K. Das to this letter is dated May 26, 1947, in which A.K. Das states that he was not any way responsible for the loans which were covered by the period during which the appellant (R. N. Singh) was in charge of the company as its chairman. On this ground A. K. Das regrets his inability to give any information on the matters referred to by the Liquidator. The third letter written by the Liquidator to the appellant alone is dated May 30, 1947, asking the appellant to explain certain irregularities and furnish the Liquidator with the particulars mentioned in letter, Attention of the appellant was invited to the provision of Section 177A of the Indian Companies Act. The fourth letter written by the Liquidator is also dated May 30, 1947 and it is also addressed to the appellant alone. By this letter the Liquidator asks the appellant to supply him with particulars of certain ornaments and goods pledges with the bank. The fifth letter written by the Liquidator to the appellant alone is dated June 5, 1947, in which the Liquidator asks for particulars of the identical loans referred to in the Liquidator's letter to A.K. Das dated May 6, 1947. The sixth letter written by the Liquidator to the appellant is dated June 24, 1947, in which the Liquidator asks for particulars of certain G.P. Notes purported to have been transferred by the bank in favour of the appellant. The Liquidator's letters dated May 6, 1947 (addressed to A.K. Das), May 30, 1949 and June 5, 1947 were replied to by the appellant's Solicitor by his letter dated the 27th June, 1947. The material portion of this reply is as follows:-

"With regard to the said letters I have been instructed by my said client to state as follows :-

With regard to the letter dated 6th May, 1957 my client states that Mr. A.K. Das took over charge a few days before the actual conclusion of the agreement between him and my client. The clean cash-book of the Bank at its said office was kept open under his instruction for entries to be made in order to suit his convenience. The entries from 29.3.46 to 6.4.46 as also the entry in August and September 1946 do not at all concern my client. Mr. Das alone can explain those entries and is solely responsible for the same. In regard to other loans my client is afraid that he is not in a position to give any details from his memory.

With regard to one of the letters dated 30.5.47 my client states that the Bank never pledged any ornaments or goods to him but Mr. P.L. Ghosh, the Agent at Jamalpur Branch of the Bank pledged some ornaments in his personal capacity against which he took money from my client. If these ornaments are claimed as Bank's properties my client is to be paid the amount with interest till the date of the release of the ornaments.

With regard to the other letter dated 30.5.47 my client states that irregularity if any were fully made known to Mr. A.K. Das when he approached my client for taking over the management of the Pacific Bank Ltd. and never became fully conversant with the affairs of the Bank. He fixed up terms of transfer of the management of the Bank. Thus he should be asked to comply with your requirements u/s 177A of the Indian Companies Act.

Yours faithfully, S.C. Ray Chaudhuri."

10. If one reads the letter written by the appellant's Solicitor on June 27, 1947, along with the letter written by A. K. Das on May 26, 1947, one will find that in respect of the loans granted by the bank between March 29, 1946 upto April 6, 1946, which amount to a total of nearly 6 lakhs of rupees the appellant holds A.K. Das responsible for those entries, whereas A.K. Das charges the appellant with the duty of explaining those entries. The reply of the appellant's Solicitor refers to the fact that as result of an agreement between the appellant and A.K.Das entered into on April 3, 1946, A.K. Das placed in sole charge of the management of the bank and therefore, he was responsible for the entries. The agreement has been made an annexure to the Liquidator's petition u/s 235 and has been printed in the paper book. It recites that in consideration of a sum of Rs.7,60,000/- to be paid by A. K. Das to the appellant within a week from the date of the agreement, the appellant will delegate to A.K. Das such power or powers as were then vested in the appellant for the purpose of carrying on the business of the bank and will appoint A. K. Das as the General Manager. There is nothing on the record to show whether the sum of Rs.7,60,000/- agreed to be paid by A.K. Das to the appellant was actually paid by him, though the Solicitor's letter recites that powers were delegated by the appellant to A.K Das "a few days before the actual conclusion of the agreement". I have hesitation in holding that this statement in the Solicitor's letter was a false statement and it was calculated to mislead the Liquidator and put him on a wrong track. It is significant that with regard to the loans purported to have been granted by the bank between March 29, 1946, the appellant's Solicitor categorically states that they do not at all concern the appellant. In respect of these loans the appellant does not state that he could not explain them from his memory nor does the appellant ask for any inspection of the account books for explaining those entries. What the appellant states in his letter is that with regard to other loans, that is to say, the loans purported to have been granted by the bank outside the aforesaid period, the appellant was not in a position to give any details from his memory. Even then he does not ask for inspection of the account books of the

bank. The reply of the appellant's Solicitor with regard to the loans, therefore, consists of two parts. The first part deals with loans between March 29, 1946 upto April 6, 1946 and the second part relates to loans outside that period. The plea of the appellant that he could not give details from memory relates only to the second part and does not touch the first part in respect of which his categorical statement is that he is not responsible for those entries, but A.K. Das is. I have, therefore, no hesitation in holding that the appellant was misleading the Liquidator by stating that in respect of the loans purported to have been granted by the bank between March 29, 1946 and April 6, 1946 the appellant was not responsible, this was a false statement calculated to mislead the Liquidator and this constituted fraudulent concealment within the meaning of Section 18 of the Indian Limitation Act, which kept the Liquidator from the knowledge of his right to apply u/s 235 of the Indian Companies Act.

11. A good deal of argument has been advanced before us by the learned Counsel for the appellant on the question that the Liquidator deliberately refused the appellant an inspection of the account books of the bank, whereby the appellant was prevented from explaining the true position relating to the affairs of the bank. Our attention was invited to the cross-examination of the Liquidator where in answer to questions put by the Court he stated that after the receipt of the letter dated June 27, 1947, he did not ask the appellant to come and explain; that the statement u/s 177A could not have been submitted without an inspection of the books and that the Liquidator did not "offer" the appellant inspection in writing. With great respect I venture to think these questions put by the Court presuppose that it is the duty of the Liquidator to offer inspection to a delinquent Director before calling upon him to furnish a statement u/s 177A. If a delinquent Director thinks that he is unable to submit the statement of the affairs of the company without an inspection of accounts, it is for him to ask for such inspection. I suppose it is not the duty of the Liquidator to go about offering inspection without being asked for it. Although the failure of the Liquidator to give inspection to the appellant has been put in the forefront of his agreement by the learned Counsel for the appellant, it is remarkable that there is not a single letter on the record prior to March 25, 1950, in which the appellant asked for inspection. Even with regard to loans which all outside the period between March 29, 1946 and April 6, 1946, the appellant merely states that he cannot explain them from his memory. He does not ask for an inspection in respect of those loans. I am, therefore, entirely unable to absolve the appellant of the charge of fraudulent concealment on the ground that he was not offered an inspection in writing by the Liquidator.

12. Even apart from this it appears from the affidavit-in-opposition affirmed by the appellant on May 1, 1950, in answer to the Liquidator's application for private examination, that the appellant states in paragraph 12 that he had an inspection of the account books of the bank on April 24, and 25, 1950 and that he discovered on "further inspection" of the accounts that certain fictitious loans were shown to make up the said amount. From the affidavit-in-opposition

affirmed by the appellant on May 1, 1950, it appears that he inspected the account books of the company and more than two dates in 1950. Mr. Ray has placed strong reliance upon the admission made by the Liquidator in his cross-examination in answer to question No.336 that he stopped giving inspection after allowing such inspection for two days. In view of the statements made by the appellant himself in his affidavit-in-opposition, I am not prepared to attach much importance to the admission made by the Liquidator in his cross-examination, because the Liquidator was being examined in Court about 5 years and 6 months after the date of the alleged inspection and it is reasonable to hold that the Liquidator did not and could not remember all the details after the lapse of so much time. In any case, in the circumstances of this case, I am not prepared to draw any inference against the Liquidator from his failure to give inspection to the appellant on any date prior to March 25, 1950, because as I have already said the appellant never asked for it and also because the appellant deliberately made a false and misleading statement by his Solicitor's letter dated June 27, 1947.

13. The Liquidator claims in his petition that he was kept from the knowledge of his right to apply u/s 235 till the month of October, 1950, when the appellant admitted in the course of his examination u/s 195 that there were false and fictitious entries in the account books of the bank. Upon the materials on the record, I am not prepared to hold that the Liquidator came to know about his rights for the first time in the month of October, 1950. As I have already said, the certainly had knowledge of his right on March 25, 1950, when he made his application for the examination of the appellant u/s 195 of the Indian Companies Act. It also appears that the appellant made admissions about the false and fictitious nature of the entries in the affidavit-in-opposition affirmed by him on May 1, 1950. It is not necessary that the Liquidator should collect all evidence in support of his claim before he can institute a proceeding u/s 235. It is enough if he has knowledge of the facts which constitute his cause of action. As the fact alleged in the Liquidator's petition for examination of the appellant u/s 195 constitute the cause of action of the Liquidator, I hold that the starting point of limitation in the present case is March 25, 1950, on which date the affidavit in support of the petition u/s 195 was affirmed by the Liquidator and I further hold that prior to that date the Liquidator was kept from the knowledge of his right by the fraudulent concealment of the true state of affairs of the bank by the appellant in violation of Section 177A prima facie the Indian Companies Act. My conclusion, therefore, is that the Liquidator is entitled upon the materials on record to the benefit of Section 18 of the Indian Limitation Act.

14. Mr. Ray appearing for the appellant relied upon the decision of the Supreme Court in the case of Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari, for the proposition that keeping a person from the knowledge of his right to apply within the meaning of Section 18 of the Indian Limitation Act is different from preventing him from exercising the right of which he has knowledge. The argument is that the omission of the appellant to supply the statement relating

to the affairs of the bank can at best be said to be an act, which prevented the Liquidator from making an application u/s 235 of the Indian Companies Act; but it cannot be said to be an act which kept the Liquidator from the knowledge of his right. In *Yeswant Deorao's* case (3) the Supreme Court was considering the question of the limitation applicable to an application for execution of a decree which was held to be barred u/s 48 of the Civil Procedure Code. To avoid the bar of limitation it was argued on behalf of the decree-holder before the Supreme Court that the decree-holder had been prevented from executing the decree by reason of the fact that the judgment-debtor had concealed from the decree-holder his ownership of a certain property and therefore, the decree-holder, would get a fresh start of limitation from the date of his knowledge of the judgment-debtor's ownership of the property. The Supreme Court repelled the contention on the ground that "there is no obligation on the judgment-debtor to post the decree-holder with all details of his properties, it is the decree-holder's business to gather knowledge about the properties so that he can realise the fruits of his decree". The law applicable to the present case, however, is just the reverse of the above proposition. Under the Indian Companies Act it is the statutory obligation of every Director to furnish a statement of the affairs of the bank u/s 177A and if a director fails to comply with the requirement of the Section 177A of the Act, he cannot turn round and say that it was the business of the Liquidator to gather knowledge of the assets of the bank. There is still another reason why the observations of the Supreme Court in the aforesaid case do not apply to the facts of the present case. In the case of an application for execution of a decree, time runs against the decree-holder from the date of the decree. But in the case of an application u/s 235, time runs against the Liquidator only from the date of his knowledge of certain facts e.g., misapplication or retention of money by the persons enumerated in the Section or certain facts upon which those present can be said to be guilty of misfeasance or breach of trust in relation to the company. In an application u/s 235 the knowledge of the Liquidator's right is dependent on his knowledge of the facts referred to above and if the Liquidator is prevented from gathering knowledge of those facts by the fraudulent concealment of a delinquent Director, he is certainly kept from the knowledge of his right to apply u/s 235. For these reasons, I am unable to accept the contention advanced on behalf of the appellant that in the circumstances of the present case the decree-holder cannot be said to have been kept from the knowledge of his right to apply. Mr. Ray faintly suggested that Section 18 of the Indian Limitation Act does not apply to an application u/s 235 of the Indian Companies Act. In view of the language of Section 29 of the Indian Limitation Act, however there is hardly any doubt that Section 18 of the Indian Limitation Act applies to a proceeding u/s 235 of the Indian Companies Act, because the Indian Companies Act is certainly a special law within the meaning of Section 29. For the reasons given above, I hold that the Liquidator has succeeded in making out a case u/s 18 of the Indian Limitation Act.

15. In view of my decision on the question of the applicability of Section 18 of

the Indian Limitation Act, the further point about the retrospective effect of Section 45(O) of the Banking companies Amendment Act (Act LII of 1953), which came into operation on December 30, 1953, ceases to be of any practical importance, because I hold that application filed by the Liquidator is within the period of limitation of 3 years prescribed by Section 235 of the Indian Companies Act read with Section 18 of the Indian Limitation Act. Still, however, as the point has been dealt with in great detail by S.R. Das Gupta J. and since the point has been argued at length before us by Mr. Ray appearing in support of the appeal, I shall only notice the arguments advanced before us without expressing any final opinion. Section 235 of the Indian Companies Act of 1913 corresponds to Section 333 of the English companies Act of 1948 and the corresponding Section of the English statute previous to the English Companies Act of 1948 was Section 276. The law as to the retrospective operation of statutes is well-known and it is that in the absence of express words or necessary intendment to the contrary a statute relating to substantive rights is presumed not to be retrospective; but if a statute affects procedure only it is presumed to be retrospective, because nobody has a vested right in procedure. The controversy in every case is whether the new statute affects substantive rights or effects merely a change in procedure. In the case of Sarkar Dutt Roy and Co. Vs. Shree Bank Ltd. (In Liquidation), , a Division Bench of this Court to which I was a party held that Section 45(O) of the Banking Companies Amendment Act of 1953 was not retrospective so as to enlarge the time for the decree-holder's right to apply for execution. The same view was taken by another Division Bench to which my learned Brother was a party in the case of Suburban Bank Ltd. v. Nistaran (5) (Appeal from Original Decree No.119 of 1954 unreported) in respect of a right of suit. In both these decisions, however, it was found that the right sought to be affected by Section 45(O) of the Banking Companies Amendment Act was a substantive right. In the former case the right was a right to apply or execution of a decree and in the latter case the right was a right to institute a suit. It is, however, contended in the present case that Section 235 of the Indian Companies Act of 1913 is merely procedural. There are weighty English Authorities in support of the view that the section in the English statute corresponding to Section 235 of the Indian Companies Act merely provides a summary mode of enforcing rights, which are not the creatures of the section but which flow from the winding up order of the Banking Company. Mr. Ray very fairly invited our attention to all the English authorities on the point, all of which are seemingly against him. He referred us to a passage in Buckley's Companies Acts (13th Edition), 672; Palmer on Company Precedents (16\\7th Edition) Volume II, 500; Halsbury (3rd Edition) Volume VI, Article 1226, page 622; all of which lay down the proposition that the English section corresponding to Section 235 of the Indian Companies Act creates no new rights, but provides a summary method of enforcing rights which arise as a result of the winding up order. These observations of the text book writers are founded on a large number of decisions of English Courts beginning from 1880 and ending with 1955. Mr. Ray was good enough to place the English decisions also before us. The first English decision to

which our attention was invited is the decision of James, L.J. in the case of *In re : Canadian Land Reclaiming and Colonising Company* (6) 14 Ch. D. 660, reversing the decision of Jessel M.r. The second decision is that of the House of Lords in the case of *Cavendish Bentinck v. Thomas Fenn* (7) (1887) 12 AC 652, in which Lord Macnaughten observed at page 669 that the section creates no new offence and gives no new rights. The next case is that of *In re: Brazilian rubber Plantations* (8) (1911) 1 Ch. 515. The next decision is that of Sargant, L.J. in the case of *In re : City Equitable Fire Insurance Company Limited* (9) (1925) 1 Ch. 407 at page 527. Reference was also made to the case of *In re : Windsor Coal Company Limited* (10) (1929) 1 Ch. 151 and the case of *In re : B. Johnson and Company Limited* (11) (1955) 2 AER 775. Mr. Ray sought to distinguish all the English authorities on the point including the observations of the English text-book writers by pointing out that under the English statute there is no period of limitation for a misfeasance proceeding, whereas the Indian statute prescribes a period of limitation of 3 years from the date of the first appointment of the Liquidator or of the misapplication or misfeasance complained of whichever is later. His argument is that Section 45(O) of the Banking Companies Amendment Act of 1953, in so far as it enlarges the period of limitation prescribed by Section 235, does, in effect, interfere with a substantive right, because it takes away the immunity of a delinquent Director and other persons enumerated in the section, from the proceeding, which has accrued in their favour by lapse of time. He has relied upon the Full Bench decision of this Court in the case of *T.S.R. Sarma Vs. Nagendra Bala Debi*, for the proposition that the right to defend on the ground of limitation is by itself a substantive right and he has also relied upon the decision of another Division Bench of this Court in the case of *Manjhoori Bibi and Others Vs. Akel Mahumed and others* which is an authority for the proposition that a statute of limitation abridging the period of limitation is not retrospective. These are weighty arguments which may require careful consideration on a proper occasion.

16. It remains now to consider the decision of a Division Bench of the Allahabad High Court in the case of *Benares Bank Ltd. Vs. Shri Sri Prakasha Bhagwan Das and Others*, , which has been relied upon by S. R. Das Gupta, J. and which has been subjected to considerable criticism by Mr. Ray. That was a case where the Court was called upon to consider the effect of the amendment of the Indian Companies Act of 1913 by the Indian Companies Amendment Act of 1936. Before the amendment of 1936 the period of limitation prescribed for making an application u/s 235, as contained in sub-section 3 of that section, was as follows :-

"(3) The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit."

17. This sub-section was deleted by the Amendment Act of 1936 and in its place a new period of limitation was introduced which provided that the application u/s 235 shall be filed "within three years from the date of the first appointment of

the Liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust as the case may be whichever is longer." In the case of Benaras Bank the transactions in respect of which the proceeding u/s 235 was started took place some years before the filing of the winding up petition on the 3rd August, 1939. The compulsory winding up order under which the Official Liquidator was appointed was made on March 1, 1940 and the application u/s 235 was filed on February 12, 1943. The controversy that arose in that case was whether the proceeding was to be governed by the period of limitation as it stood prior to the Amendment of 1936 or whether it should be governed by the new period of three years' limitation from the date of appointment of the Liquidator as provided by the Amendment Act of 1936. If the proceeding was to be governed by the old period of limitation, it would be barred; but if the new period of limitation applied it would be within time. The Court held that the proceeding would be governed by the new period of limitation. On the facts of that case, there can be no doubt that the conclusion was correct, because the proceeding in that case was started after the coming into operation of the Amendment of 1936 and as it was instituted within three years from the date of the appointment of the Official Liquidator it was not barred. It is well settled that ordinarily the law of limitation applicable to a proceeding is the law in force at the commencement of the proceeding. Braund, J. in delivering the judgment of the Division Bench, however, adopted a different line of reasoning and held upon the authority of English decisions in the cases of *Cavendish Bentinck v. Fenn* (7) 12 AC 652 and *In re City Equitable Fire Insurance Company* (1925 1 Ch. 407 that Section 235 was merely a procedural section. He further held that Section 235 prescribes no limit to the power of the Court's scrutiny of the past transactions of a delinquent Director and that the Court had an "equitable jurisdiction" to order the delinquent Director to refund the money retained by him without being circumscribed by any hard and fast rule of limitation. The learned Counsel for the appellant has taken exception to these principles and has argued that under the Indian law the power of the Court is a statutory power which can be exercised within the limits prescribed by the statute, though the position under the English law may be different. There is considerable force in this argument but as it is not necessary to decide this point in this case, I refrain from expressing any final opinion on it. The question whether Section 45(O) of the Banking Companies Amendment Act of 1953, which came into operation during the pendency of the present proceeding will apply to it will in the ultimate analysis depend on two questions. (a) Whether the Liquidator's right to apply under the section is a substantive right and (b) whether the Director's right to defend is a substantive right. If either of these rights be a substantive right, Section 45(O) will not apply to the present proceeding. For the reasons already stated, I do not consider it necessary to express any final opinion on this point.

18. As I have held that in the present case the Liquidator was kept from the knowledge of his right by the fraudulent concealment of the affairs of the company by the appellant till March 25, 1950, and as the application which was

filed on April 6, 1951, is within three years from that date, the application is within time. I, therefore, hold that the appeal is without substance and must be dismissed with costs. Certified for two counsel.

19. Bose, J. : The only question raised in this appeal is whether an application for misfeasance brought at the instance of a liquidator of a banking company in liquidation is barred by limitation. On the 31st March, 1947 the respondent bank was ordered to be wound up and one Siddhartha Kumar Ghosh was appointed the official liquidator of the Bank. On the 20th May, 1947 a committee of inspection was appointed. On the 4th December, 1947 an application was made u/s 153 of the Indian Companies Act for sanction of a scheme and an interim order was made for stay of the winding up proceedings. On the 29th July, 1948 the application for sanction of the scheme was dismissed and the stay order was vacated. On or about the 3rd April, 1950 the liquidator made an application for examination of the appellants Raghubar Narain Singh and the respondent A.K. Das who acted as directors of the bank for their examination u/s 195 or 196 of the Indian Companies Act, 1913 and also for compelling the said directors to file Statements of Affairs u/s 177A of the Indian Companies Act. An order was made on the 6th June, 1950 for examination of the two directors u/s 195 of the Indian Companies Act and directions were also given for filing of the Statements of Affairs u/s 177A of the Act and for giving inspection of the books and documents to the said directors. The order, as drawn up, does not contain any direction for filing of the statements u/s 177A of the Act or for giving inspection of the books and records. But the Court minutes of the order made on the 6th June, 1950 have been produced at the time of the hearing of this appeal and it appears therefrom that the order was also to the effect that for the purpose of furnishing the statements u/s 177A, Raghubar Narain Singh and A.K. Das were entitled to take inspection of such books and records as they might require. Such inspection was to be started within a week from date and was to be completed within a fortnight from that date. On the 23rd June, 1950 an order was made by consent of parties under which the filing of the Statements u/s 177A of the Act was dispensed with. In October, 1950 the two directors were examined u/s 195 of the Indian Companies Act and on the 6th April 1951 the official liquidator took out the misfeasance summons out of which the present appeal arises asking for inter alia the following reliefs :-

(Relief were set out, and his Lordship then proceeded as follows) :-

20. At the foot of the Summons reference is made to the petition of Siddhartha Kumar Ghosh affirmed on the 3rd April, 1951 as the grounds of the application. There is also an endorsement on the Summons that the application was noted as made on the 6th April, 1951. On the 14th May, 1953 a supplementary affidavit was affirmed by the official liquidator after obtaining the leave of the Court. It appears that such leave was given without prejudice to the right of the parties to agitate the question of limitation at the time of the hearing of the application u/s 235 of the Indian Companies Act. The learned trial Judge before whom the point

of limitation was argued at some length held that the application was not barred by limitation, and on 23rd December 1958 made an order directing the two directors to restore or pay the sums as mentioned in the order.

21. Before us the contention of Mr. Siddartha Sankar Ray, the learned Counsel for the appellant, is that Section 235 of the Indian Companies Act 1913 prescribes a period of three years from the date of the first appointment of the liquidator or three years from the acts of misfeasance whichever is longer, as the period within which the application is to be made. But as the present summons was taken out after the expiry of three years from the 31st March, 1947 after excluding the period that elapsed between the 4th December, 1947 when the application u/s 153 was made and stay of the winding up proceedings was granted, and the 29th July, 1948 when the said application was dismissed and the stay order was vacated, the application u/s 235 is barred by limitation and is not maintainable. The other branch of the argument on the question of limitation is that the learned trial Judge (S.R. Das Gupta, J.) is wrong in applying Section 45(O) of the Banking Companies Act of 1953 (Act 52 of 1953) which came into force on the 30th December, 1953 to the facts of the present case. Now in order to examine the force of this contention it will be convenient to set out at this stage Section 235 of the Indian Companies Act which is as follows:-

"235(1). - Where, in the course of winding up a company, it appears that any person who has taken part in the formation of promotion of the company, or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promotor, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the thinks just."

22. The words "within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer" were introduced in the Act of 1913 by the Companies Amendment Act 1936, to set at rest the conflict of decisions of the various High Courts as to whether the Article 36, 90, 115, 116 or 120 was applicable to an application u/s 235 of the Act. Sub-section 3 of Section 235 of the old Act of 1913 which provided "the Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit" was deleted by the amendment of 1936 and the special period of limitation of three years from the date of the first appointment of the liquidator or from the date of

the acts of misfeasance etc., was inserted in the body of sub-section (1) of Section 235. In construing this Section 235 S.R. Das Gupta, j. inter alia made the following observation :-

"In my opinion, Section 235 confers a discretion on the Court to order an examination of the conduct of the promoter, director, manager, liquidator or officer of the company, the object of its examination such compensation in respect of his misapplication or retainer or misfeasance or breach of trust as the Court think just It should be noted that the liquidator can place before the Court for it to take action if it thinks necessary, the conduct of the promoter, director, manager, liquidator and officer even if such conduct relates to a period beyond the period of limitation. In other words, even if a claim had been barred by limitation, the Court may examine into the conduct of the persons named in that section in respect of such claim and upon such examination make an order for payment of compensation against the said persons."

23. The learned Judge relied on certain passages in the judgment of Braund, J. in the case of Benares Bank Ltd. Vs. Shri Sri Prakasha Bhagwan Das and Others,) in support of the observations made by him. It appears to me that these observations of the learned Judge are not strictly accurate. When the Legislature inserted the special period of limitation in sub-section (1) of Section 235 it intended to make this condition of making the application within three years a condition precedent to the maintainability of the application u/s 235. It is a well-settled rule of interpretation of statutes that a statute is to be construed as to give effect to all the words used in the enactment and the Court is not at liberty to disregard word or expression or any part of a provision if some meaning can be given to it. The provision as to the three years' limitation cannot therefore be regarded as superfluous. The discretion which is conferred on the Court u/s 235 is limited to the granting of the reliefs contemplated in the section. The Court may grant these specified reliefs in the application or may not and can relegate the parties to a suit or action. But it cannot go to the length of ignoring the provision as to limitation in exercising this discretion under the said section. An application which does not fulfil all the requirements of the section is not an application under the section and no relief can be given on such an application nor can it be entertained by the Court.

24. In the case of Benares Bank Ltd. v. Sri Prakasha (14) (AIR 1946 All 269) the official liquidation launched misfeasance proceedings against certain directors and officers of the Bank in respect of transactions which took place some years prior to the liquidation. The winding up petition was filed on the 3rd August, 1939. A provisional liquidator was appointed on the 14th February, 1940 and the compulsory winding up order was made on the 1st March, 1940. the misfeasance application was filed on the 12th February, 1943 u/s 235 of the Act of 1913 as amended by the Companies Amendment Act, 1936, (Act 22 of 1936) which introduced in sub-section (1) of Section 235 the provision as to the three years"

limitation. The misfeasance application was within three years from the date of the appointment of the provisional liquidator but was beyond three years from the acts of misfeasance complained of. The question raised was "whether the amendment of the Companies Act in 1936 enables the official liquidators of the bank to claim compensation for any wrongful act of any respondent in any case in which the remedy under the said Section 235 had become barred before such amendment." Braund, J. after referring to and dealing with Section 276 of the English Act and Section 235 of the Indian Companies Act as it existed before the amendment of 1936 made these following observations :-

"For these reasons, in my view, on the true construction of Section 235(1), Indian Companies Act, 1913, as it now stands, the only period of limitation to be applied, in cases governed by the amended section, is that constrained in sub-section (1) itself. That of course, does not mean that the section has ceased to be a discretionary. And it may be that in a proper case, the Court might still view lapse of time as a sufficient reason for refusing to exercise its discretion in the liquidator's favour. But that is not the question now before us, and nothing I have said above is intended to prejudice any discretion the Court might be free to exercise on any ground in any proceedings u/s 235."

25. Then further down at page 273 the learned Judge proceeded to observe as follows:-

"It seems to me, therefore, that the Legislature, in construing the amended sub-section (1) of Section 235 of the Act, very deliberately, entrusted everything to the Court's discretion in the sense that the test was to be what was "just" and not what was legally recoverable at any particular time. And that it has been the special object to bring defences of limitation within the ambit of the Court's discretion is, I think, underlined by the very deliberate removal of the period of limitation formerly contained in sub-section (3)."

26. But for the reasons already given by me the observance of the provisions as to the special period of limitation given in sub-section (1) appears to me to be an essential condition of the maintainability of the application. I am unable to subscribe my approval to the view that the Court can ignore the provision as to the limitation for the purpose of doing whatever appears to it to be just. The next question which was dealt with by Braund, J. in the Allahabad case was whether Section 235 is purely a rule of procedure or it is a section which affects substantive rights. The learned Judge after referring to certain English and Indian decisions proceeded to observe as follows:-

"Applying these three principles, we can reach a comparatively simple solution to this question. The procedure prescribed to be followed in the winding up prior to 1936 by a liquidator in relation to misfeasance was that of the unamended Section 235, Companies Act, 1913, which included an express period of limitation. Both before the date of the commencement of the winding up of the Bank in this case and before the filing of the misfeasance proceedings with which

we are now concerned, the Legislature had provided new procedure by which it expressly removed one procedural rule of limitation and substituted another. When, therefore, the Bank's Official Liquidators were appointed in 1940 and when they started their misfeasance proceedings u/s 235, they were governed by the latter procedure and nothing else. They could lawfully have applied none other."

27. So Braund, J. held that Section 235 as amended in 1936 was in force at that time the misfeasance proceedings were lodged and the provisions of the amended section were applicable to the case and liquidator was therefore within time in bringing the application within three years from the date of his appointment. In coming to this conclusion the learned Judge was giving effect to the well recognised principle that rights of the parties to a suit or proceeding should ordinarily be determined in accordance with the law as it stood at the time of the commencement of the proceeding. In the case before us the misfeasance proceedings were launched on the 6th April, 1951 before Section 45(O) of the Banking Companies Act, 1953 came into force and Section 235 as unaffected by Section 45(O) of the Banking Companies Act, was therefore the governing section.

28. Now, the question that arises further is whether Section 235 is a purely procedural section and whether Section 45(O) of the Banking Companies Act is retrospective in operation in the sense that it applies to and affects even pending proceedings instituted u/s 235 prior to coming into operation of Section 45(O) of the Banking Companies Act. It has been held in two Division Bench decisions of this Court that Section 45(O) does not apply to pending proceedings. The first in point of time is the case of *Nistaran Chakravarty v. Suburban Bank Ltd.* (5) (Appeal No.119 of 1954 which is an unreported decision to which I was a party), the other is the case of *Sarkar Dutt Roy and Co. Vs. Shree Bank Ltd.* (In Liquidation), . The former decision dealt with the case of a suit and the latter with the right to apply for execution. As I have pointed out already Braund, J. also in the Allahabad case gave effect to the principle that it is the law in force at the time when a proceeding is launched which is the law that must govern the rights of the parties to the proceeding, and such principle also applies to a proceeding u/s 235 of the Indian Companies Act. It appears to me therefore, that Section 45(O) of the Banking Companies Act, 1953 cannot be relied on in support of the plea that it saved the application of the liquidator from being barred by limitation. Section 45(O) was not intended expressly or by necessary implication to apply to pending proceedings.

29. It has further been argued by the learned Counsel for the appellant that Section 235 of the Indian Companies Act is not a purely procedural section but it also affects substantive rights. It is pointed out that Section 235 differs from the corresponding English Section 333 of the Act of 1948 in an essential aspect, namely, that there is no provision as to limitation in the English section. It is submitted that if the provision as to limitation in Section 235 is not observed and

an application becomes barred under the provisions of that section the person or persons proceeded against acquire a right by lapse of time for successfully resisting the application and as a right of defence has been held to be a substantive right, the section cannot be regarded as a purely procedural one. Reference is made to the Full Bench decision of this Court reported in (12) T.S.R. Sarma Vs. Nagendra Bala Debi, and to a Division Bench decision of this Court reported in (13) Manjhoori Bibi and Others Vs. Akel Mahumed and others .

30. It has been further argued that in a proceeding u/s 235 the persons proceeded against have no right of set-off or counterclaim and reference is made to the case of Anglo French Co-operative Society, in Re : Exparte Pelly (15) (1882) 21 Ch. Div. 492 where it was held that a director liable in misfeasance for moneys of the company misapplied by him is not entitled to claim set-off for any loan advanced by him to the company.

31. Now it is true that Section 235 provides that certain specified individuals only, such as, liquidator or creditor or contributory can launch proceedings under the section and it is against some particular classes of individuals that the proceeding can be taken, and only certain particular reliefs can be granted under the section. The procedure envisaged is a summary procedure, for enforcement of certain substantive rights. But the question is whether the section can be said to deal with substantive rights so as to justify the presumption that vested rights are not affected by a change in the law. Our attention has been drawn to passages in Buckley's Companies Act (13th Edition) page 672 and in Palmer's Company Precedents (17th Edition) page 500 to show that the view of the English Courts is that Section 333 of the Act of 1948 does not confer any new rights or create any new liability but the section is only a procedural section which provides a summary method of enforcing such liabilities as might have been enforced by the company itself or by its liquidator by means of an ordinary action including new rights created by the Companies Act as a result of the winding up.

32. It appears that the passages in Buckley and Palmer owe their origin to certain observations made by Sir George Jessel in the case known as Coventry and Dixon's case (6) (1880) 14 ch. Div. 660 and reaffirmed in subsequent cases. These observations were made while the Court had to consider the question as to what acts or range of conduct of directors or officers mentioned in the Statute constitute misfeasance or breach of trust or duty within the meaning of the section and it was in dealing with this aspect of the matter that it was said that the wrongful acts which are brought within the section cannot be regarded as any new offence or liability created by the section. In the case of Covendish Bentinck v. Fenn (7) (12 Appeal Cases 652 at 669) Lord Macnaughten said:

"Section 165 of the Act of 1862 (Section 333 of the Act of 1948) has often come under discussion and it has been settled, and I think rightly settled, that that section creates no new rights but only provides a summary and efficient remedy in respect of rights which apart from the section might have been vindicated

either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company."

33. In the City Equitable Fire Insurance Company's case (9) (1925) Ch. 407 at 507 Pollock M.R. after referring to Section 215 of the Act of 1908 (now Section 333) said :-

"I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights, it provides a summary mode of enforcing existing rights; and I think that is abundantly shown by Coventry and Dixon's case (6) (14 Ch. Div. 660); IN Re: Brazilian Rubber Plantations and Estates Ltd. (8) (1911) 1 Ch. 425; and Cavendish Bentinck v. Fenn (7) (12) AC 652 at 669)."

34. At page 527 of the Report Sarjant. L.J. also said practically the same thing about the nature of Section 215.

35. Then again in the case of In Re: Johnson & Co. (Builders) Ltd. (11) (1955 2 All ER 775 at 780-71 Sir Raymond Evershed reiterated the proposition thus :

"Section 333, it has been many times said, is a purely procedural section. I do not in the least seek, by so stating, to lessen its significance: I mean that it does not create any new cause of action; it only provides a method of litigating patrimonial claims, and in providing a method it is not exclusive. Prima facie (though as will be later seen, there are difficulties in the plaintiff's way in this case) if the procedure of Section 333 is not open against any person who is within the section, the claimant may proceed by ordinary action."

36. In Halsbury's laws of England Vol. 6 (3rd Ed.) page 662 paragraph 1226 - the same proposition is stated and certain Indian decisions also adopt the same view. [See AIR 1924 285 (Lahore) : Narasinha Iyengar v. Off. Assignee of Madras (17) V. Narasimha Aiyangar, Official Liquidator of the City Hygienic Milk Supply Co. Ltd. Vs. The Official Assignee of Madras and Others, ; Benaras Bank Ltd. v. Sri Prakas (14) Benares Bank Ltd. Vs. Shri Sri Prakasha Bhagwan Das and Others, ; Govind Narayan v. Rangnath (18) (ILR 54 Bom 227 at 271) and other cases.]

37. It is to be noted that in Section 333 of the English Act of 1948 or in the corresponding sections of the previous English Acts there is no provision with regard to period of limitation as is to be found in Section 235 of the Indian Companies Act, 1913. It appears to me that there is a good deal of force in the contention of Mr. Roy that Section 235 is not merely procedural but it affects substantive rights; but it is not necessary for the purpose of disposing of the case before us to express any final opinion on this point. It is enough to point out, as I have already done, that Section 45(O) of the Banking Companies Act, 1953 was not intended to apply to pending proceedings. So the proceeding taken by the liquidator in the present case is not affected or governed by Section 45(O)

of the Banking Companies Act 1953.

38. Another argument which has been addressed to us upon the wordings of Section 45(O) of the Banking Companies Act of 1953 is that Section 45(O) was not intended to apply to Section 235 at all. It is submitted that Section 45(O) speaks of claim by Banking Company against directors and not of claim by any other person against any other persons as mentioned in Section 235 and so it is plain that Section 235 was never intended to be brought within the ambit of Section 45(O) at all. But as has been repeatedly pointed out by the Courts the object of misfeasance proceedings by whomsoever they are brought is to swell the assets of the company by recovery of damages. The successful fruits of misfeasance proceedings must be paid to the company or its liquidators in a liquidation for the purpose of distribution among those who are interested in the assets. So a proceeding started by a contributory or creditor is as much a claim by the Bank as a claim put forward on behalf of the Bank by the liquidator. An application under the section is a representative proceedings filed on behalf of a class of persons. It is not a proceeding to enforce any personal remedy or to obtain any exclusive benefit. So this point is of no substance.

39. On behalf of the liquidator respondent it has been contended that even if the provision as to limitation as embodied in Section 235 is the provision which is applicable to this case the liquidator is entitled to call in aid Section 18 of the Limitation Act for extension of the period of limitation inasmuch as he was by reason of the fraud of the directors kept back from the knowledge of his right to institute this misfeasance proceeding.

40. It appears that before the trial Court an objection was taken on behalf of the directors that facts necessary to attract Section 18 of the Limitation Act had not been pleaded in the original petition which was made the ground for Summons taken out on the 6th April, 1951 and accordingly a supplementary affidavit was filed with the leave of the Court by the liquidator on the 14th May, 1953 and in this affidavit some further and better particulars of fraud were introduced. The learned trial Judge has taken this date in May, 1953 as the date of institution of the proceedings for the purpose of dealing with the question whether Section 18 saves the misfeasance proceedings from the bar of limitation. The learned Counsel for the liquidator has argued with reference to the relevant Company Rules (Rule 209 and other in Appendix 7 of the Ormond's Rules) prevailing in the Original Side of this Court, that the date of the taking out of the Summons is to be regarded as the date of institution of the misfeasance proceeding especially when the application was noted as made on the 6th April, 1951 and the allegations in the supplementary affidavit are merely further and better particulars of the fraud already pleaded in the original petition. The learned Counsel for the appellant concedes that the date of institution is the 6th April, 1951 but he does not accept the position that the original petition contains sufficient averments of fraud necessary to attract Section 18 of the Limitation Act.

41. Now the allegations of fraud in the original petition affirmed on the 3rd April,

1951 are to be found in paragraphs 3, 6, 7, 8 and 11 thereof. The allegations are that the directors were repeatedly requested to submit statement of affairs u/s 177A but they refused or neglected to do so. Thereafter an order was made by the Court for filing of such statement but in spite of the order no statement was filed and ultimately such filing was dispensed with. As the petitioner (liquidator) could not get any help from the directors or officers of the company he himself carried out a thorough investigation of the affairs of the company and upon an examination of the books of documents of the company and the complicated accounts extending over a period of 8 years be found out various irregularities, illegalities and fraudulent entries, erasures and alterations in the books of the company. The petitioner thereupon called the directors to explain the discrepancies and the fraudulent transactions but none of them came forward to explain the position. An application was thereafter made on such materials as were available, for examination of the directors u/s 195 of the Indian Companies Act and as a result of such examination of the directors in October, 1950 the petitioner (liquidator) came to have definite knowledge about the fraud in the conduct of the directors.

42. In the supplementary affidavit of the 14th May, 1953 the relevant allegations of fraud are contained in paragraphs 2, 3, 5 and 6 and they are substantially the same but expressed in a different language and in a different form to attract Section 18 of the Limitation Act. In my view, the original petition contains sufficient averments of fraud so as to attract Section 18.

43. The learned Counsel for the appellant has argued that fraud as pleaded in the petition and the supplementary affidavit has not been proved. It was submitted that the directors were prepared to submit Statements of Affairs u/s 177A but the liquidator did not give inspection of the books and documents although he was directed by a order made on the 6th June, 1950 to give such inspection, and thus prevented the directors from filing the Statements but ultimately on the 23rd June, 1950 the filing was dispensed with by an order of the Court passed with the consent of parties. The learned Counsel drew our attention to the oral evidence of the liquidator and particularly to Questions 353 to 363, 401-405, and to the letter of the Solicitors of Mr. R. N. Singh dated the 27th June, 1947 and submitted that Singh's conduct was consistent with his innocence of the fraud charged viz., keeping the liquidator from the knowledge of his right to institute the misfeasance proceeding.

44. It is however quite clear from the materials on record that on the 30th May, 1947 the liquidator wrote two letters to R. N. Singh and on the 5th June, 1947 he wrote another letter to Mr. Singh asking for explanation with regard to certain matters and entries but instead of making any efforts to explain them Mr. Singh caused his Solicitors to write an evasive reply on the 27th June, 1947 in which palpably false representations were made to the effect that he was not in any way responsible for the entries made between the 29th March, 1946 and the 6th April, 1946 and in August and September, 1946, and he had no concern with

such entries although it appears from his evidence that he was the Managing Director from 1940 to 1947. It is true that it was not possible for the directors to give an explanation of the entries from memory but it is obvious that Mr. Singh was at first reluctant to disclose the true state of affairs and it was only when the liquidator came forward with an application for examination u/s 195 or 196 and for compelling the directors to file a Statement u/s 177A that Mr. Singh in his affidavit came out with certain admissions of the fictitious nature of certain transactions. The receipt of the liquidator's letter of the 5th June, 1947 was acknowledged by Mr. Singh by his letter dated 7th June 1947. A reminder was sent by the liquidator on the 24th June, 1947. Thereafter the Solicitors for Mr. Singh in their reply dated the 27th June, 1947 stated inter alia that Mr. A. K. Das was concerned with and was solely responsible for some of the material entries and Mr. A. K. Das should be asked to comply with the requirements of Section 177A of the Indian Companies Act. Thus the concluding portion of this letter makes it abundantly clear that Mr. Singh was not willing to submit a Statement u/s 177A and he was trying to shift the blame on Mr. A. K. Das. So there can be hardly any room for doubt that the directors were trying to avoid detection of the irregularities and the fraud, by withholding information asked for by the liquidator.

45. Thereafter in August 1947 proposal for revival of the Bank under a Scheme was started and on the 13th August 1947 the liquidator was informed about it by Mr. A. K. Das by his letter of that date. The order staying the winding up was made in the application u/s 153 of the Indian Companies Act on the 4th December, 1947 and this order was not vacated till the 29th July, 1948. So during this period of stay the liquidator could not make any application u/s 235. It is also clear that during the period between the 31st March 1947 and the 4th December 1947 the liquidator was trying to take possession of the books and assets of the company and was also scrutinizing the documents and books of the bank for ascertaining the correct state of affairs of the bank and in course of examination of the voluminous books and documents he had come to entertain suspicion about the genuineness of certain transactions and entries. But although he might have received some hints and clues in between this period there is nothing to indicate that he had acquired any definite knowledge about the fraud committed by the directors, or had formed any definite opinion about it. Being an auditor himself, the liquidator was able to make independent investigation without the aid or cooperation of the directors and it is clear that through his own exertions he had been able to form a definite opinion about the fraudulent conduct of the directors and the irregular nature of some of the transactions at the time he affirmed the petition for examination of the directors u/s 195 or 196, on the 25th March 1950. Even if it be assumed that he had completed his investigation and known about the fraud by the time the stay order was vacated in July 1948 the application u/s 235 made on the 6th April 1951 is within time.

46. Our attention was drawn by the learned Counsel for the liquidator to the case of *Rahimbhoy v. Turner* (1) (20 IA 1) where the Judicial Committee laid down that "when a man has committed a fraud and got property there by, it is for him

to show that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute the fraud, at a time which is too remote to allow him to bring the suit." The learned Counsel also invited our attention to the case of *Biman Chandra Datta v. Promotha Nath Ghose* (2) (ILR 49 Cal 886 at 891) where Sir Asutosh Mookerjee after referring to certain observations of Westbury, L.C. and Lord James in the cases of *Rolfe v. Gregory* (19) (4 De. G.J. & S. 576 at 379) and *Bulli Coal Mining Co. v. Osborn* (20) (1899) AC 351, 363 and to the observations of Lord Hobhouse in the case of *Rahimbhoy v. Turner* (1) (20 IA 1 at 5) laid down the following propositions :-

"The true position then is that where a suit is on the face of it barred it is for the plaintiff to prove in the first instance the circumstances which would prevent the Statute from having its ordinary effect. A person, who in such circumstances, desires to invoke the aid of Section 18 must establish that there has been fraud and that by means of such fraud he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established the burden is shifted on the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Such knowledge must be clear and definite knowledge of the fact constituting the particular fraud as Lord Hobhouse points out, it is not sufficient for the defendant to show that the plaintiff had some clues and hints which perhaps, if vigorously and acutely followed up might have led to a complete knowledge of the fraud." (pages 891-892).

47. Relying on these principles it is argued on behalf of the liquidator that as the liquidator did not acquire any definite knowledge of the fraud till after the examination of the directors u/s 195 in October 1950 the application u/s 235 is not barred by limitation. It is further submitted that the identical fraud which form the cause of action or the subject matter of the misfeasance proceeding is the fraud which kept the liquidator from the knowledge of his right to institute the proceeding and this is enough for attracting Section 18. The Supreme Court however in the case of *Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari*, has made it clear that in order to invoke the aid of Section 18 of the Limitation Act it is essential to prove concealment from a person the knowledge of his right to institute proceeding. The question before the Supreme Court was whether a decree-holder who had applied for execution of the decree was kept from the knowledge of the right to make the application by fraud of the judgment-debtor and the Supreme Court pointed out that "concealing from a person the knowledge of his right to apply for execution of a decree is undoubtedly different from preventing him from exercising his right of which he has knowledge. Section 18, Limitation Act postulates the former alternative." (page 21 paragraph 19).

48. In the case of AIR 1938 577 (Lahore) while-dealing with the nature of misfeasance proceedings u/s 235 of the Indian Companies Act and the question of maintainability of a subsequent suit filed for compensation for fraud or

misfeasance, Addison, J. and District Inspector Mohammad, J. had to consider the effect of Section 18 of the Limitation Act and Addison, J. who delivered the judgment made the following observations :-

"Section 18 of the Limitation Act cannot help the plaintiff as he was not by means of fraud kept from the knowledge of his right or the title on which it was founded. His action may be based on fraud but it is not established that the knowledge of his right was kept from him by means of fraud. He himself was as fraudulent as any one else. The suit is thus long time-barred."

49. It is thus clear that Section 18 contemplates a different kind of fraud. But as I have pointed out already, the attitude of non-co-operation adopted by the directors, their refusal and avoidance of explanation of the suspicious entries and the irregularities complained of prevented the liquidator from having definite knowledge of his right to proceed u/s 235. Being an auditor and an accountant he had no doubt the special skill and experience of detecting fraud in relation to the accounts and affairs of a company, but having regard to the voluminous nature of the accounts of the bank extending over a period of eight years it is reasonable to presume that without some co-operation or assistance of the directors or officers of the bank it was not possible for the liquidator to acquire any definite knowledge about the fraudulent conduct of the directors or about the irregularities in the transactions, within a short period of time. It was argued by the learned Counsel for the appellant that Section 235 being a statutory right there could be no question of concealing such right from the liquidator and Section 18 of the Limitation Act is therefore not attracted to such a case. But it is to be pointed out that unless the liquidator has knowledge that he or the company has a cause of action against the directors to proceed u/s 235, it cannot be said that he has knowledge of his right to make an application u/s 235.

50. In my view the learned trial Judge's finding on the question of applicability of Section 18 of the Limitation Act to the facts of this case, is not correct and it appears that if the learned Judge had not fallen into the error of taking the date of the filing of the supplementary affidavit as the date of the institution of the misfeasance proceeding he would have come to a different conclusion. I hold that the liquidator is entitled to the benefit of Section 18 of the Limitation Act and the application u/s 235 is not therefore barred by limitation. The order made by the learned trial Judge is therefore upheld though on a different ground.

51. I agree that this appeal should be dismissed with costs.