(1973) 03 CAL CK 0022

In the Calcutta High Court

Case No : Appeal from Original Order No. 35 of 1958

Sudhir Chandra Nawn APPELLANT

Vs

Offcial Receiver, High Court RESPONDENT

Date of Decision : 02-03-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141, 34
Companies Act, 1913 — Section 235
Evidence Act, 1872 — Section 3
Trusts Act, 1882 — Section 88

Citation : (1974) 1 ILR (Cal) 410

Hon'ble Judges : T.K. Basu, J;S.K. Mukherjea, J

Bench : Division Bench

Advocate : T.P. Das and R.L. Sinha, for the Appellant;A.G. Mitra, for the Respondent

Final Decision : Dismissed

Judgement

T.K. Basu, J.—This is an appeal by the Appellant Sudhir Chandra Nawn against the judgment and order of S. R. Das Gupta J. dated February 7 8c 8, 1957, in an application u/s 235 of the Indian Companies Act, 1913 (hereinafter referred to as the Act).

2. Before the learned trial Judge there were sixteen Respondents to the application against whom orders were sought making them liable for diverse sums of money to the Bank of Commerce which was then in liquidation (hereinafter referred to as the Bank). At the time of the trial, however, the claims against some of the Respondents were not pressed on behalf of the Official Liquidator. The learned trial Judge found seven of the Respondents liable for various sums of money. Out of these seven Respondents four have come up on appeal before us. They are the Respondents Sudhir Chandra Nawn, Bima-lakshya Basu, Subhendu Prosad Roy Choudhury and Dr. Sailendra Nath Sinha. Between the filing of the appeal and the hearing thereof, Dr. Sinha died and his heirs and legal representatives have been substituted in his place and stead. These four

Appellants have filed four separate appeals which will have to be dealt with separately.

3. We are making these preliminary observations, however, for the purpose of indicating that all the common questions of fact and law, which have been argued in the four different appeals, will be dealt with in the present judgment. Only the distinctive questions of fact and law pertaining to the three appeals will be dealt with in respective judgments.

4. The facts of the case have been admirably summarised by the learned trial Judge. We shall, however, briefly indicate the salient features of the case under appeal.

5. The Bank was incorporated in the year 1925. In the year 1930 its registered office was shifted from Pabna to 56 College Street, Calcutta. On May 12, 1941, the Bank was amalgamated with the Khulna Loan Bank.

6. Sometime in the month of May or June 1930, the Board of Directors of the Bank appointed a committee of management which was to function subject to the control and supervision of the Board. At the 136th meeting of the Board of Directors of the Bank held on April 17, 1941, a Committee of Directors was appointed for certain purposes. As a large part of the controversy in this case will turn on the constitution of the powers of the Committee of Directors, we propose to set out the relevant portions of different resolutions in extenso. The material portion of the resolution of April 17, 1941, is in the following terms:

Considered and settled the powers of the Committee of Directors. It is Resolve that the office of the Committee of Directors at the Bank''s premises at Ballygunge be and is hereby directed to keep control and supervision over the business of the company conducted front the several branches of the Bank to harmonise the working o:: the Bank and to systematise its procedure in keeping accounts and records etc. and to direct and guide their activities accordingly.

Resolved that the Committee of Directors do consist of:

Dr. S.N. Sinha Mr. S.N. De Mr. B. Basu and Mr. S.P. Roy Choudhury (Managing Director, Ex Officio) and the said Committe of Directors, besides the general powers which they may require for the proper conduct of their duties as aforesaid, be and is hereby authorised to do and exercise all or any of the following powers and duties:

(c) To sanction loan out of the funds of the Company in such manner as the said Committee of Directors may deem proper provided that no such loan or overdraft shall exceed Rs. 5,000 (Five thousand) only to one and the same party.

Resolved further that the Committee of Directors do function from the 1st May 1941.

7. It may be mentioned that at the same Board meeting several other resolutions were passed including one appointing Mr. S.P. Roy Choudhury as Managing

Director of the Bank on and from January 1, 1941, on certain terms and conditions which are to be found therein.

8. The next important resolution in this connection was passed at the Board meeting on May 7, 1941, in the following terms:

(1) It is resolved that the proceedings of the Committee of Directors need no ratification by the Board, but particular instances should be brought up for necessary action by the Board.

9. On June 19, 1943, the Board passed what is perhaps the most material resolution for the purpose of this case and is in the following terms:

(2) The Committee is authorised to invest such amount as they deem proper including in gold and silver bars and the limit of investment to an individual party of Rs. 5,000 is withdrawn. All investments made by the Committee be placed at the Board meeting in shape of monthly statements.

10. The Bank''s premises where the Committee of Directors were to function, in terms of the first resolution quoted above, were situated at premises No. 220-B Rash Behari Avenue. The Committee of Directors had its office on the first floor of the said premises.. This office was known as the Central Office. The modus operandi of the Central Office and its relation with the Head Office have been accurately summarised in the judgment under appeal, and we can do no better than to set out the relevant extract:

The Central Office was in no sense an operating office of the Bank and no deposits could be made in or moneys with drawn from the same. Only small cash used to be kept at the Central Office out of which petty expenses used to be met. It was, as I have already said, the office of the Committee of Directors wherefrom they used to carry on their duties and functions Dr. Sinha was the Director-in-charge of the Central Office Moneys were advanced by and under the authority of the Central Office, but those moneys used to be given from the Head Office. The procedure which used to be followed in the matter of advancing moneys by and under the authority of the Central Office was as follows:

A pay order was issued by the Central Office or the Head Office in favour of the party to whom moneys were to be advanced. On the strength of this pay order the sums in question used to be paid by the Head Office. The Central Office maintained its own books, which included cash book, ledger book, loan ledgers, letter receipt book, letter despatch book, suspense account ledger and suit register. Although the Central Office did not keep the cash it used to maintain records of all advances that were made by and/or under its direction and such records used to be kept in the books maintained by the Central Office. If a loan so advanced by the Central Office was paid off, either wholly or in part, that fact would also be recorded in the books of the Central Office.

11. We may only add that after a pay order was honoured by the Head Office in the manner aforesaid, the amount in question used to be debited, in the books of

the Central Office and a corresponding amount would usually be credited in the account of the party concerned which was maintained with the Head Office.

12. Sometime in the month of November 1946, the Bank received a notice from the Reserve Bank of India whereby the Reserve Bank wanted to inspect the records of the Bank under the provisions of the Banking Companies Ordinance, 1946. Thereafter, the Reserve Bank wrote two letters on March 17, 1947 and March 29, 1947, making certain enquiries with regard to the investments made by the Bank and several other things. We shall have to advert to these letters in some detail later on. Two replies were sent to these letters on April 8, 1947, and April 9, 1947, respectively. Thereafter, on October 7, 1947, the Reserve Bank made a report recommending the descheduling of the Bank.

13. On May 6, 1948, the Bank suspended payment. On May 10, 1948, there was an application for moratorium and interim moratorium was granted. On January 20, 1949, a moratorium was granted for one year commencing from January 76, 1949. On March 13, 1950, a winding up petition was presented and on August 17, 1950, the final winding up order was made and the Official Receiver was appointed the Official Liquidator of the Bank.

14 These are briefly the facts which preceded the making of the present application by way of Master''s Summons supported by an affidavit of Dwarkanath Seal affirmed on August 5, 1953, together with a supporting affidavit of Hemchandra Sen Gupta affirmed on the same date.

15. Insofar as the Appellant Nawn is concerned, it is the admitted position that he was never a member of the Committee of Directors, although hef attended some committee meeting to which we shall refer later on. He joined the Board of Directors of the Bank sometime in the middle of the year 1944. There is some dispute as to the date when he became a Director. According to the affidavit of Seal, Nawn joined on August 3, 1944. According to the records of the Registrar of the Joint Stock Companies, it was in the month of May or June 1943. Be that as it may, Nawn certainly became a Director of the Bank on August 3, 1944, if not earlier.

16. The argument before the learned trial Judge on behalf of the Respondents before him including the Appellant Nawn turned both on the question of their liability as also on the question of the amount for which they were liable if at all. After elaborately discussing both these aspects of the arguments the learned trial Judge made the following order as far as the Appellant Nawn is concerned:

There will be an order against the Respondents Dr. Sinha, S.P. Roy Choudhury, B. Basu, S.N. De, S. C. Nawn, Dr. K. Ghosh and Krishna Chandra Roy Choudhury for the payment of Rs. 19,61,443-6-10. The said sum will carry interest at the rate of 6 % from today.

17. It may be recorded at this stage that although in the printed Paper Book before us the amount reads as Rs. 19,41,443-G-lO, it was admitted by the

parties that this was an arithmetical mistake and the aggregate amount would be Rs. 19,61,443-6-10.

18. It is against this order that Nawn has come up before us in the present appeal.

19 The principal contention that was raised before us by Mr. M.M. Sen on behalf of the Appellant was that Nawn did not have any knowledge of the advances at the time when they were made with regard to those advances for which Nawn had been found to be liable by the learned trial Judge. The learned trial Judge upon an investigation of this aspect of the matter came to the conclusion that Nawn came to know of the advances made by the Central Office on either April 1 or April 2, 1947, and not earlier. The fact and circumstances which impelled the learned trial Judge to come to this conclusion will be discussed by us hereinafter. Even this finding was assailed by Mr. Sen as wrong. According to him, Nawn only came to know about These advances on October 1947, a fact which was admitted by Nawn in his oral evidence.

20. Mr. A. C. Mitra appearing on behalf of the Official Liquidator challenges this rinding and submits that Nawn knew about the advances at all material times. Mr. M.M. Sen did not challenge the right of Mr. Mitra to invite us to disturb this finding of the learned trial Judge as to the knowledge of Nawn regarding the advances. He only wanted an opportunity of giving a full reply on the factual aspects of this matter. We granted Mr. Sen that liberty and elaborate arguments were advanced by Mr. Sen for several days in his reply on this aspect of the matter.

21. The principal argument of Mr. Mitra in challenging the finding of the learned trial Judge regarding the knowledge of Nawn as to the advances on April 1 or April 2, 1947, and not earlier, was Abased on the affidavit filed by Nawn in these proceedings. Briefly put, the argument is that in the affidavit filed by S. C. Nawn in answer to the affidavit of Seal, in support of the summons, Nawn never stated that he was ignorant of any of these advances at any point of time. This contention could be illustrated by taking a few specimen paragraphs from the affidavits of Seal and Nawn. It is to be remembered that in these proceedings the Respondents before the learned trial Judge including Nawn were sought to be held liable in respect of large advances made, inter alia, to the following concerns:

(a) Dover Development Ltd.,

(b) Hindusthan Machineries Ltd.,

(c) Ballygunge Estates Ltd.,

(d) Jhajha Cement Industries Ltd.,

(e) Amalgamated Studio Ltd.

22. Let us examine the affidavits before us with regard to some of the advances.

With regard to Ballygunge Estates Ltd., after stating the facts, we find the following averments in para. 49 of the affidavit of Seal:

49. By reason of the aforesaid wrongful advances, the Bank has suffered a loss to the extent of Rs. 3,42,538-14-5 and the Respondents and/or Sailendra Nath Sinha and S.P. Roy Choudhury are liable to compensate the said amount to the assets of the said Bank.

23. These allegations are dealt with in para. 55 of the affidavit of Nawn which contains the following bald statement:

I deny and dispute each and every allegation contained in paragraph 49 of the said affidavit.

24. There is no statement in this paragraph or anywhere ele in the affidavit of Nawn with regard to this advance that he had no knowledge, with regard to the advances to Ballygunge Estates Ltd.

25. With regard to the advances to Hindusthan Machineries Ltd., a company of which the Appellant Nawn happened to be a Director at all material times, Seal in his affidavit in para. 70 avers as follows:

70. By reason of the aforesaid wrongful advance, the said Sailendra Nath Sinha and/or the Respondents have caused loss to the Bank and are liable to compensate and/or to contribute to the assets of the Bank to the extent of the said sum of Rs. 29,521-10-3.

26. This para. 70 of the affidavit of Seal docs not appear to have been dealt with at all in the affidavit of Nawn.

27. With regard to the advances to Jhajha Cement Industries Ltd., a company of which the Appellant Nawn was also a Director at all material times, the relevant paragraph in the affidavit of Seal is para. 97 and is in the following terms:

97. By reason of the aforesaid advances, the Bank has suffered a loss to the extent of Rs. 4,59,291-2-9, and the said Sailendra Nath Sinha, Sudhir Chandra Nawn and/or the Respondents are liable to compensate the Bank and/or to contribute the said amount to the assets of the said Bank.

28. It is to be noticed that the Appellant Nawn is being specifically mentioned in this paragraph by name.

29. The answer of Nawn is to be found in para. 102 of his affidavit which is as follows:

102. I deny and dispute each and every allegation contained in paragraph 97 of the said affidavit. In particular, I deny that the Bank has suffered any loss or damages as alleged in the said paragraph or at all, or that the Respondents or any of them had been guilty of any wrongful act or had caused loss to the Bank, or that the Respondents or any of them was or is liable to compensate or to contribute to the Bank.

30. It is significant that there is no whisper about any lack of knowledge on the part of Nawn at any point of time with regard to this advance to Jhajha Cement Industries Ltd.

31. We have only taken a few of the illustrations and refrain from dealing with other advances to other companies to avoid an inordinately long judgment. The general stand taken by Nawn with regard to these advances may be illustrated with reference to para. 54 of his affidavit where he deals with the advances to Dover Development Ltd. in general terms. Paragraph 54 runs as follows:

54. With reference to paragraph 48 of the said affidavit I state that the loans granted to the Dover Development or to the said company were duly granted and the said investments were properly made by the said Committee of Directors of the said Bank. I deny that the aforesaid investments were unauthorised. In any event, the Board of Directors or myself had no notice of or had no occasion to know or suspect that the alleged loans were granted or investments were made illegally or in any unauthorised manner as alleged in the said paragraph. I deny that the sum of Rs. 1 lakh was paid to S.P. Roy Choudhury by or through the Bank or that the said sum of Rs. 1 lakh was paid in the circumstances as alleged in the said paragraph. In any event, I state that the Board of Directors or myself had no notice of the aforesaid allegations and could have reasonably known of the aforesaid allegations nor there was any occasion for the Board of Directors or myself to suspect any of the said transactions. So far as the Board of Directors including myself was concerned, it acted bona fide reasonably and honestly. The Board of Directors relied upon the papers and documents which came up before the Board and there was nothing in such papers to raise any suspicion. The Board o! Directors further relied upon the reports as to the valuation, of the properties and also relied upon the experts engaged and informations. Save as stated hereinbefore and save that the said Sailendra Nath Sinha and Subhendu Roy Ghoudhury acted as Director and Managing Director, I do not admit the other allegations and suggestions made in the said paragraph.

32. Similarly, with regard to the advances to Hindusthan Machineries Ltd. para. 59 is worth-noting:

59. With reference to paragraph 52 of the said affidavit I state that the sum of Rs. 9 lakhs mentioned therein was duly lent and advanced by the said Bank to the said company and that the aforesaid investment was duly made by the said Committee of Directors. I deny and dispute that the Committee of Directors could not ratify any loan which it itself had the power to grant. I further deny that such ratification would be illegal or would not be binding on the Bank. Save as stated hereinbefore 1 deny the other allegations contained in the said paragraph.

33. On the basis of these paragraphs Mr. A.C Mitra, in our view, legitimately mooted this question; can this affidavit be said '"' to contain a plea of ignorance on the part of N awn with regard to any of the advances?

34. Before we conclude this aspect of the matter two other paragraphs from the affidavit of Nawn are worth noticing. With regard to the advances to Dover Development Ltd. this is what is stated in para. 34 of his affidavit:

34. With further reference to the various allegations contained in the said paragraph I crave leave to refer to the records of the said Bank and also to the various resolutions passed by the said Bank. In any event, I deny that the Board of Directors of the said Bank or myself had been guilty of any laches in respect of the transactions referred to in the said paragraph. I further state that the Board of Directors or myself had acted bona fide, honestly and with due care and had no occasion to suspect the activities of the Committee, of Directors with regard to investments made by the said Committee. I further state that the Board of Directors had nothing to do with the actual investments made by the Committee of Directors and the said Board of Directors, including myself, acted bona fide and in due course relied upon advices given by the Committee of Directors specially appointed for the purpose of investments and relied upon the documents from time to time placed before the Board of Directors. Any reasonable prudent man acting as a Director of any Bank would have relied'' on such papers and documents which from time to time would have been placed regarding the investment made by the Committee of Directors.

35. It was commented that this paragraph clearly shows that Nawrn was aware of the records of the Bank and that various documents were placed by the Committee of Directors before the Board from time to time and the members of the Board including Nawn acted honestly, bona fide and as a prudent banker in relying on those documents. There is. no plea that anything was ever kept back or concealed from Nawn with regard to those investments.

36. The general stance adopted by Nawn. is further illustrated by para. 23 of his affidavit which is in the following terms:

23. With regard to the various allegations contained in the affidavit in general and in particular with regard to the allegations contained in paragraphs 17 to 128 Of the said affidavit, I state that as a Director of the said Bank I had nothing to do with the Central Office or the Committee of Directors to whom powers were specifically delegated for the purpose of investments or that the affairs thereof or that the transactions effected through the Central Office or by the said Committee of Directors except when they came up before the Board of Directors which always have acted reasonably, bona fide and in good faith. The said Board of Directors at all material times duly and honestly relied upon the advices received and informations placed before them by the said Committee of Directors and the officers of the said Bank which they had no occasion to doubt. None of the advances made by the said Bank during the period I had served as a Director of the said Bank was* ratified by me without taking due caution and/or proper or reasonable care of without examination of the documents placed before me without taking into account the other usual factors normally considered on such occasions. I deny all allegations and suggestions contained in the said paragraph

that T have misappropriated or had been a party to the misappropriation of any funds of the Bank or that I had committed any breach of trust or that I have been a party to the committal of any alleged breach of trust of that I had been guilty of any wrongful act. The allegations contained in the said paragraph against the Directors of the said Bank suggesting misappropriation, breach of trust and wrongful acts are so far as I am aware or concerned are baseless and false. I state that at all material times I had exercised due dilligence and had acted in the same way as any reasonable and prudent Director of any Bank would have done. I had no occasion to doubt or suspect the activities of any of my co-Directors or of the Committee of Directors.

37. As is evident from the above paragraph, not only is there a complete absence of any plea of ignorance or concealment, but this is also a plea of complete justification of the advances made which, it is needless to say, postulates that the deponent was fully aware of those advances at all relevant times.

38. Our attention was drawn in this connection to the Rules framed by this Goui/t with regard to proceedings under the Act and, in particular, Rules 209 and 210 thereof which are in the following terms:

209. An application u/s 235 of the Act shall be made to the Judge on summons to be served with a copy of any affidavit intended to be used in support on every person against whom an order is sought eight days before the returnable date of the summons.

210. The Judge may give such directions for the hearing of the summons as to him may seem fit and may direct that evidence shall be taken wholly or in part by affidavit or orally.

39. It is evident, therefore, from a perusal of Rule 210, that proceedings u/s 235 of the Act can be disposed of by affidavits alone. In fact, as is well-known, a number of proceedings u/s 235 of the Act have been disposed of by this Court and other Courts only on the basis of the affidavits themselves although the matter might have been set down for trial on evidence. It would necessarily follow that these affidavits in these proceedings arc not merely pleadings but also evidence on which the Court may, if it thinks fit, dispose of the entire proceedings.

40. In this context, the interesting question that was raised before us was whether if issues had, in fact, been raised before the matter was tried on evidence before Das Gupta J., would the question of ignorance of Nawn as to any of these advances or the question of concealment of any of these advances from him by any other person would have been in issue. From the Minutes of the hearing before the learned trial Judge we find the following records of the hearing dated January 17, 1956:

Mr. R. C Deb--Hands over to Court typed copy of suggested issues and the Court peruses the issues.

The Court--On perusing the issues observes that it is not necessary to frame issues in proceedings u/s 235 of the Indian Companies Act. Asks, however, Mr. Deb to give all his points which his Lordship will take down without missing any one of them.

41. This was followed by recorded Minutes of the hearing dated January 18, 1956:

Mr. Gouri Mittef for Sudhir Chandra Nawn--Indicates to Court the points of defence in respect to his client.

42. Whether it is necessary to raise issues in proceedings u/s 235 of the Act when the matter is set down for trial on evidence, it is not necessary for us to decide in this appeal; Suffice it to say that had issues been raised at the trial the ignorance of Nawn or any concealment from him with regard to any of these advances would, in our view, not have been in issue on the state of the affidavits.

43. It will not be out of place to mention here that in spite of repeated suggestions by Mr. Mitra on behalf of the Official Liquidator, Mr. M.M. Sen did not place the affidavit of Nawn before us, although he argued elaborately on the question of Nawn''s ignorance of the advances and all matters being concealed from him for several days. It was only when Mr. Mitra''s turn came to argue that the affidavit of Nawn was placed before us.

44 It seems to us that before Das Gupta J. adequate emphasis was not placed on the affidavit of Nawn in the manner it has been done before us. This is evident from the fact that, while discussing this aspect of the matter, the learned trial Judge poses the question in the following form:

The question of Mr. Nawn''s knowledge relating to the advances made to Dover Development Ltd. falls to be considered under two heads, namely,

(i) Did he know at the time when these advances were made ? In this connection, it should be noted that the evidence of Mr. Sen Gupta is that the advances to Hindusthan Machineries Ltd. had all been made through the medium of Dover Development Ltd. and of Financier Trust Ltd., and what happened in January 1947 was mere adjustment of liabilities. The question, therefore, is whether Mr. Nawn knew about these advances at or about the time they were in fact made.

(ii) Did Mr. Nawn come to know of these advances at a subsequent stage ?

45. As would be clear from what has been stated earlier, it is our considered opinion that this question does not really arise for consideration on the state of the affidavits in these proceedings. Mr. Mitra for the Official Liquidator, however, frankly stated before us that there was rio question of any misappropriation of the affidavit of the Appellant Nawn by the learned trial Judge. According to Mr. Mitra, who also appeared for the Official Liquidator at the trial, the responsibility was entirely his. He pointed out that the matter had not been- argued in the

same fashion and with the same emphasis on the affidavit of Nawn as it has been done before us.

46. Be that as it may, having regard to the fact that the learned trial Judge has elaborately gone into the evidence on this aspect of the question and come to certain findings, and in view of the fact that elaborate arguments were advanced before us on the same aspect, it would be necessary for us to examine the question briefly on its merics.

47. With/respect again, the findings of the learned trial Judge do not seem to be very consistent to us on this point as will appear from certain extracts from his judgment which are set out herein-below.

48. With regard to the advances to Hindusthan Machineries Ltd. the learned trial Judge comes to the following finding:

As I have said before, Dr. Sinha, according to the evidence of Mr. Sen Gupta, was guiding the affairs of Hindusthan Machineries Ltd. Nawn was only a Director of the said concern and it does not appear that these advances ever came to be considered by the Board of Directors of Hindusthan Machineries Ltd. There is no other evidence on this question except the bare statement of Dr. Sinha. I am unable to hold on such a statement that Mr. Nawn knew about these advances at or about the time when they were'' made.

I have, therefore, come to the conclusion that Mr. Nawn knew about these advances to Hindusthan Machineries Ltd. in or about October 1947.

49. With regard to all the advances from the Central Office generally which, it seems to us, would also include the advances to Hindusthan Machineries Ltd., the learned trial Judge came to the following conclusion:

I am unable to accept that contention and I am prepared to hold on the materials before me that Mr. Nawn came to know of the Central Office advances at least on the 1st and/or on the 2nd of April 1947. That being my finding on fact, the next question which arises for my consideration is what is- the effect thereof on the question of Mr. Nawn''s liability for these advances.

In spite of my finding that Mr, Nawn came to know of these advances at least in April 1947, I find it difficult merely on that ground to hold that he is responsible for the loss which was caused to the Bank by such advances. It should be noted that by that time the advances in question had already been made. . .

Therefore, he could not prevent the mischief which had already been done. All that could be said against Mr. Nawn is that he should have brought this fact to the notice of the Board. But, in my opinion, it must be shown that failure to perform this duty has resulted in loss to the Bank. In, other words, it must be established that as a result of this neglect of duty the Bank has suffered loss. No attempt has been made before me to show that the loss which has been suffered by the Bank was the direct result of Mr. Nawn''s keeping silent over this matter. I want to make it clear that whatever may be the effect in law I find no justification for Mr. Nawn''s conduct in keeping .quiet over this matter even after he came .to know of it and not bringing it to the notice of the Board. I cannot, however, find that the Bank has suffered any loss by reason of such conduct alone.

50. As we have already indicated, if the finding of the learned trial Judge is that Nawn came to know of all the Central Office advances on April 1 or April 2, 1947, it is difficult to see how he could come to the finding that Nawn, came to know of the advances to Hindusthan Machineries Ltd. in or about October 1947 which is a much later date. Even Nassuming that these two findings can be reconciled by adopting the interpretation that when the learned trial Judge finds that Nawn knew about the Central Office advances on April 1 or April 2, 1947, it does not include the advances to Hindusthan Machineries Ltd., we are with utmost respect unable to agree with these findings of the learned trial Judge. We shall indicate briefly our reasons therefore.

51. It seems to us that, in coming to the finding that he did, the learned trial Judge failed to take notice of certain salient facts on this aspect of the matter. This failure or omission again, it was pointed out by Mr. Mitra, had however nothing to do with the appreciation of the evidence by the learned trial Judge. Mr. Mitra frankly, stated before us that the responsibility was entirely his in the sense that either these farts were not brought to the notice of the Court or due emphasis was not placed on them in, the manner in which it has been done before us.

52. The first important fact to be noticed is that, when Nawn joined as a member of the Board of Directors of the Bank, he had to acquire certain qualification shares. These qualification shares, interestingly enough were acquired by Nawn by obtaining a transfer of some of the shares of the Bank standing in the name of Dover Development Ltd. This was admitted by Nawn in his oral evidence. Questions 826 to 831 may be noted in this connection and are as follows:

Q. 826: As a Director of the Bank of Commerce I take it you required qualification shares. A.--Yes.

Q. 827: Will you agree that the qualification shares you acquired were from the holding of the Dover Development Co. ? - . A.--Yes.

Q. 828: In other words, you acquired your qualification shares from the holding of Dover Development Co. in the shares of Bank of Commerce and Dover transferred those . shares to you ?

A.--Dr. Sinha transferred the shares of the Bank of Commerce held by Dover Development and he received money from me for such transfer in my favour.

Q. 829: You accepted those shares willingly, I take ?

A.--Yes, of course..

Q. 8-50: This was on October 13, 1944?

A.--May be, I do not remember the date.

Q. 831: If you look at Board Pt. Ill, p. 179 proceedings of the Board of the 165th meeting dated October 13, 1944, resolution No. 1--The ''Board confirms the transfer of the following shares in favour of the transferee", then the name of the. transferor Dover Development, transferee yourself _S. C. Nawn and the distinctive number of shares is 100 being shares '' Nos. 9578 to 9677 ?

A.--Yes.

53. This is corroborated by the proceeding of the 165th meeting of the Board of Directors of the Bank held on October 13, 1944. The relevant portion of the resolution is as follows ;

(1) The Board confirms the transfer of the following shares in favour of the transferees i Ordinary shares Transferor Transferee Dist. Nos. of shares Dover Development Ltd, S. C. Nawn 100 (9578/9677)

54. It is also seen from the Minutes of the proceedings that Nawn was present at that meeting of the Board. From this, it is ?evident that even at the point of time when Nawn first became a Director of the Board he must have been aware of two things. First, that a company under the name and style of Dover Development Ltd. existed and, second, that the company held certain shares of the Bank. This must be so because he acquired the qualification shares as a transferee of some of the shares of the Bank held by Dover. This appears, in our view, to have a very significant bearing on the extent of knowledge of Nawn with regard to the advances to various companies the largest-amount of the advances being to Dover Development Ltd.

55. As we have already ''stated, there is some controversy as to the exact date when Nawn joined the Board of the Bank. It must have been at the latest on August 3, 1944, if not earlier. A most significant fact in this connection which is unfortunately not either placed or placed with proper emphasis before the trial Court is that on September 4, 1944, which is almost a month or so after he joined as a Director, Nawn is attending a meeting of the Committee of Directors which we have spoken of'' earlier. The relevant portion of the Minutes of the meeting of the Committee of Directors dated September 4, 1944, may be set out in this connection:

Proceedings of 60th meeting of the Committee of Directors of the Bank of Commerce Ltd. held at No. 12 Clive Street, Calcutta on Monday the 4th September, 1944, at 3 p.m.

Present: Mr. S.P. Roy Choudhury " B. Basu " S. N-Sinha " S. C. Nawn (by invitation) Mr. Basu was voted to the chair.

Item No. 12 of the Minutes is in the following terms: (12) To ratify the ''Investment Register'' Serial Nos. 37, 48, 50, 53-62, dt. 1-9-44. Note: 53, 55, 59 rejected, rest confirmed.

56. An overwhelming mass of oral evidence establishes that this ''Investment Register'' which is mentioned in the" Minutes quoted above was the only register which was placed before the Board of Directors of the Bank from time, to time in respect of the Central Office advances. It is also on evidence that large advances, from the Central Office, with which we are concerned in the appeal, were never recorded in this register. In fact, the total amount of investments shown in this register amount to about one lakh of rupees, a fact which has been noted by the learned trial Judge in his judgment.

57. From the above facts it clearly follows that almost as soon as N Swn joins the Board of the Bank he. is aware of the fact that the affairs of the Bank were, by and large, being run by a Committee of Directors. Why Nawn was invited to be present at the meeting it is not really relevant for us to consider. What is significant and worth noticing is that right from the beginning of his association with the Bank as a Director Nawn is taken into the ''inner circle'' of the Bank, i.e. its Committee of Directors. He is also aware of the fact that this committee is ratifying certain investments which were made by it. From this, it needs but a small step to ascertain as to what were the functions of this Committee of Directors and as to what advances were being made by it and what were the concerns to which such advances were being made.

58. It is also to be remembered that at or about this time Nawn was also aware of the existence of Dover which was the largest recipient of these advances sanctioned by the Committee of Directors. 58. It is to be noted that under the provisions of the Evidence Act, 1872, a fact is said to be proved not only when its actual existence was proved but also when having regard to all the surrounding circumstances and probabilities of the case the Court considers its existence to be reasonably probable. The relevant portion of Section 3 of the Evidence Act may be noted in this connection:

A. fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

59. From the cumulative effect of the facts and circumstances and having regard to the probabilities of the case we are amply satisfied that it is reasonably probable that Nawn knew not only about the existence of the Committee of Directors but also about all the advances made by it to the different concerns right from the time when he joined the Board of Directors of the Bank.

60. There is another factual aspect of this question of Nawn''s knowledge which requires somewhat close examination. With regard to the advances to Hindusthan Machineries Ltd., Mr. Nawn, in his oral evidence, asserted .that he did not know anything about these advances until October 7, 1947. The aforesaid-oral evidence has to be tested against the background of the fact that not only

was Nawn a- member of the Board since the middle of 1944 but he was also a Director of both Hindusthan Machineries Ltd., the recipient of a loan of Rs. 9 lakhs as also of Financiers'' Trust Ltd. which were the Managing Agents of Hindusthan Machineries Ltd. until a certain point of time. He joined as a Director of both these companies as early as May 1943. It is further on record that in the months of May, June and August 1944 he had Been personally lending monies to Hindusthan Machineries Ltd. and obtaining promissory notes from the company three of which are on the records of this appeal.

61. It is further to be noted that Nawn is not, a stranger to the world of business and commerce. In answer to Q. 2 in his oral evidence he says that he is connected with the following joint stock companies:

B.C. Nawn & Bros. Ltd., Nawn Estates Ltd., Bengal Fine Spinning and Weaving Mills Ltd., Screen Corporation (1935) Ltd., Prima Films (1938) Ltd., Rupabani Theatres Ltd., Premier Theatres Ltd., Land and Housing Ltd.

62- He also says in answer to Q. 3 that he is a Managng Director of B. C. Nawn & Bros. Ltd., Nawn''s Estates Ltd. and a Director-in-charge of Bengal Spinning & Weaving Mills Ltd. In answer to Qs. 44 and 45 Nawn says that in or about 1947 he held shares in different joint stock companies of the value of Rs. 15 to 20 lakhs. He also stated that he was connected with textile mills and industries which had an annual turnover of 30 to 40 lakhs of rupees. In 1947, Nawn was about 50 years of age.

63. From the above facts it necessarily follows that in or about 1947 the Appellant Nawn was a businessman with a vast experience in running different companies. This gentleman, according to his oral evidence, suddenly discovers in October 1947 that the Bank through its Committee of Directors has advanced no less than a sum of Rs. 9 lakhs to Messrs Hindusthan Machineries Ltd., a company of which he is a Director. If Nawn''s evidence is to "be believed, these large advances must have been made without any prior knowledge or consent of Nawn although he was a Director of the Bank which was making the advances. This realisation when, according to Nawn, it came to him, must have hit him like a bolt from the blue. This is because he suddenly discovers that all these advances have been, kept concealed from him over a number of years.

64. In this state of affairs how does the Appellant Nawn react ? Does he send a letter of protest recording his strong feelings about this ? Does he take any step to convene a, meeting of the Board of Directors of the Bank to ask for an explanation as to the conduct of the other members in keeping these advances concealed from him and for a possible show down ? Does he send a letter offering his resignation from the Board of the Bank or even a letter threatening to resign unless a satisfactory explanation is forthcoming with regard to this concealment ? Unfortunately for the Appellant Nawn, the answer to all the above questions arc in an emphatic negative. There is not a scrap of paper to show that Nawn recorded any form of protest in writing in any manner whatsoever. All. that

he has to say in his oral^ evidence that he protested verbally to Dr. Sinha who assured him that the matter would be taken up in due course. Notwithstanding the fact that no further steps were taken by Dr. Sinha in this regard, Nawn chose to remain silent in this matter.

65. Even this is not the end of this chapter of this story. As noted earlier, in November 1946 the Reserve Bank of India sent a, letter to the Bank with regard to the inspection of its records under the Banking Companies Ordinance, 1946. Presumably in anticipation of trouble, Subhendu Prosad Roy Ghoudhury, who was the Managing Director of the Bank, on the same day, i.e. January 4, 1947, resigned "his directorship from three different concerns, viz. Hindusthan Machineries Ltd., Amalgamated Studio Ltd. and Ballygunge Estates Limited. All these three concerns were beneficiaries of large advances from the Bank. It is not disputed that this fact of the resignation of Roy Choudhury from all these concerns was known to Nawn. Even at this point of time does this resignation put Nawn''s back up J Does he take any steps to find out as to what is the reason for this sudden resignation of Roy Choudhury ? The answer, alas ! is again in the negative.

66. Mr. A. C. Mitra for the Official Liquidator submitted that this conduct of Nawn after his alleged knowledge of the loans to Hindusthan Machineries Ltd. in October 1947 or after the resignation of Roy Choudhury on January 4, 1947, is only referable to two possible alternative conslusions.. The first is that Nawn was aware of all these advances of the Central Office at all material times and that is why he took no steps by, way of protest. The second possible conclusion is that Nawn was guilty of ''wilfully shutting his eyes'' or callous indifference which, in the light of the law, we shall discuss a little later, would make him equally liable. In our view, the first of the two alternative conclusions that Mr. Mitra poses is the one that should be accepted. In other words, we are of the view that taking all the above facts together and having regard to the meaning of proof as denned in Section 3 of the Evidence Act, 1872, it has been fully established that Nawn had full knowledge of all the advances from the Central Office right from the time of his association with the Bank. To this extent, as we have indicated earlier, we respectfully differ from the findings of the learned trial Judge that Nawn came to know of the advances only On April 1 or April 2, 1947, and not at an earlier date.

67. Since we arc in almost entire agreement with all the other findings of the learned trial Judge, on every other aspect of this case we consider it unnecessary to express our views in detail on the. various other points which were canvassed before the learned trial Judge and also before us at considerable length. There is, however^ one factual aspect of the matter to which we consider it necessary to allude before we proceed to discuss the question of valuation of the securities and the legal position. Since incorporation of the Dover Development Ltd. most of the advances from the Bank used to be debited against Dover in the books of the Bank Dover in its turn used to lend large sums of money to various concerns in which Dr. Sailendra Nath Sinha, the Appellant Nawn and various other persons

were directly interested; In other words, Dover was used as the conduit pipe for passing the money from the Bank to these various concerns. This was presumably done because a number of Directors of the Bank were also Directors of the various concerns, whereas they were not directly concerned with the Dover Development Ltd. Just to illustrate this point it may be mentioned that although the wife of Dr. Sinha was a share-holder of Dover, her name was shown in the books of | Dover as Sm. Pratima Rani Mitra and not Pratima Rani Sinha although she had been married to Dr. Sinha long time ago. The result of this modus operandi was that at various points of time the indebtedness of Dover to the Bank became extremely large and sometime touched the figure nearly 29 or even 30 lakhs of rupees. In November 1946, as noted earlier, the Reserve Bank of India sent the intimation regarding inspection of the books of the Bank. Soon thereafter, it seems to us, the Directors of the Bank felt a little uncomfortable about the large indebtedness of Dover to the Bank particularly in view of the fact that very few of the securities (such as they were)" against those advances stood in the name of Dover.

68. On January 8, 1947, the Bank opened new loan accounts in the name of three concerns which had hitherto been the beneficiaries of the advances through Dover to these concerns. They were shown as the direct debtors of the Bank to the following extent:

(a) Ballygunge Estates Ltd. ... Rs. 15,50,000

(b) Hindusthan Machineries Ltd. Rs. 9,00,000

(c) Ballygunge Electrical Industries Ltd. ... Rs. 25,000 Rs. 24,75,000.

69. This amount of Rs,24,75,000 for which these three concerns were directly debited in the books of the Bank was correspondingly credited in the loan account of Dover. The result was that the indebtedness of Dover to the Bank came down considerably and stood at a figure of nearly two and a half lakhs of rupees.

70. One of the main points of Mr. Sen''s argument for the Appellant Nawn was based on the postulate that this ''splitting up'' of the indebtedness of Dover and converting it into the indebtedness of these three concerns, as the direct debtors of the Bank was a mere ''transaction'' as Mr. Sen called it. According to this contention, no money actually passed from the Bank to these concerns on January 8, 1947, and consequently no loss was caused to the Bank on that date. Consequently, it was submitted that even assuming that Nawn knew about this splitting up on January 8, 1947, he could not be held liable as it was a mere paper transaction.; The same argument was advanced before the learned trial Judge who, however, did not allow this contention to be raised on the ground that no such case was made out in the affidavit of Nawn.

71. Quite apart from the fact as the learned trial Judge rightly pointed out, that was never raised in the affidavit; it seems to us that this argument is somewhat

misconceived. In the eye of law, as far as we can see, there is no such thing as a paper transaction. A transaction is either genuine, or it is a sham or fictitious transaction. In keeping this classification in mind we fail to see how this transaction can be called a sham or fictitious transaction. To take an illustration, when a constituent hands in a cheque payable to him out of somebody else''s account on the same branch of the Bank in which he has an account, all that-the Bank does is to make a book adjustment by debiting the drawer of the cheque and crediting the payee of the constituent for the amount mentioned in the cheque. No money physically passes in the sense in which Mr. Sen sought to argue this aspect of the matter. Can it, therefore, be contended that it is merely a sham transaction and not a genuine one ? Our definite opinion is that it cannot. Similarly, when the indebtedness of Dover was reduced by a sum of Rs. 24,75,000 and the three concerns mentioned above were shown as" direct debtors of the Bank, the transaction was as genuine as in the illustration that we have given above. It would follow that we are unable to accept the contention of Mr. Sen that the transaction on January 8, 1947, was a, ''sham'' transaction in the: sense, that it was a fictitious one.

72- According to Mr. Sen, the learned trial Judge in coming to his conclusion omitted to consider several facts which may be very briefly dealt with. According to his contention; there was nothing in the affairs of the Bank to raise the suspicion of Nawn. The Auditors, insofar as the balance-sheet of the Bank is concerned, had always given reports without raising any objections and Nawn implicitly relied on the Auditors'' certificates. It was also submitted that things were kept concealed from Nawn and he being an outside Director had no means of finding out what was really going on in the ''inner circle''. In view of our finding that Nawn knew about advances at all material times, all these arguments of Mr. Sen must be held to be without any substance.

73. It is lastly argued that there is no allegation of mala fide against the Appellant Nawn. In our view, it is not necessary to allege or prove mala fide in an application u/s 235 of the Act. This will be amplified a little later when we come to discuss with the legal position.

74. Before we come to the question of valuation and the legal aspect there is one small point regarding the pleading which docs not appear to have been raised before the learned trial Judge but was argued before us.

75. The foundation of this argument is the finding of the learned trial Judge that the Appellant Nawn has been guilty of gross negligence and callous indifference insofar as his duties as a Director of the Bank are concerned. Mr. Sen, in this connection, drew our attention to a decision of the English Court in the case of The Over end, Gurney if Co. v. Thomas Jones Gibb and John Darby Gibb L.R. 5 HL 480 (495) . The material observation of the Lord Chancellor (Lord Hatherley) is as follows:

If we had found any statement in the bill charging distinctly any improper motive or any undue neglect of any circumstances or transaction which ought to have been inquired into by the persons making this purchase, the case would of course have been different--but I do not find a single intimation, from the beginning to the end of the bill, of anything being left undone that ought to have been done by these trustees.

76. To the same effect are certain observations in Halsbury''s Laws of England (3rd. ed., vol. 6, Article 619), viz., that the allegation of negligence should be distinctly charged. This observation, how4 ever, is based on the case which we have just noted above.

77. Relying on the above, Mr. Sen submitted that there was; no specific allegation of negligence insofar as the Appellant NawnS is concerned in the affidavit in support of the summons. According to Mr. Sen, the learned trial Judge was in error in coming to the conclusion that he did in view of the fact that there was no pleading of negligence before him.

78. There are several answers to this contention of Mr. Sen which were pointed out by Mr. A.C. Mitra, counsel for the Official Liquidator. In the first place, although there is no specific; allegation of negligence with regard to the individual transactions which are alleged in different parts of the affidavit of Seal, in sup-i port of the summons, para. 143 of the affidavit is in the following; terms:

143. The Respondents aforesaid are guilty of misapplication in retainer of the properties and funds of the Bank and; are liable and accountable for the monies and properties of the Bank hereinafter mentioned and are guilty of misfeasance and /or breach of trust in relation to the Bank in having: advanced or caused to be advanced monies or funds of the Bank without security and/or without adequate security and/ or wrongfully having allowed credit entries to be made in the books of the Bank and /or having substituted one creditor in place of another and/or having invested moneys of the Bank negligently and/or having ratified such investments and/or having failed to apply their minds or judgments to the investments of the Bank and/or having assignments to be effected relating to the Bank''s properties and/or having parted with properties of the Bank as more fully described hereinbefore in \\ this affidavit.

79. Needless to say, the Respondents mentioned in the above (paragraph would include the Appellant Nawn. This quite apart ; From anything else, in our view, is a sufficient allegation of negligence insofar as Appellant Nawn is concerned.

80. It was also pointed out by Mr. Mitra that the decision relied on by Mr. Sen in the case of The Over end, Gurney & Company v. Thomas Jones Gibb and John Darby Gibb (Supra) was a decision given in a suit and not in misfeasance proceedings. Needless to say that in the plaint filed in a suit, as has been specifically provided by our own Code of Civil Procedure, full particulars of negligence have to be given if the Plaintiff is to succeed. The English decision is, therefore, distinguishable from the present case on that ground also.

81. But there is a formidable hurdle in the way of Mr. Sen''s client with regard to this contention.

82. Mr. R. L. Sinha, who followed Mr. Mitra for the Official Liquidator, drew our attention, to a decision of the Supreme Court in the case of Nagubai Ammal and Others Vs. B. Shama Rao and Others, . Venkatarama Ayyar J. observed as follows:

(12). It was argued for the Appellants that as no plea of lis pendens was taken in the pleadings, the evidence bearing on that question could not be properly looked into, and that no decision could be given based on Exhibit J series that the sale dated 30-1-1920 was affected by lis; and reliance was placed on the observations of Lord Dunedin in AIR 1930 57 (Privy Council) that ''no amount of evidence can be looked into upon a plea which was never put forward''.

The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties and on which they had no .opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.

83. To the same effect is another recent decision of the Supreme Court in the case of P.V. Ayyappa Reddiar Vs. Ayyappan Pillai Janardhanan Pillai and Another, the material portion whereof is as follows:

14: As pointed out by Mr. Subramania Ayyar, it is no doubt true that there is no specific pleading by any party that Ex. P-l is a contingent contract, but when the High Court was considering the competing claims of two parties claiming under two separate agreements and when the High Court was upholding the truth of the execution of the two agreements, there is no error committed by the High Court in discussing the circumstances under which Ex. P-l came to be executed. It was in considering such a question that the High Court has held that the Plaintiff got Ex. P-l executed in his favour with full knowledge of the execution of Ex. D-2. As Ex. D-2 is of an earlier date and held to be a true transaction, the High Court was justified in holding that Ex.P-1 was got executed only on the basis that the Plaintiff could rely on the same if the second Defendant did not complete the transaction of purchase under the agreement Ex. D-2. Therefore, we see no error in the approach made by the High Court in this regard.

84. On the strength of the above decisions it was submitted that even assuming for the sake of argument that there was no pleading pf negligence in the. affidavit in support of the summons, Appellant Nawn with full knowledge of that omission in the pleading went to trial on various questions including the question of negligence. From the oral evidence of Nawn it appears that a large number of questions were asked in cross-examination on the question of Nawn''s negligence, no objection appears to have been raised before the trial Court or

recorded by it on the ground that there was no pleading of negligence and, as such, the question was not in issue. As we have observed earlier, no formal issues were raised at the trial. That being the legal position, having participated at the trial with the full knowledge of lacuna in the pleading of negligence, assuming there was one, he is now precluded from challenging the finding of the learned trial Judge before us on this ground. This contention of Mr. Sen, therefore, also fails on the state of the authorities mentioned above.

85. Before we come to the question of assessment of the liability of the Appellant Nawn it would be appropriate to deal with the question of a Director''s liability under the law. We must point out at this stage, however, that since Das Gupta J. found that Nawn did not actually come to know of the advances made by the Bank which were the subject-matter of the misfeasance proceedings until April 1 or April 2, 1947, he went into the legal aspect; of the matter and, after discussing certain authorities to which we shall presently refer, he held that Nawn was guilty of ''wilfully shutting his eyes'' to these advances and was guilty of. wilful negligence or callous indifference. It was on that basis that the learned trial Judge held Nawn liable for these advances although, according to him, Nawn had no actual knowledge of the advances at the time they were made. In view of our finding, that Nawn knew about all these advances at all material times, we are of the view that it is really unnecessary for us to go into the legal aspect of the matter for deciding the liability of Appellant Nawn. In deference to the elaborate arguments advanced at the Bar on the legal aspects, however, we shall very briefly deal with it.

86. In order to appreciate the rival contentions on the legal position and since this is a special statutory liability created by the Act, it will be useful to set out Section 235 of the 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 or 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 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, ratainer, misfeasance or breach of trust, as the case may be, whichever is longer, examine into the conduct of the promoter, 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 Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible.

87. It is clear from a perusal of the Section that a Director of a company, and in

this appeal we are only concerned with a Director, will be liable if he has ''misapplied'' or ''retained'' or ''became liable- or ''accountable'' for any ''money or property of the company'' or ''being guilty of any misfeasance'' or ''breach of trust in relation to the company''. These are the different grounds on which a Director may be held to be liable under this Section.

88. It is in this context of the expression ''breach of trust in relation to a company'' that a new argument was advanced before us on the legal position which, according to Mr. Mitra, was not canvassed before the trial Court. In fact, we do not find any discussion in the judgment on this aspect of the matter except a bare reference to the Section which we shall presently consider. Our attention was drawn to the provisions of Section 88 of the Indian Trusts Act, 1882, which is in the following: terms:

88. Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interest of another person, by availing himself of his character; gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under: circumstances in which his own interests are, or may be, adverse to those of such other persons and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage or gain.

89. Mr. ''Sen for the Appellant contended that this Section in terms'' has no application to the facts of the present case. We entirely agree with that contention. But the significance of Section 88 of the Indian Trusts Act, 1882, in the context of the present appeal is that a Director of a company stands in a fiduciary character ''to protect the interests of another person''. Since the singular includes the plural, this expression in this Section, in our view, would in an appropriate case mean the share-holders of a company. Therefore, a Director of a company stands in a fiduciary capacity and occupies a fiduciary position vis-a-vis the share-holders of the company. It is to be further noticed that Section 88 is to be found in chap. IX of the Indian Trusts Act, 1882, which bears the heading ''Of Certain Obligations in the Nature of Trusts''. As is well-known the obligations u/s 88 have been held by different Courts to be in nature of a quasi-trust.

90. It would follow, therefore, that under the law of the land a Director of a company is in the nature of a trustee and occupies a fiduciary position in relation to the share-holders. Mr. Mitra also placed strong reliance on a very early decision of the Supreme Court in the case of Nanalal Zaver and Another Vs. Bombay Life Assurance Co. Ltd. and Others, . Kania C.J. observed as follows:

42. It is well established that directors of a company are in a fiduciary position vis-a-vis the company and must exercise their power for the benefit of the company. If the power to issue further shares is exercised by the directors not for the benefit of the company but simply and solely for their personal aggrandisement, and to the detriment of the company, the Court will interfere

and prevent the directors from doing so. The very basis of the Court''s interference in such a case is the existence of the relationship of a trustee and of cestui quo trust as between the directors and the company.

91. This decision of the Supreme Court is a clear authority for the proposition that a Director stands in the position of a trustee in relation to the company which really means its shareholders.

92. Relying on certain English authorities Mr. Sen argued that a Director of a company cannot be a trustee in the full sense of the term. We accept this contention of Mr. Sen for two unimpeachable reasons. In the first place, a Director cannot be equated with a trustee in the full sense of the term because the legal property of the company does not vest in the Directors. Secondly, a trust contemplates three parties--the settlor, the trustees and the beneficiaries. In case of a company, there are no such three parlies. That is why the provisions of Section 88 of the Indian Trusts Act, 1882, assumes special significance in the context of Section 235 of the Act. In other words, a Director commits a breach of trust in relation to the company as contemplated of Section 235 of the Act when he fails to exercise the degree of care, diligence and vigilance which is required of him by virtue of the fact that he is in a fiduciary position vis-a-vis the company, i.e. its share-holders, and is saddled with an obligation in the nature of a trust as is made clear by the observations of the Supreme Court quoted above.

93. From our previous discussion on the factual aspect of the matter, it will be abundantly clear that Appellant Nawn certainly did not act with due care and caution and with the appropriatc vigilance that were required of him by virtue of his fiduciary character. Consequently, it must be held that, quite apart from anything else, Appellant Nawn is guilty of breach of trust in relation to the company as contemplated by Section 235 of the Act.

94. This, in our view, is sufficient to dispose of the legal aspect of the question involved in this appeal. Having regard to the various authorities cited at the Bar we shall briefly refer to them.

95. Mr. Sen relied on a decision of Romer J. in the case of Lagunas Nitrate Co. v. Lagunas Syndicate (L.R. (1899) 2 Ch. 392 (418-19)). Appropriate observations are to be found. The case went up on appeal and the judgment of Lindley M.R. is to be found there. The observations relied upon are in the following terms (5):

As directors, I am not aware that there is any difference between their legal and their equitable duties. If directors act within their legal powers, if they act with such care as is reasonably to be expected from them, having regard to their know-'' ledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company. In this case, they clearly acted within their powers; they did nothing ultra vires ; fraud is not imputed. The enquiry, therefore, is reduced to that of care and bona fides with a view to the interests of the nitrate company. 1 he amount of care to be taken is difficult to define; but it is plain that directors are not liable for all the mistakes they may make, although if they had taken more care they might have avoided them: Over end, Gurney Company v. Gibb, L.R. 5 H.L. 480. Their negligence must be not the omission to take all possible care; it must be much more blameable than that; it must be in a business sense culpable or gross. I do not know how better to describe it.

96. Reference was also made to another decision in the same volume in the case of In re National Bank of Wales Lid. L.R. (1819) 2 Ch. 629 (671). Lindley M.R. who delivered the judgment of the Court of Appeal in that case approved of the observations in his own decision in the Lagunas case (Supra (422, 435)) which we have quoted above. It may be-mentioned that this case went up on appeal to the House of Lords and is reported as the case of poverty and the Metropolitan Bifnk (of England and Wales) Ltd. v. John Cory L.R. (1901) A.C. 477 (489-90) . Mr. Mitra strongly relied on certain observations in the judgment of Lord Davcy which are as follows:

My Lords, I need only refer to three cases which seem to me to contain the whole law upon the subject. The Stringer''s case L.R. (1869) 4 Ch. 475, the business of the company in question was of an extremely speculative and hazardous character, and the directors had paid a dividend on their estimated value of assets which were afterwards totally lost. It was held that the estimate, having been made bona fide, and without any intention to defraud anybody, a director could not be made liable when the company was wound up to replace the money. In Ranee''s case L.R. 6 Ch. 104 Lord Romilly laid down the principle which he thought governed cases of this description thus: "When an improper payment has been made, if it be a mere error of judgment it cannot be recovered; if it be a fradu-lent payment then it can." The learned Judge explained what he meant by a fraudulent payment: "I mean one where the'' person who makes it or is concerned in making it is at the time aware of the impropriety of making it but does so in order to obtain a benefit for himself" ; and he adds: "The director may be ignorant of this fact, but if his ignorance arises from his wilfully shutting his eyes to the facts which are before him, -he. is equally guilty." I think that this statement of the law is very nearly, but not quite, accurate. In my opinion, it is not necessary that the motive of the improper payment should be to obtain a benefit for the director himself. I also understand Lord Romilly to include in the expression ''wilfully shutting his eyes'', culpable negligence or reckless indifference by the director in the performance of his duties. Lord Romilly decided that case in favour of the director. The Court of Appeal took a different view of the facts from that taken by Lord Romilly and held that the directors in the preparation of the so-called .balance-sheet had not followed the directions in their articles of association, and the balance-sheet did not, in fact, purport to show a profit out of which a dividend could be paid. In such a case there can be no doubt'' of the liability of the director who took part in the payment of the dividend.

The case of Leeds Estates, and Company v. Shepherd 36 Ch.D. 787 before

Stirling J. was a case of the same description. The directors had not followed the directions contained in the articles of association. The learned Judge, in the course of his judgment, states the law thus: "It seems to me that the views expressed by the learned Judges who decided Ranee''s case (L.R. 6 Ch. 104) are consistent with the proposition that directors who are proved to have, in fact, paid a dividend out of capital fail to execute themselves if they have not taken reasonable care to secure the preparation of estimates and statements of accounts, such as it was their duty to prepare and submit to the shareholders and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements submitted to them.

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

97. As was submitted by Mr. Mitra, and, we are inclined to accept that submission that this decision of the House of Lords is a clear authority for the proposition that Lord Romilly''s statement of the law as to the Director''s liability when he is guilty of ''wilfully shutting his eyes'', as to what was going on, is fully approved by the House of Lords with the minor modification that personal benefit of the Director concerned is not necessary ingredient of that liability. In our view, also on a proper reading of Section 235 of the Act the question of personal benefit is not a relevant consideration except in deciding the question of retainer as contemplated by that Section. Therefore, even on his own rinding of fact, the ^earned trial Judge in our view was quite correct in his approach to the legal position when he accepted Lord Romilly''s statement of the law as laid down in Ranee''s case L.R. 6 Ch. 104 which, as we have said, was approved by the House of Lords and held Nawn liable on that basis. As we have said earlier, in view of our finding on the [acts, this aspect of the matter really becomes academic for the purposes of this appeal.

98. Before we leave the case of Dovery and the Metropolitan Sank (of England and Wales) Ltd. v. John Cory it is to be mentioned that Mr. Sen strenuously contended before us that in that:ase the House of Lords found that John Cory was not guilty of any act of misfeasance. He submitted that we should come to a similar conclusion regarding Appellant Nawn.

99. In the first place, it seems to us that from the propositions of law laid down by the House of Lords in that case the ultimate decision must be held to be confined to the facts of that case. Turning to the facts of that case, the following observation occurs in the judgment of Earl of Halsbury L.C. (Supra (484)):

But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And, indeed, what is really made the test of his responsibility is that he did not find out what was fraudulently withheld from his knowledge. So the warning letters of the auditor, which were never supposed to reach him, are suggested as warnings to him which he ought not to have neglected.

100. This is clearly a finding of fact that certain letters of the Auditors which contain certain warnings were not allowed to reach John Cory and were, in fact, fraudulently withheld from him. In the instant case before us, we have already held that there is no evidence that anything was concealed from Appellant Nawh either fraudulently or otherwise.

101. Again, there is another observation of Earl of Halsbury L.C. regarding the facts of that case which is set out herein below (Supra (7) Supra (484-85)):

Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded. One was his own brother, another was the General Manager; and once I arrive at the conclusion that there were those about him whose interest and object was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which sought to be relied upon as matters for which he was responsible.

102. Once again we repeat, there is no evidence that ''anything was definitely concealed'' from Nawn in the present ease. In that view of the matter, the decision of the House of Lords would seem to be completely distinguishable on facts from the present case.

103. Mr. Sen also relied on the decision in the case of In re City Equitable Fire Insurance Co. Ltd. L.R. (1925) 1 Ch. 407 (426-30). Romer J. discussed the general duties and responsibilities of Directors with reference to various authorities some of which we have discussed above. We do not see how this decision advances Mr. Sen''s client''s case any further. We must also observe in a peculiar case like the present, where the Board of Directors have by a resolution abdicated all their duties and functions to a Committee of Directors and have imposed upon the committee the sole obligation of sending up to the Board monthly statements of the advances made and the securities taken does not appear to have been considered in the above decision- From that point of view this decision would be distinguishable from the facts of the present case.

104. Mr. Sen next submitted that the loss caused to the Bank must be a direct consequence or result of the acts of misfeasance which are contemplated u/s 235 of the Act before Nawn can be held liable. In support of that proposition reliance was placed on a decision of the Judicial Committee in the case of Prefontaine v. Grenier (1907) A.C. 101 (111) where the following passage occurs:

Their Lordships are not prepared to say that there was negligence in omitting to sanction an inspection inconsistent with the ordinary method of conducting the affairs of the Bank, nor has it been shown that there was any direct connection with the matters excepted to by Gagnon and the fatal overdrafts.

105. Reliance was also placed in this connection on a decision of a learned single Judge of this Court in the case of In Re: Indo Burma Industries Ltd., . P.B. Mukharji J. (as he then was), inter alia, observed as follows:

The word ''misfeasance'' in Section 235 has not been defined. The counter part of the English Companies Act making similar provisions for misfeasance has been judicially noticed on a number of occasions In re Kingston Cotton Mill Co. reported in (1896) I Ch. 331. ''Misfeasance'' is said to cover every misconduct by an officer of a company, as such, for which he might, apart from Section 10, English Companies (Winding-up) Act of 1890, have been sued and includes the case of an auditor who, either knowingly or through failure to use reasonable skill and care, certifies accounts which ought not to have been certified, provided the direct result is pecuniary damage to the company.

106. Emphasis was laid on the expression ''direct''. This decision caused some confusion because the expression ''direct result'' or ''direct consequence'', insofar as the loss is concerned, is not to be found in Section 235 of our Act. Bearing this in mind, we requested Mr. Sen to cite the decision referred to in the judgment of P. B. Mukharji J., viz. the case of In re Kingston Cotton Mill Co. L.R. (1896) 1 Ch. 3181. Reading that judgment, it is quite clear to us that Vaughan Williams J. in that case was merely quoting Section 10 of the Companies (Winding-up) Act, 1890, where the expression ''direct result'' occurs. This expression, however, as we have already said is not to be found in Section 235 of the Act with which we are concerned. In that view of the matter, we are unable to hold that on a proper interpretation of Section 235 of the Act the loss must be the direct result of the various acts of misfeasance contemplated in Section 235 of the Act.

107. Reference was also made to another decision of the Court in the case of In re Central Calcutta Bank Ltd. 63 C.W.N. 407 (425-28). In that case, H.K. Bos C.J. (as he then was) after considering the particular facts of that case held some of the Directors to be not liable in misfeasance and some other Directors to be liable. Although Mr. Sen read the entire case before us, it seems to be confined to the special facts of that case and cannot be said to be of any assistance to the Appellant in the present appeal. The legal position has been discussed by Bose J. with reference to some of the cases which we have already discussed. We do not find any new legal proposition in that discussion nor do we find anything in the legal aspect which is of any assistance to the Appellant in the present case.

108. The decision in the case of In re Etic, Limited L.R. (1928) 1 Ch 861 was cited by Mr. Sen as an authority for the proposition that some act of omission or non-misfeasance-per se does not amount to misfeasance. In order to arrive at misfeasance such non-misfeasance must bi coupled with breach of trust. This proposition although it appear to have laid down by Maugham J. in that case must be tested in tin light of the language of Section 235 of the Act which, as we

havi already pointed out, contemplates breach of trust in the sense ii which we have explained it as an independent item of misfeasanci also, quite apart from other act of omission or commission. This case also, therefore, does not appear to be of any assistance to the Appellant.

109. Mr. A. G. Mitra referred to the decision in the case of The Charitable Corporation v. Sir Robert Sutton and Ors. (1741) 2 Atkyn 405 as an authority for the proposition that a Director occupies a position ol trustee and must act with fidelity and with reasonable diligence. This aspect of the matter has already been discussed by us with reference to a Supreme Court case and with reference to Section 88 of the Indian Trusts Act, 1882.

110. Reference was also made to the case of The New Flemming Spinning and Weaving Co. Ltd. v. Kessowji Naik if Ors. ILR 9 Bom. 373 and Govind Narayan Kakade Vs. Rangnath Gopal Rajopadhye, . These two cases have been elaborately discussed by learned trial Judge and we do not feel that we can usefully add anything to the discussion.

111. Reference was also made by Mr. Sen to a decision of Chitty J. in the case of In re Denham and Company L.R. (1884) Ch.D. 752. In that case, one Mr. Crook was sought to be proceeded against on the ground of misfeasance in respect of a company called Charles Denham 8c Co. Ltd. In that case, it was found as a fact by Chitty J. that practically all the powers of the company were conferred on one Mr. Denham and Mr. Crook had been guilty of considerable negligence in the discharge of the duties of his office. He did not attend a single meeting of the Directors during the period in question. To quote the language of the learned Judge--

He appears to have abstained from doing anything whatever, being misled, as he says, by reason of the extraordinary powers conferred by the articles upon Denham. He was in fact deceived as many other share-holders were.

112. In the circumstances, Chitty J. held that Crook was not liable. This case seems to be practically distinguishable on facts. In fact, Appellant Nawn attended practically every week the Board of Directors'' meetings of the Bank during relevant period. We are not satisfied, as we have said, that he was being deceived by anybody.

113. This really disposes of all the authorities which were cited at the Bar. To sum up, the legal position'' would seem to be that, although a Director did not have actual knowledge of certain transactions which had caused the loss to the company, in view of the position that he occupied under the law of the land and in the light of the decided cases, he would be equally responsible if he had been guilty of wilfully shutting his eyes to the transaction or had been guilty of culpable or gross negligence or callous indifference. The learned trial Judge found Nawn guilty having regard to the legal position in the matter. This question does not really arise before us as, on the facts, we have found that Nawn was fully aware of all the transactions at all material times.

114. This brings us to the last principal question which was canvassed in the appeal, viz. assuming that Nawn is liable, what is the extent of his liability ? Needless to say, this will depend on (a) the amount of loss that was caused to the Bank by reason of the outstanding advances and (b) the valuation of the various securities which remained in the possession of the Bank against those outstanding advances. The quantum of liability of the Appellant Nawn would clearly be the difference between (a) and (b).

115. As we have mentioned earlier, this appeal and three other connected appeals were heard one after the other involving the same question of valuation of securities as that would affect the quantum of liability of each of the Appellants in these four appeals. Since it is a common question, it was agreed by all parties that Mr. T. P. Das who appears for the Appellant in the appeal of Bimalakshya Basu v. Official Receiver, High Court, Calcutta, and Ors. (Appeal No. 35 of 1958) and S.P. Roy Chowdhury v. Official Receiver, High Court, Calcutta, ir ors. (Appeal No. 37 of 1958) would address us on behalf of all the Appellants on the question of valuation of the securities. This Mr. Das did for a number of days. Before addressing us on the merits of the valuation reports to which we shall refer presently and the learned Judge''s conclusions, Mr. Das raised a question on the onus of proof. It was submitted that the onus of proof as to the loss caused to the Bank as contemplated by Section 235 of the Act was on the Official Liquidator. It was submitted that-just as in a suit the Plaintiff has to prove his claim, the Official Liquidator has also to prove his claim against the Directors in the same manner.

116. We accept this submission of Mr. Das. On the evidence we are quite satisfied that the Official Liquidator in the present case has proved the loss. The best evidence of the loss is to be found in the books of the Bank which have been tendered in evidence. The books clearly show the amounts of the respective advances which were outstanding from the various parties as on the date of the taking out of the summons. This, in our view, clearly discharges the onus of proof that lies upon the Official Liquidator with regard to the loss.

117. Mr. Das, however, went a step further and submitted that it was not only the duty of the Official Liquidator to prove the amount of the loss but it was also his duty to prove that the securities which were pledged with the Bank against the respective advances were inadequate to cover the amounts of the respective advances. This part of the argument of Mr. Das we are entirely unable to accept. Although, in the present case, the Official Liquidator had chosen to tender evidence as to the valuation of the various securities which were lying with the Bank, in our view, it was not strictly necessary for him to do so. He could have proved the amount of loss caused to the Bank in the manner indicated above and then claim a decree for compensation of the entire amount from the Directors who might have been held to be liable. It was, in our view, the duty of the Respondents in that event to establish to the satisfaction of the Court that no loss had really been caused to the Bank because the securities were adequate to

cover the amount of the advances. In other words, once the Official Liquidator has proved the loss, the onus would appear to shift on to the Respondents who are seeking to resist the claim to prove the adequacy of the securities.

118. We need only to add that, since we arc dealing with the case of a banking company, it would not be enough for the Respondents to establish that the market value of the securities at the relevant time was equal to the amount of the advances. This is because keeping in mind the practice and policy followed by prudent ban-kers, the nature of the securities, viz., whether they were Government promissory notes or immovable properties would have to be considered. This is because this will have a bearing on the margin which a prudent banker would almost always keep as against the total value of the securities when he makes an advance.

119. It follows from what we have said above that the contention of Mr. Das that the Official Liquidator has not discharged the onus that lies on him must be held to be without substance.

120. Before we discuss the merits of the valuation, we must record at the outset that we are in entire agreement with the findings of the learned trial Judge on the question of valuation of the properties save for some minor modification which we shall indicate at a later stage and which modification we may state now was conceded by Mr. A. C. Mitra appearing on behalf of the Official Liquidator. Having regard to the elaborate arguments advanced on the valuation of the securities we shall briefly record our observation thereon.

121. At the time of the trial the securities principally belonged to two of the major debtors of the Bank, viz., Ballygunge Estates Ltd. and Dover Development Ltd. Before the learned trial Judge two valuers were examined. On the side of the Official Liquidator, one P. C. Chattcrjec gave evidence as to the valuation of the securities. On the side of the Respondents the evidence of valuation was given by H. C. Sarkar.

122. With regard to the properties belonging to the Ballygunge Estates Ltd. which were available to the Bank as securities has been listed by the learned trial Judge in his judgment as follows:

I now come to the properties of Ballygunge Estates Ltd. They are, (a) 26 and 30 Garihata Road, (b) 10/2 and 23 Puddo-pukur Lane, (c) Salimpur Road, (d) 22/IB and 22/1C Monoharpukur Road, (c) 128c 27 Cockier Lane, (f) 25 Puddopukur Road (sold in 1947 and sale proceeds credited), (g) Asansole properties, Apcar Garden, (h) Ambona property, (i) 8 South Sinthee Road, (j) Naskar Jhcel and (k) land at Salimpur. There was another property, namely, Naba Kisscn Street property which have been sold and sale proceeds credited.

123. Out of the above list of properties belonging to the Ballygunge Estates Ltd. except for two properties, viz. 8 South Sinthee Road and Naskar Jheel properties, the only valuation available before the learned trial Judge was that of P. C.

Chatterjee on behalf of the Official Liquidator. In other words, Mr. H. G. Sarkar who gave evidence for the Respondents did not choose to value any of the other properties of Ballygunge Estates Ltd. except for the two properties mentioned above. The reason for this is far clear. In spite of repeated queries to Mr. Das on this, point, the learned Counsel was entirely unable to suggest any cogent reasons as to why the learned trial Judge was not given the benefit of choosing between two different valuations in respect of these properties. Similarly, we fail to see why, as is very often done, no prayer was made before the learned trial Judge to appoint an independent valuer by the Court for the valuation of all these properties and also the other properties which were available to the Bank as securities.

124. Elaborate and strong criticism was made by Mr. Das with regard to the method Of valuation adopted by Mr. Chatterjee. Comments were made on his experience. It was submitted that he did not have the requisite experience. We do not consider this criticism to be well founded. It is found from his evidence (Qs. 1 to 4) that Mr. Chatterjee is not only a Bachelor of Engineering of the University of Calcutta but he has been on the panel of this Court since the year 1932. Since then he had been practising as an engineer, surveyor and valuer. It was further commented that /Mr. Chatterjee had not actually measured these properties. This appears to be so the reason being that Mr. Chatterjee was furnished by the Official Liquidator with the plans of all the properties "which he had valued. He admitted that he had not personally measured the properties but had taken the measurements in the plans as correct. From the records, however, we find that these plans have been tendered by consent of parties and marked exhibits without any objection as to the correctness of the measurements recorded in the plans. In that background we fail to appreciate this argument of Mr. Das.

125. It was next submitted that Chatterjee completed the valuation of these properties in hot haste in a matter of days when on his own showing in the oral evidence the matter might have taken months. Lastly, it was submitted that Mr. Chatterjee did not compare these properties with the properties in the neighbouring areas which according to his own evidence was one of the correct ways of valuing the properties.

126. We have carefully perused the valuation reports of Mr. Chatterjee and also "considered his oral evidence. We have no hesitation in saying that the valuation reports of Mr. Chatterjee are not the best we have come across. In other words, they leave a lot to be desired. Having said this, however, we must observe that except for those two properties, viz., 8 South Sinthce Road and Naskar Jheel properties, insofar as the other properties of the Ballygunge Estates Ltd. were concerned, the choice before the learned trial Judge was Hobson''s choice. This is because apart from the valuation of Chatterjee there was no other valuation before him. In this state of affairs, Das Gupta J. chose to accept the valuation of Chatterjee in respect of these properties. Having recorded our impression of

Chatterjee''s report, we entirely agree with the learned trial Judge that there was no other choice left to him but to accept the report. That being the position, we do not find it'' necessary to discuss the valuation of these properties any further save to state that we are in entire agreement with the findings of the learned trial Judge on the question of the valuation of these properties.

126. With regard to Naskar Jheel property, as we have said, there are two rival valuations. The learned trial Judge after a .very careful comparison of the two valuations has chose to accept Chatterjee''s valuation. The relevant observations of the learned trial Judge on this property are as follows:

As for the Naskar Jheel property, Mr. Chatterjee''s opinion is that this property, excluding the portion already disposed of, if at. all sold, would not fetch more than Rs. 1,40,000. It is situated in Dhakuria within Tollygunge Municipality. It has an area, according to the report of Mr. Chatterjee, of 110 bighas. Of the said area about 50 bighas are jheels and there are strips of land by the side of jheels which are too narrow for building sites and the total area of these strips is about 4 bighas. A considerable portion of the solid land, Mr. Chatterjee reports, practically the northern, eastern and a part of western portion, is occupied by refugees. Small plots of land of the total area of about 5 bighas have been sold. This, according to him, is an undeveloped property and needs considerable money and time for executing suitable development scheme and it is very difficult to secure any purchaser for this property.

Having taken all these circumstances into consideration, Mr. Chatterjee''s opinion is that the property cannot fetch more than Rs. 1,40,000.

As against the view expressed by Mr. Chatterjee, as aforesaid, Mr. Sarkar has given his opinion. According to his evidence, about 50 bighas of this property consist of solid land out of which 66 collahs have been sold away leaving a balance of 46-7 bighas of solid land. He has valued the remaining portion of the land at Rs. 4,53,000. He has valued the land at Rs. 500 per cottah and he has valued the tanks and jheels, which consists of an area of about 60 bighas, at Rs. 150 per coltah and he has given a deduction of 20 per cent considering the largeness and other factors. In the result, he has valued the said property at a total valuation of Rs. 4,57,000.

Mr. Sarkar, in his evidence, at first said that he had not seen refugees in the Naskar Jheel, but later on he qualified his said answer by saying that near about the place there are flourishing refugee colonies. He was asked about the costs of piling up of the 60 bighas of jheel land which has a depth of about 12 ft. and he had to admit that it would be somewhere near Rs. 7,20,000. Faced with this position he tried to justify his report by saying that he had not calculated for building purposes but for jheel, that is, fishery purpose and that it would remain as jheel for fishery purpose. He stated that he had valued it on the basis that the jheel would remain a jheel and that was the plan of the Ballygungc Estates Ltd. as given to him. In other words, his evidence is that the Development Company buying this property would keep the jheel for amenity purpose.

Then it was suggested to him that if 60 bighas go out, what , would be left of the property, and after some hesitation he said that he agreed with Sinha that it would be ideal for small building plots. It was then suggested to him that the cost for building roads, drainage, lights etc., supervision charges and loss of area for building roads, interest on capital, all these and other expenses would be very high and he could not deny that suggestion. He had to admit that it would take two to three years to develop and sell these plots and that small purchasers would want only developed plots. It should be noted that the evidence of Dr. Sinha is also to the same effect, namely, that small purchasers would not buy unless the property is developed.

Mr. Sarkar further admitted in his cross-examination that some area of this property was too narrow for building purpose. With regard to those his evidence was that in the plan given to him by Dr. Sinha it was suggested that they could be used for kitchen garden and he agreed with that suggestion. This suggestion seems to me to be fantastic. The building plots in question would be at some distance from this kitchen garden and the persons owning the Se building plots would have to walk down the public way upto some distance in order to go to their kitchen garden. Mr. Sarkar did not at all produce a favourable impression on my mind. It seems to me that he was more eager to support the persons who had engaged him than to give a fair and impartial opinion in the matter.

Coming to the question of refugees, I have already said that Mr. Sarkar in his examination-in-chief had stated that he had not seen any refugee although he later on qualified his said answer by saying that near about the property there were flourishing refugee colonies. Towards the end of his evidence, however, he said that he saw some buildings in the north but he did not know if they were lawful owners or refugees. In spite of the fact that Mr. Chatterjee in his report said that they were in the occupation of the refugees he did not enquire about it. He also admitted towards the close of his evidence that in the eastern side there were holdings, but as before, he did not also enquire about them. I have already mentioned that, according to Mr. Chattcrjee, a considerable portion of the solid land, practically the northern and eastern, and a part of the western portion arc occupied by refugees. Finally, Mr. Sarkar said that he did not agree that the lands occupied by refugees had not a market value, because, the Government would make arrangement to remove them. Then he was asked whether it would fetch the same price and, it was after a long pause, that he said that it would be a little less. I am unable to accept the evidence of Mr. Sarkar on this point.

In my opinion, having regard to the facts and circumstances which I have mentioned, the valuation put. by Mr. Chatterjee should be accepted as a fair and reasonable valuation of this property. It should be remembered that, so far as the Bank is concerned, it would be a case of forced sale. It should also be remembered that the category of prospective buyers, if any, are very small and they would be only the developing companies, because both Mr. Sarkar and Dr.

Sinha admitted that small purchasers would want only developed plots. I, therefore, accept the view expressed by Mr. Chatterjec and hold that the remaining portion of this property will not fetch more than Rs. 1,40,000.

127. We have set out the findings of the learned trial Judge in extenso only for the purpose of illustrating the very cogent reasoning adopted by him in rejecting the report of Sarkar and accepting that of Ghatterjee. We have no desire to add anything to the finding except to say that we are in entire agreement with it.

128. With regard to the valuation of the 8 South Sinthi Road property also, we are in agreement with the conclusions of the learned trial Judge arrived at after a careful "comparison of the valuations. We shall merely quote the relevant observations:

I now come to the other property, namely, No. 8 South Sinthi Road. This property was purchased for Rs. 1,00,000 on the 31st of July, 1945. Mr. Chatterjee''s report as to the valuation of this property is as follows:

It consists of an area of land measuring 11 bighas 9 cot lakhs and 15 chaltaks on a part of which partly one and partly two storied building has been erected. This property has got no road frontage excepting the gate which is fitted at the narrow strip of land serving as a passage into the premises. Mr. Chatterjec, however, was not allowed access to the premises. One Cawnpore Hosiery Factory Ltd. is the tenant occupying the premises for more than 10 or 12 years. The tenant pays a rent of Rs. 150 per month and also both shares of municipal taxes. Mr. Chatterjee said that litigations were going on between the tenant and the owners and his view was that it would be very difficult to evict this tenant. The intending purchaser, therefore, will have to be satisfied with the present rent for the present, and afterwards he may get the proper return, but that of course will mean expenses and trouble of litigation. For the above reasons, Mr. Chatterjec reports that there will be a very few purchasers of this property and they will offer very low prices. This property, if offered with vacant possession, would be a little over Rs. 2,00,000, but under the present circumstances if it be offered for sale along with the said tenant, it would not fetch more than Rs. 1,30,000 in the present market.

As against the said opinion of Mr. Chatterjec, regarding the valuation of the South Sinthi Road property, Mr. Sarkar has given evidence before me. According to his evidence, this property is almost at the back of the Emerald Bower and accessible from South Sinthi Road as also from Panchanantola Lane. The area of this plot is 11^ bighas. There is a tank covering about 31 coliahs on this area. There is a building partly one and partly two storied, the second storey having asbestos sheets. He, however, admitted that this property has been let out to Cawnpore Hosiery Factory Ltd. He has valued the land at a total figure of Rs. 3,18,326. According to him, if the area of the tank is deducted, the area of a solid land would remain at 199 coltahs. He has valued the tank land at half of the value of the solid land. In order to arrive at a valuation he has added half the area of the tank land to the solid land and has valued the entire land at Rs. 1,750 p.c. and deducted 15 per cent which gives him net figure of Rs. 3,l8;325. To that he has added the depreciated value of the structures at Rs. 36,000 making the total at Rs. 3,54,325, Mr. Sarkar in his evidence admitted that he had not seen the conveyance of this property and ? did not even ask for it. He admitted that in the year 1954 the purchase price was Rs. 1,00,000, but his evidence is that since then the value of this property has gone up by 350 per cent. He, however, did not- ascertain whether the price paid was the market price. When his attention was drawn to the fact that possession could not be obtained and it was an under-developed land, he said that he could not say anything on this point because he did not investigate into the matter. It seems to me that he missed the most important point regarding the valuation of the property, namely, that it was in the possession of the tenant. This witness admitted in his cross-examination that the land in occupation of the tenant would be of lesser value and that return on capital was not the proper mode of valuation of a property in the occupation of the tenant. But he said that the rental method had some importance before the Rent Act, but it had none after the said Act came into existence, because, the Rent Controller fixes rent on the basis of 1950 rent, whereas the value of the property increased considerably since 1951 and has no bearing on 1941 rent. I confess I could not quite follow the last answer of Mr. Sarkar. The Rent Act has made it more difficult for the landlord to get possession of the premises from the tenant if the tenant performs all its terms and conditions. The real point is that a purchaser of this property would have, as Mr. Chatterjee pointed out, to be satisfied with the rent which he would receive from the tenant and he cannot put (he property to the use to which Mr. Sarkar in his evidence was referring. In other words, so long as the tenant remains, it would not be possible to plot it out and to sell the plots. This aspect of the matter Mr. Sarkar completely ignored in his evidence before me. I have said before that the real test is what price would be fetched if the property is put up to sale under a mortgage decree, i.e. in a forced sale. It seems to me that Mr. Sarkar did not consider the question from this point of view as well, but he valued it on the basis as if he was asked to value it in a compensation case. It is perhaps for that reason that he said in his evidence that in rare cases in India rental method is applied. A number of questions were put to Mr. Sarkar as to the enormous costs which have to be incurred in order to develop a land. Mr. Sarkar although not agreeing with the actual figure which was suggested to him admitted that considerable sums had to be spent in order to develop a property. It should be noted that this property was purchased in the year 1945 at Rs. 1,00,000 and the tenant Cawn-pore Hosiery Eactory Ltd. is in occupation of the same for the last 10 or 12 years. The property was purchased while the tenant was in occupation thereof. There is no evidence before me that there has been any increase of rent since such purchase. In the result, therefore, although in my opinion the price paid for the purchase of the said property should be .taken to be the value of the same even at the present day, the sum of Rs. .1,30,000, as suggested by Mr. Chatterjee in his report, is the maximum which can be allowed as the value thereof. I accept the valuation made by Mr. P. C. Chatterjee in preference to that of Mr. Sarkar on this question.

129. Coming to the securities of Dover, the first item of property to be considered is the plot of land which is alleged to have been conveyed to Dover by one Rama Nath Mondal. According to the learned trial Judge, this property could not be traced and was in fact non-existent. Mr. T. P. Das strongly contended before us that the learned trial Judge was wrong in his finding and this property was a genuine item of the property. The sheet-anchor of his argument was the allegation in the affidavit of Seal in support of the summons, para. 29 whereof is as follows:

29. As has already been mentioned, the aforesaid Dover Development Limited had a paid up share capital of Rs. 6,200. Besides, it had some landed properties. The said landed properties are:

(1) Bademashar land near Garia Road alleged to have been purchased at the price of Rs. 1,15,000.

(2) Selimpur land (Rama Nath Mondal''s land) alleged to have been purchased at the price of Rs. 31,000.

130. In his cross-examination-in-chief Hem Chandra Sengupta, who was the principal ^witness on behalf of the Official Liquidator, denied the existence of this property. The material questions on this point are Qs. 619 to 621 and Q. 868:

Q. 619: In enumerating the properties belonging to Dover, I find you have missed out a property called Rama Nath Mondal''s land. Was there such a property belonging to Dover Development ?

A.: No, it did not belong to Dover Development Ltd.

Q. 620: I find, however, there is a conveyance in the possession of the Liquidator purporting to be a conveyance of this - property iiv favour of Dover Development (Pt. 5, p. 1)-- first of all have you been able to trace out where this property is ?

A.: No, I could not trace it out.

Q. 621: I want to know whether in fact there was a purchase of this property by Dover ?

A.: At least no consideration money was paid for this property.

Q. 868: 8-1-47, when the 3 big advances were made to Ballygunge Estates, Hindusthan Machineries and Ballygunge Electrical Industries, what property remained as security for the balance of the indebtedness of Dover ?

A: Only Bademashar land and a fictitious land of Rama Nath Mondal.

131. The answer of Sengupta to the last question quoted above is a clear and categorical statement that Rama Nath Mondal''s property is fictitious one. It is

curious to note that in spite of this definite assertion of Sengupta in his examination-in-chief, there is not a single question asked in cross-examination of Sengupta-on this vital aspect of the matter, although an array of eminent counsel of this Court representing the various Respondents had cross-examined Sengupta for a number of days. We have not been able to find out any explanation far less a satisfactory one for this significant omission.

132. More significant perhaps is Dr. Sinha''s own oral evidence on this point. Admittedly, Dr. Sinha was more in the know of. the affairs of the Bank and the various beneficiary companies than anyone else who have been impleaded in these proceedings.

133. The first significant group of questions are to be found in the examination-in-chief of Dr. Sinha and are Qs. 758 to 761 which are set out hereinbelow:

To counsel:

Q. 758. Do you know a property known as Rama Nath Mondal''s land ?

A.: Rama Nath Mondal''s is an extensive property. I have not seen the title deeds minutely.

Q. 759: (Shown title deeds of Rama Nath Mondal''s land property.) Can you tell where this property is ?

A.: It is in mouza Dhakuria mainly, but without reference to the survey map and dags it will not be possible for me to identify the plots and tell you just now. To Court:

Q. 760: Have you seen the property yourself ?

A.: I know a portion of the property beyond Rama Nath Mondal''s. To Court:

Q.: Have you seen this particular property ?

A.: No.

134. It is clear from the above questions and answers that the initial assertion of Dr. Sinha is that he has not seen this property.

Now, turning to the cross-examination of Dr. Sinha it is found to be full of prevarication on this point. The relevant questions are Qs. -5053 to 3058 and may be set out hereinbelow:

Q. 3053: You remember Rama Nath Mondal''s land has come up for consideration before my Lord and the evidence of Official Liquidator is that no such land could be traced ? A.: Yes, that is. what he has said.

Q. 3054: You have stated that you did not know where this land is situate ?

A.: I did not say that. I said from the schedule....

Q. 3055: You have not seen this property ?

A.: I have seen Rama Nath Mondal''s other properties.

Q. 3056: Can''t you answer one question straight ? Have you seen the property which is the subject-matter of this conveyance ?

A.: This property, yes, I have seen. I have said the property could not be identified from the schedule.

Q. 3057: Never mind. Have you seen the property which is the subject-matter of this conveyance ?

A.: I may have seen one or two properties of this land. .

To Court:

Q. 3058: Have you or have you not seen this property ?

A.: I have probably seen, I must have seen it because Rama Nath Mondal''s property I know.

135. It is really unnecessary to make any comments on these questions and answers because the evidence, in our view, speaks for itself. Considering that the Official Liquidator''s definite evidence was that this property did not in fact exist, if this property was a genuine one would not have expected Dr. Sinha to come out with that statement at the first available opportunity in the examination-in-chief. But he does not do that. On the other hand, as we have already said, his first reaction is tha); he has not seen the property. In the cross-examination he first says he has seen the property, then .later on in answer to Court''s question says that he must have seen the property. In the judgment of the learned trial Judge it has been remarked that Dr. Sinha struck him as a frank witness. This kind of hedging on the part of such a witness like Dr. Sinha leaves no doubt in our mind that Dr. Sinha knew that this conveyance was in respect of a fictitious property. Otherwise, one would have expected him not only to make a definite and forthright assertion as to the existence of this property but also, if necessary, to make a prayer before the Court for the appointment of a Commissioner for local inspection of the property which would have put the matter beyond the pale of any controversy.

136. But the matter does not end there. We find from the records that Mr. P. C. Chatterjee who, as we have already said, valued the property on behalf of the Official Liquidator, was handed over the plans of these properties. These plans have been tendered and form part of the records of this case. Among these plans, however, we do not find any plan of any property alleged to have been conveyed by Rama Nath Mondal to Dover Development Ltd.

137. Mr. Das sought to argue that the property described as Selimpur land in the valuation report of Mr. Chatterjee being item No. 6 thereof is none other than the property of Rama Nath Mondal. This argument is also based on the statement in para. 29 of the affidavit of Seal where Rama Nath Mondal''s land is also described as Selimpur land. This, according to Mr. Das, conclusively establish that this

property was a genuine one. Although this did create a certain amount of confusion in our mind for a time, it was very soon dispelled by Mr. A. C. Mitra, counsel for the Official Liquid dator, with reference to certain documents which we shall now mention. The alleged deed of sale with regard to the property of Rama Nath Mondal is to be found in Pt. 2, vol.4 at p. 258. It will be noticed from the document that this alleged conveyance is only in respect of a vacant plot of land and does not mention any structure.

138. Our attention was next drawn to a list containing a schedule of properties which is an annexure to a Memorandum .of Deposit created by Ballygunge Estates Ltd. in favour of the Bank and is a part of Ex. BB-1 before the trial Court. Item No. 7 in that list is as follows:

7. Title deed of Selimpur Road property being No. 2864 of 1939 (24-Parganas).

139. Turning to a conveyance, which is to be found in Pt. 2, vol 4, at p. 358, we find that it is a conveyance of Selimpur Road property. At p. 364 of that Paper Book the registration number of the conveyance is given and it tallies with the registration number given in item No. 7 of the schedule of properties mentioned above. It further appears from the conveyance that this property was not conveyed by Rama Nath Mondal to Dover Development-Ltd. but is between two different parties. This is the property which Mr. Chat-terjec valued as item No. 6 in his valuation report. This is further evident from the fact that Mr. Chatterjee''s report of valuation is of both land and structure whereas the alleged corfveyance of Rama Nath Mondal''s property mentioned only vacant land.

140. For all the foregoing reasons we are completely satisfied that the learned Judge was entirely right in coming to the conclusion that this property alleged to have been conveyed by Rama Nath Mondal to Dover Development Ltd. was a fictitious and non-existent property.

141. The next item of Dover''s security is what is described as the trust deed with regard to the property at 5 Ramani Chatterjee Street to secure the debentures of Dover Development Ltd.

142. It was on this security that Dover was granted a debenture loan of Rs. 75,000. For the reasons given by the learned trial Judge he has come to the conclusion that this security was no security at all. The relevant portions of his conclusion on this point are noted below:

The first question which I have to decide is whether the Respondents who had sanctioned this advance are guilty of misfeasance and/or a breach of trust. The other question, is that, has the bank suffered any loss on account of this transaction ? In my opinion, there is no room for doubt that in making the said advance on debentures to Dover Development Ltd. the Respondents concerned are guilty of misfeasance. The lease is for 20 years from 17th September 1938. The said lease therefore expires on, 18th September 1958. What was assigned to Dover was the unexpired residue of the lease. The debentures, on the other hand, were redeemable after 26 years from September 1942, that is to say, after September 1967. The result, therefore, is that the leasehold interest which was given security for the said loan to Devor comes to an end long before the debentures themselves become redeemable in September 1967 ; the said security was, therefore, of no value whatsoever Mr. Mitra contended before me and I accept his contention that the terms of the trust deed.also shows quite clearly that the said security was of the most precarious nature.

143. Thereafter Das Gupta J. goes on to discuss the reasons why leasehold interest was of precarious nature.

144. We have merely quoted the above extract from the judgment on this security and we do not wish to add anything further to it. This is because we are in complete agreement with the findings of the learned trial Judge and also his reasonings. We do not think we can usefully add anything on this point.

145. There is, however, one aspect of this debenture loan which perhaps was not brought to the attention of the learned trial Judge and of which we do not find any discussion in the judgment. According to the trust deed which is on record, it was intended to be a security for the debentures alleged to have been issued by Dover of the value of Rs. 75,000 against which a loan of Rs. 75,000 was granted by the Bank to Dover. On a close examination of this aspect of the matter, however, we are of the view that these debentures alleged to have been issued by Dover are really no debentures at all but are mere scraps of paper on the assumption that they were issued. This is because, as is well-known, air debentures issued by a company have to be subscribed to the extent they are issued. In the instant case, curiously enough there is nothing to show that anybody ever subscribed to a single debenture of this issue which was to be of the denomination of Rs. 100 each. Although there is a reference to these debentures in the trust deed, there is nothing on record to show that these debentures were even printed and in that sense see the light of the day. This is merely one of the illustrations of the various sham transactions evidencing sharp banking practice with which this case is replete from beginning to end. We must record when we put this question bluntly to the learned Counsel for the Appellant, he was entirely unable to show us anything to prove that a single debenture out of this issue of Rs. 75,000 was ever subscribed by anybody. It, therefore, follows that issue of these debentures was entirely a sham and fictitious transaction.

146. The only other item of Dover''s security which requires consideration is what is known as Bademashar land. Considerable argument was advanced on this item of property. According to the title deed, this property was purchased in 1946 for a sum of Rs. 1,15,000. Mr. Chatterjee has valued this property at Rs. 12,232. On a comparative study of these two figures Mr. Das contended that ex facie this valuation which was made in 1956, 10 years., after the purchase, must be held to be a gross under-valuation.

147. On this question of undervaluation of this property and other properties by Mr. Chatterjee as contended by Mr. Das, there is one aspect of the matter which we feel it necessary to allude to. It is on record that P. C. Chatterjee was appointed by the Official Liquidator of the Bank to value these properties pursuant to an order of this Court. After all, Mr. Chatterjee was acting for the Official Liquidator who is an officer of this Court and is not a private litigant. What interest could Mr. Chatterjee possibly have in under-valuing any of these properties which he valued, we entirely fail to understand. We have said earlier that Mr. Chatterjee''s valuation report is not the best we have come across and leaves much to be desired. For one thing, it could gave contained many more details of valuation which it does not. But having said this, the question must be posed as to why would Mr. Chatterjee deliberately undervalue this item or any other item of the property. It was submitted by Mr. Das from the Bar before us that this undervaluation was done at the instance of Mr. Hem Sengupta for it is on record that Mr. Sengupta accompanied Mr. Chatterjee for the purpose of identifying various properties which Mr. Chatterjee valued. Mr. Sengupta, it was argued, bore a grudge against Mr. S.P. Roy Choudhury, one of the Appellants in the connected appeals, because it is an undisputed fact that immediately before'' the misfeasance proceedings commenced Mr. Roy Choudhury had obtained a decree for ejectment against Mr. Sengupta in respect of a house of Mr. Roy Choudhury which Mr. Sengupta was occupying as a tenant. In spite of this argument from the Bar, however, curiously enough we do not find a single suggestion to Mr. Sengupta in his cross-examination by a number of learned Counsel that Mr. Sengupta got these properties deliberately undervalued by Mr. Chatterjee with an ulterior motive or because of the grudge which he bore against Mr. S.P. Roy Choudhury. In the absence of even such a suggestion to Mr. Sengupta we are unable to entertain this contention of Mr. Das that there was any deliberate under-valuation of this property or any other property by Mr. Chatterjee.

148. Turning to the plan of the Bademashar land which is on record, it is found and as pointed out by Mr. A. C. Mitra that it contains no less than four tanks and one doba within the property and it does not seem to have any access to Gariahat Road as appears from the plans. Plots Nos. 297 and 298, as mentioned in the plan, appear to be situated beyond a tank would seem to be totally inaccessible unless the tank was filled up or some kind of bridge was built over the tank. These are some of the various factors which must have impelled Mr. Chatterjee to arrive at the valuation that he did.

149. There is, however, another and a more important aspect of this matter as has been found by the learned trial Judge. It appears that Mr. Chatterjee did not value the entirety of this property. In fact, on a rough calculation the area valued by Mr, Chatterjee comes to approximately 6 bighas whereas, according to the plan, the area of the property is very much more. In fact, in the rival valuation of Mr. Sarkar the area has been shown as approximately 35 bighas. This aspect of the matter, however, need not detain us any further in this appeal because the

learned trial Judge has come to the finding that as much as 27 bighas of the Bademashar land had not been valued by Mr. Chatterjee at all. The maximum valuation that Mr. Chatterjee put on any plot of this area was Rs. 200 per cottah, i.e., Rs. 4,000 per bigha The learned trial Judge in his judgment (on this point) observed as follows:

Having regard to all the circumstances to which I have referred, I hold that the valuation put by Mr. Chatterjee is the maximum which can be expected from the sale of the remaining portion of the Bademashar land. Mr. Chatterjee lias valued the best plots in the said land at Rs. 200 per cottah. Even if the remaining plots in Bademashar land which consist of dobas, tanks etc. arc valued at Rs. 200 per cottah, then the total value of the said remaining 27 bighas would be Rs. 1,80,000, that is, approximately Rs. 2,00,000.

150. This amount of Rs. 1,80,000.which is to be found not only in the Paper Book but also in the original judgment which is an obvious arithmetical mistake. This is because if the value of one bigha is Rs. 4,000 the value of 27 bighas is Rs. 1,08,000 and not Rs. 1,80,000. This position was not as indeed it could not be disputed by the parties. This mistake in the arithmetical calculation, however, has not made any difference in the ultimate liability as found by Das Gupta J.

151.- For the reason given above we arc of the view, that the learned trial Judge was entirely correct in his valuation of the security of the Bademashar land.

152. This really concludes our observations on the question of valuation of different securities by the learned trial Judge. There were several other securities in respect of the advances of some other debtors. Although some arguments were advanced on the valuation of these securities and certain criticisms were made about the method of valuation, we are in entire agreement with the findings of the learned trial Judge in respect of the valuation of these securities. Consequently, we feel it unnecessary to make any further observations to other items of valuation and thereby add to the length of this judgment.

153. Before we leave this aspect of the mattef, however, there arc certain small sums for which the Appellant is entitled to Credit and a reduction of his liability as found by the learned trial Judge which we shall mention now.

154. At the time of the hearing it appears in respect of Selimpur land, Dhakuria, which is item No. 6 of the valuation report of Mr. Chatterjee, that although Chatterjee finds that there is a structure on the land he has not assigned any value to that structure. On this being pointed out, Mr. Mitra on behalf of the Official Liquidator fairly conceded that this was an omission and the Appellant is entitled to credit for the proper valuation on this structure. Thereupon we recorded the following order in the minutes of the appeal on August 18, 1972:

Minutes The Court: Mr. P. C. Chatterjee was the valuer who gave evidence on behalf of the Official Liquidator and who had also submitted two reports, the first one being of the 28th July, 1953, which is to be found at Part II, volume III, page 358, Item No. 6 Of that report relates to the valuation of Selint-pur land, Dhakuria. In his report on this property, Mr. Chatterjee expressly mentions that he has not included in the valuation a building which is fetching a monthly rent of Rs. 75.

Mr. A. C. Mitter, learned Counsel for the Official Liquidator, fairly stated that some credit should be given to the Respondents for the valuation of this structure. By applying the capitalization method, the value of the structure comes to Rs. 18,000. After making allowance for municipal tax, repairs etc. we think that the proper valuation of the structure should be Rs. 15,000 (Rupees fifteen thousand). Mr. Mitter agrees with this figure as a proper value.

155. There was another mistake in the valuation of premises No. 20, Cockier Lane which is item No. 5 in the above valuation report of Mr. Chatterjee. Mr. Chatterjee has taken the area of this property about 4 cotlahs and valued it at the rate of Rs. 7,000 per coltah taking Rs. 28,000 as the aggregate value. Mr. A. C. Mitra stated before us that on a proper calculation the area comes to over 5 cottahs, viz. Rs. 7,000 per cottah, the Appellant is entitled to a credit of Rs. 8,750 on this land.

156. The last item what was called the Lawrence Road property belonging to Hindusthan Machineries Ltd. This was a large property having a boundary wall all around. Mr. Chatterjee in course of his cross-examination admitted that he had made some mistakes in the calculation of the value to be assigned to this boundary wall. We feel it unnecessary to refer to the questions and answers in detail because it was conceded by Mr. A. C. Mitra that on the admission of Mr. Chatterjee in his cross-examination Appellant Nawn would be entitled to a credit of Rs. 19,000 in addition to the valuation made by Mr. Chatterjee on this account.

157. It would follow, therefore, that the Appellant is entitled to a total credit of Rs. 42,750 in addition to the credit given by the learned trial Judge with regard to the valuation of the different securities. Consequently, the liability of the Appellant as found by Das Gupta J. would be reduced by this sum of Rs. 42,750.

158. This disposes of all the questions which were raised in this appeal except the question of interest. The learned trial Judge in the operative portion of his judgment allowed interest at the rate of six per cent on the entire amount for which Appellant Nawn has been found liable from the date of the judgment and order. An interesting and novel argument was advanced by Mr. Sen for the Appellant on the question of interest which we shall now have to examine.

159. Referring to Section 235 of the Act Mr. Sen submitted that it contemplates two different types of power the Court has with regard to the persons who may be found liable under that Section. The first is the power to "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." The other power is to compel the person liable "to contribute such sum to the assets of the company by way of compensation." That there is a clear dichotomy of powers in the Section about

which there can be no manner of doubt. In other words, these two powers are disjunctive as is evident from the use of the word ''or'' between these two powers and also the insertion of a ''comma'' before the expression ''or''. Mr. Sen''s argument was that when the Court exercises the first mentioned power, viz., compelling the person liable to pay or restore the money or property or any part thereof, the Court has the power to grant interest because the Section says so. When, however, the Court compels the person liable to contribute such sum to the assets, of the company by way of compensation, the Court has no power to award interest. This is'' because with regard to the first limb of the power the right to grant interest is expressly mentioned, whereas with regard to the exercise of the second limb of the power such a right is conspicuous by its absence in the express language of the Section.

160. Turning to the judgment Mr. Sen submitted that the learned Judge has really exercised the power contemplated by the second limb of Section 235 of the Act. To illustrate this submission he referred us to certain portions of the judgment where the learned trial Judge speaks of the liability. We shall set out only a few of the. illustrations as specimen of the language used by the learned trial Judge in fixing the liability. Speaking of the Ballygunge Estates Ltd. the learned trial Judge comes to the following conclusion:

In my opinion, the point of time which should be taken into consideration for the purpose of determining the actual loss suffered is the date of winding up. At that date the total amount due to the Bank was Rs. 8,08,580-14-5. The total value of the remaining properties of Ballygunge Estates Ltd: as already mentioned is Rs. 4,33,541-14-7. The Bank has, therefore, suffered a loss of Rs. 3,75,038-15-10 which the Director concerned should be made to compensate.

161. Similarly, with regard to the Hindusthan Machineries Ltd. this is the conclusion of the learned trial Judge:

I, therefore, hold that in respect of these advances the Bank has suffered a loss of Rs. 7,83,916-2-6 and the Directors concerned should be made liable to compensate the Bank, for this loss.

162. With regard to the Amalgamated Studio the relevant finding is as follows:

The Bank, therefore, suffered loss in respect of this transaction of Rs. 2,22,057-12-1 and the Directors responsible for this transaction should compensate the Bank for the said loss.

163. These illustrations could be multiplied, but we refrain from doing so. Suffice it to say, that the expressions used by the learned trial Judge with regard to the liability is either ''compensate'' or ''make good the loss''. As far as we have been able to gather, the learned trial Judge has not used the expression ''repay'' or ''restore'' in any part of his judgment.

164. It was on this basis and laying stress on the verb ''compensate'' that Mr. Sen submitted that the learned trial Judge has clearly acted under the second

limb of the power u/s 235 of the Act. According to his submission, the learned Judge had no legal right to award interest in that view of the matter.

165. Mr. A. C. Mitra for the Official Liquidator submitted in the first place that this was a new point which was never argued before the learned trial Judge. He submitted on the basis of the general tenor of the judgment with regard to the imposition of liability from the passage quoted above that the learned Judge was perhaps not fully alive to the dichotomy of the powers contemplated by Section 235 of the Act in the manner in which it has been presented to us. Consquently, he submitted that this point should not be allowed to be urged at the appellate stage since we do not have the benefit of the learned trial Judge''s findings on this point.

166. Mr. Mitra may be right that the learned trial Judge was perhaps not fully alive to this dichotomy of powers which Vfe are discussing. After an anxious consideration of this aspect of the matter we are, however, of the view that it will not be right to shut out this contention on this ground alone. After all, there is a general ground taken in the Memorandum of Appeal that the lear* ned Judge went wrong in allowing interest. In any event, it is a pure question of law. No new facts are necessary to decide this question. Finally, as is well-known, the Court has no power to do what the law prohibits. In that view of the matter, we are of the view that this contention with regard to interest needs to be examined on its merits.

167. On the merits, Mr. Mitra submits in the first place that the Court has general power to award interest u/s 34 of the CPC which is in the following terms:

34(1) "Where and insofar as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sums adjudged, from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate not exceeding six pqr cent per annum as the Court deems reasonable on such ..principal sums, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

168. There are two difficulties in the way of accepting this argument of Mr. Mitra. In the first place, the power u/s 34 is a power vested in Court to grant interest in the case of suit. Although misfeasance proceedings have been held to be the original proceedings wheather they could be equated with a suit in the strict sense of the term is a debatable question. We are aware that an argument can be founded on the basis of Section 141 of the Code which prescribes that all the provisions of the Code as regards suits will apply mutatis mutandis to applications. There is no doubt that the Code applies to a misfeasance proceedings. But the answer to that argument would possibly be the well-settled principle that has been followed in this Court unanimously and consistently that the-Court has no power to grant interest on damages. On a proper reading of

Section 235 of the Act it is our view that the decree or order that the Court passes is really in the nature of damages for the loss caused to the Bank. If that be so, no interest could be granted on that sum.

169. The other and perhaps a more fundamental difficulty is that Section 235 of the Act itself provides for the granting of interest in terms with regard to one limb of the Court''s power. This is presumably because in the absence of that power no interest could be awarded because, as we have said, the decree or order u/s 235 of the Act would be in the nature of the damages. Since a specific provision on the question of award of interest is there in Section 235, this would appear to exclude the general power of the Court u/s 34 of the Code of Civil Procedure, 1908, following the well-known maxim generalia specialibus non derogant^.

170. For the aforesaid reasons we are of the view that Section 34 of the CPC is of no assistance to Mr. Mitra''s client in the present case.

171. In the dichotomy of powers contemplated by Section 235, that we have spoken of, why the Legislature in its wisdom chose to grant an express power to award interest in one case and did not include that power in the other is not for us to surmise. We asked the learned Counsel to find out if the legislative history of that Section could throw any light on this curious distinction, but none was pointed out to us.

172. On prnciplc, we are of the view that the use of the expression ''compensation'' in the second limb of the power would in a proper case not only vest the power of directing the person liable to pay the principal sum but also to award interest in a proper case. This is because of the oft repeated view expressed by the Supreme Court in a large number of cases, the expression ''compensation'' means ''a just equivalent''. In other words, when the Court is given a power to compensate a party for the loss caused to it that power would necessarily mean the power to make good the loss in its entirety. We do not see how or why that power should be confined only to the power to award the principal sum and not interest. To put it differently that power would embrace within its scope not only the power to award the principal sum but also to include such usufruct or interest on that sum which the rightful owner of the money or property lost might have earned during the period when it was lost to the rightful owner. Judged in that light, although there appears to be a distinction in the language of the two limbs of the power contemplated by Section 235 of the Act, in the sense that the first limb includes an express power to grant interest and the second limb does not, this distinction in the view that we have taken is really a distinction without a difference. This is because in the second limb the operative verb is the expression ''compensate''.

173. This view that we have taken on principle finds some " support in a decision which was relied upon by Mr. Mitra in the case of In re Home and Colonial Insurance Co. Ltd. L.R. (1930) 1 Ch. 102 (137). This was a misfeasance

proceeding under the English statute which is very much in para materia with Section 235 of the Act. In the concluding portion of the judgment Maugham J. came to the following conclusion:

In my judgment the sum which the Respondent ought in justice to contribute by way of compensation to the assets of the company is such an amount as will enable all the creditors of the company to be paid in full with interest at 5 per cent. If necessary, there will be an enquiry as to this amount. The Respondent must also pay the costs.

174. This it seems to us is a clear authority for the proposition that the Court''s power to compensate includes the power to award interest. Mr. Mitra also drew our attention to a decision of a Division Bench of this Court in the case of Mahamed Mozaharal Ahamed v. Mahamed Azimaddin Bhuinya AIR 1923 Cal. 507 (511) where the following observations occur in the judgment of Mookerjee J.:

The term ''compensation'' as pointed out in the Oxford Dictionary signifies that which is given in recompense an equivalent rendered. ''Damages'', on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained; the value estimated in money, of something lost or withheld. The term ''compensation'' etymologically suggest the image of balancing one thing against another; its primary signification is equivalence, and the secondary and more common meaning is something given or obtained an equivalent.

175. This is the same'' view as taken by the Supreme Court that compensation is a just equivalent that we have mentioned above. Mr. Mitra also drew our attention to a recent decision of the English Court in the case of In re V. G. M. Holdings Ltd. L.R. (1942) 1 Ch. 235. (242). The observation is as follows:

The Court declared that Vanbergen was guilty of misfeasance for breach of trust in relation to the company making the payment of Rs. 1,59,801, and that he was liable to contribute to the, assets of the company by way of compensation in respect of such misfeasance or breach of trust an amount sufficient (with the other assets of the company) fully to pay and discharge all the debts of the company (other than any debt to himself) with interest thereon at the rate of 4 per cent from the date of the liquidation of the company. An inquiry was ordered to ascertain the company''s loss.

176. Here again in acting under what appears to be the corresponding provision of the second limb of Section 235 of our Act the English Court has granted interest on the principal sum.

177. For reasons given above, even assuming that the learned trial Judge was aware of the distinction between the two limbs of the power u/s 235 of the Act and was acting under the second limb, he was fully justified in. awarding the interest which he did.. This contention of Mr. Sen, therefore, fails.

178. This disposes of all the contentions raised on behalf of the parties.

179. In the result, save for the modification that the liability of Nawn which was computed by the learned trial Judge at a sumi of Rs. 19,61,443-6-10 (as we have already noted the sum of Rs. 19,41,443 6-10. was admitted by all parties to be mistaken calculation) is reduced by a sum of Rs. 42,750 and is computed at Rs. 19,18,693-6-10 with interest thereon at the rate of 6 per cent per annum on that sum from the date of the decree, the appeal fails. The appeal is, therefore, dismissed.

180. The Appellant is directed to pay the costs of the Official Liquidator of this appeal. The Official Liquidator will be at liberty to retain the costs of this appeal out of the assets in his hands.

181. Certified for two counsel The operation of this order is stayed for a period of ten weeks from date.

S K. Mukherjea, J.

182. I agree.

