

(1965) 08 MAD CK 0053

In the Madras High Court

Case No : O.S. Appeal No. 5 of 1965

V.S. Ramaswamy Iyer and Another

APPELLANT

Vs

Brahmayya and Co., Official Liquidators, Hanuman Bank Ltd.
(In Liquidation)

RESPONDENT

Date of Decision : 10-08-1965

Acts Referred:

Banking Companies Act, 1949 — Section 45A, 45B, 45N, 45O, 45O(1)
Companies Act, 1913 — Section 235
Succession Act, 1925 — Section 306

Citation : (1966) ILR (Mad) 217

Hon'ble Judges : P. Chandra Reddy, C.J;M. Natesan, J

Bench : Division Bench

Advocate : V.K. Thiruvengkatachari, for N.A. Subramaniam, for the Appellant; S. Swaminathan, for the Respondent

Final Decision : Dismissed

Judgement

Natesh, J.—This appeal is directed against the order of our learned brother, Sadasivam J., pronouncing the opinion of the court on certain preliminary objections to the maintainability of an application under Sections 45A and 45B of the Banking Companies Act, which the liquidators, the respondents in the appeal, had filed. The proceedings arise on the liquidation of the Hanuman Bank Ltd., Tanjore, which is being wound up on a creditor's petition dated July 26, 1947. Liquidation proceedings were initiated under the Indian Companies Act, 1913, and the applicability to the matter of the Banking Companies Act, 1949, which came into force on March 16, 1949, is not questioned before us.

2. Before setting out the questions for consideration in this appeal, which are of general and considerable importance, and not free from difficulty, it is necessary and we shall refer to the facts leading up to the present appeal.

3. The Hanuman Bank Ltd. (in liquidation) was incorporated as a public limited company under the Indian Companies Act, 1913. The subscribed and paid up

capital is stated to be Rs. 5,75,000 and Rs. 4,31,000 respectively. It is needless to refer to the circumstances leading to the creditor's petition for winding up, which was presented on July 26, 1947. A provisional liquidator was appointed on August 19, 1947, and the final order, directing the bank to be wound up, was passed on November 5, 1947. By an order dated January 12, 1948, the present respondents, Messrs. Brahmayya and Company, were appointed the official liquidators. The father of the present appellants, one Dewan Bahadur Swaminatha Iyer, a retired Chief Engineer of the Madras Government, was a director of the bank, and, according to the liquidators, intimately connected with the management of the bank, till its crash. While, under Article 52 of the articles of association of the bank, the general supervision and control of the business of the bank were vested in the directors, under Article 54, the actual management of the business was vested in the managing committee as provided under Article 59. Article 60 provided that the managing committee shall have all the powers of the directors, and all acts of management done by them in conformity with the rules and regulations of the bank shall have the like force and effect, as if done by the directors themselves. Article 64 provided that, subject to the control of the managing committee, the business of the bank should be conducted and carried on by the managing director, in accordance with the rules and regulations of the bank. It is stated on behalf of the official liquidators that on August 17, 1937, the aforesaid Swaminatha Iyer became a member of the managing committee, and on March 22, 1938, he was elected as the president of the board of directors. According to the liquidators, the managing committee, under the dominating influence of Swaminatha Iyer, allowed the affairs of the bank to be carried on by the managing director in a reckless manner, according to his whims and fancies, in total disregard of his powers and duties. It is also stated that Swaminatha Iyer was fully conversant with the affairs of the bank, and the conduct of the business of the bank by the managing director in disregard of the rules and regulations, be it in the matter of making loans and advances, or in making investments. The liquidators charge Swaminatha Iyer with permitting the funds of the bank to be misapplied by improper loans and advances, and discounting of cheques and bills. There is another count that the funds of the bank were unauthorisedly utilised for the purchase of coffee estates by K.V. Krishnamurthi Iyer, the managing director of the bank, for the Coorg Coffee Plantations Ltd., which he promoted, and of which Swaminatha Iyer was the president. It is stated by the liquidator that K.V. Krishnamurthi Iyer was enriching himself vastly at the expense of the bank, utilising the funds of the bank for purchasing lands in his own name, by adopting improper devices. These misapplications by K.V. Krishnamurthi Iyer are stated to total about Rs. 2,05,000. A further charge by the liquidators is that dividends have been declared by the bank out of the capital, and the loss caused to the bank on this account totalled Rs. 90,700. The loss sustained by the bank by reason of improper loans and advances was estimated at about Rs. 11,12,947. In all, under three counts, the loss to the bank was totalled at Rs. 14,08,647.

4. The liquidators initiated proceedings u/s 235 of the Indian Companies Act, 1913, by way of misfeasance summons, in Application No. 2826 of 1960, against the directors and officers of the bank, charging the respondents therein with acts of misfeasance, misapplication of funds; breach of trust, etc. The enquiry in the application was protracted, and when arguments on the application were coming to an end, and no orders had been passed, Swaminatha Iyer above referred to died on August 16, 1959. On his death, following the decision of this court in *Peerdan Juharmal Bank Ltd., In Re*, [1958] 28 Comp. Cas. 546, it was held that the application u/s 235 of the Companies Act could not be continued against the legal representatives of Swaminatha Iyer in those very proceedings. In *Peerdan Juharmal Bank Ltd., In re*, the question directly arose for consideration, whether proceedings initiated u/s 235 of the Indian Companies Act against a director of a bank ordered to be wound up could be continued after his death, and whether the liability, if any, of such director could be enforced against his legal representative in those proceedings. After examining the decisions in India and the decisions in England, on the corresponding 165th provision of the English statute, this court held that the right to continue the proceedings u/s 235 ended with the death of the director. It was observed that the language of Section 235 decided the issue, and that it was a limited right. As observed by Beaumont C.J. in *Manilal Brijlal v. Vandrawandas C. Jadan*, ILR 1944 Bom. 284 ; [1944] 14 Comp. Ca9. 147. :

"Section 235 is concerned only with an enquiry into the conduct of the officers of the company in relation to the company's property, and in my opinion, it was never intended to involve the court on an application under that section in an enquiry relating to the estate of a deceased person."

5. The Application No. 2826 of 1950 was proceeded with against the other respondents to the application, and this court held that the members of the managing committee were liable to pay compensation to the bank for the losses sustained by it by the misappropriation and improper loans and advances, and discounting of cheques and bills and illegal declaration of dividends out of the capital. The members of the managing committee, who were alive and parties to the application, were made liable for varying sums. It is in these circumstances that the liquidators, acting under the provisions of Sections 45A and 45B of the Banking Companies Act (X of 1949), filed Company Application No. 217 of 1963 against the present appellants, who are the sons and legal representatives of the aforesaid Swaminatha Iyer, claiming relief against his estate for the losses caused by the acts of misfeasance and breach of trust of the deceased Swaminatha Iyer. Incidentally, in the same application, they also prayed for a declaration that the release deed dated July 27, 1945, executed by the said Swaminatha Iyer in favour of his sons was void against the bank in liquidation and other creditors of Swaminatha Iyer. It is averred, with reference to this release deed, that it was a sham and nominal transaction, not acted upon, and brought about to defeat and delay the creditors.

6. Various, defences have been taken to this application, on the merits and in law, and some of the objections in law are preliminary and go to the root of the matter. Apart from challenging the factual basis on which the claim is made, and questioning the liability of Swaminatha Iyer himself in law, the appellants, who are the legal representatives of Swaminatha Iyer, contend, inter alia, that, in a case of the present kind, the cause of action does not survive the death of the director against his estate. It is further contended that the claim preferred in 1963, assuming that it is otherwise tenable, is hopelessly barred by limitation. There is also a plea that the dismissal of Application No. 2826 of 1950 would bar the present proceedings. The propriety of challenging the release deed executed by Swaminatha Iyer, which would properly come u/s 53 of the Transfer of Property Act, by an application u/s 45B of the Banking Companies Act, was also questioned.

7. So far as the validity of the deed of release executed by Swaminatha Iyer is concerned, it is agreed before us by the counsel for the official liquidators and the counsel for the appellants, that this question may be left over for consideration, if and when the bank in liquidation makes out its claim against the estate of Swaminatha Iyer, and it becomes necessary to proceed against the estate. In fact, though the learned company judge has discussed the matter at length, the learned judge ultimately observed only that the question whether the release deed executed by Swaminatha Iyer is void could be considered in the enquiry u/s 45B of the Banking Companies Act, in case the applicants obtained a decree for compensation. The entire question, whether it is open to the liquidators to agitate the validity of the deed in proceedings u/s 45B, and whether on the merits it is void, will all be left over for consideration at the appropriate time, in the event of the liquidators getting the liability of the estate fixed up, to any extent. Prayer No. 1 of Application No. 217 of 1963 is, therefore, not dealt with, and is relegated for consideration later at the appropriate time.

8. The two main contentions, on which the application was sought to be defeated in limine, namely, (i) the extinction of the cause of action with the death of Swaminatha Iyer, and (ii) the bar of limitation, the learned judge found against the appellants. The learned judge has held that, on the facts as made out at the preliminary stage, the liquidators had a prima facie case to proceed against the estate of Dewan Bahadur Swaminatha Iyer in the hands of the respondents, to recover the amounts, in respect of which Swaminatha Iyer had committed breach of trust by being a party to the misapplication of the funds. The learned judge referred to the averments in the application and certain documents, which have been placed on record, that showed that Swaminatha Iyer as a member of the managing committee had large powers of management and control vested in him over the moneys of the bank. Of course, the learned judge was perfectly conscious of the absence of any case by the liquidators that Swaminatha Iyer had enriched himself by the acts of misfeasance and breach of trust, on which the claim was based.

9. On the question of limitation, while observing that the question was not free from difficulty, the learned judge held that it could not be said that the entire claim of the applicants was barred by limitation. The learned judge was of the view that at least that portion of the claim, which arose within the seven years prior to December 30, 1953, would be in time, and saved by Section 45-O of the Banking Companies Act. The learned judge negatived the contention of the appellants that the claim against them as legal representatives of Swaminatha Iyer was barred by limitation, holding that the cause of action against the legal representatives arose only after the death. It was held that Clause (i) of Section 45-O of the Banking Companies Act would save it and that the claim was within time.

10. Now, in this appeal before us, though the memorandum of grounds raised a number of contentions, the arguments were confined to two principal contentions, namely, (i) the extinction of the cause of action with the death of Swaminatha Iyer, and (ii) the bar of limitation, the entire claim being out of time.

11. When the appeal was opened, Mr. S. Swaminathan, learned counsel appearing for the respondent-official liquidators, raised a preliminary objection to the maintainability of the appeal. In the memorandum of the grounds of appeal, as preferred, the provision of law under which the appeal was preferred was indicated as Clause 15 of the Letters Patent. However, when the appeal was taken up, after due notice to the respondents, an application in C. M. P. No. 8004 of 1965 was taken out by the appellants for amending the memorandum of grounds, so as to indicate reliance on Section 202 of the Indian Companies Act, 1913, and Section 45N of the Banking Companies Act, 1949, for the maintainability of the appeal.

12. Learned counsel appearing for the liquidators contended that the order in question could not be considered to be a judgment under Clause 15 of the Letters Patent entitling an appeal therefrom. It was contended that it could not even be considered an "order or decision " as contemplated u/s 202 of the Companies Act, or Section 45N of the Banking Companies Act. It was submitted that the provisions of Part III-A have been specially enacted for the speedy disposal of winding up proceedings, and that a strict and narrow construction must be given to the provision for appeals thereunder. It was contended that the remedy by way of appeal u/s 45N of the Banking Companies Act was more restricted than the remedy available u/s 202 of the Companies Act, and that, for an appeal to be competent u/s 45N, it must amount to a decree. The learned counsel further argued that, even assuming that reliance could be placed on Section 202 of the Companies Act, even then the " order or decision" should amount to a judgment under Clause 15 of the Letters Patent, as the second part of Section 202 of the Companies Act put a limitation on the first part of that section providing for appeals.

13. Mr. V.K. Thiruvenkatachari, learned counsel appearing for the appellants, argued that the matter appealed against would amount to a judgment under

Clause 15 of the Letters Patent, and that the appeal could be maintained even under the Letters Patent. It was further pointed out that the words "order or decision" in Section 202 of the Companies Act could not be equated to a "judgment" under Clause 15 of the Letters Patent and that the latter part of Section 202 related to only the procedure or the manner of preferring appeals, and not to the character of the order sought to be appealed against.

14. So far as Section 45N of the Banking Companies Act is concerned, learned counsel submitted that a wide and exclusive jurisdiction has been given to the High Court under the Banking Companies Act, and that there is no reason for limiting the scope of the provision for appeal u/s 45N. Learned counsel pointed out that an appeal is provided for from "any order or decision" and that "decision" meant only a pronouncement or determination on a controversy.

15. In our view, there is nothing to limit the scope for appeal u/s 45N of the Banking Companies Act to a decree or final order, as contended by the learned counsel for the liquidators. The fact that Part III-A is headed as "Special provisions for speedy disposal of winding up proceedings" cannot control the plain language of the section and take away a valuable right of appeal, which the words convey. The object, it is seen, is achieved in many ways, without encroaching on the provisions as to appeal. The headings in an Act of Parliament may be resorted to only to resolve any ambiguity in the words, but the effect of the plain words of a section, if there is nothing incongruous in their application according to their ordinary meaning with the rest of the provisions of the Act, cannot be curtailed by reference only to the heading. To a certain extent, the right of appeal is curtailed by the requirement as to value in the section itself. Then the jurisdiction u/s 45B is exclusive and all embracing, and the exclusive jurisdiction to entertain and decide any claim made by or against a banking company that is being wound up is given to the High Court. Section 45F makes documents of the company evidence and prima facie evidence against the directors and there are other provisions which facilitate the speeding up of the liquidation proceedings.

16. Now, the High Court is given jurisdiction to decide any question of priorities, or any other question whatsoever, whether of law or of fact, which may relate to or arise in the course of the winding up of a banking company, whether such claim or question has arisen or arises, or such application has been made or is made before or after the date of the order for the winding up of the banking company or before or after the commencement of the Banking Companies (Amendment) Act, 1953. There are other provisions in Part III-A, like the settlement of the list of debtors, special provision to make calls on contributories, provision for public examination of directors and auditors, special provision for orders on such examination restraining persons from being directors, auditors or partners without the leave of the High Court in certain circumstances, etc., which can have serious consequences, and could therefore be properly made the subject of an appeal. It is in this background the language of Section 45N has to

be interpreted. Section 45N runs thus :

"An appeal shall lie from any order or decision of the High Court in a civil proceeding under this Act when the amount or value of the subject-matter of the claim exceeds five thousand rupees."

17. The limitation on the right that is apparent is that the order or decision must be in a civil proceeding under the Banking Companies Act, and that the amount or value of the subject-matter of the claim should exceed five thousand rupees. In this case, there is no question that the subject-matter of the claim exceeds five thousand rupees. Obviously the matter arises in a civil proceeding. The dictionary meaning of the word "decision" that may be appropriately adopted is "a judgment or conclusion reached or given" (Webster's), and it is treated as being synonymous with conclusion, disposal, resolution, determination and opinion. There can be no doubt in this case that there has been a "decision" on a matter in controversy between the parties. Parliament, which must know the distinction between order and decision, specifically made decisions also appealable ; and the preceding word "any" has also to be given its due force in the context. The right of appeal conferred is a substantial and valuable right and the court should be slow to limit and cut down the prima facie operation of the words if it could be avoided.

18. The only limitation that could be placed on the words in the context is that the order or decision should not be merely procedural in character, and that is the limitation that has been placed on these words as they occurred in Section 202 of the Indian Companies Act, 1913 (section 453 of Act 1 of 1956). Section 202 of Act VII of 1913 ran thus :

"Re-hearings of, and appeals from, any order or decision made or given in the matter of the winding up of a company by the court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same court in cases within its ordinary jurisdiction."

19. One argument on this provision for appeal had been that any order or decision to be appealable must, in view of the later provisions in the section, satisfy the requirements of Clause 15 of the Letters Patent.

20. But this limitation to be placed on Section 202 of the Companies Act, by equating the "order or decision" to the "judgment" as understood under the Letters Patent, has not been accepted by the Supreme Court.

21. In *Shankarlal Aggarwala v. Shankarlal Poddar*, [1965] 35 Comp. Cas. 1, 13 (S.C.). , agreeing with the view expressed by the Bombay High Court in *Bachharaj Factories Ltd. v. Hirjee Mills Ltd.*, [1955] 25 Comp. Cas. 227. and *Western India Theatres Ltd. v. Ishwarbhai Somabhai Patel*, [1959] 29 Comp. Cas. 133. , *Rajagopala Ayyangar J.*, speaking for the court, observes:

"We thus agree with Chagla C.J. that the second part of the section (section 202

of the Companies Act) which refers to "the manner" and "the conditions subject to which appeals may be had" merely regulates the procedure to be followed in the presentation of the appeals and of hearing them, the period of limitation within which the appeal is to be presented and the forum to which appeal would lie, and does not restrict or impair the substantive right of appeal which has been conferred by the opening words of that section. We also agree with the learned judges of the Bombay High Court that the words "order or decision" occurring in the first part of Section 202, though wide, would exclude merely procedural orders or those which do not affect the rights or liabilities of parties."

22. In *Western India Theatres Ltd. v. Ishwarbhai Somabhai Patel*, while, on the face of the petition for winding up the company, no case for winding up was made out, instead of dismissing the petition, the company judge passed an order directing the petition to be advertised. Chagla C.J. sitting with Desai J. observed that, looking to the wide language used in Section 202, the order was appealable. The learned Chief Justice remarked, in the course of the judgment, that the company was aggrieved because the learned judge did not dismiss the petition, but proceeded to give directions under Rule 751 of the High Court of Bombay Original Side Rules, directing the petition to be advertised.

23. In *Bachharaj Factories Ltd. v. Hirjee Mills Ltd.*, [1955] 25 Comp. as. 227 Chagla C.J. sitting with Dixit J., while upholding appealability of an order passed by a single judge on the original side of the Bombay High Court, refusing to wind up a company, but adjourning the petition for hearing it on the merits to a future date, observed :

"But Section 202 is general in its nature and it provides for appeals against any order or decision made or given in the matter of the winding up of a company. Therefore, the first fact which strikes one is that the legislature attached particular importance to the winding up of a company and made orders, made in the course of the winding up, subject to appeal. Another important fact that must be borne in mind in construing Section 202 is that it is not only any order in the matter of the winding up which is made appealable, but every decision in the matter of the winding up, and the importance of its being made appealable can be realised from the fact that u/s 199 the Act provides that all orders made by a court may be enforced in the same manner in which decrees of such court made in any suit pending therein may be enforced. Therefore, the legislature knew the distinction between an order and a decision, and whereas Section 199 talks of how an order should be enforced, Section 202 does not limit the right of appeal merely against an order, but also confers that right of appeal against a decision. In our opinion, the right conferred is not only a substantial right but a very valuable right and the court must be anxious not in any way to cut down or impair that right. It is true that u/s 202 a right of appeal is not provided against any procedural order or decision which in no way affects the rights or liabilities of parties. The order or decision given by the court in its winding up must be such as would in any way deprive or affect the right of a party, which would make the

party aggrieved by that order and which would make him desire to come to a higher court for getting the order passed by the trial court rectified."

24. In both the above Bombay cases, the attempt to cut down the right of appeal, by construing the second part of Section 202, which dealt with merely procedural implications of the appeal, and requiring that the order should be a judgment within the meaning of Clause 15 of the Letters Patent failed.

25. As noticed above, the decision of Chagla C. J. in the above case has been accepted by the Supreme Court. Whether Section 202 of the Companies Act is available to the appellants or not, we see no reason to limit the wide language of "any order or decision" as above interpreted and made appealable u/s 45-O of the Banking Companies Act. The order in question sought to be appealed against certainly determines the rights of parties; it is not merely procedural. If either of the contentions of the appellants herein, now pressed before us, is accepted, the application itself would have to be rejected. So far as the company judge in this case is concerned, he has given his final determination on the question of limitation and the survival of the cause of action.

26. Learned counsel for the liquidators referred to the decision of the Calcutta High Court in *Nath Bank Ltd. v. Kshetra Nath Dalal*, [1955] 25 Comp. Cas. 167. To the extent the case, decided that the order of a single judge was appealable u/s 202 of the Companies Act, only if the order was appealable under Clause 15 of the Letters Patent of the Calcutta High Court, it must be held to be no longer good law, after the decision of the Supreme Court in *Shankarlal Aggarwala v. Shankarlal Poddar*, [1965] 35 Comp. Cas. 1 (S.C.). . In *Nath Bank Ltd. v. Kshetra Nath Dalai*, the applicability of Section 45N of the Banking Companies Act was not in question, as the proceedings, which were in appeal there, were proceedings u/s 235 of the Indian Companies Act, and not proceedings under the Banking Companies Act; and all that was laid down in that decision was that the right of appeal conferred by Section 45N was limited to orders in original civil proceedings contemplated by the Banking Companies Act, and did not extend to orders passed in civil proceedings under the Indian Companies Act.

27. Mr. V.K. Thiruvengkatachari, learned counsel for the appellants, contended that the order appealed against in the present case would also be a judgment under Clause 15 of the Letters Patent. The definition of a judgment under the Letters Patent, as enunciated in *Tuljaram Row v. Alagappa Chettiar*, .I.L.R.(1912) Mad. 1 . was relied upon, and it was submitted that the definition of judgment in *Tuljaram's* case has been adhered to by this court ever since. There has been a conflict between the various High Courts as to the meaning of " judgment" under Clause 15 of the Letters Patent, and this conflict is noticed by the Supreme Court in *Asrumati Debi v. Kumar Rupendra Deb Raikot*, [1953] S.C.R. 1159. *Shankarlal Aggarwala v. Shankarlal Poddar* and *State of Uttar Pradesh Vs. Dr. Vijay Anand Maharaj*, . In *Asrumati Debi's* case the Supreme Court was concerned with an order for the transfer of a suit under Clause 13 of the Letters Patent of the Calcutta High Court, and it was held that such an order was not a judgment

within the meaning of Clause 15 of the Letters Patent, and therefore no appeal was competent therefrom, " as it neither affects the merits of the controversy between the parties in the suit itself, nor terminates or disposes of the suit on any ground." In *Central Brokers v. Ramnarayana Podder & Company*, [1954] 2 M.L.J. 525 . , Govinda Menon J. observes that his Lordship Mukherjee J. was inclined to agree with the definition of the word "judgment" given by Sir Richard Couch C.J. in *Justices of the Peace for Calcutta v. Oriental Gas Company*, (1872) 8 Ben. L.R. 433. and by Sir Arnold White C.J. in *Tuljaram Row v. Alagappa Chettiar*, I.L.R.(1912) Mad. 1 . But Sir Richard Couch defines "judgment" under the Letters Patent thus :

"We think that "judgment" in Clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit and; a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

28. That is, a judgment under Clause 15 of the Letters Patent may be either preliminary or interlocutory, the only requirement being that it must affect the merits of the question between the parties by determining some right or liability. Thus viewed, it is indisputable that the order in question now under appeal would be a judgment, and even if the word " decision " in Section 45N of the Banking Companies Act is equated to a judgment, the order would be appealable.

29. But in *Tuljaram's* case, I.L.R.(1912) Mad.14 . Sir Arnold White C.J. observed thus:

"The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent."

30. The learned Chief Justice, while discussing the observations of Sir Richard Couch C.J. in *Justices of the Peace for Calcutta v. Oriental Gas Company*, was not prepared to say that, in order that a decision could be a judgment, it must be one which affects the merits by determining some right or liability ; but, according to the learned Chief Justice, whatever its form it must terminate the suit or proceeding. However, in *Tuljaram's* case, (1912) ILR 35 Mad. 1, Krishnaswami Aiyar J. observed :

"But I do not think we shall be justified in confining the term "judgment" to final disposal of suits, appeals or original petitions or proceedings in execution.

Preliminary or interlocutory judgments which ascertain rights and direct further enquiries which determine liabilities though further directions are given for ascertaining the measure of those liabilities must be deemed to fall within Clause 15."

31. Now, White C.J. in the same case, referring to *Vaghoji v. Camaji*, I.L.R. (1904) Bom. 249, where it was held that an appeal lay from an order dismissing the judge's summons to show cause why leave granted under Clause 12 of the Letters Patent should not be rescinded and the plaint taken off the file, observed :

"Here the adjudication asked for, if made, would have disposed of the suit."

32. After referring to this observation of White C. J., the Supreme Court in *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, . observed thus :

"Leave granted under Clause 12 of the Letters Patent constitutes the very foundation of the suit which is instituted on its basis. If such leave is rescinded, the suit automatically comes to an end, and there is no doubt that such an order would be a judgment. If, on the other hand, an order is made dismissing the judge's summons to show cause why the leave should not be rescinded, the result is, as Sir Lawrence Jenkins pointed out in *Vaghoji v. Camaji* that a decision on a vital point adverse to the defendant, which goes to the very root of the suit, becomes final and decisive against him so far as the court making the order is concerned. This brings the order within the category of a "judgment" as laid down in the Calcutta cases."

33. Mr. V.K. Thiruvengkatachari, learned counsel for the appellants, relied on the above observations of the Supreme Court, and contended that, on the principle of the above observations, it must be held that the order now appealed against is also a judgment. The decision one way or the other goes to the root of the matter, and the decision given by the learned company judge has become final and decisive so far as the court making the order is concerned.

34. Here again, in the Madras Full Bench case, *Central Brokers v. Ramanarayana Poddar & Co.*, at page 529, Govinda Menon J. would observe that the Supreme Court also held that an order refusing to rescind leave to be granted under Clause 12 of the Letters Patent was not a judgment under Clause 15 of the Letters Patent. The Full Bench has held that the two tests laid down by the Supreme Court to find out whether an adjudication in a particular proceeding is a judgment or not are : (i) Whether it terminates the suit or proceeding ; and (ii) Whether it affects the merits of the controversy between the parties in the suit itself. This two-fold requirement of a judgment under the Letters Patent is re-stated again in another Full Bench case of this court in *Southern Roadways (P.), Ltd. Vs. Madurai Veeraswami Nadar (died) and Others*, , where it is observed at page 29 that the decision in *Asrumati Debi v. Kumar Rupendra Deb Raikot*, [1953] S.C.R. 1159 substantially proceeds on the basis that an order by the court which relates to a suit, but which has the effect of keeping that suit alive cannot be regarded as a final judgment. Again in *Cork Industries v.*

Govindarajulu Mudaliar, [1964] 2 M.L.J. 265 this court has held that though an order would be a "judgment" against which an appeal is maintainable under Clause 15 of the Letters Patent, the same cannot follow in regard to an order granting leave. In this state of the law, as the present appeal could, in our opinion, be sustained u/s 45N of the Banking Companies Act, it is needless to examine the tenability of the appeal under the Letters Patent or the further question whether an appeal outside Section 45N is open in civil proceedings under the Banking Companies Act. The present appeal fulfils the requirements of Section 45N of the Banking Companies Act, both as to valuation, the subject-matter of the claim being over five thousand rupees, and as to character, the order in question being an order or decision in a civil proceeding, and not merely procedural. The preliminary objection, as to the maintainability of the appeal, is, therefore, overruled.

35. We shall first take up the contention that the cause of action does not survive against the heirs and representatives of Swaminatha Iyer under the maxim *actio personalis moritur cum persona*. Mr. V.K. Thiruvengkatachari, learned counsel for the appellants, contends that this rule of personal action abating with the death of the delinquent is a well-established rule, and the rigour of the rule, which has been relieved to a certain extent by the Legal Representatives' Suits Act (XII of 1855), cannot help the liquidators in the present case. Under that Act suits for wrongs, which do not survive the death of the wrongdoer against his executors, administrators, heirs or representatives, could be maintained against the said executors, administrators, heirs or representatives, if the wrong, which has given rise to the cause of action, had been committed within one year before the death. Learned counsel points out that this is not a mere rule of limitation, and that if the cause of action was not within one year prior to the death, no action can be laid on the cause of action--the cause of action did not survive. The period of limitation for suits under this Act is two years from the time the wrong complained of was done--Articles 33 and 34 of the Limitation Act, 1908. If the liquidators have to rely only on Act XII of 1855, then *ex facie* the claim would be barred by limitation.

36. The arguments on this part of the case may be briefly summed up thus. The liability of the director is not *ex contractu*, but one in tort. The cause of action is, in fact, based on negligence, and not on any contract, express or implied ; nor is the action founded on the type of obligations commonly referred to as "quasi contract" and the subject of provision by Sections 68 to 72 of the Indian Contract Act in Chapter V under the heading "Of certain relations resembling those created by contract". It not being the case of the liquidators that Swaminatha Iyer had gained for himself any pecuniary advantage, it is argued that forms of action for recovery based on the theory of unjust enrichment have no application. Strong reliance is placed on the scope of the maxim *actio personalis moritur cum persona* stated by Bowen L.J. in *Phillips v. Homfray*, (1883) 24 Ch. D. 439, thus :

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys."

37. Elaborating the arguments, learned counsel covered a wide field, referring to the development of the law relating to liability in torts, the distinction between actions on contract and actions on tort, between implied contract and what is commonly referred to as quasi contract, and actions based on the obligations in the nature of trusts, provided for under Chapter IX of the Indian Trusts Act, referring particularly to Section 88 of Indian Trusts Act. The arguments principally centered round establishing that the liability sought to be fastened on the representatives of the deceased in this case was, in fact, a liability in tort, and, therefore, did not survive against the heirs. Our attention was drawn to Section 235 of the Indian Companies Act, 1913, corresponding to Section 543 of the present Companies Act, where, on examination of the conduct of a delinquent director, he could be compelled to repay or restore the money or property or any part thereof with interest, or to contribute such sum to the assets of the company by way of compensation in respect of misapplication, retainer, misfeasance or breach of trust as the court thinks just. It was pointed out that, while the section was not exhaustive and fully descriptive of the suits under the general law, which could be pursued against the delinquent director, it gave an indication of the nature of the liability which a director can incur. Learned counsel drew our attention to the meaning of misfeasance, malfeasance and nonfeasance found in the Dictionary of English Law by Jowitt. While malfeasance is shown as the doing of an unlawful act, for example, trespass, and misfeasance is defined as the improper performance of a lawful act, as where a person is guilty of negligence in performing a contract, nonfeasance is referred to as the neglect or failure of a person to do some act which he ought to do. The term is generally used to denote not a breach of contract, but rather a failure to perform a duty towards the public, whereby some individual sustains special damage peculiar to himself, as where a highway authority permits a road to become worn into a dangerous hole.

38. It is contended that the three counts, on which the application is founded, are none of them the result of any breach of any express or implied contract. It is contended that, in essence, the action is laid on the basis of gross or culpable negligence, and is purely one in tort. No property or benefits have been acquired by the wrongdoer, and therefore no action for the value of the property survived against the wrongdoer. The action is not one for restoration of money or property.

39. Mr. S. Swaminathan on behalf of the official liquidators takes the stand that the liability in this case is not one founded on tort, but one founded either on breach of contract or breach of trust. It is submitted that misapplication of the funds of the bank, the improper outlay of the funds, and unlawful advances

contrary to rules and regulations, could come either as breaches of contract, implied, if not express, or, at any rate, as breach of trust, or under quasi contract, and that in such cases the estate of the wrongdoer would be liable. Learned counsel argues that the maxim *actio personalis moritur cum persona* is limited to personal wrongs arising out of tort, and does not relate to the liability arising out of breach of trust, express, implied or constructive. It is submitted that the relationship between the director and the bank, apart from being contractual, was also fiduciary, and that any actionable negligence in respect of fiduciary obligations would be outside tort. Learned counsel points out that the liability in this case was sought to be made out not on negligence simpliciter of Swaminatha Iyer. As set out already, in the report filed by the liquidators in support of the application, averments are found that the managing committee, of which Swaminatha Iyer was a member, had full control of the business of the bank carried on by the managing director, and that Swaminatha Iyer had a preponderating voice in the management of the bank. Certain documents have been exhibited in the case by the liquidators in support of their contention that Swaminatha Iyer had effective control over the bank, and that the misapplication of the funds of the bank by the managing director was with the full knowledge of Swaminatha Iyer. No doubt, these are averments that will have to be made out when the merits of the application are gone into, and the liability is sought to be fastened on the estate of Swaminatha Iyer. But it is clear from the case of the liquidators that the action is founded on the basis that the deceased director had effective voice not only in the business, but had also control over the funds of the bank, and that he was actively associated with the transactions of the bank and its investments. Learned counsel for the liquidators submits that Swaminatha Iyer was, in the circumstances, apart from any contract, bound by fiduciary character to protect the interest of the bank as recognized u/s 88 of the Trusts Act, and u/s 95 of the Trusts Act he must, so far as may be, perform the same duties, and subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the properties of the bank for whose benefit he held it. It is submitted that virtually he had full control of the finances of the bank and his obligations and liabilities were those of a trustee. The maxim *actio personalis moritur cum persona*, according to the learned counsel, does not apply to the applications arising out of breach of duties of persons in the position of a trustee.

40. Mr. V.K. Thiruvengkatachari, learned counsel for the appellants, submitted that the passing of the Legal Representatives' Suits Act, XII of 1855, was itself a recognition of the applicability of the maxim in India. It is argued that as to what causes of action could survive against the representatives, one must look to the law in England in 1855. Reference was made to *Tummala Nagabhushanam Vs. Sri Rajah Venkatadri Appa Row Bahadur Zemindar Garu* being minor, represented by the Collector of Kistna, . and *Marwadi Mothiram (died) and Others Vs. M. Samnaji (died) and Others*, . pointing out the applicability of the maxim in India. The former was an action for recovery of damages for illegal distraint by a deceased person, and it was held that the action abated. Therein the decision of

Bowen L.J. in *Phillips v. Homfray*, (1883) 24 Ch. D. 439. was relied upon. The other case was a suit for damages for malicious prosecution. It should be noticed that Act XII of 1855 does not permit the continuance of an action, which has been commenced against the wrongdoer himself in his lifetime. In *Rustomji Dorabji v. Nurse*, ILR (1921) Mad. 357 . where it became necessary to refer to a Full Bench the question, whether in a suit for malicious prosecution, if the defendant died more than a year after the prosecution in question, and before judgment, the right to sue survived within the meaning of Order XXII, Rule 1, of the Civil Procedure Code, so as to prevent abatement of the suit, on the order of reference, Wallis C.J. adverting to the maxim *actio personalis moritur cum persona*, observed thus :

" That rule, which is of post-classical origin and is referred to in *Pollock on Torts* as barbarous, is far from embodying the principles of justice, equity and good conscience in so far as it deprives an injured party of redress if the alleged wrong-doer happens to die, as in the present case, before a decree has been obtained against him. It has not been applied to contracts, and has been limited by statute as regards torts affecting property."

41. The Full Bench held that the Legal Representatives" Suits Act made no provision for the continuation of suits already begun by the wronged against the wrong-doer in the event of the death of either party. It may here be reiterated that the dismissal of the application preferred in these winding up proceedings against Swaminatha Iyer u/s 235 of the Companies Act on his death as abated, was not in pursuance of the nature or character of the liability which was sought to be agitated in the application, but by reason of the very nature of the proceedings u/s 235 of the Act, which, as a summary procedure, provided only for the examination into the conduct of the promoter, director, manager, liquidator, etc., and compel him to repay or restore the money, etc., or contribute such sum to the assets of the company by way of compensation, etc. The very nature of the proceedings limited the proceeding to the director or individual involved and sought to be made liable. It did not exclude the other remedies the company had. Act XII of 1855, which provided for the institution of suits, was entitled an Act to enable executors, administrators or representatives to sue and be sued for certain wrongs. The preamble ran thus :

"Whereas it is expedient to enable executors, administrators or representatives in certain cases to sue and be sued in respect of certain wrongs which, according to the present law, do not survive to or against such executors, administrators or representatives. ..."

42. Under the law, as it then existed, following the English precedents, the right to sue and the liability to be sued, as the case may be, did not survive on the death of the wronged individual and the person who committed the wrong, respectively, to or against the representatives. The Act was enacted to make the right to sue survive where it did not and to enable suits to be brought.

43. The Indian Succession Act of 1865 contained u/s 268 of the Act the following proviso :

""All demands whatsoever, and all rights to prosecute or defend any action or special proceeding, existing in favour of or against a person at the time of his death, survive to and against his executors or administrators, except causes of action for defamation, assault as defined in the Indian Penal Code, or other personal injuries not causing the death of the party, and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

44. It will be seen that while Act XII of 1855 enacted the survival of the right to sue for all kinds of tort, Section 268 of the Indian Succession Act excluded "causes of action for (i) defamation; (ii) assault under the Indian Penal Code; (iii) other personal injuries not causing the death of the party and (iv) cases where the relief sought could not be enjoyed or granting it would be nugatory (say, restitution of conjugal rights). As the Succession Act did not apply to Hindus, Mohamadans or Buddhists, a similar provision was enacted in the Probate and Administration Act, 1881, by Section 89, which runs as follows :

"All demands whatsoever, and all rights to prosecute or defend any suit or other proceeding, existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators, except causes of action for defamation, assault as denned in the Indian Penal Code or other personal injuries not causing the death of the party, and except also cases, where after the death of the party the relief sought could not be enjoyed, or granting it would be nugatory ."

45. Then we have Section 306 of the Indian Succession Act (XXXIX of 1925) more or less in the same terms as the provisions of the Succession Act of 1865 and the Probate and Administration Act, 1881, which both got repealed by this Act of 1925. It will be noticed, however, that, while the Legal Representatives' Suits Act, 1855, enables actions to be maintained against heirs of any person deceased for any wrong committed by him in his lifetime, the Indian Succession Act, 1925, as its predecessors, limits the survival of the cause of action to and against executors and administrators only, while further excepting certain claims, like defamation, assault and other personal injuries specified therein. It has been held by a Division Bench of this court in Arunachalam Chettiar v. Subramanian Chettiar, AIR 1958 Mad. 142. that Section 306 is confined to executors and administrators of a deceased person, and does not apply to heirs or other legal representatives, following the decision of the Rangoon High Court in Casim (D.K.) & Sons v. Sara Bibi, (1935) ILR 13 Rang. 385. It is also held that the maxim *actio personalis moritur cum persona* is a part of the law of India except in so far as it has been modified by statute. The Lahore High Court has taken a different view in People's Bank of Northern India Ltd. v. Des Raj, [1935] 5 Comp. Cas. 296. and People's Bank of Northern India Ltd. v. Har Gopal, [1935] 5 Comp. Cas. 275 and applied Section 306 against heirs also. It is contended that the

Indian Succession Act, as well as its predecessors, have to be read along with the Legal Representatives' Suits Act, 1855. That Act is available to heirs as well as against the heirs of the deceased. Though executors and administrators are denominated in the Indian Succession Act, when particularly action has to be taken against the estate of the deceased, it is an argument for consideration whether a liberal interpretation should not be given to the word "administrator" used in Section 306 of the Indian Succession Act. In this connection the statement in Maxwell on the Interpretation of Statutes, eleventh edition, at page 30, as to the force of the definition section may be referred to. It is stated:

"Even where an Act contains a definition section, it does not necessarily apply in all the contexts in which a defined word may be found."

46. In the view we are ultimately taking as to the applicability of the maxim to a claim of the kind agitated in the present proceedings, it is unnecessary for us to consider further the applicability of Section 306 to heirs.

47. We have referred above to the statutory modifications of the rule in India, which, as is apparent, leaves much to be desired. The general rule at common law in England was that the maxim had no application to any breach of contract except breach of promise to marry. Several exceptions to the applicability of the maxim were introduced in England by statutes in the case of claims to property arising out of tort. The Administration of Estates Act, 1925, Section 26(2) and (5), replacing 4 Edw. 3, c. 7, and the Civil Procedure Act, 1883, Section 2, made considerable inroads on this rule by permitting actions to survive for the benefit of the estate if based on wrong to the deceased's real estate, and to survive against the estate if based on wrongs committed by the deceased to the property of other persons, subject in each case to a special period of limitation. There was the Fatal Accidents Act, 1846, commonly known as Lord Campbell's Act, which gave right of action by executors or administrators for the benefit of the relatives specified in the Act, corresponding to the Indian Fatal Accidents Act (XIII of 1955). Subject to these exceptions, the maxim continued in force for several centuries in regard to actions for tort, and was abrogated in England only in 1934, by the Law Reform (Miscellaneous Provisions) Act, 1934. Under this Act it is provided that on the death of any person, all causes of action subsisting against or vested in him shall survive against or for the benefit of his estate, except causes of action for defamation, seduction, inducing one's spouse to leave the other, and claims for damages for adultery. Under the provisions of this Act, a suit by or against a person in tort may be continued by or against his representative. This makes a distinct departure from the Legal Representatives' Suits Act of 1855, which does not provide for the continuance of actions. But a reference to the English text books would show that the principle of the maxim, which operated under the common law as a bar to the survival of actions against the estate of the deceased or for the benefit of the estate of the deceased, was confined only to actions in tort. It is a feature to be noticed in the early case-law in England that often the tort was waived, where permissible, and the action

founded on contract to escape the rule. Actions based upon torts, by which the deceased had enriched his estate at another's expense, could be pursued against the estate of the deceased, and the operation of the maxim, already limited by various statutes as afore-stated totally ceased to have any effect after the Act of 1934.

48. In *Winfield on Tort*, seventh edition, with reference to the origin of the rule in respect of the law on death, it is stated thus, at page 117:

"In early times one method of seeking redress for a felony was an "appeal of felony". This was an accusation brought by the injured party himself and was much more of a private or civil proceeding than a public or criminal one, but it retained enough criminal flavour to make it cease if either appellor or appellee died pending it. When the writ of trespass was invented in King John's reign it had a close resemblance to an appeal of felony ; in fact, it has been called " an attenuated appeal". Hence trespass, which was the parent of much of our modern law of tort, began life with a strong quasi-criminal character and on that ground the action for it did not survive the death of either plaintiff or defendant. Nor did there appear to be any injustice in this. If one has the habit of looking on a wrong as something very like a crime, it is a natural inference that nobody ought to be liable for it except the man who committed it. True, the argument is not so strong where it is the plaintiff in trespass who dies. Why should not his successors sue the defendant if he is still alive ? The answer apparently is that the rule that an appeal perished, whether it was the appellor or appellee who died, seems to have infected the law as to transmissibility of the action of trespass, and the infection passed from trespass to actions in tort generally."

49. The learned author, referring to the maxim *actio personalis moritur cum persona* itself, observes at page 118:

"The maxim is derived from neither Roman law nor the Canon law. Bracton was unjustly accused by a later generation of its parentage. Others have hinted that Coke invented it, but that is not so, though it is just the sort of thing that was a savoury bakemeat in his mouth. It cannot be traced in the Year Books earlier than 1479. It gradually came into use and it was discussed judicially in *Pinchon's* case, (1611) 9 Rep. 86, 87-A and in *Hambly v. Trott*, (1776) 1 Cowp. 371 and in later cases which were concerned not only with the extinction of liability for tort by death, but also with the creation of liability in tort by death ; and it has wrongly been put forward in modern times as the reason for extinction in the one case and for denial that liability can be created in the other. In fact, an investigation of the earlier authorities leads to a very different conclusion, which is that the maxim is hardly ever mentioned without being limited to personal torts, like assault and battery, and in that shape it merely stated in Latin a long-established principle of which it was neither the historical cause nor the rational explanation."

50. In *fame's General Principles of the Law of Torts*, 1959, referring to the effect

of death on causes of action in tort, the learned author states, at page 44 :

"At common law, although latterly there were many exceptions, the rule was that rights of action in tort were extinguished by the death of either plaintiff or defendant. This unfortunate principle was enshrined in the maxim *actio personalis moritur cum persona*."

51. In Paton, A Textbook of Jurisprudence (1946), the learned author observes thus, at page 253 :

"The effect of death on causes of action already subsisting in tort represents a very confused chapter of English law. The maxim *actio personalis moritur cum persona* has darkened counsel, and " like some other Latin maxims, which have been invented or adopted by our laws, we should have missed nothing if it had never found its way there." The common law rule was that if I commit a tort against you and either of us dies, the liability is extinguished. This doctrine was made tolerable only by a series of exceptions, and it was largely swept away in England in 1934, although it still survives to disfigure the law in many of the Dominions."

52. We shall now examine the nature of a tort to find out whether the liability of the kind, which is agitated in these proceedings would come under the category of claims in tort. Tort is described in fame"s General Principles of the Law of Torts, above referred to, at page 6, thus :

" Further, the hallmark of a claim in tort is that it will give rise to a common law action for damages. Thus, although a breach of trust will often cause loss to beneficiaries, and breaches of trust are not permitted in equity, a breach of trust is not a tort; for, on the one hand, it gives rise to an equitable (as opposed to a legal) claim in the parties injured, and on the other hand it is remediable by proceedings in the Chancery Division, and not by an action for damages at law."

53. In Winfield on Tort, at page 7, it is stated thus: " The duty in tort is towards persons generally:

The emphasis here is to be laid upon "generally." If the duty is towards a specific person or specific persons, it cannot arise from tort. There the duty is always general. Thus, I am under a duty not to commit assault, or battery, or any other tort against any one who can sue me in any court which can entertain the action. My duty not to commit a tort is not limited to John or to Mary or to any other named person or persons. This element of generality is an important factor in the definition and it is sufficiently workable in the majority of cases, but it must be admitted that in some instances it is hard to say who exactly are "persons generally." "

54. In Salmond on Jurisprudence, eleventh edition, the sources of obligations in English law are divided into four classes :

(1) Contractual--Obligationes ex contracts.

(2) Delictal--Obligationes ex delicto.

(3) Quasi-contractual--Obligationes quasi ex contractu.

(4) Innominate.

55. The first class of obligations is well-known. Coming to obligations arising from tort, the learned author defines tort as :

"A civil wrong, for which the remedy is an action for damages, and which is not solely the breach of a contract or the breach of a trust or other merely equitable obligation."

56. A civil wrong is not a tort unless the appropriate remedy for it is an action for damages. Forms of civil remedy, according to the learned author, where restitution of property or payment of liquidated sums of money by way of penalty or otherwise, are claimed will not be torts. Referring to the breaches of trust as not coming under torts, the learned author puts the principle thus, at page 497 :

"The fourth and last class of wrongs which are not torts consists of breaches of trusts or other equitable obligations. The original reason for their exclusion and separate classification is the historical fact that the law of trusts and equitable obligations originated and developed in the Court of Chancery, and was wholly unknown to those courts of common law in which the law of torts grew up. But even now, although the same courts administer both law and equity, it is still necessary to treat breaches of trust as a form of wrong distinct from torts, and to deal with them along with the law of trusts itself, just as breaches of contract are dealt with along with the law of contract. Torts, contracts, and trusts developed separately, the principles of liability in each case are largely different, and they must be retained as distinct departments of the law."

57. Quasi contractual obligations are obligations which are not in truth contractual in the sense of resting on agreement, but which the law treats as if they were. As the learned author puts it, they are contractual in law, but not in fact, being the subject-matter of a fictitious extension of the sphere of contract to cover obligations which do not really fall within it. The learned author would bring in obligations other than those that are contractual, delictal or quasi-contractual, under the fourth heading innominate. Obligations of trustees are included in this class. We are setting out this aspect of the matter to show that obligations of trustees are outside delictal or tortious liabilities.

58. In Paton's Jurisprudence, already referred to, in Chapter 14, dealing with rights directly created by law, the learned author states, at page 307 :

"The right of contract arises directly from a juristic act. Other rights are granted by the law, whether the person bound by the duty consents or not. The American Restatement contrasts three broad branches--contract, tort and restitution. In contract the underlying postulate is that a person shall obtain what was freely promised ; in tort that a person has a right not to be harmed by an unlawful act;

in restitution that a person has a right to have restored to him a benefit gained at his expense by another, if the retention of that benefit would be unjust. Since both in tort and restitution the rights do not arise from consent but are granted by the law, there will naturally be some overlapping of the boundaries in actual systems."

59. It may be stated that, till the nineteenth century English law possessed no classification of personal actions, being content with the enumeration provided by the forms of action. In *Phillips v. Homfray*, (1883) L.R. 54 Ch. D. 439, the tort was waived, and action was laid for recovery of the proceeds of the wrong to avoid the application to the case of the maxim *actio personalis moritur cum persona*.

60. In *Chitty on Contracts*, twenty-second edition, volume I, referring to quasi-contracts, the learned author states (at page 657):

"A quasi-contractual situation resembles a contractual one in that liability is imposed upon a particular person to pay money to another particular person, yet it differs radically in that quasi-contractual liability is imposed by the law irrespective of the agreement of the parties. On the other hand, quasi-contractual liability, though like tortious liability in that it is imposed upon the defendant by the law, differs from tortious liability, according to Winfield, in the scope of the defendant's duty : "In tort it is towards persons generally, in quasi-contract it is towards a particular person." The residual character of the subject is emphasised in Winfield's definition of "genuine quasi-contract" : "Liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit". "

61. It is unnecessary to consider at length the development of the law of quasi-contracts and restitution or to deal particularly with the distinction between express and implied contracts. It may be that in many cases action could be maintained against the wrong-doer on tort or on the basis of a quasi-contract by claim against him for recovery of money which he had received as a result of the tort, that is, to make him disgorge the unjust enrichment he had by the wrong. By proceeding on the basis of quasi-contract, it was possible to avoid and circumvent the rule preventing survival of an action in tort against the estate of the tortfeasor. Reference is made to this aspect of the matter only to show that except when the action is in tort, the claim survives against the estate on the death of the wrong-doer.

62. It was contended for the appellants that the liability which the appellants are called upon to meet is the same liability as that of the deceased Swaminatha Iyer, that there is no independent cause of action against them, and that the character of the claim, now made against the estate, cannot be different from the claim that could have been made against Swaminatha Iyer when alive, on the same cause of action. In this connection, reference is made to a decision of

the Supreme Court in *The Andhra Bank Ltd. Vs. R. Srinivasan and Others*, . At page 19 of the report, after referring to the true legal position u/s 52 of the Code of Civil Procedure, and Order 22, Rule 4, Sub-rule (2), of the Code of Civil Procedure, which provides that the defence which the legal representatives can make has to be appropriate to their character as legal representatives, it is observed :

"That emphatically brings out the character of the contest between the legal representatives and the appellant. The appellant in substance is proceeding with its claim originally made against the deceased Raja Bahadur and it is that claim which respondents Nos. 2 to 12 can defend in manner appropriate to their character as legal representatives."

63.Their Lordships referred, with approval, to the statement in *Salmond's Jurisprudence* on this aspect of the matter, that :

"Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man, for the representative is in some sort identified by the law with him whom he represents. The rights which the dead man can no longer own or exercise in *propria persona*, and the obligations which he can no longer in *propria persona* fulfil, he owns, exercises, and fulfils in the person of a living substitute. To this extent, and in this fashion, it may be said that the legal personality of a man survives his natural personality, until, his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for."

64. Proceeding on this principle, it is contended that the relationship between the director and the company was not contractual, and that the breach of duty relied upon is not breach of contract, express or implied. It is contended that the foundation of the liability in this case can only be in negligence simpliciter which is a tort, the duty being not contractual. The argument proceeds that there being no case of unjust enrichment, the cause of action is not a claim even on quasi-contract, waiving the tort, to survive the wrongdoer's death. Our attention is drawn to Section 20 of the English Companies Act (Section 36 of the Indian Companies Act, 1956) and section 21 of the Indian Companies Act, 1913, and reliance is placed on the decision in *Beattie v. E. & F. Beattie Ltd.* [1938] 3 All E.R. 214., where it has been held that the contractual force given to the articles of association by the Companies Act was limited to those provisions of the articles that applied to the relationship of the members in their capacity as members, and did not extend to those provisions that applied to the relationship of the members and the directors as such. At page 218 of the report, it is observed :

"They are statements (referring to the observations of Astbury J. in *Hickman v. Kent or Romney Marsh Sheep-Breeders' Association*, [1915] L.R. 1 Ch. 881, with regard to the true construction and operation of Section 20, and they have the result in the present case of preventing that section from giving contractual force

to the article as between the company and its directors as such."

65. It is pointed out that this decision has been followed by this court in *Mothey Krishna Rao Vs. Grandhi Anjaneyulu and Others*, .. But, in our view, it is unnecessary to consider, whether the articles, particularly relating to the directors and the managing committee referred to in the report of the liquidators in support of their application, constituted a contract between the concerned directors and the company. It is sufficient for our purpose to hold that the management of the business was vested in the managing committee and the managing committee had control over the funds of the bank. The cause of action relied upon is not mere negligence, but a breach of duty, specifically undertaken by accepting the office as director and a member of the managing committee. Reference was made by learned counsel for the appellants to *Letang v. Cooper*, [1964] 2 All E.R. 929 pointing out that the tort of negligence is firmly established. Certain observations in the decision were referred to, but we find that they are of little help to the appellants in the present case. The question there was as to the applicability of the provisions of the Law Reform (Limitation of Actions, etc.) Act, 1954, which ran thus :

"Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this sub-section shall have effect as if for the reference to six years there were substituted a reference to three years."

66. The contention was that the above words did not cover an action of trespass to the person and that therefore the time-bar was not the new period of three years, but the other period of six years. Lord Denning M.R., after discussing the now obsolete forms of action, observes :--

"The tort of negligence is firmly established. So is the tort of nuisance. These are given by the Legislature as sign-posts. Then these are followed by words of the most comprehensive description:

"Actions for . . . breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision)."

These words seem to me to cover not only a breach of a contractual duty, or a statutory duty, but also a breach of any duty under the law of tort, Our whole law of tort today proceeds on the footing that there is a duty owed by every man not to injure his neighbour in a way forbidden by law. Negligence is a breach of such a duty."

67. The Court of Appeal was, in that case, dealing with the provisions of the Limitation Act, and the observations there are in relation to the language of the

statute that was being construed. It is not an authority for the proposition that all negligence is a breach of duty, and therefore only a tort.

68. Mr. V.K. Thiruvengkatachari also drew our attention to the passages in Halsbury's Laws of England, third edition, volume 28, at page 19 :

"The practice of a profession, art or calling which, from its nature, demands some special skill, ability or experience, carries with it a duty to exercise, to a reasonable extent, the amount of skill, ability and experience which it demands. If a person so practising fails to possess that amount of skill and experience which is usual in his profession or calling, or if he neglects to use the skill and experience which he possesses or the necessary degree of care demanded or professes, he will usually be liable for breach of contractual duty. In addition the defendant is under a great duty in tort to exercise a proper degree of skill and care wherever failure or omission is likely to cause physical injury to persons or property . . . Where the prospect of physical injury is absent, the duty to exercise skill is only contractual, as with accountants, architects and surveyors, auctioneers, bankers, company directors, insurance brokers ..."

69. It was pointed out that the recent case of the House of Lords in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 ; [1964] 34 Comp. Cas. 96 established that there was no distinction between cases in which there is a prospect of physical injury and cases in which there is a prospect of financial loss. Learned counsel pointed out that even when financial loss is caused, and there is no physical injury, the liability could be in tort. Our attention was drawn to the Cumulative Supplement (1964), to the third edition of Halsbury's Laws of England, where, with reference to the passage in Halsbury's Laws of England above cited, the Supplement states as follows (for paragraph 17 of volume 28):

" There is no distinction between cases in which there is a prospect of physical injury and cases in which there is a prospect of financial loss, A person exercising a profession or calling is liable for failing to exercise due care and skill despite the absence of contractual relationship, if the person to whom his careless advice or information is given is relying on him to take the care required in the circumstances, such reliance being reasonable, and he knows or ought to know that he is being relied on. Responsibility may, however, be expressly disclaimed."

70. We are unable to see how the above would help the appellant in this case. It must be noticed that in the House of Lords case, there was neither a pre-existing contractual or fiduciary obligation. The head-note in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 ; [1964] 34 Comp. Cas. 96 runs thus : .

"If, in the ordinary course of business or professional affairs, a person seeks information or advice from another, who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted, or that his skill or judgment was being relied on, and the person asked chooses to give the

information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply ; and for a failure to exercise that care an action for negligence will lie if damage results."

71. It was pointed out in the course of the judgment that the duty to take care should not be limited to cases of fiduciary relationship in the narrow sense of relationship which had been recognised by the Court of Chancery as being of a fiduciary character. The House of Lords case, in our opinion, is not an authority for the position that even cases of breach of duty, where it is not contractual, must be founded on tort.

72. There is a difference between negligence, which is tortious, and the neglect of some special duty, which a person has undertaken in regard to some specified person or a group of persons. The latter, when there is a fiduciary relationship, would amount to a breach of trust. It is only negligence, which is tortious, that, subject to exceptions, dies with the person. In the latter, the liability of the person follows his estate, on his death. Though directors may not be express trustees, they are in the position of trustees, and their office is fiduciary.

73. Section 88 of the Indian Trusts Act (2 of 1882) emphasises the fiduciary character of the director of a company. It provides that, where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, avails himself of his character, and gains for himself any pecuniary advantage or, where any person so bound enters into dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained. While, u/s 88, a person in a fiduciary position, who had gained an advantage to himself, would be compelled to disgorge the gain, so as to benefit the person whose interest he was fiduciarily bound to protect, Section 95 of the Indian Trusts Act equates his position to that of a trustee in respect of his liabilities and disabilities. Section 95 runs thus:

"95. The person holding property in accordance with any of the preceding sections (from Section 80 onwards of Chapter IX, of certain obligations in the nature of trusts) of this Chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it . . ."

74. In Palmer's Company Law, twentieth edition, at page 517, referring to the position of directors, and in what sense they are trustees, it is stated :

"Directors are not only agents, but they are in some sense and to some extent trustees or in the position of trustees, but their position differs considerably from that of ordinary trustees, and the strict rules applicable to such trustees do not apply in all respects to directors."

75. As early as in 1742, in *Charitable Corporation v. Sutton* (1742) 2 Atk. 400, Lord Hardwicke L.C. held that committee men or directors of a chartered corporation, who had misapplied its funds and committed breaches of its bye-laws, were liable as trustees for "breach of trust". In *York and North Midland Ry. v. Hudson*, (1853) 16 Beav. 485, directors who had improperly dealt with funds of the company were held liable as trustees. Romily M. R. there said :

"The directors are persons selected to manage the affairs of the company for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by shareholders therefore, that shares or any other species of property shall be at the disposal of directors, is a resolution that it shall be at the disposal of trustees ; in other words, that the persons entrusted with that property shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to benefit their cestui que trust."

76. The dual character of directors is, perhaps, best expressed in Lord Selborne's words in *G. E. Ry. v. Turner*, (1872) L.R. 8 Ch. App. 149,. where he said:

"The directors are the mere trustees or the agents of the company--trustees of the company's money and property ; agents in the transaction which they enter into on behalf of the company."

77. Sir George Jessel expressed himself similarly in *In re Forest of Dean, etc. Co.*, (1878) 10 Ch. D. 450. :

"... directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control ..."

78. At page 518, the learned author states :

"For most purposes it is sufficient to say that directors occupy a fiduciary position and all the powers entrusted to them are only exercisable in this fiduciary capacity."

79. No doubt, as pointed out by Palmer, the fiduciary relationship of a director exists with the company; a director is in no sense a trustee for individual shareholders.

80. Passages to similar effect are found in Buckley on the Companies Acts, thirteenth edition. At page 864 it stated :

"The directors of a company fill a double character. They are (i) agents of the company, and (ii) trustees for the shareholders of the powers committed, to them."

81. Expanding the latter, at page 865, instances of the powers are given, as, for instance, of the power of approving transfers of shares; of the power of allotment of shares ; of the power of employing the funds of the company ; of

the power of making calls ; or receiving payment of calls in advance ; of the power of forfeiting shares, etc., and it is pointed out that as trustees they may be rendered liable for their misuse of their powers. It comes to this that the directors are trustees with reference to their powers of employing the funds of the company, and for misuse of this power they could be rendered liable as trustees. For the purpose of the present discussion it is unnecessary to consider what would amount to misuse, and when, in the case of imprudence in the exercise of powers, it would amount to actionable negligence or crassa negligentia.

82. Buckley summarises the position thus at page 869 :

"The assets of the company are entrusted to the directors to be applied for certain defined objects, and they are responsible as for a breach of trust if they apply them to other objects."

83. It is also noticed that the liability incurred by means of a breach of trust is not discharged by liquidation proceedings, and does not die with the person (page 870).

84. In Halsbury's Laws of England, third edition, at page 307, paragraph 616, it is stated thus :

"A director who has misapplied or retained or become liable or accountable for any money or property of the company, or who has been guilty of any breach of trust in relation to the company must make restitution or compensate the company for the loss. Where the money of the company has been applied for purposes which the company cannot sanction, the directors must replace it, however honestly they may have acted . . .

The estate of a deceased director has always been liable for his breaches of trust."

85. In Buckley on the Companies Acts, thirteenth edition, at page 678, with reference to the liability of the estate of a deceased director, the position is thus stated:

" Before the enactment of Law Reform (Miscellaneous Provisions) Act, 1934, Section 1, the maxim *actio personalis moritur cum persona* applies to prevent the estate of deceased directors, etc., being rendered liable in any proceedings which were of the nature of an action of negligence (as where it was sought to charge directors for loss beyond the amount of the money placed in their hands) or of the nature of an action for deceit (as where it was sought to charge directors on the ground of fraudulent misrepresentation in the prospectus). But it could always be rendered liable in respect of any claim in the nature of a breach of trust, as for payment of dividends out of capital."

86. In Gore-Browne, Handbook of Joint Stock Companies, forty-first edition, at page 374, it is stated :

"In the case of the death of a director his estate remains liable for any breach of trust he may have committed (including any wrongful dealing with the company's property, such as a payment of dividend out of capital or sale of its assets at an undervalue)."

87. The distinction as to cases in which there is no survival of causes of action is found at page 182 of the book, where it is stated :

"In regard to actions for deceit and other wrongs, the principle *actio Personalis moritur cum persona* may be mentioned. Under this principle, with regard to actions for wrongs, independent of contract, done either to or by a deceased person in his lifetime, his legal personal representative could neither sue nor be sued. This is still so in some cases, e.g., defamation. Even at common law this principle is subject to the modification that where loss results to the estate of the plaintiff or direct profit to that of the defendant, the action survives to the extent of the loss or profit."

88. In *Williams on Executors and Administrators*, fourteenth edition, volume 2, referring to the liability of the executor or administrator in respect of the acts of the deceased, the legal position is thus enunciated at page 1009 :

"The law which governs this subject is based partly upon the characteristics which surrounded the ancient forms of action. Some forms of action, such as debt, trespass and trover, did not at common law survive against personal representatives. Others, such as *detinue*, *replevin* and *assumpsit*, did so survive. Further, it was often possible to substitute a form of action which survived in place of some other, and possibly more appropriate, form which did not survive.

The general rule has been established from very early times, with respect to such personal claims as are founded upon any obligation, contract, debt, covenant or other duty, that the right of action on which the testator or intestate might have been sued in his lifetime, survives his death, and is enforceable against his executor or administrator."

89. At page 1016, with reference to the directors, the legal position is stated thus:

"Formerly an action for damages for misrepresentation or negligence did not survive against the personal representatives of a deceased director of a company, except in so far as the estate of the deceased director had benefited directly from the misrepresentation or negligence. Nor did the liability for untrue statements made in a prospectus u/s 37 of the Companies Act, 1929 (now replaced by Section 43 of the Companies Act, 1948), survive.

It is clear, however, that an action for misrepresentation or negligence now survives against the personal representatives of the deceased director. Similarly, the liability u/s 43 of the Companies Act, 1948, which is liability in tort, now survives, since the rock upon which the action against the personal representatives formerly foundered--the principle *actio personalis*, etc.--is now

destroyed. Liability under the provisions of earlier Acts now replaced by Section 333 of the Companies Act, 1948, seems, however, to have been created by the courts on a rather different footing. In *In re Felton's Executors*, (1865) L.R. 1 Eq. 219 an action based on the corresponding section of the Act of 1882 against the personal representatives of the deceased director was dismissed, not on the ground that the action was a personal one which died with the director, but on the ground that the procedure was inapplicable to the case of personal representatives."

90. Section 333 of the English Companies Act, 1948, corresponds to the old Section 165, there, that is, Section 235 of the Indian Companies Act, 1913, or Section 543 of the present Companies Act. The liability which is enforced under the summary procedure by these sections, and that is the liability that is sought to be agitated in the present proceedings, the learned author points out, is not in tort, but on a different footing. Of course, as pointed out by the learned author, at page 1017, the procedure by summons may not survive the death.

91. In *Flitcroft's case*, (1882) 21 Ch. D. 519 the directors of a limited company for several years presented to the general meetings of shareholders reports and balance-sheets in which various debts known by the directors to be bad were entered as assets, so that an apparent profit was shown though in fact there was none. The shareholders, relying on these documents, passed resolutions declaring dividends, which the directors accordingly paid. An order having been made to wind up the company, the liquidator applied u/s 165 of the Companies Act, 1862, for an order on the directors to replace the amount of dividends thus paid out of capital. Referring to the position of directors, Bacon V. C. observed :

"One must have regard to the position of directors of a joint stock company. It is said they are not trustees. Answering that objection in general, I should say they are trustees and nothing else. They have interests of their own, but they are trustees of the money which may be collected by subscriptions, and of all the property that may be acquired ; they have the direction and management of that property, and at the same time they have incurred direct obligation to the persons who have so entrusted them with their money."

At page 527, it is stated :

"Then it has been gravely argued that because one of the respondents has become bankrupt, no order can be made against him or his estate, inasmuch as all that he did was to commit a tort. It is no tort whatever; it cannot be called a tort, nor is this an action for damages. If you establish that the man committed a breach of trust, you have only to count what is the amount of the liability arising out of that breach of trust, and there is the decree and the order made at once."

92. On appeal, Jessel M.R., referring to the directors as quasi-trustees for the company, held that if they paid away the assets to the shareholders, they were liable to replace them. Brett L. J., referring to directors, observed at page 535 :

"They are trustees for the company, not for the individual shareholders. The liquidator represents the company, and is bound to discharge towards the creditors all the duties which the company owes them. . It is therefore his duty when such a breach of trust as this is discovered to get a return of the assets improperly expended that they may be applied in payment of debts. The act of the directors is impeached as a breach of trust, not on the ground of tort or misfeasance. There are persons who may be made liable u/s 165, without having been guilty of a breach of trust; but where the person charged under that section is a trustee, the act which brings him within the section is a breach of trust."

93. On this ground it was held that the Statute of Limitations was no bar. The plea of limitation was not available before 1890 for breaches of trust, and it was only by the Trustee Act, 1882, which came into operation on the first of January, 1890, that the trustees were permitted, by Section 8, to rely upon lapse of time, except in certain cases enumerated, in a subordinate clause, namely, where the claim was founded on fraud or where it was to recover trust property, retained by the trustee or converted to his use. This section was not confined to express trustees.

94. In *Ramskill v. Edwards*, (1885) 31 Ch. D. 100, the directors of a company advanced some moneys of the company upon an unauthorised security, and two sums so lent were lost. One of the directors, against whom a judgment had been obtained by the company for the amount lost, commenced the action claiming contribution from his co-directors and the administrator of one of his co-directors, who had died since the issue of the writ. On behalf of the deceased director the claim for contribution was sought to be met with the plea that inasmuch as the director was dead, his estate could not be made liable. Pearson J. overruled the objection observing :

"It was undoubtedly a bold contention, and if it succeeded, the result would be that any defaulting trustee would have only to die, and his estate would cease to be liable for his misfeasance. Not only is there; no authority for such a proposition, but it seems to me that it would be most pernicious to allow it."

95. This decision is sought to be distinguished for the appellants as a case of claim for contribution by one of the directors, who had been called upon to pay the amount by the company. But the court had to go into the question of the primary liability of the deceased director to the company to make him liable to contribute.

96. In *In re Sharpe, In re Bennett, Masonic and General Life Assurance Company v. Sharpe*, (1892) L.R. 1 Ch. D. 154 by the articles of association of a company incorporated in 1868, it was provided that interest on the money paid upon the share should be paid to the shareholders until otherwise determined by the directors ; and that no dividend or bonus should be payable except out of the profits. No profits were made by the company; but the directors paid interest to the shareholders out of the capital of the company until 1878, when the Board of

Trade interfered and the directors ceased to pay interest. On the company being wound up in 1886, the liquidator commenced an action in 1889 against the personal representatives of one of the directors, who had been functioning as such from 1869, till his death in 1883. The liquidator sought to make the estate of the deceased director liable for the money paid as interest to the shareholders out of capital, while he was a director. For holding that the payment of interest out of capital, when there were no profits, was ultra vires, notwithstanding the clause in the articles of association and that the directors being in the position of trustees, the Statute of Limitations was no bar to the action (being prior to 1890), Lindley L.J. observed ;

"As soon as the conclusion is arrived at that the company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted."

97. It is further observed at page 167 :

"Now a director of a company is certainly not a mere agent. It is his duty, amongst other things, to protect the company and to enforce its rights even against himself, and the conflict between his interest and his duty when he has misapplied the company's money prevents the Statute of Limitations from applying to an action brought against him by the company in order to recover such money. Although it is true that the company may be set in motion by other persons, it is by no means easy to do so, and these considerations have induced the courts to treat a misapplication of the money of a company by its directors as a breach of trust to which the Statute of Limitations has no application--at least, while they are directors : see Flitcroft's case, which is a clear decision of this court on this very point. The liability of a director, in the case supposed, being treated as a breach of trust, I apprehend that the Statute of Limitations would not apply, even after a director had ceased to be a director."

98. At page 170 of the report, there is a further observation, in considering what interest should be awarded, that:

"The trustee is treated as if he had the funds still in his hands."

99. In *In re Faure Electric Accumulator Company*, (1889) L.R. 40 Ch. D. 141 it is observed that if the directors of a limited company apply the money of the company for purposes so outside its powers that the company could not sanction such application, they may be made personally liable as for a breach of trust: but if they apply the money of the company, or exercise any of its powers, in a manner which is not ultra vires, then a strong and clear case of misfeasance must be made out to render them liable for a loss thereby occasioned to the company. Kay J., discussing the real position of the directors of a joint stock trading company, on a summons u/s 165 of the Companies Act, on the liquidation of the company, while no imputation whatever was made upon the honesty or the honourable conduct of any of the directors, but it was alleged that

they had committed breaches of trust in making certain payments out of the moneys of the company and in permitting the transfer of certain of its shares, observed at page 150 of the report thus:

"With respect to the capital of the company which is under their management, it has been said that they are "quasi-trustees" for the company : Flitcroft's case. In that and other respects they are, "to a certain extent, trustees" (Lindley on Partnership). In the language of Lord Romilly, in *York and North Midland Ry. Co. v. Hudson*, (1845) 16 Beav. 485 "The directors are persons selected to manage the affairs of the company, for the benefit of the shareholders ; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely." They certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or a will. One obvious distinction is that the property of the company is not legally vested in them. Another and perhaps still broader difference is that they are the managing agents of a trading association, and such control as they have over its property, and such powers as by the constitution of the company are vested in them, are confided to them for purposes widely different from those which exist in the case of such ordinary trusts as I have referred to, and which require that a larger discretion should be given to them. Perhaps the nearest analogy to their position would be that of the managing agent of a mercantile house to whom the control of its property and very large powers for the management of its business are confided; but there is no analogy which is absolutely perfect. Their position is peculiar because of the very great extent of their powers and the absence of control, except the action of the shareholders of the company."

100. Reference was made to the observation of Jessel M. R. in *In re Forest of Dean Coal Mining Company*, (1878) L.R. 10 Ch. D. 450 that the directors "are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company".

101. The case, *Concha v. Murrieta*, (1889) L.R. 40 Ch. D. 543 though not a case of directors of a company, effectively illustrates the scope and limitation of the maxim. It related to the estate of a father who, under the law of Peru, was entitled to administer the estate of his infant child, and to receive for his own benefit the income during the child's minority. It was alleged in the case that the father, during the infancy of his daughter, improperly sold a part of her property for much less than it proved to be worth. After his death the daughter claimed compensation out of his estate for the loss occasioned by the disadvantageous sale. It was held that the father stood in such a fiduciary position towards the daughter that the rule *actio personalis moritur cum persona* did not apply to the demand, and that, as the sale had been made without justification, the father's estate must account for the amount which would have been received from the property had it been retained in specie. It should be noted that it was not a case of any unjust enrichment and the estate of the wrongdoer had not benefited by the sale. Dealing with the applicability of the maxim *actio personalis*, etc., Cotton

L.J. observed at page 553 :

"It is true that no action for a tort can be revived or commenced against the representatives of the person who committed it; but the case is quite different where the act is not a mere tort, but is a breach of a quasi-contract, where the claim is founded on breach of a fiduciary relation, or on failure to perform a duty. Here the father, though I do not call him a trustee, was in a position in which he owed duties of a fiduciary character to his daughter. In the very careful judgment of Lord Justice Bowen in *Philips v. Homfray*, (1883) L.R. 24 Ch. 439 cases depending on breach of contract, express or implied, are excepted from the judgment. Here there is what we call a quasi-contract, the law implying a contract that a man will faithfully perform the duties which he has undertaken. Juan Jose Concha undertook a duty in consequence of his position, and losses arising from his breach of it can be followed up against his estate."

102. Adopting the observation of the learned Lord Justice, the director in the case of a company undertakes a duty in consequence of his position, and losses arising from his breach of it could be followed up against his estate.

103. In *In re Lands Allotment Company*, (1894) L.R. 1 Ch. D. 616 it was held that, where directors, who had no power to invest the capital of the company in the shares of other companies, so invested, they were guilty of breach of trust. Holding that the directors of the company were trustees as to moneys of the company which had come into their hands, or were under their control within the meaning of the Trustee Act, 1888, the directors in question in that case were held protected by the Statute of Limitations, as their protection was not taken out by the exceptions. At page 631, Lindley L. J. observed :

"Then, if it was an improper transaction, all those directors who were parties to this improper investment, for in this point of view it was improper, would naturally and obviously be liable to make good the money. We are asked to say that the directors are liable for these moneys upon the footing that they committed a breach of trust, but that they are not entitled to the benefit of the Statute of Limitations which was passed for the benefit of trustees. I cannot be a party to any decision so supremely absurd. Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees, and it has always been held that they are not entitled to the benefit of the old Statute of Limitations because they have committed breaches of trust and are in respect of such moneys to be treated as trustees."

104. Kay L.J. observed at page 638 :

"Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or quasi-trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company,

although those funds are not absolutely vested in them but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust. I do not believe that there has ever been any deviation from the language of the late Sir George Jessel in the case of *In re Forest of Dean Coal Mining Company*, Sir George Jessel said this:

"Directors are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company."

So that, when they get assets of the company under their control, or into their hands, and deal with them in a way which is beyond the powers of the company, they are liable as for a breach of trust."

105. The law in India regarding the nature of the liability of directors has not been different. In *New Fleming Spinning & Weaving Company v. Kessowji Naik*, I.L.R.(1885) Bom. 373, a decision of Scott J. in original civil, the suit was instituted by the official liquidators of the plaintiff company against the directors of the company and the official assignee of the estate and effects of the partners in the firm of Nursey Kessowji & Company, one of the partners of which firm was also a director of the company in liquidation. The action was founded on the claim that the directors began to borrow money upon the credit of the company in liquidation far in excess of the legitimate wants of the company, and to pay over the moneys so borrowed to the firm of Nursey Kessowji & Company to be used by that firm in speculative business. The latter firm failed having in its hands, when it stopped payment, a sum of over Rs. 8,80,000, belonging to the company in liquidation. The liquidators charged the directors with gross negligence in raising loans or permitting them to be raised and in permitting moneys so borrowed to remain in the hands of the firm which failed, to be applied by that firm to its own purpose. Two of the directors died after the institution of the suit, and the sons of one were made parties. Considering the question as to the survivorship against the sons of the liability of the deceased director, the learned judge said (at page 397):

"The rule of common law on this point was laid down by Lord Mansfield (*Cowp.* 376);

"Where property is acquired which benefits the testator, then an action for the property shall survive against the executor." But the Courts of Equity have extended this liability to the representatives of a person who stood in a fiduciary position, even where the estate has not been benefited by the breach of trust--*Walsham v. Stainton*, (1863) 1 D.G. & J. & Sm. 678. It was urged on behalf of *Sakerchand Nagerdas* (the deceased director) that this liability, if any, did not survive his death as a charge on his assets, because it was, at the most, a mere personal default productive of no benefit to his estate. Two well-known cases were cited in support of this contention--*Overend, Gurney & Company v. Gurney*,

(1869) L.R. 4 Ch. App. 701 and *Peek v. Gurney*, (1873) 6 H.L. Cas. 377, 393. But neither of those cases are on all fours with the present case. In the first case Lord Hatherley, in his judgment, says that he would have decided differently if the charge had been one of a breach of trust in the disposal of money actually entrusted to the care of the defendants. In the second case Lord Chelmsford, in his judgment, expressly stated that the case before him was not one of breach of trust, but of inducing people to subscribe by deceit and misrepresentation. The present case is one distinctly of breach of trust; and the English law is clear on that point. It is laid down by Sir W. Grant in *Montfort v. Cadogan*, (1810) 17 Ves. 489. , where he says :

"A question was raised by Cadogan's executors, whether, as this was a mere personal default productive of no benefit to his estate, his assets are liable to make compensation." But in *Scurfield v. Howes*, (1790) 3 Bro. C.C. 90.the trustee's estate had derived no benefit from the breach of trust, and in *Adair v. Shaw* (1803) Sch. & Lef. 243., Lord Redesdale says:

"It has been the constant habit of Courts of Equity to charge persons in the character of trustees with the consequence of a breach of trust, and to charge their representatives also, whether they derive benefit from the breach of trust or not."

I have already said that misfeasance of a director constitutes a breach of trust. It is more than mere negligence, which consists in the omission to do something which a reasonable man would do, or the doing of something which a reasonable man would not do. Negligence depends upon the public duty which is incumbent upon everyone to exercise due care in his daily life ; but a breach of trust depends upon the neglect of some special duty undertaken in regard to some specified person or body of persons. In the former case the liability dies with the person ; in the latter it follows his estate after his death."

106. This case has been followed by this court in *Ramaswami v. Streeramulu Chetti*, (1896) T.L.R. 19 Mad. 149 That case arose out of an application under the Indian Companies Act, 1882, by the official liquidator, praying that the directors of the company in liquidation be ordered to pay over to him a sum of money which had been improperly distributed among the shareholders. Of course, the question was whether Article 35 of the Limitation Act would apply to an application. We are not on that point. But, while considering the nature of the act, it was observed:

"On the question whether the act complained of was a breach of trust or not we may point out that in an application u/s 165 of the English Companies Act, 1862 (which corresponds to Section 214 of the Indian Companies Act, 1882), it was held that the relationship of trustee and cestui que trust subsists between the directors of joint stock companies and the shareholders."

107. And *New Fleming Spinning and Weaving Company Ltd. v. Kessowji Naik*, I.L.R.(1885) Bom. 373. was relied on, amongst others, for the proposition that

the misfeasance of a director was a breach of trust.

108. Again in *Malik v. Thiruvengadaswami Mudaliar*, another, [1949] 19 Comp. Cas. 311. Division Bench of this court has relied upon the above case, *New Fleming Spinning and Weaving Company Limited v. Kessowji Naik*. There the question arose whether, where a director is ordered to pay in misfeasance proceedings a sum of money, he can be arrested in execution proceedings, though he was a pauper and was quite unable to raise the money to discharge the decree. This court held that the director of a company occupied a fiduciary position with regard to the members of the company, and relied upon the above cases of *New Fleming Spinning and Weaving Company Limited v. Kessowji Naik* and *Ramaswami v. Streeramulu Chetty*, I.L.R.(1896) Mad. 149.

109. Our attention has not been drawn to a single case where a claim against a director, based on a breach of trust, has been held not to survive against his estate in the hands of his legal representatives. In *Phillips v. Homfray*, (1883) L R. 24 Ch. D. 439, 454 the cause of action was in tort, and there was no pre-existing fiduciary relationship. It was not a case of a breach of trust, and *Bowen L.J.*, taking up for consideration the true limit and meaning of the rule that personal action dies upon a defendant's death, and whether there was, or could be, in the circumstances raised by the case, a profit received by his assets, which the plaintiffs could follow, observed at page 454 :

"The only cases in which, apart from questions of breach of contract express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or money. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there."

110. That case established only one of the exceptions to the applicability of the maxim, *actio personalis moritur cum persona*, in a case of tort--claim for recovery by appropriate form of action, when there was enrichment of the tortfeasor's estate.

111. The other two cases, *Peek v. Gurney*, (1873) 6 H.L. Cas. 377, 394 and *Geipel v. Peach*, (1917) L.R. 2 Ch. D. 108. relied upon for the appellants are also cases of tort. It is observed in *Geipel v. Peach* at page 114 :

"There being then a tort, although it is one created or modified by statute, it seems to me that such a tort has in general all the ordinary incidents of a common law tort, and that an action in respect of it is amenable to the maxim,

actio personalis moritur cum persona, especially having regard to the fact that the statutory liability is so analogous to the old liability for deceit."

112. We have also the decision of the Lahore High Court in *People's Bank of Northern India Ltd. v. Des Raj*, [1935] 5 Comp. Cas. 296. and *People's Bank of Northern India Ltd. v. Hargopal*, [1935] 5 Comp. Cas. 275.. In *People's Bank of Northern India Ltd. v. Des Raj*, the case arose out of a suit by a bank against two directors of a branch office for compensation for misconduct in sanctioning a loan in violation of the rules. Pending the suit, one of the directors died, and the contention was raised by the sons, who had been brought on record as legal representatives, that the right to sue did not survive against them. It was urged that the suit was really for compensation for loss alleged to have been suffered by the bank due to tortious acts, independent of contract, committed by the deceased director. Jai Lal J., dealing with this contention, observed :

"In the first instance, I do not agree that the suit is for compensation merely for a tort committed by Hargopal. It is a suit for breach of a fiduciary obligation towards the bank by Hargopal and thus arises out of the breach of a quasi-contract. Hargopal was one of the local directors of the bank and according to the rules governing the conduct of the local directors he was not competent to sanction this loan and he defied those rules fraudulently. Such rules must be deemed to be a contract between the bank and Hargopal. Secondly, it may be that, as was contended by respondent's counsel, according to the English law, a suit for compensation for a mere tort does not survive against the legal representatives of the person who committed the tort, but the law in India appears to be different in this respect."

113. Reference was made to the decision in *Phillips v. Homfray* and the observation of Baggallay J. in that case and of Cotton L.J. in *Concha v. Murrieta*, (1883) L.R. 24 Ch D. 439 which we have referred to already. Jai Lal J. held that *Phillips v. Homfray*, (1889) L.R. 40 Ch. D. 543. was not authority in support of the contention that there was no survival of the cause of action. For upholding the liability of the legal representatives, reliance was placed in that case also on Section 306 of the Indian Succession Act. While accepting the contention that under the Indian Succession Act also the right to sue would survive against the legal representatives of the deceased director, the learned judges observed, with reference to the language of Section 306, thus:

"It is true that the section governs the liability of the executors and administrators, but there is no reason to hold that the liability of the heirs, who have not taken out probate or letters of administration, stands on a different footing."

114. But we have pointed out in the earlier part of this judgment that our court in *RM. P. KP. AR. Arunachalam Chettiar Vs. V.S. alias S.V.V. Subramanian Chettiar* (died) and *Veerappa Chettiar* brought on record as L.R. of deceased, has taken the view that Section 306 is confined to executors and administrators of a

deceased person, and does not apply to the heirs and other legal representatives. The other two Lahore cases, above cited, also place reliance on Section 306 of the Succession Act.

115. We may point out that in *Official Liquidators v. Jugal Kishore*, [1938] 8 Comp. Cas. 300, Harries J. also has dissented from the view as to the applicability of Section 306 of the Indian Succession Act expressed in the Lahore decisions. There is a full discussion of the scope of Section 306 of the Succession Act, with particular reference to the reasoning in the decisions of the Lahore High Court and Harries J. holds :

"In my judgment, however, the present applicants can obtain no assistance whatsoever from the provisions of Section 306, Indian Succession Act. In terms that section only gives the right to continue proceedings against an executor or administrator of the deceased defendant or opposite party. The section does not give a right to continue proceedings against heirs as representing an estate . . . The terms "executors or administrators" are defined in Section 2 of the Act.

When terms are defined in an Act of the legislature, such terms must be given the meanings contained in the definitions wherever the terms are used in a statute, unless it is clear that they must be given some different meaning."

116. In view of the decision of the Division Bench of this court, cited above, as to the limitations in the applicability of Section 306 of the Indian Succession Act, we would rest our decision that the cause of action survives in a case like the present against the legal representatives on other grounds. The foundation of the liability is not on mere tort, but on the breach of fiduciary relationship, the failure to perform duties undertaken by a person in the position of a trustee. The liability in such cases is as on a breach of trust, or, as observed by Cotton L.J. in *Concha v. Murrieta*, (1889) L.R. 40 Ch. D. 543 on breach of a quasi-contract. Not being laid on tort, in the light of the foregoing discussion, the maxim *actio personalis moritur cum persona* does not apply to the present claim by the liquidators, and there is survival of the claim against the appellants.

117. Of course, we do not say that the maxim has no application at all to cases outside torts. Contracts of purely personal nature, such as contracts for personal service, will get discharged by the death of either party. Claims for restitution of conjugal rights, custody and the like, will also get extinguished. But it will be seen that the extinction is by reason of the very nature of the claim--the impossibility of enforcement. Doubtless, the liability of the representative originates from, and depends entirely upon, the liability of the deceased, so that a representative would have all the defence open to the deceased, and could rely upon any period of limitation which the deceased could have maintained. The liability is of the estate of the deceased and the representative cannot rely upon any limitation period which the deceased himself could not have set up. The contention that there is no survival of the cause of action against the estate of Swaminatha Iyer, now represented by his sons, fails, and the first point is thus

found against the appellants.

118. We shall now take up for consideration the question whether the claim against the appellants is barred by limitation. This question involves the interpretation of Section 45D of the Banking Companies Act. We have heard able arguments, presented with considerable lucidity, on the rather complex question, as would be seen presently, from Mr. V.K. Thiruvengkatachari, learned counsel appearing for the appellants, and from learned counsel for the official liquidators, and we have given our most anxious consideration to the points raised.

119. It would be convenient, if a few relevant dates are set out once again. The petition for winding up of the company was presented on 26th July, 1947. A provisional liquidator was appointed on 19th August, 1947, and after the passing of the order for winding up on 5th November, 1947, the present respondents were, by order dated 12th January, 1948, appointed official liquidators. As already seen, an application u/s 235 of the Indian Companies Act was taken out even in 1950. Before final orders were passed thereon, Swaminatha Iyer, the director, whose sons are the present appellants, died on 16th August, 1959. The present proceedings u/s 45A and Section 45B of the Banking Companies Act against the representatives of the deceased director was filed on 25th January, 1963. Of the three counts, on which the claim is based, the first count, viz., payment of dividends out of capital, is stated to be between the years 1941 and 1946. Misapplication of the funds of the bank, by utilising the same for the purchase of the Coorg Coffee Plantations Limited, is stated to have commenced from about 11th August, 1945, and continued till the crash of the bank. Under the third count, improper advances, fictitious advances of loans, by the managing director to cover up fraudulent abstraction of funds, etc., the liability starts, the earliest, from 8th March, 1945.

120. There can be no doubt that prior to the Banking Companies Act, as the summary procedure u/s 235 was not available against representatives, action against representatives would be governed by the law relating to the limitation of suits in such cases. It is only by virtue of the provisions of the Banking Companies (Amendment) Act (52 of 1953), which came into force on 30th December, 1953, giving exclusive jurisdiction to the High Court, that proceedings against representatives have been initiated under the provisions of Sections 45A and 45B of the Act. The Banking Companies (Amendment) Act (52 of 1953) was preceded by an ordinance containing similar provisions, the ordinance coming into force on 24th October, 1953.

121. The principal contention on behalf of the appellants is that, as on 24th October, 1953, all the claims against the representatives in respect of the cause of action would be barred by limitation. It is contended that the appropriate article applicable to the claims will be Article 36 of the Limitation Act. It is submitted that even if Article 120 should be applied, even the latest of the items for which the directors were sought to be made liable, being dated 5th July, 1947, the whole claim would be barred by limitation. Learned counsel for the

appellants contended that if a suit would be barred on 24th October, 1953, to the extent the suit was barred, the application under the Banking Companies Act would be equally barred. As contended by Mr. V.K. Tiruvenkatachari, the test no doubt would be whether the application filed on 25th January, 1963, would be in time, if it had been filed as a suit against the deceased Swaminatha Iyer. It is well settled that, unless a statute otherwise provides, the limitation for a suit must be determined by the law of limitation prevailing at the time when the suit is instituted, and this brings for consideration the scope and interpretation of Section 45-O of the Banking Companies Act.

122. Section 45-O, under the marginal heading "Special period of limitation", is found in Part III-A of the Banking Companies Act, which is headed "Special Provisions for Speedy Disposal of Winding up Proceedings." Section 45-O runs thus :

"Section 45-O.--(1) Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908, or in any other law for the time being in force, in computing the period of limitation prescribed for a suit or application by a banking company which is being wound up, the period commencing from the date of the presentation of the petition for the winding up of the banking company shall be excluded.

(2) Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908, or Section 543 of the Companies Act, 1956, or in any other law for the time being in force, there shall be no period of limitation for the recovery of arrears of calls from any director of a banking company which is being wound up or for the enforcement by the banking company against any of its directors of any claim based on a contract, express or implied ; and in respect of all other claims by the banking company against its directors, the period of limitation shall be twelve years from the date of the accrual of such claims (or five years from the date of the first appointment of the liquidator, whichever is longer).

(3) The provisions of this section, in so far as they relate to banking companies being wound up, shall also apply to a banking company in respect of which a petition for the winding up has been presented before the commencement of the Banking Companies (Amendment) Act, 1953."

123. Part III-A, now current, in which Section 45-O is found, was brought in as an amendment of the Banking Companies Act, 1949, Act 52 of 1953, substituting the present Part III for the former Part III. Amended Act 52 of 1953 came into force on 30th December, 1953. The amending Act was preceded by an ordinance, Ordinance No. 4 of 1953, dated 24th October, 1953, containing similar provisions. It is the interpretation of Section 45-O as found in the ordinance dated 24th October, 1953, and subsequently replaced in the Act, that we are now called upon to consider.

124. A reference to the prior provisions of law relating to the banking companies is, in our view, necessary. The Indian Companies Act of 1913, as originally

enacted, applied to all kinds of companies, including banking companies. Summary proceedings for misfeasance, breach of trust, etc., against delinquent directors and officers of the company were provided for u/s 235 of the Companies Act, and by Clause (3) of Section 235 it was provided that, "The Indian Limitation Act, 1908, shall apply to an application under this section as if such application were a suit." In 1936, the Act as a whole was substantially amended, and, among other amendments, the time-limit in Section 235, Clause (1), was enlarged by introducing into it a time-limit of three years within which the official liquidators, a creditor or contributory, should or might launch misfeasance proceedings ; and the old Sub-section (3) applying the Limitation Act was removed altogether. u/s 235(1) an application by the liquidator could be made within three years from the date of the first appointment of the liquidator in the winding up or of the misapplication, retainer, misfeasance breach of trust, etc., whichever is longer. The effect, as would be seen, was to give an extended period of limitation. In *Narasimha Ayyangar v. Official Assignee of Madras*, I.L.R. (1931)Mad. 153, 60 M.L.J. 280, 287, AIR 1931 Mad. 58 this court had held that the directors of a company were not express trustees within the meaning of Section 10 of the Limitation Act, and could, consequently, plead the bar of limitation. To Section 235, as it stood unamended then the Limitation Act applied, and it was found in that case that, whether Article 36 or Article 120 applied, the claim was barred. It will be interesting to note that Beasley J. in his judgment in the same case, in the original jurisdiction which was affirmed, observed that he arrived at his conclusion :

"... with great reluctance, because I am of opinion that in this country it must necessarily take a very long time before the official liquidator appointed in the winding up is able to bring to light acts of misfeasance on the part of the company's directors. "

125. By the amendment of the Companies Act in 1936 (Act 22 of 1936), certain special provisions were added in respect of banking companies in Part X-A, and in 1946 the Banking Companies (Inspection) Ordinance came into force. In the same year was passed another Act, the Banking Companies (Restriction of Profits) Act. This was followed up by the Reserve Bank of India (Temporary Amendment) Ordinance, 1947, and then we got the Banking Companies Act X of 1949. This Act, entitled the "Consolidating and amending Act of the law relating to Banking Companies", provided by Section 2 that the provisions of the Act shall be in addition to, and not, save as otherwise expressly provided by the Act, in derogation of the Companies Act and any other law for the time being in force. This has replaced Part X-A of the Companies Act. In the Banking Companies Act, as originally enacted, Part III-A, providing for certain special provisions for speedy disposal of winding up petitions, was not present. By Ordinance 23 of 1949, Part III-A, consisting of Sections 45A to 45H, was first inserted in the Act on 19th September, 1949. This was later replaced by the Banking Companies (Amendment) Act of 1950, which came into force on 18th March, 1950. The Amending Ordinance of 1949 and the Amendment Act of 1950 introduced into

the Act a special provision in regard to limitation, providing an extended period in certain cases. Section 45F of Part III-A runs thus :

"Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 (9 of 1908), or any other law for the time being in force, in computing the period of limitation prescribed for any suit or application by a banking company, the period of one year immediately preceding the date of the order for the winding-up of the banking company shall be excluded."

126. Then came the Banking Companies Ordinance 24 of 1953, completely overhauling the then existing Part III-A already referred to. The former sections were deleted, and Sections 45A to 45X providing, as it were, a complete code in respect of banking companies in liquidation, introduced. Section 45-F went out of the scene, and Section 45-O, above set out, providing a special period of limitation, came into force.

127. It may be necessary here to point out that there was a further enlargement of the period of limitation specified in Section 45-O, wherein by Act 33 of 1959, which came into force on 1st October, 1959, to Sub-clause (2) were added the following words, at the end of Sub-clause (2): "or five years from the date of the first appointment of the liquidator, whichever is longer." Section 45-O, as unamended in 1959, provided for the third category in Sub-clause (2) of Section 45-O, a period of twelve years from the date of the accrual of the cause of action only.

128. While interpreting Section 45-O, we have to bear in mind the overriding force of Part III-A of the Banking Companies Act over other laws, and the exclusive jurisdiction conferred on the High Court with reference to claims in respect of banking companies. Section 45A provides :

"The provisions of this Part and the rules made thereunder shall have effect notwithstanding anything inconsistent therewith contained in the Companies Act, 1956, or the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1898, or any other law for the time being in force or any instrument having effect by virtue of any such law but the provisions of any such law or instrument in so far as the same are not varied by or inconsistent with the provisions of this Part or rules made thereunder shall apply to all proceedings under this Part."

129. Section 45-B confers exclusive jurisdiction on the High Court to entertain and decide any claim made by or against a banking company, which is being wound up. The non-obstante clauses in Sub-clauses (1) and (2) of Section 45-O further emphasise the overriding effect of the provision as to limitation in Part III-A. Sub-clause (3) of Section 45-O expressly states that the provisions of the section, in so far as they relate to banking companies being wound up, shall also apply to a banking company in respect of which a petition for the winding up has been presented before the commencement of the Banking Companies (Amendment) Act, 1953. The language is quite clear that the section applies to winding up proceedings in respect of a banking company, which were pending at

the time the Act of 1953 came into force, having commenced on a winding up petition presented before the commencement of the Act.

130. To take up first Sub-clause (1) of Section 45-O, it will be seen that; while the earlier Act 20 of 1950 provided for the exclusion of a period of one year immediately before the date of the order for winding up, in the computation of the period of limitation, the effect of Sub-clause (1) is to arrest the running of limitation after the presentation of the petition for winding up of the banking company. One of the principal contentions of Mr. V.K. Thiruvengkatachari in regard to the effect of Section 45-O is that Sub-clauses (1) and (2) are mutually exclusive. It is the contention of the learned counsel that Sub-clause (2) provides for a special period of limitation as regards claims against directors, and that Sub-clause (1) would apply only to claims against others by the banking company. Now, so far as Sub-clause (1) is concerned, it does not repeal or purport to prescribe a period of limitation different from the Limitation Act or any other law. But it provides that in computing the period of limitation the period commencing from the date of the presentation of the petition for winding up shall be excluded. Section 45-O(1) comes into play in applying the period of limitation prescribed by the Limitation Act where applicable, or by any other law in force, as may be applicable. Of course, the provision being for exclusion of a period of time in the computation of the limitation period according to the law applicable, it necessarily assumes that the period according to the law of limitation had commenced. There can be no exclusion unless an occasion has arisen for computing the period and the period was running out on the date of the presentation of the petition. It necessarily follows that limitation had commenced to run before the presentation of the petition for winding up, that is, the cause of action must have arisen before the initiation of the winding up proceedings. Only then can the running of time be arrested from the date of the presentation of the winding up petition. That this is the true legal position has been held in a case relating to this very company in *Brahmayya & Co. v. Mohammedsa*, [1959] 29 Comp. Cas. 291, 295 Rajamannar C.J. observing:

"The provision for exclusion indicates that the date from which the period of limitation is to be computed is before the date of the presentation of the petition...Suffice it to say that the language of Section 45-O(1) does not permit its application to a case where the cause of action for instituting the suit or the right to make an application accrued to the company in liquidation after the presentation of the winding up petition."

131. While the effect of Sub-clause (1) is to nullify the principle that time, which has once begun to run, will, as a rule, continue to do so, even though subsequent events occur, which make it impossible that action should be brought, and which rule holds good with respect to all limitation enactments (vide Halsbury's Laws of England, third edition, volume 24, page 197, and Section 9, Indian Limitation Act, 1908), Sub-clause (2), in fact, while removing the limitation on certain actions, provides also a special period of limitation in

certain cases. Directors of companies, who had been in a special position of privilege and responsibility in relation to the banking company, are placed in a special category, and limitation of claims against them are dealt with under this Sub-clause. Sub-clause (2) deals with three classes of claims, namely, (i) recovery of arrears of calls from any director of a banking company which is being wound up ; (ii) enforcement by the banking company against any of its directors of claims based on a contract, express or implied; and (iii) all other claims by the banking company against its directors. With regard to claims falling under the first and second classes, all periods of limitation are ruled out. With regard to all other claims which could be made against a director, they would fall under the residuary class, and in respect of these a longer period of limitation" than generally available under the ordinary law is provided, the period of limitation being twelve years from the accrual of such claim. By the amendment in 1959 a further enlarged period of limitation is provided so that even if the twelve-year period had expired, the liquidator could take action within five years from the date of the first appointment of the liquidator. The provision of limitation, Sub-clause (2), is an express provision of law, and, where the claim against a director is not in respect of arrears of call or on contract, express or implied, the claim would be governed by the twelve-year period of limitation from the accrual of the cause of action, subject to an extended period, when required, the liquidator being empowered to take action within five years of his appointment. Neither counsel disputes that it is this Sub-clause (2) that would have to be considered with reference to the present application by the liquidators against the representatives of the deceased director.

132. It is not seriously contended for the liquidators that the present claim is based on a breach of contract, express or implied. It is based on a breach of fiduciary duty which is different from an implied contract, and is sought to be sustained as on a breach of trust. And the arguments; therefore, proceeded on the view that the claims made in the present proceedings against the representatives of the director would come under the third or residuary category of claims in Sub-clause (2) for which a twelve-year period of limitation from the accrual of the cause of action is provided.

133. The argument of Mr. Thiruvengkatachari, that Sub-clauses (1) and (2) are mutually exclusive, is rested mainly on a suggested incongruity. Sub-clause (2) provides a period of five years from the date of the first appointment of the liquidator as an alternative period of limitation if that will be favourable from the point of view of the liquidator. Learned counsel submits that this postulates the running of time after the commencement of the liquidation proceedings : five years have to be counted from the date of the first appointment of the liquidator under this provision. But, if Sub-clause (1) also applied, there was no running of time. It is suggested that this incongruity or repugnancy could be avoided only if Sub-clauses (1) and (2) are held to be mutually exclusive. This argument, of course, would not be available in respect of Sub-clause (2) as it stood prior to the amendment in 1959 . Ostensibly and statedly the effect of the amendment in

1959 of Sub-clause (2) was to extend the period of limitation, and the Act applies not only to banking companies which are being wound up, but to companies which may get wound up in future. One can visualize, and it is not unlikely, the twelve-year period expiring just before the presentation of the winding up petition. In respect of such a claim Sub-clause (1) would be of no avail, and only the amended provision of Sub-clause (2) would enable the liquidator to take the necessary action in that case within five years of his appointment, the latter being a more favourable mode of computation. In such cases, as Sub-clause (1) cannot come into play, there is no incongruity or repugnancy. When Sub-clause (1) comes into effect, then the latter amended part of Sub-clause (2), providing a period of five years from the date of the first appointment of the liquidator, will have no application, it being totally unnecessary and not called for to maintain the claim. If the cause of action was subsisting on the date of the presentation of the petition for winding up, time would cease to run, be it the twelve-year period of limitation available as a bar to a director or any other period of limitation that may be available to the opposite party, if he happens to be a non-director. To accede to the contention of the learned counsel for the appellants may bring in rather anomalous and unintended situations. An action against a third party, who is not a director, and not under a fiduciary obligation--and it may be for a simple debt--could be commenced" years and years after the presentation of the petition for winding up, provided the claim was in time at the time of the presentation of the petition. But against a director, for a breach of trust, if, just about the time when the petition for winding up is being presented, the twelve-year period were to expire, the utmost the liquidator would have is a period of five years from the first appointment of the liquidator. We do not think that that would have been the intention of the legislature. On the contrary, it appears to us that, while suspending the running out of any limitation period after the presentation of a petition for winding up, with reference to directors, Parliament has provided also a longer period of limitation for certain class of claims to get barred before the presentation of the winding up petition. It must be noticed that there have been conflicting decisions in the several High Courts as to the period of limitation u/s 235 of the Indian Companies Act, whether it is Article 36 or Article 120 of the Limitation Act. u/s 214 of the Indian Companies Act of 1882, which preceded Section 235 of the 1913 Act there have been cases that had taken the view that there was no period of limitation for the application under the section. Now, as against third parties, in respect of most of the money claims, the period of limitation is just three years under the Limitation Act, and if the claim was in time at the commencement of the winding up, there would be no bar pending the liquidation proceedings. The amendment of 1959 further enables the liquidator to take action in respect of defalcation, misdeeds and misfeasance of directors even long anterior to the presentation of the petition, provided he takes action within five years of the first appointment of the liquidator. As, in our view, the five-year period in Sub-clause (2) would come into play only in cases where Sub-clause (1) does not apply, there is no repugnancy or incongruity in construing Sub-

clauses (1) and (2) together as not mutually exclusive. There is nothing unreasonable, harsh or illogical in the view we are taking. Directors, who have been in the position of trustees, and themselves in control of the company and its funds, with opportunity to conceal their misdeeds and acts of misfeasance, are not entitled to claim a liberal interpretation in their favour of the provisions of the statute relating to limitation. We see no reason to depart from the true intent and purport of the section, as apparent from its plain language, and to exclude the operation of Sub-clause (1) to the law of limitation prescribed in Sub-clause (2). In our view, even against directors and their representatives, apart from the special provision of Sub-clause (2), Sub-clause (1) also would apply. The application of Sub-clause (2) does not necessarily call for the exclusion of Sub-clause (1).

134. In this view, any claim against a director, which was subsisting on the date of the presentation of the winding up petition would be alive, and action could be laid thereon at any time during the winding up proceedings. Even in respect of claims against directors, there will be cessation of the running of time u/s 45-O(1) from the date of the presentation of the petition for winding up.

135. But this view, by itself, will not help the liquidators in this case, in view of the further contention on behalf of the appellants, that the Act could be applied only to claims which were subsisting, at the earliest, on 24th October, 1953, when Ordinance 4 of 1953 came into force. The contention is that the Act is not retrospective to revive claims which had got barred under the old law prior to 24th October, 1953. Learned counsel would limit the operation of Sub-clause (3) of Section 45-O, which gives a retrospective effect to the section, by contending that it is not so retrospective as to revive barred claims. We shall now take up this aspect of the matter for consideration.

136. So far as Sub-clause (3) is concerned, the words are emphatic and clear. To set out the section once again it runs thus :

"The provisions of this section, in so far as they relate to banking companies being wound up, shall also apply to a banking company in respect of which a petition for winding up has been presented before the commencement of the Banking Companies (Amendment) Act, 1953."

137. There is, and there could be, no dispute that the present company is a banking company in respect of which a petition for winding up has been presented before the commencement of Act 52 of 1953. So, on the plain language, the provisions of Section 45-O should apply to it, and that will take in Sub-clauses (1) and (2). But it is contended that the retrospectivity must be limited to apply the provisions of the section to claims which are not barred. We are unable to appreciate this argument, particularly with reference to Sub-clause (1). If Sub-clause (1) applies, then the period of limitation is arrested from the date of the presentation of the petition, for winding up. Learned counsel contends that the period of limitation could be arrested only from the date of the

ordinance, viz., 24th October, 1953, if the claim was then subsisting. But this would be mutilating Sub-clause (1) in its application, and for this there is no warrant. Either Sub-clause (1) is applied or not. Sub-clause (3) provides for the application of the section to a banking company, which can only mean in respect of actions taken by a banking company. It can have no other meaning, as the whole of this section provides for suits and applications by a banking company which is being wound up.

138. No doubt, the provisions of the section have to be construed on the general principle against the retrospective intendment of the statute to the prejudice of the subject. But it is undoubted that Parliament has jurisdiction by statute or amendment of statute to affect the subject even in respect of past transactions to its prejudice. It may, and often, does so, by words leaving no possibility of doubt. It can, in certain cases, be a matter of pure construction, and may be self-evident from the language of the statute. The real question for consideration in all cases is whether Parliament has, on a proper construction of the statute, expressed or sufficiently implied its intention of giving a retrospective force to its Act. Undoubtedly, it is an accepted principle of our law that in the case of alteration of a substantive law, as opposed to a mere procedural law, the intention adversely to affect the subject in the sense of depriving him of some accrued right or interest is not to be inferred unless the intention is either express or plainly to be inferred.

139. In *Km. Kr. Ramanathan Chettiar Vs. N.M. Kandappa Goundan (died) and Others*, Rajamannar C.J., while considering the Limitation (Amending) Act (16 of 1942), observed :

"We agree with Mr. N. Sivaramakrishna Aiyar, the learned advocate for the appellant, that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. It is also well settled that the law of limitation being procedural law, its provisions operate retrospectively in the sense that they apply to causes of action which arose before their enactment. But on an examination of the authorities on the point, we find it equally well established that if a right to sue had become barred by the provisions of the Limitation Act then in force on the date of the coming into force of a later enactment, then such a barred right is not revived by the application of the new enactment."

140. It was also observed in that decision, meeting the contention that only remedy for recovery of a debt was barred, and that there was no extinction of the right:

"It does not follow that because rights are not extinguished, such rights can be deemed to be enforceable in a court of law."

141. It was pointed out therein that the law of limitation as such only dealt with remedies to enforce rights in a court of law, and if, therefore, the remedy was gone when the amending Act came into force, there was no principle on which it

would be held that the remedy again became available. The power of the legislature to make an amendment retrospective was recognized. The learned Chief Justice observed :

"If it was the intention of the legislature to say that not only that the law should be in future as embodied in the amendment, but that the law should be deemed to have always been as laid down by the amendment, then appropriate language would have been used as in other statutes in which such an intention is apparent, e.g., the recent amendment to Section 28, Provincial Insolvency Act."

142. We would here remark that the reference to the language of the amendment in the Provincial Insolvency Act is only illustrative.

143. In *The Ahmedabad Mfg. and Calico Printing Co., Ltd. Vs. S.C. Mehta, Income Tax Officer and Another*, the Supreme Court has observed thus :

"The date on which the amendment comes into force is the date of the commencement of the amendment. It is read as amended from that date. Under ordinary circumstances, an Act does not have retrospective operation on substantial rights which have become fixed before the date of the commencement of the Act. But this rule is not unalterable. The legislature may affect substantial rights by enacting laws which are expressly retrospective or by using language which has that necessary result. And this language may give an enactment more retrospectivity than what the commencement clause gives to any of its provisions. When this happens the provisions thus made retrospective, expressly or by necessary intendment, operate from a date earlier than the date of commencement and affect rights which, but for such operation, would have continued undisturbed."

144. If the clear language of Sub-clause (3) of Section 45-O, without mutilating its application, could be limited to claims which were alive on the date of the Act, the court should do so. But when the retrospectivity cannot be limited unless by introducing into the words of the section limitation on its application, we are bound to give the words their plain meaning and effect. We have earlier set out the law before the Act was passed. The dominant purpose in construing the statute being to ascertain the intent of the legislature as expressed in the statute, and statutes not coming out in vacuo, but of the necessity and need of the occasion, the cause and necessity of the Act may properly be referred to, if there is ambiguity in the provisions of the statute. In *Craies on Statute Law*, sixth edition, at page 127, it is stated :

"The cause and necessity of the Act may be discovered, first, by considering the state of the law at the time when the Act was passed. In innumerable cases the courts, with a view to construing an Act, have considered the existing law and reviewed the history of legislation upon the subject."

145. The learned author quotes the observation of Lord Lindley M. R. in *Thomson v. Lord Clanmorri*, [1900] 1 CH. 718, 725 :

"...in construing any... enactment regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided."

146. Having set out the history of the earlier legislation in the matter, we would like to refer also to the circumstances under which Act, 52 of 1953, came to be passed. It would be seen that Parliament had been coming with ordinances followed up by Acts in succession to meet the crisis of a number of banks failing in the post-war and post-partition period. In *A. Thangal Kunju Musaliar Vs. M. Venkitachalam Potti and Another, Bhagwati J.*, in delivering the judgment of the court, observed :

"It has been said that although the statement of the objects and reasons appended to a bill is not admissible as an aid to the construction of the Act as passed (see *Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another*, yet it may be referred to only for the limited purpose of ascertaining the conditions prevailing at the time which necessitated the making of the law."

147. It may be seen from the statement of objects and reasons for the Banking Companies (Amendment) Act, 1953, that the Banking Companies Act was amended in 1950, as experience showed, on the liquidation of a large number of banks that failed during the post-war and post-partition period, that the procedure for the liquidation of joint stock companies was totally inadequate for the liquidation of banking companies in a manner satisfactory to the depositors. The committee constituted in 1950 found that 321 banks were in liquidation under the various courts, dating from 1926, with outside liabilities of about thirty crores of rupees. First the ordinance was promulgated on the 24th October, 1953, and later came the Act, 52 of 1953. The lacuna found in Sub-clause (2) of Section 45-O was later removed by the amendment of 1959.

148. Right through, it will be seen that the legislative effort had been to extend the period of limitation in favour of the bank, and there is nothing to be surprised at in this, as ultimately it is the innocent depositors of the bank that suffer in its crash.

149. The 1936 amendment itself was to enlarge the period of limitation for applications u/s 235, by providing that a liquidator may within three years from the date of his first appointment take action against directors, promoters, etc., in respect of misapplication, retainer, misfeasance or breach of trust. The result of the amendment was to enable the liquidator to take action under the section, even though the right of suit may be barred under the Limitation Act. Sub-clause (3) of that section, which applied the Limitation Act to applications under the section, was deleted. Then, as now, a similar situation arose as to the time-limit for an application u/s 235 of the Companies Act, and the question, whether the amendment of the Companies Act in 1936 would enable the official liquidators of a bank to claim compensation for any wrongful act, in any case in which the

remedy u/s 235 had become barred under the Limitation Act before, the said amendment came up for consideration before the Allahabad High Court in *Official Liquidators, Banares Bank Ltd. v. Sri Prakasha*, ILR [1946] All. 461, [196] 16 Comp. Cas. 38, 50. Braund J. held that, "notwithstanding the amendment of Section 235 of the Indian Companies Act, 1913, effected in 1936, the official liquidators of a bank are entitled to have the conduct of any promoter, director, manager or officer of the bank examined under that section and to claim compensation for the wrongful act of any such person discovered and proved as a result of such enquiry notwithstanding that a cause of action on that act would in a suit by the company itself have been barred by the law of limitation in force prior to the coming into operation of the amendment provided nevertheless that the express provisions as to limitation of the amended Section 235(1) of the Indian Companies Act, 1913, are themselves observed."

150. In that case, from the mere deletion of the old Sub-section (3), an inference was made that the amended Act was intended to be retrospective. The learned judge observed , [1946] 16 Comp. Cas. 38, 42, 49 :

"In the view I take, the first part of the argument addressed to us is sufficiently answered by the fact that the legislature, when it made the amendment of 1936, which took effect in 1937, went out of its way to remove Sub-section (3) from the old section altogether. If the legislature, in doing that, did not intend in the case of those liquidations to which the amendment was to apply, to remove from the liquidators" path all obstacles of limitation other than those which were expressly contained in the amended section itself, then I cannot understand what object the legislature could have had in doing away with the old Sub-section (3). Nor is it, to my mind, in the least unreasonable or illogical that it should have taken the view that it was anomalous and contrary to the public interest that directors at least, and probably other officers of the company, should be protected by a period of limitation running prior to the liquidation during a period when they themselves were in control of the company and had both the opportunity and incentive to conceal their own misdeeds ".

151. At page 473 it is observed :

"It is as clear as anything can be that the 1936 amendment of Section 235 of the Indian Companies Act, 1913, was intended to affect the position of delinquent directors, and to affect it adversely ".

152. Of course, the view as to retrospectivity taken in that case is, to a certain extent, founded also on the discretion in the court u/s 235 of the Indian Companies Act, to take up the view in any particular case that it would be unjust in that particular case to hold a director or other officers liable for some act of misfeasance which took place long ago.

153. The principle of the above case has been accepted by Clark J. in *Official Liquidator, S.S.R.S. Nidhi v. Krishnaswami Iyengar*, [1947] 17 Comp. Cas. 77.

154. The question as to the retrospectivity of Section 45-O was mooted in *Brahmayya & Co. v. Mohammedsa*, [1959] 29 Comp. Cas. 291 but the appeals were disposed of on another short ground, without discussing the retrospective operation of Section 45-O(3). It may be stated, that the trial judge held that Section 45-O(1) would apply only to cases where the claim was subsisting both on the date when the amendment Act of 1953 came into force and also on the date of the presentation of the petition for winding up.

155. In *Punjab Commerce Bank v. Brijlal Mehendi Ratta*, [1955] 25 Comp. Cas. 72, 76 it was observed that Section 45-O is not retrospective in effect expressly or by necessary implication, and that there was nothing in the section so retrospective in effect as to revive a claim which before that date had become unenforceable by lapse of time. But, actually, the question considered was the applicability of the provisions of Section 45-O to a pending suit by the official liquidator. The suit was admittedly barred on the date of its institution, and the question was whether it could be held within time in view of the Amending Act of 1953. It was in those circumstances that it was held that, in the absence of any specific mention of pending suits, it was not possible to hold that the section would apply to them. Bishan Narain J. observed :

"Sub-section (3) is to a certain extent retrospective in effect because it makes Sub-section (1) applicable to those cases in which a petition for winding up had been presented before the Amending Act, 1953, came into force, but this retrospective effect cannot be extended to claims or suits pending in the High Court at the time that the Amending Act came into force."

156. This decision can be distinguished on the short ground that the claim had been made the subject of an action and as the limitation in respect of any suit would be governed by the statute current at the time of the institution, the subsequent amendment would not, in the absence of express provision, save the suit from the bar of limitation.

157. The decision in *S. B. Corporation Ltd. v. Dhansiri Saw Mills Ltd.*, AIR 1955 Ass 246, affirmed on appeal in *Resarichand v. S.B. Corporation*, AIR 1959 Ass 162, 167, referred to on behalf of the appellants, is not of much help to either side. The period of limitation in that case commenced from December 29, 1950. The application for liquidation was filed on February 26, 1953. The order for liquidation was made on May 26, 1953, and an application u/s 45D of the Act was made on June 28, 1954. It was observed by the Division Bench on appeal:

"Of course, if the debt had become barred under the law of limitation before the initiation of the liquidation proceedings or the presentation of the application, the debt could not be revived merely because an application was presented within time u/s 45D of the Act for adjudging the debtor concerned as a debtor of the bank in liquidation ; but, where on the date of initiation of the liquidation proceedings, the debt has not been extinguished, then by virtue of Section 45-O the debt will continue to subsist ... In other words, the obvious intention of

Section 45-O of the Act is that the period of limitation, as it were, remains suspended throughout the liquidation proceedings. "

158. The point to be noticed is that in that case, the debt was alive, when the Ordinance 4 of 1953 came into force on October 24, 1953.

159. In *Suburban Bank Ltd. (in liqdn.) Vs. Nistaran Chakrabarti, Bachawat J.*, then of the Calcutta High Court, had to consider the applicability of Section 45-O(1) with reference to a pending suit by a bank which had gone into liquidation. The learned judge, observing that the legislature considered that a strict application of the existing law of limitation to claims by banking companies in liquidation was unjust and unreasonable, and setting out the history of the legislation, leading to Section 45-O by the Act 52 of 1953, states:

"The object of the legislature being the extension of the period of limitation for claims by banking companies, I do not consider that the legislature intended that the sub-section would apply to such suits and would bar the existing right of action.

I am unable to hold that the sub-section applies to those pending suits where its application would revive the right of action barred by the law in force at the time of the institution and that it does not apply to other pending suits where its application would bar the existing right of action. The language of the sub-section is not capable of such construction. The general words "a suit or application" can be given full effect by limiting them to suits and applications commenced after the sub-section came into force. The effect of the non-obstante clause at the beginning of the sub-section is to abrogate existing laws clearly inconsistent with the Sub-section. I find nothing in the sub-section inconsistent with the rule that a statute which is not a matter of mere procedure does not affect a pending proceeding in the absence of a clear intention to the contrary shown either by express words or by necessary implication. In my judgment Sub-section (1) of Section 45-O does not apply to a suit or application pending on the date when it came into force."

160. The learned judge expressed no opinion as to the effect and operation of Sub-section (1) of Section 45-O in proceedings instituted after it came into force, nor any opinion on the effect of Sub-section (2) of Section 45-O.

161. The question came up for consideration directly in *Sarkar Dutt Roy and Co. Vs. Shree Bank Ltd. (In Liquidation)*, . before a Bench consisting of Lahiri C.J. and Bachawat J. Reference was made to the decision of the Judicial Committee in 26 CWN 858 (Privy Council) ,, where it had been held that the right to apply for execution of a decree which had become barred under the Limitation Act, 1877, could not be revived under the Limitation Act, 1908, in the absence of any provision in the latter Act so retrospective in its effect as to revive and make effective a judgment or decree which before that date had become unenforceable by lapse of time. Observing that the relevant enquiry, therefore, is whether there is anything in Section 45-O of the Banking Companies Act which makes its

provisions applicable to rights which had already become barred before the date on which it came into operation, the learned Chief Justice states:

"On this point it is significant to note that Sub-section (3) of Section 45-O makes the provisions of the section applicable only to a banking company in respect of which a petition for winding up has been presented before the commencement of the Banking Companies (Amendment) Act of 1953 ; but does not make the provisions of the section applicable to debts due to the banking company which had become barred by lapse of time before the date of such commencement. Then again Sub-section (1) of Section 45-O provides that the period commencing from the date of the presentation of the petition for the winding up of the banking company shall be excluded and does not say that this period shall always be deemed to have been excluded. The use of the future tense in Sub-section (1) indicates that the legislature did not intend its provisions to operate on decrees which had before the date of its commencement become unenforceable by lapse of time. There is, therefore, neither any express words nor any necessary implication in Section 45-O to indicate that its provisions were intended by the legislature to have retrospective effect. "

162. The other learned judge, Bachawat J., observed with reference to subsection (3) of Section 45-O, thus :

"Sub-section (3) of Section 45-O specially provides for the retrospective application of the section to a banking company in respect of which a petition for the winding up has been presented before the commencement of the Banking Companies (Amendment) Act, 1953. But the legislature deliberately has not provided that Sub-section (1) of Section 45-O should have a larger retrospective operation. In my opinion, Sub-section (1) of Section 45-O does not revive a right to apply for execution of a decree which has already become unenforceable by lapse of time."

163. A similar view has been taken by the Allahabad High Court in *Jwala Prasad Vs. Official Liquidator Jwala Bank Ltd.*, . , following the decisions in *Suburban Bank Ltd. v. Nistaran Chakrabarti* [1954] 24 Comp. Cas. 273. , *Punjab Commerce Bank Ltd. v. Brij Lal Mehendi Ratta*, [1955] 25 Comp. Cas. 72., *Kesarichand v. S.B. Corporation*, AIR 1959 Ass 162. and *Sarkar Dutt Roy & Co. v. Shree Bank Ltd.*, [1960] 30 Comp. Cas. 416. Referring to Sub-section (3) of Section 45-O, *Srivastava J.* observes :

"The purpose with which Sub-section (3) was enacted was, however, different. Had the sub-section not been there, it would have been argued that Section 45-O could be applied only to those winding up proceedings which commenced after the enactment of the section. In order that this contention may not be put forward, Sub-section (3) was enacted and it was provided in it that the provisions of the section would apply even to those cases in respect of which the petition for winding up had already been presented. The only effect of the Sub-section, therefore, was that Section 45-O was to apply not only to companies

ordered to be wound up after the section had been enacted, but also to companies which had been ordered to be wound up earlier.

There is nothing in Sub-section (3) on the basis of which it can be argued that the provisions of Sub-sections (1) and (2) of the section were to have the effect of reviving dead claims or of extending limitation for suits and applications which had already become time-barred. Advantage of those Sub-sections could, therefore, be taken only if the cause of action either arose after the enactment of the section, or the claim in respect of it, if it had arisen earlier, was still within time."

164. But in the Mysore High Court, Narayana Pai J. in *In re Varthakavardhini Bank Ltd.*, [1964] 34 Comp. Cas. 225, 230-231 has held that the necessary intendment of the Banking Companies Act is that even if a claim is barred by the expiry of a period of limitation prescribed for its enforcement by any other law, that bar is removed by Section 45-O(2). The learned judge holds that the net result of the provisions of Section 45-O is that claims which are governed by Section 45-O(1) and in respect of which the provisions thereof can operate must be claims which are alive on the date of the presentation of the winding up petition. With reference to Section 45-O(2), claims against the directors by a banking company, it was held that they were governed by Section 45-O(2) only, and not Sub-section (1), and that even dead claims were revived. In that case there were two hand-loans, one of the year 1936 and another of the year 1937, in respect of which the widow of the director was sought to be made liable. The winding up petition of the banking company was filed in November, 1944. The objection as to limitation of the claims was sought to be met by the liquidator on two grounds : (i) Section 45-O(2) of the Banking Companies Act is a complete answer, and alternatively (ii) the signature of the deceased director in the balance-sheets, as amounting to acknowledgment of the liability. The court expressed no opinion on the latter ground. Dealing with the scope of Section 45-O, the learned judge observed :

"The overriding effect of this section over all other laws is apparent not merely from the general provisions of Section 45-A at the commencement of Part III-A, but also from the language of the said section itself. This part was substituted for the part of the same number by the Amending Act 52 of 1953. Sub-section (3) of Section 45-O expressly states that the provisions of that section shall apply to a banking company which is being wound up in respect of which a petition for winding up has been presented before the commencement of the Amending Act of 1953. Hence, it applies to winding up proceedings in respect of a banking company which were pending at the time the 1953 Act came into force, having commenced on a winding up petition presented before the commencement" of the Act . . . The rules regarding limitation prescribed in the said sub-section govern those claims notwithstanding anything to the contrary contained either in the Indian Limitation Act or in any other law for the time being in force.

The consequence of this view is that, so far as the rules of limitation governing

the claims by a banking company which is being wound up against its directors are concerned, Sub-section (2) of Section 45-O constitutes a complete and self-contained code exclusively applicable to those claims and nothing contrary to those provisions contained in any other law can apply."

165. Dealing with the argument that, although Section 45-O of the Banking Companies Act may be said to have retrospective operation, especially in view of Sub-section (3) thereof, the general principles of law governing the interpretation of statutory provisions purporting to have retrospective effect is that, in the absence of an express provision or clear intendment of the statute," claims which are dead or barred should not be taken to have been revived, the learned judge observed :

"If regard be had to the general overriding effect given to Part III-A of the Banking Companies Act by Section 45-A and also to the language of Section 45-O(2), it appears to me that the contention of Mr. Bopanna is unavailable. If the two conditions regarding the claim are satisfied, viz., that the claim is made by a banking company in winding up and that the said claim is made against its director, it is governed exclusively by the provisions of Sub-section (2) of Section 45-O, and, consequently, there is no limitation of time for its enforcement notwithstanding anything to the contrary contained in any other law. It may be noted that the said sub-section prescribes a period of limitation only in respect of claims falling under the third category and expressly declares that there shall be no period of limitation in respect of the first two categories of claims. So far as these claims are concerned, the position is not one of amending or extending or otherwise prescribing conditions for the application of a period of limitation prescribed by any other law but one of totally repealing the provision of every other law which may prescribe the period of limitation for their enforcement. If such is the effect, the necessary intendment of the statute is that even if the claim is barred by the expiry of a period of limitation prescribed for its enforcement by any other law, that bar is removed by Section 45-O(2)."

166. The decision of the Calcutta High Court in *Sarkar Dutt Roy & Co. v. Shree Bank Ltd*, [1960] 30 Comp. Cas. 416., which was referred to, was distinguished as a case dealing with the first sub-section of Section 45-O. But, however, the learned judge only limits Section 45-O(1) by observing that, so far as claims which are governed by Section 45-O(1) are concerned, it can operate only in respect of claims which are alive on the date of the presentation of the winding up petition.

167. While we agree with the learned judge that the provisions of Section 45-O(2) are retrospective, with respect, we are unable to subscribe to the view that Section 45-O(2) alone will apply in respect of claims against directors and Section 45-O(i) cannot be called into play. We have already discussed the position regarding the applicability of both Sub-clauses 45-O(1) and (2) to claims with reference to directors. As noticed by the learned judge, Section 45-O(2) contains three categories of claims, and while limitation is taken away in respect

of the first two categories, a new period of limitation is prescribed in respect of the residuary claims; and as, with reference to them it will be very necessary to apply the provisions of Section 45-O(1), we fail to see why Section 45-O(1) should be excluded.

168. If Sub-clause (3) is to be given any effect with reference to Sub-clause (1), its effect must be to keep alive all claims that were subsisting on the date of the presentation of the winding up-petition. If Sub-clause (3) is applied liberally to Sub-clause (1) in its appropriate position, it would read thus :

"Notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908, or any other law for the time being in force, in computing the period of limitation prescribed for a suit or application by a banking company (in respect of which a petition for the winding up has been presented, before the commencement of the banking companies (Amendment) Act, 1953) the period commencing from the date of the presentation of the petition for the winding up of the banking company shall be excluded."

169. When read as above stated, we find nothing in Part III-A of the Act to limit the plain language of Sub-section (1) so read with Sub-section (3). It must be noticed that apart from Section 45-A making the provisions of Part III-A override all laws for the time being in force inconsistent with the provisions of Part III-A, Section 45-O(1) and Section 45-O(2), each start with a non-obstante clause, emphasising the overriding effect of the Sub-clauses. The provisions of the Indian Limitation Act to the contrary are specifically excluded.

170. We fail to see what other retrospectivity Parliament intended by providing Sub-clause (3). In Maxwell on the Interpretation of Statutes, eleventh edition, it is stated at page 277 :

"The defence of lapse of time against a just demand is not to be extended to cases which are not clearly within the enactment while provisions which give exceptions to the operation of such enactments are to be construed liberally."

171. In regard to the applicability, which is conceded, of Sub-clauses (1) and (2) to banking companies in liquidation, and in respect of claims which were subsisting and alive on the date of the Act, there is no need for a special provision. A rule of limitation, being a law of procedure, is, as a rule, retrospective in its operation to this extent, that it governs all proceedings from the moment of its enactment. Only under the general law, when the retrospective application of the statute would disturb or impair vested rights, or inflict such hardship or injustice as could not have been within the contemplation of Parliament, the statute is not to be construed retrospectively. We are not prepared to assume, as was suggested at the bar, that Sub-clause (3) was introduced by Parliament in *ex abundanti cautela* to make sure of the applicability of Section 45-O to winding up proceedings then pending. In our opinion, as a special provision, and on the emphatic language of Sections 45A, 45B and 45-O, even without Sub-clause (3), and in the absence of any saving

clause, Section 45-O would apply to all steps taken after it had come into force, and it would determine the period of limitation as well as the terminus a quo in respect of suits and applications commenced after it has come into force, even though the cause of action occurred previously.

172. We here desire to quote the observations of the Supreme Court in *Gulab Chand Vs. Kudilal and Another*, , with reference to the retrospective operation of a statute. At page 322 the principle is thus enunciated :

"The rule is clear that "provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment" : *Delhi Cloth and General Mills Co. Ltd. v. Commissioner of Income Tax*, (1927) L.R. 54 IndAp 421, Before proceeding further we wish to observe that the rule that a statute is not to have retrospective operation is only applicable where it is doubtful from the language used whether or not, it was intended to have such operation. Where the language of a statute plainly gives it a retrospective operation, the rule has no application, for, "of course, it is obviously competent for the legislature, if it pleases, in its wisdom to make the provisions of an Act of Parliament retrospective" : *Smith v. Callander*, [1901] A.C. 297, 305.. We may usefully read here what Bowen L.J. said in *Reid v. Reid*., (1886) 31 Ch. D. 402, :

"Now the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights."

We wish to emphasise that it is not as if all efforts should be made so as not to give a statute a retrospective operation whatever its language is. The rule does not require of the courts an " obdurate persistence" in refusing to give a statute retrospective operation."

173. As, in our view, not merely intendment, but by the plain and express language, Sub-sections (1) and (2) have been made retrospective and applicable to banking companies already being wound up, we are unable to limit or curtail the operation of the statute to exclude from Section 45-O(1) claims which were subsisting on the date of the presentation of the winding up petition, but later got barred before the Banking Companies (Amendment) Act of 1953 came into force. We, therefore, respectfully differ from the decisions of the Calcutta, Assam, Allahabad and Punjab High Courts above referred to. We hold that Section 45-O(1) would apply to all claims by the banking company in liquidation in these proceedings, which were subsisting and alive on July 26, 1947, the date when the petition for the winding up of the company was presented.

174. This leads us to the consideration of the question as to the law of limitation applicable in respect of claims, the subject-matter of these proceedings : were these claims subsisting as on July 26, 1947 ? On this point as already stated

there has been a cleavage of opinion as to whether Article 36 or Article 120 of the Limitation Act was applicable. The question has generally arisen on applications by the liquidator u/s 235 of the Indian Companies Act, 1913. Articles 90, 115 and 116 of the Limitation Act have also been invoked in certain cases. In the view we have taken as to the nature of the liability, that it is not one in tort, or a simple case of breach of contract, we are of the opinion that it is Article 120 that applies to such claims. The applicability of Section 10 has been ruled out on the ground that directors are not express trustees, and Section 10 of the Limitation Act does not operate to deprive them of their right to rely on the available provision or article in the Limitation Act as bar to the liquidator's claim. In *Narasimha Iyengar v. Official Assignee, Madras*, I.L.R.(1931) MAD. 153, the applicability of Section 10 of the Limitation Act was rejected but as the claim in that case was barred, whether Article 36 or Article 120 applied, there was no decision as to which of the two articles specifically applied.

175. The Bombay High Court in *Govind Narayan Kakade Vs. Rangnath Gopal Rajopadhye*, , has taken the view that applications by the liquidator against directors and agents of a bank u/s 236 of the Companies Act were governed by Article 120 of the Limitation Act. At page 252, Harten C.J. observes ;

"Another answer to the argument on Article 115 is that the misfeasance to be established in the present case must be a breach of trust or misfeasance in the nature of a breach of trust as pointed out by Lord Macnaghten in *Cavendish Bentinck v. Fenn*, (1887) 12 App. Cas. 652, and that Article 115 is not strictly applicable to a misfeasance of that character, nor is Article 116, as "breach of contract" is not the sole liability sued on, nor is it the usual nomenclature for a breach of trust whether specific or quasi. But whichever answer is adopted, this leaves us only with Article 120."

176. In *Rustomji's Law of Limitation*, , sixth edition, at page 127, it is stated thus:

"In India, directors are not considered " express trustees " as the company's property is not vested in them within the meaning of Section 10(a). The residuary Article 120 would be applicable in the case of a breach of trust by a director."

177. In *Subbiah Thevar v. Samiappa Mudaliar*, ILR 1938 Mad. 586, AIR 1938 Mad. 353, it is stated at page 595 :

"Article 36 applies to torts not specially provided for, and if it stood alone there would be little to indicate that it was not intended to apply to breaches of trust of the nature of those we have now in mind. But there is Article 98, and when the two articles are considered together there are strong indications that the legislature did not intend Article 36 to apply to trustees. In the first place, in Article 36 the word "compensation" is used, which is the appropriate word to apply in connection with a suit to remedy an injury to a person or a person's property. Article 98 speaks of suits "to make good" the loss, which are more

appropriate than the word " compensation " when the loss is not a personal one.
"

178. In *India Sugar and Refineries Ltd. v. Ramalingam Estate*, [1953] 23 Comp. Cas. 107., where the director and the sole managing agent of a sugar manufacturing company, bound in a fiduciary capacity to protect the interests of the company, availed himself of his position and utilised the premises and the staff of the company, as well as its credit, and gained for himself pecuniary advantage, it was held that the suits against him were governed by Article 120 of the Limitation Act, and no other article was applicable. Article 36 of the Limitation Act was held not to apply to the facts as the amount was not claimed as compensation for any tortious act.

179. We have pointed out, while discussing whether the cause of action survived the death of the director, that the action was not in tort. Nor can it be said that the action is wholly independent of contract. Following the above decisions, we hold that Article 120 applies to the case.

180. It was contended on behalf of the liquidators that even if Section 45-O(1) was not so retrospective as to apply to claims that had got barred before the Amendment Act or the Ordinance of 1953, they would, at any rate, be entitled to pursue all claims in respect of which cause of action arose within seven years prior to October 24, 1953, the coming into force of Ordinance 4 of 1953. Learned counsel pointed out that by reason of Section 45F introduced in the Banking Companies Act by Ordinance 23 of 1949 on September 19, 1949, followed up later by Act 20 of 1950 on March 18, 1950, a period of one year immediately preceding the date of the order for the winding up of the banking company could be excluded in computing the period of limitation. Section 45F provided that "notwithstanding anything to the contrary contained in the Indian Limitation Act, 1908 (9 of 1908), or any other law for the time being in force, in computing the period of limitation prescribed for any suit or application by a banking company, the period of one year immediately preceding the date of the order for the winding up of the banking company shall be excluded." There is no restriction or qualification in applying Section 45F to the banking company then in liquidation.

181. In *Kalipada Banerjee v. Sree Bank Ltd.*, [1956] 30 Comp. Cas. 234 it has been held that banking companies, which were ordered to be wound up before the Banking Companies Act, 1949, came into force, were also entitled to the benefit of the special period of limitation provided by Section 45F. Of course, as the effect of Section 45F is only to provide for the exclusion of a period of one year in the computation of the limitation, the claim must be subsisting, when the provision was first introduced into the Banking Companies Act, namely, on September 19, 1949, when Ordinance 23 of 1949 came into force. Section 45F will, therefore, apply only to claims within six years prior to September 19, 1949. The order for winding up in this case was made on November 5, 1947. The liquidators will be entitled to exclude, for computing the period of limitation, a period of one year immediately prior to November 5, 1947. If giving the benefit

of the exclusion of one year under Ordinance 23 of 1949 and Act 20 of 1950, a claim was alive on October 24, 1953, that is, the date of the Ordinance 4 of 1953, which later became Act 52 of 1953, then all such claims would attract the operation of Section 45-O(1) of the Act. As observed by Balakrishna Ayyar J. in *In the Matter of Agricultural and Industrial Bank Ltd.*, [1956] 26 Comp. Cas. 381, 383. :

"On the day that Act 52 of 1953 became law, the claim which the official liquidator has preferred was alive, and it is not to be readily supposed that when it passed Act 52 of 1953 the legislature intended that the " rights and remedies which were alive on that date should be destroyed ". The contention that the claim is barred by limitation must therefore be overruled."

182. In that case-the claim would have been barred within three years from January 4, 1950. But by reason of Section 45F of Act 20 of 1950, the claim was alive on the 30th of December, 1953, when Act 52 of 1953 came into force.

183. As it is Article 120 that applies to the claim, the subject-matter of the present proceedings, adding the benefit of one year given under Act 20 of 1950, all claims within seven years prior to October 24, 1953, would be in time, when Ordinance 4 of 1953 came into force, and, therefore, in time when Act 52 of 1953 came into force. The result is that even giving a narrow interpretation to Section 45-O(3) of the Act, as saving only claims which were alive when the amending Ordinance and Act of 1953 came into force, all claims within seven years prior to October 24, 1953, would be alive and subsisting and, therefore, could be enforced. It cannot, therefore, be said in this case that the entire claim gets barred by limitation, entitling dismissal of the application wholly as barred by limitation. A major portion of the items in respect of which the director is charged would be within time and not barred by limitation, even if the retrospective operation of Section 45-O is limited to claims that were subsisting on the date the new Act came into force.

184. At the close of the arguments, Mr. S. Swaminathan, learned counsel for the liquidators, drew our attention to the non-applicability of Article 181 of the Limitation Act, 1908, to claims u/s 33C(2) of the Industrial Disputes Act, even though claims may be otherwise barred, and referred to the decision of the Supreme Court in *Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others*, . The following passage at 757 of the report was relied on :

" In dealing with this question, it is necessary to bear in mind that though the legislature knew how the problem of recovery of wages had been tackled by the Payment of Wages Act and how limitation had been prescribed in that behalf, it has omitted to make any provision for limitation in enacting Section 33C(2). The failure of the legislature to make any provision for limitation cannot, in our opinion, be deemed to be an accidental omission. In the circumstances, it would be legitimate to infer that legislature deliberately did not provide for any limitation u/s 33C(2). It may have been thought that the employees who are

entitled to take the benefit of Section 33C(2) may not always be conscious of their rights and it would not be right to put the restriction of limitation in respect of claim which they may have to make under the said provision.....It seems to us that where the legislature has made no provision for limitation, it would not be open to the courts to introduce any such limitation on grounds of fairness or justice. The words of Section 33C(2) are plain and unambiguous and it would be the duty of the Labour Court to give effect to the said provision without any considerations of limitation."

185. This decision, in our opinion, with respect, fully supports the view we have taken as to the proper interpretation of Section 45-O of the Banking Companies Act. The legislative intent is not only clear, but emphatically express, that the provisions as to limitation set out in Section 45-O would alone apply to claims by the banking companies, which are being wound up, even in cases where the winding up proceedings were initiated before the provisions came into force in 1953. As against the precise language of the statute, a presumed intention of Parliament not to affect vested rights cannot be imported.

186. It is clear, in the light of the above discussion, that the plea, that the claim of the liquidators is wholly barred by limitation, is untenable.

187. Of the claims, the subject of these proceedings, the liability in respect of payment of dividends out of capital is stated generally to have arisen between 1941 and 1946, and the learned counsel for the liquidators has stated that the claim in respect of this count will not be pressed against the representatives. This is recorded.

188. The matter will, therefore, have to go back for further enquiry and adjudication in the light of the opinion we have expressed on the question of limitation. We have already recorded that the enquiry into prayer No. 1 relating to the lease deed may be taken up after the liability of the representatives is ascertained. The claim of the liquidators in respect of payment of dividends out of capital, as stated before, is not being pressed. The other claims will have to be enquired into on the merits.

189. The appeal, therefore, fails and is dismissed with costs.