(1954) 09 CAL CK 0008

Calcutta High Court

Case No: Order No. 96 of 1954

Nath Bank Limited (in liquidation)		APPELLANT
	Vs	
Kshetra Nath Dalal and Others		RESPONDENT

Date of Decision: Sept. 7, 1954

Acts Referred:

- Constitution of India, 1950 - Article 138
- Government of India Act, 1935 - Section 205

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

Bench: Division Bench

Advocate: A.C. Gupta, E.R. Meyer and Samaren Sen, for the Appellant;S. Chaudhuri, A.C. Mitra, A.K. Sen, B. Das and P.K. Pal s, for the Respondent

Judgement

Lahiri, J.

This is an appeal by the Nath Bank Ltd. (In Liquidation) through its Court Liquidator against an order of Bachawat, J., dated July 16, 1954, rejecting the appellant''s contention that u/s 45H of the Banking Companies Amendment Act it is not necessary for the appellant to adduce any evidence in the first instance and that it is for the Respondents to begin their case and to prove that they are not guilty of misfeasance. The facts o the case, which are not in dispute, are as follows: - On the 4th may, 1953, the Official Liquidator of the Bank took out a Master''s summons for a misfeasance proceeding u/s 235, Indian Companies Act, against the Respondents praying for an order compelling the Respondents and each of them to reply or restore a total sum of Rs.2,19,59,612-7-8, or such other sum as the Court might fix, to the assets of the said Bank and for various other reliefs. On August 27, 1953, S. R. Das Gupta, J., made an order to the effect that the matter should be set down for trial on evidence. On December, 16, 1953, Bachawat, J., passed an order to the effect that for the purpose of shortening the trial, the parties agreed that copies of relevant documents relied upon by the petitioner should be annexed to a further

affidavit to be affirmed by or on behalf of the petitioner and thereafter the order runs as follows:-

"Learned Counsel on behalf of all the parties are agreed that the original documents save and except the minutes of the meeting of the Board of Directors, dated June 5, 1945, and July 21, 1945, be proved by affidavit and that copies of original documents, save and except the said two documents, may be admitted in evidence and that formal proof of the original may be dispensed with save and except the said two documents.

Learned Counsel are also agreed that the further affidavit to be filed on behalf of the petitioner will be admitted at the trial in proof of the several documents copies whereof are annexed to the said affidavit save and except in respect of the said two documents."

2. Then follows a long list of documents copies of which were permitted to be annexed to the affidavit. Towards the end of the order the learned Judge observes as follows:-

"Copies of the documents annexed to the affidavit to be filed under this order shall be admitted in evidence subject to all questions of admissibility and relevancy."

3. The effect of this order is to dispense with the formal proof of the documents enumerated therein subject to all questions as to their admissibility and relevancy. The additional affidavit annexing copies of documents intended to be relied upon by the Liquidator has not been printed in the paper book, but we are informed that two such affidavits were filed on the 24th April and the 4th June, 1954. In the meantime the Banking Companies Amendment Ordinance of 1953 came into operation on the 24th October, 1953, and the Ordinance was replaced by the Banking Companies Amendment Act of 1953 which received the assent of the President on the 30th December, 1953. The case was taken up for hearing by Bachawat, J., on July 14, 1954, when the Liquidator was called upon to adduce evidence in support of his case. At this stage the Liquidator raised a point to the effect that since he had made out a prima facie case against the Respondents it was for them to begin their case and that the Liquidator was entitled to an order for repayment against the Respondents u/s 45H of the Banking Companies Amendment Act of 1953 unless they proved that they were not guilty of misfeasance. Bachawat, J., by his order, dated July 15, 1954 has overruled that contention and against that order the Liquidator has filed this appeal.

4. On behalf of the Respondents, a preliminary objection has been taken to the maintainability of the appeal. It is argued that the order does not determine the rights of the parties and as such it is not a judgment within the meaning of clause 15 of the Letters Patent and if it is not a judgment no appeal is maintainable u/s 202, Indian Companies Act. On behalf of the appellant Mr. Gupta and Mr. Meyer have argued that the appeal is maintainable u/s 202, Indian Companies Act, clause 15 of

the Letters Patent and also u/s 45N of the Banking Companies Amendment Act of 1953. With regard to Section 202, Indian Companies Act, it is argued that the right of appeal under that section is an independent right and that an appeal under that section is an independent right and that an appeal will lie under that section against an order even if it is not a "judgment" within the meaning of clause 15 of the Letters Patent. Section 202, Indian Companies Act, so far as it is material for the present purpose runs as follows:-

". . . . 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 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."

5. On a plain reading of the section it seems to us that the expression "in the same manner" relates to the procedure about the presentation and hearing of the appeal; but the expression "subject to the same conditions" requires that the order should be such as would be appealable if it had been passed in the exercise of the Ordinary Jurisdiction of the Court. An order made by a Single Judge of this Court in the exercise of his ordinary original jurisdiction would be appealable under clause 15 of the Letters Patent if it is a judgment within the meaning of that clause. We accordingly hold that right of appeal u/s 202, Indian Companies Act, is co-extensive with the right of appeal under clause 15 of the Letters Patent. This was the view taken by this Court in the case of Levy Brothers and Knowles Ltd. v. Subodh Kumar Dey (31 CWN 894), which was an appeal from an order made by Gregory, J., as a company Judge. At p. 897, Sir George Rankin, C.J., observed as follows:-

"It would appear that by clause 202 of the Indian Companies Act it is necessary that it should be shown that the order made by Gregory, J., is a judgment in that sense (i.e. under clause 15 of the Letters Patent). But having regard to the fact that the learned Judge refused all forms of relief except the form of relief which required the Liquidators to reserve a sum sufficient to pay the dividend. I am of opinion that Mr. Justice Gregory''s order is a judgment within clause 15 of the Letters Patent . . . In my judgment this order is an order which deprives the appellant of substantial and important rights and I am not prepared to hold that this order is not appealable by reason that it is not a judgment under clause 15 of the Letters Patent."

6. This was also the view taken by the Appeal Court consisting of C. C. Ghose and Buckland, JJ. in the case of Madan Gopal v. Sachindra (ILR 55 Cal 262). On behalf of the appellants reliance has been placed upon a Full Bench decision of the Lahore High Court in the case of Sansar Chand v. Punjab Industrial Bank Ltd. (ILR 10 Lah 805) and the judgment of a Division Bench in the case of AIR 1938 658 (Lahore) for the proposition that the whole of the expression "in the same manner and subject to the said conditions" in Section 202, Indian Companies Act, regulates procedure in appeal. We are, however, bound by the decisions of this Court and are not prepared

to accept the Lahore view as correct as in our opinion the expression "subject to the same conditions" does not regulate procedure only but requires that the order should be of such a nature as would be appealable if it were passed in the exercise of the ordinary jurisdiction of the Court. Indeed, the first of the Lahore judgments itself states, when laying down generally what kind of an order would be appealable, that it must be an order which is not merely a formal or interlocutory order, but one which decides a dispute between the parties and deprive the appellant of a substantial or important right, which comes very near to Calcutta definition of a judgment.

7. The next question that falls for determination is whether the order of Bachawat, J., can be said to be a judgment under clause 15 of the Letters Patent. So far as this Court is concerned the root authority as to the meaning of judgment under that clause is the case of The Justice of the Peace for Calcutta v. The Oriental Gas Co. (8 Beng LR 433). According to that decision, a judgment under 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". These observations of Sir Richard Couch, C.J., have been followed in all subsequent decisions of this Court. Applying this test we are unable to hold that the order passed by Bachawat, J., has determined any right or liability between the parties. Reading the order as a whole it seems to us that by the order under appeal Bachawat, J., has only given a direction on the question of onus and has overruled the appellant''s argument to the effect that u/s 45H of the Banking Companies (Amendment) Act, 1953, it is for the respondents to begin their case and to prove that they are not guilty of misfeasance. This decision, in our opinion, is not a "decision which affects the merits of the question between the parties", but is a step towards the final determination of the rights of the parties. On behalf of the appellant it has been argued that the order of Bachawat, J., amounts to a refusal to make an instant order against the respondents to repay the money and is therefore equivalent to a decision on the rights of the parties. We are, however, unable to accept this argument. The relevant portion of Section 45H provides that if the applicant "makes out a prima facie case against such person to repay unless he proves that he is not liable to make the repayment . . . ." It is well-known that u/s 235, Indian Companies Act, the entire onus is upon the liquidator or the applicant to prove his case Vide Cavendish Bentick v. Fenn (12 AC 652) in which Lord Herschell observed as follows at p. 661 "when an applicant seeks under the 165th section to establish a case of misfeasance I think it is necessary for him to give evidence of all elements that go to make up that misfeasance." By the introduction of Section 45H the rule about the onus of proof has been modified by making a provision that where the applicant u/s 235, Indian Companies Act, has been able to establish prima facie case the onus will be shifted

to the persons against whom the application is made to prove that they are not guilty of misfeasance. Section 45H of the Banking Companies (Amendment) Act, 1953, therefore modifies a rule about the onus of proof and cannot be said to enact any provision about the rights or liabilities of the parties. An order u/s 45H accordingly cannot be said to be an order affecting the rights or liabilities of the parties and is not therefore a judgment within the meaning of clause 15 of the Letters Patent. Our conclusion therefore is that the order made by Bachawat, J., is not appealable u/s 202, Indian Companies Act.

8. We have now to consider the question whether the order is appealable u/s 45N of the Banking Companies Amendment Act (1953) : That section provides "An appeal shall lie from any order or decision of the High Court in a civil proceeding under this Act where the amount or value of the subject matter of the claim exceeds five thousand rupees." The proceedings in which the order under appeal has been made is a proceeding u/s 235, Indian Companies Act, and not a "civil proceeding" under the Banking Companies Act. It is true that the Banking Companies Amendment Act contains many provisions which regulate the procedure in a proceeding under the Indian Companies Act but that does not convert a proceeding under the latter Act into a proceeding under the former. Many kinds of Civil proceedings can be started under the Banking Companies Amendment Act itself; for example, u/s 45B the High Court has been given exclusive jurisdiction to decide al claims in respect of banking companies whether such claims have arisen before or after the date of the order for the winding up of the Banking Company. Similarly Section 45D gives jurisdiction to the High Court to settle a list of debtors in the manner provided for in that section. It seems t us that the right of appeal conferred by Section 45N is limited to orders in original civil proceedings contemplated by that Act and does not extend to orders passed in civil proceedings started under the Indian Companies Act. The order against which the present appeal is directed is, in our opinion, a refusal to exercise a power under the Banking Companies Amendment Act in a civil proceeding under the Indian Companies Act and therefore it is not an order or decision in "a civil proceeding under this Act" within the meaning of Section 45N. We are, therefore, of the opinion that the order in the present case is not appealable u/s 45N.

9. It was contended on behalf of one of the Respondent, that a right of appeal was governed by the state of the law at the date of the initiation of the proceeding concerned and since the application u/s 235 had been made on a date when Section 45N of the Banking Companies Act was not in existence, no right of appeal under that subsequently enacted section could be available to the appellant. We are unable to accept that contention. This is not a case where a right of appeal existing at the date of the commencement of the proceeding is being denied, nor a case where a right of appeal is being claimed under a new law in respect of an order passed before the law had come into force. Here, the order appealed from was passed after Section 45N had come into force and therefore if the order be of such a character as is contemplated by the section a right of appeal under it cannot be

denied on the ground that when the application u/s 235 was made, the section had not yet been enacted.

10. Our conclusion therefore is that the preliminary point raised by the respondents must succeed. Since, however, the appeal has been argued at considerable length on the merits we consider it proper to record our views on one point. From the judgment of Bachawat, J. it appears that one of the points raised before him was that as soon as the applicant u/s 235 comes before the Court with certain allegations and the petition discloses a prima facie case against the Respondents, it must be held that the petitioner has made out a prima facie case within the meaning of Section 45H and the respondents should be called upon to prove that they are not guilty of misfeasance. We have no hesitation in holding that this contention is not sound and that it was rightly overruled by the learned Judge. The language used in Section 45H is "Where the applicant makes out a prima facie case." In our opinion there is a substantial distinction between "making out" a prima facie case and "disclosing" a prima facie case. If the application does not disclose a prima facie case it is liable to be summarily dismissed; but if it discloses a prima facie case it will be admitted for further consideration. That is, however, something entirely different from "making out" a prima facie case. Making out a prima facie case, in our opinion, means establishing a prima facie case by legally admissible evidence. That evidence need not always be oral evidence or evidence furnished by documents proved by witnesses in Court. It may consist of affidavits provided such affidavits comply with the requirements of Order 19, Rule 3, C. P. Code.

11. Before us the appellant has argued that even if the extreme contention raised before the trial Court fails it should be held upon the materials produced by the applicant in support of its application that it has been able to make out a prima facie case. In our opinion that argument is not open to the appellant. It will be recalled that S. R. Das Gupta, J., by an order dated the 27th August, 1953, directed that the matter be set down for trial on evidence on the 8th December, 1953, and that discovery and inspection be completed by the 24th November, 1953. The Banking Companies Amendment Ordinance of 1953 was promulgated on the 24th October, 1953. Thereafter the appellant took no steps to get the order of S. R. Das Gupta, J., vacated but on the other hand submitted to it and took and order from Bachawat, J., by consent on December 16, 1953, undertaking to file originals and copies of documents with supplementary affidavits. We have already stated that these supplementary affidavits with copies of documents intended to be relied upon were filed in Court on the 24th April and the 4th June, 1954, long after the commencement of the Banking Companies Amendment Act of 1953. From these facts it appears that even after the commencement of the Banking Companies Amendment Ordinance and Act the liquidator took upon himself the duty of proving by evidence the allegations made in the application u/s 235. We see no reason how in these circumstances the liquidator can be permitted to go behind the order made by S. R. Das Gupta, J., on August 27 and Bachawat, J., on December 16, 1953, and

claim that u/s 45H he is not bound to prove his allegations by evidence as he was made out a prima facie case within the meaning of that section. In the second place it seems to us that u/s 45H of the Banking Companies Amendment Act of 1953 the applicant may either confine himself to the petition and supporting materials or he may adduce only a portion of the evidence available to him and ask for an order against the respondent. If, however, he chooses the latter alternative, he will do so at his risk. If the respondent succeeds in adducing evidence which is sufficient to rebut the evidence adduced by the applicant, he cannot then turn round and say that he has further evidence and proced to adduce the same. It does not appear that the case made by the appellant before Bachawat, J., was that it had made out a prima facie case by the petition, the supporting materials and the further documentary evidence introduced by the subsequent affidavits and that it was prepared to close its case. It pressed the learned Judge to hold that prima facie case had been made out by the petition and the supporting materials so that, perhaps, even if the respondents succeed in dislodging the prima facie case, it would then be entitled to commence leading evidence. Bachawat, J., did not entertain the contention in the view that the matter had entered the stage of evidence under the order of S. R. Das Gupta, J., and that as regards the petition and the supporting materials, they might disclose a prima facie case but by themselves did not make it out. In our opinion, the view taken by Bachawat, J., was right. No argument was addressed to us on the sufficiency of the materials contained in the petition and the supporting documents for the purpose of making out a prima facie case and in view of our opinion that the appellant was not entitled to recede to those materials by reason of the order of S. R. Das Gupta, J., and its own subsequent conduct, no such argument would be tenable. We, therefore, express no opinion on the contention of the respondents that there was no proper affirmation in the affidavits filed in support of the petition.

12. Mr. A. K. Sen appearing for some of the respondents contended that the provision in Section 45H to the effect that the High Court "shall" make an order against such person to repay, etc., is directory and not mandatory and relied upon the decision of the Judicial Committee in the case of Punjab Co-operative Bank Ltd. v. Commissioner of Income Tax, Lahore (LR 67 IA 464). In that case in interpreting Section 205 of the Government of India Act, 1935, the Privy Council held that the requirement in that section that it shall be the duty of every High Court to consider in every case whether or not the case involves a substantial question of law as to the interpretation of that Act or any order in Council made thereunder, was directory and not mandatory. It seems to us that Section 45H of the Banking Companies Amendment Act of 1953 is very differently expressed. There as in Section 45H, the mandatory provision is preceded by a condition precedent and that condition precedent is satisfied, no discretion is left to the Court. We are therefore unable to accept the argument that even if the applicant u/s 235 has made out a prima facie case, the Court has still a discretion u/s 45H to refuse to call upon the respondents

to prove that they are not guilty of misfeasance. Though we cannot accept this argument we are of the opinion that the appellant before us has failed to satisfy the condition precedent and therefore the trial Court was right in refusing to ask the respondents to begin their case.

13. In the result, the appeal fails and is dismissed with costs.

14. Certified for two Counsel in the case of the parties for whom two Counsel were actually briefed.

15. Costs o the Liquidator will come out of the assets of the Company. Certified for two Counsel.

16. Chakravartti, C.J. - I agree entirely with what has fallen from my learned brother and would only add a few observations.

17. First, as to the maintainability of the appeal. It was contended that it was maintainable u/s 202 of the Indian Companies Act or alternatively under clause 15 of the Letters Patent or in the further alternative, u/s 45N of the Banking Companies Act itself. None of these contentions appears to be tenable.

18. As to Section 202 of the Indian Companies Act, I doubt if it deals with the right of appeal at all. The section speaks of not only appeals but also re-hearings of appeals and with regard to both it says that they "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". It is not said that appeals may be had in the manner and under the conditions of appeals in ordinary cases and that re-hearings may be had in the manner and under the conditions of re-hearings. Both, it is said, may be had in the manner and under the conditions of appeals. If the section is to be read as providing for a right of appeal, it must be construed as saying that re-hearings may be had in all cases in which appeals may be had which, it appears to me, is an impossible construction. What, to my mind, the section really means is that an appeal from an order made in the course of a winding up or a rehearing of such an appeal shall be governed procedurally by the rules and conditions applicable to appeals from orders or decisions in cases within the ordinary jurisdiction of the Court.

19. Section 202 therefore does not by itself give any right of appeal. Even if it does, it gives only a qualified right and the qualification is that the same manner must be followed and the same conditions satisfied as in the case of an appeal from an order made in the Court''s ordinary jurisdiction. There has been some controversy which is reflected in judicial decisions as to whether the word "conditions" refers to mere procedure or to requisites of the right of appeal itself. In my opinion, the latter meaning of the word is plain. The language of the section is that appeals may be "had" subject to the conditions which the section mentions and if it is to be read at all as providing for a right of appeal, the word "had" makes it clear that the

conditions are the conditions of the right itself and not conditions of the filing or the carriage of the appeal. It follows that if the right of appeal depends upon the same conditions as govern appeals from orders made in the Court''s ordinary jurisdiction, it really adds nothing to the laws under which appeals may be had in the later cases.

20. An order in the matter of the winding up of a company may be made by either the High Court or the Court of a District Judge if it has been vested with the necessary jurisdiction. Under the proviso to Section 3(1) of the Companies Act, the Central Government may empower any district Court to exercise all or any of the jurisdictions under the Act, again, u/s 164 the High Court may, after making a winding up order, direct all subsequent proceedings to be had in a District Court.. Appeals from orders made by a High Court in the matter of the winding up of a company must therefore satisfy the conditions of clause 15 of the Letters Patent and appeals from orders made by a District Court will have to satisfy the conditions laid down in the Civil Procedure Code. We are however not concerned in the present case with orders made by a District Court, since the High Court has now been made a Court of exclusive jurisdiction in regard to the winding up of baking companies. Section 202 of the Companies Act, therefore, throws us in the present case on clause 15 of the Letters Patent.

21. As to Section 45N of the Banking Companies Act, I am of opinion that it does not apply to the order appealed from in the present case. As my learned brother has pointed out, that section speaks of "an appeal . . . . . from any order or decision . . . . . in a civil proceeding under this Act", i.e., the Banking Companies Act, and not of "an appeal from any order or decision under this Act made or given in a civil proceeding". It also speaks of a case where "the amount or value of the subject matter of the claim exceeds Rs.5,000." The orders contemplated by the section are clearly orders made in proceedings which are specially authorised by the Banking Companies Act and which involve some claim, such as proceedings u/s 45B. The proceedings in which the order appealed from in the present case was passed was a proceeding not under the Banking Companies Act, but u/s 235 of the Indian Companies Act. Indeed Section 45H under which the order was made mentions specifically an application u/s 235 of the Companies Act and all that the former section does is to provide for an order of a certain kind to be made under it in the course of the proceedings initiated by an application under the latter section. To my mind, Section 45N excludes itself from orders of the present kind by its own language.

22. It was contended on behalf of the appellants that the winding up proceedings in the present case were proceedings under the Banking Companies Act as well, because reference to that Act are to be found in the winding up order. I do not think that the contention is tenable. The Banking Companies Act does make a provision in Section 38 for a winding up order in the case of Banking Companies, without prejudice to the provisions of Section 162, 371 and 37 of the Indian Companies Act

and consequently it may, it is true, be said that the winding up proceedings in the present case was a civil proceeding under the Banking Companies Act as well. But a winding up proceeding does not involve a claim and cannot be said to be a proceeding within the contemplation of Section 45N. The proceeding which was initiated in the present case and which does involve a claim is a special proceeding authorised by Section 236 of the Companies Act alone and, as I have already pointed out, Section 45N of the Banking Companies Act only provides for an order of a certain kind to be made in the course of such a proceeding, but does not provide the foundation for the proceeding itself.

23. I do not, however, think that Section 45N contemplates appeals from the High Court to the Supreme Court and not to the High Court itself as was contended on behalf of one of the respondents. Assuming that Parliament could create such a right of appeal to the Supreme Court under Article 138 of the Constitution, it is clear that no such thing has been done by Section 45N. In the first place, it will appear from clause (c) of Section 45U that the High Court has been given power to make rules prescribing "the authority to which, and the conditions subject to which, appeals may be preferred and the manner in which such appeals may be filed and heard." Since rules can be framed by the High Court even as regards the authority to which appeals may be preferred, such authority must obviously be some authority within the High Court, such as a Division or a Special Bench and cannot possibly be the Supreme Court. In the second place, sub-section (2) of Section 45N empowers the High Court to provide for an appeal from any order made u/s 45J by rules framed by it. Section 45J is concerned with criminal proceedings. It is thus clear that appeals contemplated by sub-section (2) of Section 45N are appeals to the High Court itself, because the High Court could not possibly be given power to confer a new Appellate Jurisdiction on the Supreme Court by making rules under the Act. It would, therefore, seem to be unarguable that Section 45N contemplates appeals to the Supreme Court.

24. Section 45N of the Banking Companies Act being thus excluded and Section 202 of the Indian Companies Act being also excluded as conferring a general or additional right of appeal, one is thrown back on clause 15 of the Letters Patent. The question whether the present appeal could be said to be warranted by the provisions of clause 15 is bound up to a certain extent with the merits of the case, as was rightly pointed out by all the parties. Since we are holding that the appeal is not maintainable, I would not be justified in making any observation on the merits of the case which might cause embarrassment in future and must confine myself to only such matters as cannot be avoided in considering the appealability of the order. The one such matter which is relevant is the true scope of Section 45H and it must be adverted to in order to determine the nature of the order appealed from.

25. Section 45H speaks of a case where an application u/s 235 of the Companies Act is made and where the applicant makes out a prima facie case. It thus speaks of two

things, first the making of an application and second, the making out of a prima facie case by the applicant. It is thus clear that something more - that the mere making of an application is contemplated by the section which will justify an order against the respondents to the application. u/s 235 of the Companies Act, the onus and the whole onus of proving his case lies on the applicant and it lies on him up to the end. Section 45H introduces a middle point at which the onus shifts or to be more accurate, an onus is thrown on the respondents to prove their innocence. The point at which a prima facie case can be said to have been made and the onus to shift is not specifically marked out by the section. Accordingly, so far as the words of the section go, it can be at any stage of the proceeding, either the stage at which only the application has been made or a subsequent stage when some evidence has already been led by the applicant. It seems to me, however, that in practice the section can work only if it is involved Returning Officer applied when only the application has been made and if that be so, it seems to me further that the section has conferred very little additional advantage on the applicant.

26. In terms, Section 45H does not provide for an application by the applicant for an order on the respondents to disprove their guilt on the ground that he has made out a prima facie case. It rather provides that where the applicant makes out a prima facie case, it shall be the duty of the Court to make an order against the respondents which in the first place will have to be an order to dislodge the prima facie case. In practice, I imagine, the applicant will make an application. Be that as it may, if at the stage when only the application has been made, the Court, after considering it and the materials produced in its support, comes to hold that a prima facie case has been made out, it will make an order on the respondents to disprove their prima facie guilt and if they succeed in doing so, it will perhaps be in order to allow the applicant to lead his evidence and try to prove his case in the ordinary manner. In such a case, the applicant will be reduced to the old position of an applicant u/s 236 of the Companies Act with the whole onus of proving his case lying on him, but losing his prima facie case, he will not lose his application altogether. Suppose, however, the applicant claims or the Court holds in the middle of the applicant''s evidence that a prima facie case has been made out and directs the respondents to enter upon their defence. If they do so and succeed in dislodging the prima facie case, it seems impossible that the applicant will then be allowed to revert to leading evidence and proceed with the application. If such a thing is to be allowed once, it must have to be allowed any number of times, whenever it is thought that a prima facie case has been made out and two parties will be adducing evidence and counter evidence alternatively throughout the course of the proceeding. To my mind such a procedure is inconceivable. If, after he has led some evidence, the applicant asks the Court to hold that a prima facie case has been made out, he will do so at his risk because if the prima facie case is disproved, he will not be entitled to make any use of any further evidence that he may have at his command. No application will ever take that risk. Similarly, if the Court discloses any

inclination in the middle of the applicant''s evidence to hold that a prima facie case has been made out and a consequential order against the respondents ought to be made, such an order will, I think, be resisted by the applicant with all his might, because it will expose him to the serious risk of losing altogether the benefit of the further evidence that remains to be adduced on his behalf. I do not think that any Court also will like to make any such order at an intermediate stage and will consider itself debarred from doing so by practical considerations of a fundamental nature. Whatever the intention of Section 45H might have been, its net effect is to make an order on the basis of a prima facie case possible only at the very initial stage when all that has happened is that an application has been filed but no evidence has been led. Once the proceeding has reached the stage of evidence it can no longer be possible to make the initial order on the basis of prima facie case, unless the applicant takes the risk which, I conceive, he never will. The advantage which an applicant u/s 235 gets from Section 45N of the Banking Companies Act is thus a very small advantage indeed.

27. When an order on the basis of a prima facie case is made u/s 45H, it means that in the opinion of the Court the onus has shifted or been thrown o the respondents to disprove their apparent guilt and that they must lead evidence. It is purely a procedural order. Again, making out a prima facie case means making out such a case to the satisfaction of the Court and not to the satisfaction of the applicant and not merely making an allegation. In the present case, S. R. Das Gupta, J., had made an order on the 27th August, 1953, that the application should be set down for trial on evidence. On that date, Section 45H was not in existence. It came into existence on the 24th October, 1953, as a part of the Banking Companies Amendment Ordinance, 1953 and became a part of the consequential act on the 30th December following. At that time, however, the Court Liquidator or his predecessor did not pay any attention to the section, but continued to proceed on the basis of the order of S. R. Das Gupta, J. Even on the 24th April and the 4th June, 1954, he was filing affidavits and adducing documents and what he was doing was clearly that he was going to trial on evidence. It was only after he had produced all that evidence and only after the hearing of the application had commenced in July, 1954, that he first began to think of Section 45H and to insist on an order on the basis of that section. Even then he was not saying that he had made out a prima facie case by his application and by the evidence which he had adduced up to that time, but claimed to be entitled to an order u/s 45H on the basis of his application and the supporting materials. The extreme and only contention put forward on his behalf before Bachawat, J., was that he was entitled in view of Section 45H to limit himself to his application and the supporting materials and that the allegations made therein should be held to be an equivalent of a prima facie case.

28. M Justice Bachawat repelled that contention. He recalled the order of S. R. Das Gupta, J., which still stood and pointed out that he was not dealing with the case in which an application was tried on affidavits. This would be sufficient to dispose of

the applicant''s contention, but the learned Judge added that disclosing a prima facie case was not making it out and that the application did no more than disclose a case. In the result, he declined to make an order against the respondents on the basis that an onus had been thrown on them to disprove their guilt and that they must begin by leading evidence.

29. It is that order which has been appealed from. As I have pointd out, Section 45H does not indicate any specific stage at which an order on the basis of a prima facie case can be askd for and made. I would, therefore, concede that despite the order of S. R. Das Gupta, J., for a trial on the evidence, the applicant might, if he so wished, ask the Court to hold on the basis of the evidence he had adduced up to the time that a prima facie case had been made out. To do so, however, would be to abandon the right of adducing further evidence and the applicant did not take the risk. Instead, he asked for an order on the basis of only the application and the supporting materials which Bachawat, J., refused to make.

30. If the present appeal can be held to be maintainable only if it can be proved to be warranted by clause 15 of the Letters Patent, I am clearly of opinion that clause 15 does not warrant it. However wide a construction may be put upon that clause, it cannot be held to cover an order by which all that is held is that there being already an order for trial on evidence, evidence must be led. Such an order cannot be said to be a ''judgment'', inasmuch as it does not finally determine any question between the parties on the merits of the case, nor does it determine question between the parties on the merits of the case, nor does it determine any right or liability affecting the merits. I have already pointed out that if the applicant was to be held to the order of S. R. Das Gupta, J., it was not really necessary also to hold that Section 45H contemplated the making out and not merely the disclosure of a prima facie case and that no such case could be made out by a mere petition without the aid of admissible evidence. But assuming that finding was also a relevant finding, it was only a finding to the effect that in the learned Judge''s view, the onus had not shifted to the respondent, as claimed by the applicant. The adjudication contained in that order, if there was any, was only an adjudication on a procedural matter arising out of a prayer made by way of a stop towards obtaining the final adjudication in the proceedings. In my opinion, it cannot be said that even that finding makes the order o the learned Judge a ''judgment''.

31. As I have said already, in view of our decision that no appeal lies, it will not be proper to make any observations on the merits of the case or the merits of the learned Judge''s order, if they can be avoided. I may however, make one observation. It seems to me that although S. R. Das Gupta, J., had made an order for a trial of the application on evidence on the 20th August, 1953, it was open to the applicant, after the Banking Companies Amendment Ordinance had come into force, to apply for a rescission of that order on the ground that a new law, conferring a new right on the applicant, had since been made and he desired to take

advantage of that right. He might have refrained from filing the affidavits he did on the 30th April and the 4th June, 1954, and asked for an order u/s 45H on the basis of his application and the supporting materials. He did not take that step with the result that the order of S. R. Das Gupta, J., stood. In my view, Bachawat, J., was entirely right in holding that in view of that order and the stage which the proceeding had reached, there could be no going back to the stage of trial on affidavits. He was also right in holding that Section 45H did not contemplate the mere making of an application u/s 235 with the allegations contained in it, but contemplate making out a prima facie case which had to be done by admissible evidence. As o whether the application and the supporting materials in the present case contained any or sufficient admissible evidence I express no opinion, because we were not invited to consider those materials, because in view of the order of S. R. Das Gupta, J., the question does not arise and because no appeal lies from the order of Bachawat, J. For those very reasons I do not also express any opinion on the question as to whether the procedure applicable where an order u/s 45H is asked for on the basis of the application and the supporting materials is the procedure of an ex parte application such as is provided for in rules 196 and 200 of the rules framed by this Court under the Companies Act or whether the respondents to the application should be heard before an order is made.