(1953) 04 CAL CK 0022

Calcutta High Court

Case No: Appeals from Original Orders No''s. 157 and 169 of 1952

Dwarkadas Agarwalla		APPELLANT
	Vs	
Dharamchand Jain		RESPONDENT

Date of Decision: April 30, 1953

Acts Referred:

- Banking Companies Act, 1949 - Section 35, 37, 38, 38(1), 38(3)
- Companies Act, 1913 - Section 153, 153(1), 162, 163, 271

Citation: (1955) 2 ILR (Cal) 378

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

Bench: Division Bench

Advocate: S. Banerji and A.K. Dutta, for the Appellant;R. Chaudhuri, S.K. Hazra, S. Chaudhuri, B. Das, S.M. Bose, General and B. Das, for Bank of Jaipur, for the Respondent

Final Decision: Allowed

Judgement

Chakravartti, C.J.

These are two appeals arising out of the affairs of the Calcutta National Bank Limited, Appeal No. 157 of 1952 being directed against an order dismissing an application for a scheme and Appeal No. 169 of 1952 being directed against an order for the winding up of the company. The Appellant in both the appeals is one Dwarkadas Agarwalla, who has described himself as the president of the depositors'' association of the bank.

2. The appeals for the last chapter of a long story which commenced as long ago as on May 14, 1951, if not a little earlier. It appears that the Calcutta National Bank Limited is a fairly large undertaking with an authorised capital of Rs. 50,00,000, divided into 5,00,000 shares of Rs. 10 each, all of which are fully subscribed and paid up. The assets of the bank, as would appear from a report submitted by certain auditors under the directions of the Company Court, are considerable, but so are the liabilities of the bank not inconsiderable. Apparently, the affairs of the bank were

not being conducted in a prudent and businesslike manner which attracted the attention of the Reserve Bank of India, and shortly before the date which I have mentioned, namely, May 14, 1951, the Reserve Bank of India appears to have carried out some kind of investigation, presumably u/s 35 of the Banking Companies Act. As a result of the examination of the affairs of the bank made by it, the Reserve Bank of India felt it necessary to take some action and the action it took, or caused to be taken, was to direct the Bank not to accept any fresh deposits and not to do any further banking business. Upon that direction being given, the bank suspended payment on May 14, 1951, and applied for a moratorium to this Court u/s 37 of the Banking Companies Act. An interim moratorium was granted, but within seven days thereof an application was made by one Sachindra Bhattacharyya for a winding up of the bank on May 21, 1951. While that application was still pending, the present Appellant, Dwarkadas Agarwalla, appeared on the scene and on September 3, 1951, he made an application u/s 153 of the Indian Companies Act for the adoption of a scheme of arrangement which he proposed. Reference to the details of the scheme will have to be made later. On that application being made, Banerjee, J., who was the Company Judge at the time, directed meetings of the creditors and depositors and of the shareholders to be held on October 14 to consider the scheme. On October 14, the scheme was considered and passed at two meetings.

3. The Reserve Bank of India gave its blessings to the scheme u/s 45(a) of the Banking Companies Act and certified that the arrangement would not be detrimental to the interests of the depositors of the company. When the scheme came up finally before Banerjee, J. with the certificate of the Reserve Bank of India, he sanctioned it on February 11, 1952, but before he did so, he made extensive modifications in it himself. The scheme, as so modified by the learned Judge, was not sent hack for reconsideration by the creditors, depositors and shareholders, nor was any certificate of the Reserve Bank asked for or obtained. All that was done was that a copy of the scheme, as revised and modified, was sent to the solicitors for the Reserve Bank of India who were acting in the matter for the Reserve Bank in its capacity as a secured creditor. It also appears that although by the initial order the learned Judge had directed individual notices to be issued to all the creditors and depositors, no such notice was issued to the creditors in Pakistan.

4. The substance of the scheme was that the assets of the company would be realised, the creditors and depositors paid off so far as possible, and if, after they had been paid up in full, any surplus was left, the same would be distributed among the shareholders. The essence of the scheme, therefore, was a winding-up of the company, but the special feature which has created all the subsequent trouble was that instead of the winding-up being carried out officially by a liquidator appointed by the Court, it was to be carried out under the scheme by a private agency, namely, the Bank of Jaipur, acting as the agent of the Calcutta National Bank, Limited.

5. At the time when Banerjee, J. made the initial order on September 3, 1951, he also appointed a Special Officer in the person of one Mr. P.C. Chaudhury, who had been at one time an Accountant-General. It appears that even after the scheme had been finally sanctioned, he continued to remain in office.

6. Between February 11, 1952, and May 27 following, the scheme was apparently in operation, but the interval seems to have been spent mostly over wrangles between the Special Officer on the one hand and the Bank of Jaipur on the other, either directly or indirectly. On May 27, 1952, another person appeared on the scene with an application for a winding-up. He was Dharam Chand Jain, one of the Respondents to these appeals, who had an amount of Rs. 1,105-10-0 in deposit with the Gaya branch of the bank in a current account. Dharam Chand Jain alleged that on May 2, 1952, he had served a notice on the bank u/s 163 of the Indian Companies Act for the repayment of his money, but had not obtained payment. On the basis of that failure to obtain payment, he alleged that the company was unable to pay its debts and asked for a winding-up order.

7. On June 9, 1952, Dharam Chand Jain was joined by one Sree Gopal Joshi who was a shareholder, holding eight ordinary shares in the Calcutta National Bank. On his behalf an affidavit was affirmed and filed by one Viswanath Arora in which the scheme was attacked on various grounds.

8. The application for a winding-up came to be heard by Banerjee, J. on June 17, 1952, when he refused to admit it. He overruled the legal objections taken to the scheme which he had already sanctioned and rejected the application for a winding-up on the ground that a good and valid scheme having already been sanctioned and being in operation, no question of entertaining an application for a winding-up could possibly arise.

9. On July 2, 1952, Dharma Chand Jain preferred an appeal to this Court and when that appeal was pending, the Bank of Jaipur made an application to the Appellate Court on July 28, 1952, for a direction on the Special Officer to make over to the Bank of Jaipur the assets of the Calcutta National Bank Limited. I should state here that one of the terms, and indeed the first term, of the scheme of arrangement, was that the Bank of Jaipur would take over and run in its name the branches of the Calcutta National Bank Limited at certain places. The application made by the Bank of Jaipur for an order on the Special Officer was made for the purpose of obtaining from the Special Officer possession of some of the branches of the bank which, it was alleged, were continuing to be in the Special Officer''s possession.

10. The appeal was disposed of on August 14, 1952, when it was allowed. It was allowed in the form that Dharam Chand Jain''s application for a winding-up was admitted and the Company Court was directed to issue the usual advertisements and to make special mention of the fact that objections taken to the validity of the scheme would be considered. The Special Officer was directed by the Appellate

Court to hand over the assets of the Calcutta National Bank, Limited, which might still be in his hands, to the Bank of Jaipur Limited. With those directions the matter went back to the Company Court.

11. After the matter had gone back, the Appellant, Dwarkadas Agarwalla, appeared again on the scene with another application for the consideration of another scheme. He said in his application that he had been advised that the previous order of the Company Court, sanctioning the scheme of arrangement, was without jurisdiction and a nullity and he submitted that, in those circumstances, there was no legal bar to his making a fresh application and proposing a fresh scheme. The fresh scheme he proposed for the consideration of the creditors and shareholders was a revised version of the old scheme, the Bank of Jaipur still figuring as the prospective agent of the Calcutta National Bank, Limited, to be charged with the duty of winding-up the affairs of the bank and to be remunerated more or less in the same way as under the previous scheme. Certain alterations, however, were made, to which reference will be made later. The second application of Dwarkadas Agarwalla was made on November 25, 1952, and was disposed of by S.R. Das Gupta, J. on December 2, following. By the same order the learned Judge also disposed of the application made by Dharam Chand Jain for the winding-up of the bank. He held that the scheme of arrangement sanctioned on the previous occasion by Banerjee, J. was a nullity and, therefore, there was no legal bar to Dharam Chand Jain making, or the Court entertaining, the application for a winding-up As regards the second application for the adoption of a revised scheme, the learned Judge held that, in view of the provisions of Section 38 of the Banking Companies Act, it was obligatory upon him to direct a winding-up and not open to him to entertain an application for a scheme. He, however, proceeded to examine the scheme on the merits and came to the conclusion that it was not a scheme which the Court could properly send to the creditors and shareholders for their consideration and further that the scheme was of such a nature that the Court ought not to take any steps in order to the framing of a scheme of arrangement on the lines of such a scheme. Turning then to the application for a winding-up, the learned Judge pointed out that, so far as the winding-up of the affairs of the bank was concerned, it had not been opposed by any of the parties and all the debate before him had been as regards the maintainability of Dharam Chand Jain''s application and as regards the agency through which the winding-up should be carried out. Accordingly, after rejecting the application for a scheme, the learned Judge found nothing which could incline him not to direct a winding-up of the company and he proceeded to make a winding-up order. As already stated, it is against those two orders that the two appeals before us were preferred.

12. I have already stated that S.R. Das Gupta, J. rejected the application for a scheme on a ground of law, but not on a ground of law alone. He said that he had also carefully considered the scheme itself, which had been presented before him, and he did not feel justified in making an order u/s 153(1) of the Indian Companies Act.

He said again towards the close of his judgment that he was clearly of opinion that even if he had any option u/s 38 of the Banking Companies Act, which he thought he had not, he should not grant the application before him, because to do so would be to disregard the true interests of the poor and ignorant depositors. "I cannot", observed the learned Judge, "even if the majority of the creditors present at "the meeting proposed to be called are foolish enough to accept "this position-put my seal on it." In view of the two lines of reasoning upon which the learned Judge proceeded, the argument before us naturally took the same two lines.

13. Before us, Dwarkadas Agarwalla was represented by the learned Standing Counsel and the Bank of Jaipur for some time by Mr. S. Chaudhuri and during the final stages of the hearing by the learned Advocate-General. It was contended by the learned Standing Counsel that the view taken by S.R. Das Gupta, J. of Section 38 of the Banking Companies Act was erroneous, and the error had been caused by the fact that the learned Judge had overlooked the opening and qualifying words occurring in Sub-section (1) of the section. It was submitted that if proper regard was paid to those words, it would appear that, even u/s 38 of the Banking Companies Act, the Court had a discretion to order or not to order a winding-up and that it had not been made obligatory on the Court to order a winding-up in the circumstances stated in the section. The learned Advocate-General took a different line, but I shall deal first with the contention of the learned Standing Counsel.

14. Section 38(1) of the Banking Companies Act is thus expressed:

Without prejudice to the provisions contained in Section 162 or Section 271 of the Indian Companies Act, 1913 (VII of 1913), and without prejudice to its powers u/s 37, the Court shall order the winding-up of a banking company if it is unable to pay its debts and the Court shall also order the winding-up of a banking company if the Reserve Bank applies in this behalf to the Court.

15. S.R. Das Gupta, J. held that the company in the present case was a banking company, that it was unable to pay its debts as appeared from the fact that Dharam Chand Jain''s debt had not been paid and also from the fact that the company had to apply for a moratorium. According to the learned Judge, the conditions precedent to the applicability of Section 38(1) were all present and that being so, the Court was bound to carry out the mandate contained in the section by ordering a winding-up.

16. It was contended by the learned Standing Counsel that while the closing portion of Section 38(1) was expressed in an absolute and a mandatory form, the section began with an important reservation which was that whatever obligations were going to be laid upon the Court, they would be-

Without prejudice to the Provisions contained in Section 162 or Section 271 of the Indian Companies Act,... and without prejudice to its powers u/s 37.

17. We need not for the present concern ourselves with either Section 271 of the Indian Companies Act or Section 37 of the Banking Companies Act. Confining ourselves to Section 162, it is pertinent first to enquire what the provisions of that section are. The section, it will appear, provides when a company may be wound up by the Court and contains an enumeration of six contingencies in which a winding-up order can be made. The only contingency which is relevant to the present discussion is that numbered (v) which is: "if the company is unable to pay "its debts". As the section begins with the word "may", its effect, read by itself, is to confer a discretion on the Court to order or not to order a winding-up even when the inability of a company to pay its debts is proved. So far as the contingency in which a company is unable to pay its debt is concerned, it will appear that, if the company is a banking company, the effect of Section 38(1) of the Banking Companies Act is clearly to give a direction to the Court contrary to that contained in Section 162 of the Indian Companies Act. Prima facie, therefore, it would seem that while the legislature, by Section 162 of the Indian Companies Act, was saying that even if a company was unable to pay its debts, it would be entirely optional for the Court to direct or not to direct a winding-up, the same legislature, by Section 38(1) of the Banking Companies Act, was saying that if the company unable to pay its debts was a banking company, the Court would be bound to order its winding-up. Had Section 38(1) contained only a simple provision that in the case of a banking company being unable to pay its debts, the Court must order its winding-up, it would be easy to construe it as superseding the general provision applicable to all companies contained in Section 162 of the Indian Companies Act. Section 38(1) of the Banking Companies Act, however, saves the provisions of Section 162 of the Indian Companies Act, for it begins, as I have already stated, with the words "without prejudice to the provisions contained in Section 162". The learned Standing Counsel contended that the effect of the opening words was to preserve the discretion or option conferred by Section 162 of the Indian Companies Act even in the case of banking companies which were unable to pay their debts. But I do not see how that can possibly be the true construction. If the opening words of Section 38(1) also comprise the case of a banking company which is unable to pay its debts and if the effect of those words be to maintain the operation of Section 162 of the Indian Companies Act even on banking companies in that condition, the subsequent provision making it obligatory on the Court to direct a winding-up when a banking company is unable to pay its debts, is perfectly meaningless and a plainly inconsistent provision. There can be no doubt that the section is most clumsily drafted and does no credit to the draftsman. The only reasonable and sensible meaning that can be spelt out of it is that the opening words preserve the discretion of the Court only in cases specified in Clause (i) to (iv) and Clause (vi) of Section 162, but so far as Clause (v) is concerned, namely, a case where a company is unable to pay its debts, the provisions of Section 38(1) of the Banking Companies Act must prevail in the case of a banking company. The only use of the opening words, therefore, is to preserve the discretion of the Court in cases where, although the

company is a banking company, the reason for which its winding-up is sought is not the reason given in Clause (v) of Section 162, but a reason contained in one or other of the remaining five clauses. If that be the true meaning which I consider to be the only reasonable construction of which Section 38(1) will admit, S.R. Das Gupta, J. was right in holding that Section 38(1) required him to direct a winding-up in the facts of the present case.

18. The learned Advocate-General, as I have said, took a different line. He conceded that the effect of Section 38(1) was to supersede the provisions of Section 162 of the Indian Companies Act in cases where the company was a banking company and the ground for asking its winding-up was that it was unable to pay its debts He, however, contended that the debts contemplated by Section 38(1) were not any debts, but only banking debts. He proceeded to contend that, u/s 38, not only must the debts, which a banking company was unable to pay, be banking debts, but the inability must also be of the kind defined or explained in Sub-section (3) of the section. That Sub-section provides that-

A banking company shall be deemed to be unable to pay its debts if it has refused to meet any lawful demand for payment made at any of its offices or branches within two working days, if such demand is made at a place where there is an office, branch or agency of the Reserve Bank, or within five working days, if such demand is made elsewhere, and if the Reserve Bank certifies in writing that the Banking company is unable to pay its debts.

19. But Sub-section (3) is also prefaced by an introductory phrase and that phrase is, "without prejudice to the provisions contained in "Section 163 of the Indian Companies Act, 1913".

20. The learned Advocate-General''s contention was that what Section 38(1) of the Banking Companies Act contemplated was a case where the company concerned was a banking company and the debts which it was unable to pay were banking debts and its inability to pay had been of the kind mentioned in Sub-section (3) of the section and to such inability, a certificate of the Reserve Bank that the bank was unable to pay its debts was added. The conclusion to which that argument led was that the default in the present case had not been of the kind mentioned in Sub-section (3) of Section 38, nor had there been any certificate by the Reserve Bank to the effect that the Calcutta National Bank, Limited, was unable to pay its debts. Consequently, Section 38(1) did not apply and the discretion given to the Court by Section 162 of the Indian Companies Act remained unaffected.

21. I find it extremely difficult to accept even this construction suggested by the learned Advocate-General. In aid of his argument he referred to the provisions contained in Section 38(1) to the effect that the duty laid on the Court by that section would be "without prejudice to its powers u/s 37". Section 37 is the section which empowers the Court to grant a moratorium and the learned Advocate-General

asked how, if it was obligatory on the Court to direct a winding-up in the circumstances mentioned in Section 38(1), it could grant a moratorium at all It appears to me that it was precisely to save the powers of the Court to grant a moratorium that the words "without "prejudice to its powers u/s 37" were inserted in Section 38(1). The effect of the insertion of that qualifying phrase is that the obligation lying on the Court to direct a winding-up of a banking company in the circumstances stated in the section would be subject to the exception that the Court would be at liberty to exercise the powers conferred by Section 37. I do not, therefore, find anything in the qualifying phrase to which the learned Advocate-General referred to aid the construction which he would put upon Section 38(1).

22. Nor do I find any reason to think that by the word "debts" in Section 38(1) the legislature was meaning banking debts. If it had that meaning in contemplation, there was nothing to prevent it from saying so. The word "debts" is used in the section simpliciter and unless there is something else in the context or other parts of the section which suggests a limited meaning, there would seem to be no reason why a word, apparently used in the general sense, should be understood as limited to a particular meaning.

23. Nor do I find any reason to accede to the learned Advocate-General''s contention that the inability to pay its debts, contemplated by Section 38(1) of the Banking Companies Act, must be such inability as is described in Sub-section (3) of the section. It is quite true that if the provisions of Sub-section (1) of Section 38 were not to be attracted unless the banking company had defaulted in the manner laid down in Sub-section (3) and unless the Reserve Bank of India had certified that the Bank was unable to pay its debts, the present case would go out of the operation of the section. But I cannot understand how the meaning of the words "is "unable to pay its debts", occurring in Section 38(1), can be limited to the particular variety of inability specified in Sub-section (3). The learned Advocate-General frankly conceded that upon the construction of Sub-section (3) which he was suggesting, there was absolutely no room for the introductory words "without prejudice "to the provisions contained in Section 163 of the Indian Companies Act". Those words, he said, were utterly irrelevant and he could not suggest any use for them, consistently with the construction which he was proposing for the Sub-section. It seems to me, however, that on another construction of Sub-section (3), some use for the introductory words can be found.

24. The introductory words are, as I have already said, "without "prejudice to the provisions contained in Section 163 of the "Indian Companies Act, 1913". Sub-section (1) of Section 163 is concerned with enumerating the cases when a company shall be deemed to be unable to pay its debts. Case (1) is a case where, upon a demand being made, the company neglects to pay the demand for three weeks or to make an arrangement for its payment. Case (2) is a case where some

order for payment in favour of a creditor is not complied with and execution or other process, issued in respect thereof, is returned unsatisfied. Case (3) is a case where it is proved to the satisfaction of the Court aliunde that the company is unable to pay its debts. What Sub-section (3) of Section 38 does is to say that a banking company shall be deemed to be unable to pay its debts in another case as well, but such deeming of the company to be unable to pay its debts shall be without prejudice to the provisions contained in Section 163 of the Indian Companies Act. The effect of these two provisions, read together, appears to me to be that the fact that a particular contingency is being specified in Sub-section (3) of Section 38 as to when a banking company shall be deemed to be unable to pay its debts, must not be understood to exclude the contingencies enumerated in Sub-section (1) of Section 163 of the Indian Companies Act; in other words, in addition to the cases mentioned in the latter section, there will be a fourth case mentioned in Section 38(3) of the Banking Companies Act, when also a banking company shall be deemed to be unable to pay its debts. If that be so, then the result which follows appears to me to be that if anyone relies on the kind of default specified in Section 38(3) of the Banking Companies Act, he will have to establish that such default has occurred and also that the Reserve Bank has given the certificate contemplated by the section. But if any one desires to rely on one or other of the cases of default contemplated by Section 163(1) of the Companies Act, it is still open to him to do so, and if in a case a default of a nature specified in Section 163 of the Indian Companies Act is alleged, it will be sufficient to satisfy the requirements of that section in order to attract the provisions of Section 38(1) of the Banking Companies Act. In no other view can I explain the presence of the introductory words in Section 38(3) of the Banking Companies Act.

25. If it was the intention of the legislature to provide that Section 38(1) would apply only when a default of the kind mentioned in Section 38(3) had occurred, one would expect that intention to be expressed by saying in Section 38(1) that that Sub-section would apply if a banking company was unable to pay its debts "within the "meaning of Sub-section (3)", or perhaps the same intention would be expressed with equal clarity, if the legislature had said in Sub-section (3) that "for the purposes of Sub-section (1)"" a banking company shall be deemed to be unable to pay its debts in the circumstances stated in the Sub-section. Neither of these forms of expression has been used and the result, it seems to me, is that so far as Section 38(1) is concerned, its provisions are attracted as soon as it is proved that a company is a banking company and it is unable to pay its debts either within the meaning of Section 163(1) of the Indian Companies Act or within the meaning of Section 38(3) of the Banking Companies Act. So far as Sub-section (3) of Section 38 is concerned, the effect, it seems to me, is only to add a fourth case where also a company, if it is a banking company, shall be deemed to be unable to pay its debts. I am accordingly of opinion that the constructions respectively suggested by the learned Standing Counsel and the learned Advocate-General will not bear examination and that the

view taken by S.R. Das Gupta, J. was the right view.

26. I have discussed this matter at such length, because it was argued before us with some elaboration. The present case, however, does not require to be dealt with on grounds of law at all. As I have stated, S.R. Das Gupta, J., after he had dealt with the question of law, proceeded to deal with the facts and he came to the conclusion that the facts were sufficient to justify him in throwing out the application for a scheme. If the application or the scheme recommended thereby is not a fit one to be sent to the creditors and shareholders for consideration, it is wholly immaterial whether Section 38 makes it obligatory on the Court to reject an application for a scheme or not. I may, therefore, now proceed to consider the second part of the case which, in my view, is the more important part.

27. The two grounds upon which Dwarkadas Agarwalla chiefly relied in his application were that the realisation and distribution of the assets of the Calcutta National Bank by the Bank of Jaipur, Limited, would be cheaper and quicker. S.R. Das Gupta, J. has considered those aspects of the case in some detail. What the learned Judge has pointed out is that the effect of the proposed scheme was not that an arrangement was being made for paying up the creditors and thereafter for setting the banking company once again on its feet. The scheme was quite clearly and plainly a scheme for a winding-up of the company, because what it contemplated was that the assets would be realised, that out of the assets the creditors and the depositors would first be paid and that, thereafter, if any surplus was found, the same would be distributed among the shareholders. That being the substance and the effect of the scheme, S.R. Das Gupta, J. held that unless there was some very strong ground for preferring a private agency to the agency of the Official Liquidator for carrying out what was really a winding-up of the company, there was no reason why he should make an order in furtherance of the scheme.

28. Applying himself to an enquiry as to whether any reasons existed for preferring the Bank of Jaipur to an Official Liquidator, the learned Judge held that not only did no such reasons exist, but it would be a distinct disadvantage to the creditors and depositors and prejudicial to the true interests of the bank, if the task of investigating into the affairs of the bank and realising and distributing the assets was entrusted to the Bank of Jaipur. He pointed out that if any investigation was called for into the misdeeds of the past directors, the Bank of Jaipur would not be in a position to carry out such investigation or, in any event, to initiate proceedings relating thereto with the same advantage and same support of the Companies Act as an Official Liquidator. If, again, the Jaipur Bank itself failed to carry out the terms of the scheme and looked after only its own interest, there would be no means of compelling the Bank of Jaipur to honour its obligations.

A liquidator, the learned Judge says,

in effect works as under the taskmaster''s eye, being always subject to the control and the direction of the Court and being specially empowered to initiate and prosecute proceedings of a certain character which a private agency could not do.

29. Another disadvantage, the learned Judge thought, of entrusting the work to the Jaipur Bank would be that if the company was sent to liquidation, all the suits by or against the company would have to be tried at one place in the High Court, whereas if the bank was not sent to liquidation but merely dissolved by a private agency without being liquidated, the agents would have to go to all corners of India to file suits against the debtors of the bank and to incur heavy expenditure thereon. As regards the provision contained in the scheme that a dividend of 20 per cent, would be paid in the first instance within four months and if necessary the Bank of Jaipur would make an advance not exceeding fifteen lakhs of rupees, the learned Judge pointed out that the previous scheme also contained a similar provision and it was for the advance of a larger amount, namely, twenty lakhs of rupees, but although the scheme had been in operation for a fairly long time, the bank had not advanced a single price. The learned Judge also referred to the allegation made before him that in reality the Bank of Jaipur, Dwarkadas Agarwalla and Dharam Chand Jain had all been acting in the same interest, namely, the interest of the Bank of Jaipur and that when an application had been made or was about to be made for enforcing payment of the twenty lakhs of rupees provided for in the first scheme, Dharam Chand Jain was set up to approach the Court with a winding-up order, in order that the payment of the said twenty lakhs of rupees might be avoided and after that purpose had been accomplished, Dwarkadas Agarwalla had been set up again to come forward with a second application for a second scheme by which the position of the Bank of Jaipur as a prospective agent of the Calcutta National Bank, limited, had been considerably improved. Although the learned Judge referred to that allegation, he did not enquire into or act upon it. For him it was sufficient that no reasons had been made out why a private agency should be preferred to the Official liquidator when, in fact and in substance, the company was going to be wound-up even under the scheme, and when, on the other hand, the disadvantages of entrusting the work to a private agency were many and various.

30. The learned Advocate-General, who was appearing for the Bank of Jaipur before us, made no secret of the fact that the Bank of Jaipur had been drawn into the matter by the prospect of being able to expand its own business which it saw in the scheme and that it could not be denied that, to a certain extent, it would be pursuing its own interest. He, however, contended that the apprehensions to which expression had been given by the learned Judge could be justified if only one started with the presumption that the bank would act dishonestly. Apart from any such presumption which, according to the learned Advocate-General, there was nothing to justify, it would be plainly more advantageous to entrust the work of winding-up the bank to another bank which had a readymade organization and which would be able to collect the assets more quickly and less expensively. He, therefore,

submitted that the scheme ought to be given a trial and should have been sent to the creditors and share-holders for consideration by them.

31. The learned Standing-Counsel, who appeared for Dwarkadas Agarwalla but who at times appeared to be speaking for the Bank of Jaipur, also stated with his usual forthrightness that the bank was not a charitable institution and, therefore, it was not ashamed to admit that it was pursuing its own interest. That, however, could be no reason for treating it with suspicion or for holding that it would not be able to carry out the work, which it was prepared to undertake, with efficiency and honesty.

32. The consideration to which reference was made by the learned Advocate-General and the learned Standing Counsel perhaps explained to a certain extent why the Bank of Jaipur should have been contesting this matter strenuously by expensive counsel from the beginning. The affairs of the Calcutta National Bank, Limited, appear to be in an extremely involved condition and one would normally think that another bank of repute, carrying on its own business in the usual way, would not feel any enthusiasm for getting itself voluntarily entangled in the affairs of a bankrupt bank. But it was admitted that the bank had not been drawn into the scheme by any determination to do good to others, but saw in the scheme advantages for itself. There is no reason not to accept that explanation, but it at once raises the question whether it is right and proper to entrust the work of winding-up a company and realising and distributing the assets among the creditors, share-holders and depositors, to a party which will primarily be thinking of and regarding its own interest, in preference to an Official Liquidator, who will be under the directions of the Court and whose only concern will be to wind up the company with no ancillary or subsidiary interest of his own to be pursued on parallel lines.

33. Certain features of the scheme may now be referred to. It is not without significance that the very first term of the scheme is that, provided the Reserve Bank of India permits it to do so, the Bank of Jaipur will take over and run in its name the branches of the Calcutta National Bank at about fifteen places. In plain words, that provision which has been placed in the forefront of the scheme means that the Bank of Jaipur will step into and occupy the seats of business, which the Calcutta National Bank, Limited, had established, after removing every vestige of the Calcutta National Bank''s previous occupation. Clause 6 of the scheme virtually makes the Bank of Jaipur the sole director of the company. Clause 7 gives it a commission of 2 per cent, on the gross assets. Clause 12 requires it to pay within four months from the relevant date, by which presumably is meant the date on which the scheme is sanctioned, a dividend of 20 per cent, to the creditors, including depositors, and to advance a sum up to the limit of fifteen lakhs of rupees in order that such dividend may be declared and paid. The clause proceeds to make the Bank of Jaipur a secured creditor of the Calcutta National Bank, Limited, in respect of this sum and not only provides for an interest of 5 per cent, per annum, but also gives the Bank of

Jaipur a first charge on the properties and the assets of the bank. By Clause 13 it is provided that, after the costs and expenses are paid, future realisations will first be applied to the repayment of the advance granted by the Bank of Jaipur. It will, therefore, appear that all that the Bank of Jaipur is to do in the first instance is to make an advance of fifteen lakhs of rupees or less, if required, in order to pay a dividend of 20 per cent. Thereafter, as far as one can see from the scheme, it is left entirely at large. I am not overlooking the general provision contained in Clause 22 which says that all persons affected by the scheme shall be entitled to apply to the Court from time to time and obtain directions from the Court so as to carry out the scheme. But how that can be done or under what provision of the law the Court will be giving such direction, it is impossible to see. I am also not overlooking the provisions of Clause 8 which speaks of a committee of management, consisting of not more than six members, one to be nominated by the Bank of Jaipur who shall be the ex officio secretary of the committee and others to be elected by the unsecured creditors and shareholders. It is no doubt said in Clause 8 that the function of this committee will be to direct the Bank of Jaipur in the matter of realisation and distribution of the assets of the bank, but that clause also provides that, till the initial advance granted by the Bank of Jaipur is repaid, the committee will act in an advisory capacity only. It is possible not to attach too much importance to this saving provision, but what, to my mind, is more significant is the provision which follows in the same clause. It is said that the committee shall have the power of framing rules and regulations for the guidance of the agents regarding realisation and distribution of the assets of the bank and the expenses incidental to such realisation and distribution, but very significantly it proceeds to provide that such powers shall be subject to the approval of the agents themselves. Clause 8, therefore, provides on the one hand that the committee of management shall be entitled to direct the agents in the matter of realisation and distribution of the assets and at the same time provides that the manner in which the committee will so direct the agents in the matter of realisation and distribution of the assets shall be subject to the approval of the agents themselves. Nothing can be more illusory than any control provided in that form. It is again said in Clause 18 that

So long as the scheme will remain in force, all suits proceeding against the bank and/or the said agents, in so far as they do not relate to the enforcement of the terms and conditions of the scheme are hereby stayed.

34. Unless there is a drafting error, the clause means that the the agents themselves shall be immune altogether from any proceedings of any kind, so long as the scheme is in operation and so long as the enforcement of its terms is not involved. But I shall concede that that extreme meaning may not have been intended. What strikes one, treating the scheme as a whole, is that the Bank of Jaipur is moving into the seats of business established by the Calcutta National Bank, Limited, and is undertaking to realise and distribute the assets among the creditors, depositors and share-holders, but the only tangible thing which it is being required to do is to make

an advance of fifteen lakhs of rupees, if necessary, and which, if advanced, will be recovered with a heavy interest earlier than any other debt. In view of the liquid assets of the bank in hand and the nature of its investments, it is not unlikely that the Bank of Jaipur will not be required to make any advance at all and if it has not to, it will establish itself over the remains of the Calcutta National Bank for nothing. The Bank of Jaipur will get also a commission of 2 per cent, on the gross realisations. If the Bank of Jaipur, after taking possession of the various branches of the Calcutta National Bank, Limited, and after making the initial advance of fifteen lakhs of rupees or such part of it as may be necessary and recovering the same in due course, does nothing further or mismanages the affairs of the Calcutta National Bank, Limited, or does not take any steps which may be required in the interests of justice to be taken against the prior directors, there is practically no effective means in the scheme for compelling the Bank of Jaipur to do so. The learned Advocate-General was forced to admit that it would only be open to any party to bring a suit against the Bank of Jaipur for the enforcement of the terms and conditions of the scheme. It need hardly be stated that the sanction of a possible suit is hardly a sanction which will have any practical effect. It can scarcely be possible for any of the creditors or the depositors to institute and finance a suit against the Bank of Jaipur and to bring it to a successful conclusion, if the ground of such suit is that the bank is not performing its duty or has been guilty of malpractice.

35. Mr. S. Chaudhuri, who appeared on behalf of the Bank of Jaipur during the earlier stages of the hearing, contended that all that was being asked for at the present stage was that the scheme should be sent to the creditors and depositors for their consideration and the Court would have a final opportunity of sanctioning or rejecting the scheme after it had been received back from the creditors and depositors and shareholders, if they approved of it at all. His argument was that there was no reason for intercepting the scheme at the present stage and for not allowing it to go further. The argument is a plausible one, but the question which a Court must ask itself is this: the bank being admittedly unable to pay its debts and a winding-up being necessary in the view of all parties, will the Court be discharging its responsibility or exercising its discretion properly if it complicates matters at this stage by interposing the consideration of a scheme which, if carried out, will not have the effect of setting the bank again on its feet, but will have the same effect as a winding-up? It seems to me that if the Court thinks that the scheme that is being proposed is a scheme for winding-up and that it is going to be entrusted for execution to a private agency, it is justified, quite apart from the capacities or the honesty of the proposed agent, in declining to entertain it, because it ought not to relinquish or abandon its control over the bankrupt bank in the interest of the vast body of creditors and depositors who can be easily misled. Apart from that, as I have already stated, there is the further consideration that the Bank of Jaipur did not exhibit any earnestness during the period between the date when the scheme was

first sanctioned and the date when Dharam Chand Jain made his appearance with his first application. As the learned Judge has pointed out, it did not pay a price of the twenty lakh of rupees, but went on prosecuting a bitter quarrel with the Special Officer. The position is not as if a scheme is being proposed for the first time and a prayer is being made to submit it to the will of the creditors and shareholders. The scheme has already acquired a history and its real purpose and possible effect is no longer in doubt. It appears to me to be a very relevant consideration that the Bank of Jaipur is almost insisting on being appointed agent for the Calcutta National Bank, Limited, and trying to acquire that agency, apparently at great expense, for the avowed object of being able to expand its business at the cost, as the learned Advocate-General himself put it, of the Calcutta National Bank, Limited. That being so, the endeavour of such an agent, it seems to me, would be more to establish itself securely in the newly acquired business than to serve the interests of the creditors of the old bank and all the work which it will probably do by way of realisation and distribution of the assets will be work by way of clearing the decks for the purpose of making its own passage clear. It does not seem to me that a party which comes to undertake an agency with such an object in view, ought to be preferred to an Official Liquidator who, as I have said, will have no interest except that of realising and distributing the assets and will work under the constant direction of the Court. I cannot see how, if a dispute arises regarding the settlement of some claim, the Bank of Jaipur will ever be able to handle such disputes with anything like the facilities and the powers which an Official Liquidator has. The other advantages of having an Official Liquidator have been pointed out by the learned Judge. It does not appear to me that it will be cheaper to have the Bank of Jaipur rather than the Official Liquidator as the agent for the purpose of winding-up the company; nor is there anything to warrant an expectation that the winding-up in the hands of the Bank of Jaipur will be more expeditious. As I have said, after it has realised its initial advance of fifteen lakhs of rupees, if it advances it at all, it will have little interest left to realise the assets of the Calcutta National Bank, Limited, because, as the learned Advocate-General said several times, the 2 per cent, commission was so trivial that it was of no interest whatsoever to his client.

36. An impression seems to have gone round that if the scheme is put through and adopted, the creditors will in the main benefit, because in some way or other, the Calcutta National Bank will survive by an amalgamation with the Bank of Jaipur and that the employees also will benefit more from a winding-up being carried out by the Bank of Jaipur than by an Official Liquidator. I find from the order drawn up in respect of the judgment passed by Banerjee, J. that the employees were represented before him and a reference to them was made before us by the learned Advocate-General. It appears to me that the true nature of the scheme, which is a winding-up by a private agency rather than an Official Liquidator, has not been properly and correctly appreciated, and that it has not been understood that even if the scheme be put through and worked out, it means equally the end of the bank

and the same fate for all interested or connected with it.

37. For all the reasons given above, it appears to me that the learned Judge below, in not entertaining the application for the scheme, exercised his discretion properly, even if it was not a case in which he was bound to direct a winding-up under the provisions of Section 38(1). I would decide the case, as he did, not on the ground of law but on the ground of facts, which seem to me to make it overwhelmingly clear that this bank and the vast number of unfortunate people connected with it should be taken in hand by the Court immediately and that the difficulties of the bank should not be made the hunting ground of other adventurers, avowedly pursuing their own interest. I am satisfied in my mind that in all the circumstances of the case, the creditors and the employees will benefit substantially more by a liquidation by an Official Liquidator than by the agents proposed and the learned Judge, in preferring the Official Liquidator, acted wisely and exercised his discretion correctly.

38. So far as the other appeal is concerned, namely, the appeal against the winding-up order, no argument was addressed to us and as the learned Judge points out, there was no affidavit against the application at all. That was natural, because it is common ground of all parties that the company must be wound up and if it is not going to be wound up by means of a scheme to be worked out by the proposed agents, it must be wound up officially as prayed for by Dharam Chand Jain and as ordered by the Court.

39. It remains to refer to one circumstance which appears to us to be somewhat inexplicable, if not very suggestive. After the learned Counsel for the Appellant had concluded their arguments in the appeal against the order rejecting the scheme, Mr. R. Chaudhuri, who was representing Dharam Chand Jain, said, much to our surprise, that he did not wish to oppose the appeal. Asked how he could possibly take up that position consistently with the application which his own client had made, Mr. Chaudhuri said that his instructions were not to oppose the appeal against the order regarding the scheme application. It seems to me strange to a degree that a person who had brought forward and had been pursuing an application for a winding-up for such a length of time should suddenly adopt the attitude which Mr. R. Chaudhuri was instructed to adopt. Towards the end of the argument, however, Mr. S. Hazra, appearing for Dharam Chand Jain, said that his client did not wish to abandon his own application and so far as the appeal against the order directing a winding-up was concerned, he would support that order. Even if a scheme was accepted, Mr. Hazra contended that the winding-up order should stand and the scheme should be carried out in the winding-up by the Official Liquidator. There is no such scheme before us and, therefore, the last argument of Mr. S. Hazra requires no consideration. I have referred to the attitude adopted by Dharam Chand Jain with regard to one of the appeals, only because of the allegation made before the learned trial Judge that the Bank of Jaipur, Dwarkadas Agarwalla and Dharam Chand Jain had, in fact, been pursuing the same interest. There is no

direct evidence of that and the learned Judge below did not act on it and all that can be said is that appearances are what they are.

40. In the result, both the appeals are dismissed with costs. Certified for two counsel where two counsel appeared. The Official Liquidator will get his costs out of the assets. Let two orders be drawn up, but there will be one set of costs.

41. After the above judgment had been dictated, Mr. Das, appearing for the Bank of Jaipur, brought it to our notice that during the time the scheme had been in operation, the Jaipur Bank had performed certain functions and incurred some expenditure thereon. He, therefore, prayed that, on the Bank of Jaipur producing audited accounts before the Official Liquidator and on the Liquidator being satisfied of the accuracy thereof, the Bank of Jaipur should be allowed credit for the expenditure so incurred and the functions discharged by the Bank of Jaipur during the time the scheme had been in operation should be deemed as having been discharged with authority. The prayer is a reasonable one and we direct accordingly, but delivery of possession to the Official Liquidator of the assets of the bank, including the head office and the branches, must on no account be delayed for the purpose of the presentation or the passing of such accounts.

42. Mr. G.K. Dutt who had been appointed a Receiver for a limited purpose by the Court of Appeal was, under the order appealed from, appointed Official Liquidator by S.R. Das Gupta, J. During the pendency of the present appeals the operation of that order was stayed and Mr. G.K. Dutt was directed to function as Receiver instead of as the Official Liquidator under the orders appealed from. The interim order made by the Appellate Court staying the operation of the trial Court''s order appointing Mr. G.K. Dutt the Official Liquidator and appointing Mr. G.K. Dutt a Receiver, shall stand discharged, and Mr. G.K. Dutt will act henceforth as the Official Liquidator, under the orders now affirmed.

43. In the original order passed by the Appellate Court on the previous occasion, the remuneration of Mr. G.K. Dutt, who was then appointed a Receiver for a limited purpose, was fixed at 100 gold mohurs in the first instance, provided the period of his appointment did not exceed one month and the question of making a further order for further remuneration was reserved. That order must now be made. It appears that Mr. G.K. Dutt has worked as a Receiver for the limited purpose for a further period of three months and twenty days. We direct that in addition to the 100 gold mohurs already allowed to him, he be paid a further sum of Rs. 5,000 for the further period of three months and twenty days.

44. The Bank of Jaipur will hand over to the Official Receiver the sum of Rs. 13,000 which it was authorised to withdraw from the Imperial Bank of India for the payment of the employees on May 1, 1953, as soon as it is withdrawn and it will also hand over to the Official Liquidator such sum as may be lying in its hands in the account of the Calcutta National Bank Limited for the purpose of defraying the day

to day expenses.

45. The Jaipur Bank shall be at liberty to retain such of the staff as they may think necessary till the Official Liquidator takes possession from them. The expenses incurred for retention of the said staff till possession is taken over by the Official Liquidator are to be paid by the Official Liquidator after he takes over possession. The sum of Rs. 13,000 for payment to the staff and whatever balance is in the hands of the Bank of Jaipur shall be made over forthwith by cheque in favour of Mr. G.K. Dutt in his personal name.

46. Let a signed copy of the minutes be supplied to the Bank of Jaipur.

Sarkar, J.

47. I agree.