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**Parthasarathi Sinha and ors. Vs. Official Liquidator, Ballygunge Real Property and Building Society Ltd. (In Liquidation) and ors.**

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**Overruled by :** [Official Liquidator Vs. `Parthasarathi Sinha and Ors.](#)

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**Court :** Kolkata

**Decided On :** Aug-01-1975

**Reported in :** [1976]46CompCas555(Cal),79CWN972

**Judge :** Masud and ;S.C. Ghose, JJ.

**Acts :** [Companies Act, 1956](#) - Sections 483, 543, 543(1) and 583

**Appeal No. :** Appeal No. 324 of 1970 (Matter No. 24 of 1937)

**Appellant :** Parthasarathi Sinha and ors.

**Respondent :** Official Liquidator, Ballygunge Real Property and Building Society Ltd. (In Liquidation) and ors.

**Advocate for Pet/Ap. :** Ranadeb Chaudhuri and ;P.K. Sen, Advs.

**Disposition :** Appeal allowed

**Judgement :**

Masud, J.

1. The important point to be decided in this appeal is whether misfeasance proceeding in connection with a company in liquidation can lawfully proceed

against the heirs and legal representatives of an alleged delinquent director after his death. The facts of the case may briefly be stated as follows :

2. On January 8, 1958, Ballygunge Real Property and Building Society Ltd. was directed to be wound up under the [Companies Act, 1956](#). On January 2, 1963, the official liquidator took out summons under Section 543(1) of the said Act against its directors including Dr. S. N. Sinha for a declaration that the said directors were guilty of misfeasance and breach of trust and also for an order directing them to repay or restore the money or property of the said company which they were alleged to have retained wrongfully. On November 16, 1969, Dr. Sinha died intestate leaving his son, Parthasarathi Sinha, and two married daughters, Smt. Maya Bose and Smt. Mira Mitra, as his heirs and legal representatives. Thereafter, on February 12, 1970, judge's summons was taken out at the instance of the official liquidator for leave to proceed with the said misfeasance application against the said heirs and legal representatives of Dr. Sinha and for their substitution in place of Dr. Sinha. On November 9, 1970, S. P. Mitra J., as his Lordship then was, passed an order for substitution. This appeal has been preferred on December 7, 1970, against the said order.

3. Mr. R. Chaudhuri, counsel for the appellant, has drawn our attention to the words in Section 543(1) of the said Act, and relying upon several English and Indian decisions, has submitted that the misfeasance proceeding, in the very nature of such proceeding, cannot continue against the heirs and legal representatives of a deceased director. Mr. B. Das, counsel for the official liquidator, however, has justified the correctness of this order of Mitra J, mainly on the ground that the heirs and legal representatives of the said delinquent director have enriched themselves by inheriting money or property of the said company which Dr. Sinha wrongfully retained.

4. Mr. Das also has raised a preliminary point of law that this appeal against the order for substitution is not a ' judgment ' within the meaning of Clause 1 5 of the Letters Patent. In our view, there is no substance in the said contention. The application has been made in the liquidation proceeding of the said company and, as such, this appeal is specifically maintainable under Section 483 of the said Act.

The words 'in the matter of the winding up of a company ' in the said section should be construed in its widest import and there is nothing to justify a narrow construction of the same. On the contrary, the said summons was taken under Section 543(1) which mentions the words, ' in the course of a winding up of a company'. Admittedly, the order under appeal has been made under Section 543(1) and, therefore, it cannot be said that the order was not made 'in the matter of the winding up of the company'. The delinquent director died and obviously the misfeasance proceeding cannot continue against him. The misfeasance proceeding has been taken recourse to after the company was wound up. The official liquidator was directed to take steps, inter alia, for recovery of the company's property after the winding up of the company. Such property cannot be recovered unless steps are taken by the official liquidator to follow up the properties which were under the ostensible ownership of Dr. Sinha and have now devolved on his heirs and legal representatives. The official liquidator, in discharge of his statutory duties, made this application for substitution of his heirs and legal representatives. In our view, it cannot be said that the order was not made in the course of the winding up of the company. However, the language used in Section 483 of the present Act is substantially the same as the words used in Section 202 of the Companies Act, 1913. An appeal against any order in the matter of winding up of a company is maintainable inasmuch as the opening word of Section 202 gives a substantive right of appeal to the parties affected by the impugned order. The question whether the heirs and legal representatives of a deceased director of the said company in liquidation are legally or factually liable or not is a different question but it cannot be said that this appeal is not maintainable under Section 483 of the said Act. Section 483 reads as follows :

' Appeal from orders.--Appeals from any order made, or decision given, in the matter of the winding up of a company by the court shall lie to the same court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the court in cases within its ordinary jurisdiction.'

5. On a plain construction of the said section, the first part gives the party affected a substantive right of appeal against any order which may be made in the matter

of winding up of a company and the words ' in the matter of winding up ' must be construed as ' in connection with ' or ' in the course of such winding up'. The latter part of the section only sets out the procedure or the mode and the manner in which such appeal can be filed.

6. In connection with the maintainability of this appeal, Mr. Das has also submitted that the order under appeal is not a ' judgment ' under Clause 15 of the Letters Patent. According to him, the order under appeal has only decided to substitute the heirs of Dr. S. N. Sinha at the instance of the official liquidator before the court of first instance and the rights and liabilities of the appellants have not been finally determined. Reliance has been placed by him on *Nurul Hoda v. Amir Hasan*, AIR 1972 Cal 449 [FB], *Madan Gopal Daga v. Sachindra Nath Sen*, (AIR 1928 Cal 295, *Levy Brothers and Knowles Ltd. v. Subodh Kumar Day*, AIR 1927 Cal 689 and *Sansar Chand v. Punjab Industrial Bank*, AIR 1929 Lah 710 . He has urged that the jurisdiction of the appeal court is not attracted unless a final determination of the rights and liabilities of the appellant by the company court is made by the order under appeal. The learned judge in the operative part of his judgment has formally substituted the appellant as the heirs of Dr. Sinha. The final question on the liabilities of such heirs, if at all, has yet to be decided by the company court. Thus, it is premature to contend that the appellant's rights and liabilities have been finally affected.

7. There is force in the contention of Mr. Das inasmuch as the decisions relied upon by him substantiate his argument. We are, however, of opinion that this appeal is maintainable not only under Section 483 as held earlier, but also on the ground that the order under appeal also satisfies the tests laid down in the said Full Bench decision, *Nurul Hoda v. Amir Hasan* . In paragraph 19 of judge's summons on which the order has been passed by Mitra J. the question of liability of the heirs of Dr. S. N. Sinha and also to make them liable for the loss, if any, caused to the company on account of the breach of trust or misfeasance on the part of Dr. Sinha have been specifically raised. The learned judge by substituting the heirs of Dr. Sinha in the cause title of the misfeasance proceeding has expressly opened up the possibility of the liability, if-any, of the heirs of Dr. Sinha. It is true that the official trustee had to apply for the said summons in connection

with the liability of the delinquent director to pay compensation to the company in liquidation, but in doing so the learned judge has decided as a principle of law that the company court has jurisdiction to implead the heirs of a delinquent director for payment of compensation on the ground of the breach of trust on the part of such director. The ultimate question of the liability of the heirs may be determined in favour of or against the heirs on the evidence to be adduced in the misfeasance proceeding but the fact remains that the liability of the heirs of a delinquent director in a misfeasance proceeding has been held to be possible in spite of the express provision of Section 543 of the [Companies Act, 1956](#). If the court has the power to substitute the heirs on the ground that the children can be made liable for the conduct of their father, a decision to that effect has been made on the company court's jurisdiction and thus the test of the said Full Bench decision is satisfied. It has been held by Mitra J. that the heirs may be liable in the same way as the director might be liable for misfeasance or breach of trust under certain contingencies and it is on that basis the learned judge has substituted the heirs of Dr. Sinha although Dr. Sinha died before he was even examined under Section 543 of the Act. The learned judge has not only decided a substantive law of importance but also has indirectly decided the rights of the company court to determine the liability of the heirs of such delinquent director to the limited extent of the properties inherited by them.

8. In this connection reference may be made to *Shankarlal Aggarwala v. Shankarlal Poddar* on which the counsel for both the parties have relied. In the said decision an order was passed by the company court confirming the sale of certain property of a company in liquidation by the official liquidator. An appeal was preferred against the said order whereby the appeal was allowed and the said sale was set aside. Before the Supreme Court a point was raised by the counsel for the respondent that the High Court should have dismissed the appeal on the ground that the said order for confirmation of sale could not be a ' judgment ' under Clause 15 of the Letters Patent. Ayyangar J., dismissing the appeal, has discussed the scope and the import of Section 202 of the Companies Act, 1913, the provisions of which are substantially identical with the provisions of Section 483 of the Act of 1956. The principles of law laid down in the said decision do not support Mr. Das's contention and we respectfully agree with the views taken by

Ayyangar J. Firstly, the orders substituting the heirs of a delinquent director cannot be called an administrative or ministerial order and, as such, the said order is a judicial order within the meaning of Section 483 of the [Companies Act, 1956](#).

9. Secondly, the words used in the said section, ' any order made, or decision given ' clearly show that an express right of appeal has been provided in respect of such an order or decision. Apart from a general right of appeal from a 'judgment' under Clause 15 of the Letters Patent, there is a special right with special powers given under the Companies Act. The plea that the substantive right of appeal in the first limb of the section is restricted by the second limb cannot be accepted inasmuch as such a construction would not only have been inconsistent with the first part of the said section but also would lead to anomalous consequences. To illustrate, in the district civil courts, the district judges have also been empowered to pass orders under the Companies Act. It has been contended that the order or decision made by a company judge in the High Court could only be the subject-matter of an appeal if it amounts to ' judgment ' under Clause 15 of the Letters Patent. But an order by a district judge in connection with the Companies Act would be appealable, although such order or decision might not satisfy the well-settled tests to determine a 'judgment ' under the said Clause 15. Section 104(l)(i) of the Code provides for an appeal against orders which include, ' any order made under Rules from which an appeal is expressly allowed by Rules '. Section 122 of the Code empowers the High Court to make rules in different States. If the conditions relating to appeal in respect of an order passed by a company court in the districts are to be determined by rules framed by different High Courts in different States, the maintainability of an appeal against such order or decision would be different in different States. Similarly, in the same State also the right to appeal in respect of such order or decision would be different if such order is passed by a company judge of the High Court and a district judge of a civil court in the State. Reliance may be placed upon the observations of Ayyangar J., at page 13, which are as follows :

' We thus agree with Chagla C.J. that the second part of the section which refers to ' the manner ' and ' the conditions subject to which appeals may be had ' merely regulates the procedure to be followed in the presentation of the appeals and of

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

10. As stated earlier, the order under appeal in the instant case cannot be said to be a procedural order only inasmuch as the liability of the heirs of the delinquent director is impliedly decided by the learned company judge, if the allegations against the delinquent directors on their examination are proved or declared. As the jurisdiction of the learned judge in passing the said order has been challenged in this particular case, the order under appeal not only is maintainable under Section 483 of the Act of 1956, but also is a ' judgment ' under Clause 15 of the Letters Patent even on the basis of tests laid down in the said Full Bench decision of this hon'ble court. Reliance may also be placed on *Golcha Investment (P.) Ltd. v. Shanti Chandra Bafna*, [1970] 40 Corap Cas 1128 (SC) and *Smt. Jatan Kanwar Golcha. v. Golcha Properties P. Ltd.*, [1971] 41 Corap Cas 230 (SC) Thus the point of demurrer, argued by the counsel for the respondent, must fail.

11. We are also of opinion that the heirs or legal representatives of a deceased director in a misfeasance proceeding cannot be substituted. The reasons why we have come to the said conclusion are as follows:

Section 543 of the Act of 1956 expressly empowers the court to assess damages against the alleged delinquent director and not against their heirs. The section makes a past or present director liable if he has ' misapplied, or retained, or become liable or accountable for, any money or property of the company; or has been guilty of any misfeasance or breach of trust in relation to the company '. The section also provides that the court may examine into the conduct of such director and compel him to repay or restore the money or property or any part thereof. Thus, the court is not only empowered to examine into the conduct of such director but also will compel such director to contribute to any loss which has been caused

to the assets of the company in liquidation by way of compensation. The liability, therefore, is fixed upon the director personally. The section nowhere mentions the liability of the estate of such delinquent director in case of such misfeasance or breach of trust. There is complete silence of any liability directly or indirectly to be imposed upon the heirs and legal representatives of such director on the ground that such heirs and legal representatives have enriched themselves by wrongfully misappropriating the assets of the company. In this connection reliance may be placed upon *Official Liquidator, Supreme Bank Ltd. v. P. A. Tendolkar*, [1973] 43 Comp Cas 382 (SC) where Beg J., at page 398, has stated.

' But we think that the power under Section 235 of the Act of 1913 which corresponds to Section 543 of the Act of 1956 would not extend beyond making a declaration against a deceased director provided he, in his lifetime, all heirs, after his death, have had due opportunity of putting forward the case, on behalf of the allegedly delinquent director. If either a liquidator or the heirs of a delinquent director, against whom a declaration of liability has been made, can question the determination of liability of the deceased delinquent who was alive at the time of judgment against him, it is obvious that the appellate court could give a declaration either reducing or increasing a liability, even though it may not be able to enforce it by an order under Section 235 of the Act. If the declaration can be questioned by an appeal, as we think that it can, the liability can be not only wiped off or reduced but also increased on an appeal heard after the death of a director held liable.'

12. Earlier, in connection with the scope of Section 543 of the said Act, the said learned judge at page 397 has also observed :

' This power does not, on the language of these provisions, extend to making compulsive orders against heirs of delinquents. As the power to take these special proceedings is discretionary and does not exhaust other remedies, although the court may, as a matter of justice and equity, drop proceedings against delinquent directors, managers or officers who are no longer alive, leaving the complainant to his ordinary remedy by a civil suit against the assets of the deceased, yet where no injustice may be caused by continuing these proceedings against a past director, even though he be dead, the proceedings could continue after giving

persons who may be interested, opportunities to be heard. But even such proceedings can only result in a declaration of the liability of a deceased director, because the language of Section 235 of the Act of 1913, as already noticed, does not authorise passing of orders to compel heirs or legal representatives to do anything. Such compulsive proceedings, as may become necessary, against those upon whom devolved the assets or the estate of a deceased delinquent director, who may have become liable, could only lie outside Section 235 of the Act of 1913.'

13. The observations of the Supreme Court give an indication that in a proper case the declaration of the liability of a delinquent director, who subsequently dies, is possible but no order for repayment or restoring the money or property lying in possession of the heirs can be passed against the heirs or legal representatives of such director. Thus, even assuming that the application for substitution of the heirs of Dr. Sinha, in this particular case, is only an interlocutory order of procedural nature, the ultimate liability cannot be imposed upon such heirs or legal representatives of Dr. Sinha. It may be added that, in the Supreme Court decision, the delinquent director, Mr, Tendolkar, died after his examination by the company court in the misfeasance proceedings. Even, in such a case, although the liability of Mr. Tendolkar was declared, his estate was not followed up in the hands of his heirs or legal representatives. In the present case, Dr. Sinha died before he was even examined and no declaration of liability against him could be made. Thus, even from a practical point of view even if the appellants were substituted in place of Dr. Sinha no compulsive order could be made against them, although the company court might decide against the delinquent directors who are jointly and severally liable. Further, the son and the two married daughters of Dr. Sinha could not have any personal knowledge about their father's 'dealings and affairs with the said company in liquidation.

14. The common law doctrine of *actio personalis moritur cum persona*, as argued by the counsel for both the parties, cannot have any application to cases under a special statute such as the Companies Act. In view of the express words used in the said Section 543 and the observations of the Supreme Court, we are of opinion that the learned judge is not justified in substituting the names of the

appellants in the place of their father, Dr. Sailendra Nath Sinha.

15. For the reasons stated above, save and except that death of Dr. Sailendra Nath Sinha is recorded, the judgment and order of the court of first instance is set aside and the appeal is allowed. Parties will bear their own costs.

16. The costs of the official liquidator, however, will be paid out of the assets lying with him,

**Ghose, J.**

1. I concur in the order passed by my Lord. The order under appeal directing the substitution of the appellants in the misfeasance proceedings in the place and stead of Dr. Sailendra Nath Sinha was made under Order 22, Rule 4 of the Code of Civil Procedure read with Section 141 of the said Code.

2. The misfeasance proceeding was initiated against, inter alia, Dr. Sailendra Nath Sinha, the predecessor-in-title of the appellants under Section 543(1) of the [Companies Act, 1956](#), hereinafter referred to as the said Act.

3. Dr. Sailendra Nath Sinha died intestate on November 16, 1969, leaving him surviving the appellants as his heirs and legal representatives. Thereupon, the application for substitution by the appellants in the place and stead of the deceased, Sailendra Nath Sinha, was made by the official liquidator on February 12, 1970, wherein the order, inter alia, for substitution was made on November 9, 1970.

4. The main and indeed the only contention of Mr. R. Chaudhuri, the counsel appearing for the appellant, was that the cause of action in a misfeasance proceeding did not survive as against the heirs and legal representatives of the delinquent director or officer. Mr. Chaudhuri in support of his contention cited the decisions of various High Courts in India as well as the decisions of the courts in England.

5. In order to appreciate the contentions of Mr. Chaudhuri it is necessary to consider Section 235 of the Companies Act of 1913, Section 543 of the

[Companies Act, 1956](#), as well as section 333 of the English Companies Act of 1948. I am reproducing hereinafter Section 235 of the Indian Companies Act, 1913, Section 543 which is the corresponding section in the Companies Act of 1956, and Section 333 of the English Companies Act, 1948.

6. Section 235 of the Indian Companies Act, 1913, reads as follows :

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

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

7. Section 543 of the [Companies Act, 1956](#), reads as follows :

' 543. (1) If in the course of winding up a company, it appears that any person who has taken part in the promotion or formation of the company, or any past or present director, managing agent, secretaries and treasurers, manager, liquidator or officer of the company-

(a) has misapplied or retained or become liable or accountable for any money or property of the company, or

(b) has been guilty of any misfeasance or breach of trust in relation to the company ;

the court may, on the application of the official liquidator, or the liquidator, or of any creditor or contributory, made within the time specified in that behalf in Sub-section (2), examine into the conduct of the person, director, managing agent, secretaries and treasurers, manager, liquidator or officer aforesaid, and compel him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the court thinks just.

(2) An application under Sub-section (1) shall be made within five years from the date of the order for winding up, or of the first appointment of the liquidator in the winding up, or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer.

(3) This section shall apply notwithstanding that the matter is one for which the person concerned may be criminally liable. '

8. Section 333 of the English Companies Act, 1948, is set out hereunder:

' 333. (1) If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just.

(2) The provisions of this section shall have effect notwithstanding that the offence is one for which the offender may be criminally liable.

(3) Where in the case of a winding up in England an order for payment of money is made under this section, the order shall be deemed to be a final judgment within the meaning of paragraph (g) of Sub-section (1) of section one of the Bankruptcy Act, 1914.'

9. From a perusal of the abovementioned provisions in regard to the proceedings relating to misfeasance committed by directors or other officers of a company it is clear that the above-mentioned 3 sections have been expressed in identical terms with very minor variations.

10. Section 236 of the Indian Companies Act of 1913 was in terms same as Section 165 of the English Companies Act, 1862. In construing Section 165 of the English Companies Act, the English courts were of the uniform opinion that Section 165 of the Companies Act, 1862, conferred power on the court to examine the delinquent director or officer of a company in regard to misfeasance or breach of trust relating to the affairs of the company and direct payment by him to make good the loss or damages suffered by the company on account of such misfeasance or breach of trust. The remedy conferred by Section 165 of the English Companies Act, 1862, was a personal remedy against the delinquent director or officer of the company and was not available against the personal representatives of such director or officer. Indeed, it was held that the powers to examine into the conduct of a director or officer and compel him to pay are conjunctive powers conferred by the section. Examination into the conduct must necessarily mean the examination of the director himself and upon the misfeasance or breach of trust occasioning loss to the company being proved on such examination, power has been conferred by the section upon the court to compel the said director or officer to pay for the purpose of making good the loss occasioned by his misfeasance or breach of trust.

11. That has been the consistent view of the English courts in construing Section 165 of the English Companies Act of 1862. Reference may be made to Feltom's Executors' case : In re East of England Bank, [1865] 1 Eq 219, which laid down

that power conferred by Section 165 of the said Act upon the courts did not extend to the executor of a delinquent director. The section was personal as against the director or officer, etc. The ratio in this case was followed in *In re British Guardian Life Assurance Company*, [1880] 14 Ch D 335 (Ch D)., wherein it was held that although a proceeding under Section 165 of the English Companies Act, 1862, could not be continued against some of the officers who had died pending the proceeding, the survivors of them could be proceeded against under the section. The ratio in the above-mentioned cases were followed uniformly by the courts in India in construing Section 235 of the Companies Act, 1913, quoted in the earlier part of the judgment before. The Indian Companies Act, 1913, was repealed by the [Companies Act, 1956](#). It has to be remembered in this connection that the section does not create any new right but lays down merely a summary method for enforcing rights which can be enforced by the companies or by its liquidators by means of an ordinary suit. The section has conferred powers upon the court to 'examine into the conduct ' of delinquent director or officer mentioned in the section and ' compel him to pay ' such amount as would compensate the company for the loss occasioned to the company by the misfeasance or breach of trust of such directors or officers by means of an application in the winding-up proceeding itself without being required to recover the loss from such delinquent director or officer by means of a separate suit, so that ' complete justice might be done between the parties and a complete winding-up effected'. Reference may be made to the observations of Giffard L.J. in *Stringer's case*, [1869] 4 Ch D 475, 493.

12. The decision in the abovementioned English case relating to the construction of Section 165 of the English Companies Act of 1862 was followed by different courts in India in interpreting Section 235 of the Indian Companies Act, 1913. Harrison J. in *S. B. Billimoria, Official Liquidator v. Cecilla Mary De Souza*, AIR 1926 Lah 624 was of the opinion that Section 235 which was introduced in the Indian Companies Act, 1913, from the English Companies Act of 1862, could not have any different meaning. Harris J. in *Official Liquidators of the Mufassil Bank Ltd. v. Jugal Kishore*, [1938] 8 Comp Cas 300 (All) in construing Section 235 of the Indian Companies Act, 1913, was of the view that the section empowered the court to compel payment of moneys which would upon investigation be found to be payable by persons mentioned in the section. The section, according to Harris J.,

was not intended to apply to executors or administrators of a deceased person because they could not be compelled to pay in the winding-up. Section 235 of the Indian Companies Act, 1913, was held by Harris J. to be not applicable against the legal representatives or heirs of a delinquent director or officer.

13. Beaumont C.J. and Rajadhyaksha J. in *Manilal Brijlal v. Vandravandas C. Jadav*, [1944] 14 Comp Cas 147. 149 (Bom) held that a proceeding initiated under Section 235 of the Indian Companies Act, 1913, against the delinquent liquidator could not continue upon his death against his heirs and legal representatives. The learned Chief Justice observed :

' I have no doubt that on the authority of the English cases and on the strict wording of the section, and on a consideration of the general scope of the section, it would be wrong to allow proceedings to be taken against the personal representative of a deceased liquidator under Section 235'.

14. In *P.V.M. Sankaran Nambiar v. Official Liquidators, Kottayam Bank*, [1946] 16 Comp Cas 36 (Mad), Shahabuddin J., in construing Section 235 of the Indian Companies Act, 1913, came to the conclusion that a proceeding under Section 235 of the Indian Companies Act, 1913, could not be continued against the heirs of a deceased director. In *In re Peerdan Juharmal Bank Ltd. (in liquidation)*, [1958] 28 Comp Cas 546 (Mad) by its official liquidator, the question again came up for consideration as to whether the proceeding initiated under Section 235 of the Indian Companies Act, 1913, against a director of a banking company directed to be wound up could be continued after his death and whether the liability of such a director could be enforced against the legal representatives in the said proceeding. The question was answered in the negative by the Division Bench of the Madras High Court in the said case.

15. It has been stated earlier that Section 543 of the [Companies Act, 1956](#), which repealed the Indian Companies Act, 1913, is in identical terms as Section 235 of the repealed Act except certain very minor variations. The legislature, no doubt, was aware of the construction put by the courts on Section 235 of the repealed Act. Notwithstanding the same, Parliament enacted Section 543 of the [Companies Act, 1956](#), in identical terms as Section 235 of the repealed Act. In the premises it

has to be held that the legislature intended that Section 543 would have the same meaning as was held to be the meaning of Section 235 of the repealed Act by the courts for the long series of years before the 1913 Act was repealed. Reference in this connection may be made to the case of Bengal Immunity Co. v. State of Bihar, : [1955]2SCR603 and especially to the observations of the Supreme Court appearing at paragraph 22 of the judgment at page 674 of the report. Parliament in the [Companies Act, 1956](#), made certain sections applicable to heirs and legal representatives in express terms, e.g., Sections 429, 430, 431 as well as Section 542. In refraining from making Section 543 applicable to the deceased director or officer, etc., the legislature has, in my opinion, approved of the established accepted construction of Section 235 of the repealed Act as laid down by different courts in the cases mentioned here-inabove.

16. S. V. Venkatasubbu v. Utilities (India) Ltd, : AIR1964 Mad230 . (in voluntary liquidation by its liquidator, R. T. Naidu) laid down that Section 543 of the [Companies Act, 1956](#), was only an enabling provision and did not deprive the company to realise its money from the hands of a fraudulent director by means of an action. In Official Liquidator, Supreme Bank Ltd. v. P. A. Tendolkar, [1973] 43 Comp Cas 382 (SC) the Supreme Court held that, where a delinquent director was examined in a proceeding under Section 235 of the Indian Companies Act, 1913, and thereafter died before an order for payment was made against him in such proceeding, the order that could be passed in the said misfeasance proceeding as against the deceased director was merely a declaration as to his liability to the company in liquidation. No order for payment for the discharge of such liability could be made. The Supreme Court observed that before a declaration as to liability could be made against such director, his heirs and personal representatives should be heard. The Supreme Court, however, expressly negated the contention that, where a director died after he had been examined in a proceeding under Section 235 of the repealed Act, his heirs or legal representatives or his estate could be directed to pay up the loss occasioned to the company on account of the misfeasance of such director in such proceeding. It is, therefore, apparent from a perusal of the abovementioned authorities that Section 543 has not made any departure from the provision contained in Section 235 of the repealed Act and in the premises it has to be held that the cause of

action in a misfeasance proceeding initiated under Section 235 of the repealed Act or Section 543 of the [Companies Act, 1956](#), does not survive against the heirs or legal representatives of a delinquent director or officer, etc., of a company and such heirs or legal representatives cannot be substituted in the place and stead of a deceased delinquent director, officer, etc.

17. Observation made by the Supreme Court appearing : [1973]3SCR364 (Official Liquidator, Supreme Bank Ltd. v. P. A. Tendolkar), does not lay down any contrary rule in my opinion.

18. Mr. Das's contention that the order under appeal is not appealable also has no substance. The order was passed in the matter of a winding-up proceeding within the meaning of Section 583 of the [Companies Act, 1956](#). The said section is reproduced hereunder :

'583. Winding up of unregistered companies.--(1) Subject to the provisions of this part, any unregistered company may be wound up under this Act, and all the provisions of this Act with respect to winding up shall apply to an unregistered company with the exceptions and additions mentioned in Sub-sections (2) to (5).

(2) For the purpose of determining the court having jurisdiction in the matter of the winding up, an unregistered company shall be deemed to be registered in the State where its principal place of business is situate or, if it has a principal place of business situate in more than one State, then, in each State where it has a principal place of business ; and the principal place of business situate in that State in which proceedings are being instituted shall, for all the purposes of the winding up, be deemed to be the registered office of the company.

(3) No unregistered company shall be wound up under this Act voluntarily or subject to the supervision of the court.

(4) The circumstances in which an unregistered company may be wound up are as follows :--

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts ;

(c) if the court is of opinion that it is just and equitable that the company should be wound up.

(5) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the court may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor ;

(b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due, or claimed to be due, from the company, or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such 'manner as the court may approve or direct, the company has not, within ten days after the service of the notice-

(i) paid, secured or compounded for the debt or demand ; or

(ii) procured the suit or other legal proceeding to be stayed ; or

(iii) indemnified the defendant to his satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;

(c) if execution or other process issued on a decree or order of any court in favour of a creditor against the company, or any member thereof as such, or any person

authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied in whole or in part;

(d) if it is otherwise proved to the satisfaction of the court that the company is unable to pay its debts. '

19. Section 202 of the repealed Act which corresponds to Section 583 of the present Act came to be considered in *Shankarlal Aggarwala v Shankarlal Poddar*. The Supreme Court observed in the said case :

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

20. In any event, in my opinion, Section 583 of the present Act does not confer any power upon the court to direct substitution in a proceeding initiated under Section 543 of the [Companies Act, 1956](#). In directing substitution in such a proceeding the court makes the order which is beyond its jurisdiction and thus such an order is a ' judgment ' within the meaning of Clause 15 of the Letters Patent. In my view, the question involved in the appeal is a jurisdictional question and the order under appeal is, therefore, appealable. The power under Section 543 of the [Companies Act, 1956](#), is a statutory power and must be exercised within the four corners of the section. If the power is exercised in a manner which is not authorised by the section, the exercise of power becomes appealable. The above mentioned Supreme Court decisions overruled the cases noted at page 538 of *Company Law* by Sen and Sarkar. For all the reasons stated hereinabove, this appeal must succeed.

