
(1970) 01 BOM CK 0012
In the Bombay High Court
Case No : Appeal No. 425 of 1963

Balkrishan R. Dayma

APPELLANT

Vs

Bank of Jaipur Ltd. and Another

RESPONDENT

Date of Decision : 14-01-1970

Acts Referred:

Contract Act, 1872 — Section 151, 152

Citation : (1971) 41 CompCas 557

Hon'ble Judges : Nathwani, J;Chitale, J

Bench : Division Bench

Advocate : S.V. Desai, for the Appellant; S.T. Tijoriwala, for the Respondent

Judgement

Nathwani, J.—This is an appeal against the judgment and decreed of the Principal Judge, City Civil Court, Bombay, dismissing the plaintiff's suit except for Rs. 1,000 awarded as damages and interest thereon. The plaintiff filed the suit against the defendants for return of 40 bales of yarn pledged by him with the first defendant bank, or for Rs. 14,210 as the value thereof, or in the alternative for the said sum of Rs. 14,210 as damages for failure to return the said 14 bales, and interest and costs. The plaintiff had also, in addition to the aforesaid reliefs, claimed Rs. 5,000 as damages for dishonour of three cheques drawn by him on his current account maintained in the first defendant bank and interest thereon,

2. The plaintiff's case may be briefly stated as under : The plaintiff was at all material times carrying on business as merchant in cotton yarn in Bombay in the firm name and style of M/s Roopnarayan Sharma; that he used to store his cotton-yarn bales on Godown No. 8 Gulalwadi Bombay; that prior to 15th September, 1963, the plaintiff had a current account with the first defendant bank its Kalbadevi branch in the firm name and style of M/s Roopnarayan Sharam; that on or about 15th September, 1953, the plaintiff obtained from the defendants a cash credit account facility and the first defendants opened in the plaintiffs name at its Kalbadevi branch a cash credit account; that the first defendants agreed to advance in the said account a sum of Rs. 50,000 to the

plaintiff's against the pledge of goods to be store by the plaintiff in the plaintiffs said godown at Gulalwadi and the keys and control thereof was to be handed over to the first defendants. The terms and conditions on which the said cash credit account was to be opened and secured by pledge of goods were embodies in an agreement dated 15th September, 1953, exhibit No. 1. By the said agreement it was, inter alia, agreed that the plaintiff would be at liberty from time to time to withdraw any of the pledged goods, provided the advance value of the said goods was paid into the said cash credit account by the plaintiff, or provided the necessary margin required under the said agreement was fully maintained and the plaintiff had agreed to maintain in favour of the first defendants a margin of 30 per cent. of the value of goods. According to the plaintiff, at the time of the said agreement the handed over the keys of the said godown to the first defendant's representative and the same continued to remain with the first defendants and as such the control and possession of the said godown thereof remained with the first defendants and plaintiff had no access to the said godown. In pursuance of the said agreement the first defendants from time to time advanced to the plaintiff diverse amounts in the said cash credit account against bales of cotton yarn pledged with the first defendants and stored in the said godown, and the plaintiff also from time to time made several payments against release of several bales stored in the said godown.

3. According to the plaintiff, on 15th March, 1955, there were about 53 bales of cotton yarn pledged with the first defendants under the said agreement and the same were lying in the said godown, that on that day the plaintiff wanted to release two bales of cotton yarn and for that purpose he addressed a letter to the first defendants in that behalf and when the plaintiff's representative went to take delivery of the two bales it was found that one of the two bales, viz., bale No. 80, along with 13 other bales, were found missing and the first defendants could not trace the said 14 bales, and, therefore, the plaintiff's representative only obtained delivery of the said bales No. 60. Thereafter certain correspondence ensued between the plaintiff and the first defendants, exhibit No. 4 (collectively). By their letter dated 15th March, 1955, but delivered to the plaintiff on 16th March, 1955, the first defendants informed the plaintiff that only 38 bales of the value of Rs. 34,475 were lying in the godown; that the advance value against the said 38 bales came to Rs. 22,600 and, therefore, the cash credit account was overdrawn by the plaintiff to the extent of Rs. 12,200; and the first defendants had, therefore, earmarked the plaintiffs balance of Rs. 8,000 in the plaintiff's current account against the said shortfall. In the circumstances, the plaintiff alleged that the 14 bales which were lying in the said godown had been lost to the plaintiff and the first defendants were responsible for the said loss and were liable either to return the said bales to the plaintiff or pay Rs. 14,210 either as the value thereof as damages for the first defendant's failure to return the said bales.

4. The plaintiff further alleged that on 14th March, 1955, the plaintiff had issued

three cheques (exhibit 5 - collectively) respectively for Rs. 575 Rs. 5,531-4-0 and Rs. 1,106-4-0 to third parties and the said three cheques were presented by the said three parties to their bankers on the 16th March, 1955, and all the said three cheques were dishonoured by the first defendants on the ground "exceeds arrangement". According to the plaintiff, the said dishonouring of the three cheques arose because the first defendants had purported to earmark Rs. 8,000 from out of the plaintiff's current account by way of adjustment towards the shortfall arising on account of the loss of the said 14 bales. The plaintiff, however, contended that the first defendants were liable for the loss of the said 14 bales and were not entitled to earmark or transfer the said sum of Rs. 8,000 and, therefore, the first defendants had wrongfully dishonoured the said cheques although there were sufficient funds in the plaintiff's current account to meet the aforesaid three cheques. The plaintiff, therefore, claimed Rs. 5,000 as damages for failure to honour the said three cheques.

5. It may be here mentioned that after the filing of the suit, the first defendant bank merged in the second defendant bank under the provisions of the State Bank of India (Subsidiary Banks) Act, 1959, and by virtue of the provisions of the said Act the undertaking of the first defendant-bank stood vested in the second defendant-bank. The plaintiff, therefore, amended the plaint and added the second defendants as party defendant to the suit and claimed the same reliefs against them.

6. By their written statement the first defendants denied the plaintiff's claim both as regards the loss of 14 bales and the non-payment of the said three cheques. The first defendants inter alia contended that on a true construction of clause 7 of the said agreement, exhibit No. 1, all risks as regards quantity and quality of the bales pledged by the plaintiff with the first defendants was retained with the plaintiff and the first defendants were not liable or responsible for the difference in quantity of such goods. The first defendants further contended that under clauses 11 and 12 of the said agreement, the first defendants' right to recover from the plaintiff the balance for the time being remaining due and payable by the plaintiff to the defendants at the foot of the said cash credit account was not prejudiced in any manner. The first defendants admitted that on 15th March, 1955, their representative had accompanied the plaintiff's representative to the said godown for giving delivery of two bales when it was ascertained that instead of 52 bales there were only 38 bales of cotton yarn; that having regard to the absence of the said 14 bales it was obvious that the margin maintained by the plaintiff in respect of the said balance at the foot of the said cash credit account was insufficient and that the plaintiff was not, therefore, entitled to an advance in the said account to the extent of Rs. 22,600, which amount in fact the plaintiff had obtained from the first defendants; that the plaintiff had actually overdrawn the said cash credit account to the extent of Rs. 12,200 and, therefore, the first defendants by their letter dated 15th March, 1955 (part of exhibit No. 4), had informed the plaintiff that they had earmarked a sum of Rs. 8000 from out of the amount lying in the plaintiff's current account

with the first defendants. The first defendants also contended that on the very day, i.e., 15th March, 1955, the plaintiff's was orally informed about the fact that the first defendants would be earmarking the said amount from the plaintiff's current account towards the said shortfall. In the circumstances, the first defendants contended that they were entitled to appropriate sufficient amount from the plaintiff's current account and apply the same to recover the loan advanced in the said cash credit account and bring the said loan to the level of the margin of 30 per cent. The first defendants further contended that having regard to the aforesaid adjustments of Rs. 8,000 from the plaintiff's current account the first defendants had no balance left to honour the said three cheques and they were required to dishonour the said cheques on 16th March, 1955, when the same were presented by the third parties. It may be mentioned that, so far as this transfer of the said sum of Rs. 8,000 is concerned, the defendants have admitted that the actual transfer of the said amount of Rs. 8,000 from the plaintiff current account to the cash credit account was made in the plaintiff said current account on 25th November, 1955, but a note that the said earmarking from out of the plaintiff's current account was already made in the plaintiff's said account when the decision to earmark the said amount was taken and as such the plaintiff was not really concerned with as to when exactly this transfer entry in respect of the said sum came to be made in the plaintiff's account in the bank's books of account. The first defendants has, in the alternative, also contended that, though the entire risk of the goods was retained by the plaintiff under the said agreement, the first defendants had taken all due and necessary care of the said pledged goods as an ordinary prudent bailee and pledgee would take of such goods by maintaining the lock on the said godown and, therefore, they contended that the said 14 bales were found stolen from the said godown without any negligence on their part.

7. The second defendants, who were subsequently brought on record as party defendants, filed their written statement on 14th September, 1961, raising the same contentions which were put forward by the first defendants in their written statement.

8. When the matter came up for hearing before the learned trial judge, the defendants made an application for amendment of the written statement. The said application was allowed. By the amendment made by the defendants it was, inter alia, contended that under the said agreement dated 15th September, 1953, the first defendants had contracted themselves out of their liability by reason of clause 7 of the said agreement.

9. Upon the pleadings the learned judge raised ten issues, out of which the following are material for the present appeal before us :

"(2) Whether the first defendants, under the provisions of the said agreement and in particular clause 7 thereof, were not bound to exercise the care of a bailee and/or pawnee in respect of the said goods belonging to the plaintiff and if so, whether the defendants were not liable for the loss of the said 14 bales ?

(3) Whether the loss of 14 bales was on account of the negligence and failure to take as much care of the said goods as it was incumbent upon the defendants as pledgees and bailee thereof to take under the law as alleged in paragraph 13 of the plain ?

(4) Whether the defendants are bound to deliver to the plaintiff 14 bales and/or the value thereof viz Rs. 14,210 as alleged in paragraph 13 of the plaint. ?

(5) Whether the defendants are bound to pay Rs. 14,210 as and by way of compensation and damages for failure to return the 14 bales as alleged in paragraph 13 of the plain ?

(6) Whether the defendants were entitled to earmark the said sum of Rs. 8,000 as contended in paragraphs 9 and 10 of the written statement ? ...

(8) Whether the defendants were both in law and in fact bound to honour the three cheques and whether the defendants wrongfully failed to honour them as alleged in paragraph 14 of the plain ?

(9) Whether the plaintiff suffered any damages and whether the defendants are bound to pay to the plaintiff damages in the sum of Rs. 5,000 or any other amount ?"

10. At the herring ,one Nadkarni, who was the agent of the first defendants gave evidence to show how the first defendant-bank had taken care in storing the said 14 bales found missing on 15th March, 1955, and how the first defendants decided to earmark a sum of Rs. 8,000 and the having orally informed the plaintiff on 15th March, 1955, about the said decision to earmark the said sum of Rs. 8,000 from the plaintiff's said current account.

11. On behalf of the plaintiff his brother Radhakisan Roopnarain Dayma who used to manage the plaintiff's business gave evidence. On the evidence, oral and documentary, led before him, the learned trial judge answered the above issues as follows :

Issue No. 2 - First defendants were not bound to exercise care as bailees and not liable for loss of 14 bales.

Issue No. 3 - In the negative. Defendants have taken reasonable care as bailees or pledgees as required by law.

Issue No. 4 - In the negative.

Issue No. 5 - In the negative.

Issue No. 6 - In the affirmative to the extent of Rs. 5,584.

Issue No. 8 - Defendants were bound to honour two of the three cheques and wrongfully failed to honour the two cheques.

Issue No. 9 - In the affirmative; and on the latter part defendants are bound to

pay to the plaintiff damages in the sum of Rs. 1,000.

12. In view of the above findings, the learned judge decreed the plaintiff's claim for damages to the extent of Rs. 1,000 and dismissed the rest of the suit and directed the plaintiff to get his costs only to the extent to which he had succeeded and to pay to the defendants their costs to the extent to which they had failed.

13. Being aggrieved by the said decision the plaintiff has come in appeal to this court.

14. On behalf of the appellant, Mr. Desai has raised two contentions before us Firstly, it is urged that on a proper construction of clause 7 of the said agreement it did not exempt the first defendants from their liability for negligence in taking care of pledged goods and that the learned trial judge erred to holding that the said clause 7 exempted the defendants from liability as bailees u/s 151 and 152 of the Indian Contract Act. He further urged that the first defendants as the bailees had failed to take such care of the pledged goods, viz., 14 bales, as an ordinary prudent owner in similar circumstances would take of him goods.

15. We will deal first with the question, viz., whether the first defendants had taken due care as the pledgees of the said 14 bales stored in the plaintiff's said godown No. 8 in Gulalwadi. The witness, Nadkarni, who gave evidence in support of the defendants' case, claimed that as bailees they had taken due and requisite care of the pledged goods. In his deposition he described the practice that was followed by the plaintiff for the purpose of pledging fresh bales with the bank and for releasing bales from the pledge. Whether the plaintiff wanted to pledge fresh bales or get some of them released from the pledge he used to address a letter to the first defendant-bank and the plaintiff's representative would attend the bank's branch office at Kalbadevi with such a letter upon receipt of such letter; the witness used to issue instructions to the bank's godown-keeper who used to be in the bank's office to accept the bales or to release the bales, as the case may be; the key of the godown used to remain in his (agent's) custody and under his control he used to hand over the key to the bank's godown-keeper and the later used to go to the said godown in the company of the plaintiff's representative and after the bales were either kept in the godown or were taken out of the godown, as the case may be, the godown-keeper used to bring the key of the godown to him and the witness used to keep the key in the safe of the bank. The witness further stated that he himself used to go to the godown twice or thrice a month for the purpose of checking and that in his absence his accountant used to go to the godown for the purpose of checking and that nobody else used to do that work. Now, it is not in dispute before us that only the first defendant-bank had the keys of the said godown.

16. Mr. Desai, for the appellant, has urged four points before us to show that the first defendants did not take proper care of the said pledged goods, namely :

(i) the first defendants had not kept a watchmen to keep a watch on the said

godown and that the bank like the first defendants as a prudent banker ought to have got a watchman to look after the said godown;

(ii) the witness, Nadkarni, as the agent of the bank did not inspect the said godown and check the pledged goods as falsely stated by him and therefore, there was lack of proper checking of the said goods on behalf of the first defendants;

(iii) the first defendants did not lead evidence of the godown-keeper, who used to accompany the plaintiff's representative at the time of either pledging fresh bales or withdrawing some bales from the said godown; and

(iv) the first defendants did not complain to the police in respect of the 14 bales of cotton yarn found missing on 15th March, 1955, nor did they take any other steps to inquire into the matter, namely, how the said 14 bales came to be lost.

17. Now, the law regarding the duty of a bailee u/s 151 of the Indian Contract Act is well settled. The only liability of a bailee is for negligence under the said section. It must, therefore, be shown in the first place by the bailee that the loss of goods entrusted to him was not due to his or his servants' negligence, or, rather, to put it in a positive form, the bailee must shown that he took the ordinary care of the goods pledged as required by section 151 of the Indian Contract Act (see *Lakhaji Dollaji & Co. v. Boorugu Mahadeo Rajanna*).

18. Now, as regards the first defendant-bank not having employed a watchman to look after the said godown, it is no doubt admitted by the witness, Nadkarni, that the first defendant-bank had not engaged any watchman to look after the said godown No. 8 at Gulalwadi. But in this connection it is important to bear in mind that the plaintiff's was the owner of the said godown, and in his deposition the plaintiff's own witness Radhakisan stated that the plaintiff's firm had three godowns in Bombay, all located in one and the same building at Gulalwadi. One of the said godowns is the godown No. 8 in which the goods pledged by the plaintiff were stored by the first defendant-bank. The witness further admitted that during 1953 and 1955 the plaintiff's godown. Now, u/s 151 a bailee is required to take such care of the goods entrusted to him as a prudent owner thereof in similar circumstances would take care of his own goods. As in this case the plaintiff himself had not thought fit to employ a watchman for the said godown, it could not be said that the omission on the part of the first defendant-bank to do so amounts to a failure on their part to take care of the said pledged goods as required u/s 151 of the Indian Contract Act.

19. It is next urged on behalf of the appellant-plaintiff that the godown-keeper who used to receive delivery on behalf of the first defendants from the plaintiff and stored the same in the said godown and also delivered some of the pledged bales to the plaintiff when so requested and was thus in charge of locking the said godown was not examined as a witness and to this extent there is a lacuna in the evidence led on behalf of the first defendants to show that they had taken the requisite care of the pledged goods. It is true that, according to Nadkarni,

the bank agent, every time the plaintiff's representative went to pledge fresh bales to the first defendants or to redeem some of them the godown-keeper used to get the keys of the said godown from him (Nadkarni), and go to the godown and in the presence of the plaintiff's representative receiver or release from the godown such bales. Further, this witness has deposed that after the bales were either kept in the godown or were taken out of the godown by him, the godown-keeper used to bring the key to him which he used to keep in his custody. The witness has also in his cross-examination admitted that he had not received any report or intimation from anybody working under him to show that there was anything wrong with the lock of the godown. It is also not in dispute that on the day in question, i.e., 15th March, 1955, the lock of the godown was not tampered with, nor were there any signs of any intrusions or disorder in the said godown. It is also in evidence of the plaintiff's witness, Radharkisan, that whenever he went to the first defendants-bank for the purpose of offering bales in pledge or getting some pledged bales released, the godown-keeper used either to accompany him to the godown or to meet him there and store the bales in the godown or release some bales therefrom as desired by the plaintiff. This is the evidence so far as the godown-keeper is concerned. It is important to observe that in the cross-examination of Nadkarni, no question was put to him which would suggest fraud or want of care on the part of the godown-keeper in discharging his duty as a godown-keeper. It may also be mentioned that in the trial court the plaintiff did not contend that the defendants ought to have examined the godown-keeper and no such ground was taken even in the memorandum of appeal. Having regard to these circumstances, we are not inclined to hold that by their omission to examine the godown-keeper the first defendants have failed to prove ordinary care on their part as bailees of the said 14 bales.

20. The next point urged on behalf of the appellant is with respect to the checking of the pledged goods by the bank's agent, Nadkarni. In his deposition, Nadkarni stated that he used to go for inspection of the plaintiff's godown twice a month. Before going for such inspection he used to consult the stock register and ascertain the number of bales as shown by the stock register and thereafter used to go to plaintiff's godown and check the actual number of bales and also check the make of the bales. He further stated that he used to send certificates of inspection to his head office and admitted that in the certificates which used to be sent once or twice every month he had mentioned only certain number of godowns of certain borrowers inspected and checked by him but he had not mentioned the date on which such visits were paid by him to such godowns. Mr. Desai for the plaintiff had argued that as even according to this witness inspection of the goods pledged involved checking the very numbers and make of the pledged bales and as the number of the bales pledged by the plaintiff with the first defendants was a large one (i.e. 58 bales), and if the witness himself had inspected the godown and checked the pledged goods in the said godown as alleged by him (Nadkarni), he must have taken the assistance of the stock

register or some other record and must have made an endorsement on such record about his having inspected and checked up the pledged goods at that time. However, argues Mr. Desai, the witness himself has admitted in his cross-examination that he did not make any memo or keep any other record on such occasion when he used to inspect the plaintiff's godown for checking the pledged goods. Mr. Desai has, therefore, strongly urged that the evidence regarding the periodic inspection and check by the witness, Nadkarni, should not be accepted as trust worthy. Now, it cannot be said that Mr. Desai's above contention is without force. Such memos or records, if kept by the witness of his inspection of the said godown, would have strongly corroborated his oral evidence in regard to his visits to the said godown and checking of the pledged goods. In the absence of such record, however, we are not inclined to disregard his oral evidence of his visits to the godown and inspection of the pledged goods. The witness, Nadkarni, was an agent of the defendant-bank and as such a responsible officer of the bank. The learned judge has accepted his oral evidence in this behalf as reliable. We, therefore, accept his oral evidence on his point.

21. Lastly, it was contended by Mr. Desai that the first defendant-bank did not lodge any complaint with the police in respect of the loss of the said 14 bales, nor did they hold any inquiry themselves in the matter. Nadkarni had admitted in his cross-examination that nobody on behalf of the first defendant-bank referred the matter of loss of the said 14 bales to the police. He, however, stated that while forwarding the plaintiff's letter dated 16th March, 1955, to the general manager he had requested the general manager to refer the matter to the police. It is not explained why no such step by way of lodging a complaint with the police was taken by the first defendants. There is also no evidence of the first defendants themselves having inquired into the matter. It seems that the first defendants sought shelter for protection of their right in respect of the said loss of 14 bales on the terms of the said agreement dated 15th September, 1953, Now, in our opinion, as the first defendant-bank was in possession of the said godown when the loss of the said 14 bales occurred, they ought to have lodged a complaint with the police and got the matter investigated by them. Their failure to do so, in our opinion, exposes them to the criticism of involvement of some employee of the first defendants in the said loss of 14 bales. We cannot but deprecate the conduct of the first defendant-bank in not reporting the matter to the police or not themselves inquiring into the matter when the agent of the bank found that 14 bales were missing from the godown though there were no signs of lock of the godown being tampered with or any other sign of any intruder having access to the said godown. However, this conduct is subsequent to the loss of the said 14 bales and by itself will not justify an inference that the bank was negligent in taking care of the said 14 bales as required u/s 151 of the Indian Contract Act.

22. These were all the points raised on behalf of the appellant in regard to the negligence alleged on the part of the first defendants in taking care of the pledged goods. As we have rejected all the above contentions, we hold that the

first defendants took such care of the pledged goods as a bailee thereof is required to take under the law and confirm the finding of the learned trial judge in that behalf.

23. In view of our above finding, it is not strictly necessary to consider the defendants' other contention, viz., clause 7 of the said agreement dated 15th September, 1953, exhibit No. 1, exempts them from liability for negligence of their servants in taking care of the pledged goods. Assuming, however, we are wrong in the above finding, we proceed to consider this aspect of the matter also.

24. Clause 7 of the said agreement, exhibit No. 1, reads as follows :

"That the borrowers shall be responsible for the quantity and quality of the said goods pledged with the bank and also for the correctness of statements and returns furnished by them to the bank from time to time as mentioned above. The bank shall be at liberty at any time in its discretion to get the goods weighed and valued at the expense of the borrowers, and that during the continuance of this agreement the borrowers shall be responsible for all losses, damages or deterioration of the said goods caused by theft, fire, rain, floods, earthquake, lightning or any other causes, whatever notwithstanding that the goods may be in the possession or under the control of the bank."

25. Mr. Desai, for the appellant as contended that the words "any other causes whatever" in clause 7 should be construed ejusdem generis, that all the preceding forms of loss enumerated in clause 7, viz., theft, fire, floods, earthquake, lightning had a common characteristic, viz., want of any negligence on the part of the first defendants in taking care of the pledged goods and, therefore, the words "any other cause whatever" excludes any clauses which do not involve any negligence on the part of the bank or their servants. In support of his contention, Mr. Desai relied upon a passage appearing in Halsbury's Laws of England, 3rd edition volume 11, paragraph 693, at page 430. The said passage is as follows :

"Where the particular things named have some common characteristics which constitutes them a genus, and the general words can be properly regarded as in the nature of a sweeping clause designed to guard against accidental omissions, then the rule of ejusdem generis will apply, and the general words will be restricted to things of the same nature as those which have been already mentioned; but the absence of a common genus between the enumerated words will not prevent the application of the rules ..."

26. He also argued that clause 7 must be construed strictly against the bailee, i.e., the first defendant-bank, and relied upon a passage in Chitty on contracts, 23rd edition, volume 2, paragraph 185, at page 184. The said passage runs as follows :

"Exemption from liability. - The bailee may exempt himself from his common law liability by special conditions in the contract, but the exempting words must be

express, unambiguous and adequate in all the circumstances since they will be construed strictly against the bailee."

27. He also cited a case mentioned in the foot-note to the above passage, viz., Price & Co v. Union Lighterage Co.

28. Now, it is not possible to accede to the appellant's contention that clause 7 applies to those cases only in which there is no negligence on the part of the first defendant bank or their servants in taking care of the pledged goods and therefore does not apply to a case where there is such negligence on the part of the first defendants and their servants. It is apparent that some of the enumerated clauses of loss, like, theft, fire and even rain, might have taken place owing to negligence on part of the first defendant-bank in taking care of the said pledged goods while they were lying stored in the said godown. There is no reason, therefore, to limit the operation of such enumerated clauses like theft, fire and rain when there was no negligence by the first defendant bank in taking care of the said pledged goods. So to construe the said clause would be to import words of limitation which are not in it. Moreover, the appellant's above contention begs the very question in issue viz., whether on a proper construction of clause 7 it exempts the defendants from liability on their part for negligence. Further, if clause 7 was not intended to mean and does not mean to exempt the first defendant-bank from liability for negligence in taking care of the pledged goods, the said clause would be redundant in the sense that even in its absence it would not make any difference to the liability of the first defendant-bank qua the forms of enumerated loss, for a bank, unlike a common carrier, is not an insurer of goods and u/s 152 of the Indian Contract Act, unless a contrary intention is expressed or reasonably implied in the agreement, it will only be liable for negligence and not for causes of loss such as mentioned in the said clause assuming that the same do not cover acts of negligence on the part of the bank (see Lakhaji Dollaji & Co. v. Boorugu Mahadeo Rajanna [1939] 41 Bom. L.R. 9`.

29. Further, as regards the rule of strict construction against bailee and the case of Price & Co. relied upon by the appellant, it is necessary to refer to the facts of that case. In that case goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss or damage to goods which can be covered by insurance". The barge was sunk owing to the negligence of the servants of the barge owner and the goods were lost. In an action to recover damages for the loss of the goods, the trial court gave judgment for the plaintiff and the defendants appealed against it. In the court of appeal, it was held that the exemption being in general terms, not expressly relating to negligence, the barge owner was not exempt from liability for loss or damage caused by the negligence of his servants, and confirmed the decision of the trial court. Lord Alverstone C.J. observed :

"... when a clause in such a contract as this is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the

carrier or his servants and the other will make it applicable where there is such negligence, it requires special words to make the clause cover non-liability in case of negligence."

30. It would, therefore, be seen that the decision on the case rested on the words of the clause granting exemption from liability viz., "any loss or damage to goods which can be covered by insurance." In the present case clause 7 is quite differently worded and contains the words "all losses ... caused by ... any other cause whatsoever". In this connection it is pertinent to observe the last words in clause 7 which serve to emphasise that the plaintiff as borrower shall be responsible for all such losses notwithstanding that the goods were merely in the possession or control of the bank.

31. Mr. Tijoriwala, learned counsel for the respondent relied on a passage from Chitty on contracts, volume I, paragraph 697, at page 696, which is as follows :

"Effective exclusion. - Liability for negligence may be effectively excluded if words are used which indicate that all damage however caused, it is to be comprehended within the exemption, or which throw the risk upon the plaintiff. If the defendant merely says "any loss" he is directing attention to the kinds of losses and not to their cause or origin so liability for negligence will not be excluded. But if he says, however arising" or "any cause whatever" these words will cover losses by negligence. Thus the words" however caused", "from whatever other cause arising", "however arising," "no liability whatever," "under any circumstances", "relieves from responsibility for any injury, delay, loss or damage however cause", have been held to be effective. Similarly, such words as "at sole risk", "at customer"s sole risk", "at their own risk" and "with all faults" will exclude liability."

32. Mr. Tijoriwala has also relied, inter alia, on the case of Joseph Travers & sons Ltd v. Cooper. The learned trial judge has relied upon this authority as furnishing guide in construing the said words "any other cause whatsoever" in clause 7. In this case the facts were as follows :

"Goods were loaded into a barge from a ship for delivery at the barge owner"s wharf in the Thames under a contract which exempted the barge owner from liability "for any damage to goods however caused which can be covered by insurance". While the barge was lying alongside the wharf with the goods on board before being unloaded the barge owner"s lighter man who was in charge of the barge negligently left her unattended at night; and the barge, after taking the ground at low tide, became submerged as the tide rose, and the goods were damaged. In an action against the barge owner to recover damages for the loss so caused there was no direct evidence as to the cause of the barge being submerged and the evidence left it in doubt whether the submerging was or was not attributable to the negligent act of the defendant"s servant in leaving the barge unattended." It was held the court of Appeal "that the term in the contract exempting the defendant from liability for damage "however caused" relieved

him from liability for damage caused by the negligence of his servant, and that therefore he was entitled to judgment."

33. In the judgment of the learned Justice Kennedy, at page 93, there is reference to the decision in *Price & Co. v. Union Lighterage Co.* relied upon in the present case by the appellant. Referring to that decision, Kennedy J. observed as follows :

"In that case, however, there were on such words as "however caused". The contract of carriage exempted from liability only "for any loss of or damage to goods which can be covered by insurance". There were no words referring to causation. Mr. Roche, in his full and able argument, has satisfied me that the presence of such words creates an essential difference; and that, whilst it is settled law that a contractual exemption, whether from loss or damage generally or from certain enumerated forms of loss or damage (such e.g. as collisions, stranding, and other perils) will not be read as protecting the carrier from liability for loss or damage if the loss or damage is proved to arise from the carrier's negligence, and words "for any loss of or damage to goods which can be covered by insurance" do not operate to enlarge the exemption, as appears from the case to which I have just referred, a different position in regard to the carrier's liability is created if the exemption clause is so worded as, according to the natural and plain interpretation of its language, clearly to comprehend all loss or damages, however that loss or damage may originate."

34. The learned judge further observed as follows :

"The general principle was laid down by Lord Blackburn in *Manchester Sheffield and Lincolnshire Ry, Co. v. Brown* : "when an exception is made, the question is, what is excepted ? Custom and ordinary usage say in bills of lading when the goods are going by sea. "Perils of the seas excepted." Well the carrier is free as regards them. No one could for a moment argue that if the shipowner's servants negligently ran upon a rock, or negligently had a collision with another vessel, the owner of the goods carried in his ship would not be entitled to say, "I will bring an action against you for this negligent collision which has done me harm, even though you are not to be made responsible, as an insurer, for a peril of the sea, which is an excepted means of damage." And so of leakage, and many other things of that sort. But that does not in the slightest degree show that when a man says he will not be responsible for damage however caused that is to be cut down and made, contrary to the intention of the parties not to include the negligence of his servants".

35. At page 101 of the case Lord Justice Phillimore observed as follows :

"This then is the distinction. It is a fine one, and I am sorry to think that it is so fine; But it seems to be this. If you say "any loss" you are directing attention to the kinds of losses and not to their cause or origin, and you have not sufficiently made it plain that you mean "any and every loss" irrespective of the cause and therefore you have not brought home to the person who is entrusting the goods

to you that you are not going to be responsible for your servants on your behalf exercising due care for them, or possibly even for your own personal want of care. But if you direct attention to the causes of any loss, if you say "any loss", "however caused or under any circumstances", you give sufficient warning, and it is not necessary to say in express terms "whether caused by my servants" negligence", or in the bill of lading phrase, "neglect or default or otherwise". This seems to be indicated by the decision in *Haigh v. Royal Mail steam packet Co.*"

36. From the above observations it is quite clear that if the words "any loss however caused" or "Under any circumstance" are used, you give sufficient warning that the person who is entrusted with the goods is not going to be responsible for his servants not exercising due care and it is not necessary to employ express words like "whether caused by my servants negligence". As clause 7 contains the words "loss caused by any other cause whatever they are wide enough to include negligence on the part of the defendants' servants in taking care of the said goods. We therefore confirm the finding of the learned trial judge that on a reasonable, business like construction of clause 7 the first-defendant-bank is exempt from the liability for negligence on the part of their servants in taking care of the said pledged goods.

37. As regards the dishonouring of the said three cheques, Mr. Desai argued that on 16th March, 1955 when the said three cheques were presented for payments by third parties the defendant-bank had not earmarked Rs. 8,000 from the plaintiffs current account and as there was then sufficient amount to honour the said three cheques, the first defendant-bank ought to have honoured all the said three cheques, and that the learned trial judge was not right in holding that there was earmarking of Rs. 8,000 on 15th March by the first defendant-bank. In this connection, he relied on the fact that the entry actually transferring Rs. 8,000 from the plaintiff's current account to the cash credit account in the first defendant-bank's books of account was made on 25th November, 1955. In this connection, however, Mr. Tijoriwala has pointed out that in their written statement the first defendants had specifically averred that the agent had orally informed the plaintiff on 15th March, 1955, that the first defendant-bank would earmark certain amount in the plaintiff's current account to cover the loss in respect of the said 14 bales, which were found missing on that day. The witness, Nadkarni, has deposed to the same effect in the trial on 15th March 1955, showing that the bank had earmarked Rs. 8,000 on that day. In view of this evidence it is not possible to accept Mr. Desai's contention that Rs. 8,000 were not earmarked on 15th March, 1955. We accordingly confirm the learned trial judge's finding regarding dishonouring of the said three cheques.

38. In the result, the appeal fails. However, in view of the facts and circumstances of the case, we are of the opinion that the fair order to make for costs would be not to make any order as to costs of the suit or appeal. Order of costs of the trial court is set aside.