

(1997) 10 DEL CK 0029
In the Delhi High Court
Case No : Suit No. 524 of 1982

Jagdish Chandra Trikha

APPELLANT

Vs

Punjab National Bank and Others

RESPONDENT

Date of Decision : 24-10-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 2
Contract Act, 1872 — Section 148
Limitation Act, 1963 — Section 9
Succession Act, 1925 — Section 211

Citation : (1997) 6 AD 753 : AIR 1998 Delhi 266 : (1996) 4 CLT 513 : (2000) 100 CompCas 839 : (1997) 69 DLT 874 : (1997) 2 ILR Delhi 343

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : M.L. Bhargav, S.K. Khanna and P. Mitra, for the Appellant;

Judgement

C.M. Nayar, J.

(1) The plaintiff moved this Court in December 1977 for permission to file the suit as an indigent person under the provisions of Order 33 Rules 1 and 2 of the Code of Civil Procedure. The Court granted permission by order dated 22/03/1982. The plaintiff, as a consequence, filed a suit for recovery of Gold ornaments weighing 480 Tolas i.e. 5596.80 grammes deposited in safe deposit box under receipt No. 17/47 dated 3/06/1947 with the defendant .Bank or in the alternative for the price thereof amounting to Rs. 3,72,400. The plaint was subsequently amended and the plaintiff claimed recovery of the gold ornaments/ jewellery or price there of as on the date of the judgment/decreed in the suit.

(2) The brief facts of the case are that late Rai Sahib Mool Chand, father of the plaintiff and defendants 3 to 5 and husband of Smt. Washeshran Devi, who was arrayed as defendant No. 2 but was deleted by the Court's order as she had expired during the pendency of the suit was an eminent civil lawyer of the city of Peshawar (now forming part of Pakistan) in 1947. The said Rai Sahib Mool Chand

had a very lucrative practice as an Advocate and was a regular Income Tax payer. He was considered to be one of the wealthiest person in the city of Peshawar and after migrating from Peshawar in 1947 to India with his family at the time of partition died on 30/04/1953 in Delhi leaving behind the legal representatives/heirs entitled to his estate as referred to above. Rai Sahib Mool Chand entrusted for safe custody a sealed box containing 500 Tolas of Gold ornaments/jewellery belonging to him with the then The Punjab National Bank Ltd., Peshawar Cantt. Branch, Peshawar of which defendant No. 1 is the successor according to the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1969. The gold ornaments/jewellery allegedly weighed 500 Tolas and were placed in the box by the late father of the plaintiff Rai Sahib Mool Chand and his mother Smt. Washeshran Devi with a list of the said articles of jewellery therein and the same was locked by the deceased himself after which the box was wrapped with a white cloth and duly stitched by defendant no. since deceased, and sealed with "Lac" (sealing wax) by the deceased after which a monogram "M.C.R.S." i.e. "Mool Chand Rai Saheb" was embossed on the seals of the said box in the presence of defendant No. 2. Before handing over the said box to the then The Punjab National Bank Ltd., Peshawar Cantt Branch, Peshawar, the deceased wrote his name on the said box. The box was given/entrusted to the Bank under receipt No. 17/47 dated 3/06/1947 and the aforesaid Bank accepted it for safe custody as a part of its business activities for fee paid by the deceased to the said Bank for safe custody. The details of the jewellery as handed over to the Bank are referred to in paragraph 3 of the plaint which may be reproduced as follows : (i) S. No. Description of articles Quantity Weight in Tolas 1. Gokhroos 2252. "Churian" 8 403. Bangle 8 54. Other Bangles 12 75. Phul-Churian 2 56. Lacche 2 67. Pocchian 2 68, Janjeer 1 169. Necklace 1 910. Other type Necklace 1 1011. Chain I 312. Small Necklace 2 313. Lammi 1 614. Chhote Kare 2 315. Children's Necklaces 6 716. Kanon-ke-Magar 2 517. Chain of wrist watch 1 218. Buttons 4 319. Studs 2 120. Finger rings 2 221. Bittion-ke-Har 1 3022. Pound-ke-Har 1 2023. Separate Pounds - 1024. Sets of ear rings 3 Total 250 Tolas (ii) In addition to above mentioned articles, 250 Tolas of Gold ornaments/jewellery were also lying in the Box containing some broken items and some concrete items of gold ornaments/jewellery, Sone-ka-pasa, weighing 25 Tolas, bangles weighing 30 tolas, Kare 13 Tolas and Bangles of 14 Tolas with 20 Bitties..... 200 Tolas (iii) Other miscellaneous items of Gold ornaments 50 Tolas Total 500 Tolas (3) --

(3) In paragraph 4 it is stated that after depositing the sealed box containing the aforesaid jewellery/gold ornaments father of the plaintiff came to Simla Hills in July, 1947 on a visit and stayed there for a month. In the meantime the communal disturbances took place and consequently said Rai Sahib Mool Chand could not return to Peshawar to collect his paraphernalia/belongings lying in the paratial bungalow situated at No. 5 Kitchner Lane, Peshawar Cantt including the safe deposit box deposited with the then The Punjab National Bank Ltd., Peshawar Cantt Branch, Peshawar.

(4) After partition of the country in August, 1947 the above said box along with safe deposit boxes of several other depositors were removed to Rawalpindi Branch of the above Bank as per letter dated 30/07/1950 received by the plaintiff's father. From Rawalpindi the box along with other safe-deposit boxes of other depositors were removed to the Lahore Branch of this Bank as per letter dated 4/08/1950. Thereafter, the said box remained throughout in the physical custody of the Bank at Lahore till the same was brought to India along with other boxes of other persons in the end of November, 1961 under the Indo-Pakistan Movable Property Agreement of 27/06/1950 between the Government of India and Government of Pakistan by the Ministry of Rehabilitation, Government of India, New Delhi. There had been active correspondence by the father of the plaintiff with the Head office of the aforesaid Bank at Delhi regarding the delivery of his box to him. Similarly, the father of the plaintiff had been in correspondence with the High Commissioner of India in Pakistan, the Custodian of Evacuee Property at Lahore and Branch offices of the said Bank at Rawalpindi and Lahore. Rai Sahib Mool Chand, however, expired at Delhi on 30/04/1953 and there after the plaintiff and his mother Smt. Washeshran Devi remained in correspondence with the Head office of the Bank regarding the delivery of the box and also with the High Commission of India and Pakistan, Karachi. The plaintiff received a letter No. DMP/3469 dated 24/ 26/12/1959 from the Head office of the Bank that the safe deposit of plaintiff's father was lying with the Bank duly sealed and that charges on that articles will be determined as soon as such articles are allowed to be released. The contents of the letter as referred to in paragraph 5 of the plaint may be reproduced as follows:

DEAR Sir, Reg : Safe Custody Box of late R.S. Pt. Mool Chand, Advocate, of Peshawar. With reference to your letter dated 15-12-1959 we have to advise you that so far as the release of the safe custody articles lying in Pakistan is concerned there is no change in the position already advised to you in our previous letter No. 921 dt. 1-4-59. We may, however, add that such articles are now lying in Pakistan with the Bank duly sealed by the representatives of the Government of India, Custodian of Evacuee Property, Lahore and our Lahore office. The charges on such articles will be determined as soon as these are allowed to be released. Please note and oblige. Yours faithfully, Sd/- B. K. Sharma, Manager

Similarly, the plaintiff received another letter No. PTL/PNB/2/58/1029 dated 27/01/1959 from the Property Field Officer of the High Commission of India in Karachi intimating that the safe deposit of Rai Sahib Mool Chand had been jointly sealed by the representative of that Mission, the custodian of Evacuee Property and the Bank concerned and intimation will be sent as and when the boxes will be allowed to be removed to India.

(5) After the partition of the country the Government of India had called upon the safe deposit owners to submit their original deposit receipts and the list of their contents and the mother of the plaintiff, Smt. Washeshran Devi accordingly

had submitted the list of contents in the said box as stated in paragraph 3 of the plaint which has been reproduced above in the year 1955-56. Carbon copy of the list in Hindi which was sent at that time was placed on record. Similarly English translation was also prepared.

(6) The facts leading to the subsequent arrival of the deposit box of the plaintiff along with other boxes to India as well is the letter dated 22/05/1962 written by Shri Dharam Vira, the then Secretary to the Government of India, Ministry of Rehabilitation to the General Manager of defendant Bank bringing to his notice the missing jewellery from the safe deposits and lockers are detailed in paragraphs 7 and 8 of the amended plaint which may be reproduced as follows ;

THAT the safe deposit box was brought to India by the Ministry of Rehabilitation, Government of India under the Indo Pakistan Moveable Property Agreement of June, 1950 Along with safe deposits of several other depositors pertaining to the then The Punjab National Bank Ltd., and other Banks and since the plaintiff remained in active Correspondence with the Ministry of Rehabilitation, New Delhi, the Ministry vide Letter No. 5(225)/LSD/61 dated 3-2-1962 informed the plaintiff that the safe deposit box of Shri R.S. Mool Chand deposited with the then The Punjab National Bank Ltd.,-Peshawar Cantt. Branch, Peshawar, had been received in India and the delivery of the said box can be obtained after the Ministry is satisfied as regards the Legal heirs of late R. S. Mool Chand and that a sum of Rs. 25 is required to be deposited in Government Treasury as Bank's charges for deposit, transport and departmental charges on the said box and the same was duly deposited and other legal formalities required by the Ministry of Rehabilitation was also complied with to their satisfaction. As a result thereof, the Ministry of Rehabilitation, New Delhi, informed the mother of the plaintiff that she would come to the Reserve Bank of India in May, 1962 for taking the delivery of the said box. The plaintiff accompanied her mother to the Reserve Bank of India. Parliament Street, New Delhi on the fixed date and when the said box was produced, it was found to have a different wrapper having the seals of the then The Punjab National Bank Ltd., Lahore and the original wrapper and the seals of plaintiff's father were not visible and found on the said box except the Bank's own wrapper and seals. The plaintiff's mother on lifting the box also noticed that the box was otherwise light in weight, she Therefore, refused to accept the delivery of the said box on the grounds that the box was not found in the condition in which it was deposited with the said Bank at Peshawar Cantt and that the box had a new cloth wrapper bearing the seals of the The Punjab National Bank, Lahore, and also that the box was light in weight.

THAT after refusing delivery of the said box, the plaintiff's mother sent a strong representation to the then secretary to the Government of India, Ministry of Rehabilitation, New Delhi on the 30/05/1962 complaining about the changed condition of the box offered for delivery and requested for necessary action in the matter. The Ministry of Rehabilitation addressed a letter to the then General Manager of the then Punjab National Bank Ltd., Parliament Street, New Delhi vide

letter No. 5(225) LSD/61 dt. 5th June, 62 with a copy endorsed to the plaintiff's mother asking the said Bank that the heirs of deceased deposit or Late R.S. Mool Chand had refused to accept the delivery of the Box deposited by late R.S. Mool Chand on the ground that the safe deposit box was not found in the condition in which the same box was deposited with the Bank and that the Bank should reply to the party direct under intimation to that Ministry as to what action they propose to take on the complaint. Surprisingly the Head Office of the said Bank chose to keep silent and no reply was sent to the plaintiff's mother's representation dated 30th May, 1962. It is very necessary to mention that one letter was also written by Shri Dharam Vira the then Secretary to the Government of India, Ministry of Rehabilitation to the General Manager of the Punjab National Bank Ltd. on 22/05/1962 which is reproduced below:- Do "No. 3(2)/LSD/62 New Delhi, 22/05/1962. My dear-- . .

AS you know, under the moveable property Agreement between the Government of India and Pakistan, contents of lockers and safe deposits of displaced person should with banks in the two countries have been transferred from one country to the other at Government level. Accordingly, 47 safe deposits belonging to displaced persons held with your bank in Pakistan were handed over to the representatives of Government of India, through the Custodian of Evacuee property Pakistan, by the Lahore Branch of your Bank on the 30/11/1961.

2. It was observed that all the safe deposits handed over by your bank had new packings and bore the seals of your bank.

3. We have since delivered 12 safe deposits transferred by your Bank to the Claimants. Unfortunately, in ten cases the depositors have complained that the whole or substantial part of the jewellery from their safe deposits were found missing. In some cases, as reported to this Ministry, it was found that all the original seals of the depositors had been broken and the newly wrapped packages contained nothing except the original packing cloth and/or a few old things. In certain cases the depositors have written to your bank about their missing jewellery and in reply they have been informed that due to passage of time, dampness, white ants etc. the original wrappers as well as the seals affixed thereto had been worn out and, Therefore, the bank, as a measure of prudence, put new wrappers and seals over the safe deposits and further that the bank is not responsible for the contents of the safe deposits.

4. Since the percentage of complaints is very high (10 out of 12), the matter needs serious consideration. Ordinarily, the bank should not have removed or covered the original wrappers without securing the approval of the depositor and if the circumstances necessitated such action, they should have done so in presence of the representatives of Government of India and Pakistan. The omission has given the depositors a reasonable cause of grievance and some sort of enquiry is called for in regard to the missing articles.

5. We shall be grateful if you will kindly let us have your views in the matter at an

early date.

YOURSSincerely,Sd/- (Dharam Vire 22-5-62)356Shri R.L.Tuli. General Manager.The Punjab National Bank Ltd., H.O.Parliament Street New Delhi.The Bank did not reply to the above letter and kept silent, It is submitted that one Shri Vidya Prakash Sethi had also deposited a box in the said Bank at Rawalpindi for safe custody and since the seals of the said box of Shri Sethi were also found to be broken and tempered and contents removed, said Shri Sethi filed a suit against the said Bank which was decreed in RFA(O.S.)No.4/70 entitled : Shri Vidya Prakash Sethi Vs.Punjab National Bank, by the Division Bench consisting of Hon"ble Mr. Justice P.S. Safer and Hon"ble Mr. Justice V.S. Deshpande on 28.11.1975, of the High Court of Delhi. Thus the points in issue between the plaintiff and the defendant No. 1 are the same which had been adjudicated by their Lordships of High Court of Delhi who delivered the judgment on 28.11.1975.A certified copy of the said judgment is place on record of this case. The plaintiff also insisted that in view of the changed condition of the Box,an open delivery be given. Since the Defendant No. 2. mother of the plaintiff refused to accept the delivery on the ground that the box was not found in the same condition in which it was deposited by her late husband, Therefore,the Ministry of Rehabilitation was left with no alternative but to handover the said box to the Head Office of the said Bank at Parliament Street, New Delhi and informed that the said Bank be approached regarding the box. The plaintiff also insisted that in view of the changed condition of the box, an open delivery be given but the said Bank refused to give open delivery and replied that the box is merely lying with them for delivery to the rightful claimants. The said Bank further insisted to bring a letters of Administration qua the said box from a Competent Court of Law not with standing the Ministry of Rehabilitation was satisfied regarding the veracity of the legal heirs of late R. S. Mool Chand. The Manager of Pakistan Branch of said Bank wrote to the plaintiff vide letter No. DMP/Cus/2 dt. 2nd January, 1969 to obtain letters of Administration but did not agree to give open delivery of the said box. In probate case No. 72/70. before the learned Distt. Judge, Delhi the plaintiff's mother was the petitioner, the said box was ordered to be produced in the Court of the District Judge, Delhi which was brought by Shri B.K.Sharma, Accountant. Pakistan Branches, of the said Bank in the Court. The said box was ordered to be opened in presence of the parties,her counsel and a jeweller of Chandni Chowk, Delhi.The cloth wrapper put by the Lahore Branch showing the seals of the Lahore Branch was removed, the said box was found unlocked and unsealed with a worn out cloth over it. The certified copy of the proceeding "in the above case is enclosed with this petition".

(7) In view of the above averments the plaintiff has contended that the box was found tempered with and its contents were removed and jewellery of 480 Tolas was found missing from the box. The defendant Bank refused to give open delivery of the box and only on the direction of the District Judge, Delhi on January 13, 1971 in probate case No. 72/70 the box was opened in the Court

where it was discovered to contain few broken/small articles weighing only 251 grams i.e. approximately 20Tolas. This obviously, as alleged, was an act of omission and commission on the part of the Bank, its employees, representatives who were liable and responsible for the theft. The articles which were found are detailed hereunder :value as on13.1.711. One pair of "Gokhloss" (4 pieces)2. 143 Beads (58 Big & 85 small) Rs.4267/-3. One Taweez and one ear ring ;Total 251 Grammes

(8) The acceptance of the box by the Bank in Peshawar is not denied and, Therefore, it is argued that the Bank under took the responsibility to keep it with due care as a trustee and to be vigilant about the box and its wrappings and seals and to return the same in the very. condition with wrappings and seals intact. The Bank was liable to retain the box in the condition it was entrusted and is, Therefore, guilty of breach of trust.tampering with the trust property; neglect and misappropriating of the gold ornaments/jewellery and defendant No. 1 being the successor of the said Bank in Peshawar is liable to return the jewellery articles/gold ornaments weighing 480 Totals or its present price for the loss suffered by the plaintiff.

(9) The plaintiff has submitted that the cause of action for the purpose of present suit arose firstly on Janua

(10) Defendant No. 1 filed the written statement wherein thethe averments made in para I of the preliminary objections and para 10 on merits relating to the contention that the suit is barred by limitation read as follows:

"1.On the facts disclosed in the plaint, ex-facie, the suit is barred by time and may be ordered to be dismissed on this short ground alone.

10.No. cause of action arose in favor of the plaintiff. The suit is missconceived. The suit is barred by time.It is wrong and denied that the right to sue accrued on4-12-1974 when the Letters of Administration wereregranted. It is also denied that the box was lying in trust with the defendant No. 1 The suit merits dismissal on this short ground alone,"

Similarly, merits the pleas of the plaintiff are controverter in paragraphs 2,3,5, and 9 which read as follows:

"2.It is not denied that there was a Safe Vault Deposit for which receipt No. 17/47 was issued by the then Punjab National Bank Limited at Peshawar. It is denied that the said Box, as alleged, was sealed in the manner averred or at all. It is also denied that the deceased wrote his name on the said box, as alleged. Except for the averments made herein, the rest of the para is denied.

3.In reply to para No. 3, it is submitted that the Punjab National Bank Limited Peshawar accepted the said Deposit subject to the conditions of the receipt and the rules applicable to such deposits. Except for the averments made herein, the rest of the para is denied. The averments made in this para are absolutely wrong and denied. At the time of the deposit, the defendant No. 1 was never made

aware or apprised of the contents of the said box nor under the procedure the Bank was supposed to know about the same, Therefore, the defend and No. 1 owns no responsibility for the contents thereof.

5.The averments of para No. 5 are denied. The boxes of Safe Vault were taken delivery of by representative of the Government of India at Lahore from the Government of Pakistan and were thereafter brought and kept in India by the Government of India and its possession was retained by them. The defendant No. 1 had no part or role to play in taking delivery of such deposits from the authorities in Pakistan. The movement of the boxes from Peshawar to Lahore, if any, was also carried on by the Government of Pakistan and under their supervision and control. The custody of them at Lahore was also with the Government of Pakistan till the same was delivered to Government of India, to be brought to India. Except for the averments made herein the rest of the para is denied.

9.The averments of para No. 9 are wrong and denied. No Box was tampered or its contents removed by defendant No. 1. It is also denied that the jewellery of 480Tolas was found removed form the said Box. However, it is correct that on the reopening of the Box in Court Gold articles weighing 251 Grammes were takenout, for which the necessary inventory was prepared and the same is lying deposited in the custody of Treasury-Delhi. It is denied that the wrappers and seals as alleged, or at all, were ever broken by the defendantNo. 1 nor is there any record to show that the said box was sealed and wrapped in the manner alleged. Except for the averments made herein, the rest of the para is denied. There is no liability of the Bank to the plaintiff or any other person torn the contents of the Box.It is denied that the defendant No. 1 has committed any act of breach of trust or tampered with the box or neglected or misappropriated the alleged gold ornaments/jewellery. The defendant Bank is not liable,in any manner, whatever for the reasons stated or otherwise in the plaint. It is denied that 480 Tolas were ever entrusted to the defendant No. 1".

(11) Replication was filed by the plaintiff wherein the contents of the plaint were reiterated. On the pleadings of the parties the following issues were framed on 23rd July,1984:1. Whether the suit is within time? OPP2. Whether the box covered under safe deposit receipt No. 17/47was entrusted to the defendant No. 1 duly sealed in the manner alleged by the plaintiff? OPP3. What were the contents of the box at the time of its entrustment to defendant No. 1 and the details thereof? OPP4. Whether the custody of the said box throughout remained with defendant No. 1? 5. Whether the box was found tampered with and unlock that the time when it was produced and opened in the court of learned District Judge, Delhi and if any jewellery was found short andmissing, if so, how much? 6. Whether the defendant is guilty of neglect, breach of trust,misappropriation and tampering with the box, if so to what effect? 7. Whether the defendant No. 1 refused to give open delivery to the plaintiff's mother, if so to what effect? 8. Whether the Defendant-Bank insisted that the plaintiff should obtain letters of

Administration, if so to what effect? 9. To what amount the plaintiff is entitled to on account of loss of gold ornaments? 10. To what amount the plaintiff is entitled to on account of interest.? OPP 11. Relief.

(12) The plaint was permitted to be amended by Order dated January 31, 1992 and the following additional issues were framed on February 15, 1993: 1A. Whether the plaintiff is entitled to the market value of the gold ornaments on the date of judgment and decree? OPP 1B. Whether the provisions of order 7 Rules 2 & 7 CPC are not complied with in the present case? OPP

(13) Issue NO. 1 The learned counsel for the plaintiff has argued that the suit is well within time whereas Mr. S.K. Khanna, learned counsel for the defendants has vehemently contended that the suit is hopelessly barred by limitation. There is no controversy that the limitation for the present suit is governed by Article 70 of the Limitation Act, 1963 which reads as follows:

70. To recover movable Three years The date of refusal after property deposited or demand pawned from a depository or pawnee.

The learned counsel for the plaintiff states that the plaintiff could only file the suit after obtaining letters of administration in respect of the estate of his late father which were granted on December 4, 1974. It is argued that the defendant Bank insisted on the plaintiff obtaining the letters of administration from a competent court of law to consider his claim and, Therefore, there was no option left with the plaintiff but to file the suit after obtaining of the letters of administration. Reference is made to the communication dated January 2, 1969 of defendant Bank to the plaintiff which is Exhibited as Public Witness 4/25. The same reads as follows: (ESTABLISHED 1895) (Regd Office Parliament Street, New DELHI) PAKISTAN Department Post Box NO. 274 HEAD Office ; NEW Delhi Parliament street reference DMP/CUSTODY/2 New Delhi-1 January 2, 1969 Shri J.C. Trikha, I I/123, Double Storey, Tilak Nagar, New Delhi-18 Dear Sir, Re : Safe deposit relating to Late R.S. Mool Chand Advocate, Peshawar With reference to your letter No. JCT/PNB/VI/68 dated 19-12-1968; in view of your objections to the indemnity clause in the indemnity bond it has been decided to request you to obtain a "Letter of Administration" from a competent Court of Law so that the matter may be looked into further on the basis thereof. The question of supplying a copy of the indemnity bond, therefore, does not arise. Sd/-MANAGER" Reference is also made to Section 16 of the Limitation Act which reads as follows: "16. Effect of death on or before the accrual of the right to sue-(1) Where a person who would, if he were living, have a right to institute a suit or make an application dies before the right accrues, or where a right to institute a suit or make an application accrues only on the death of a person, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application, (2) where a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, or where a right to institute a suit or make an application against any person accrues on

the death of such person, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute such suit or make such application.(3) Nothing in sub-section (1) or sub-section (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of a hereditary office". Letters of Administration were granted on December 4, 1974. The present suit (IPA 5 of 1978) was filed in this Court on December 2, 1977 under the provisions of Order 33 Rule I read with Section 151 CPC which is within a period of three years of the expiry of limitation and Therefore, the suit is well within time.

(14) On the other hand, the learned counsel for the defendant Bank has argued that the suit is hopelessly barred by time. The box was opened before the District Judge in Probate proceedings on January 13, 1971 and the suit having been filed on December 2, 1977 is barred by time though the letters of Administration may have been granted on December 4, 1974.

(15) Reference is made to the judgments reported as Jogendra Chunder Dutt and another V. Apurna Dassi and others 1909 I C 859 (I); (Soonam Mayana Kena Roona) Meyappa Chetty V. Soonam Navena Supramanian Chetty Air 1916 P C 202 (2) (Tikait) Mahabir Prosad Narayan Deo Vs. Bhupal Ram and Others, (3); Mt. Kulwanta Bewa and Others Vs. Karam Chand Soni and Others, , Bhudeb Chandra Roy and Others Vs. Bhikshakar Pattanaik and Others, (5); Venkateswara Sarma, styled Gnanasivacharia Swamigal, Matathipathi and Guru of Perur Mel Mutt, for himself and on behalf of the Mutt Vs. S.N. Venkatesa Aiyar and Others, (6); P.S. Nagarajan Vs. Robert Hotz, ; Lahore Enamelling and Stamping Co. Ltd. Vs. A.K. Bhalla and Others, ; Julieta Vs. Lila Coutinho and Others, ; Ram Chand Ganesh Dass Vs. Sardara Singh and Another, ; Dr. Mrs. Joginder Kaur Malik and Another Vs. Malik Anup Singh, ; Behari Lal Ram Charan Vs. Karam Chand Sahni and Others, ; Special Land Acquisition Officer (1) Bombay and Bombay Suburban District Vs. Natverlal Jamnadas Muni, ; Shri Vidya Prakash Sethi v. Punjab National Bank, New Delhi (1976) 1 Del 605; (14); Col. Adarsh Rattan and others v. State Bank of India Jalandhar 1987(1) P L R 193; (15); UCO Bank Vs. Hem Chandra Sarkar, and P.K. Kutty Anuja Raja and another Vs. State of Kerala and another, ..

(16) On the basis of the cases referred to above, the learned counsel for the defendant Bank has contended as follows: (A) The suit is barred by time and the plea of the plaintiff that the could not come to the Court earlier as letters of Administration were only granted on December 4, 1974 is fallacious as the law is well settled that it is not compulsive to apply for letters of administration and the plaintiff could have approached the Court within the period of limitation, as provided in law. The limitation had started to run as early as on August 8, 1966 when the box was allegedly received by the defendant Bank from Government of India. (B) The provisions of Section 9 of the limitation Act clearly down that there is continuous running of time that where once time has begun to run no subsequent disability or inability to institute a suit or make an application will

stop it.

(17) Section 9 of the Act has been referred to by learned counsel for the defendant Bank to reiterate the proposition that where time has begun to run no subsequent disability or inability to institute suit or make an application will stop it. This provision reads as follows: "9. Continuous running of time-where once time has begun to run, no subsequent disability or inability to institute a suit or make an applications top it; Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues,"³⁶⁵

(18) There is no doubt that the law is well settled that it is not necessary to obtain letters of administration in terms of the provisions of Sections 211 and 212 of the Succession Act, 1925 and cases which are of relevance and as cited above may now be referred.

(19) In *Jogendra Chunder Dutt and another v. Apurna Dassi and others* (supra) it was held that a Hindu widow sufficiently represents the estate of her deceased husband when there is no other person short of obtaining letters of administration to his estate who can be said to represent his estate.

(20) In *Mt. Kulwanta Bewa and others v. Karam Chand Soni and others* (supra) it was held that the whole scheme of Sections 216, 220 and 273 and other provisions of the Act is only to provide for representation of the deceased's estate for purposes of administration, and is not intended to cut down the rights of the beneficiaries. Hence merely because an estate is in the hands of an administrator, the beneficiaries are not thereby rendered incompetent to deal with their interest in the estate.

(21) In *Bhudeb Chandra Roy and others v. Bhikshakar Pattanaik and others* (supra) it has been held by Patna High Court as follows (page 127):

OF course u/s 213 of the same Act, no right as executor can be established in any Court of Justice, unless a Court of competent jurisdiction has granted probate of the will under which the right is claimed. This only means that no Court shall recognise the right of an executor unless he has obtained probate of the will under which he claims. But the effect of Section 211 is that the estate of the deceased testator vests in the executor by virtue of the will and from the date of his death.

(22) In *Mrs. Julieta w/o Ciriaco Bernardo Coutinns v. Lila Coutinho and others* (supra) it was reiterated that the rights of the minors can be established although no representation has been obtained to the estate of the deceased.

(23) No probate is necessary in order to set up a claim regarding property either movable or immovable on the basis of a Will executed in Punjab and not relating to property situated in the territories mentioned in Section 57. The Court held so on interpretation of provisions of Section 213 and 57 of the Succession Act

1925. This was held in *Ram Chand Ganesh Das v. Sardara Singh and another* (supra).

(24) The same High Court in *Dr. Mrs. Joginder Kaur Malik and another v. Malik Anup Singh* (supra) has held that in the absence of probate or letters of administration the suit simpliciter by legatee is not barred. Paragraph 2 of the judgment reads as follows:

2. Mr. G.S. Vohra, learned counsel for the petitioners has challenged the correctness of the said judgment dated 24-7-1965. First, he says that the suit is barred by reason of the provisions of the Indian Succession Act, 1925, and the only remedy available to the plaintiff was to obtain letters of administration or probate to the alleged will. He has mainly relied on Ss. 213, 214, 227, 263, 264 and 273. According to him, the scheme of the whole Act shows that the only remedy for a person placed in the position of the plaintiff could be to obtain a probate and the filing of the suit is excluded. Placing particular emphasis on Ss. 213 and 214, Mr. Vohra says that no right as executor or legatee can be established in any Court, unless a Court of competent jurisdiction has granted probate of the will, which Court, according to Mr. Vohra, is the Court of the District Judge. It is further said that by virtue of S. 214 no decree can be passed against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof except on production of probate or letters of administration evidencing the grant to him of administration to the estate of the deceased. Reliance has been placed on *Ganshamdoss Narayandoss Vs. Gulab Bi Bai*, and *Kesar Singh Sant Singh and Others Vs. Smt. Tej Kaur*, . In *Ganshamdoss's* case, it was held that even a defendant cannot use an unprobated will as a defense. That decision was based on S. 187 of the Indian Succession Act of 1865, which corresponds to S. 213 of the present Act. That judgment can have no applicability to the present case inasmuch as Sub-s.(2) of S. 213 excludes the applicability of S. 213(1) in the case of wills made by Muhammadans and wills made by any Hindu, Buddhist, Sikh or Jain where such wills are of the classes specified in Cls.(a) and (b) of S. 57. Reference to Cls.(a) and (b) of S. 57 would show that S. 213 will only apply (a) to wills made within the territories which on the first day of September 1870, were subject to Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature of Madras and Bombay, and (b) to all such wills and codicils made outside those territories and limits as relate to immovable property situated within those territories or limits. Section 213 of the said Act being not applicable to the present will, it is no bar to a plaintiff to establish his right as executor or legatee by a regular suit.

(25) In the judgment reported as *Col. Adarsh Rattan and others v. State Bank of India Jalandhar* (supra) the learned Judge took the view that it was not compulsive to apply for letters of administration and suit claiming a declaration that heirs were owners of the box lying with the Bank and entitled to the sealed

box with consequential relief of allowing them to operate the said safe deposit was not barred. M.M. Punchhi, J. as his Lordship then held as follows in paragraphs 11 and 13:

"11. To apply the principles to the case in hand, the box in question vested in the heirs under the Hindu Succession Act the moment the deceased died intestate and they there and then derived title thereto. That title could be abrogated or substituted by a representative title if letters of administration were successfully sought for the purpose, it is otherwise plain from the language, of sections 211 and 212 of the Act that it is not compulsive for heirs to apply for letters of administration in the case of a Hindu and qua other persons of other religious denominations as mentioned in either of sub-section (2) under both the provisions, dying intestate. The argument built on Sub-sections (2) of section 211 that unless there was a joint Hindu family and the heirs had succeeded by means of survivorship, section 211 had not applicability appears to me without any force. The principle of survivorship proceeds on the basis that on death, the existence of the deceased gets subsumed but the existence of the coparcenary continues to exist. A coparcener cannot be said to have any well-defined share in a coparcenary at any moment. So, his death would not have the effect of passing of any estate to his other coparceners. It is in that sense that sub-sections (2) of section 211 of the Act has been studied in the chapter, to remove any doubts in that regard. But when the estate passes on the death of an intestate, then section 212 throws open an enabling avenue to have the letters of administration from the Court of competent jurisdiction and to have the estate administered under the guidance and protection of the Court. By no means can it be said that the estate of an intestate Hindu cannot be allowed to vest or be claimed by his heirs unless letters of administration have been obtained. Thus I am of the considered view that it was not essential for the plaintiffs to have letters of administration before operating the box lying safe with the bank. This view of mine does not take into account. Section 8 of the Hindu Succession Act, for that is irrelevant here for the present purposes.

13. It is the heir or heirs of the deceased Hindu dying intestate and failing his creditor/s who may apply for the grant of letters of administration. It is not incumbent, for instance, on the creditor to always apply for letters of administration in order to recover his debt. Similarly, it is not incumbent on the heir or heirs to apply for letters of administration as a compulsive necessity. The provision is merely enabling. It cannot be said with any effectiveness that the law of succession is put to winds merely because letters of administration can be obtained under the provisions of the Act. The provisions of sections 264, 270, 273, 278 and 283 pressed into service by the learned counsel for the Bank to highlight the role of the District Judge (a higher Court than the Court of the Sub Judge) can mean no substitution as a desirable necessity to the choice of having letters of administration. The additional pleas of the learned counsel that the letters of administration bring about more orderliness are efficacious for the purpose of creditors, ensure realisation of estate duty and make the State earn

some revenue are irrelevant considerations when one is confronted with the choice available to the heirs. Equally fallacious is the argument that in face of the provisions of the Indian Succession Act whereunder letters of administration are obtainable, section 34 of the Specific Relief Act and section 9 of the CPC would debar the maintenance of a suit. It appears to me that there is no such impediment on the rights of the plaintiffs to claims the estate of the deceased wherever it was lying."

(26) The Full Bench of Patna High Court in (Tikait)Mahabir Prosad Narayan Deo vs. Bhupal Ram and others (Supra)reiterates the proposition that it is not necessary to invoke a theory of suspension of limitation in case in which suspension is not expressly provided for either in the Limitation Act or in some Special Act. The following paragraph from page 700reads as follows:

I do not think that it is necessary or that it would be good law to invoke a theory of suspension of limitation in any case in which suspension is not expressly provided for either in the Limitation Act or in some special Act. I would be reluctant to whittle away the definite provisions of Section 9 of the Limitation Act. Suspension of limitation was not made the ground of decision in Basu Kuer v. Dhum Singh(8) in Soorno Moyee Dasi v. Shoshee Mokee Burmonia (3). or in Muthu Korakkai Chetty v. Madar Ammal (10), though in the last mentioned case one of the learned Judges thought that limitation was suspended. I have referred to Lakhan Chunder Sen v. Madhusudan Sen (11) and am of opinion that for the purpose of deciding that case the R principle of suspension of limitation need not have been invoked. Nor indeed is it necessary to invoke it in the present appeals because limitation must in any case have been given a fresh start u/s 19 of the Limitation Act from the acknowledgement of the debt on 21st September 1906 during the period of management and thereafter limitation in my opinion did not begin to run till the estate was released, soI condider that no such question of suspension at all arises.

IN Venkateswara Sarma, Styled Gnanasivacharia Swamigal Matadhipathi and Guru of Perur Mel Mutt (supra) the Full Bench of Madras High Court held that equitable consideration sare out of place while construing the Limitation Act. The following passage from page 460 which is some relevance maybe referred to :

THE argument for ignoring Article 134-B is that it isa general principle of the law of limitation that limitation can only be deemed to run from the date when the cause of action accrues, and a cause of action cannot exist unless there is a person capable of suing. Granted that this is soit does not mean that the Legislature cannot make an arbitrary starting point, irrespective of whether there is a person capable of suing or not. It is to be observed that there is a vast difference between the wording of Article 134-Band Article 120. Under Article 120 the period of limitation commences when the right to sue accrues, which is plainly not the case so far as Article 134-B is concerned, wherethe starting point is definitely from the date on which the manager of the endowment ceases to hold office. As Venkataramana Rao J. has been at pains to point out in his

referring order the Legislature has made an arbitrary starting point, and I agree with him. In my opinion, there is here no room for the application of any principle, which, if applied, would mean the overruling of the plain words of the statute. What is so often lost sight of is that the plain words of a statute must be given effect to, unless by doing so it is obvious that it would lead to an absurdity. That is not the position here. Moreover, the Privy Council has itself pointed out that equitable considerations are out of place when construing the Limitation Act and the strict grammatical meaning of the words is the only safeguard; 60 Cal 1. And that case was concerned with the interpretation of Article 182. Limitation Act.

(27) In *Lahore Enamelling and Stamping Co. Ltd. v. A.K. Bhalla and others* (supra) it was held that when once the period of limitation under the provisions specifically recognising exclusion or deduction. There is no principle of law outside the Limitation Act under which limitation can be suspended and exemptions, which are not provided by the statute cannot be assumed either on grounds of hardship or of reasonableness.

(28) The facts of the present case may now be co-related to the law as referred to in the above mentioned judgments. Certain correspondence which has been exchanged between the parties which is of relevance may now be referred. On December 24, 1959 the defendant Bank wrote to the plaintiff as follows: THE Punjab National Bank LTD. (Established 1895) HEAD OFFICE Pakistan Department. Post Box No. 274 Parliament Street, Ref: DMP/3469 New Delhi-1 24th Dec. 1959 Shree Jagdish Chandra Trikha. 17/25, Tilak Nagar, New Delhi-18 Dear Sir. Ref: Safe Custody Box of late R.S. Pt. Mool Chand Advocate, of Peshawar. With reference to your letter dated 15.12.59 we have to advise you that so far as the release of the Safe Custody Articles lying in Pakistan is concerned there is no change in the position already advised to you in our previous letter No. 921 dated 1-4-59. We may, however, add that such articles are now lying in Pakistan with the Bank duly sealed by the representatives of Government of India. Custodian Evacuee Property, Lahore and our Lahore office. The charges on such articles will be determined as soon as these are allowed to be released. Please note and oblige. Yours faithfully Sd/- Manager" "Dear Madam, I am in receipt of your letter of January, 5, 1967. I understand that the Safe Deposit Boxes belonging to the displaced persons deposited by them with the various branches of the Punjab National Bank Ltd. in West Pakistan, including the Safe Deposit Box of your husband, late Shri R. S. Moolchand were brought over to India by a representative of the Department of Rehabilitation on November 30, 1961. Those Safe Deposit Boxes had new packing and bore the seals of the Lahore Branch of the Punjab National Bank Ltd. and were brought over from Lahore to Delhi in the same condition in which these were received.

(29) Some of these boxes were delivered to the claimants in India and the remaining were handed over to the Punjab National Bank Ltd. New Delhi for delivery by the Bank direct to the claimants. The Bank was also advised to give open delivery of sealed packages to the rightful owners but they expressed their

inability to do so. In the circumstances, you will appreciate that the Government has no responsibility for any losses that may have occurred at any stage of handling. The Government representative handed over the boxes to the Bank in Delhi in the same condition in which they were received by them with the seals of the Lahore Branch of the Bank in tact. Therefore, it is for you to put up your claim for losses, if any, to the Bank authorities in terms of agreement, if any, between you and the Bank for keeping your Safe Deposits with the Bank."

(30) The defendant Bank on August 8, 1966 rejected the request of the plaintiff to give open delivery of the box. This communication is Exhibit Public Witness 4/24 and reads as follows : "Shri Jagdish Chandra Trikha, S/o late R. S. Mool Chand Advocate 11/123, Double Storey, Tilak Nagar, New Delhi-18. Dear Sir. Re : Safe deposit relating to R. S. Mool Chand Advocate, Peshawar. With reference to your letter dated 22-7-1966, the box in question as it was received by us from Government of India, is lying with us merely for its delivery to the rightful owners and we regret our inability to accede to your request for giving its open delivery. Yours faithfully Sd/- Manager"

(31) On January 2, 1969, the following correspondence which is marked as Exhibit Public Witness 4/25 was sent to the plaintiff: "Shri J. C. Trikha, 11/123, Double Storey, Tilak Nagar, New Delhi-18. Dear Sir. Re : Safe deposit relating to late R. S. Mool Chand Advocate, Peshawar. With reference to your letter No. JCT/PNB/VI/68 dated 19-12-1968 in view of your objections to the indemnity clause in the indemnity bond it has been decided to request you to obtain a "Letter of Administration" from a competent Court of Law so that the matter may be looked into further on the basis thereof. The question of supplying a copy of the indemnity bond. therefore. does not arise. Sd/- Manager"

(32) The widow of the testator and mother of the plaintiff Smt. Washeshran Devi on receipt of communication dated January 2, 1969 approached the Court of District Judge for grant of probate/letters of administration under Sections 276/278 of the Indian Succession Act and the case was numbered as Case No. 72/70 in which the box containing the gold ornaments and the jewellery was directed to be opened by the Court when the following order was passed on January 13, 1971 : "The cloth wrapper having been removed the box was found wrapped with a paper tied with Sutli string, which was directed to be removed. The paper wrapper having been removed. the box was found unlocked and unsealed with a worn out cloth over it. This cloth having been taken away, the box was found containing ornaments as detailed in the inventory prepared in duplicate by Shri Sat Pal Jain of Messers Popular Jewellers, Chandni Chowk, Delhi, called by the petitioner at her expense, and attached with the record, besides some old cotton etc. The inventory having been prepared in the presence of the petitioner Washeshran Devi, her counsel Shri R. L. Kohli, Shri B. K, Sharma, Accountant, Punjab National Bank and myself, was signed by them. It was attached with the record of this case. The ornaments and duplicate of the inventory duly signed by the aforesaid persons were placed in a small tin box

provided by the petitioner. The tin box thus duly sealed with the seal of this Court was ordered to be put in the State Treasury, Tis Hazari, Delhi. On a request made by the petitioner's counsel the cloth and paper wrappers and the tin box were put in a cloth, which having been duly sealed was entrusted to the Ahlmad for preserving the same, All the persons signing the inventory remained present throughout during the period of opening the box brought by Shri B. K. Sharma and sealing the contents recovered there from. The case shall now come up before me on 2.2.1971 for further proceedings. 13-1-1971 Sd/- Mohan Lal Jain District Judge, Delhi "It is understood that this application was dismissed for non prosecution and subsequently as the widow Washeshran Devi had passed away the plaintiff moved the learned District Judge for grant of probate or letters of administration (Probate No. 85/73) and an order in respect thereof was passed on December 4, 1974 which reads as follows : "Grant of Letters of Administration u/s 290 of the Indian Succession Act, XXXIX of 1925. Probate Case No. 85 of 1973 IN The Court Of The District Judge At DELHI; 1. F. S. Gill, Judge of the District of Delhi, hereby make known that on the 3rd day of June, in the year 1974, letters of administration with the Will annexed of the property and credits to the extent of Rs. 4267/- (Rupees four thousand two hundred sixty seven only) as per schedule attached of late R. S. Pt. Mool Chand, late of Delhi, deceased were granted to Shri Jagdish Chandra Trikha son of R. S. Pt. Mool Chand, Advocate, resident of 11/123, Double Storey, Tilak Nagar. New Delhi, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court within six months from the date of this grant or within such further time as the Court may from time to time appoint and also to render to this Court a true accounts of the said property and credits within one year from the same date or within such further time as the Court may from time to time appoint. Given under my hand and the seal of the Court this 4th day of December, in the year 1974. Sd/- F.S. Gill, District Judge: Delhi "The plaintiff sent a legal notice to the defendant Bank which is dated November 19, 1977 (Exhibit Public Witness 4/8) bringing to the notice of the Bank all facts and asked for the following relief: "That now you being the Successors of the then Punjab National Bank Limited was bound to return the said box containing the aforesaid gold ornaments but since the said bank did not do so and its contents of 480 Tolas were removed and the box was tampered with and thereafter since you are the successor of the aforesaid bank you are bound to return the box containing the aforesaid ornaments in the same condition in which it was deposited by Shri R.S. Mool Chand, Advocate for safe-custody to my aforesaid clients" but since the ornaments have been removed there from in the circumstances, indicated above, you are bound to return and restore the said ornaments to my client's above named or the value thereof as duly mentioned in para I above. I, Therefore, call upon you to either return/restore the ornaments detailed in para I above, (list attached or to pay the value thereof at the present market value to my aforesaid clients" within 7 days hence of the receipt of this notice by you, failing which I have got clear instructions to institute a suit against you for the said purpose at your risk as to costs and

consequences."The defendant Bank allegedly replied to the notice on January 2,1978. The plea of the plaintiff that there was no actual refusal on the part of the defendant Bank and limitation as provided under Article 70, Therefore, had not started to run is factually correct.The only time when the defendant refused to accept the demand of the plaintiff was on the basis to the reply to notice dated January,2 1978. There had been no categorical refusal by the defendant Bank of the demand as raised by the plaintiff. The documents which have been referred to above are the letter dated August 8,1966 Exhibit Public Witness 4/24 refusing open delivery, letter dated January 2,1969 Exhibit Public Witness 4/25 asking the plaintiff to obtain letters of administration from a competent Court of Law, Exhibit Public Witness /34is the letter dated July 22, 1966 by which the plaintiff requested for open delivery of the box and Exhibit Public Witness 4/43 is letter dated September 15. 1966 refusing open delivery of the box. These communications may be referred to as below:"The Manager(Pakistan Branches)The Punjab National Bank Ltd.,Parliament Street.New Delhi-1Subject : Delivery Of Safe Custody Box Of LATER.S. Mool Chand, ADVOCATE Dear Sir,With reference to your correspondence on the subject noted above.2. Please inform us whether you agree to give us an open delivery of the safe-custody box, in question in the presence of some responsible persons on executing the Indemnity Bond sent by you.Please treat this as most urgent and reply early.Faithfully Yours.Sd/- (Jagdish Chandra Trikha)So late R.S. Mool Chand,Advocate,11/123. Double Storey,Tilak Nagar,22-7-1966 New Delhi-18.""THE Punjab National Bank LTD.(ESTABLISHED 1895)Regd. Office PAKISTAN DEPARTMENT"POST Box NO. 274PALIAMENT Street, : DMP/SAFE CUSTODY/6721 New Delhi-1 September 15. 1966 Shri Jagdish Chandra Trikha II/ I 23. Double Storey. Tilak Nagar, New Delhi-18Dear Sir.Re : Safe deposit relating to R.S. Mool Chand, Advocate With reference to your undated letter No. JC/PNB/ AI/66we refer you to our letter No. 610 dated 8-8-1966and once again advice you that the box in question is held by us merely for its delivery to the rightful owners in the condition it was received by us from the Government of India.We, under the circumstances regret our inability to accede to your request.Yours faithfully.Sd/- Manager."

(33) Similarly, by communication dated January 2. 1969(Exhibit Public Witness 4""25) the contents of which have already been stated above directed the plaintiff to obtain letters of administration from the competent court. These documents will establish that the defendant Bank at no stage acceded to the request to grant open delivery of the box to the plaintiff and on the contrary directed the plaintiff to obtain letters of administration before taking any further action in the matter.Letters of administration were granted on December 4. 1974the present suit was filed in forma pauper is on December and 2, 1977 which would prove that the suit was instituted within a period of three year from the dale of refusal by the defendant Bank. On its own showing the defendant Bank insisted that the plaintiff should obtain letters of administration and only then they would deal with the case of handing overthe box. Therefore, it cannot

be contended at this stage that the suit is barred by limitation as it was not necessary for the plaintiff to obtain letters of administration and he ought to have filed the suit immediately on the intimation of the arrival of the box with the defendant Bank. This argument cannot be sustained on the ground that the defendant did not entertain the plaintiff without grant of letters of administration or agreed to, open delivery of the box as would be indicated from reading of the correspondence as referred to above. The limitation in this view of the matter cannot be held to have started "running as has been argued by learned counsel for the defendant. The Privy Council in the Judgment as reported in (*Soona Nayana Kena Roona*) *Meyappa Chetty* (Supra) deals with the necessity of obtaining the letters of administration. The following paragraph from page 205 may be reproduced as under: "There was a good deal of discussion before their Lordships" hoard as to what would have been the result had the English statutes of limitation been applicable. This discussion, though perhaps not strictly relevant was useful as illustrating the principle which ought to guide the Court and throwing light on the meaning of the ordinances of the Straits Settlements. For the purpose of the English statutes of limitation, time runs from the accrual of the cause of action, but a cause of action does not accrue unless there be someone who can institute the action. In the case of a cause of action arising in favor of the estate of a deceased person at or after his death, time will at once begin to run, if there be an executor, even though probate has not been obtained, *Knox v. Gye*; but if there be no executor, time will run only from the actual grant of letters of administration; *Murray v. East India Company*. It is, in their Lordships' opinion, probable that section 17 sub Section (1) of the ordinance in question was intended to apply to this rule. A good deal was also said as to what would be the effect if the executor who might have instituted proceedings subsequently renounced probate."

(34) Similarly, the Division Bench of the Punjab High Court in *P.S. Nagarajan Vs. Robert Hotz*, held as follows: "8. With regard to the period before Pook's death the argument was that although the suit fell within Article 106, Limitation Act, limitation was saved by the operation of section 17 of the Act. Section 17..is in the following terms: "Where a person who would if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application." Therefore it is clear that the right to institute the suit must accrue after the death of the person concerned and not because of his death. In my view the death must not in any way affect the right to sue and must not give rise to the cause of action. If that were so the deceased person cannot be said to have the right to institute the suit because it is only his death which entitles his legal representative to bring the suit. In the present case it cannot be said that Pook's right to sue for accounts accrued after this death in this sense. He could sue at any time for dissolution of partnership and for rendition of accounts. According to the plaintiff it is Pook's death which dissolved the partnership and Therefore gave

him (the plaintiff) a right to demand accounts from the other partner. In other words it is Poor's death which has resulted in the right to sue accruing. The case Therefore does not fall within the terms of section 17. The matter was considered by a Full Bench of the Madras High Court in Venkateswara Sarma, styled Gnanasivacharia Swamigal, Matathipathi and Guru of Perur Mel Mutt, for himself and on behalf of the Mutt Vs. S.N. Venkatesa Aiyar and Others, . This was a suit by a manager to recover a property alienated by his predecessor-in-office who died without nominating his successor. The suit was under Article 134-B. The plaintiff claimed the benefit of Section 17, Limitation Act. Abdur Rahman. J., observed at page 466 : "Cases of this nature are very different from those which are covered by Section 17, Limitation Act the language of this section makes it clear that the right to institute a suit or make an application must be independent of the death of the person and must have been such as should have accrued during his lifetime if he had lived but did not do so on account of his death. This section does not seem to contemplate cases where the right of action is connected with or arises in consequence of the death". In the present case Pook's death is set up as the event which imposed an obligation upon the defendant to render accounts. In this view of the matter the argument that the administrator is not in the same position as an executor under the will scarcely arises. The learned counsel argued and in my view rightly that an Administrator can claim exemption u/s 17, Limitation Act. although an executor cannot because an executor is a creature of the will and is in existence at the time of the testator's death. An administrator on the other hand is appointed by an order of the Court and his title vests in him on the day he is so appointed and Therefore an administrator can validly say that there was no legal representative of the deceased capable of instituting a suit until the date of his appointment on 18-9-1949. - "Meyyappa Chetty V. Subramanian Chetty". AIR 1916 Pc 202 (H). But as I have observed above the plaintiff cannot claim the benefit of section 17 because a case of this type is not covered by Section 17."

(35) In similar facts the Division Bench of this Court in Shri Vidya Prakash Sethi V. Punjab National Bank. New Delhi (1976) 1 Delhi 605 also did not accept that the suit was time barred. Paragraph 14 of this Judgment reads as follows : "14. We may here and now dispose of the contention that the suit was barred by time. The open delivery was given on the 1st of April, 1963 It was only on that date the plaintiff appellant came to know that most of the jewellery contained in the box was missing. He could have filed the suit for the reliefs claimed within three years. The learned trial Judge was right in holding that the suit was filed within time and the contention raised before us that it should have been held time barred is meritless."

(36) The Supreme Court in UCO Bank Vs. Hem Chandra Sarkar, took the view that Bankers do not, in practice, set up statute of limitations against their customer or their legal representatives."

(37) Next the provisions of Sections 9 and 16 of the Act may be examined. This

provisions of section 9 establishes "where once time has begun to run. no subsequent disability or inability to institute a suit, or make an application stop it. The section also contains, the proviso which states that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover debt shall be suspended while the administration continues. Section 16 deals with the situation with regard to the factum of death on or before accrual to the right to sue. Sub-section (2) which is of relevance reads as follows: "(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, or where a right to institute a suit or make an application against any person accrues on the death of such person, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute such suit or make such application," In the present case, the gold jewellery/ornaments were entrusted to the defendant Bank by the father of the plaintiff R.S. Mool Chand who dies on April. 30, 1953 prior to the date the right to institute suit accrued. the period of limitation has to be computed from the time there is a legal representative of the deceased on the basis of the above provision.

(38) The law on the subject is, Therefore, well settled that " In case of a cause of action "arisen in favor of the estate of a deceased person on or after his death, time will at once begun to run if there be an executor, even though probate has not been obtained: but if there be no executor, the time will run only from the actual grant of letters of administration." (Soona Mayana Kena Roona) Meyappa Chetty V. Soona Navena Supramaniam Chetty. Air 1916 P C 1202. Therefore on the basis of the law as cited above and taking into consideration the facts of the present case it cannot be said that the limitation had started to run as the defendant on his own had insisted on obtaining the letters of administration by the plaintiff and there was no categorical refusal to deliver the jewellery except in reply dated January, 2, 1978 to notice issued by the plaintiff. It is accordingly held that the suit is not barred by limitation and the issue is decided in favor of the plaintiff. Issue No. 2 (Whether the box covered under safe deposit receipt No. 1747 was entrusted to the defendant No. 1 duly sealed in the manner alleged by the plaintiff? OPP)

(39) The receipt of the box by the defendant Bank is not denied. The plaintiff has reiterated that the box was properly sealed with wrapper and sealing wax. This witness gave the details in his testimony in the following manner: "R.S. Mool Chand was my father. He is dead. He was an Advocate in Peshawar N.W. now in Pakistan, until the partition of the Pakistan in 1947. He left Peshawar on 3rd July, 1947 for Simla Hills during summer vacations with Out entire family which included myself, my father and my younger brothers. In the mean while country was partitioned and as such he could not go back to Peshawar. Before coming to Simla a box containing jewellery was deposited by him with the Punjab National Bank on 3rd June. 1947. My mother had accompanied him to the bank. My mother later told me that they had prepared a list of jewellery in the box before

it was deposited. A copy of the said list was placed inside the box and was wrapped by a white cloth cover with seals on it. The seals were M.C.R.S. on all sides of the box. My mother had told me all this. There was no lock put on the box and inbuilt look was there. The receipt was issued for acceptance thereof in safe deposit of the bank."In cross-examination this witness reiterated that his father was a leading lawyer of Peshawar. He further stated as follows:"I was told by my parents that they had put a wrapper and a seal on the box and also that there was 500 Tolas of gold ornaments in the box. Otherwise I have no personal knowledge. The seal which was put by my father on the wrapper was left behind in Pakistan. The receipt of the deposit given by the Bank was also left behind in Pakistan. What I am saying is what I heard from my parents."The statement of the mother of the plaintiff was also recorded where in she stated as follows:"The name of husband was Rai Saheb Mool Chand. He was an Advocate at Peshawar. He was a famous and leading Advocate of Peshawar. He had property in Peshawar including 6, 7 shops. He used to get rent from the shops. He possessed a car and tongas. With Rai Sahib I went to Punjab National Bank Peshawar and kept a box containing jewellery, which I covered and stitched with cloth. The box was sealed by putting sealing wax of my late husband having his name. The same was sealed by and put by my husband. The weight of the jewellery in the box was 500 Tolas. The jewellery was mixed, both old and new. The box was kept in the year in which Pakistan was made i.e. the year of the partition of the country. This was the month of June."She further stated in the following manner:"I went to the Reserve Bank with my son Mr. J.C. Trikha. After distributing the boxes of other banks, they showed to us the boxes of Punjab National Bank. I saw that the wrapper that I had put on the box was not there and neither was there the seal. It was wrapped by a white cloth as different from ours. The box when lifted was empty as compared in weight to that which we had kept. I did not accept the box. for the said reason".

(40) This witness also stated that when the box was sealed she had accompanied her husband to the Bank. There was list in the box of the ornaments contained therein and one list was kept by her. She herself checked the ornaments before preparing the list. The box once sealed was not reopened. There was no suggestion which was put to her to the effect that the box was not sealed in the manner as indicated above. The endorsement is also not disputed by the defendant Bank and receipt No. 1747 was issued by the Bank in Peshawar in token of having received the box. The procedure for safe custody of articles in the Bank are clearly elaborated in the Instructions as issued by the defendant Bank. Paragraphs 1, 7 and 8 may be referred to as follows:"1. All articles accepted in safe custody on behalf of constituents should be of the nature of sealed packets, stout cloth envelopes and boxes. The seal to be used will be of the depositor or of any other person whom he trusts and not that of the Bank. Papers should be securely sealed with the depositor's seal. Boxes should be securely locked by the depositor and their names painted thereon. No key of the box will be held by the Bank. Each article should bear the bank's registered safe

custody No., the name of the depositor and his address. The relative receipt issued to the constituent should also bear the same number and particulars. Note 1.- According to the legal opinion it is not binding that customer should have his own seal affixed on the safe custody article. It is the customer's own interest that the seal should be his own or that of some body whom he can trust. The Bank has to re-deliver the safe custody box with its seals in tact. Note 2.- The seal may be of the choice of the depositor, but in no case seal of the bank or its employee ought to be accepted. 7. As the Bank can have no cognisance of the contents of sealed packets or locked boxes left with it for safe custody, all receipts must be given on Bank's standard Form No. 126 (Serial No. 2) on the back of which are given certain conditions. Condition No. 1 thereof covers this point and reads "sealed boxes, for the contents of which the bank will not be responsible, will only be accepted for deposit. Seal to be used should be of the depositor, and not that of the Bank". Condition No. 3 covers bank's non-liability for any Lesser destruction to such articles or any part thereof, by dacoity, fire, or other accident to Vis Major over which the Bank has no Control. It also gives option to the bank for cancelling the contract of the deposit by giving a fortnight's previous notice in writing to the depositor to this effect. Serial No. of the safe custody receipt should be the same as of the account in the Safe Custody Register. 5. The articles in safe custody will be kept in the Strong Room under joint custody of the Manager or an officer duly authorised by the Head Office and the cashier."

(41) The testimony of Washeshran Devi clearly inspires confidence and it cannot be said even on the basis of the instructions issued by the defendant Bank that the box entrusted to the Bank was not duly sealed in the manner as alleged by the plaintiff. The Bank would not have accepted the box if it was not sealed. This issue is, therefore, decided in favor of the plaintiff. ISSUE NO. 3 (What were the contents of the box at the time of its entrustment to Defendant No. 1 and the details thereof OPP)

(42) The details of the gold ornaments/jewellery has been submitted in paragraph 3 of the plaint which has already been reproduced in the earlier part of the judgment.

(43) The reading of the above will indicate that the plaintiff is claiming that gold ornaments/jewellery which were kept in the box that weighed 500 Tolas. The defendant Bank filed reply to this paragraph in the following manner: "3. In reply to para No. 3, it is submitted that the Punjab National Bank Limited Peshawar accepted she said deposit subject to the conditions of the receipt and the rules applicable to such deposits. Except for the averments made herein, the rest of the para is denied. The averments made in this para are absolutely wrong and denied. At the time of the deposit, the defendant No. 1 was never made aware or apprised of the contents of the said box, not under the procedure, the Bank was supposed to know about the same, Therefore, the defendant No. 1 owns no responsibility for the contents thereof." The main willness to state particulars of the contents of the box is the mother of the plaintiff Smt.

Washeshran Devi and her statement was recorded on Commission. The following paragraphs from her testimony read as under:

THE name of husband was Rai Saheb Mool Chand. He was an Advocate at Peshawar. He was a famous and leading Advocate of Peshawar. He had huge property in Peshawar including 6, 7 shops. He used to get rent from the shops. He possessed a caf and tongas. With Rai Sahib I went to Punjab National Bank Peshawar and kept a box containing jewellery. which I covered and stitched with cloth. The box was sealed by putting sealing wax of my late husband having his name. The same was sealed by and put by any husband. The weight of the jewellery in the box was 500 Tolas. The jewellery was mixed, both old and new. The box was kept in the year in which Pakistan was made i.e. the year of the partition of the country. This was the month of June.....

"THE Government asked us to prepare a list which was submitted by me.

AT this stage a copy of the list is shown to the witness and she states that the original of this list was submitted to the Government. She further states that this was prepared under her instructions. This is marked as "A" and initialled by me.

THE receipt of the Bank was left in my cupboard at Peshawar, for I had thought that we would go back. I do not know in whose name the receipt was. However, the same had been given to me....."

"WHEN the box was sealed, I accompanied my husband to the Bank. There was a list in the box of the items contained therein and one list was kept by me....."

"MY husband told the Bank, that the box contained jewellery and it should be kept in safe custody. The bank issued receipt to this effect. I myself did not tell the bank of the contents of the box. I checked the ornaments and made the list accordingly prior to the sealing of the box."

The above said witness was cross-examined. She only reiterated that she has checked the ornaments and made list accordingly prior to the sealing of the box which in fact had not been disputed. The deceased Rai Saheb Mool Chand deposited the box of gold ornaments and jewellery with the defendant Bank at Peshawar. It is contended that a person of his status would not go to the Bank for placing the gold and jewellery in safe-custody box containing only 20 Tolas which was recovered when the box was opened before the District Judge, Delhi. The following documents have been cited by learned counsel for the plaintiff to reiterate that the box contained the jewellery as alleged in the plaint. Exhibit Public Witness 4/2 is a letter dated November 28, 1955 addressed to the Ministry of Rehabilitation, Government of India, New Delhi. The contents read as under; "To The Ministry of Rehabilitation" Government of India, New Delhi. Sir, That my husband Shri Mool Chand. Rai Sahib, Advocate, Peshawar, who died about three years ago had deposited Gold ornaments etc. in locker in Punjab National Bank, Peshawar on 3.6.1947 vide Serial No. 17/47. Due to partition he could not bring the above said articles. Now I am his wife and legal heir to the property left

by him. It is, Therefore, requested that I may kindly be helped in getting my gold ornaments etc. Placed in the locker of Punjab National Bank Peshawar, according to agreements made between two Governments i.e. Indian and Pakistan. Thanking you in anticipation. Yours faithfully, Sd/- Washeshran Devi wd/o Shri Mool Chand, R.S. Advocate (deceased) C/o Dr. Raja Ram's Hospital, 28.11.55 West Patel Nagar. New Delhi. Exhibit Public Witness I/3 the reply dated December 31, 1955 to this communication was received by the Government which may also be reproduced as follows: "From Shri Kanwar Bahadur, Under Secretary to the Government of India To Smt. Vasheshra Devi, Wd/o Shri Mool Chand R.S. Advocate C/o Dr. Raja Ram's Hospital, West Patel Nagar. New Delhi. Subject: Indo-Pakistan Agreement on Movable provable property of Evacuees June 1950-Articles on deposit with Banks. Lockers and Safe Deposits. Sir. With reference to your letter No. nil dated 28.11.55 on the above subject I am directed to enclose here with a copy of the Press Note issued by this Ministry on the above subject which gives detailed information regarding restoration of lockers and safe deposits of evacuees left in the custody of Banks in Pakistan. All lockers and safe deposits, lying in the custody of Banks, in respect of which there are no third party claims are to be released by 31st May, 1956. You are, Therefore, requested to await general release of lockers and safe deposits which will be announced in the Press for the information of all concerned. 3. No particular forms have been prescribed for this purpose. Yours faithfully, Sd/- D.N. Asija for Under Secretary to the Govt. of India." The mother of the plaintiff wrote a letter dated January 20, 1956 to the Government of India which is marked as Exhibit Public Witness 4/3. This makes the following reading: "The Under Secretary to the Govt. of India, Ministry of Rehabilitation, New Delhi. Indo-Pakistan agreement on Movable Property of Evacuees June 1950-Articles on deposit with Banks Lockers and Safe Deposits. Sir, Kindly refer to your letter No. 3(2)(5)/56-(I), dated 31st December. 1955 which you have replied in response of my application" letter dated 28.11.1955 on the above subject. I am enclosing herewith a list of Gold ornaments which my late husband, Shri R.S. Mool Chand, Advocate of Peshawar had kept inside the Safe-deposit Box No. 17/47, on 3.6.1947 with the Punjab National Bank Ltd., Peshawar Cantt. I, Name and address of the person The Punjab National Bank Ltd. with whom the article was Peshawar Cantt. pawned or deposited: 2. The bank with which the The Punjab National Bank Ltd. articles is deposited: Peshawar Cantt. 3. Detailed description of the article List of Gold Ornaments is enclosed for example Gold., cash etc. weighing 500 Tolas. to enable its identification: 4. Weight of the article (approximate Rs. 50,000/- Value approx. now. weight to be indicated if Wt. not remember. exact weight is not known). 5. Value of the article: Rs. 50,000/- approx. 6. Reasons for which article was For Safety Purpose. pawned or deposited: 7. Date and terms of conditions Not pawned but deposited with of deposit of pawning: the bank for safety purpose. 8. Money owned by the person to the persons with whom the articles were deposited/pawned, along with upto date interest, if Not applicable. any and total amount owed upto date. 9. Documentary or other proof Attested true copy of the indemnity support of the

claim, bond.Sd/-January 20, 1956 Washeshran Devi Wd/of Late R.S. Mool ChandAdvocate, 17/25, Tilak Nagar New Delhi.Copy to: The Custodian of Evacuees Property,New Delhi.The Deputy High Commissioner of India in Pakistan,The Mall, Lahore."Admittedly, this letter was received by the Government of India on January 31. 1956 as indicated from the acknowledgment receipt Exhibit Public Witness 4/4. Similarly, Exhibit Public Witness 4/46 will indicate that copy of the communication dated January 20, 1956 was also sent to the Personal Attache to the Deputy High Commissioner of India in Pakistan. The Ad card in respect of the same is filed as ExhibitPW4/46A. The legal notice dated November 19. 1977 (ExhibitP\\V4/8) was served on the defendant Bank.

(44) On the above basis, it is contended that the mother of the plaintiff sent copy of the detailed list containing full particulars of gold ornaments and jewellery as placed in the box at the time it was handed over to the Peshawar Branch, of the defendant Bank. A copy of the list which was alleged to be placed in the box would obviously have been removed when the box was tampered with andpilfered.

(45) The plaintiff also wrote to the Government of India Ministry of Supply and Rehabilitation for supplying the list which had earlier been submitted as referred to above. The following communication dated February 8, 1978 was sent by the Department:"Subject: Supply of copy of the list of jewellery articles supplied to the Ministry of Rehabilitation, New Delhi in 1955-56.Sir,With reference to your letter dated 19-1-1978 on the subject cited above I am directed to say that the list of jewellery articles is no available in his Department and as such, it is regretted that a copy thereof cannot be supplied.Yours faithfully,Sd/- (D.C.Verma)for Joint Director."

(46) Further communication was sent by the plaintiff on August 4, 1978 (Exhibit Public Witness 4/56) asking the Government to trace the list and supply to the plaintiff which request was declined by the communication dated August 10, 1978. The plaintiff subsequently sent a list along with the legal notice which was contended to be the correct list. The plaintiff examined one D.D.Ahuja as Public Witness 1 to show that file No. 3(2)(5)/56(I) had been destroyed. Therefore the,Government could not supply the list which had earlier been submitted in the years 1955-56.

(47) The evidence of the plaintiff establishes that gold ornaments and jewellery worth about 500 Tolas were placed in the box which was sealed and then handed over to the Peshawar Branch of the defendant Bank. The detailed particulars of the items had also been submitted by Smt. Washeshran Devi mother of the plaintiff. The defendant Bank has not led any evidence to rebut this testimony no produced any documents to prove that the box did not contain the items of gold and jewellery as reiterated by Smt.Washeshran Devi.

(48) The judgment as reported in The Bilaspur Central Co-operative Bank Ltd. Vs. The State of Madhya Pradesh, may be referred. The facts indicated thata

Bank used to keep at the end of each day its cash in sealed condition in the police station house. One morning the box was found missing and on investigation was found in a field with its hasp broken and contents removed. In a suit by the bank against Government for recovery of Rs-46,946-7-0 the Government did not admit that the box contained that amount and pleaded that the contents were not verified by the police. The bank tendered in evidence its cash book, and the detailed book of accounts showing the amounts on hand from day to day. The evidence of the plaintiff Bank was held sufficient to establish that this amount was put into the box before it was handed over to the police. Paragraph 14 of the judgment maybe reproduced as under : "14. It was contended, however, that the Inspector-General of Police had clearly indicated that the police officers would not be responsible for the contents of the box. But the Inspector-General of Police in the same memorandum said that the box should be securely locked and sealed, which meant that the police officers accepted the responsibility for a sealed box but did not concern themselves with its contents or their verification. However, in the present case the box was bodily removed and when found the lock was intact but the hasp was broken. The responsibility of the police officers is not discharged by handing over the broken box, with its contents rifled, to the Bank. The box was interfered with and was not delivered in the state in which it was received and that being so the responsibility for the contents cannot be avoided by that kind of writing. We accordingly hold that by accepting the bailment of the box the police officers must be deemed to be responsible for the security of the box as a whole. There are cases to show that such a condition is not meant to exonerate the bailee from the responsibility in respect of the contents. The responsibility of the bailee, which the law requires remains, and that is to take such a care of the goods bailed to him as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. After all, it was well understood that the box contained cash. It was being received for several months previous to this and it must have been known that the contents of the box were mentioned in a slip pasted on the lid. In these circumstances, the presence of that proviso in the letter of consent 6 issued by the Inspector-General of Police when receiving the box for safe custody loses all its force and meaning."

(49) Reference is also made to the judgment of the National Consumer Disputes Redressal Commission, New Delhi in Punjab National Bank, Bombay V. K.B. Shetty First Appeal No. 7 of 1991" decided on August 6, 1991 which also related to the case of the contents having been removed from the locker. The facts and the evidence as recorded are referred to in the following paragraphs:

THE next ground of attack is that an opportunity to cross examine the Respondent Complainant regarding the value of the ornaments lost was not given to the Appellant by the State Commission. He has also stressed that there is no evidence of the value of the ornaments lost by the Respondent Complainant and that the State Commission was not justified in relying on untested evidence

regarding the value of the ornaments lost and that the State Commission denied the Appellant Bank opportunity to cross examine the Complainant. The Appellant has, Therefore, emphasized that the Bank officials were not guilty of any negligence inasmuch as the locker was opened by the lessee. the locker holder, the locker was locked exclusively by the locker holder with the key in her possession though it can be opened only with the help of the Master key in the possession of the Bankers; that the Respondent Complainant had not produced any evidence regarding the gold ornaments actually kept in the locker before or after 21st April, 1988, the date on which the locker was last operated, that the valuation of the ornaments claimed to have been lost by the Respondent Complainant by valuers appointed by the Government of India on the 10th March, 1988 is no proof of the ornaments kept in the locker and that they were the same ornaments which were lodged in the locker. In short, the Appellant Bank has suggested that it was a case of conspiracy hatched with an intent to defraud the Bank. We find that the State Commission has examined these points at length taking into account the reservations of the Appellant Bank whether any ornaments were actually kept in the locker on 21-4-1988, which are said to have been stolen and the proper value thereof. That Commission has taken cognizance of the affidavit filed by Mrs. V.B. Shetty and believed the same. They have further accepted her statement about the items of ornaments she had kept in the locker. They have also accepted the value of those ornaments and have, therefore observed that the claim of the complainant regarding the ornaments lost into the locker and their valuation cannot be disputed. It is also noted that no request was made by the Bank to the State Commission to cross examine Mrs. Shetty and this Commission cannot allow this plea to be raised at this stage.

(50) In the present case, when the box was ultimately opened it had obviously been interfered with and was not delivered to the mother of the plaintiff in the State in which it was received and, therefore, the responsibility of the Bank in respect of the contents could not be avoided by relying on the fact that the Bank was not aware of the contents of the box. The mother of the plaintiff has been examined and she has clearly deposed about the contents of the box which allegedly contained gold jewellery/ornaments weighing about 500 Tolas. The defendant Bank did not examine any witness nor anything was elicited from the cross-examination of this witness. The box which contained the gold ornaments/jewellery was produced in the court of District Judge in the probate proceedings.

THE same was also produced in this Court. The size of the box is 1-1/2"x1"x8" when it was opened before the probate Court but it only contained jewellery weighing about 20 Tolas. The size of the box would show that it could not have been deposited with the Bank containing only 20 Tolas and the contention of the plaintiff that it contained about 500 Tolas sounds more plausible.

(51) From the evidence produced it is clearly established that (a) the box which was entrusted to the defendant Bank in its Branch at Peshawar was tampered with and pilfered and most of the contents were removed. The original seals

which were put on the Box at the time when it was entrusted were found missing; (b) the list of the jewellery was furnished to the Government of India as early as on January 20, 1956. There was no satisfactory response from the Government and it is only stated that the list was not available in the Department and the file was destroyed; (c) the plaintiff produced his mother Smt. Washeshran Devi who was present at the time when the Box was handed over to the defendant Bank. This witness has reiterated the contents of the box and no contrary evidence is available on record to hold otherwise; (d) when Smt. Washeshran Devi found that the Box hardly contained anything she refused to take the delivery as the defendant turned down the request for open delivery. It was only when the open delivery was given in the Probate Court that the plaintiff came to know that most of the jewellery was missing.

(52) Taking an overall view of the facts and circumstances of the present case and on the basis of evidence as referred above, it is established that the box contained the gold jewellery/ornaments as contended by the plaintiff in the present suit. This issue is decided accordingly. ISSUE NO. 4 Whether the custody of the said box throughout remained with defendant No. 1?

(53) The learned counsel for the defendant Bank has argued that the custody of the Box did not at all times remain with the defendant after the partition of the country and at times it was under the control of the Custodian of Evacuee Property. The learned counsel for the plaintiff has referred to various documents to indicate that the custody of the Box throughout remained with the defendant Bank. The following documents may be cited in this regard: (i) Letter dated February 14, 1952 (Exhibit Public Witness 4/37) from PNB to the father of the plaintiff informing him that as soon as facilities regarding moving the safe custody of articles of Hindus lying at their Lahore office are provided to them, they will remove the safe custody of articles to India; (ii) Similar letter dated 13th May, 1954 (Exhibit Public Witness 4/38) of Punjab National Bank to mother of the plaintiff; (iii) Letter dated October 23, 1958 (Exhibit Public Witness 4/39) from Punjab National Bank to the same effect; (iv) Letter dated December 26, 1959 (Exhibit Public Witness 4/1) from Punjab National Bank to plaintiff stating that there was no change in advice and articles lying in Pakistan with the Bank duly sealed; (v) Letter dated January 24, 1962 (Exhibit Public Witness 4/41) from Punjab National Bank to plaintiff that the Government has decided to deliver the articles direct to the rightful owners. The plaintiff was advised to correspond with the Accounts Officer, Ministry of Rehabilitation; (vi) Letter dated August 22, 1962 (Exhibit Public Witness 4/49) from Accounts Officer, Ministry of Rehabilitation requesting the mother of the plaintiff to approach Punjab National Bank for getting the Box. (This letter was written by Ministry in view of the fact that most of the Boxes were not found in the original condition and had been tampered with; (vii) Letter dated February 12, 1963 (Exhibit Public Witness 4/52) from Ministry to plaintiff that Ministry has already informed the Bank and Ministry cannot do anything; (viii) Letter dated May 2, 1963 (Exhibit Public Witness 4/13) from Punjab National Bank to the mother of the plaintiff requesting her to inform

that probate has been obtained;(ix) Letter dated July 22, 1966 (Exhibit Public Witness 4/34) from the plaintiff to Punjab National Bank regarding Open Delivery; (x) Letter dated August 8, 1966 (Exhibit Public Witness 4/24) from Punjab National Bank to plaintiff, Open Delivery refused;(xi) Letter dated September 15, 1966 (Exhibit Public Witness 4/43) to the plaintiff that the request of the plaintiff is rejected;(xii) Letter dated January 2, 1969 (Exhibit Public Witness 4/25 from Punjab National Bank directing him to-obtain-Letter of Administration;(xiii) Proceedings in the court of District Judge (Exhibit Public Witness 3/3showing that Shri B.K. Sharma of Punjab National Bank produced Box in Court with wrapper of the Punjab National Bank, Lahore.

(54) Exhibit Public Witness I/2 is the copy of the Notification by which the Banks mentioned in the schedule of that Notification were exempted from the purview of Pakistan (Administration of Evacuee Property) Act, 1957. The name of Punjab National Bank is indicated at Seriall No. 50. The contents of some of the documents as referred to above may be indicated. Letter Exhibit Public Witness 4/37 reads asunder:"R:S.Pandit Mool Chand,Block No. .17, Quarter No. 28, Tilak Nagar. New Delhi Dear Sir,Reg ; Your safe custody box With reference to your letter dated 29.1.52 we have to inform you that. the-question of implementation of Evacuees Movable Property Agreement of June, 1950is still under high level talks of both the Governmentsconcerned. As soon as necessary facilities are afforded to us we will arrange to remove to India the safe custody articles of Hindus now lying at our Lahoreoffice.Yours faithfully,Sd/-District Manager,Pakistan Branches "Letter dated May 13, 1954 Exhibit Public Witness 4/38 reads as under:"Smt. Washeshra Devi,Widow of Late R.S.Pandit Mool Chandof..Peshawar, Block No. 17,Quarter No. 25, Tilak Nagar,New Delhi 18Madam,Reg; Safe Custody box deposited by Late R.S. Mool Chand With reference to your letter dated nil we have to advise you that the safe custody articles of the Hindus are still lying at our Branch Office, Lahore. So for necessary facilities have not been afforded to us to remove these to India.This is for your information please.Yours faithfully,Sd/- District Manager Pakistan Branches."

(55) The letter dated 24/26.12.1959 addressed to the plaintiff,Shree Jagdish Chandra Trikha Ext. Public Witness 4/1 reads as under:"Shree Jagdish Chandra Trikha,17/25, Tilak Nagar,New Delhi-18.Dear Sir,Reg: Safe Custody Box of late R.S. Pt. Mool ChandAdvocate, of Peshawar.With reference to your letter dated 15-12-59 we have to advise you that so far as the release of the Safe Custody Articles lying in Pakistan is concerned there isno change in the position already advised to you in our I previous letter No. 921 dated 1.4.59. We may,however, add that such articles are now lying in Pakistan with the Bank duly sealed by the representatives of Government of India, Custodian Evacuee Property,Lahore and our Lahore office. The charges on such articles will be determined as soon as these are allowed to be released. Please note and oblige.Yours faithfully Sd/- Manager "The Letter dated August 22, 1962 addressed to Smt. Washeshran Devi Exhibit Public Witness 4/49 reads as under:"No.5(225)LSD/61Government of India Ministry of Works Housing & Supply(Department of Rehabilitation)New

Delhi, the 22nd August, 1962 From, Shri R.P. Nijhawan, Accounts Officer to Shrimati Washeshran Devi, 11/123, Double Storey, Tilak Nagar New Delhi-18. Subject: Restoration of safe deposits transferred from Pakistan. Madam, I am directed to refer to your letter dated the 10th August, 1962, on the subject mentioned above and to request you to please approach the Punjab National Bank Ltd., Head Office, Parliament Street, New Delhi in the matter. Yours faithfully, Sd/ R.P. Nijhawan Accounts Officer.,

(56) Exhibit Public Witness 4/13 the letter dated May 2, 1963 may also be reproduced as below ; "THE Punjab National Bank LTD. (ESTABLISHED 1895) REGD. OFFICE "PAKISTAN DEPARTMENT" POST Box NO. 274 PARLIAMENT STREET REF.-DMP/SAFE CUSTODY/689 NEW DELHI-1 May 2, 1963 Vaisakha 12, 1885 (Saka) Shrimati Washeshran Devi, 11/123, Double Storey, Tilak Nagar, New Delhi Madam, .Reg: Safe Deposit of late R.S. Mool Chand, Advocate. Please refer to your letter dated 8.4.1963. We find from the form No. 92-A sent by you under the said letter that neither you have mentioned in it whether or not Probate of the will, said to have been left by Late R.S. Mool Chand, has been obtained by you nor the names of the widow of the predeceased son and the grand daughter of late R.S. Mool Chand have been declared in it. We, Therefore, request you to please let us know if you have obtained probate of the will in question and if so an attested copy thereof maybe sent to us. We may also be intimated the present age of each of your sons named in the said form No. 92-A. Yours faithfully, Sd/- Manager"

(57) The plea of custody of Box was also raised in another case which raised similar questions. In Shri Vidya Prakash Sethi v. Punjab National Bank, New Delhi (Supra) a the Division Bench of this Court examined the plea raised by the Bank in that suit and after making reference to the relevant provisions of law came to the conclusion. Reference may be made to Paragraphs 15, 16, 17, 18 and 19 of the judgment which may be reproduced as follows: "15. The question which really falls for decision is as to whether the concerned box given for safe deposit remained in the custody of the respondent bank or not and as to whether there is enough of proof on the record for granting relief to the plaintiff. It was found by the trial Judge as is clear from the observations made on page 102 of the paper book that the contents of the box had been pilfered. Under tissue No. 7 the learned single Judge concluded that the box did not contain the jewellery mentioned in the plaint. What remains to be determined is as to whether the box remained in the legal and physical custody of the respondent so P.S to continue is responsibility to deliver it in the same condition in which it had been offered as a safe deposit. It is contended on behalf of the respondent that Administration of Evacuee Property Ordinance had been issued in terms whereof the concerned box came to be owned by , the Custodian of Evacuee Property, Pakistan. It is submitted by the appellant that similar ordinances were issued and the law promulgated in Pakistan as well as in India was identical. The appellant prepared a paper book pertaining to the Evacuee and Rehabilitation Laws in Pakistan and India and gave copies thereof to us as well as to the counsel appearing for the

respondent-bank. No provisions contrary to the provisions relied on by the appellant have been cited before us on behalf of the respondent to the appeal.¹⁶ Section 6 in the relevant ordinance was to the following effect:—"S.6 Vesting of evacuee property in Custodian. "(1)All evacuee property shall vest in the Custodian and shall be deemed always to have vested in the Custodian with effect from the first day of March, 1947".⁴⁰²The mere vesting of the property according to us did not mean the losing of its physical control by the bank. The relevant Sub-Sections (1) and (2) in Section 7 make the position clear :—"S. 7. (1) Every person who is, or has a.. any time after the twenty eighth day of February, 1947, been in possession, supervision or management of any evacuee property shall be deemed to hold or to have held, as the case may be, on behalf of the Custodian.(2) Every person who is in possession, supervision or management of any evacuee property or property which he knows or has reason to believe is evacuee property shall, as soon as may be but not later than such date as may be notified by the Central Government in the Official Gazette intimate to the Custodian in writing his willingness to surrender such property to the Custodian or to any person authorised by the Custodian in this behalf and shall surrender the same if called upon by the Custodian or any person authorised as aforesaid."¹⁷. Interpreting the aforequoted provisions we hold that on a plain reading thereof the supervision and management of the evacuee property which vested in the Custodian was to be such that the property was to be held on behalf of the Custodian and the actual physical possession was not interfered with. The person having the physical possession was to supervise or manage the evacuee property as a person acting on behalf of the Custodian. That did not mean that such a person was necessarily to lose its physical control. Only the supervision or management was to be deemed as being on behalf of the Custodian and the person holding the physical possession was to be deemed to be holding it on behalf of the Custodian. It meant that although supervising or managing the property while having its physical possession the concerned person remained answerable to the Custodian and was to be deemed to be acting on his behalf. Subsection (2), is of great significance. According to the postulation in that provision the person in possession of the property carrying out its supervision or management was to state in writing his willingness to surrender the property to the Custodian. He was also⁴⁰³under a legal liability to surrender it only if called upon to do that.¹⁸ The respondent bank has failed to prove that the Custodian of Evacuee Property in Pakistan at anytime issued any demand calling upon the respondent to surrender the property. No document has been placed on the record by the respondent containing any demand by the Custodian Evacuee property. Pakistan requiring that the box containing the appellant's jewellery be surrendered. We will later on deal with the transfer of the box from Pakistan to India.¹⁹ With the law as continued to stand it remains unproved that the Custodian of Evacuee Property, Pakistan, ever obtained a physical surrender of the property and thus became possessed of it. Even when there was a formal transfer of the deposits in lockers from the Banks in Pakistan to Government of India, it was only under the supervision of the said Custodian and not by the

Custodian taking from the custody of the respondent and giving it to the Government of India.²⁰ As we have observed earlier, the letter, dated the 22nd of May, 1962, has been admitted in evidence because of its significance and when we will deal with the transfer of the box, it will come in for consideration. We may, however, notice that the Governments of India and Pakistan passed the Transfer of Evacuee Deposits Acts of 1954. The Government of India passed Act XV of 1954, dated the 26th of March, 1954, the Government of Pakistan passed Act VI of 1954, dated the 8th of April, 1954. Both the enactments provided for the transfer of the evacuee deposits. The enactments were the result of an agreement between India and Pakistan. The transfer of deposits was covered by the statute. We have to examine as to in whose possession the safe deposit box belonging to the appellant remained till it was transferred to the Government of India. In this behalf we may first refer to Exhibit P.35 a letter, dated the 7th of May, 1957. The letter was addressed by the Manager of the respondent bank to the present appellant and was in reply to the letter sent by him under the date 23rd of April, 1957. The petitioner was informed through the letter:—"We have to inform you that your safe custody articles have been included in the list of safe custody articles supplied by our Lahore office to the Deputy Rehabilitation Commissioner, Rents and Repairs, Lahore." How could have the Lahore Branch of the bank supplied the list including the item pertaining to the box with which this litigation is concerned if it was not actually in the custody of the bank? This is a document which came into being much earlier than the open delivery given to the appellant on the 1st of April, 1963. There is other conclusive evidence concerned with this aspect. Exhibit P.64 on page 175 of the paper book is a reply sent to the notice given to the respondent by the appellant through his counsel Shri R. L. Kohli. If anything, the reply proves to the hilt that after the box was given for safe deposit to the bank in 1944, it all along remained with the respondent till it was given for a while to the Government of India under the scheme of transfer agreed to by the Governments of India and Pakistan. It is necessary to quote from the replies sent by the respondent:—"The seals and the covering of the safe custody box deposited by your client with the bank became worn out with the passage of time. The bank as prudent measure put only a wrapper to protect the seals and the covering whatever was left of the same by the passage of time."

(58) The findings are further recorded in this judgment in paragraphs 21 and 22 which make the following reading:²¹ The legal plea raised in the course of the litigation is also propounded in the reply to which we are making reference. The words used in the communication were:—"The said safe custody box became evacuee property under the Evacuee legislation in Pakistan and came to be vested in the Custodian of evacuee property and it remained thereafter with the bank at the disposal of the Custodian."⁴⁰⁵ The plea that the vesting of the box in the Custodian of Evacuee Property, Pakistan, interfered with the responsibility and obligations of the bank loses all merit in the face of the foregoing admission. The reason is that the admission clearly states that in spite of vesting in the Custodian

of Evacuee Property the said safe custody box remained after such vesting with the bank although at the disposal of the Custodian. Such an admission made on the 16th of July, 1965, persuades us to the view that the respondent bank had admittedly the physical possession of the safe custody box belonging to the appellant before us. It was for that reason that the bank was acting with due care as a bailee.²² We may now refer to another document which is a letter dated the 17th of April, 1957, Exhibit P. 68 in the course whereof it was stated:—"We have to inform you that the safe custody articles of our Pakistan Branches are lying with our Lahore office and our Lahore office supplied lists of the safe custody articles lying with them to the Deputy Rehabilitation Commissioner. Rent and Repairs, Lahore." "The aforesaid admission along with Exhibit P. 64 from which we have quoted leads to an irresistible conclusion that all along the custody of the box with which this litigation is concerned along with other safe custody articles remained with respondent. Vesting in the Custodian of Evacuee Property, Pakistan, fastened an additional liability on the bank to keep the box intact and not to deal with it in any way which may prejudice the vesting. The vesting however, never diverted the respondent of the physical custody of the box. We cannot accept the submission on behalf of the respondent that at any time before it was given to the Government of India under the supervision of Custodian of Evacuee Property, Pakistan, the respondent lost its physical custody."

(59) The facts in the present case are similar to the facts which arose in the case of Vidya Prakash Sethi. The learned counsel for the defendant Bank has not been able to point out any distinguishing features to come to contrary conclusions to the ones which have been rendered in the above said judgment. The numerous communications which have been addressed to the father, mother and to the plaintiff himself as referred to above will also lead to irresistible conclusion that the custody of the Box always remained with the defendant Bank and this issue is decided in favor of the plaintiff. ISSUE NO. 5 Whether the box was found tampered with and unlocked at the time when it was produced and opened in the court of learned District Judge, Delhi and if any jewellery was found short and missing, if so. how much?

(60) The statement of the mother of the plaintiff was recorded wherein she has stated that the wrapper of the box was different to the one which had been put on the box at Peshawar when the box was handed over to the defendant Bank for safe custody. The gold jewellery/ornaments were found missing and the original seals with the monogram of "M.C.R.S." which was put on the box were not there when it was opened before the Probate Court. The court record of the Probate Court (Exhibit Public Witness 3/3) would indicate that the original packing had been removed and was found missing. The proceedings as recorded on January 13, 1971 have been referred in the earlier part of the judgment to prove the same. In view of the above, it is, therefore,, established that the Box did not have the original packing and was found tampered with and unlocked at the time when it was produced in the Court of District Judge and the items of

jewellery were discovered short and missing. This has already been discussed while disposing of issue No. 3 with regard to the missing items. This issue is decided accordingly. ISSUE NO. 6 Whether the defendant is guilty of neglect, breach of trust, misappropriation and tampering with the box, if so to what effect?

(61) The learned counsel has first made reference to the provisions of Sections 148 and 151 of the Contract Act which define bailment, bailor and bailee and then has contended that the Bank has discharged its duty and care which was required to be taken by the bailee in the discharge of its contractual obligations. These two provisions of law may be reproduced hereunder:

"148. A bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, prudence would value as the goods bailed,"

(62) He has put emphasis on the provisions of Section 151 of the Indian Contract Act to reiterate that the defendant Bank as a bailee has taken as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods and, Therefore, the defendant cannot be held liable under the provisions of law. Reference is made to the cases as reported in Dwarka Nath Rai Mohan Chaudhuri and another V. Rivers Steam Navigation Co. Ltd. Air 1917 P C 173; Lakhaji Dollaji & Co. V. Boorugu Mahadeo Rajanna and another Air 939 Bom 101; Shiv Nath Rai Ram Dhari and Others Vs. The Union of India (UOI), and Gopal Singh Hira Singh, Merchants Vs. Punjab National Bank and Another, .

(63) In Dwarka Nath Rai Mohan Chaudhuri and another (supra) the learned Judges considered the true import of the type of care required by the bailee in the matters of peril and extremely difficult position which has to be established on evidence on record. This does not also discharge the plaintiff from proving the want of due diligence, or (expressing it otherwise) the negligence of the servants of the defendant company. The following paragraph from page 175 reads as follows:

It may be for the Company to lay the materials before the Court; but it remains for the plaintiffs to satisfy the Court that the true inference from these materials is that the servants of the defendant Company have not shown due care, skill and nerve. Before applying themselves to a close examination of the facts and such disputed points in the evidence as require more minute consideration, their Lordships desire to observe that good sense and the policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. There

have been many expressions of judicial opinion upon this subject, particularly in cases dealing with ships and navigation, where emergencies often arise with great suddenness. For this purpose their Lordships would select the case of "The Bywell Castle."⁽¹⁾In that case, which was one of collusion, the emergency was brought about by the previous wrongful maneuver of the vessel whose owners were complaining. But this makes no difference; the question was, what is to be required of a man who finds himself in a sudden emergency, however that emergency has been brought about? In the Court of Appeal each of the Lords Justices expressed himself in different language but to the same effect. In a moment of extreme peril and difficulty you are not to expect perfect presence of mind, accurate judgment and promptitude. If a man is suddenly put in extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because upon review of the facts, it can be seen that the course he had adopted was not in fact the best.

(64) In *Lakhaji Dollaji & Co.* (supra) the facts indicated that the client instructed his commission agents to purchase silver bars and to keep them with themselves and the same on purchase were kept by them unlocked among other bars against the wall of pedhi which was unattended and three of them were lost, the agents were held guilty of negligence in the manner in which they kept the bars. The following paragraph 2 from pages 101-102 may be referred to as under:

THE contract between the parties is evidenced by three telegrams sent by the plaintiffs to the defendants. The first telegram read: "By five silver violate ready chowkas. Keep there." The other two telegrams were in similar terms except as to the number of bars. In my opinion the effect of the telegrams was that the plaintiffs offered to the defendants the business of buying bars as commission agents and keeping them pending instructions as to delivery. No doubt the defendants could not have been compelled to keep the bars for more than a reasonable time, but the instructions were that the bars were to be bought and kept by the defendants. Now the defendants in acknowledging these telegrams reported that the bars had been purchased and "kept there at your risk." The learned Judge treated the contract between the parties as a contract in which the bars were retained by the defendants at the risk of the plaintiffs, but he held that the words "at your risk" were not enough to absolve the defendants from the act of negligence which resulted in the plaintiffs' loss. If I agreed with the learned Judge as to the nature of the contract between the parties. I should not be prepared to accept his view as to its legal effect. But, in my opinion, the contract between the parties was not a contract to keep the bars at the risk of the plaintiffs. The offers contained in the telegrams were accepted by the defendants when they executed them. and in my view the contract required the defendants to keep the bars as bailees for a reasonable time, and they were not entitled to add. new term to the contract by providing that they were not to be

under the ordinary liability which attaches to bailees.

(65) In Shiv Nath Ram Ram Dhari (supra) the Supreme Court was dealing with the question which arose in the appeals from the judgment of the High Court of Punjab as to whether the Union of India was liable to the consignees of different commodities or goods which were consigned to them by rail from various places in the country on account of their non-delivery. The period of endorsement to the Railways was the period of communal disturbances in August and September, 1947 after partition of India and Pakistan. It was held that the Court could take judicial notice of such events. Paragraphs 11, 12 and 13 of this judgment may be reproduced as follows:

(11) It was urged by learned counsel appearing for the different appellants that the diary maintained by the station staff at Asoli is unreliable and that if that diary is rejected there is no evidence to show that the wagons had been looted. We will keep the diary out of our consideration. There is, however, in the first place the evidence of the Station Master and the Assistant Station Master to the effect that the wagons had been broken open. This evidence was no doubt, rejected by the trial Court but was accepted by the High Court and in our opinion the High Court was justified in accepting this evidence particularly because there is corroboration to their evidence. (12) Then there is the evidence of D.W.1 Pannalal, I Head Trains Clerk, Agra. He has stated that the wagons which were later found to have been broken open at Asoli were received on different dates at Agra and that every one of those wagons was then duly riveted and sealed. He has also deposed that when these wagons were dispatched on August 28 by N.35 Down they were "intact and in the same condition in which they were, when they were received." There is nothing vague in his evidence, which sets out the numbers of each of those wagons. In addition to this there is the evidence of B.P. Pande, D.W. 6, Assistant District Commercial Inspector, G.I.P. Railway who was posted at Agra at the relevant time. He says that he had made a list of the property looted and also of the property not looted from the wagons which had been broken into. He inspected these wagons between September 27 and 29th and he has stated that some of those wagons had been completely looted while some were looted partly and many others were intact. He had brought with him a list made by him but the trial Court refused to permit its production in evidence on the ground that it had not been relied on earlier. In our opinion the trial Court went wholly wrong in refusing to admit this document. In any case there is the evidence of this person and we see no reason for not accepting it. We are satisfied that the High Court was perfectly right in holding that the consignments were lost as a result of looting. (13) In so far as C.A.No. 505 of 1962 (Jeet Singh vs. Union of India) is concerned. Mr. Agarwala has brought to our notice that neither in the evidence of the Station Master nor in that of any other witness has it been established that the wagon in which the consignment of the appellant therein was being carried has been shown to have been broken open. That is indeed so. But Mr. Patwardhan, appearing for the respondent says that since the incident itself, that is of the looting of the wagons, had been established and

since the evidence clearly shows that the wagons had been broken open the mere non-mention of the number of the Particular wagon in which the appellant's consignment was being carried has not been specifically deposed to by any one would make little difference. He also points out that there is evidence to show that amongst the articles looted.were consignments of turmeric and the consignment of the appellant was of turmeric and, Therefore, this is an additional reason for holding that the loss of the appellant's consignment was because it had been looted.In our opinion, there is no substance in his argument.It cannot be assumed that because the other consignments were lost as a result of looting even this one which was not delivered could be said to have been lost through the same circumstance, that is, by reason of its beinglooted. Again, there is nothing to show that the other wagons did not contain turmeric.

(66) The dissenting view was taken by Wanchoo, W. who did not accept the above findings and came to the following conclusion (pages 1678-1679):

ON a careful consideration of the entire evidence for the railway administration I am satisfied that this is not a case where the train was looted by a large lawless mob bent upon looting goods train on account of the communal situation preceding the division of India in 1947. I cannot take judicial notice of there being such large mobs going about the country side bent on looting goods trains.All that a Court can take judicial notice of is that there were communal disturbances in those days which isa very different thing from general lawlessness resulting in looting of goods train indiscriminately in that part of the country. The very fact that evens had no information of any looting till 13th September seems to suggest that all these happened because of the station staff either looking on supinely or perhaps actually being involved in the thefts. That may also explain why at least the Assistant Station Master ran away on 12th to give colour to the story of lawlessness and looting. But the attempt to show that this was done at the instance of the higher authorities has failed: and there is no reason to suppose that the theft of goods which took place from this train could not be avoided if the rule as to watch and ward had been followed and if there was no persistent negligence assuming that the incidents between 4th and 9thSeptember as recorded in the station diary were correct.I, Therefore, hold on the evidence produced by the railway administration that the loss took place on account of the negligence of the railway administration or its servants and thus the Union of India would be liable to make good the loss even on risk-note form 8 B in the circumstances of these cases.

(67) In M/s Gopal Singh Hira Singh, Merchants (supra) H.L.Anand, J. also dealt with the case arising out of similar facts as a consequence of the partition of the country. Paragraph 23 of this judgment makes the following reading ;

CONSIDERABLE oral evidence has been led depicting generally the situation that obtained in what was then dominion of Pakistan including the district of Multan in the wake of partition of India and the holocaust that followed, the suiting up of the two dominions, insecurity of the life and property of the non-muslim

population under the compulsion of adverse circumstances. It is, however, unnecessary to refer to the evidence because the factum of the partition of India, the extra-ordinary breakdown of law and order machinery following that, the consequent insecurity of the life and property of the non-Muslims in the then dominion of Pakistan and the compulsive migration of the mass of these persons to the territories now forming part of India and the fate that overtook their properties have now come to be part of history which does not need to be proved in any Court of law in any of these two countries and the Court would take judicial notice of the situations that developed. It is well settled that on the setting up of the two dominions as a result of the partition of India, there was a total break-down of law and order in the territory then forming part of Pakistan dominion with the result that there was mass killing of the Hindu population and looting and destruction of their movable and immovable property. In the extraordinary situation that developed there was a compulsive mass migration of the Hindu population leaving behind the warmth of their hearth and home as well as their movable and immovable property and a vast majority of these unfortunate millions on both sides of the border migrated to the safety of the other dominion with their meagre worldly possessions and mostly perhaps merely their will power. In that sort of a situation, it was not possible for any Hindu in the said territory to either protect his life or make any arrangement for the protection of his property and what applied to the individual Hindus also applied to the various institutions including the Banking institutions which were by and large manned by Hindu staff. The bank was no exception to this with the result that even though some sort of nucleus of Pakistan branches was set up by most of the banking institutions, which migrated to India and arrangements were made eventually to salvage some of the properties possessed by the Banking institutions left soon after the partition, the entire staff for took their duty, deserted their posts under threat to their life and property and left the property of the banks and other institutions uncared for. It is also well known that immediately after the partition and in the holocaust that followed for months together, these properties were mercilessly looted or were subjected to arson, fire and other modes of destruction. It is until after some sanity was restored that the authorities on both sides took custody and control of what was left of the movable and immovable properties followed by the schemes on both sides for the take-over of the properties for payment of compensation and for allotment of the same to the displaced persons. The obligation of the bank, Therefore, to take care of the pledged goods must be seen in the context of the extra-ordinary situation that developed. It is not possible to test this obligation on the touch stone of the duties of a bank in normal circumstances. It is not disputed that the plaintiff, as indeed millions like the plaintiff, had to leave the comfort of their hearth and home and left their moveable and immovable properties uncared for, to ensure protection of their life and preservation of whatever little they could salvage while leaving what was then their homeland. A test as to what a prudent person would have done in relation to his own property in the extraordinary situation that developed is provided by the conduct of the plaintiff and its partner

as indeed similarly situated other unfortunate Hindus who had to migrate to the territories now forming part of India. If that is what they did with respect to their own properties as indeed the bank and other institutions did with their own properties, it is difficult to imagine that the bank could have done any better with regard to the property that was pledged with it. The contention on behalf of the plaintiff that the case of an individual was distinguishable from that of a banking institution does not carry the plaintiff's case any further. It is true that the banking institutions would have better resources and perhaps then benefit of institutional functioning or a more effective representation with the authorities on the other side of the border but their fate was not different during the initial period of the carnage. The further contention of the plaintiff that the plaintiff had suggested the posting of special staff including a high powered Englishman to the bank and that in its failure to take any such steps, the bank failed to discharge its legal obligation is not sustainable because it was not possible for a banking institution to make an exception in the case of an individual. The banking institution, as indeed other institutions, had to go by such arrangements as could possibly be made for all their constituents who were similarly situated. The posting of a high powered Englishman could not be said to be a part of an ordinary care which a prudent man in the circumstances would have taken. It is quite doubtful if merely the nationality of the person posted for the safety of the goods would have made any qualitative or quantitative difference in the unfortunate result. It is well known that major looting and destruction of the property had taken place during the first few weeks of the carnage and the fact that some goods were taken over by the Custodian of Evacuee Property for which the bank had given to the plaintiff a credit referred to above, clearly shows that the takeover process took sometime to be initiated. The evidence led by both sides with regard to the situation that developed and the possible steps that could have been taken to protect the property does not lead to any conclusion other than the one that I have arrived at on the basis of what had happened according to the common knowledge and would in the ordinary course of events have happened in the situation that developed in the wake of the partition of India. In the result, I am unable to return a finding that the bank failed to take such care of the goods as a person of ordinary prudence would have taken of his own in the circumstances in which the bank was placed in the extraordinary situation that developed. The various cases cited on behalf of the plaintiff dealt with the ordinary situations in which it was possible to weigh in a fine scale the measures taken by a bailee and none of these cases would have, therefore, any relevance to the extraordinary situation in which the parties were placed. In the result, the bank could not be said to be liable to account for the pledged goods or to pay the price thereof to the plaintiff because it had discharged its obligation as a bailee and could not have taken any other steps to protect the property.

(68) The learned counsel for the defendant Bank has next referred to the settled position with regard to bailee's duty of care as incorporated in Chapter 16 "SAFE CUSTODY" in Paget's Law of Banking, Tenth Edition, page 268 as it is contended

that the usual care which is required by bailee was taken care of in the facts of the present case. It also deals with the accepted position in English law on the basis of the judgments as cited there in. The following paragraphs from this book (pages 268-270) may be referred to : "(a) Bailee's duty of care (i) Existence and scope of the duty A banker who accepts articles for safe custody is probably bailee for reward rather than a gratuitous bailee. This view was expressed in *Port Swettenham Authority v. W. W. Wu and Co (M) Sdn Bhd* by Lord Salmon, delivering the advice of the Privy Council : "In any event, a bank which offers its customers, in the ordinary course of business, the service of looking after goods deposited with it, can hardly be described as a gratuitous bailee. The bank must realise that were it to refuse a customer such a service it would probably lose a customer who would have no difficulty in finding another bank which would be happy to render the service which is normally offered by banks to their customers." In practice, the distinction between a gratuitous bailee and a bailee for reward appears to make little difference to the existence and scope of the bank's duty of care, in that : (1) on a gratuitous bailment (as on a bailment for reward) the bailee may be liable for want of ordinary care; (2) where bailed goods are lost from the custody of the bailee, then whether he was a gratuitous bailee or a bailee for reward, the onus is on him to prove that the loss was not due to his failure to exercise the care required by law; (3) the standard of care required in providing a service for safe custody is unlikely to differ much, if at all, as between a gratuitous bailee and a bailee for reward, especially in the light of Lord Salmon's observation set out above. The matter was put into proper perspective in *Houghland v. R. R. Low (Luxury Coaches) Ltd.* by Ormerod LJ who thought that : "...to try to put a bailment, for instance, into a water tight compartment such as a gratuitous bailment on the one hand, and bailment for reward on the other - is to overlook the fact that there might well be an infinite variety of cases which might come into one or the other category. The question we have to consider in a case of this kind, if it is necessary to consider negligence, is whether in the circumstances of this particular case a sufficient standard of care has been observed by the defendants or their servants." The banker's knowledge or ignorance of the nature of the goods entrusted to him would seem not to affect his liability. A banker is under no obligation to accept a parcel for safe custody and where he is asked to do so, could ask to know its contents and value in order to gauge the nature and extent of any possible liability; but it is submitted that he need not inquire. (ii) Liability for dishonest acts of bank staff The crux of the Court of Appeal decision in *Morris v. C. W. Martin & Sons Ltd.* in which a servant directed to clean a mink coat made away with it, was that the employee committed the fraud in the course of doing the class of acts which the company had instructed him to do, thus applying *Lloyd v. Grace, Smith & Co.* and *C. and Ladenburg v. Great Fingall Consolidated Ltd.* "If the master is under a duty to use due care ... he is rid of his responsibility by delegating his duty to another; and in the case of a bailee for reward the burden is on him to show that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty." On the basis of *Lloyd v.*

Grace, Smith & Co. responsibility for the wrongful acts of bank staff would seem to depend upon whether the act can be said to be within the scope of the servant's authority. In that case it was said by Lord Shaw of Dunfermline that : "the fraud was committed in the course of, and within the scope of, the duties which the defendants had entrusted Sandles as their managing clerk.... they must in these circumstances be answerable for their agent's misconduct. The decision was applied by the Privy Council in *United Africa Co. Ltd. v. Saka Owoade* : ". .the fair inference from the facts proved is that the goods were committed expressly to the respondent's servants and that they converted the goods whilst they were on a contract which the respondent had undertaken to carry out and the conversion, Therefore, was in their Lordships' view in the course of the employment of the respondent's servants. There is in their Lordships' opinion no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment." The authorities were reviewed by the Court of Appeal in *Morris v. Martin & Sons Ltd.* in which Lord Denning MR. said that ; "From all these instances we may deduce the general proposition that when a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or depredation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also if the servant or agent himself steals them or makes away with them." *Salmon LJ*, at 78 said that : "A bailee for reward is not answerable for a theft by any of his servants but only for a theft by such of them as are deputed by him to discharge some part of his duty with reasonable care. A theft by any servant who is not employed to do anything in relation to the goods bailed is entirely outside the scope of his employment and cannot make the master liable." The matter obviously depends in some degree upon the extent of the authority which the servant may be expected to have and, of course, on any knowledge in this respect of which the plaintiff may be possessed. The extent of the apparent or implied authority will depend in part upon the status of the staff officer concerned; as was said by the Privy Council in *Bank of New South Wales v. Owen* ; "The duties of a bank manager would usually be to conduct banking business on behalf of his employers, and when he is found so acting, what is done by him in the way of ordinary banking transactions may be presumed, until the contrary is shown, to be within the scope of his authority; and his employers would be liable for his mistakes and under some circumstances, for his frauds, in connection of such business." Similar citations may also be referred from various works on Law of Banking. Firstly, the following paragraph (from pages 81-82) from *Law of Banking* by Lord Chorley may be referred to : "Bailments Deposit for safe custody is a branch of the law of bailments. A bailment is the delivery of movable property by one person (the bailor) to another (the bailee) on condition that it shall, in due course, be redelivered to the bailor or to his order. An ordinary commercial bailment is contractual, but voluntary

bailments (i.e. where there is no consideration) are technically not contractual. For practical purposes, the most important question which arises in connection with bailments relates to the standard of care which the bailee must observe in relation to the property while in his custody. If goods are lost or damaged or destroyed while in a bailee's charge, is he responsible to his bailor? The answer is that an ordinary or common bailee for safe custody is not responsible for such loss unless this was caused by some negligence on his part, or unless he delivered to a third party without the customer's authorisation, or possibly as a result of the fraudulent conduct of his servant. The second of these possibilities can be dismissed quickly. A person who wrongly disposes of another's goods or documents of title so as to deprive him of possession is guilty of conversion and liable to pay the value to the owner as compensation. It is immaterial that the wrongful conversion was made bona fide and without negligence. A banker who is asked to redeliver valuables deposited with him for safe custody, to any person other than the depositor himself must satisfy himself fully as to that person's credentials before handing the goods or documents to him. If necessary, the banker may reassure himself by reference to the customer personally. It has been suggested that such action which might involve a refusal for the time being to make delivery to a person who is actually entitled to receive the property would amount technically to conversion. It has been said, however, that "a refusal to deliver up goods to the owner on the ground that the holder must have time to ascertain whether he is the owner, is no conversion."

(69) J. Milnes Holden in his *Law and Practice of Banking* (third edition) also deals with the liability of bailee. The following paragraphs (from page 316) read as under: "10.84 Turning then to the subject of bankers as bailees, one may say that the care which a banker is obliged to take is such care as an ordinarily efficient and prudent person would take in similar circumstances. The following illustrations may be given. If a bank locks up its customers' valuables in the strong room and if thieves succeed in breaking into that strong room and stealing the customer's valuables, the bank will not be liable. If, however, the bank's officials carelessly leave a customer's deed box outside the strong room and it is stolen, it will be a clear case of negligence and the bank will be liable accordingly. Again, if a bank discovers that a loss has taken place and thereupon fails to take prompt steps to recover the property by informing the owner or the police, this too will amount to negligence. Disclaimer of liability 10.85 Some banks are content to accept articles for safe custody subject to the obligations imposed upon them at common law. In the case of other banks, their safe custody service is the subject of a special contract in which it is stipulated that the bank will not, in any circumstances whatsoever, be liable for loss or damage to articles accepted for safe custody. However, in view of the provisions of the Unfair Contract Terms Act, 1977, it may be that banks are no longer able to rely upon such disclaimers of responsibility. It seems that such a disclaimer would be effective only if the bank could show that the exclusion of liability was reasonable."

(70) T.G. Reddy in "The Law relating to Banking" the care as required by the

bailee has been discussed as follows (pages 81-82):

(IV) Bailment A bailment arises where personal property is delivered by one party (the bailor) to another party (the bailee) on a condition express or implied that the property shall be returned to the bailor or disposed of in accordance with directions as soon as the purpose for which the bailment arose has been fulfilled. Bailment can exist independently of contract, though there is often a contract set out the terms and conditions. Examples of bailment are hire-purchase, pledge, carriage of goods, delivery of goods for repair, etc. and the point at which contract is involved is safe custody. Warehousemen, of course, are bailees, but they are more concerned with the preservation of merchandise, than the safety of valuables, which is the bank's special concern. It is generally considered (though opinions to the contrary have been expressed) that bailment is not implied in the ordinary banker and customer relationship, i.e. there is no obligation on a bank to accept property from a customer for safe custody. Such facilities might be expressly agreed when the account is opened, but this would be exceptional, and normally safe custody items are accepted at the bank's discretion, so that they would be declined if they were too bulky, or undesirable for some other reason. Another unresolved difficulty is whether banks are gratuitous bailees, or bailees for hire or reward, because, a part from the special case of safe deposit facilities for which banks charge a periodical rental and which are available to the general public, banks do not make a special charge for safe custody services. It is argued that in so far as this may be borne in mind when assessing the commission to be debited to a customer's account, the bank may be deemed to be a paid bailee. On the other hand, a customer who utilises the safe custody service may not be charged any commission because of a substantial average credit balance on their account or the value of their connections. However, the difference has little practical effect, since banks take the same care of the items in their strong rooms whatever sort of bailee they may actually be. Legally, a gratuitous bailee is bound to take the same care of the property as a reasonably prudent man with the same facilities at his command would take in respect of similar goods of his own; whereas a paid bailee is expected to have the best possible safeguards and to exercise the same degree of care and skill as may reasonably be expected in the ordinary and proper course of a similar business to that for which he is paid. To counter modern criminal's scientific progress in safe breaking, banks are constantly improving their strong rooms at great expense and so their standard of care of customers' property entrusted to them for safe custody does not fall below that expected of a paid bailee. In *Moynihan v. National Bank Ltd.* (1969) Lady Moynihan sued for the loss of her jewels which were kept in a deed box at the bank and were stolen in a weekend raid on the bank's strong room. The bank denied negligence: however, during the hearing the case was settled for an undisclosed sum. Thus, the bank will not be liable if property held in safe custody is destroyed by fire or otherwise, lost or stolen unless there is negligence on the part of the bank, and the degree of negligence required to establish liability will depend on the relevant circumstances of the case, including what type of bailee

the bank is held to be Customers should Therefore be advised to insure the items they deposit; in fact, they will be quoted a lower premium by the insurers than would be the case if the items were kept on their own premises. If the bank seeks to exclude or limit its liability as bailee in any way then by the Unfair Contract Terms Act, 1977 (discussed in Chapter 1) the term or notice to that effect must satisfy the test of reasonableness.

(71) The law in relation to the duty of bailee and negligence has been cited above. The facts of the case may now be examined. The Box was entrusted to the defendant Bank at Peshawar. The same was accepted by the Bank as a bailee and it was expected that the usual care which is demanded in such matters would be taken. The partition of the country took place and there was no doubt that in view of the uncertainty and there was arson and looting as a consequence of which thousands of people lost their lives as well as their goods. Here in the present case, the entrustment by the plaintiff's father who was an eminent lawyer at Peshawar is not denied. The jewellery box was locked, wrapped and sealed when it was handed over to the defendant's Branch at Peshawar. The contents of the box have been held as duly proved in the findings as recorded in respect of issue Nos. 3 and 5. Similarly, it has been held on the basis of the evidence and findings as recorded in respect of issue No. 4 that the custody of the box throughout remained with defendant No. 1, whether it was at Peshawar Or Lahore or it was in Delhi. The proceedings in the court of District Judge at Delhi (Exhibit Public Witness I/3) in probate case No. 72, 70 clearly showed the condition of the box at the time it was opened and also about the contents which were recovered after the opening. On facts, it has been established that the defendant Bank did not deliver the box in the same condition it was entrusted to the Bank in Peshawar by the father and mother of the plaintiff. It is also proved on record that the Lahore Branch of the Bank put their own wrapper on the Box and the box was not locked. The evidence of the mother of the plaintiff clearly establishes the contents of the Box as well as the items of jewellery/ornaments placed in the same.

(72) The defendant Bank has not led any evidence to the contrary. The facts in the case of Shiv Nath Ram Ram Dhari (supra) would indicate that the Court did not grant relief in one case which was held to be a case of looting due to unforeseen circumstances but confirmed the decree of the High Court in respect of other cases where no looting was proved. The Court held that it cannot be assumed that because other consignments were lost as a result of looting even this one which was not delivered could be said to have been lost through the same circumstances, that is, by reason of its being looted. In the present case no such pleas of looting and arson have been raised by the defendant Bank nor any evidence has been led that the jewellery/ornaments were tampered with or looted or missing from the Box as a result of unforeseen circumstances as presently highlighted by the defendant Bank. Similarly, the learned Judge in M/s. Gopal Singh Hira Singh, Merchants (supra) was only dealing with the goods which were pledged with the Bank consisting of Kappas, cotton seeds, cotton seed

cakes and cotton, seed oil etc. The finding was recorded in the following manner ; "A test as to what a prudent person would have done in relation of his own property in the extraordinary situation that developed in Pakistan after the partition of India is provided by the conduct of the plaintiff and its partner as indeed similarly situated other unfortunate Hindus who had to migrate to the territories now forming part of India. Since the employees of the pledgee bank were mostly Hindus the staff forsook the duty and the property pledged with the bank was also left behind uncared for. Hence the Bank could not be said to be liable to account for the pledged goods or to pay the price thereof to the plaintiff because it had discharged its obligation as a bailee and could not have taken any other steps to protect the property."

(73) The facts are quite different in the present case where the entrustment of the Box has been admitted. The custody remained with the defendant Bank. The box has been produced in Court and only the items of ornaments/jewellery are found missing. The defendant Bank has, Therefore, failed to discharge its duty as required in law. In *National Bank of Lahore Ltd. Vs. Sohan Lal Saigal and Others*, the Division Bench held that a principal is liable for the fraud of his agent acting within the scope of his authority. The law on the subject as elaborately stated in paragraphs 6 and 7 of this judgment may be referred to as below: "(6) The next case on which reliance was placed by the learned counsel for the appellant Bank is *Bombay Burmah Trading Corporation Ltd. vs. Mirza Mohamed Ally*, 2nd 4 Cal 116. Their Lordships of the Privy Council, after referring with approval to the exposition of Willes, J. in *Barwick v. English Joint Stock Bank*, (1867) 2 Ex 259 and in *Mackay v. Commercial Bank of New Brunswick*. (1874) 5 Pc 394, express their inability to apply the principles laid down in those cases on the ground that at the material time no relationship of employer and employee existed between the defendants and one Darwood. In (1867) 2 Ex 259, the plaintiff had been supplying on the guarantee of the defendants (the English Joint Stock Bank), oats to one J.D. who was their customer for carrying out a Government contract. He refused to continue to make the supplies unless he got a better guarantee. Thereupon the defendants' Manager gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favor in payment for the oats supplied would be paid on receipt of the Government money in priority to any other payment "except to his bank" J.D. was then indebted to the bank to the amount of 12,000 pounds, but this fact was not known to the plaintiff nor was it communicated to him by the Manager. The plaintiff supplied the oats of the value of 1227 pounds, the Government money, amounting to 2676 pounds, was received by J.D., and paid into the bank" but J.D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum of 2676 pounds in payment of J.D.'s debt to them. The plaintiff filed an action for false representation and for money had and received. As the court did not wish to anticipate the verdict of the jury, it was observed that if fraud in the Manager was found, the question would arise whether the bank being the employer of the Manager would be answerable for it,

wills, J. enunciated the rule in the following words: "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Dealing with the argument that the act had not been authorised by the master, it was observed- "it is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Interpreting and explaining the above rule, the House of Lords in *Lloyd V. Grace, Smith and Co.*, 1912 AC 716, laid down that "a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent". What had happened there was that a widow, who owned certain property, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm he induced her to give him instructions to sell her property and to call in certain mortgage money) and for that purpose to give him her deeds and also to sign two documents, which were neither read over nor explained to her. These documents were in fact a conveyance to him of the property and a transfer to him of the mortgage. He then dishonestly disposed of the property for his own benefit. The firm was held liable for the fraud committed by its representative in the course of his employment. The following passage from the judgment of Lord Loreburn is highly instructive. "It is clear to my mind, upon these simple facts, that the jury ought to have been directed, if they believed them, to find for the plaintiff. The managing clerk was authorised to receive deeds and carry through sales and conveyances, and to give notices on the defendant's behalf. He was instructed by the plaintiff, as the representative of the defendant's firm and she so treated him throughout to realise her property. He took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed and put the proceeds into his own pocket. In my opinion there is an end of the case. It was a breach of the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal. Referring to the decision of the Exchequer Chamber delivered by Willes, J., Lord Halsbury observed that so far from giving any authority for the proposition in favor of which it was quoted, the court went out of its way to disclaim their being any doubt about the rule that the principal was answerable for the act of his agent in the course of his master's business, and the words added, "and for his benefit", obviously meant that it was something in the master's business. In 1955 AC-130, the appellant-company of General Merchants had expressly committed to servants of the respondent a transport contractor, at his request, goods for carriage by road, and the servants

stole the goods and the evidence established that conversion took place in the course of their employment, the respondent was held liable to the appellants for the value of the goods. The principle established for the liability of the master for the servant's fraud perpetrated in the course of the master's business whether the fraud was committed for the master's benefit or not in Lloyd's case, 1912 AC 716 (supra), was followed: (1905) 1 KB 237, on which the Lahore Bench had relied in Oma Parshad's case, Air 1937 Lah. 572, was distinguished by the House of Lords on the ground that the criminal act of the servant had not occurred in the course of his employment. The contract in that case was not a contract of carriage of goods but the carriage of brougham for the purpose of driving the traveller in the course of his business. When the traveller was absent, the servant in pursuance of an arrangement made with confederates, drove the brougham to a place where a great portion of the samples in it was stolen by them. These pronouncements of the House of Lords relating to cases in which the facts were quite apposite are fully applicable to the facts of the present case for the purpose of deciding whether the fraudulent and criminal acts of Baldev Chand were committed within the course of his employment. In *Sherjan Khan V. Alimudedi*, ILR 43 Cal. 511 : AIR 1916 Cal. 428, Mukherjee, J. in an illuminating judgment discussed the entire case law on the point and after referring to *Gopal Chandra v. Secretary of State*, ILR 36 Cal. 647, and certain other cases, made the following observations at page 519 : These cases recognised the doctrine that acts of fraud by the agent, committed in the course and scope of his employment, form no exception to the rule where by the principal is held liable for the torts of his agent, even though he did not in fact authorise the commission of the fraudulent act. There are, no doubt, dicta in some of these cases, based apparently upon a misapprehension of the rule enunciated by Willes, J. in (1867) 2 Ex. 259, and particularly of the expression "for the master's benefit". The true meaning and scope of the rule, however, has now been settled beyond controversy by the decision of the House of Lords in 1912 AC 716. "The learned counsel for the appellant wanted to rely on the earlier Calcutta decision, but in view of the criticism of Mookerjee, J. in the subsequent decision, it is not possible to accept the law laid in the earlier case as correct. In *Dina Bandhu V. Abdul Latif Molla*, 68 Ind cas 4391 : AIR 1923 Cal 157, defendants 2 to 4, who were boatmen as agents of defendant No. 1, the owner of the boat, entered into a contract with the plaintiff to carry his goods from one place to another. The goods having been misappropriated on the way by defendants 2 to 4 the plaintiff instituted a suit for recovery of the price. Defendant No. 1, the owner, was held liable for the loss in accordance with the rule that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. This again is a judgment of the Calcutta High Court and we have not been shown any Indian decisions which may have taken a contrary view with the exception of 36 Cal 647 and to a certain extent Air 1937 Lah. 572. (7) The learned counsel for the respondents has invited our attention to certain American decisions, which directly dealt with the liability of the Bank in the matter of any loss incurred by safe deposit box

holders on account of the fraudulent and criminal acts of the Bank's employees. In *Sporsem V. First National Bank of Poulsbo*, 233 P R 641, the plaintiff had brought an action for the losses sustained by reason of the burglarizing of the safe deposit boxes which had been leased from the defendant-Bank. The customer had to pay an annual rental and sign a little contract which was printed on the back of a card. It was held that the Bank was in the position of a bailee and was bound to exercise the same degree of care that was required from a bailee. In *Blair Vs. Riley*, 175 Ner 210, the plaintiffs had deposited their available securities in what is called safety deposit boxes which were held by them under contract of rental with the Bank. These securities had disappeared. The access to the boxes was made possible by entrusting the boxes and contents on occasions to Browning, who was the cashier of the Bank, through whom the parties had dealt with the Bank or by entrusting to him the keys which were required to be used in conjunction with the master key held by the Bank to open the boxes. It was a practice of the cashier to assist the customers of the Bank in their business transactions. It was held that the circumstances under which the cashier so acted were such as to justify the conclusion that he was acting for and on behalf of the Bank. The Court of Appeals of Ohio treated the relation of box-holder and the Bank as that of special bailment. The defense of the Bank that it could rest on the broad principle of landlord and tenant was rejected. The bank had asserted that it had used due care in the selection of the cashier and its officers had not been put on notice as to his misconduct and, therefore, they should not be held responsible for his breach of trust with the patrons of the Bank. This was negated by reference to *Citizens' Savings Bank v. Blakesley*, 42 Ohio St. 645, in which the rule had been stated thus: "Where a transaction with an incorporated banking association properly pertains to the business of such an association, neither the abuse or disregard of his authority by its managing officer or agent, nor his fraud or bad faith will be permitted to be shown in defense of such bank in an action against it by an innocent party, growing out of such transaction." The learned counsel for the appellant has sought to assail the theory of a bailment being created in such circumstances on the ground that the definition of bailment given in the Indian Contract Act would not justify the view that a relationship of bailor and bailee comes into existence between persons who take on rent a locker in a safe deposit vault and the bank. Section 148 defines "bailment" as "the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them". As has been pointed out in *Pollock and Mulla's Indian Contract Act* (8th Edition), it was the late Mr. Justice Story's work on *Bailment and Agency*, which had acquired a classical reputation, which had been largely used in the chapter of bailment in the Indian Contract Act and in other chapters. The learned counsel for the appellant has not been able to show that the American Law is in any way different from the Indian Law, the basic conception of bailment derived from the Roman Civil Law being the same in both systems. It may be that the person who hires a locker retains

some control over it by having one key with himself but if the locker can be operated without any key, as was possible in the lockers which were rented out to the plaintiffs, then at once any impediment in the way of control and possession of the Bank to whom the locker belonged and in whose strong room it was to be found, would be removed and it could well be said that the bank was strictly in the position of a bailee. This is an additional ground for making the Bank liable but its liability has been properly and correctly determined by the trial court on the other rule, namely, the liability of the master for the fraudulent and criminal acts of the servant committed in the course of his employment."

(74) This Court in the case of Vidya Prakash Sethi (supra) raising similar question considered the plea of negligence and duty of a bailee. It was held that the Bank remained liable for the price of items of jewellery found missing and calamity of partition did not absolve the Bank from its responsibility as a bailee. Paragraph 28 of the judgment may be referred to as below: "Apart from section 154 the bank having held the physical custody of the box and having interfered with the original wrappings and seals put by the appellant without having given him opportunity of inspecting the box and its condition, acted in circumstances which raise suspicion that someone interfered with the contents of the box during the bailment and for that reason the original wrappers and the seals were so damaged that the same had to be discarded or placed under a new wrapper by the bank authorities which wrapper had to be clamped under new seals of the bank. No case has been made out for exonerating the bank from its responsibility. We cannot uphold the findings by the learned Single Judge recorded under issue No. 8 and we are of the view that the bank remains liable for the price of the items of jewellery which were found missing on the 1st of April, 1963. We cannot hold that by operation of law the bank was over divested of the physical custody of the box. As discussed in detail, the physical custody of the concerned box always remained with the respondent bank. We are also in disagreement with the view that the calamity of the partition absolved the respondent bank from its responsibility as a bailee. In reply to the letter dated the 22nd of May, 1962, the bank never repelled serious allegations that the contents of the safe deposits had been interfered with and fresh wrappers and seals had been put on the safe deposits behind the back of the depositors. We, Therefore, accept the appeal and decree the plaintiff's suit. The suit was filed on the 28th of March, 1966, and the finding by the trial Judge was that in case of his success the plaintiff was to be entitled to the price of the jewellery as stated in the plaint. The decree is being made for a sum of Rs. 32,397 and the appellant will be entitled to receive interest at the rate of 6 percent per annum as from the 28th of March, 1966, till the date of realisation. He has gone through great hardship and his claim has been resisted without justification. We, therefore, allow him the costs of the suit as well as of the appeal. A decree will be drawn up in accordance with these observations. The appeal being allowed is hereby disposed of."

(75) Sh. Dharam Vira, the then Secretary to the Government of India, Ministry of

Rehabilitation also complained to the General Manager of the defendant Bank on May 22, 1962 to the effect that the lockers and safe deposits of displaced persons field with banks in the two countries which had been transferred from one country to the other at Government level had been tampered with. 47safe deposits belonging to displaced persons held with branches in Pakistan were handed over to the representatives of the Government of India through the custodian of Evacuee Property Pakistan by the Lahore Branch on November 30, 1961 and it was observed that all the safe deposits handed over by the Bank had new packings and bore the seals of the Bank. It was also noticed that in 10 cases out of the 12 safe deposits transferred to the claimants, the depositors complained that whole or substantial part of the jewellery from their safe deposits were found missing. The copy of the letter has been referred to in the earlier part of this judgment.

(76) In view of the facts and law as stated above, it is established that the defendant Bank failed to discharge its duties as a bailee and did not take care of the goods of the parents of the plaintiff as we would under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The goods were not alleged to be lost nor proved to be lost as a result of dacoity, looting and fire or other accident over which the Bank had no control. The Box was in the custody of the defendant Bank and it was produced before the court of District Judge in the probate proceedings where it was found that the original wrappers and the seals were missing and the same were replaced by the wrapper of the Bank's branch at Lahore.

(77) This issue if,, accordingly, decided in favor of the plaintiff and against the defendant Bank. Whether the defendant No. 1 refused to give open delivery to the plaintiff's mother, if so, to what effect?

(78) The defendant Bank has not denied that it refused to give open delivery to the plaintiff or plaintiff's mother. In any case, the documents as referred to in Exhibits Public Witness 4/24, Public Witness 4/35 and Public Witness 4/43 would indicate that the Bank did not accept to give open delivery. Exhibit Public Witness 4/24 is a letter addressed by the Bank to the plaintiff dated August 8, 1966 which reads as follows : "Shri Jagdish Chandra Trikha, S/o Late R.S. Mool Chand Advocate, 11/123, Double Storey, Tilak Nagar, New Delhi-18 Dear Sir, Ref; Safe deposit relating to Late R.S. Mool Chand Advocate, Peshawar With reference to your letter dated 22.7-1966, the box in question as it was received by us from Government of India, is lying with us merely for its delivery to the rightful owners and we regret our inability to accede to your request for giving its open delivery. Yours faithfully, Sd/-Manager" Similarly, the Bank addressed another letter dated September 15, 1966 to plaintiff (Exhibit Public Witness 4/43) regretting its inability to accede to the request for open delivery. The issue is also decided in favor of the plaintiff and against defendant No. 1. ISSUE NO. 8 "Whether the Defendant-Bank insisted that the plaintiff, should obtain letters of Administration., if so to what effect"

(79) This issue has been earlier discussed while dealing with issue No. 1 and in view of the findings as recorded in respect of that issue it is held that the defendant Bank insisted and asked the plaintiff to get letters of administration from a court of competent jurisdiction and this is corroborated also from the testimony of the plaintiff. Reference may be made to the documents Exhibits Public Witness 4/13, Public Witness 4/14, PW4/15 and Public Witness 4/25. No further detailed discussion is required and this issue is also decided in favor of the plaintiff and against defendant No. 1. **ISSUE NO.9** To what amount the plaintiff is entitled to on account of loss of gold ornaments?

(80) Initially the plaintiff filed a suit for recovery of gold ornaments weighing 480 Tolas equivalent to 5596.80 grammes or price there of amounting to Rs. 3,72,400. The prayer in this regard may be referred to as under: "In the circumstances, it is respectfully prayed that a decree for the return of specific gold ornaments/jewellery weighing 480 Tolas = 5596.80 Grammes as per List attached in Hindi more particularly described in para 3 of the plaint or its price at the present market value as on 19-11-77, the date of notice amounting to Rs. 3,72,400 may be passed in favor of the plaintiff and against the defendant No. 1, with future interest @12% per annum from the date of filing till realisation and costs of the suit be also awarded in favor of the plaintiff and against the defendant No. 1. Any other order or relief which this Hon'ble Court may deem just and proper in the interest of justice be also awarded." Subsequently the plaint was amended when the following relief was claimed: "In the circumstances, it is respectfully prayed that a Decree for the return of specific Gold ornaments/Jewellery weighing 480 Tolas = 5596.80 Grammes as per list attached more particularly described in para 3 of the plaint or price at the market value of the Gold ornaments/jewellery prevalent on the date of the judgment/decreed which may be passed by this Hon'ble Court in favor of the Plaintiff and against the defendant No. 1 with future interest @12% per annum from the date of filing the suit till realisation and costs of the suit lie also awarded in favour of the plaintiff and against the defendant No. 1. Any other order or relief which this Hon'ble Court may deem just and proper in the interest of justice be also awarded."

(81) Additional issues were framed on February 15, 1993 which read as follows: 1A. Whether the plaintiff is entitled to the market value of the gold ornaments on the date of judgment and decree? 1B. Whether the provisions of Order 7 Rules 2 and 7 CPC are not complied with in the present case? **OPD**

(82) The learned counsel for the defendant Bank has contended that the delay was caused by the plaintiff and he took no steps to mitigate the damages. Therefore, he was not entitled to the value of the goods as on the date of passing of the decree. It is also argued that the value has not been proved by the plaintiff by cogent evidence on record. The plaint does not indicate the precise amount. The relief, as a consequence, has not been specifically stated and, Therefore, the plaintiff has not proved this issue.

(83) The contention raised by learned counsel for the defendant Bank is that the

plaintiff has not claimed any definite amount and, therefore, the relief is barred by the provisions of order 7 Rules 2 and 7 of the Code of Civil Procedure. The said provisions may be reproduced as under: "7(2) In money suits:—Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed: But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate, the plaintiff shall state approximately the amount or value sued for, 3. Where the subject-matter of the suit is immovable property.—Where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers."

(84) No relief accordingly, it is argued, can be granted as the plaintiff has neither specified the precise amount claimed nor specifically stated the relief which can be entertained.

(85) The admitted fact is that the defendant Bank is in no position to return the entire gold ornaments/jewellery which were held in trust by the Bank in Peshawar as the same have allegedly been pilfered and lost. The relief of return of the jewellery cannot, therefore, be granted to the plaintiff in the facts and circumstances of the present case. To what relief then the plaintiff is entitled? Is he entitled to the value of the goods as at the date of the decree or as at the date of filing of the suit? The plaintiff had in the first instance claimed the recovery of the gold ornaments or price thereof amounting to Rs. 3,72,400 at the time of filing of the suit. Similar prayer is referred to in paragraph 11 of the amended plaintiff which reads as under: "11. That at the time of filing the suit the value of the suit for purposes of Court fee and jurisdiction for return/recovery of 480 Tolas of gold ornaments/jewellery or the price thereof at the then market rate was Rs. 3,72,400. The value of the said gold ornaments/jewellery shall be determined on the market rate as on the date of passing of the decree by this Hon'ble Court. The plaintiff is not possessed of means sufficient to enable him to pay the Court fee provided by law for the suit and, therefore, respectfully and humbly prays for permission to sue as an Indigent Person. The immovable and movable property possessed by the plaintiff is specified in Schedule 'A' and 'B' of the Application under order 33 Civil Procedure Code. The plaintiff undertakes to pay the court fee on the decretal amount which may be assessed/determined by this Hon'ble Court on the basis of the market value of said gold ornaments/jewellery prevalent on the date of passing the decree, as per prayer clause of this plaintiff." The reading of the above will establish that the plaintiff in fact has reiterated the prayer made in the unamended plaintiff. The amendment which he sought was only with regard to the market value of the gold ornaments on the date of the judgment and decree. This indeed cannot be granted to the plaintiff and he has not seriously contested this issue nor substantiated the same on any

cogent reasoning.

(86) In the case of Shri Vidya Prakash Sethi (supra) the Division Bench granted the relief to the plaintiff therein on the basis of the date when open delivery was given to the plaintiff i.e. on April 1, 1963. The finding of the learned Single Judge was affirmed in this regard. In the present case. though the open delivery of the Box was given on January 13, 1971, the defendant Bank continued to insist for grant of Letters of Administration before the matter could be further considered. Letters of Administration were granted on December 4, 1974 and the present suit was filed on December 1, 1977 within the period as prescribed under law.

(87) The plaintiff has been deprived of the goods to which he was entitled in law and the same cannot be returned as having been lost. The price in lieu thereof has to be granted in view of the findings as given in respect of the issues as referred to in the judgment. In the facts and circumstances of the present case, it will be just, fair and equitable in case the relief for the payment of the price of the market value of the goods at the time of institution of the suit i.e. Rs. 3,72,400 is granted to the plaintiff which will reasonably compensate him for the loss suffered. The price of the goods has been proved by the plaintiff as at the date of filing of the suit and no contrary evidence has been led by the defendant Bank to prove otherwise.

(88) In view of the above the Additional issue No. 1A is decided against the plaintiff and in favor of the defendant. Additional issue No. 1B is decided in favor of the plaintiff and against defendant No. 1. ISSUE NO. 10 To what amount the plaintiff is entitled to on account of interest?

(89) In view of the fact that the goods as well as their value have been withheld from the plaintiff till date, he shall also be entitled to simple interest at the rate of 12 per cent per annum from the date of filing of the suit till the date of realisation.

(90) For the aforesaid findings, I pass a decree in favor of the plaintiff and against defendant No. 1 for a sum of Rs. 3,72,400 with costs. The plaintiff shall also be entitled to pendente lite and future interest at the rate of 12 per cent per annum from the date of institution of the suit till the date of realisation. The plaintiff shall pay the court-fees on the decretal amount in accordance with law.