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# NATIONAL BANK OF LAHORE LTD

*v.*

# SOHANLAL SEHGAL AND OTHERS

*March* 5, 1965

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[K. SUBBA RAO, J. C. SHAH AND R. S. BACHAWAT, JJ.]

*Limitation Act, 1908, First Schedule, Articles 36 and 115—Scope of*

The respondents hired lockers in the safe deposit vaults from the appellant bank at Jullundur through its manager under different agreements on various dates during 1950. In April 1951, the lockers were tampered with and the valuables of the respondents kept in them were removed by the Manager. In due course the Manager was prosecuted and convicted for theft. The respondents filed three suits against the bank for the recovery of different sums being the value of the contents of the lockers which had been removed. The bank denied its liability on various grounds and also contended that the suits were barred by limitation.

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The trial court held that the Bank was liable to bear the loss incurred by the respondents and that the suits were not barred by limitation. On appeal, the High Court accepted the findings of the trial court on both the questions and dismissed the appeals.

In the appeal before the Supreme Court, only the question of limitation was raised. It was contended on behalf of the appellants on the facts found that the suit was barred by limitation as the theft of the valuables by the Manager was a tort committed by him *dehors* the contracts entered into by the appellant with the respondents and, therefore, Article 36 of the Limitation Act which required that a suit must be instituted within two years applied, and not Art. 115, which provided for a period of limitation of three years; that the suits were not based on a breach of contract committed by the bank but only the theft committed by its agent *dehors* the terms of the contract.

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HELD: The suit claims, being *ex contractu*, were clearly governed by Article 115 of the First Schedule to the Limitation Act and not by Article 36. [298 F]

There were clear allegations in the plaint that the appellant committed breach of contract in not complying with some of the conditions thereof and that the appellant understood those allegations in that light and traversed them. [298 E]

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Even if the respondents' claim was solely based on the fraud committed by the manager during the course of his employment, such a claim could not fall under Art. 36. To attract Art. 36, the misfeasance must be independent of contract. The fraud of the manager committed in the course of his employment must be deemed to be a fraud of the principal, i.e. the Bank must be deemed to have permitted its manager to commit theft in violation of the terms of the contracts. While under the contracts the bank was under an obligation to provide good lockers and not to permit access to the safe except to persons mentioned in the contracts, in violation of these terms the bank gave defective lockers and gave access to the manager, thus facilitating the theft. In either case the wrong committed was not independent of the contract but directly arose out of the breach of contract. [298 G, H]

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CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 929, 930 and 931 of 1963. A

Appeals by special leave from the judgment and decree dated October 11, 1961 of the Punjab High Court in Regular First Appeals Nos. 136, 137 and 138 of 1959.

*Hans Raj Sawhney* and *B. C. Misra*, for the appellant (in all the appeals). B

*B. R. L. Iyengar, S. K. Mehta* and *K. L. Mehta*, for the respondents (In C.A. No. 229 of 1963).

*V. D. Mahajan*, for the respondent. (In C.A. No. 930 of 1963). C

*Kanwar Rajendra Singh* and *Vidya Sagar Nayyar*, for the respondent (In C.A. No. 931 of 1963).

The Judgment of the Court was delivered by

**Subba Rao, J.** These appeals by special leave raise a question of limitation. D

The National Bank of Lahore Limited, hereinafter called the Bank, is a banking concern registered under the Indian Companies Act and having its registered office in Delhi and branches at different places in India. Though its main business is banking, it carries on the incidental business of hiring out lockers out of cabinets in safe deposit vaults to constituents for safe custody of their jewels and other valuables. It has one such safe deposit vault at its branch in Jullundur. The respondents herein hired lockers on rental basis from the Bank at Jullundur through its Manager under different agreements on different dates during the year 1950. In April 1951 the said lockers were tampered with and the valuables of the respondents kept therein were removed by the Manager of the Jullundur branch of the Bank. In due course the said Manager was prosecuted before the Additional District Magistrate, Jullundur, and was convicted under ss. 380 and 409 of the Indian Penal Code. The respondents filed 3 suits in the Court of the Subordinate Judge, Jullundur, against the Bank for the recovery of different sums on account of the loss of the valuable contents of the lockers hired by them. The Bank denied its liability on various grounds and also contended that the suits were barred by limitation. E F G

The learned Subordinate Judge held that the Bank was liable to bear the loss incurred by the plaintiffs and that the suits were not barred by limitation. On appeal, the High Court of Punjab accepted the findings of the learned Subordinate Judge on both the questions and dismissed the appeals. The present appeals arise out of the said judgment of the High Court. H

The only question raised in these appeals is one of limitation. Before considering the question of limitation it is necessary to

A notice briefly the findings of fact arrived at by the High Court. The High Court summarized its findings thus:

(1) The whole object of a safe deposit vault in which customers of a Bank can rent lockers for placing their valuables is to ensure their safe custody. The appellant-Bank had issued instructions and laid down a detailed procedure for ensuring that safety but in actual practice the Manager alone had been made the custodian with full control over the keys of the strong room and a great deal of laxity had been observed in having no check whatsoever on him.

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(2) The lockers had been rented out to the plaintiffs by the Manager Baldev Chand, who was entrusted with the duty of doing so. It was he who had intentionally rented out such lockers to the plaintiffs which had been tampered with by him. This constituted a fraud on his part there being an implied representation to the plaintiffs that the lockers were in a good and sound condition.

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(3) Although the Bank authorities were not aware of what Baldev Chand was doing, but the fraud, which he perpetrated, was facilitated and was the result of the gross laxity and negligence on the part of the Bank authorities.

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(4) The lockers were indisputably being let out by the Manager to secure rent for the Bank.

Having found the said facts, the High Court held that the fraud was committed by the Manager acting within the scope of his authority and, therefore, the Bank was liable for the loss incurred by the respondents. Then it proceeded to consider the question of limitation from three aspects, namely, (i) the loss was caused to the respondents as the Manager of the Bank committed fraud in the course of his employment; (ii) there was a breach of the implied condition of the contract, namely, that only such lockers would be rented out which were safe and sound and which were capable of being operated in the manner set out in the contract; and (iii) there was a relationship of bailor and bailee between the respondents and the Bank, and therefore the Bank would be liable on the basis of the contract of bailment. It held that from whatever aspect the question was approached Art. 36 of the First Schedule to the Limitation Act would be out of place and the respondents' claims would be governed by either Art. 95 or some other article of the Limitation Act.

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Learned counsel for the appellant accepted the findings of fact, but contended that on the facts found the suits were barred by limitation. Elaborating the argument the learned counsel pointed out that the theft of the valuables by the Manager was a tort committed by him *dehors* the contracts entered into by the appellant with the respondents and, therefore, Art. 36 of the First Schedule

to the Limitation Act was immediately attracted to the respondents' claims. A

The scope of Art. 36 of the First Schedule to the Limitation Act is fairly well settled. The said article says that the period of limitation "for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specifically provided for" is two years from the time when the malfeasance, misfeasance or nonfeasance takes place. If this article applied, the suits having been filed more than 2 years after the loss of the articles deposited with the Bank, they would be clearly out of time. Article 36 applied to acts or omissions commonly known as torts by English lawyers. They are wrongs independent of contract. Article 36 applies to actions *"ex delicto"* whereas Art. 115 applies to actions *"ex contractu"*. "These torts are often considered as of three kinds, viz., non-feasance or the omission of some act which a man is by law bound to do, misfeasance, being the improper performance of some lawful act, or malfeasance, being the commission of some act which is in itself unlawful". But to attract Art. 36 these wrongs shall be independent of contract. The meaning of the words "independent of contract" has been felicitously brought out by Greer, L.J., in *Jarvis* v. *Moy, Davies, Smith, Vanderveil and Co.*[1] *thus*: B C D

> "The distinction in the modern view, for this purpose, between contract and tort may be put thus. Where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract it is tort and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract." E F

If the suit claims are for compensation for breach of the terms of the contracts, this article has no application and the appropriate article is Art. 115, which provides a period of 3 years for compensation for the breach of any contract, express or implied, from the date when the contract is broken. If the suit claims are based on a wrong committed by the Bank or its agent *dehors* the contract, Art. 36 will be attracted. G

Let us now apply this legal position to the claims in question. One of the contracts that was entered into between the plaintiffs and the Bank is dated February 5, 1951. It is not disputed that the other two contracts, with which we are concerned, also are of the same pattern. Under that contract the Bank, the appellant herein, and Sohanlal Sehgal, one of the respondents herein, agreed "to hire. subject to the conditions endorsed, the company's safe No. 1651/ H

(1) [1936] 1 K. B. 399, 405.

A 2203 Class lower for one year from this day at a rent of Rs. 40". The relevant conditions read as follows:

> 14. It is agreed that the connection of the renter of the safe and the Bank (and it has no connection) is that of a lessor and lessee for the within mentioned safe and not that of a banker and customer.
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> 15. The liability of the company in respect of property deposited in the said safe is limited to ordinary care in the performance by employees and officers of company of their duties and shall consist only of (a) keeping the safe in vault where located when this rental contract is entered into or in one of equal specifications, the door to which safe shall be locked at all time except when an officer or an employee is present, (b) allowing no person access to said safe, except hirer or authorised deputy, or attorney in fact having special power to act identification by signature being sufficient or his/her legal representative in the case of death, insolvency or other disability of Hirer, except as herein expressly stipulated. An unauthorised opening shall be presumed or inferred from proof of partial or total loss of contents.
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> 16. The company shall not be liable for any delay caused by the failure of the vault doors or locks to operate.
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> 17. The company shall not be liable for any loss etc.

The only purpose of the contract was to ensure the safety of the articles deposited in the safe deposit vault. It was implicit in the contract that the lockers supplied must necessarily be in a good condition to achieve that purpose and, therefore, that they should be in a reasonably perfect condition. It was an implied term of such a contract. Condition 15 imposed another obligation on the Bank to achieve the same purpose, namely, that the Bank should not allow access to any person to the safe except the hirer or his authorised agent or attorney. If the articles deposited were lost because one or other of these two conditions was broken by the Bank, the renter would certainly be entitled to recover damages for the said breach. Such a claim would be *ex contractu* and not *ex delicto* and for such a claim Art. 115 of the First Schedule to the Limitation Act applied and not Art. 36 thereof.

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Learned counsel for the appellant contended that the suits were not based upon the breach of a contract committed by the Bank but only the theft committed by its agent *dehors* the terms of the contract. This leads us to the consideration of the scope of the plaints presented by the respondents. It would be enough if we take one of the plaints as an example, for others also run on the same lines. Let us take the plaint in Civil Suit No. 141 of 1954, i.e., the suit filed by Sohanlal Sehgal and others against the Bank for the recovery of a sum of Rs. 26,500. We have carefully gone through

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the plaint, particularly paragraphs 8, 9 and 10 thereof. It will be seen from the plaint that though it was not artistically drafted the relief was claimed mainly on two grounds, namely, (i) that it was an implied term of the contract that the locker rented was in a good condition, and (ii) the valuables were lost because the Manager, on account of the negligence of the Bank in not taking all the necessary precautions, committed theft of the articles in the course of his employment. In the written-statement the defendant denied its liability both under the terms of the contract and also on the basis that it was not liable for the agent's fraud. The High Court found that at the time when the lockers were rented out they were in a defective condition and that the Bank, in actual practice, made the Manager the sole custodian with full control over the keys of the strong room and permitted a great deal of laxity in not having any check whatsoever on him. In this state of the pleadings and the findings it is not possible to accept the contention of the learned counsel for the appellant that the plaintiffs did not base their claims on the branch of the conditions of the contracts. This argument is in the teeth of the allegations made in the plaint, evidence adduced and the arguments advanced in the Courts below and the findings arrived at by them. While we concede that the plaint could have been better drafted and couched in a clearer language, we cannot accede to the contention that the plaints were solely based upon the fraud of the Manager in the course of his employment. We, therefore, hold that there were clear allegations in the plaints that the defendant committed breach of the contracts in not complying with some ot the conditions thereof and that the defendant understood those allegations in that light and traversed them. The suit claims, being *ex contractu*, were clearly governed by Art. 115 of the First Schedule to the Limitation Act and not by Art. 36 thereof.

If Art. 115 applied, it is not disputed that the suits were within time.

Even if the claim was solely based on the fraud committed by the Manager during the course of his employment, we do not see how such a claim fell under Art. 36 of the First Schedule to the Limitation Act. To attract Art. 36, the misfeasance shall be independent of contract. The fraud of the Manager committed in the course of his employment is deemed to be a fraud of the principal, that is to say the Bank must be deemed to have permitted its manager to commit theft in violation of the terms of the contracts. While under the contracts the Bank was under an obligation to give to the respondents good lockers ensuring safety and protection against theft, it gave defective ones facilitating theft; while under the contracts it should not permit access to the safe to persons other than those mentioned in the contracts, in violation of the terms thereof it gave access to its Manager and enabled him to commit theft. In either case the wrong committed was not independent of the contract, but it directly arose out of the breach of the contract.

A In such circumstances Art. 36 is out of place. The competition between Arts. 115 and 120 to take its place need not be considered, for neither of those Articles hits the claim, as the suits are within 3 years, which is the shorter of the two periods of limitation prescribed under the said two Articles.

B In this view it is not necessary to express our view on the question whether the contracts in question were of bailment.

In the result, the appeals fail and are dismissed with costs one hearing fee.

*Appeals dismissed.*