APPELLATE CIVIL

Before D. Falshaw and A. N. Grover, JJ.

NATIONAL BANK OF LAHORE, LTD.,—*Appellant.*

versus

SOHAN LAL SAIGAL AND OTHERS,—*Respondents.*

Regular First Appeal No. 136 of 59.

1961

Oct. 11th

Indian Contract Act (IX of 1872)—Section 238—Principal and agent—Fraudulent and criminal acts committed by the agent in the course of his employment—Liability of the principal in respect thereof—Banker and Customer—Safe deposit lockers rented out by the banker—Contract between the banker and the customer—Whether that of bailment—Indian Limitation Act (IX of 1908)—Articles 36, 95 and 120—Suit for recovery of the valuables stolen from the locker against the bank—Whether governed by Article 36 or 95 or 120.

Held, 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. 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 defence of such bank in an action against it by an innocent party, growing out of such transaction.

Held, that the person who hires a locker, no doubt, 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.

Held, that the suit by a renter of a locker against the bank for recovery of the price of his valuables stolen from

the locker is not governed by Article 36 but by Article 95 or 120 where the allegation is that the manager of the bank had played fraud on the plaintiff by renting out lockers which had been tampered with and which could be opened without the key in the possession of the plaintiff and that the bank was guilty of gross negligence in not ensuring that a proper control over the strong room and the lockers should be exercised. The suit does not cease to be for a relief on the ground of fraud simply because, while giving particulars of fraud and other facts relevant thereto, allegations had been made of negligence on the part of the Bank which helped and made the perpetration of the fraud possible. At any rate, it cannot be said that the suit is one for malfeasance, misfeasance and non-feasance only so as to bring it within the ambit of Article 36. It is well-settled that where the breach of duty alleged arises out of a liability independent 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.

Regular First Appeal, from the decree of Shri Jagdish Chandra, Sub-Judge, 1st Class, Jullundur, dated the 31st March, 1959, granting the plaintiffs a decree for Rs. 23,993-4-0, with proportionate costs against the defendant.

H. R. SAWHNEY AND K. C. NAYAR, ADVOCATES, for the Appellant.

L. D. KAUSHAL AND SHAMAIR CHAND, ADVOCATE, for Respondents.

JUDGMENT

The Judgment of the Court was delivered by:—

GROVER, J.—These three appeals (Regular First Appeals Nos. 136, 137, and 138 of 1959) arise out of three suits which have been decreed by the trial Court in the sum of Rs. 23,993-4-0, Rs. 16,509 and Rs. 11,055 in favour of Sohan Lal Saigal and others, Grover, J.

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Shrimati Lila Vati (daughter of Shrimati Ram Piari, the latter having died meanwhile), and Shrimati Durga Devi, respectively. All these appeals will be disposed of by this judgment.

The appellant-Bank used to maintain a safe deposit vault in the Bank premises at Jullundur City where it kept locker cabinets for the safe custody of the jewellery and other valuables of its customers who might wish to hire them. The Head Office of the Bank had issued certain instructions to the branches regarding the operation of these lockers (Exhibits P.2 and P. 2/A at page 223 of the paper-book in Regular First Appeal No. 136 of 1959 to which alone all references shall be made hereafter). The vault was to remain under the joint control of the cashier and the custodian. If no separate custodian was appointed, it had to remain under the joint control of the Manager and the cashier. The master-key and keys of unleased lockers overnight were always to remain under the joint control of the cashier and the Manager like the Bank's cash and other articles. Lockers had to be operated in the presence of two representatives of the Bank. As and when the lockers fell vacant, the locks had to be replaced. New keys were to be obtained from the company which were to be received duly sealed and the seals had to be broken in the presence of the client only. If there were more than two keys belonging to a safe and the outer door of the strong room, one key in each case was to be given to the Accountant. In a letter addressed by the Personal Assistant to the General Manager of the Bank to all branches (Exhibit P. 25 at page 180), it was stated that a recent inspection had revealed that most of the branches did not attach due importance to the safe custody business. It was pointed out that the Bank accepted great responsibility in running the safe deposit vault and accepting articles for safe custody. Utmost precaution and vigilance were to be exercised so that there was no loophole or shortcoming in the observance of the various formalities. Notwithstanding all this it appears that the Bank authorities entrusted the task of being the custodian of the deposit vault in the Jullundur Branch of the Bank to its Manager, Baldev Chand, alone.

In all the three suits certain lockers were taken by the plaintiffs on different dates for depositing their jewellery and valuables but those articles kept by the plaintiffs in their respective lockers were ultimately found missing. The trial Court found that Baldev Chand had the exclusive control over the locker cabinets lying in the strong room of the Bank. The keys of the strong room were kept by him personally and not in any safe. The custodian's key was also only one for all the lockers and the same used to remain with him. The renter's keys of the unleased lockers used to remain in an iron almirah kept in his room and the key of that almirah was also kept by him. The plaintiffs had alleged that before the lockers had been rented out to them by the Manager, he had filed off the levers of the renter's portion of which they had no knowledge, with the result that any key could open and be applied to the renter's portion and it was not necessary to take the help of the renter's key which was in his possession. These facts, according to the trial Court, had been established by the evidence, which was produced in the suits, and by other facts and circumstances. Indisputably the Manager used to reside in the upper portion of the Bank's premises so that he had ample opportunity to carry out his nefarious design of tampering with the locks of the lockers. An attempt had been made by the counsel for the Bank in the trial Court to create some sort of suspicion that the Godrej Company which had supplied the locks had sent defective ones, but the Court found that there was no ground for any such suggestion. The conclusion at which the trial Court arrived was that the act of letting out the lockers, which had been tampered with by Baldev Chand and which could not ensure the safety of the ornaments of the plaintiffs, was clearly a fraud on the part of the Manager and after stealing them, he had misappropriated the same.

The learned counsel for the appellant-Bank has not disputed the findings given by the trial Court, referred to above, but has based his argument principally on the legal liability of an employer or principal for the fraudulant and criminal acts of the employee or the agent. It is argued that the acts of the Manager, which were responsible for the lockers being in a defective

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condition and for the loss of the valuables said to have been placed by the plaintiffs in those lockers, could not be said to fall within the ambit of section 238 of the Indian Contract Act, 1872, nor were they of such a nature as could be regarded to have been done in the course of his employment by the Manager. Now, there can be no doubt that the following matters stand fully established in the present case:—

(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.

(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 good and sound condition.

(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.

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

According to the learned counsel for the appellant, the Bank had never authorised Baldev Chand, Manager, to tamper with the locks of the lockers and to

rent them out in a defective condition and to steal and misappropriate their contents and it is argued that the Bank could not be held liable for the unauthorised and unlawful acts of its Manager. A good deal of reliance has been placed on *Oma Parshad* v. *Secretary of State* (1), in this connection. In that case, certain property, which was said to be stolen, was ordered to be placed in the *malkhana* by a Magistrate as it was required to be detained in connection with a case under section 411 of the Indian Penal Code. One Hamayun Akhtar, who was in charge of the *malkhana* where the property had been deposited for safe custody, absconded with it. The owner sued the Secretary of State for India in Council for making good the loss After referring to some English and Indian decisions, Addison and Din Mohammad, JJ. were of the opinion that the act of embezzlement by Hamayun Akhtar was not done in the course of his employment. It was a felonious act unauthorised by his employer and unlawful in its nature and his employer could not be held responsible. It was further held that no relationship of bailor and bailee ever came into existence. Even on the assumption that it was a case of quasi-bailment, it had not been proved that the Secretary of State did not exercise as much care of the property as a man of ordinary prudence would, under similar circumstances, have taken of his own goods. This case is clearly distinguishable on the short ground that the property alleged to have been stolen had been deposited in the *malkhana* under the orders of the Magistrate passed under the Criminal Procedure Code and it had come into possession of the servants of the Secretary of State in exercise of the rights vested in them under the Code. The main decisions on which the learned Judges relied referred to a very different set of facts. *Cheshire* v. *Bailey* (2), was itself distinguished in a recent decision of the House of Lords in *United Africa Company Limited* v. *Saka Owoade* (3), which will come up for discussion later. The reference to the decision of the Privy Council quoted from Smith's Law of Master and Servant is again not apposite. The Bankers were not held liable on the

(1) A.I.R. 1937 Lah. 572.
(2) (1905) I.K.B. 237.
(3) 1955 A.C. 130.

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ground that they were merely gratuitous bailees. The facts in *Lakhmi Das* v. *Babu Megh Raj* (1), were quite different as the articles were actually stolen from the defendants' shop and it was said that they had taken as much care of the articles bailed to them as an ordinary prudent man would, under similar circumstances, have taken of his own goods. It is not possible, therefore, to derive much assistance from the discussion and the observations in the Lahore judgment.

The next case on which reliance was placed by the learned counsel for the appellant-Bank is *Bombay Burmah Trading Corporation, Limited* v. *Mirza Mohamad Ally and the Burmah Company, Limited* (2). Their Lordships of the Privy Council, after referring with approval to the exposition of Willes, J. in *Barwick* v. *The English Joint Stock Bank* (3) and in *Mackay* v. *The Commercial Bank of New Burnswick* (4), expressed their inability to apply the principles laid down in those cases on the grounds that at the material time no relationship of employer and employee existed between the defendants and one Darwood. In *Barwick* v. *The English Joint Stock Bank* (3), 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 favour in payment for the oats supplied would be paid on receipt of the Government money in priority to any other payment "except to this 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 1,227 pounds; the Government money, amounting to 2,676 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

(1) 90 P.R. 1900.
(2) I.L.R. 4 Cal. 116.
(3) L.R. 2 Exch. 259.
(4) L.R. 5 P.C. 394.

dishonoured by the defendants, who claimed to retain the whole sum of 2,676 pounds in payment of J. D.'s debt to them. The plaintiff filed an action for false representation 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 aries whether the bank being the employer of the Manager would be answerable for it. Willes, 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 (Pauper)* v. *Grace, Smith & Co.* (1) 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

(1) 1912 A.C. 716.

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committed by its representative in the course of his employment. The following passage from the judgment of Earl 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 by 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., Earl of Halsbury observed that so far from giving any authority for the proposition in favour of which it was quoted, the Court went out of its way to disclaim there 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 *United Africa Company Limited* v. *Saka Owoade* (1), 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 that conversion took place in the course of their employment; the respondent was

(1) 1955 A.C. 130.

held liable to the appellant 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* (*supra*) was followed. *Cheshire* v. *Bailey* (1) on which the Lahore Bench had relied in *Oma Parshad's case* (2) was distinguished by the House of Lords on the ground that the criminal act of the servant had not occured 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. *Alimuddi* (3) Mookerjee, J. in an illuminating judgment discussed the entire case law on the point and after referring to *Gopal Chandra* v. *Secretary of State* (4) 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 whereby 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 mis-apprehension of the rule enunciated by Willes J. in *Barwick* v. *English Joint Stock Bank* (5), and particularly of

(1) (1905) I.K.B. 237.
(2) A.I.R. 1937 Lah. 572.
(3) I.L.R. 43 Cal. 511.
(4) I.L.R. 36, Cal. 647.
(5) L.R. 2 Exch. 259.

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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 *Lloyd* v. *Grace* (1)."

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 Saha* v. *Abdul Latif Molla* (2), 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 pricipal or 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 *Gopal Chandra* v. *Secretary of State* (3) and to a certain extend *Oma Parshad* v. *Secretary of State* (4).

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* (5), 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

(1) 1912 A.C. 716.
(2) 68 I.C. 439.
(3) I.L.R. 36 Cal. 647.
(4) A.I.R. 1937 Lah. 572.
(5) 233 Pacific Reporter 641.

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* v. *Riley* (1), the plaintiffs had deposited their valuable 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 circumtances 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 defence of the Bank that it could rest on the broad principle of landlord and tenant was rejected . The previous view taken in *National Safe Deposit Company* v. *Stead, Attorney-General* (2), was followed and the argument that since the bailor had the key of the box, its possession was with him and not with the Bank was repelled. 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 negatived by reference to *Citizens' Savings Bank* v. *Blakesley* (1), 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

(1) 175 N.E.R. 210.
(2) 95 N.E.R. 973.
(3) 42 Ohio. St. 645.

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or bad faith will be permitted to be shown in defence 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 person 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.

The learned counsel for the appellant relied on a term in the contract between the Bank and the

plaintiffs when the lockers were rented (Exhibit P.12 at page 194). Condition No. 17 is to the effect that "the company shall not be liable for any loss etc." This is a wholly vague and meaningless condition and it is not possible to see from it as to what kind of loss was meant by it. We cannot spell out of it any stipulation that the company was contracting out of liability for the fraudulent and dishonest acts of its employees. Actually, in the American cases, referred to before, it was observed that the banks could not contract out of such liability. In view of the discussion and the principles laid down in *Summan Singh* v. *The National City Bank of New York,* (1), such a contracting out may be possible but even condition No. 17 or any other condition in the contract does not justify such a conclusion.

The next submission on behalf of the appellant relates to the finding given by the trial Court on issue No. 9. There is a full and complete discussion of the evidence and other facts and circumstances on which it was found that the plaintiffs had suffered loss to the extent to which the suits were decreed. There can be no doubt that the plainiffs had adduced all the evidence that could in the very nature of things be produced in a matter like this and the learned counsel for the appellant has not been able to satisfy us that the appreciation of that evidence by the Court below is in any way defective or open to criticism. His sole attack was confined to one aspect of the matter. It has been urged that the lists of articles of jewellery which the plaintiffs claimed to have deposited in the lockers had been exaggerated inasmuch as the original lists which the plaintiffs claimed to have in their possession and which were prepared every time they operated upon the lockers, were not produced before the police along with the first information report which was lodged as soon as it was found that the articles had disappeared from the lockers. Plaintiff Sohan Lal Saigal, who appeared as C.W. 18, stated that the Station House Officer did not ask for the production of the original lists of the property in the lockers which had been prepared by the

(1) 1952 P.L.R. 102.

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plaintiffs for their private reference. Actually, as has been noticed by the trial Court, Shrimati Durga Devi, who appeared as C.W. 16 stated that she wanted to give the list in Gurmukhi (Exhibit C.W. 16/3) to the police at the time of making the first information report but the police said that they wanted a list of the stolen property only. These lists were subsequently produced in Court before the Magistrate in the criminal trial. The statement of the plaintiffs is corroborated by Shri Baij Nath (P.W. 9), who was the investigating officer in the criminal case (page 123). The learned counsel for the appellant has not been able to show that there was any discrepancy in the lists which were given at the time when the first information report was recorded and the so-called original lists which had been kept by the plaintiffs for their private record and which were produced later on at the trial except that in the lists given with the first information report, the names of jewellers, etc. were given But there was admittedly no discrepancy so far as the number and description of articles were concerned. The trial Court accepted the explanation given by the plaintiffs in the matter of non-production of the original lists at the earliest opportunity and we are satisfied that in view of the police not having demanded the same earlier, the plaintiffs were not bound to produce these lists along with the first information report. In any case, this fact alone will not take away the authenticity and veracity of the other evidence which had been believed by the trial court and against which the learned counsel for the appellant has not been able to point out anything. The finding arrived at must consequently be confirmed.

The trial Court found on issue No. 8, that the Bank had been guilty of gross negligence. The facts and circumstances on which the trial Court, based this decision have already been adverted to. There can be no doubt that the management of the Bank had been guilty of gross negligence in not ensuring that a proper control over the strong room and the lockers should be exercised in accordance with their own instructions and in allowing one individual alone to have sole charge of it. The learned counsel for the appellant has not been able to show how the

conclusion of the trial Court on this point is not correct.

A good deal of argument has been addressed to us on the first issue which is one of limitation. According to the appellant, it was Article 36 of the Indian Limitation Act, which prescribes a period of two years for bringing such suits from the date when the wrong was committed, which should have been applied instead of Article 95. Article 36 provides a period of two years for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for; whereas Article 95 relates to setting aside of decrees obtained by fraud, or for other relief on the ground of fraud, the period prescribed being three years from the date when the fraud becomes known to the party wronged. On the argument of the learned counsel for the appellant it is clear that if Article 36 does not apply, then the suit which was filed within three years from the date when the loss was discovered, would be within time. The sole reliance for invoking the applicability of Article 36 is on the averment in the plaint that there had been gross negligence on the part of the defendant-Bank. Now, the real case of the plaintiffs, as would be clear from the reference to the plaint in the suit of Sohan Lal Saigal and others, was that such lockers had been rented out, the levers of the locks of which had been filed off in such a manner that the plaintiffs could not have any knowledge thereof. It was the Manager who did and could have filed off the levers with the fraudulent intention of mis-appropriation and theft of the ornaments and jewellery etc. which may be placed in that locker (paragraphs 6 and 7). No watchman had been kept by the Bank to keep proper guard over the safe deposit value and the door of the corridor leading to it. The previous lock of the locker leased out to the plaintiffs had also not been got changed by the Bank prior to its being rented out to them as should have been done as a matter of normal prudence and caution. Then followed the following averment in paragraph 8:—

> "All this amounted to gross negligence on the part of the defendant Bank *qua* the renters

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of the lockers, and it was such as facilitated the commission of the above fraud on the plaintiffs culminating in theft and mis-appropriation of their valuables."

In paragraph 9 the list of the articles which had been stolen and mis-appropriated was given and it was pleaded:—

> "And as this loss has been occasioned by the fraud and mis-feasance on the part of the Bank's Manager, which had been facilitated by the gross negligence on the part of the Bank and its employees, the Bank is legally and equitably liable to make good the said loss to the plaintiffs. As the very name of the vault wherein the locker cabinets are kept, suggests, and also the very purpose for which the lockers are hired by the customers of the Bank implies the least that was expected and required of the Bank in the matter of renting out of its locker, was to give on rent only such lockers as had not been tampered with in any manner, and which would ensure full safety and security of their valuables to the renters, and the renting out of the locker No. 1651 in the above condition with the levers of the renter's part of its lock, filed off by the Manager, amouted to clear fraud on the part of its servant during the course and scope of his employment, and the Bank can on no account escape liability for the resultant loss."

The trial Court applied Article 95 on the ground that the suit was based mainly on allegations of fraud and the acts of negligence were alleged for the purpose of showing that the fraud by the Manager had been facilitated owing to those acts. This view appears to be justified from the pleadings and it is not possible to see how the suit would cease to be for a relief on the ground of fraud simply because, while giving particulars of fraud and other facts relevant thereto, allegations had been made of negligence

on the part of the Bank which helped and made the perpetration of the fraud possible. At any rate, it cannot be said that the suit is one for malfeasance, mis-feasance and non-feasance only so as to bring it within the ambit of Article 36. The learned counsel for the appellant referred to *Gour Mohun Gouli and another* v. *Dinonath Karmokar* (1), and our attention was also called to *Siddappa Nagappa Divate* v. *Vishvanathsa Ramchandrasa Kabadi* (2), and *Jamsetji Nassarwanji Ginwalla and others* v. *Hirjibhai Naoroji Anklesaria and another*, (3), but these had nothing to do with the applicability of Article 36. As a matter of fact, the only case which is relevant is the one relied upon by the trial Court, namely, *Dehra Dun Mussoorie Electric Tramway Company Limited* v. *Hansraj and others*, (4) The Dehra Dun Mussoorie Electric Tramway Company, had been floated by Bilti Shah Gilani, who acted as the managing agent. Later on the company went into compulsory liquidation. As a result of mis-feasance proceedings against Bilti Shah and the auditors, they were directed to make certain contributions. Bilti Shah was criminally prosecuted and sentenced to a term of imprisonment. One Raghu Mal carried on business in Calcutta and Delhi. Mela Ram was the managing agent in charge of the Delhi business. It appeared that Bilti Shah had converted certain large sums of money to his own use. The gravamen of the charge in the suit filed by the company was that Mela Ram had assisted Bilti Shah in concealing those embezzlements from the auditors. Liability was sought to be fastened on the representatives of Raghu Mal because Mela Ram was stated to have executed the receipts in exercise of his duty as the servant of Raghu Mal and had thus committed fraud in the course of his employment. The defendants pleaded that the suit was barred by limitation under Article 36. Allsop J. in his judgment declined to apply that Article and held that the suit was for a relief on the ground of fraud and Article 95 applied to it. It was also observed that Raghu Mal himself would have been liable for the fraudulent acts of Mela Ram if he

(1) I.L.R. 25 Cal. 49.
(2) A.I.R. 1943 Bom. 419.
(3) I.L.R. 37 Bom. 158.
(4) A.I.R. 1935 All. 995.

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had been alive. We cannot see how Article 36 can be applied to the present case. It would be properly governed by Article 95. If for some reason that Article cannot be made applicable, it is Article 120 alone which would apply, with the result that the period of limitation would be six years.

There is yet another reason for not applying Article 36. Admittedly the lockers had been leased out by means of agreement (Exhibit P. 12). It is clear from the nature of the contract that there was an implied condition 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. When defective lockers were rented out by the agent or servant of the Bank, there was a breach of that condition. Apart from that, if, as has been discussed before, the relationship of bailor and bailee came into existence by virtue of the contract between the parties in the course of dealings between them, then also it would be a case of liability on the basis of contract. Article 36 in terms applies only where any of the acts mentioned therein are independent of contract. It is well-settled that where the brach of duty alleged arises out of a liability independent 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 (*Jarvis* v. *Moy. Davies, Smith, Vanderwell and Company*, (1), and *Avaran Kutti* v. *Cheriyakkan and others*, (2). The trial Court was justified in saying that as one of the main complaints of the plaintiffs was that they had been given lockers which had been tampered with and which were unsafe, there was breach of duty of the Bank as under the agreement (Exhibit P.-12), it was bound to give safe and sound lockers. This also would rule out the applicability of Article 36. In *Rai Sahib Sahu Lala Jagdish Prasad* v. *Raghuvir and others* (3), the plaintiff sued

(1) (1936) I.K.B. 399.
(2) A.I.R. 1953 Mad. 480.
(3) 94 I.C. 336.

his occupancy tenants for cutting down trees which had been sold by them. As it was an act done by an occupancy tenant in excess of his right, Walsh J. held that it arose out of contract and the suit was for compensation for breach of an implied contract not specifically provided for in the Limitation Act, the implied contract being not to cut down the trees. Article 49 was applied in view of the facts of that case. In *Vairayan Chettiar and another* v. *Avicha Chettiar and others* (1), which was a suit for compensation against a person under section 235 of the Contract Act for untruly representing himself to be the authorised agent of another and thereby inducing the plaintiff to deal with him as such agent, the Court observed:—

> "Assuming that the action may be held to be one in tort, it is certainly not for a wrong independent of contract but one connected with a contract and arising from one of the incidents of a contract."

In this maner Article 36 was found not to apply. As the learned counsel for the appellant has not been successful in showing that the present suits were governed by Article 36, it cannot be held that they were barred by limitation even if they were not governed by Article 95.

No other point was pressed before, us, with the result that all the three appeals fail and they are dismissed with costs.

B.R.T.

CIVIL MISCELLANEOUS

Before D. Falshaw, C.J., and A. N. Grover, J.

SURJA,—*Petitioner.*

versus

THE FINANCIAL COMMISSIONER, PUNJAB AND OTHERS,—*Respondents.*

1961

Dec,, 18

Punjab Security of Land Tenures Act (X of 1953)—Section 14-A—Date for determining permissible area—Whether the date of the application.

(1) 21 I.C. 65.