

## FULL BENCH.

Before Bhandari, C. J., and Falshaw, and Bishan Narain, JJ.

UNION OF INDIA, PREVIOUSLY DESCRIBED "DOMINION OF INDIA",—Defendant-Appellant.

*versus*

FIRM BALWANT SINGH-JASWANT SINGH,—Plaintiffs-Respondents.

Regular Second Appeal No. 75 of 1951.

*Indian Independence (Rights, Property and Liabilities) Order, 1947, Act 8(1) (a)—Applicability of—Contract for the purposes of Dominion of Pakistan—Goods consigned by North Western Railway from Karachi to Peshawar—Non-delivery of Goods—Suit for damages—Whether Government of India, liable.*

*Displaced Persons (Institution of Suits) Act (XLVII of 1948)—Section 4—Proprietors of Plaintiff firm registered as refugees at Delhi, but residing and carrying on business at Dehradun—Suit instituted at Delhi—Delhi Court—Jurisdiction to entertain suit.*

*Code of Civil Procedure (Act V of 1908)—Sections 20 and 80—Railways Act (IX of 1890)—Section 77—Notice under section 80, Civil Procedure Code, and Section 77, Railway Act—Service of notice, whether constitutes a part of the cause of action.*

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On 25th February, 1947, a Karachi firm consigned goods by North Western Railway from Karachi to Peshawar. The consignor made himself the consignee and later on the R. R. was purchased by B. S. J. S. of Peshawar. The goods were never delivered. On 26th April, 1948, B. S. J. S. who after partition resided and carried on business at Dehradun instituted the present suit against the dominion of India at Delhi for damages for non-delivery.

*Held*, that the contract in the present case is one which is covered by the provisions of Article 8(1) (a) of the Order and that, therefore, no liability remained with the Government of India in respect of the contract.

*Held further*, that the Court at Delhi had no jurisdiction under the Displaced Persons (Institutions of Suits) Act XLVII of 1948, and the mere fact that the proprietors of the Plaintiff-firm had registered themselves in the first place as refugees at Delhi is of no importance, and in order to institute the suit at Delhi they had also to be either residing or carrying on business at Delhi when the suit was instituted, and clearly, they were both residing and carrying on business at Dehra Dun, and therefore, the Delhi Court had no jurisdiction to entertain the suit.

*Held also*, that the mere service of notice under section 80, Civil Procedure Code, and section 77 of the Railways Act, though no doubt an essential preliminary step for the valid institution of a suit, would not make the notices part of the cause of action for the suit itself.

(Case referred to Full Bench by the Hon'ble Mr. Chief Justice and Hon'ble Mr. Justice Falshaw, on 18th November, 1954, for decision).

*Second appeal from the decree of the Court of Shri Harbans Singh II, Additional District Judge, Delhi, dated the 15th day of November, 1950, affirming that of Shri D. R. Pahwa, Commercial Sub-Judge, Delhi, dated the 20th April, 1949, granting a decree for Rs. 2,135-10-0 with proportionate costs against the defendant and further ordering that the amount shall be paid within three months from the 20th April, 1949. The Lower Appellate Court ordered the parties to bear their own costs of his court.*

N. L. SALOOJA and K. C. NAYAR, for Appellant:

H. S. GUJRAL and A. C. HOSHIARPURI, for Respondents.

## ORDER.

BHANDARI, C. J. Two contrary views appear to Bhandari, C. J. have been expressed in regard to the interpretation of paragraph 8 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, one by the Calcutta High Court in *Nani Lal Roy v. Satyendra Nath Roy* (1), and the other in a decision of this Court reported as *Chaman Lal Loona and Co. v. Dominion of India* (2). In order to resolve the conflict which has arisen it would be desirable to refer this case to a larger Bench. We would order accordingly. This case will be heard at Simla.

## JUDGMENT.

FALSHAW, J. The facts giving rise to this second Falshaw, J. appeal which has been referred to a Full Bench are as follows. On the 25th of February, 1947, a Karachi firm consigned a case of sewing needles by the North Western Railway from Karachi to Peshawar City under Railway Receipt No. 152065. The consignor made himself the consignee but the railway receipt was ultimately purchased by the firm Messrs. Balwant Singh-Jaswant Singh, then of Peshawar. The case of needles was never delivered and on the 26th of April, 1948, Messrs Balwant Singh-Jaswant Singh, giving a Dehra Dun, address, instituted the present suit against the Dominion of India in a Court at Delhi claimed Rs. 2,500 as damages for non-delivery including the actual cost of the needles and also estimated profits.

The suit was contested on all possible grounds by the defendant who challenged the plaintiff's *locus standi* to bring the suit, denied the service of due notices under section 77 of the Indian Railways Act, and section 80, Civil Procedure Code, and raised the plea that the Delhi Court had no jurisdiction to entertain the suit. The liability of the Government of India for any damages was also denied.

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(1) A.I.R. 1952 Cal. 1

(2) A.I.R. 1954 Punjab 129

Union of India, The trial Court found that proper notices had  
 previously de- been served, and also found that the Delhi Court had  
 scribed jurisdiction on account of the fact that the proprietors  
 "Dominion of of the plaintiff-firm had registered themselves as re-  
 India " of fugees at Delhi and so were entitled to bring the suit  
 v. Firm Balwant in that place under the provisions of Act 47 of 1948.  
 Singh-Jaswant On the merits it was found that the consignment of  
 Singh needles was valued at Rs. 2,135-10-0 and that the  
 Falshaw, J. plaintiff-firm was the assignee for consideration of  
 the railway receipt. The liability of the Dominion of  
 India for payment of the damages due was upheld  
 under Article 9 of the Indian Independence (Rights,  
 Property and Liabilities) Order of 1947. Only the  
 plaintiff's claim for damages on account of estimated  
 profits was disallowed and the suit was decreed for  
 a sum of Rs. 2,135-10-0.

The appeal of the Government was decided by the Second Additional District Judge, from whose judgment it would appear that only two points were raised, before him, name'v. the question of the jurisdiction of the Delhi Court and the liability of the Government of India. On the question of jurisdiction the learned Additional District Judge found that the proprietors of the plaintiff-firm were not residing or carrying on business at Delhi, but at Debra Dun, and that the mere fact that they had in the first instance registered themselves as refugees at Delhi did not give the Delhi Court jurisdiction under the provisions of Act 47 of 1948. He found, however, that the notice under section 80, Civil Procedure Code, had been served on the defendant at Delhi and held on the strength of a decision of the Calcutta High Court that this formed a part of the cause of action and, therefore, gave the Delhi Court the jurisdiction. He agreed, however, with the trial Court that the Government of India was liable under Article 9 of the Indian Independence (Rights, Property and Liabilities) Order, of 1947, and he accordingly dismissed the appeal.

The case was primarily referred to the Full Bench for a decision on the proper interpretation of the appropriate portions of the Order of 1947. The relevant portions of Articles 3 and 9, read:—

- previously de-  
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- "8. (1) Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day,—
- (a) if the contract is for purposes which as from that day are exclusively purposes of Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and
- (b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council;

and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be.

\*   \*   \*   \*  
\*   \*   \*   \*  
\*   \*   \*   \*

- (6) The provisions of this Article shall have effect subject to the provisions of Article 9 of this Order; and bank balances and securities shall, notwithstanding that they partake of the nature of contractual rights, be dealt with as property to which Article 7 of this Order, applies.

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9. All liabilities in respect of such loans, guarantees and other financial obligations of the Governor-General in Council, of a Province as are outstanding immediately before the appointed day shall, as from that day,—

(a) in the case of liabilities of the Governor-General in Council, be liabilities of the Dominion of India;

\* \* \* \*

\* \* \* "

The question whether the liability for damages on account of non-delivery of goods entrusted for consignment to a State Railway amounts to one of the "other financial obligations" coupled with loans and guarantees in Article 9 appears to be settled once and for all by the decision of the Supreme Court in the case of *The State of West Bengal v. Seraj-uddin Batley* (1). The facts in that case were that a portion of a certain building in the city of Calcutta had been taken on lease by the Government of United Bengal before the partition for use as a hostel for the students of a medical school, and in May, 1948, the owner of the premises brought a suit in the Calcutta High Court on the original side against the Government of West Bengal for the recovery of the sum due as rent from February, 1947, to January, 1948. The suit was decreed by the learned Single Judge, who held that the case was covered by the provisions of Article 8(2)(a) which reads—

"Any contract made on behalf of the Province of Bengal before the appointed day shall,

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as from that day, are exclusively purposes of:—

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- (a) if the contract is for purposes, which, as from that day are exclusively purposes of the Province of West Bengal, be deemed to have been made on behalf of that Province instead of the Province of Bengal;

\* \* \* \* \*

This decision was upheld by Harries, C.J., and Banerjee, J., in Letters Patent Appeal, The West Bengal Government appealed to the Supreme Court, before which it was conceded that in the absence of anything else the case would be wholly covered by Article 8(2)(a), but it was contended that by virtue of Article 8(6), that Article was to have effect subject to the provisions of Article 9. The point was dealt with as follows by S. R. Das, J., who delivered the judgment of the Court:—

“The argument before us has been confined only to the interpretation of Article 9. The learned Advocate-General contends that the liability to pay rent under the lease comes within the expression ‘other financial obligations’ to be found in that Article. According to him all obligations to pay money under a contract whether by reason of covenant to pay money or by way of damages for breach of contract may be properly described as ‘financial obligations’. It is no doubt true an obligation to pay money under a contract or for breach

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therefor, is in a sense a 'financial obligation' but the question is not what may popularly be described as 'financial obligation' but what is the meaning of the expression 'other financial obligations' in the context in which it has been used. To accept the argument of the learned Advocate-General will be to rob Article 8 of practically the whole of its content excepting claims for injunction or specific performance of the contract or the like. Such, we apprehend, could not have been the intention of the framers of that Article. This difficulty does not arise if the expression be construed *ejusdem generis*, for so construed it implies an obligation in the nature of an obligation in respect of loans and guarantees incurred or undertaken by the State as held by Harries, C.J., in *Province of West Bengal v. Midnapur Zamindary Co., Ltd.* (1), which has been followed by Chunder, J., in *Iswar Madan Gopal Jiu v. Province of West Bengal* (2), and by Kapur, J., in *The State of Punjab v. Mohan Lall* (3).

The phrase 'loans, guarantees and other financial obligations' occurred in section 178 in Part VII of the Government of India Act, 1935, and there cannot be any doubt that those expressions used in that section did not refer to all and sundry pecuniary obligations of the State arising out of contracts of every description. The loans and guarantees there referred to mean, it would seem, the special kinds of contracts relating

(1) A.I.R. 1950 Cal. 159  
 (2) A.I.R. 1950 Cal. 463  
 (3) A.I.R. 1951 Punjab 382



to State loans and State guarantees. In that context 'financial obligations' would mean obligations arising out of arrangement or agreements relating to State finance such as distribution of revenue, the obligation to grant financial assistance by the Union to any State or the obligation of a State to make contributions and the like. It is, however, not necessary or desirable to attempt an exhaustive definition of the expression 'financial obligations'. The Court will have to consider in each case whether a particular obligation which may be the subject-matter of discussion falls within the expression 'financial obligations' within the meaning of Article 9. Whatever liabilities may or may not come within that expression we are clearly of opinion, in agreement with the High Court, that the liability to pay rent under a lease certainly does not come within that expression."

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It will be seen that although in the last portion of this passage the matter has to some extent been left open for future consideration as and when the point arises, I do not think there can be any doubt that a claim of the present kind for damages for non-delivery of goods entrusted to a Railway is even more remotely removed from the scope of 'other financial obligations' in the light of these remarks than a claim for rent directly payable under a contract.

The question, therefore, arises whether the present claim can be brought within the scope of Article 8(1)(b), rather than Article 8(1)(a), within which it would appear to fall. There is undoubtedly one

Union of India, decision in a similar case which supports the plain-  
 previously de- scribed tiff's case on this point. This is the decision of Rox-  
 " Dominion of burgh, J., in *Union of India v. Loke Nath Saha* (1).  
 India " That related to a case of an action for damages for  
 v. short delivery of goods despatched in March, 1947,  
 Firm Balwant by the Bengal Assam Railway, both the stations con-  
 Singh-Jaswant concerned now being situated in Pakistan. The matter  
 Singh was dealt with by Roxburgh, J., as follows:—  
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“The question is whether under the Order the Dominion of Pakistan or the Dominion of India is to be held liable for the alleged short delivery if it is found that the plain-tiff has a legal claim on whichever is in law responsible. The Dominion of Pakistan will be liable under the provisions of Article 8(1)(a) if as from the appointed day the contract is for purposes which as from that day are exclusively the purposes of the Dominion of Pakistan. But I am quite unable to see how it can be said that the contract for carriage of goods in March, 1947, before the Dominion of Pakistan, was ever thought of can be held as from the ‘appointed day’ to be one that is for purposes which from that day are exclusively the purposes of the Dominion of Pakistan.

A similar question was considered in the case of the *Province of West Bengal v. The Midnapur Zamindary Co.* ( 2 ), in reference to the interpretation of Article 8(2) of the Order. In that case the contract in question was a lease of a certain house which was used as a hospital, the lease continuing in effect after the ‘appointed day’ and the finding being that the hospital after

(1) A.I.R. 1952 Cal. 140  
 (2) 54 C.W.N. 677

that day was entirely for purposes of West Bengal. The facts, therefore, are entirely different from those in the present case. In that case it was held that under Article 8(2)(a) the contract was one which made the Province of West Bengal liable.

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In deciding the matter one has to be guided practically entirely by the exact words used. Reference to the other provisions of the Order are not very helpful, though some reference was made in course of the argument. The division of rights and liabilities made by the Order is provided for according to different categories in Articles 8, 9, 10 and 11 a different system being followed for each category according to its particular nature. It is not possible, in my opinion, to discover any basic principle behind the particular system adopted in each case from which it might be argued that the exact wording, for example, of Article 8(1)(a), might not be taken to be precisely what it appears to be on a plain reading. On a plain reading of the Article, as I have said, it seems to me clear that Article 8(1)(a), does not cover the particular contract in question in this suit. Therefore, the liability on the contract must be as provided in the residual provision 8(1)(b), namely, the liability of the Dominion of India."

Falshaw, J.

If one considers Article 8(1)(a) simply by taking its words in a loose and popular sense, it is certainly difficult to say that a contract relating to the carriage of goods sent by one private person to another, although the Railway on which the goods were sent

Union of India, is entirely situated in what is now Pakistan, is a contract exclusively for purposes of the Dominion of previously described "Dominion of Pakistan, and this, it would appear, is exactly the error into which the learned Judge has fallen in the above, case. As, however, pointed out by S. R. Das, J. in the Supreme Court decision cited above, what is necessary in deciding these matters is not to consider what the words might be thought to mean by any layman but to consider their legal meaning in the context in which they are employed. It may be pointed out at once that in a subsequent decision a Division Bench of the Calcutta High Court in *Krishna Ranjan Basu v. Union of India representing Eastern Railway* (1), Das Gupta and Debrata Mookerjee, JJ., have overruled the decision of Roxburgh, J. The case was again one relating to goods consigned on the Bengal and Assam Railway in November, 1946 from and to places now in Pakistan, the suit being for damages for non-delivery. The learned Judges have expressly dissented from the decision in *Union of India v. Loke Nath Saha*, (2), and they held that in case of goods booked with a Railway the purpose of the contract as used in paragraph 8 of the Indian Independence (Rights, Property and Liabilities) Order, 1947, was the carriage of goods and where the destination was some point in Pakistan, the purpose was the purpose of Pakistan. Incidentally the learned Judges rejected the contention that the purpose of the contract was the earning of profit. Another case which has been cited is *Chaman Lal Loona and Co. v. Dominion of India* (3). The appellant in that case was a contractor who had entered into a contract in 1945 for the supply of fodder to the Military Dairy Farm at Lahore. The contract contained an arbitration clause which the contractor

(1) 59 C.W.N. 99

(2) A.I.R. 1952 Cal 140

(3) A.I.R. 1954 Punjab 129

sought to enforce against the Dominion of India, Union of India, in a Court at Ferozepore after the partition. It previously de- was held by Khosla and Harnam Singh, JJ., that "Dominion of scribed India" this contract was wholly for purposes of the "Dominion of India" v. Firm Balwant Singh-Jaswant Singh with the Dominion of India. On the facts of that case this decision appears to be inevitable, but one passage in the judgment of Khosla, J., is of some interest in the present case. This passage reads—

"An argument urged at the Bar was that Article 8 (1) applies to executory contracts and not executed contracts. This contention, however, is without any force as even a cursory examination of the phraseology of Article 8 will show that if any liability under a contract remains undischarged the question of allocating this liability arises and it necessarily follows that the contract is alive and enforceable. If a contract is completely executed no dispute under it can arise. For determining which of the two Dominions must undertake the liability under the contract must be deemed to have been made on 15th August, 1947. The purpose of the contract must then be determined, and if that purpose is the purpose of Pakistan, then the liability will be that of the Dominion of Pakistan, otherwise the liability will be of the Dominion of India."

If this test is applied to the present case, there can be no doubt that the contract would be one wholly for the purposes of the Dominion of Pakistan.

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Much the same view was expressed by Chagla, C. J., (Tendolkar, J. concurring) in the case of *The Union of India v. Chinubhai Jeshinbhai and others* (1). The facts in that case were that the plaintiffs residents of Baroda in March, 1947, purchased from the Government of India considerable quantities of longcloth which were lying at the Ordnance Parachute Factory at Lahore. For various reasons they were not able to obtain delivery before the 15th of August, 1947, and thereafter they brought a suit against the Union of India for damages. It was held that on a true construction of both the Independence Act and the Indian Independence (Rights, Property and Liabilities) Order, 1947, it was clear that when it was found that there were goods originally belonging to the Government of India lying at a place which formed part of the Dominion of Pakistan on August 15, these goods fell under the control of that Dominion and that Dominion was entitled to exercise rights of ownership with regard to those goods and that when a contract had been entered into with respect to those goods prior to the 15th of August 1947 all liability in respect of that contract devolved upon the Dominion of Pakistan, and any rights that a citizen in India had in respect of that contract could only be asserted against the Dominion of Pakistan and not against the Dominion of India. The following passage appears at page 16 in the judgment of Chagla, C. J.—

"Therefore, Article 8 (1) deals with contracts which were entered into on behalf of the Governor-General in Council before 15th August, 1947, and the provision was that if the contract was exclusively for the purposes of the Dominion of Pakistan, then the contract was

(1) A.I.R. 1953 Bom. 13

deemed to have been made on behalf of Union of India, the Dominion of Pakistan. Therefore, previously described it is clear that although in fact the "Dominion of Governor-General in Council might India" have entered into a contract with a citizen of India and although he may have undertaken liabilities under that contract and although certain rights might accrue to the citizen under that contract, if the contract was found to be on 15th August, 1947, exclusively for the purposes of Pakistan, then the contract was deemed to be a contract made by the Dominion of Pakistan. Therefore, the actual making of the contract by the Governor-General in Council prior to 15th August, 1947, was immaterial. What was material was whether on 15th August, 1947, it could be considered that the contract was for the purposes of the Dominion of Pakistan. If it was for the purposes of the Dominion of Pakistan, that it became a contract made by the Dominion of Pakistan and all rights and liabilities which might have accrued or which may accrue in future in respect of such contract would accrue to the Dominion of Pakistan again notwithstanding the fact that the contract was originally entered into by the Governor-General in Council."

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Agreeing respectfully with these views I am of the opinion that the contract in the present case is one which is covered by the provisions of Article 8 (1) (a) of the Order and that therefore no liability remained with the Government of India in respect of the contract.

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Although the case was primarily referred to a Full Bench for a decision on the point discussed above, it was not specifically so stated in the referring order, and on behalf of the Government the decision of the lower appellate Court on the question of the jurisdiction of the Delhi Court has also been attacked. On this point I am in full agreement with the learned Additional District Judge on the point that no jurisdiction was conferred on the Court of Delhi by Act 47 of 1948. The mere fact that the proprietors of the plaintiff-firm had registered themselves in the first place as refugees at Delhi is of no importance, and in order to institute the suit at Delhi they had also to be either residing or carrying on business at Delhi when the suit was instituted, and clearly they were both residing and carrying on business at Dehra Dun. I do not, however, find it possible to agree with his view that the mere service of the notice under section 80, Civil Procedure Code, at Delhi constituted part of the cause of action and therefore, gave the Court at Delhi jurisdiction. This view was based on that expressed by Harries, C. J., and Chakravartti, J. in *Dominion of India v. Jagdish Prosad Pannalal* (1). In that case two Railways were involved, and it was held that the service of a notice under section 77 of the Indian Railways Act and section 80, Civil Procedure Code, at the Head Office of the Bengal Nagpur Railway at Calcutta constituted a part of the cause of action and gave the Small Cause Court at Calcutta jurisdiction to entertain the suit. This view, however, was recanted by Harries, C.J., himself in the case *Bansi and others v. Governor-General of India in Council* (2) in which it was held by a Full Bench of three Judges including Harries, C. J.,

(1) A.I.R. 1949 Cal. 632

(2) A.I.R. 1952 Cal. 35 (F.B.)



that the service of a notice under section 77 of the Railways Act did not constitute a part of the cause of action and confer local jurisdiction on the Court where the office receiving the notice was located. The main judgment was delivered by Das, J. and Harries, C.J., merely wrote a brief judgment in which he stated that he was fully satisfied that the view taken in the case of *Dominion of India v. Jagdish Prasad* (1), to which he was a party, was erroneous, and on further consideration he found himself in entire agreement with the view expressed by his brother Das.

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Apart from the views of the Calcutta High Court on this matter, a similar view has been taken by both the High Courts of Madras and Bombay. In *Azizuddin and Company v. The Union of India* (2), Rajamannar, C.J., and Rajagopala Ayyangar, J. have held that a statutory notice required by the provisions of the Railways Act as well as the Code of Civil Procedure, though no doubt an essential preliminary step for the valid institution of a suit, would not make such a notice part of the cause of action for the suit itself, and it is an essential preliminary step and no more. This view has been expressed in almost identical words by Gajendragadkar and Vyas, JJ. in *Bata Shoe Co. Ltd. v Union of India* (3), I am therefore of the opinion that it ought to have been held that the Delhi Court had no jurisdiction to entertain the suit.

One other point has been raised on behalf of the respondent, namely that appeal of the Union of India in this Court is barred by time. It appears that the appeal was filed within time on the 12th of March, 1951, but without a certified copy of the

(1) A.I.R. (36) 1949 Cal. 622

(2) (1955) M.L.J. 316

(3) A.I.R. 1954 Bom. 129

Union of India, judgment of the trial Court. This copy was filed previously de- on the 14th of March and an application was made scribed for extending the time on the grounds that the "Dominion of India" of copy had been applied for in November, 1950, and had not been received up to the day when the ap- v. peal was filed, and although the copy became ready Firm Balwant Singh- for delivery from the Copying Department at Jaswant Singh Delhi on the 11th of March, 1951, it was only re- Falshaw, J. ceived by post by counsel at Simla on the 14th of March and it was filed the same day. In the circumstances I am of the opinion that there is sufficient ground for condoning the delay and extending the time. The result is that I would accept the appeal and dismiss the plaintiff's suit but in the circumstances leave the parties to bear their own costs throughout.

Bhandari, C. J. BHANDARI, C. J. I agree.

Bishan Narain, J. BISHAN NARAIN, J. I agree.