MANU/DE/0005/1976

Equivalent Citation: AIR1976Delhi115

IN THE HIGH COURT OF DELHI

Suit No. 291 of 1966

Decided On: 17.07.1975

Appellants: **Gopal Singh Hira Singh**
Vs.
Respondent: **Punjab National Bank and Ors.**

Hon'ble Judges/Coram:
H.L. Anand, J.

Counsels:
For Appellant/Petitioner/plaintiff: Shiva Charan Singh and A.L. Kapur, Advs

For Respondents/Defendant: R.M. Lal, Sr. Adv. and Arun Mohan, Adv.

ORDER

1. The plaintiff, a partnership firm, sues the defendant, a nationalized bank and successor -in - interest of a banking company, for the recovery of Rs. 2,19,411/-, being the balance of the value of the goods belonging to the plaintiff which were in the possession of the defendant at the end of August, 1947 in the territories now forming part of Pakistan, on the allegations that the plaintiff opened with the Jahania office of the erstwhile Punjab National Bank Limited, a cash credit account in 1946 with a limit of Rs. 12,00,000/- and by way of security for the loan proposed to be advanced, the plaintiff pledged with the said bank stocks consisting of Kappas, cotton seeds, cotton seed cakes and cotton seed oil etc. According to the plaintiff, the cash credit agreement entered into between the parties on October 23, 1946, inter alia, provided that the goods pledged would remain in the exclusive possession and under the exclusive control of the bank-, that a margin of 20 to 30 per cent in favor of the bank would always be maintained; and that the' plaintiff would insure the stock against all risks and if the plaintiff made default, the bank would get the necessary insurance effected to the debit of the plaintiffs account with it. It is further alleged that as a result of the disturbances in the then West Punjab in March, 1947, the Bank called upon the plaintiff to get the stock insured against riot and civil commotion on which the plaintiff insured the said goods in the sum of Rs. 2,80,000/- with Lloyds of London for one year from May 5, 1947 to May 5, 1948; that the account was operated by the plaintiff until August 21, 1947 when the value of the stock according to the figures given in the stock report of the bank's go down keeper and counter-signed by its manager stood at Rupees 2,16,302/- although the actual value of the stock would be to the order of Rs. 2,40,000/-; that on account of further production, the value of the stock rose to Rs. 2,58,000/-; that notwithstanding the responsibility of the bank to take due care of the pledged goods, the bank never sent any information to the plaintiff as to the conditions at Jahania although the bank had been functioning in Multan district throughout the material period and was aware of the whereabouts of the plaintiff firm and of its principal partners; that in 1949, the plaintiff came to know that the bank had given credit to the plaintiff in the sum of Rs. 38,589/- on account of the sale proceeds of the part of the pledged goods but the bank gave no information to the plaintiff as to what

had happened to the rest of the goods; that the plaintiff, however, learnt some time in 1966 that the bank was claiming that the goods pledged with it other than the stock sold had been plundered or destroyed by the rioters in the course of the riots as a sequel to the partition of the country in August, 1947; that the plaintiff informed the insurers who, expressed their inability to accept any liability and sought from the plaintiff an Explanation as to why there had been a delay of 2-.1 years in reporting the loss; that on this, the plaintiff sent a communication to the bank at its Delhi office asking for its Explanation as to the circumstances in which no claim had been filed with the insurers and requiring the bank to establish that the goods had been actually looted and claiming that the bank would be liable to the plaintiff for the loss. The suit was, however, filed against the banking company but on the nationalisation of the aforesaid bank, its successors-in interest, the nationalised bank was substituted for it as the defendant. Lloyds of London were originally impleaded as defendant No. In the suit but the suit against them was eventually withdrawn.

2. The suit was contested by the bank by way of preliminary objection, it was alleged that the plaint in its present form could not proceed to trial; that the suit having been dismissed against the insurers, their name could not be allowed to continue in the title of the plaint; that pursuant to the dismissal of the suit against the insurer, the plaint was liable to be suitably amended; that the suit was not maintainable by virtue of the fact that the bank had already obtained a decree against the plaintiff from a Pakistan Court and the matters directly in is-sue in suit were adjudicated upon between the parties by the said Court, the judgment being conclusive between the parties; and that Pran Nath because the stock had been "hypothecated by the plaintiff with the answering defendant, were as a result of a three party agreement namely the plaintiff, this defendant and Mr. Pran Nath Lamba (Guarantee Broker)" and that the stock in question continued with the plaintiff and the said guarantee broker subject to the control of the bank "in a limited manner" (sic). On the merits of the claim, it was not disputed that the plaintiff had opened a cash credit account with the bank in terms of the agreement signed between the parties; and that stocks belonging to the plaintiff were pledged by way of security. It was, however, alleged that the securities, though pledged with the bank, were "equally in possession of the plaintiff " and were required to be so in the terms of the agreement and that it was the duty of the plaintiff to submit a daily report to the bank containing the details of the stock. It was further alleged that the daily statement had to be verified as correct by the plaintiff and the godown-keeper and the physical possession of the goods pledged was always as much that of the plaintiff and the godown-keeper, a nominee of the guarantee broker, as that of the bank. It was, however, not disputed that the godown-keeper duty was to see subject to the control of answering defendant's Manager" that the plaintiff did not remove any goods out of the pledged stocks without depositing in the bank the value of stock removed. It was not disputed that the plaintiff operated, the cash credit account but it was denied that the pledged stocks exceeded the amount of indebtedness by 20 to 30 Per cent as alleged by the plaintiff and it was contended that the "requisite margin was not always maintained." It was contended that the insurance policy had to be taken out it is the name of the plaintiff and the bank jointly or in the name of the bank only and that the plaintiff did not perform its duty and the consequences for non-insurance in the manner agreed upon recoiled on the plaintiff firm and that the bank was unaware of the plaintiff having obtained any insurance in respect of the goods pledged. It was further contended that the plaintiff had neither informed the bank of the insurance nor had it delivered the policy to the bank. In the alternative, it was submitted that even if the plaintiff had taken out the insurance policy, the same having not been taken out in the manner agreed upon and no, information of insurance having been given to the bank, the goods would be deemed not to have been insured at all. The averments in the plaint

with regard to the true value of the pledged stocks were disputed and it was contended that the stock report having been prepared by the plaintiff did not bind the bank. It was further alleged that the bank's branch at Jahania had to be closed down on account of unprecedented communal disturbances, civil commotion, murders and riots on a vast scale at Jahania and the rest of West Punjab which broke out as a sequel to the partition of the country in August 1947 and that the nom Muslims of the areas, including the staff of the bank's branch at Jahania, had to flee en-mass and the branch had to cease functioning and that the conditions prevailing at Jahania were as much within the knowledge of the plaintiffs,. their agents and their staff working at Jahania, where the pledged goods were stocked, as of the bank, and that the news of the happenings in Jahania and in the neighbour hood had reached the plaintiffs agents and the staff of the bank simultaneously and the situation was discussed between the parties every moment and both the parties agreed that the situation was extremely dangerous to life and property and wholly beyond the control of both the parties. The bank accordingly denied its liability to inform the plaintiff of the conditions at Jahania. It was further alleged that to the best of the information of the bank, "the stock of goods belonging to the plaintiff had been taken possession of by the Dy. Custodian of Evacuee Property, Multan", and that this fact was "within the knowledge of the plaintiff or at least which should have been known to the plaintiff." It was denied that the bank had sold any part of the pledged goods but pointed out that to the best of the information available to the bank, what happened to the goods was set out by the bank in paragraph 6 of its plaint in the suit instituted by it in Pakistan. The said paragraph which is quoted in extenso in the written statement is in the following terms:-

> That the goods pledged by the defendants were lying at Jahania in the factory of the defendants and in the locked godowns, situate therein under the care of the plaintiff bank's godown-keeper and defendants' care-takers and watchmen guarding the said factory. There were unprecedented riots and disturbances at Jahanla and all over the West Punjab as a sequel to the partition of the country in August 1947. The plaintiff bank's staff had to flee along with the mass migration of non-Muslims from that area and thus the plaintiff bank's Jahania Branch hike some other branches ceased functioning.
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> Thereafter on enquiry regarding the position of the said pledged stocks the bank came to know that the same had been taken possession of by the Dy. Custodian, Evacuee Property, Multan. A sum of Rs. 38,589/1l/- had been recovered from the said Deputy Custodian as sale proceeds of a part of the stocks taken by him. Ibis amount has been given credit to the stocks taken by him. This amount has been given credit to the defendant's account regarding the balance, the bank's claim is still pending. If any amount is recovered the same will be duly given credit to the defendant's account in reduction of their liability. Thus the plaintiff bank has been deprived of the entire pledged security due to the action of the Government Officials and for reasons beyond the control and power of the bank and not due to any default of its own."

It was further alleged that the plaintiff through out knew fully the correct position and the plaintiff had been duly served with the plaint and had appeared through its counsel. It was denied that the bank had ever stated that the goods pledged had been plundered or destroyed by the rioters and it was pointed out that in terms of the cash credit agreement, the plaintiff had agreed, inter alia, "to absolve the bank from all liability in case the said pledged goods were destroyed or lost by theft or by any other means and had agreed that the bank would not be liable in case the same were damaged or lost by force major, that is, by an act of God, for example, by rainfall, storm, or by enemy

action, internal commotion etc. etc." With regard to the allegation of the responsibility of the bank to take care of the goods, it was contended that the possession of the goods was that of the plaint and the guarantee-broker as much as of the bank and that in any event, in the state of complete law , that prevailed in the whole of West Punjab with the consequent threat to life and property, the property of the bank as also the property pledged with it, "had to be left behind, in properly locked godowns and after having taken as much care as was possible under the circumstances." It was further contended that the bank had no control over the circumstances and "according to law and agreement, the answering defendant is immune from all liability in this matter and is not answerable to the plaintiff for the pledged stock even if it had been destroyed by the rioters or looted (although according to the information the plaintiff were not the subject of loot or plunder)." It was further alleged that by giving up its claim against the insurers, the -plaintiff had absolved the bank from all liabilities and that in any event no claim could be made against the bank "unless he makes good the amount due to the answering defendant on account of advances made by the answering defendant to the plaintiff on the security of the pledged goods" and that even in the impossible event of any claim being decreed in favor of the plaintiff, "the same must, in equity, be set off against the amount which would be due from the defendant to the plaintiff on the basis of the above-said loaning documents". The amount due to the bank was estimated at Rupees l,857-70 as on the date of the written statement. It was finally alleged that on account of the decree having been passed by a Court of a competent jurisdiction in respect of the subject-matter of the suit in favor of the bank, the suit was not maintainable.

3. By its replication, the plaintiff, by and large, reiterated the allegations made in the plaint and contented the contentions raised by the bank in its written statement.

4.On the pleadings of the parties, following issues were framed on 8-4-1964:

1. What were the terms of the cash credit account opened by the plaintiff with the defendant bank? O. P. parties.

2. What was the quantity and the value of the plaintiffs goods pledged with the defendant bank? O. P. P.

3 . Whether the pledged goods were taken -possession of by the Deputy Custodian of Evacuee Property, Multan? If so, what effect? O. P. D.

4. Whether the good in dispute were in joint possession of the defendant bank -and the plaintiff? If so what effect? 0. P. D.

5. If issue No. 3 is not proved whether, the defendant bank is not liable to account for the pledged goods and to pay its price to the plaintiffs? O. P. D.

6. If issue No. 3 is held for the defendant bank, whether the defendant bank is guilty of negligence and whether they am liable to account for the goods and to pay their price? O. P. P.

7. Whether this suit is not maintainable? 0. P. D.

8. Whether Re. 1,98,857-70 was due from the plaintiff to the defendant bank in the cash credit account as alleged in paragraph 22 (a) of the written statement and if w, whether they are entitled to a set off in respect thereof in this suit? 0. P. D.

9. Whether the defendant bank can claim a set off without payment of court fees? 0. P. D.

10. Whether the defendants' claim of set off is within time? If not what effect? 0. P. D./P.

11. Whether paragraphs 21 (a) and, 22 (a) of the written statement dated 9-3-1964 are unauthorised? If so, what effect? 0. P. P.

12. Whether the written statement dated 9-3-1964 is not properly verified and, what effect? 0. P. P.

13. Whether any, and if so, which, of the party is entitled to special costs and what amount? 0. P. P.

14. Relief.

5. In support of their respective contentions, the parties led both oral and documentary evidence. After the through the records and the written arguments, it appeared to me that the parties had neither placed any material before this Court am made any submissions in the written arguments, inter alia, with regard to the existence, and effect of Evacuee Property Laws in Pakistan and the impact of the take-over if any, of the pledged stocks by the Pakistan authorities permit to such law on the claim of the plaintiff I also, found a complete absence in the submissions made by the parties of the impact of the Displaced Persons Debts Adjustment) Act 1951 on the rights and obligations of the parties forming subject-matter of the suit. 1, Therefore, had the matter listed for further arguments and while supplementary written arguments were submitted on behalf of the plaintiff, Shri R. M. Lal, learned counsel for the bank contented himself by relying on the material and submissions already placed by him on the record and closed his case by a statement that be could not usefully add to the existing material or the written submissions,

6. 1 have gone through the records and have considered the written submissions made On behalf of the parties and examined the various questions of sets arising in the Proceedings. My conclusions on the various issues are as follows:-

Issue NO. 1

7. The question that requires consideration under this issue is as to the terms of the cash credit agreement entered into between the parties. In Paragraph 4 of the Plaint, the plaintiff referred to the cash credit agreement entered into between the partner an October 23, 1946 and purported to set out the three salient features of it in clauses (a), (b) and (c) of the paragraph. In paragraph 4 Of the written statement the bank, while admitting that a cash credit agreement Law been executed between the parties and the pledge of stocks pursuant to it, It was pointed out that clauses reproduced as (a), (b) and (c) in paragraph 4 of the plaint divorced from the context of the original agreement made an "imperfect reading of the conditions, of the contract between the parties,- It was, however, admitted that annexure 'A' to the written statement was a correct copy of the cash credit agreement. it was, however, pointed out that the securities though Pledged with the bank were equally in possession in plaintiff and were required to be so in terms Of the agreement, and that the margin envisaged in the agreement "Was never maintained." It was next pointed out that the insurance had to be effected by the plaintiff and the insurance policy had to be either in the name Of the bank or in the joint names of the Parties and the Policy and, the receipts for the Premia had to be

delivered by the borrower to the bank. it is apparently this divergence as to the true meaning and effect of the Various, clauses of the agreement which is the basis of this issue. The parties are, however, agreed that the agreement was proved at the trial and marked as Ex. D1/7 and that being so, there is very little scope for any dispute as to the true term and conditions of the agreement for a reference to this document would unmistakably indicate the terms of it. The agreement begin in writing, there was no question of any variation of it by the parties except by a subsequent agreement and no such subsequent agreement was pleaded. Learned counsel for the -plaintiff is right in his contention that by virtue of Sections 91 and 92 of the Evidence Act, there was no question of any material being placed on the record with a view to contradict, add or vary the terms of a written agreement nor was any attempt made on behalf of the bank to establish any such variation. That the issue was raised by the bank in a rather half hearted manner is clearly indicated by the written arguments filed on behalf of the bank in support of this issue. It only contains a bald statement that "issue No. 1 should be decided against the plaintiff and it be held that the plaintiffs have not, proved any terms of the Cash Credit Account." No attempt has, Therefore, been made to substantiate the pleas raised by the bank or to indicate why Ex. 131/7 is no proof of the terms and conditions of the Cash Credit agreement between the parties.

8. A reference to Ex. D 1/7 leaves no manner of doubt as to the terms and conditions incorporated in it. This agreement partakes the character of the usual document drawn between the bank and the borrower during the material period and, inter alia, provides for the pledge of goods by way of security for the amount to be advanced by the bank from time to time, the margin that must be maintained between the value of the goods and the amount of drawing, the manner in which the goods must remain under the lock and key of the bank through the godown-keeper, the liability of the borrower to submit reports with regard to the additions and withdrawals from the stocks pledged with the bank to enable the bank to verify through its godown-keeper. it must, however, be pointed out that in case of pledged goods, the goods are stored in the godown under the lock and key of the bank under the supervision of the bank's godownkeeper and the goods are undoubtedly in the' possession, physical and otherwise, of the bank and no withdrawals or additions of the, tocks are permissible without their permission. The position with regard to hypothecated goods is, however, different because these goods are strictly speaking not under the lock and key of the bank but are allowed to be kept at the factory or the premises of the borrower without any lock and key of the bank as such, but an supposed to be under the constructive possession of the bank by virtue of the deed of hypothecation which obliges the borrower to submit a regular return to the bank indicating the increase and decrease in the value of the said goods to enable the bank from time to time to determine the drawing of the borrower with regard to it. In law, however, there is no difference with regard to the legal possession of the bank. In both the cases, the goods are under the constructive possession of the bank where in the case of pledge they are also in the actual physical possession of the bank but in the case of hypothecated goods, they are in the actual physical possession of the borrower but subject to the restriction mentioned above. In a sense, the borrower in the case of hypothecated goods has actual physical possession of the goods as an agent, as it were, of the bank and in that limited sense the hypothecated goods are also not only constructively but actually in the possession of the bank.

9. Be that as it may, Ex. 131/7 being the cash credit agreement truly represents the terms and conditions agreed to between the parties and constitutes a repository of the rights and obligations of the parties under the agreement subject to the relevant provisions of the law in that behalf. The issue is decided accordingly.

Issue NO. 2

10. The question that requires consideration under this issue is as to the quantity and the value of the goods pledged by the plaintiff with the bank. This issue had its genesis in the allegation in the plaint that the value of the pledged goods in the possession of the bank at the end of August, 1947 was of the order of Rs. 2,58,000/- and that the plaintiff was entitled to recover from the bank the aforesaid value minus a sum of Rs. 38,589/- credited by the bank in the plaintiff's account on account of the amount realized by the bank either from the Pakistan authorities, as alleged by it, or as part of the sale proceeds, as is apparently contended by the plaintiff, entitling the plaintiff to Rs. 2,19,411. In its written statement, the contention as to the true value of the goods lying in pledge at the material date was denied. The bank, however, did. not give in its written statement what according to its record or estimation was the extent of or the value of the said goods and merely contented itself by a denial. The claim of the plaintiff that as on August 28, 1947, the value of the pledged goods in the possession of the bank was of the order of Rs. 2,58,000/- was sought to be substantiated by the oral evidence of P. W. 11, Ram Saran Dass, who was admittedly the bank's godown-keeper, in charge of the godown where the pledged goods were stocked during the material period; P. W. 12, Lakhpat Rai; P. W. 13 Gurmukh Singh Chawla, a partner of the plaintiff and Ex. P. W. 11/1; the last stock report, submitted by the bank's godown keeper on August 21, 1947.

(After discussion of this evidence His Lordship observed) :

> I, Therefore, see no reason -to reject the aforesaid oral and documentary evidence produced by the plaintiff and, Therefore, hold that as on August 28, 19,47, the value of the pledged goods in the possession of the bank was of the order of Rs. 2,58,000/- and decide issue No. 2 accordingly.

Issue NO. 3

11. The question for decision under this issue is whether the pledged goods had been taken possession of by the Deputy Custodian of Evacuee Property, Multan and if so, its effect. The issue is based on the plea of the bank in paragraph 12 of its written statement, which in terms purports to incorporate paragraph 6 of the plaint in the suit filed by the bank earlier against the plaintiff in a Multan Court. According to the allegations made in paragraph 6 of the aforesaid plaint, the pledged goods were lying at Jahania in the plaintiffs factory and in the locked godown situated within its precincts under the "care of the plaintiff bank's godown-keeper and defendants' care-takers and watchmen guarding the said factory"; that as a result of the mass migration of the Hindu population as a sequel to the insecurity of life and property in the wake of the partition of India, the staff of the bank had to flee and the various branches of the bank including the one at Jahania ceased to function; that on consequent enquiry, the bank came to know that the pledged goods had been taken possession of by the Deputy Custodian Evacuee Property. Multan; that a sum of Rs. 38,589/has since been recovered from the Deputy Custodian as sale proceed of part of stock of which a credit had been given to the plaintiff; that the claim for the balance was pending; that any further amount that may be received, would be credited to the account of the plaintiff and that "the -plaintiff bank has been deprived of the entire pledged security due to the action of the Government officials and for reasons beyond the control and power of the bank and not due to any default of its own." In its replication, the plaintiff admitted that the plaintiff came to know of the suit having been filed in Multan but did not submit to its jurisdiction. The plaintiff further pointed out a discrepancy between paragraph 6 of the

plaint filed in the Multan suit as extracted in the written statement and what was claimed by the plaintiff to be its correct reproduction in the replication. According to paragraph 6 of the said plaint, as claimed by the plaintiff, the pledged goods stored in locked godowns, compound and Railway Station "were in possession of the bank through the godown -keeper at Jahania"; and "the said goods were partly plundered and destroyed by rioting mobs in spite of care and precaution by the plaintiff bank partly seized and sold by the Custodian of Evacuee Property, Multan." The plaintiff also made an allegation in the replication that paragraph 6 of the Multan plaint as made out in the written statement was a result of a fabrication. The plaintiff also filed along with the replication what was described as "a copy of the original plaint."

12. This issue, of which the onus was on the bank, was sought to be substantiated in the course of the written arguments filed of behalf of the bank, solely on the ground that this Court should take judicial notice of the fact of the partition of the country, the insecurity of life and of property belonging to the Hindus and the mass migration of Hindu population as a sequel to it and that the properties belonging to the Hindus in West Punjab were taken possession of by the Custodian in West Pakistan. While this Court is entitled to take judicial notice of the factum of the partition of India, insecurity of life and property of the Hindu population in what is now Pakistan as well as the mass migration of the Hindu population to the territories now forming part of India, it is not possible to take any judicial notice either of the fact that the pledged goods in question were taken over as evacuee property or not or were subjected to loot or arson. The take over of the property by the Custodian had to be proved like any other fact. The evidence on the question is vague and insufficient.

(After referring to the evidence the Judgment proceeded).

It is, however, not possible to return on the existing material or by the aid of any judicial notice, a finding that the entire pledged goods had been taken over by the authorities in Pakistan. Having regard to the common course of events, however, it may be that a part of the goods had been subjected to loot, while part of it was taken over by the authorities.

13. The next question that arises is as to the effect of the take over of a part of the pledged goods. The bank pleads complete exoneration of all liability as a result of the take over by the Pakistan authorities of the pledged goods. In view of the finding that only a part of the pledged goods were taken over, the effect if any would have to be confined to that part. It was not disputed before me that if the Pakistan authorities had taken over the pledged property pursuant to any law which empowered it to take it over in exercise of its sovereign authority and such law, having regard to the similar enactment in force in India, was not opposed to public policy, the bank would be discharged of all its liability in relation to the property that was taken over. Unfortunately, for the bank, however, there is neither any proof that the Pakistan authorities took over part of the pledged goods in accordance with any law in force in Pakistan nor any material which may enable this Court to find out the provisions of such a law and to conclude that the law' could not be said to be opposed to public policy having regard to enactment of similar taw in India. To succeed on this question, the bank -had to prove, like any other fact, the existence of such a law in Pakistan, by producing and proving the Pakistan statute dealing with the matter. This is so because this Court is not entitled to take any judicial notice of foreign laws and all foreign laws required to be proved in a Court of this country must be proved like any other fact. In the absence of any such material even the partial take over by the Pakistan authorities of the pledged goods for which the bank received an amount referred to above, could

not exonerate the bank of its liability, if any, under the law to the plaintiff. The bank has miserably failed to place on record the necessary material to take advantage of the plea raised in the written statement and I have, Therefore, no hesitation in holding that although part of the pledged goods was taken over by the Pakistan authorities, it had no effect, on the existing material, on the liability, if any, of the bank to the plaintiff. Issue No. 3 is decided accordingly.

Issue NO. 4.

14. The question for consideration under this issue is whether the goods in dispute were in the joint possession of the bank and the plaintiff and if so, its effect. Ibis issue is based on the plea of the bank in its written statement that even though the goods were pledged with the bank, they were "equally in possession of the plaintiff firm and were also required to be so under the terms of the agreement and arrangement between the parties". The plea is in turn based on the allegation that the physical Possession of the pledged goods throughout remained with the plaintiff and the 'godown-keeper a nominee of the guarantee-broker, as of the answering defendant."

15. This issue, of which the onus was on the bank, was sought to be substantiated in the course of the written arguments by teamed counsel for the bank in the following manner.,

> "From the evidence produced by the parties, it is clearly proved that the goods in dispute were in joint possession of the parties and the plaintiffs own men used to look after the goods, and the goods were stored and kept in the plaintiff's own godowns and factory."

16. Learned counsel, however, did not refer either in his written arguments or in oral submission before me to any evidence, oral or documentary, which may indicate that " .goods, though pledged with the bank and kept in godowns bearing the lock and key of the bank, or any other -places but under the control of the bank, nevertheless, remain in or could be said to remain in the joint possession of the parties.

17. The plea on which this issue is based, to my mind, is most fantastic that could ever be raised by banking institution in respect of the pledged goods. It is well known that both conceptually and factually, the possession of the pledged goods is delivered to the bank without any transfer of property in the said by the act of pledge a two-fold special right on the pledge in the goods, namely, to hold the goods in possession and to dispose them of if the default is made in the payment of the money for which the -pledge is included to be the security. The standard cash credit agreement, which includes the provision for pledge and which is, the repository of all rights and obligations between the bank and the borrower clearly provides that the pledged goods would remain in possession of the bank even though they may-:be stored in the godowns which may even belong to the borrower or may be situated within the precincts of the factory of borrower but are under the lock and key of the bank. It is equally well known that the godowns as indeed the other Part of the factory where the goods may be shored remained under the care of a godownkeeper which is the employee of the bank although his salary may be debited to the borrower. It is equally well known that the involvement of a guarantee-broker or the mere payment Of the salary of the godownkeeper by the borrower does not either convert the guarantee broker as the borrowers agent or make the godown keeper the employee of the borrower. The provisions in the cash credit agreement Ex. DI/7 do not in any way represent a departure from the normal Practice obtaining in that behalf in this part of

the world. It is true that there is distinction between hypothecation of goods and pledge of goods, in that, the hypothecated goods need not be m the physical possession of the bank but may remain under the actual physical possession of the borrower with a view to enable the borrower to use the same ether as raw material or in the room of fabrication of goods or as finished goods. This is a facility granted to the borrower by the banking institutions so that the actual operations of the borrower are not affected. In such cases, the, borrower, is in actual physical Possession but the constructive possession a still of the bank because according to the deed of hypothecation, the borrower holds the actual physical possession not in his own right as an owner of the goods but as the agent of the bank. No attempt was made in the present proceedings to establish that any part of the pledged goods was in fact hypothecated in the sense that their actual Physical possession remained with the borrower A reference to the cash credit agreement Ex. DI/7 clearly bears out that the document incorporates a contract of pledge and the possession of the pledged goods was to be of the bank and remained in the various godowns, as indeed in other places, either under the lock and key of the bank or in the direct care of its godown-keeper.

18. I, Therefore, -have no hesitation iq holding that the pledged goods throughout were in the exclusive possession of the bank and under the direct care of the banks godown-keeper. The issue is decided accordingly.

Issues Nos.5 & 6

19. These issues can be conveniently discussed together as they raise the question, as to the extent of the liability of the bank to the plaintiff on account of the loss of the pledged goods, which appear to overlap. These issues arise, out of the plea of the bank. Ordinarily, the bank, having been entrusted with the custody of the Pledged goods, will be liable to account for it to the plaintiff and if it fails to properly account for it, to pay Me price thereof to the plaintiff. Issue No. 5 arises, out of the plea of the bank that in as much as the bank was bound to take such care of the goods as an ordinary prudent man in the circumstances would of his own property and in as much as in the extra ordinary situation that arose in the wake of the partition of India, complete lawlessness in the territories now forming part of Pakistan and insecurity of life and property of the Hindus and the consequent mass migration of the non-Muslim population to the territories now forming part of India, it was not possible for the bank to take any further steps to protect the pledged property and that the bank could not protect the property in spite of having taken all steps that a prudent person in the circumstances would have taken of his own property, with the result that the bank having discharged the obligation cast on it by law as a bailee of the goods, would not be liable to account for the pledged goods or to pay the price thereof to the plaintiff. It was further pleaded on behalf of the bank that the take over by the Deputy Custodian of the Evacuee Property, Multan of the pledged goods under the Pakistan law, extinguishes the liability of the bank but that plea has been dispelled by me while dealing with issue No. 3. Issue No. 6 arises the question as to the liability of the bank to account for the goods or to pay their price to the plaintiff and is based on the plea of the plaintiff that the bank failed to take much care of the pledged goods as a it was bound to take as a bailee or as an ordinary person would have taken of his own goods because in dealing with the pledged goods, die bank was guilty of negligence.

20. The question that, Therefore, requires consideration is whether in dealing with the pledged goods which were admitted in the possession of the, bank during the material period, the bank successfully discharged its obligation as a ballee by taking as much care of the goods as it would have as an ordinary prudent owner of it or in other words,

was the bank guilty of negligence in dealing with the matter. issue No. 6 is also based on the further plea of the plaintiff that even in the matter of take over of the pledged goods by the Deputy Custodian of Evacuee Property, Multan, the claim for compensation had not been properly followed by the bank and that the bank was, them fore, guilty of negligence in pursuing the matter with the Pakistan authorities.

21. The first question that, Therefore, requires consideration is the extent of the obligation of the bank to take care of the pledged goods and if the bank , while dealing with the pledged goods during the material period failed to discharge that obligation. Learned counsel for the plaintiff took considerable pains to define precisely the nature of the jural relationship between the parties with regard to the goods and the extent of the legal obligation cast on the bank to take care of the same and referred not only to the provisions of Sections 148, 151 and 172 of the Contract Act but sought support from a large number of Indian and English decisions touching the question of the legal obligation of a bailee vis-Ã -vis the subject-matter of bailment. It is, however, unnecessary to dilate On this aspect of the matter because it is well settled, and was not disputed on behalf of the bank, that by virtue 4 the provisions of Sections 148 and 172 of the Contract Act, the Pledge of the goods with the bank constituted the bank as a bailee and in terms of Section 151 of the said Act, the bank was 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, quality and value as the goods bailed.- The various decisions cited and the Bar on behalf of the plaintiff both in English and Indian Law were concerned with the application of the aforesaid Principle of the liability of a bailee and the extent of the care that he was bound to take Of the goods forming subject-matter of bailment were applied to the facts of the various cases. 71W decision in all these cases, Therefore, depended on the application of the well-known principle to the facts and circumstances of each case. it is, Therefore unnecessary to burden this judgment with any elaborate discussion of the facts of those cases or to recount the manner in which the Principle was applied to those facts and circumstances.

22. That, Therefore, takes me to that next question ' if ' having regard to the fads and the circumstances of this case, it could be said that the bank successfully discharged the obligation cast on it as a bailee or in other words, whether the bank took as much can of the goods as a man of ordinary prudence would in similar circumstances take of his own.

23. Considerable oral evidence has been led depicting generally the situation that obtained in what was then dominion of Pakistan including the district of multan is the wake of partition of India and the holocaust that followed, the setting 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 the 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 moveable 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 meager 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 left by the banking institutions, soon after the partition, the entire staff for shook 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 we subjected to the reason, 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 touchstone 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. Id that is what they did with respect to their own properties as indeed the blank and other in situations 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 nice 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 costing 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 take over process took some time 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 weight in a fine scale, the measures taken by a bailee and none of these cases would have, Therefore, any relevance to the extra ordinary 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.

24. The next question that requires consideration is as to whether the bank pursued with the necessary doggedness and thoroughness the claim with the Pakistan authorities for compensation for the part of the pledged goods that was taken over. Considerable stress was laid on behalf of the plaintiff on the various agreements entered into between the two dominions with regard to the take over and restoration of properties belonging to banking institutions on both sides; and it was argued, that the bank did not take effective steps either for the Presentation of the properties under these agreements or for payment of adequate compensation after they were taken over. It was, however, contended on behalf of the bank that in spite of their best effort, the bank was unable to find the precise position and was only able to get the information at some stage that the goods had been taken over by the Pakistan authorities and that the bank has been in correspondence with the Pakistan authorities with a view to obtain such compensation as the Pakistan authorities may be willing to pay. D. W. 2, Shri Mool Raj Tuli, who was working during the material time with the bank at Lahore, stated in his evidence that the Multan office of the bank had filed the claim for compensation regarding the goods that had been taken possession of by the Pakistan authorities. It is not in dispute that as a result of the claim, the amount referred to above, was received from the Pakistan authorities by the bank, a credit for which was given to the plaintiff. It is further stated on behalf of the bank that any further amount that may be received, would be similarly credited to the account of the plaintiff. I do not see what further steps the bank while dealing with the foreign Government could possibly have taken. The claim with regard to the goods of the plaintiff could not have been treated at a level different than the similarly situated properties of hundreds and thousands of other unfortunate persons who met the same fate as the plaintiff. It is well known that in spite of considerable efforts and even governmental pressure, very little relief could be obtained from the authorities in Pakistan. At a later stage, even the well-known agreement between the two Prime Ministers of the countries did not really result in any substantial relief to the affected persons. It is, Therefore, not possible to bold that in dealing with the matter the bank was in any manner guilty of any negligence and was, Therefore, liable to account to the plaintiff for the pledged goods or to pay the price thereof on that account. The issues are decided accordingly.

25. A further contention of the plaintiff must be noticed in this context. As has been pointed out above in terms of the document of pledge, Ex. 131/7, the plaintiff was under an obligation to insure "against fire risk and war risk" the pledged goods with an insurance company approved by the bank to the full extent of the value of such goods and that such policy of insurance was to be taken out it) the name of the bank or in the joint names of the ban-k and the plaintiff and the latter was to deposit the policy along

with the receipts for premium with the bank. It is further provided that in case the plaintiff fails to insure the goods, the bank would be at liberty to effect insurance at the expense of the plaintiff. According to the plaintiff, when called upon to take out such insurance, the plaintiff got the pledged goods duly insured against all risks including civil commotion with the Lloyds of London in the sum of Rs.- 2,50,000/-. It, however, appears that the insurers repudiated the claim apparently because the claim for the loss was not lodged with the insurers within the requisite time. The insurers were originally Placed as defendants in the suit but the suit against the insurers was withdrawn eventually apparently because the plaintiff thought it had no case against the insurers because of default in submitting the information of the loss and in lodging the claim with them within time. The contention of the plaintiff is that it is the bank who had been in touch with the developments in Pakistan and that, having been aware that the goods had been insured at the instance of the bank, the: bank should have taken steps to inform the insurers of the developments and to have lodged the claim with them within the requisite time, but that the bank was negligent in that it neither lodged the necessary information with the insurers nor filed a claim under the policy within the stipulated time, with the result that a valuable source of compensation for the plaintiff was lost. This plea was sought to be met by the bank with the contention that no policy, as envisaged by the agreement, had been taken out; that the policy was never deposited with the bank as stipulated in the agreement; that the bank could not, Therefore have addressed any communication to, the insurers or to have lodged any claim with them, and that the plaintiff having withdrawn the case against the insurers bad absolved the bank of all responsibility. It appears that no specific issue is claimed by either of the parties on the basis of the aforesaid allegations but the issues with which I am at present concerned would appear to me to be wide enough in its scope to admit of this controversy as well. This contention of the plaintiff appears to me to be unsustainable. It was common knowledge that there was insecurity of life and Property of the Hindus in the then dominion of Pakistan following the, partition of India and the property was either being subjected to loot or had been taken over by the Pakistan authorities. The bank was in no better Position in the matter of making either claim on the insurers or in sending the information to it . The plaintiff could as well have given the necessary information to the insurers Or to have filed a claim. A reference to the Policy, which was placed on the record, goes counter to the contention of the plaintiff. The policy was taken out exclusively in the name of the plaintiff. it is neither a joint policy nor does the name of the bank otherwise figure in it The bank, Therefore, would have had no locus standi to deal with the insurers. Even if the policy had been handed over to the bank, as is contended by the plaintiff, or the bank was aware of its existence, I do not see how that by itself would create a legal obligation in the bank to act pursuant to it when it was not a party to the document. There is force in the contention of the bank that such a policy did not conform to the requirements of the agreement Between the parties which in terms envisaged a policy either in the name of the bank or jointly in the name of the bank and the plaintiff. This contention of the plaintiff must also fall for another reason. If the plaintiff fell obliged to withdraw the suit against the insurers merely because the report of the loss or the claim was not lodged with the insurers within time, the plaintiff has to thank itself because the plaintiff was fully protected in terms of the policy notwithstanding the aforesaid default by virtue of the provisions of Section 18 of the Displaced Persons (Debts Adjustment) Act 1951. Section 18 clearly provides that where property in West Pakistan belonging to a displaced person was insured against any risk arising out of fire, not and civil commotion and there has been a loss, the insurers Amu not be entitled to refuse the payment of the sum due under any claim on the ground that -(a) no report was lodged with the police within the agreed time; (b) the claim was not made to the company

within the agreed time." The plaintiff, Therefore, withdrew the suit against the insurers to its own prejudice, and could not blame the bank for any default on its part. I had particularly invited the attention of learned counsel for the plaintiff to this provision but no attempt was made to meet this objection. The contention of the plaintiff that the bank has been negligent in the matter of claim from the insurers must Therefore, fail.

Issue NO. 7

26. This issue is based on the plea of the bank that inasmuch as the bank was not negligent, the suit was not maintainable. In the written arguments on behalf of the bank a suggestion was also made that the suit was not maintainable because the Delhi Court had no jurisdiction to entertain it. I do not see how merely because the bank my not ultimately be found to be negligent or to be liable to the plaintiff, the suit is not maintainable. The maintainability of a suit and the sustainability of claim made in it are distinguishable. Even if the claim ultimately fails and could not succeed, the suit may still be maintainable unless there is any legal bar of it and none was pointed out. The plea that this Court had no jurisdiction is equally unsustainable. The jurisdiction of the Court is clearly justified with reference to the situs of the residence of the bank. The bank admittedly had its head office during all material time in Delhi and that being so, the Delhi Court had the necessary jurisdiction to take seizing of the suit. I have, Therefore, no hesitation in holding that the suit was maintainable.

Issues NOS. 8 & 10

27. These issues are inter-connected and arise out of the claim of set off by the bank on the basis of the cash credit account, its maintainability without payment of court fees and as to whether it is within time. In paragraph 22 (a) of the written statement, it was contended by the bank that in the impossible event of any claim being decreed in favor of the plaintiff" the same, must in equity be set off against the amount which would be due from the defendant to the plaintiff on the basis of the above-said loaning documents." It was further pointed out that the amount in accordance with the terms of the loaning documents due from the plaintiff to the answering defendant "comes to Rupees 1,98,857.70 np. on the date of this written statement." The written statement is dated March 9, 1964. In the corresponding paragraph of the replication, it was contended on behalf of the plaintiff that if the bank had any counter claim it had in accord. awe with law and on payment of requisite emit-fee and no relief could be granted to the bank as no Court fee had been paid. It was further alleged that the bank having not filed any suit on the basis of the decree obtained by it from the Pakistan Court, the claim was barred by time. The claim was also disputed on the merits.

28. The onus of all the three issues was on the bank and no attempt was made on behalf of the bank to support any of these either in the written statement or in the oral submissions in Court. The reticence on behalf of the bank on the question that these issues raise is understandable because the bank has not paid any court-fees on the amount that it claims because not being a case of an adjustment, such a claim could only be made if appropriate court-fees had been paid. The claim for set off is also barred by time because the claim relates to a period prior to 1947 and no attempt has been made to show that there has been any acceptance of liability or any acknowledgement by the plaintiff. I am, however, unable to agree with the learned counsel for the plaintiff that the claim of the bank, it any, based on the credit account got merged in the decree obtained by the bank from the Pakistan Court .If the decree obtained by the bank from the Pakistan Court was a nullity, as contended, on behalf of the plaintiff, because the plaintiff, being a foreigner in that Court, never submitted to its

jurisdiction, no question of the merger of the cause of action with the decree arose .Even otherwise, according to Private International law a foreign judgment only creates a new obligation to pay but does not distinguish the original cause of action for the debt. A foreign judgment involves no merger of the original cause of action and a creditor who obtains a foreign judgment has two remedies open to him, that is, either to bring an action in a domestic Tribunal on the foreign judgment or to bring an action in the domestic Tribunal on the original cause of action. Reference may be made in this connection to MANU/MH/0122/1959 : AIR1959Bom414 and MANU/SC/0011/1963 [1964]4SCR19 . Thus has, however, no impact on the result of the three issues, which must be found against the bank. The bank's counter claim must also fad for another reason, which appears to me to be more fundamental, Section 17 of the Displaced Persons (Debts Adjustment) Act, 1951, lays down rules with regard to debts secured on moveable, property. Clause (b) of sub-section (1) of S. 17 is in the following terms :

> "(b) The creditor shall not be entitled, in any case where the pledged property is no longer in his possession or is not available for redemption by the debtor to recover' from the debtor the debt or any part thereof for which the pledged property was secured.-
>
> > The claim of the bank for the amount said to be due under the cash credit agreement is barred by the aforesaid provision obviously because it is the common case of the parties that the bank is no longer in possession of the pledged goods and the same are, Therefore, not available for redemption by the plaintiff. In the circumstances it is unnecessary to determine if there is a claim, which could form, subject-matter of a set off or a counter-claim or as to the quantification in respect thereof. In the view that I have taken of the issues, these questions do not survive.

Issues NOS. 11, 12 & 13

29. None of these issues were seriously pressed before me either in the written arguments or in the oral submissions in Court In the view that I have taken of the issues, none of them issues, really survives, The bank bas made a plea for special costs but I do not we any ground, to award any special, costs to the bank in the circumstances of the case.

Issue NO. 14

30. In the mutt, the suit fails and is thereby dismissed but, in the circumstances, leaving the parties to bear their respective costs.

31. Suit dismissed.