IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 3475 OF 1995

Shri Abhishek Agarwalla ... Plaintiff
British citizen of Indian origin,
Residing at 23, Cleveden Gardens,
Kelvinside, G.12, OPU,
SCOTLAND, U.K.

Versus

1. Indian Bank,
a Banking Corporation having
its Head Office at 17,
Rajaji Salai, Madras-600 001,
And Zonal office at 10th floor,
Maker Towers, 'F' Cuffe Parade,
Bombay 400 005 and also Branch
Office at 201, Mittal Towers,
Nariman Point, Bombay -400 021.

2. Officer in-charge of Lockers,
Indian Bank, 201,
Mittal Towers, Nariman Point,
Bombay-400 021.

3. Mr. P.Sarangam, Manager,
Indian Bank, 201,
Mittal Towers, Nariman Point,
Bombay-400 021.

4. Mr. M. Gopal Krishnan, Chairman
And Managing Director,
Indian Bank, Post Box No.1384,
Rajaji Sadan, Madras-600 001.

5. Mr. V.Raman, General Manager of
Indian Bank, Zonal Office, 18th floor,

Maker Towers "F", Cuffe Parade,
Bombay-400 005.

6. The Secretary, Indian Bank,
17, Rajaji Sapai, Madras 600 001.

7. Mrs. Ranjana Modi,
Indian Inhabitant, residing at 17-A,
Manek, L.D. Ruparel Marg,
Bombay.

8. Mr. Uma Shanker Modi,
Indian Inhabitant, residing at 17-A,
Manek, L.D. Ruparel Marg,
Bombay. ... Defendants

Mr. Jagdeep Anand a/w Ms. Vaishali Vanjara, Mr.Parag Kale, Advocate for plaintiff.

Ms. R. C. Nichani a/w. Ms. Miniben Shah i/b M/s. Anjana Shah & Co., Advocates for defendant Nos.1 and 2.

Mr.Sharan Jagtiyani, Senior Advocate a/w. Mr.Nirman Sharma, Mr.Girish B. Kedia, Ms.Shivangi G. Kedia, Mr.Manoj Agre and Ms. Trupti Shetty, Advocates for defendant Nos. 7 and 8.

CORAM : N.J. JAMADAR, J.
Reserved for Judgment on : 17th February 2020.
Judgment Pronounced on : 2nd September 2020.

JUDGMENT :

1. This is a suit for return of the jewelries and valuables and, in the alternative, a decree for the sum of Rs.1,20,00,000/-, the value of the jewelries and valuables, along with interest @ of 18% per annum in lieu of the jewelries and valuables wrongfully converted by the defendants.

2. The material averments in the plaint can be stated in brief as under :-

(A) The plaintiff is a British citizen of Indian origin. The defendant No.1 is a nationalized bank. The defendant Nos.2 and 3 were the officers in-charge of the safe vault and the Branch Manager, respectively, of the first defendant. The defendant Nos.4 to 6 were also the responsible officers of defendant No.1-Bank. The defendant No.7 is the former wife of the plaintiff. The defendant No.8 is the father of defendant No.7.

(B) In the month of February 1991, engagement ceremony of the plaintiff with defendant No.7 was held at Mumbai. At the instance of defendant No.8, the plaintiff availed the facility of locker at the safe deposit vault maintained by defendant No.1 for keeping the family jewelries and other valuables of the plaintiff, in the joint names of plaintiff and defendant No.7. Locker No. 243 came to be allotted; to be operated by either or survivor. The plaintiff was then based at Glasgow Scotland. During one of the visits of defendant No.8 to Glasgow, the plaintiff's mother handed over several valuable pieces of jewelries for being kept in the said locker No.243. The said jewelry was to be used during the marriage ceremony.

(C) The marriage of the plaintiff was solemnized with defendant No.7 on 1st December 1992. Post-wedding, the plaintiff's parents again kept their jewelries and valuables in the said locker; the key of which was handed over by the plaintiff to defendant No.7. The approximate value of the items thus kept in the locker described in the list (Exh.'A') was Rs.1,20,00,000/-.

(D) The defendant No.1-Bank was enjoined to permit the operation of locker in accordance with the rules and regulations framed by Reserve Bank of India. The rules *inter-alia* provided that where locker is opened in the joint names and one of the joint locker holders claims that the key is not available, the Bank should notify the said fact to all the other joint locker holders and after obtaining their consent, break open the locker. In such an eventuality, it is necessary to prepare a detailed inventory, after the locker is broken open and before the contents thereof are handed over to the locker holder.

(E) There was marital discord between plaintiff and defendant No.7. The latter left the matrimonial home at Glasgow Scotland on her own along with one Mr. Gopal Choudhary on 3rd June 1992 itself and reached India on 3rd June 1992. The defendant No.7 approached the defendant No.2 on 3rd June 1992 and conspired to have the said locker No. 243 broken open. The defendant No.8, who had a considerable clout and influence over the responsible officers of defendant No.1, was instrumental in ensuring that the locker was broken open post haste. The entire process was carried out in breach of the rules, regulations and guidelines. Neither the plaintiff was apprised of the claim of defendant No.7 that she had lost the key and yet desired to operate the locker. Nor an inventory of the items found in the said locker was prepared.

(F) On being apprised of the said development, by his relatives, the plaintiff rushed to Mumbai on 19th June 1992. The plaintiff questioned the post-haste action on the part of the officers of the defendant No.1-Bank. There was exchange of letters and notices. The defendant No.1-Bank and its officers endeavoured to justify their action though it was in clear breach of fiduciary and contractual obligation of the defendant No.1-Bank.

(G) In the meanwhile, the defendant No.8 approached the plaintiff and offered to settle the entire dispute. On the assurance of the defendant that all the jewelry and valuables would be returned, the plaintiff signed letter dated 1st August 1992 (Exh.'D') insulating the defendant No.1 from the liability. The defendant Nos.7 and 8, after obtaining the said letter from the plaintiff, did not deliver any of the jewelries which the defendant No.7 had unlawfully obtained by breaking open the said locker. Yet, the said letter was delivered to the Bank by the defendant No.8 though it was to be given only after delivery of the contents of locker. Moreover, the defendant Nos.7 and 8 and defendant No.1 falsely banked upon another letter dated 1st August 1992 (Exh.'E'), purportedly exonerating the Defendant No.1-Bank, which was never executed by the plaintiff and, thus, a forged one.

(H) Despite repeated demands, the defendants have failed to return the jewelries and valuables which were wrongfully converted by defendant No.7. The defendant No.1-Bank is also equally liable for the said act of wrongful conversion. In any event, the defendant Nos. 1 to 6 have acted in a negligent manner causing huge loss to the plaintiff.

(I) The plaintiff had lodged a complaint before the National Consumer Disputes Redressal Commission ('National Commission'), being Original Proceeding No.322 of 1992. By an order dated 10th March 1995, the Commission granted leave to withdraw the said complaint with liberty to institute a civil suit. The plaintiff has reserved the liberty to rely upon the said order in the event the question of limitation arises.

(J) Hence, the suit for return of the jewelries and valuables which were kept in the said locker and wrongfully removed by defendant No.7 in connivance with the officers of defendant No.1 and, in the alternative, a decree for the value of the said jewelries i.e., Rs. 1,20,00,000/- along with interest @ 18% per annum from 4th June 1992, the date the locker was broken open, till realisation in lieu thereof.

3. The defendant Nos. 1 and 2 have resisted the claim by filing written statement.

(i) The substance of the resistance put-forth by the defendant Nos.1 and 2 is that the suit is false, frivolous and vexatious. The claim of the plaintiff as regards the alleged conversion of jewelries and valuables and its non-return is at variance with the claims of the plaintiff in the proceedings before the National Commission in Complaint being No.322 of 1993, wherein the plaintiff had placed letters dated 3rd August 1992 and 4th January 1993 conceding that he had received a part of the jewelry from defendant

No.8. The further claim of the plaintiff that the letter dated 1st August 1992 (Exh.'E') is a forged one is also contradicted by the various explanations sought to be offered by the plaintiff in different proceedings. The claim of the plaintiff is also stated to be at variance with the matrimonial proceedings instituted by the defendant No.7 in M.J. Petition No. 8643 of 1993 in the Family Court at Bandra, Mumbai and the proceedings initiated by the plaintiff in the Court of Sessions, Scotland for divorce.

(ii) The defendant Nos.1 and 2 have questioned the tenability of the monetary claim as the defendant No.7 is allegedly in custody of the jewelries and valuables listed in Exh-A. In any event, the plaintiff has his remedies against defendant No.7 and not against the defendant Nos.1 to 6. It is further contended that the suit suffers from mis-joinder of parties inasmuch as the defendant Nos.1 to 6 are neither the necessary nor proper parties to the suit.

(iii) The defendant Nos.1 and 2 have asserted that there was neither any breach of fiduciary or contractual obligation nor negligence on the part of the defendants in allowing the defendant No.7 to operate the locker. The defendant No.1 has at all material times acted in good faith, and with due care and caution. The defendant Nos.1 and 2 contend that the locker No. 243 was opened in the name of plaintiff and defendant No.7, "on either or survivor basis" in accordance with the terms and conditions contained in the Memorandum dated 4th March 1991. Clause 14.1 of the rules and regulations of the safe deposit locker dated 2nd February 1981 (which was in force and applicable at the time the locker was opened) and clause 13 of the said memorandum dated 4th March 1991 prescribe the procedure to be followed by the Bank in the matter of breaking open the locker in the event of its key being lost or misplaced. Under the said memorandum and rules, the relationship between the defendant No.1-Bank and the plaintiff and defendant No.7, was that of lessor and lessee. The defendant Nos.1 and 2 claimed that the extract set out in para No.12 of the plaint is not a true and correct extract of the rules and/or guidelines issued by the Reserve Bank of India. It was categorically denied that the defendant No.1-Bank was obliged to first notify the fact of the key not being available to the other locker holders and/or only after obtaining their express consent, the locker could have been broken open. There was no mandate that only after the consent of all the holders of the locker, it could be broken open. Nor the inventory of the contents of the locker was required to be prepared as claimed by the plaintiff.

(iv) Explaining the circumstances in which the defendant No.7 was permitted to operate the locker after breaking open the same, the defendant Nos.1 and 2 claimed that, in accordance with the terms of the contract of hire, the defendant No.1-Bank in good faith and in the ordinary course of business and without any knowledge of the dispute between plaintiff and defendant No.7 proceeded to break open the said locker in accordance with the prescribed procedure. On these, amongst other, grounds, the defendant Nos.1 and 2 prayed for the dismissal of the suit.

4. The defendant Nos. 3, 4 and 5, who have been impleaded in personal capacity, have also contested the suit by filing separate written statements and denied all the averments in the plaint. These defendants have adopted the contentions in the written statement of defendant Nos.1 and 2.

5. Defendant Nos. 7 and 8 have also resisted the claim by filing written statement.

(a) At the outset, the defendant Nos. 7 and 8 contend that the suit is barred by law of limitation. The endeavour of the plaintiff to bank upon the order of the National Commission, dated 10th March 1995 in the complaint, being Original Proceeding No.322 of 1992, is not sustainable as the said order does not extend the period of limitation. Even otherwise, since defendant No.7 was not a party to the said complaint, the suit is clearly barred by limitation qua defendant No.7. The defendant Nos. 7 and 8 further assert that the instant suit is a link in the chain of the proceedings instituted by the plaintiff to harass the defendants. The plaintiff has relied upon a forged letter dated 1st August 1992 (Exh.'D') to bolster up his claim and thus the suit deserves to the dismissed on the said count. As the plaintiff had withdrawn the allegations and claim in the matter of alleged operation of the locker by defendant No.7 by addressing the letter dated 1st August 1992 (Exh.'E'), which is genuine one, the claim and cause of action stood extinguished.

(b) By way of factual contestation, the defendant Nos.7 and 8 contend that the facility of locker was availed on 4th March 1991 as jewelry was given to defendant No.7 from the plaintiff's side as well as by defendant No.8 at the engagement ceremony. The defendant No.7 had in fact availed the locker facility and the name of the plaintiff was added as a joint hirer merely for the sake of convenience. The defendant No.7 had kept the jewelry presented to her by her parents and in-laws in the said locker. The defendant No.7 operated the said locker on a number of occasions, before and after her marriage, to take out and keep the jewelry which formed part of her Stridhan. After the defendant No.7 joined the plaintiff at Glasgow, Scotland, the defendant No.7 was subjected to extreme cruelty. The defendant No.7 was forced to leave her matrimonial home and return to Mumbai. On her return on 3rd June 1992, the defendant No.7 sought permission to operate the locker by breaking it open and the defendant No.1-Bank allowed to operate the locker, after following due procedure, on 4th June 1992. On the very day, a new locker was opened in the name of defendant No.7's mother Geeta, being locker No. 363, and the Stridhan came to be transferred to the said locker.

(c) The defendant Nos. 7 and 8 contend that with the intervention of the relatives and well-wishers, the marital dispute was resolved and it was agreed that the jewelry which was presented to defendant No.7 from the plaintiff's side would be returned to the plaintiff on 1st August 1992 and, on receipt thereof, the plaintiff would sign the petition for divorce by mutual consent and address a letter to the defendant No.1 with a copy thereof to defendant No.7. It was further agreed that the remaining items of jewelry of the plaintiff's side with defendant No.7 would be returned after the plaintiff returned all the jewelry and other items of defendant No.7 received from defendant

Nos. 7 and 8. Though the jewelry kept in the locker was returned to the plaintiff and the plaintiff gave the letter dated 1st August 1992 (Exh.'E') and signed the petition for divorce by mutual consent, the plaintiff did not return all the jewelry and ornaments to defendant No.7.

After narrating the proceedings and circumstances which led to the petition before the Supreme Court, the defendant Nos.7 and 8 contend that under the consent terms filed before the Supreme Court, the defendants have returned all the items mentioned therein to the plaintiff, in January 1994. The plaintiff has acknowledged the receipt thereof. Before the Supreme Court, the plaintiff pressed for return of five articles mentioned in Annexure–C, which were duly returned to the plaintiff.

(e) The defendants have categorically denied that the jewelry and valuables of the parents of plaintiff were kept in the said locker. The list of jewelry and valuables (Exh.'A') annexed to the plaint is stated to be erroneous. The defendants have furnished a list of 15 items which were allegedly part of the defendant No.7's Stridhan, out of which, item Nos. 1 to 10 were returned by defendant No.7 to the plaintiff on 1st August 1992, and the rest five items were given after filing consent terms before the Supreme Court. The claim of the plaintiff that the locker contained the jewelry and valuables as per list (Exh.'A') and its approximate value was then Rs.1,20,00,000/- was contested on the premise that the plaintiff had not made such enumeration and/or valuation in the earlier correspondence and proceedings.

(f) The defendant Nos. 7 and 8 have denied that thedefendant No. 8 was in a domineering position and exerted influence over the officers of defendant No.1-Bank. According to the defendant Nos.7 and 8, the defendant No.1-Bank has not committed any illegality or impropriety in permitting the defendant No.7 to operate the locker after breaking it open.

The said act of defendant No.1 Bank was stated to be in conformity with the contract between the Bank and the hirers and governing rules and guidelines. The claim of the plaintiff being false, vexatious and sans a surviving cause of action, the defendant Nos. 7 and 8 prayed for dismissal of the suit with exemplary costs.

6. In the light of the aforesaid rival pleading, issues were settled by an order dated 5th July 2011. I have reproduced the issues with my findings against each of them for the reasons to follow :

Issues		***Findings***
1) Whether the suit is barred by law of limitation?	*:*	*In the affirmative as against defendant No.7 and in the negative as against defendant Nos. 1 to 6 and 8.*
2) Whether the suit locker was mandatory to be operated upon jointly by the Plaintiff and Defendant No.7?	*:*	*In the negative.*
3) Whether the Plaintiff issued the letter dated 1st August 1992 Exhibit-E to the plaint to the Defendant Bank or whether it is forged and fabricated ?	*:*	*Plaintiff issued the letter dated 1st August 1992 (Exh.E to the plaint - Exh.D-5A)*
4) Whether the first Defendant Bank or its officer illegally and unlawfully allowed	*:*	*In the negative.*

Defendant No.7 or 8 to operate the locker ?		
5) What relief, if any, is the plaintiff entitled to ?	*:*	*Suit stands dismissed.*

REASONS :

7. In order to substantiate the claim, the plaintiff Mr.Abhishek Agarwalla (P.W.No.1) ventured into the witness box. The defendant No.1 Bank examined Mr. R. Manohar (D.W.No.1), its then Deputy General Manager. Mr. Uma Shanker Modi, defendant No.8, also entered into the witness box in the rebuttal.

8. A number of documents came to be tendered for the perusal of the Court along with the affidavits in lieu of examination in chief and during the course of cross examination of the witnesses, especially Mr.Abhishek Agarwalla (P.W.No.1). The material documents include the list of jewelries and valuables (X-1), the memorandum, dated 4th March 1991 (Exh.D-3A) whereunder the locker facility was availed, specimen signature and instruction form (Exh.D-4A), a copy of the rules and regulations (X-15), the letter dated 2nd June 1992 (Exh.D-2); whereby the defendant No.7 sought permission to operate the locker after breaking open the locker, the letter dated 3rd June 1993 (Exh.D-3) addressed to M/s. Steelage Industries Limited to depute a mechanic for breaking open the locker, and documents evidencing correspondence emanating from the plaintiff being the handwritten letter dated 19th June 1992 (Exh.D-7A), typewritten letter of even date (Exh.D-6A), a lawyer's notice dated 24th June 1992 (Exh.8-A), the letters dated 4th January 1993 (Exh.D-1(A) and 11th February 1993 (Exh.D-2A) (Collectively) and the replies by the defendant No.1-Bank issued on 22nd June1992 (Exh.P-3) and 7th July 1992 (Exh.P-4). And two letters of even date namely 1st August 1993, over which there is a serious controversy. The plaintiff claims that the letter dated 1st August 1993 (X-13) is genuine and the other letter (Exh.D-5A) is forged and fabricated; which the defendants claim to be genuine.

9. At the conclusion of the trial, I have heard Mr.Jagdeep Anand, the learned counsel for the plaintiff, Ms. R. C. Nichani, the learned counsel for defendant Nos.1 and 2 and Mr. Sharan Jagtiyani, the learned Senior Counsel for defendant Nos. 7 and 8, extensively.

10. Before adverting to evaluate the aforesaid oral and documentary evidence for the determination of contentious issues, it may be apposite to note the uncontroverted facts so as to narrow down the controversy between the parties. Indisputably, the engagement ceremony of the plaintiff and defendant No.7 took place on 10th February 1991 at Mumbai. Post engagement, the locker facility at the Nariman Point Branch of defendant No.1 was availed in the joint names of defendant No.7 and plaintiff on 4th March 1991. It is incontrovertible that the said locker (No. 243) was to be operated by 'either or survivor'. Admittedly, the marriage between the plaintiff and defendant No.7 was solemnized on 1st December 1992. There is not much controversy over the fact that defendant No.7 joined the plaintiff at her matrimonial home at Glasgow, Scotland. It is incontestable that in the wake of marital discord, the defendant No.7 left her matrimonial home and reached Mumbai on 3rd January 1992. Though the date and the circumstances in which the defendant No.7 applied to defendant No.1-Bank to allow her to operate the locker No.243 are in contest, yet it is rather indubitable that the said locker was broken open on 4th June 1992, which is the genesis of the dispute. Lastly, there is no serious dispute about the fact that the defendant No.7 instituted a petition for divorce in the Family Court at Bandra and the plaintiff sought reliefs in a petition filed before the Session Judge at Scotland, and in Special Leave Petition (Civil) No.21255 of 1993, the Supreme Court by an order dated 17th January 1994 passed a decree of divorce by mutual consent, on the strength of the consent terms filed before the Supreme Court, after transferring unto Supreme Court the petition which was filed for divorce before the Family Court Bandra. Nor there is much controversy over the fact that the plaintiff had filed the Original Petition No. 322 of 1993 before the National Commission and by an order dated 10th March 1995, the said Original Petition was permitted to be withdrawn with liberty to institute a civil suit in respect of the same grievance and cause of action. The defendants have, however, put in contest the claim of exclusion of the period spent in the said original petition in computing the period of limitation for the instant suit.

11. In the light of aforesaid undisputed facts, on merits, the controversy between the parties principally revolves around the questions as to whether the defendant No.1-Bank was justified in allowing the defendant No.7 to operate locker No.243 after conceding her request to break it open; whether the defendant No.1-Bank followed the rules, regulations and standard operating procedure in allowing the defendant No. 7 to so operate the locker and whether the plaintiff succeeds in establishing as to what were the contents of the locker, his entitlement thereto and the alleged wrongful conversion thereof by defendant No.7.

12. **Issue No.1** : The defendants have assailed the tenability of the suit on the ground of it being barred by limitation. Indisputably, the plaintiff claims to have approached the defendant No.1 on 19th June 1992 and raised grievance about the action of the defendant No.1 of allowing the defendant No.7 to operate the locker No.243 after breaking it open (on 4th June 1992), without his consent. At any rate, the plaintiff can be said to have became aware of the alleged wrongful conversion of the property on 19th June 1992. The identity of the person who allegedly wrongfully removed the contents of the locker was also known. Thus, either under Article 68, which is general, or Article 69 of the Schedule to the Limitation Act, 1963, which is particular, the period of limitation would be three years. The instant suit came to be instituted on 11th September 1995.

13. The defendants, especially the defendant No.7, contend that the plaintiff is not entitled to the exclusion of the period spent in the proceedings before the National Commission in Original Petition No. 322 of 1993. The order dated 10th March 1995 (Exh.P-1), according to the defendants, is of no avail. In addition, the defendant No.7 has raised a ground that since the defendant No.7 was not impleaded as an opposite party in Original Petition No. 322 of 1993, the plaintiff cannot have the benefit of the provisions contained in section 14 of the Limitation Act, 1963 qua defendant No.7 and thus the suit is hopelessly barred against defendant No.7.

14. Mr.Anand, the learned counsel for the plaintiff submitted that the order passed by the National Commission explicitly records that the plaintiff had sought permission to withdraw the said complaint petition with liberty to institute a civil suit with the same grievance and cause of action, and the Commission was persuaded to grant the permission as sought with further observations that the dismissal of the said complaint petition would not in any manner operate to the prejudice to the complainant (plaintiff) in the matter of raising all his contentions before the competent civil court. In view of the said observations, the objection to the tenability of the suit on the count of limitation is simply unsustainable, urged Mr. Anand.

15. In opposition to this, Mr. Jagtiyani, the learned Senior Counsel for the defendant No.7 and 8 mounted a two-pronged attack to the claim of exclusion of the said period under section 14 of the Limitation Act, 1963. One, there is no pleading making out a case of satisfaction of the requisites of section 14 of the Limitation Act. In the absence of specific explanation, a bald assertion that the plaintiff reserves the liberty to bank upon the said order does not advance the cause of the plaintiff, submitted Mr. Jagtiyani. Secondly, even if maximum latitude is given to the plaintiff's case, since the defendant No.7 was not impleaded as an opposite party in the said complaint petition before the National Commission, the crucial ingredient of the proceeding having been pursued against the same party is not made out qua defendant No.7.

16. The exclusion of time spent in another civil proceeding diligently prosecuted by a party against the defendants in respect of the same matter in issue is based on the premise that a party should not suffer and be rendered remediless in the event the court in which the former proceeding was instituted is found unable to entertain the same from defect of jurisdiction or other cause of a like nature. The object of section 14 is to ameliorate the hardship of a bona fide litigant who prosecuted the remedies in good faith in a forum; which turned out to be abortive.

17. The ingredients required to be satisfied and the approach to be adopted by a court while considering the prayer of exclusion of time under section 14 were delineated by the Supreme Court in the case of ***Consolidated Engineering Enterprises Vs. The Principal Secretary (Irrigation Department) & Ors.*** [1]. The observations in para Nos. 21 and 22 are instructive. They are extracted below :

1 (2008) 7 SCC 169)

"21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:

(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(2) The prior proceeding had been prosecuted with due diligence and in good faith;

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court.

22. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity….."

18. In the case of ***Union of India Vs. West Coast Paper Mills Ltd. & Anr.*** [2] the Supreme Court exposited the necessity of the exercise being informed by liberal approach in the following words :

> *"14 In the submission of Mr. Malhotra, placing reliance on CST v. Parson Tools and Plants to attract the applicability of Section 14 of the Limitation Act, the following requirements must be specified: (SCC p.25, para 6)...........*
>
> *"6. (1) both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
>
> *(2) The prior proceedings was due to a defect of jurisdiction or other cause of a like nature.*
>
> *(3) the failure of the prior proceedings was due to a defect of jurisdiction or other cause of a like nature.*
>
> *(4) both the proceedings are proceedings in a Court."*
>
> *In the submission of the learned Senior Counsel, filing of civil writ petition claiming money relief cannot be said to be a proceeding instituted in good faith and secondly, dismissal of writ petition on the ground that it was not an appropriate remedy for seeking money relief cannot be said to be "defect of the Limitation Act. It is true that the writ petition was not dismissed by the High Court on the ground of defect of jurisdiction. However, Section 14 of the Limitation Act is wide in its application, inasmuch as it is not confined in its applicability only to cases of defect of jurisdiction but it is*

2 (2004) 3 SCC 458

> *applicable also to cases where the prior proceedings have failed on account of other causes of like nature. The expression "other causes of like nature" came up for the consideration of this Court in Roshanlal Kuthalia v. R.B. Mohan Singh Oberio and it was held that Section 14 of the Limitation Act is wide enough to cover such cases where the defects are not merely jurisdictional strictly so called but others more or less neighbours to such deficiencies. Any circumstance, legal or factual, which inhibits entertainment or consideration by the court of the dispute on the merits comes within the scope of the section and a liberal touch must inform the interpretation of the Limitation Act which deprives the remedy of one who has a right."*

19. In this context, the learned counsel for the plaintiff placed reliance on the judgment of the Supreme Court in the case of **P. Sarathy Vs. State Bank of India** [3], wherein the question of exclusion of the period spent in prosecuting an appeal before the Deputy Commissioner of Labour (Appeals) under the provisions of Tamil Nadu Shops and Establishments Act, 1947, was under consideration. The Supreme Court held that the Deputy Commissioner of Labour (Appeals) under the said Act was a Court within the meaning of section 14 of the Limitation Act and the proceedings pending before him (challenging the dismissal of the appellant therein) were civil

3 (2005) 5 SCC 355

proceedings. The Supreme Court enunciated the legal position in the following words :

> *"12 It will be noticed that Section 14 of the Limitation Act does not speak of a "civil court" but speaks only of a "court". It is not necessary that the court spoken of in Section 14 should be a "civil court". Any Authority or Tribunal having the trappings of a court would be a "court" within the meaning of this Article. In Thakur Jugal Kishore Sinha vs. The Sitamarhi Central Co-operative Bank Ltd. and another, AIR 1967 SC 1494, this Court, while considering the question under the Contempt of Courts Act, held that the Registrar under the Bihar and Orissa Co-operative Societies Act was a court. It was held that the Registrar had not merely the trappings of a court but in many respects he was given the same powers as was given to an ordinary Civil Court by the Code of Civil Procedure including the powers to summon and examine witnesses on oath, the power to order inspection of documents and to hear the parties.*
>
> *13 The Court referred to the earlier decisions in Bharat Bank Limited vs. Employees of Bharat Bank Ltd., 1950 SCR 459 = AIR 1950 SC 188; Maqbool Hussain vs. State of Bombay, 1953 SCR 730 = AIR 1953 SC 325 and Brajnandan Sinha vs. Jyoti Narain, 1955 (2) SCR 955 = AIR 1956 SC 66. The Court approved the rule laid down in these cases that in order to constitute a court in the strict sense of the term, an essential condition is that the court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has FINALITY and AUTHORITATIVENESS which are the essential tests of a judicial pronouncement."*

20. Reverting to the facts of the case, it cannot be controverted that the thrust of the plaintiff's claim is the alleged deficiency in the service rendered by defendant No.1 Bank in breach of governing rules and guidelines. Nor can it be disputed that the National Commission has the trappings of a civil cour, if seen through the prism of its adjudicatory role. It would be suffice to note a judgment of the Supreme Court in the case of ***Saushish Diamonds Ltd. vs National Insurance Co. Ltd.*** [4] wherein the Supreme Court directed that the period spent by the complainant therein in prosecuting the proceedings before the National Commission be excluded in computing the period of limitation for the suit, which the complainant therein was directed to institute by the National Commission.

21. I am not impelled to accede to the submission on behalf of defendant Nos. 7 and 8 that the absence of specific pleading making out a case for exclusion precludes this court from exercising the power under section 14. The institution of the original petition before the National Commission in the year 1993 and its disposal by order dated 10th March 1995 are beyond the pale of controversy. The plaint makes a specific reference to the order dated 10th March

4 (1998) 8 SCC 357

1995. This material is adequate to equip the court to appreciate the case for exclusion.

22. The reliance placed by Mr.Anand, the learned counsel for the plaintiff on a judgment of the Supreme Court in the case of ***Mohinder Singh (Dead) through L.Rs. Vs. Paramjit Singh & Ors.*** [5] appears to be well founded. In the facts of the said case, an identical argument of no explanation was advanced. Repelling the submission, the Supreme Court observed that the expanse of section 14 of the Act is not limited to mere jurisdictional issue but also other cause of a like nature and the fact that no explanation whatsoever has been offered for the relevant period would not whittle down the rights of the plaintiff to institute and pursue suit.

23. The second count of challenge rested in non-impleadment of defendant No.7 as a party opponent in original petition No. 322 of 1992 now warrants consideration. Indisputably, defendant No.7 was not impleaded as a party in the said original petition, though defendant No.8, her father, was impleaded. Mr.Jagtiyani urged with a degree of vehemence that the text of section 14 makes it abundantly clear that the previous proceedings must have been

5 Civil Appeal No. 10222 of 2017 dated 28th March 2018

prosecuted against the defendant to claim the exclusion. Laying emphasis on the term, "against the defendant" in sub-section (1) of section 14, Mr. Jagtiyani submitted that even if the plaintiff is granted the benefit of the exclusion of the period spent in the original petition before the National Commission, the same is of no avail to the plaintiff qua defendant No.7. Amplifying this submission, it was urged that to attract the provisions of section 14 both the proceedings must be between the same parties or their representatives. A defendant who was not party to the previous proceeding and in whose favour, by lapse of the period of limitation, a right has accrued, cannot be divested of that right for the reason that the plaintiff prosecuted a proceedings against co-defendants, urged Mr. Jagtiyani.

24. In order to lend support to this submission, Mr. Jagtiyani placed reliance on a judgment of a learned Single Judge of this Court in the case of ***Lily Realty Private Limited (in the matter between Kalpesh Dedhia & Ors. Vs. Altius Developers and Private Limited & Ors.***)[6] wherein after extracting the provisions of section

6 Notice of Motion No. 1776 of 2005
in Suit No. 512 of 2013 and connected matters
dated 18th February 2016

14, the learned Single Judge deduced its ingredients in the following words :

> *"19 It is clear from a plain reading of Section 14 of the Act, that to claim any exclusion of time by invoking Section 14, the other civil proceeding must relate to the same matter in issue; against the same defendant; it must be prosecuted in good faith; and the other court (or forum, such as the Company Law Board) must be unable to entertain it due to a defect of jurisdiction or a like defect................"*

25. Per contra, Mr. Anand, joined the issue by canvassing a submission that the non-impleadment of defendant No.7 when the rest of the defendants were impleaded as party opponents to the original petition is not of much significance. According to Mr. Anand, what is of critical significance is the identity of the matter in issue. Since the identity of the matter in issue in the said petition and the instant suit is incontistable, the non-impleadment of defendant No.7 does not detract materially from the plaintiff's claim of exclusion of the time spent in the said petition, urged Mr. Anand.

26. It is pertinent to note that under Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908, ('Code'), on satisfaction, the court can grant the plaintiff permission to withdraw a suit or part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. Rule 2 provides that in any fresh suit instituted on permission granted under Rule 1, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. Thus, notwithstanding the permission to institute a fresh suit granted under Rule 1 of Order XXIII, the plaintiff is enjoined to institute the suit within the stipulated period of limitation on the assumption that the previous suit had not at all been instituted. Sub-section (3) of section 14 of the Limitation Act professes to relieve a plaintiff from the rigour of Rule 2 of Order XXIII in the matter of limitation. It provides that notwithstanding anything contained in Rule (2) of Order XXIII of the Code, the provisions of sub-section (1) of section 14 shall apply in relation to a fresh suit instituted on a permission granted by the court under Rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature. Sub-section (3) of section 14 thus operates as a proviso to Rule 2 of Order XXIII.

27. Explanation (c) to section 14 is also of some salience. It reads as under :

> *"Explanation.— For the purposes of this section,—*
>
> *(a) ...*
> *(b) ...*
> *(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."*

28. In the backdrop of the aforesaid provisions, the pivotal question that wrenches to the fore is whether the non-joinder of a defendant, in a previous proceeding in respect of which exclusion of time is claimed, disentitles the plaintiff from claiming the benefit of section 14 against the said defendant? Section 14 employs the expression "another civil proceedings ..... against the defendant". Under section 2(e) of the Limitation Act, 1963, "defendant" includes --

> *"(i) any person from or through whom a defendant derives his liability to be sued ;"*
>
> *(ii) any person whose estate is represented by the defendant as executor, administrator or other representative;"*

29. The definition is undoubtedly inclusive. The previous proceeding, on a plain reading of sub-section (1) of section 14 and section 2(e), ought to have been prosecuted against the defendant or any other person through whom the defendant claims i.e. a predecessor in title etc. It is true that under clause (c) of the Explanation to section 14 misjoinder of parties or causes of action shall be presumed to be a cause of a like nature with defect of jurisdiction. There is no quarrel with the proposition that the expression "defect of jurisdiction or other cause of a like nature" should receive liberal construction so as to advance the cause of substantive justice which is sub-served by determination on merit rather than rendering a person remediless. In a given case, even a non-joinder of a party may fall within the expansive umbrella of "defect of jurisdiction or other cause of a like nature".

30. The court cannot be oblivious to the peremptory nature of the bar of limitation. If a party allows time to lapse against other party (against whom substantive reliefs are sought in the subsequent proceeding) and such party was not impleaded in the previous/another proceeding, the period of limitation against such party would run its course. The fact that another proceeding was being prosecuted against other parties, in a given case, would not inure for the benefit of the plaintiff. A deliberate or conscious non-joinder of a necessary party has been construed to disentitle a party to the benefit of the provisions of section 14 of the Limitation Act by the Supreme Court in the cases of ***Rabindranath Samuel Dawson Vs. Sivakasi*** [7] and ***Deena V. Bharath Singh*** [8].

31. I am mindful of the fact that this question is rooted in the facts of a given case. It would be hazardous to deduce an absolute proposition that all the defendants in the suit under consideration must be the defendants in the previous proceedings which was bona fide prosecuted, dehors the character of such defendants and the reliefs sought against them. However, in the cases, like the one at hand, where it is alleged that the defendant had wrongfully converted the movables and a decree for those specific movables or the value thereof is sought, the non-impleadment of such defendant in the previous proceeding implies that the plaintiff allowed the period of limitation to lapse qua the said defendant to his own peril.

7 (1973) 3 SCC 381
8 (2002)6 SCC 336

32. For the foregoing reasons, in the peculiar facts of the case, in my considered view, the fact that defendant No.7 was not impleaded as a party opponent to the original petition No.322 of 1992 before the National Commission disentitles the plaintiff from claiming the benefit of the exclusion of the time spent in the said petition, under section 14(1) of the Limitation Act, 1963, qua the said defendant and the institution of the suit for recovery of the specific movable property or value thereof after three years of the knowledge of unlawful conversion must be held to be barred by limitation. Thus, I am persuaded to answer issue No.1 in the affirmative as against defendant No.7 and in the negative as against defendant Nos. 1 to 6 and 8.

33. The matter can be looked at from a slightly different angle. If it is held that the non-impleadment of a defendant in the previous proceedings does not matter at all if some of the co-defendants only were parties in the previous proceedings, it may lead to serious prejudice in some cases. Under some of the enactments, a shorter period of limitation is provided for institution of the proceedings than the one provided by the Schedule to the

Limitation Act, 1963. For example, the Major Port Trusts Act, 1963 provides a shorter period of limitation for institution of the proceedings against a Port Trust. If in respect of cause of action against a Port Trust and a private party, a proceeding is instituted against a private party and later on withdrawn with liberty to institute a fresh proceeding on the same cause of action and, in the meanwhile, the period of limitation prescribed by the statute against the Port Trust expires, the grant of benefit of section 14 of the Limitation Act, 1963, despite the Port Trust being not a party to the previous proceeding, would run counter to the statutory scheme under the special enactment.

34. Issue Nos. 2 and 4 : The sheet anchor of the plaintiff's claim is the alleged breach of the rules and guidelines by the defendant No.1-Bank in allowing the defendant No.7 to operate locker No. 243 on 4th June 1992 after breaking it open. Mr. Anand, the learned counsel for the plaintiff, would urge that the rules and guidelines issued by the Reserve Bank of India (RBI) envisage two safeguards to protect the interest of a joint hirer in the event one of the hirers approaches the bank with the case of loss of the key and seeks breaking open of the locker, namely, (i) issue notice to, and obtain consent of, the joint hirers other than the hirer who seeks such dispensation; and (ii) prepare an inventory of the contents found in the locker to preserve the identity of the contents. In the case at hand, according to Mr. Anand, the defendant No.1 and its officials deliberately deviated from the aforesaid practice as defendant No.8-Uma Shanker, the father of defendant No.7, exercised his overbearing influence. As a second limb of the submission, Mr.Anand would urge that the defendant No.1-Bank was, in law, bailee of the articles deposited in the locker and was thus expected to take as much care of the contents of the locker as a man of ordinary prudence would take of his own valuables. Since the unlawful acts and omissions on the part of defendant no.1 have facilitated the wrongful conversion by defendant No.7, the defendant No.1-Bank cannot escape the liability, urged Mr. Anand.

35. Ms. Nichani, the learned counsel for the defendant Nos.1 and 2 countered by advancing a submission that neither the allegation of breach of rules and guidelines is sustainable; if tested in the light of the contract between the parties, governing rules and guidelines, nor the jural relationship between the parties was that of bailor and bailee. According to the learned counsel for the defendant Nos. 1 and 2, under the express terms of the contract between the parties, the relationship was nothing beyond lessor and lessee, qua particular locker. The defendant No.1 Bank had observed all the conditions in lawfully allowing one of the hirers to operate the locker. The testimony of Mr.R. Mahohar (D.W.No.1), the Deputy General Manager of defendant No.1 was pressed into service in support of the claim that the action on the part of defendant No.1 was in order.

36. Mr. Anand, the learned counsel for the plaintiff assailed the very admissibility of evidence of Mr. R. Mahohar (D.W.No.1) on the count that there was no proper authorization to depose before the Court. Drawing the attention of the Court to the power of attorney (Exh.D-8) on the strength of which R. Mahohar professed to depose, especially clause 14 thereof, it was urged that the said power of attorney does not confer any authority to depose. The failure to place on record the copy of the Board Resolution whereby the executants of the power of attorney (Exh.8) were empowered to delegate the power, despite being called upon, according to Mr.Anand, renders the testimony of R. Mahohar (D.W.No.1) legally inadmissible. To this end, the attention of the Court was invited to the cross-examination of Mr. R. Mahohar (D.W.No.1), wherein the witness declined to produce the Board Resolution dated 24th January 2011 along with minutes of the meeting on the premise that those were internal documents.

37. To lend support to the submission that in the absence of Board Resolution, the power of attorney which came to be executed on the strength of such resolution is of no legal consequence, Mr. Anand placed reliance on a judgment of Delhi High Court in the case of ***Lucas Indian Services Limited Vs. Sanjay Kumar Agarwal*** [9], wherein upon failure of the appellant in the said case to prove the Board Resolution in favour of the executant, it was held that the authority of the executant to appoint another officer to institute the suit could not be established.

9 RFA No. 616 of 2003 decided on 25th August 2010

38. The aforesaid judgment, on its fair reading, does not lay down the broad proposition which Mr. Anand has urged. It was specifically observed that the appellant in the said case was a private company and not a public body or corporation. Nor the officer who was authorized to institute the suit and depose before the court was one of the principal officers of the appellant company in terms of Order 29 Rule 1 of the Code.

39. In the case at hand, the defendant No.1 is a public banking company. Mr.Manohar (D.W.No.1) has filed the affidavit in lieu of examination in chief in the capacity of the Chief Manager of the Nariman Point Branch of defendant No.1. He was indisputably the principal officer of the concerned branch. The submission on behalf of the plaintiff that the relevant clause of the power of attorney (No. 14) did not confer requisite authority upon Mr. R. Manohar (D.W.No.1) to depose does not merit countenance as it is well neigh recognized that nobody can authorize anybody to depose on his behalf. Mr. R. Manohar (D.W.No.1) being the Chief Manager of the concerned branch of defendant No.1 was competent to depose on the strength of the record which Mr. R. Manohar (D.W.No.1) professed to do. Thus, the challenge to the admissibility of evidence of Mr. R.Manohar (D.W.No.1) does not commend itself.

40. As indicated above, the locker No. 243 was allotted in the joint names of defendant No.7 and plaintiff under the terms and conditions, which are overleaf the memorandum (Exh.D-3A). Indubitably, the specimen signature and instructions card (Exh.D-4A) records that the operating instructions were 'either or survivor'. It cannot be disputed that the hirers did not opt for joint operation of the locker. Either of them could lawfully operate the locker in the absence of the other. At the hub of the controversy is the issue as to whether the aforesaid operating instruction was valid even when one of the hirers approached the bank with a case that the key is misplaced and he be allowed to operate the locker after breaking it open?

41. Laying emphasis on condition 12 of the Memorandum (Exh.D-3A), clause 13.1 of the rules and regulations in respect of safe deposit lockers of defendant No.1 (Article 15) and the RBI notification dated 17th April 2007, under the caption 'access to the safe deposit lockers/return of the safe custody (page No. 830, 831,Volume IV), it was strenuously urged by Mr. Anand that the twin conditions of notice to, and consent of, the joint hirer and preparation of inventory were mandatorily required to be observed before permitting defendant No.7 to operate the locker. Reliance was also sought to be placed on the questionnaire (Article X-2) as regards the action to be initiated in such a case.

42. To bolster up the submission that the RBI guidelines have binding force, Mr.Anand placed reliance on the judgment of the Supreme Court in the case of ***M/s. Sardar Associates & Ors. Vs. Punjab & Sind Bank & Ors.***[10]**,** wherein the binding nature of the Reserve Bank of India's circulars and guidelines as regards One Time Settlement (OTS) Scheme was enunciated.

43. Ms.Nichani, the learned counsel for defendant Nos. 1 and 2 stoutly submitted that the plaintiff has resorted to selective reading of the rules and guidelines torn out of context. If the aforesaid clauses are read in the context of, and in conjunction with, the preceding and succeeding clauses, it becomes evident that no such requirement can be deduced.

10 (2009) 8 SCC 257

44. To start with the terms and conditions, subject to which locker No. 243 was allotted under memorandum, dated 4th March 1991 (Exh.D-3A). Condition Nos.11 to 13 bear upon the controversy. They read as under :

> *"11 Without prejudice to any other remedy which the Bank may have against the hirer, all rights to use of the locker shall at the option of the Bank be forfeited upon non-payment of the rental whether the same shall be demanded or not or upon breach of any of the conditions thereof by the hirer and the bank shall be at liberty to break open the locker without being liable for any loss or damage caused to the contents thereby.*
>
> *12 If the Bank decides the break open the locker, the inventory of the contents of the locker prepared by the officer of the Bank at the time of breaking open the locker, shall be conclusive and binding on the hirer in such cases, parcel post or by other means at the risk and responsibility of the hirer or may remove the contents to another safe as the Bank may think fit or/and the Bank is also at liberty to auction all or any part of the contents and appropriate proceeds thereof towards the arrears of rent and also the cost of breaking the locker and repairs thereto.*
>
> *13 If the key of a locker be lost by the hirer, the Bank should be notified without delay but the Bank shall not be responsible for any mistake. Charges for opening, changing the lock and restoring the locker to its original condition shall be payable by the hirer."*

45. Rule Nos. 12, 13.1 and 14.1 of the safe deposit lockers rules and regulations of defendant No.1 (Article 15) read as under :

> *"12 Without prejudice to any other remedy against the hirer, all the rights in respect of the use of locker by the hirer shall at the option of the Bank be forfeited upon non-payment of charges due for the locker/s and other dues whether the same were demanded or not or upon breach of any terms and conditions of the agreement entered into by the hirer with the Bank and the Bank would be at liberty either to allow the hirer to have access to the locker or after due notice, to break open the locker/s and the Bank will not be liable for any loss or damage causes to the contents thereby.*
>
> *13.1 In the event of Bank deciding to break open the lockers for the reasons aforesaid, an inventory of the contents of the locker would be prepared by the designated Officer/s present when the locker's is/are broke open and this inventory would be conclusive and bind on the hirer/s.*
>
> *.....*
>
> *14.1 If the key of a locker is lost or misplaced, the hirer/s should notify to the Bank immediately and the expenses incurred for the same like cost of breaking open the locker and replacement of the old lock by a new one and restoring the locker to its original condition, will be for account of the hirer/s."*

46. The RBI notification under the caption 'draft circular on safe deposit lockers' referred to above, provides that Bank should prepare an inventory before returning articles left in the safe custody/before permitting removal of the contents of the safe deposit locker as advised in terms of notification dated 29th March 1985, and that the inventory shall be in the appropriate forms set out as enclosed to the above notification or as near thereto as circumstances require.

47. It is pertinent to note that as to when these guidelines issued by the RBI become operative. The aforesaid guideline is under the caption [3.4 access to the safe deposit lockers/return of safe custody articles (without survivor/nominee clause)]. Evidently, the aforesaid RBI guideline has been issued with the object of avoiding inconvenience to the legal heirs and obviating litigation where there is no survivor or nominee. These guidelines address a totally different contingency.

48. From a conjoint reading of the clauses 11 to 13 of the memorandum (Exh.D-3A) and the relevant clauses of rules and regulations (Article 15), it becomes abundantly clear that the requirement to prepare an inventory of the articles is insisted upon when the Bank on its own decides to break open the locker for default in payment of hire charges or breach of the conditions by the hirer. The requirement to prepare an inventory even in a case where a hirer approaches the Bank with the request to break open the locker cannot be deduced from the aforesaid clauses. Nor the requirement of giving notice to, and obtaining consent of, the joint hirers is spelled out, especially when the operating instructions are either or survivor.

49. Either or survivor implies that either of the joint hirers has the authority to operate the locker at any point of time. Nothing could be shown from the terms and conditions or the rules and regulations which would justify an inference that the operating instructions either or survivor remains valid only when a joint hirer approaches the Bank to operate the locker armed with the key only. Such a condition was not put by the plaintiff and defendant No.7 while issuing operating instructions.

50. Mr. Anand, the learned counsel for the plaintiff submitted with tenacity that in the case at hand, the officers of the Bank did not perform their duties bona fide and in good faith. There were concomitant circumstances which would put the officers on guard. Yet, under the influence of defendant No.8, the father of defendant No.7, the officers of defendant No.1 allowed the defendant No.7 to operate the locker after breaking it open post haste, and, at any rate, a case of gross negligence is made out.

51. In order to draw home the point, Mr. Anand invited the attention of the Court to the letter dated 2nd June 1992 (Exh.D-2) purportedly given by defendant No.7 to the defendant No.1. The genuineness and trustworthiness of the said letter (Exh.D-2) was assailed on multiple counts. One, in view of the categorical assertions of the defendant Nos. 7 and 8 in the written statement that defendant No.7 came to Mumbai from London on the morning of 3rd June 1992, the letter (Exh.D-2) claiming the loss or misplacement of the key of locker No. 243 could not predate it, i.e., 2nd June 1992. Two, the said letter (Exh.D-2) does not bear acknowledgment of the defendant No.1 which would otherwise have been made in usual course of banking business. Three, the signature of defendant No.7 on the said letter, on a bare perusal, does not tally with the specimen signature on the instruction card (Exh.D-4A). These circumstances, if considered in conjunction with the influence, which the defendant No.8 exercised over the officers of defendant No.1, justifies an inference that a farce of defendant No.7 making a request of breaking open the locker on the pretext of loss or misplacement of the key was made and the defendant

No.7 was allowed to operate the locker to the detriment of the plaintiff.

52. Mr. Anand also invited the attention of the Court to the contentions in the written statement of the defendant Nos. 7 and 8, in para Nos. 12 and 13, wherein it was contended that the defendant No.7 could not operate the account on 17th March 1991 as the plaintiff had then expressed inability to hand over the key of the locker on the premise that the plaintiff had lost the locker key. Contrasting this claim in the written statement with the manner in which Mr. Uma Shanker Modi (defendant No.8) fared in the cross-examination, on this point, it was urged that the theory of loss or misplacement of locker key was specious one. In the cross examination of Uma Shanker (defendant No.8) , it was elicited that his wife had opened a locker on the very day i.e. 4th June 1992, on which the locker No. 243 was broken open, and the contents of locker No. 243 were transferred to the said locker. Uma Shanker Modi (defendant No.8) claimed that the defendant No.7 had lost the key of the locker No.243 in Scotland. To a pointed question as to what was the need to break open the locker No. 243, Uma

Shanker, expressed his inability to reply and asserted that it would have to be answered by his daughter, defendant No.7. In this context, the withholding of Ranjana, defendant No.7, (who could have made a clean breast of the transaction and the circumstances in which the locker was broken open) from the Court, according to the learned counsel for the plaintiff, warrants drawing of an adverse inference. And these circumstances cumulatively lead to an inescapable conclusion that the defendant No.1 allowed the defendant No.7 to operate the locker No. 243 illegally or unlawfully.

53. On the first principles, the banker, be it the bailee, depositee or otherwise, either gratuitous or for reward, is bound to take the same care of the property entrusted to him as a prudent and careful man is expected to take of his own property of the like description. If such banker or depositee happens to be a paid one, it is expected that he must use the greatest possible care and employ all precautions in respect of the goods deposited with him. If the property is not delivered to the true owner, though there is no element of negligence, the banker or depositee can hardly avoid his liability in conversion.

54. On the aforesaid touchstone, re-adverting to the facts of the case, it has to be seen whether in the given circumstances, the defendant No.1 could be attributed with remissness, negligence or malafide. It is true that the letter (Exh.D-2) bears the date 2nd June 1992. However, the fact that the said letter was tendered to the Bank on 3rd June 1992 is borne out not only by an endorsement in its margin dated 3rd June 1992 but a further endorsement at its bottom to the effect that the legal adviser of the Bank opined that the joint hirer may be permitted to operate the locker after breaking it open when it was claimed that the key was lost or misplaced and thus it was decided to call the mechanic from the safe maker. Thus, the date on the letter, i.e. 2nd June 1992 (Exh. D-2), by itself does not justify an inference that it was prepared and delivered even before defendant No.7 landed in Mumbai.

55. The letter dated 3rd June 1992 (Exh.D-3) addressed to M/s. Steelage Industries Limited, the safe maker, lends support to the claim of defendant No.1 that on 3rd June 1992, pursuant to the request of defendant No.7, steps to break open the locker No. 243 were initiated. The extract of the register containing entries regarding the opening of the locker No. 243 (Exh.D-1) provides further support. It indicates that the locker was broken open on 4th June 1992 in the presence of three officers of the bank. It also contains an endorsement of defendant No.7 that she desired to break open the locker as she had lost the keys. These documents cumulatively indicate that the defendant No.1 did take the steps to obtain legal opinion and thereafter made a request to the safe maker to depute mechanic and, on the next day, in the presence of the officers of the bank, locker No.243 was broken open.

56. I am not persuaded to accede to the submission on behalf of the plaintiff to draw an inference based on the comparison of signature as it is frought with hazards. It is trite that the court should be slow to undertake the exercise of comparison of the signatures, on its own, though the court is competent to do so.

57. The defendant No.7 being a joint hirer had the mandate to operate the locker. The defendant No.1 and its officers had no means to ascertain the veracity of the claim of defendant No.7 that the key was misplaced or lost. Once the identity of defendant No.7 was established (which is not contested), the only question which the officers of the defendant No.1 were to address was, can the defendant No.7 be allowed to operate the locker by breaking open the locker? In the light of the governing rules and guidelines, the terms and condition of the contract and the aforesaid circumstances, the officers of the defendant No.1 bank can be attributed neither negligence nor malafide.

58. This takes me to the submission on behalf of the plaintiff that the defendant No.1 was, in law, a bailee and thus cannot avoid the liability for wrongful conversion. Under section 148 of the Indian Contract Act, 1872 the 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them, that is, 'bailor'. Section 151 of the Contract Act provides that the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed.

59. Essence of bailment is possession. Can the banker who provides the facility of safe deposit vault be attributed with the constructive knowledge of the contents of the lockers, and, thus, be said to be entrusted with the possession thereof. Indisputably, the banker, who provides the locker, retains a master key which is used to open the locker along with the key provided to the hirer. A banker is ordinarily not in a position to open the locker with the master key alone. That is the precise reason for the provision for breaking open the locker in the event of loss or misplacement of the key or default on the part of the hirer to pay the locker charges etc. Under the standard practice, the banker neither remains present when the contents are kept in or withdrawn from the locker nor the banker has any other means to know as to what the individual locker contains. Thus, it seems that the essential element of entrustment of possession of the goods is absent. In the absence of such direct entrustment, it is not possible to infer jural relationship of bailor and bailee.

60. A profitable reference in this context, can be made to a judgment of the Punjab and Haryana High Court in the case of

Atul Mehra Vs. Bank of Maharashtra [11]**.** In the said case, the plaintiff appellant therein had hired a locker in one of the branches of Bank of Maharashtra. It was the claim of the appellant that the appellant had deposited jewelry in the locker worth Rs.4,26,160/-. There was a bank robbery. All 44 lockers were broken into by the robbers and the contents were stolen. It was alleged by the plaintiff that the bank had not taken adequate care as the safe deposit vault was not made of sturdy material in conformity with the high standards of safety. The plaintiff was non-suited on the ground that neither negligence on the part of the bank was proved nor it could be established that the plaintiff had deposited the jewelry as claimed in Annexure-A to the plaint nor there was evidence to establish that it was worth Rs.4,26,160/-. First Appeal was also dismissed. In the Second Appeal, High Court *inter-alia* framed the following question :

> *"Would the relationship between the locker hirer and the bank fall within the definition of 'bailment' as given in Section 148 of the Indian Contract Act, 1872, merely on the locker being hired; or is it necessary also to prove by independent evidence entrustment, quantity, quality and value of the property claimed?"*

11 AIR 2009 Punjab & Haryana 11

61. Answering the aforesaid question in favour of the bank and against the locker hirer, the learned Single Judge of the Punjab and Haryana High Court made the following observation :

> *"6 ……….. I am of the considered opinion that, exclusive possession is sine qua non for bailment. Therefore, I have no hesitation in coming to the conclusion that mere hiring of a locker would not be sufficient to constitute a contract of bailment as provided under Section 148 of the Indian Contract Act, 1872. In order to constitute bailment, as provided in Section 148 of the Act, it is further necessary to show that the actual exclusive possession of the property was given by the hirer of the locker to the bank. It is only thereafter that the question of reasonable care and quantum of damages would arise. In the present case, it is impossible to know the quantity, quality or the value of the jewellery that was allegedly kept in the locker at the time when the robbery occurred, The only evidence relied upon by the appellants is a statement made by DW-1, in cross-examination where it is stated that he cannot admit or deny that there was jewellery weighing 1273 grams worth Rs. 4,26,160/- are kept in the locker. This statement, would not be sufficient to hold that the appellants have proved that there was entrustment of the jewellery to the respondent-bank. In all the authorities (supra) the common feature is that exclusive possession of known property was given by the bailor to the bailee. In the present case, the plaintiffs alone had the knowledge of contents of locker, therefore, the plaintiffs had to lead independent; evidence to prove that the jewellery was actually in the locker on the date of the robbery. Even if the plaintiffs had proved this peculiar facts; they would still have to prove the value of the jewellery. No evidence, except the bald statement of the plaintiffs, and the list Annexure-A,*

> *has been produced by the plaintiffs. Therefore, clearly the plaintiffs have failed to prove entrustment of the jewellery to constitute bailment as required under Section 148 of the Indian Contract Act, 1872.*"

(emphasis supplied)

62. It is pertinent to note that in the aforesaid case, the facts were rather hard. The contents of the lockers were looted in robbery. There were allegations of negligence. Yet, the Court found that there must be evidence of entrustment of the goods and the plaintiff who claims damages must establish that he had deposited goods of particular quantity and quality and value thereof. The relationship of bailor and bailee thus cannot be proved sans such evidence. The aforesaid proposition, in my considered opinion, governs the facts of the case at hand as well.

63. For the foregoing reasons, I am persuaded to answer issue Nos.2 and 4 in the negative.

64. **Issue Nos. 3 and 5 :** An element of continuity pervades the appraisal of evidence on these issues which eventually decide the entitlement of the plaintiff for the reliefs. It was strenuously urged on behalf of the defendants, especially defendant Nos.7 and 8, that even if the case of the plaintiff is construed rather generously and taken at par, the plaintiff is not entitled to the relief sought. Firstly, from the averments in the plaint, it becomes evident that the plaintiff claimed that the mother of the plaintiff had handed over the jewelries and ornaments to defendant No.8 and they were to be used by the mother of the plaintiff in the then impending marriage and post marriage those ornaments were again kept in locker No.243. Thus, the plaintiff cannot be said to be the person who can lawfully seek the return of the ornaments or value thereof. Secondly, the description of the specific movables, the return of which is sought, is woefully inadequate and untrustworthy. The list of jewelries and valuables (Article X-1), annexed to the plaint, lacks basic elements of particularization. Omnibus description without furnishing either the make, content, quality and quantity of the items therein has been given. The lack of particulars also impairs the endeavour of the plaintiff to arrive at its approximate value. Thirdly, the description of the contents of the locker No. 243 did not find mention in any of the contemporaneous correspondence emanating from the plaintiff. A list of articles like the list (Article X-1) came to be annexed to the complaint lodged before the

National Commission, in December 1993. This further erodes the veracity of the claim of the plaintiff. Lastly, the admissions in the cross examination, by the plaintiff, clearly demonstrate that out of the said locker, whatever items belonged to the plaintiff, they were returned to the plaintiff on 1st August 1992, and thus the plaintiff acknowledged the receipt of those articles and admitted that there was no surviving claim and went on to withdraw the earlier grievances/letters by addressing the letter dated 1st December 1992 (Exh.D-5A). The feeble attempt on the part of the plaintiff to wriggle out of the situation by alleging that the said letter (Exh.D-5A) has been forged does not merit acceptance, urged Mr. Jagtiyani.

65. Per contra, Mr. Anand, the learned counsel for the plaintiff would urge that the defendant Nos. 7 and 8 have conceded that the locker did contain jewelry and out of those 15 items, 10 items which were given to defendant No.7 by the plaintiff were duly returned to the plaintiff on 1st August 1992. In the absence of any cogent evidence, especially that of Ranjana-defendant No.7, the claim of return of the ornaments from out of the said locker cannot be believed, urged Mr. Anand. The defendant No.8 had deceived the plaintiff in addressing a communication to the bank on 1st December 1992 on the promise of return of the ornaments and thus the plaintiff had addressed the letter (X-13). The defendants have falsely set up another letter of even date (Exh.D-5A), which is forged. The learned counsel or the plaintiff thus urged that the letter dated 1st August 1995 (D-5A) which has not at all been proved in the cross examination of the plaintiff and simply marked, subject to objection, needs to be de-exhibited and the letter (X-13) deserves to be marked.

66. In support of the aforesaid submission, Mr. Anand placed reliance on a judgment of the learned Single Judge of Delhi High Court in the case of ***Sudhir Engineering Company Vs. Nitco Roadways Ltd.*** [12]***,*** wherein, the distinction between marking of a document and its proof was enunciated and it was observed that a document cannot be held to have been proved merely because it has been marked as an exhibit.

67. Mr.Jagtiyani, on the other hand, placed reliance on the Full Bench judgment of this Court in the case of ***Mr. Hemendra Rasiklal***

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Ghia Vs. Subodh Mody [13], wherein in the wake of the amendments to the Code, the question as to whether objection as to the admissibility or mode of proof of evidence, oral and documentary, should be decided upon when raised or whether decision thereon can be deferred to a later stage, was answered to the effect that, "objection relating to the proof of a document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit."

68. The propositions of law are fairly well settled. In the facts of the case, the aforesaid aspect of proof of either of the letters dated 1st August 1992 is inextricably intermingled with the proof of the claim of the plaintiff. Thus, I propose to evaluate the evidence on the core issues of the identity of the items deposited in locker No. 243, proprietary claim thereto and the case of alleged return of the items to the plaintiff, by a common reasoning, which would also answer the question of either of the letters being genuine and proved in evidence.

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69. In order to appreciate the controversy in a proper perspective and retain emphasis, it would be necessary to extract the list of jewelries and valuables (X-1) :

> *"__LIST OF JEWELLRIES AND VALUABLES:__*
> *GOLD COINTS*
> *EMERALD SETS*
> *RUBY SETS*
> *JADE SETS*
> *GOLD SETS*
> *PEARL SETS*
> *SOUTH INDIAN GOLD SETS*
> *JAPAU SETS*
> *CORAL SETS*
> *SETS DIAMOND BUTTONS*
> *GOLD PENS*
> *DIAMOUND PENS*
> *SILVER SETS*
> *DIAMOUND BANGLES*
> *DIAMOUND RINGS*
> *OTHER ITEMS INCLUDING OTHER JEWELLERIES*
> *FINANCIAL INSTRUMENTS*
> *Estimated Total*
> *Value –*
> *Rs. 1,20,00,000/-"*

70. Evidently, the items enumerated in the list X-1 lack elementary particularization. As all the items are mentioned in plurals, it would be difficult to even put a precise number of the items, which were allegedly kept in the locker No. 243. The submission on behalf of the defendants that the list (X-1) lacks particularization cannot be said to be unfounded. Rule 4 of Order VI of the Code reads as under :

> *Particulars to be given where necessary: In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence, and <u>in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.</u>"*

71. The second part of Rule 4, on its proper construction, warrants that requisite particulars shall be mentioned in the pleading. It is more so when the return of a specific movables is sought, not only for establishing the identity of the specific movables but also to ascertain its value, if the very property cannot be returned. Particulars as to the make, if any, contents, purity, quality and quantity are required to be thus pleaded. The aforesaid list (X-1) being bereft of the necessary particulars does not advance the cause of the plaintiff.

72. This propels me to the question of veracity of the list (X-1). The question as to whether the locker contained the jewelries and valuables, as claimed by the plaintiff, begs an answer in the light of contemporaneous correspondence, conduct of parties and the preponderance of probabilities. Apparently, the list of jewelries and valuables (X-1) saw the light of the day when it was annexed to the original petition (complaint) filed before the National Commission in December 1993. Can the omission to identify and state the contents of the locker, which the defendant No.7 allegedly wrongfully converted, and value thereof prior to lodging of the said petition be said to be immaterial or inconsequential?

73. Answer to the aforesaid question hinges upon an answer to another question namely whether the plaintiff has had opportunity to state the particulars and value of the jewelries and valuables? Indubitably, there was protracted exchange of correspondence between the plaintiff and defendant No.1 Bank and its officers. The plaintiff indisputably became aware of the breaking open of the locker and removal of its contents on 19th June 1992. Evidently, the plaintiff lodged protest vide handwritten letter dated 19th June 1992 (Exh.7A) and typewritten letter dated 19th June 1992 (Exh.D-6A).

The omission to mention the contents of the locker and value thereof in these communications can be discounted as the plaintiff could be expected to gather the facts and then make a demand in the context of the grievance. That explanation is not available to the letter dated 24th June 1992 addressed by Neelam Grover, Advocate. In the said letter (D-8(A), addressed to the Manager of defendant No.1, it was mentioned that the locker contained the personal effects and jewelry of plaintiff and the jewelry of his mother. The bank was called upon to compensate the plaintiff for the loss. Having claimed that there were personal effects and jewelry of the plaintiff and his mother, there was no plausible reason not to furnish the particulars thereof like the nature of the jewelry, quantity thereof and description of the personal effects and value thereof.

74. The demand to compensate raises further question. What was the quantum of compensation expected of defendant No.1. For this purpose, putting value on the property allegedly wrongfully converted was imperative. Since the letter was addressed through the advocate, the omission cannot be said to be inconsequential.

75. When the bank disputed the plaintiff's claim vide reply dated 22nd June 1992, the plaintiff rejoined by letter dated 4th July 1992. The particulars of the items and value thereof were not mentioned in the letter dated 4th July 1992 (Exh.D-9). In the subsequent letters dated 3rd August 1992 (Exh.D-10), 4th January 1993 (Exh.D-1A), 11th February 1993 (Exh. D-2A) also no particulars of the wrongfully converted property and the value thereof were mentioned.

76. The omission to mention the particulars of the contents of the locker in the letter dated 3rd August 1992 (Exh.D-10) and 4th January 1993 (Exh.D1A) assumes critical significance and further exacerbates the situation as in the said letters it was claimed that part of the articles were returned by defendant No.8 on 1st August 1992. The particularization of the items which remained to be returned became imperative since part of the items were claimed to have been returned.

77. During the course of the cross examination, the plaintiff was confronted with the aforesaid letters and called upon to answer as to whether the description and the value of the contents of the locker were furnished therein. The plaintiff conceded not to have furnished either the description or the value of the contents of the locker. No explanation worthy of acceptance could also be offered.

78. The assiduous manner in which the plaintiff pursued his grievance renders it hard to believe that the plaintiff would have missed to state the description and value of those articles at the first possible opportunity. It does not appeal to human credulity that had the locker contained the articles (jewelries and valuables mentioned in the list (X-1)), it would have remained a mystery till a list was annexed to the original petition before the National Commission. The shallowness of the description in the list (X-1) is underscored by the fact that the locker is alleged to have contained the financial instruments. It hardly needs to be emphasized that financial instruments leave trail. The failure to furnish the details of the financial instruments is thus inexplicable. Viewed through the prism of contemporaneous correspondence and conduct, the omission to furnish the description of the contents of the locker and the value thereof at an anterior point of time despite opportunities dents the veracity of the list (X-1).

79. A considerable time and effort was put by the learned counsels for the rival parties to draw home their point as regards the genuineness or otherwise of the letters dated 1st August 1992 (Exh.D-5A) and X-13. It is said that the facts of the case rarely fail to provide a legitimate answer to the question raised in the *lis.* The instant case does not seem to be an exception.

80. For clarity and convenience of appreciation, I deem it expedient to extract the material contents of the letters (Exh.D-5A) and X-13, both purportedly addressed by the plaintiff to the Manager of defendant No.1, on 1st August 1992 :

Exh. D-5A	***X-13***
......Dear Sir, *Re. : Locker No. 243 held by me jointly with Smt. Ranjana Modi on E or S basis.* *--* *I refer to all my letters addressed to the Bank and also to the letter dated 24th June 1992 addressed by Ms. Neelam Grover, An Advocate on my behalf to the bank in the above matter.* *I, hereby unconditionally withdraw the allegations made by me against the bank and its officers as contained in the letters under reference with regard to the break-open of Locker No. 243*	*.....Dear Sir,* *Re. : Safe Deposit Locker No. 243 at your Nariman Point Branch, Bombay, illegally broken open into on 4.6.1992.* *---* *This is to advise you that on return by you of all the contents of the said locker to me, I will not hold the Indian Bank responsible for breaking open of the Locker and will treat all letters, issued by me and my lawyers as withdrawn.* *On receipt of all the contents, I will give my permission for the Indian Bank to close the above account.*

held jointly by Ms. Ranjana Modi and myself on either or survivor basis. *I further confirm that the matter has been settled between Ranjana Mody and myself and I have no claim against the bank with respect to the contents of the said Locker No. 243.* *I confirm having agreed and given and I hereby agree and give my consent in favour of Ms. Ranjana Modi to close the said Locker No. 243.* *Yours faithfully,* *Sd/-* *Bombay* *<u>01.08.1992.</u>* *<u>C.C. to :</u> Ms. Ranjana Modi* *17A, Manek,* *L.D.Ruparel Marg,* *Bombay 400006.*	*Thanking you,* *Yours faithfully,* *Sd/-* *Abhishek Agrawalla* *I confirm receipt of original of above letter for delivery to Indian Bank only on return of all contents of above Locker.* *Sd/-* *Uma Shanker Modi*

81. The cause and occasion for addressing the aforesaid letter were, quite indisputably, the negotiations for settlement of the marital dispute between plaintiff and defendant No.7, which were held at Hotel Taj on 1st August 1992. The plaintiff has approached the Court with a case that the defendant No.8 had assured to return all the articles and therefore he had handed over the letter (X-13), however, the defendant Nos. 7 and 8 did not deliver a single item of jewelry which was removed from the locker. In contrast, the defendant Nos. 7 and 8 claimed that, in the said meeting, it was agreed that the parties would obtain a divorce by mutual consent and the ornaments/jewelry (kept in Locker No. 243) which were presented to defendant No.7 from the plaintiff's side would be returned to the plaintiff and the remaining items of the jewelry of the plaintiff's side with defendant No.7 would be returned on the return of the jewelry and other items of the defendant No.7, received from her parental side, by the plaintiff. Thereupon, pursuant to the said compromise, the plaintiff signed the letter (Exh.D-5A).

82. The manner in which the plaintiff stood the test of cross examination assumes significance. In the cross examination, Mr. Agarwalla (P.W. No.1) conceded that there was an agreement arrived at on 1st August 1992 for filing a petition for divorce by mutual consent. Mr. Agarwalla (P.W.No.1) did not cave into the suggestion that it was further agreed that the contents of the locker, being jewelry presented to the defendant No.7 by the plaintiff's family would be returned by defendant No.8 to the plaintiff. He asserted that it was agreed that the entire contents of the locker would be returned to him. Though in the plaint, the plaintiff categorically averred that not a single item of jewelry was returned pursuant to the said compromise, in the cross examination, Mr. Agrawalla (P.W.No.1) claimed that only minor silver items of jewelry were returned to him. Indeed, Mr. Agrawalla (P.W.No.1) did not accede to the suggestion that he had agreed to return to defendant No.7 all items gifted by her family and which were then lying with him. Mr. Agrawalla (P.W.No.1), however, went on to admit that it was agreed on 1st August 1992 that the defendant No.8 would return to the plaintiff the other items of jewelry that were then lying at the residence of defendant Nos. 7 and 8, and which were items given to defendant No.7 by the plaintiff's family. It is pertinent to note that Mr. Agrawalla (P.W.No.1) was reluctant to answer the aforesaid question and the demeanor of the witness and the time taken to answer the said question were noted by the learned Judge.

83. In the aforesaid backdrop and the categorical assertions in the plaint and the affidavit in lieu of examination in chief that the defendants did not deliver a single item of jewelry, the plaintiff was confronted with the letter dated 3rd August 1992 (Exh.D-10) and 4th January 1993 (Exh.D-1A) addressed by the plaintiff to Mr.P. Sarangam, the then Manager of the Nariman Point Branch of defendant No.1 and Mr. Gopal Krishnan, the then Chairman and Managing Director of defendant No.1, respectively. In the letter dated 3rd August 1992 (Exh.D-10), the plaintiff asserted that the defendant No.8 returned part of the contents (of the Locker) on 1st August 1992 and promised to return the balance in the evening. Thus, in good faith, a letter drafted by the bank was signed by him whereby he had agreed to absolve the bank from its negligence and collusion, on return of all the contents of the locker. Neither Mr.Uma Shanker Modi nor the bank had returned the balance contents. Thus, he had no option but to treat the letter dated 1st August 1992 addressed to the Bank as withdrawn as if it was never signed. In the letter dated 4th January 1993 (Exh.D-1A Colly.) it was reiterated that Mr.Modi returned part of the contents on 1st August 1992. The balance contents were not returned. Mr. Gopal Krishan was called upon to impress upon Mr. Modi to return those contents.

84. It would be contextually relevant to note that in the letter dated 11th February 1993 (Exh.D-2A) again addressed to Mr. Gopal Krishnan, it was alleged that the plaintiff was made to sign the said letter under duress and pressure.

85. On being confronted with the aforesaid letters dated 3rd August 1992 (Exh.D-10) and 4th January 1993 (Exh.D1A Colly.) Mr. Agrawalla (P.W.No.1) attempted to salvage the position by affirming that only a few items of silver jewelry from the locker were returned and that was what he meant when he said "balance items" in those letters.

86. The confusion is further confounded by the assertion of Mr. Agrawalla (P.W.No.1) in para No. 34 of the affidavit in lieu of examination in chief. In pursuance of the consent terms before the Supreme Court the parties had agreed to return the articles enumerated in Annexure A (to be returned by the plaintiff to the defendant No.7) and Annexure C (to be returned by the defendant No.7 to the plaintiff). Mr.Agrawalla (P.W.No.1) affirmed that pursuant to the consent terms, the defendant No.7 had returned him only 10 articles (Annexure 8/Exh.D-16). Mr.Agrawalla

(P.W.No.1) went on to concede that he has received the items at Sr.Nos.1 to 5 enumerated in Annexure C to the consent terms appended to the order of the Supreme Court (Exh.D-15). He went on to further admit that the last 5 of the 10 items in Annexure 8/Exh.D-16 are not mentioned in the Annexure C to the consent terms (Exh.D-15). He attempted to wriggle out of the situation by affirming that he does not recall whether the list at Annexure C to Exh.D-15 was complete or not. However, he went on to admit that the last 5 items of Annexure 8/Exh.D-16 were returned to him on 1st August 1992. Sensing the difficulty, Mr. Agarwalla tried to explain away the admission by adding that those items were also returned to him after the hearing in the Supreme Court.

87. The situation which thus emerges is that the claim of the plaintiff wavered from one end to another. From a categorical assertion that not a single item of jewelry was returned to him pursuant to the settlement on 1st August 1992, to an admission in the letters (Exh.D-10 and Exh.D-1A), referred to above, that some items were returned to the plaintiff on 1st August 1992, to an admission that in addition to five items enumerated in Annexure C to the consent terms (Exh.D-15) the plaintiff received the articles enumerated in the list (Annexure 8/Exh.D-16). Last five of those items were not part of the items returned as per Annexure C to the consent terms (Exh.D-15).

88. In the light of above evidence, the nature and import of the afore-extracted letters (Exh.D-5A and X-13) now deserves consideration. Under the letter (Exh.D-5A), the plaintiff professed to withdraw all the letters addressed by him including the one addressed by Ms.Neelam Grover Advocate on 24th June 1992. Secondly, the plaintiff unconditionally withdrew all the allegations made against the bank and its officers in the said letters. Thirdly, the plaintiff professed to confirm that the matter had been settled between him and defendant No.7 and he had no claim against the bank with respect to the contents of Locker No.243. Lastly, the plaintiff gave consent to defendant No.7 to close the said Locker No. 243.

89. Vide the letter (X-13), the plaintiff professed to advise the bank that on return by the bank of all the contents of locker No. 243 to him, he will not hold the Indian Bank responsible for breaking open the locker and will treat all letters issued by him and his lawyers as withdrawn. Secondly, on receipt of all contents, he would give permission to close the above account. Thirdly, the said letter contains an endorsement purportedly by defendant No.8 that the latter confirmed receipt of original of the said letter for delivery to Indian Bank only on return of all contents of above locker.

90. The contrast between two letters is stark. The letter (Exh.D-5A) plainly records the factum of compromise between the parties and professes to withdraw the allegations. The letter (X-13) is contingent and circuitous. It was nothing more than that of a promise to withdraw the allegations after all the contents of the locker were returned. In a sense, the letter X-13 was executory in nature. The plaintiff neither conceded anything nor incurred any liability thereunder.

91. In this backdrop, it does not stand to reason that the retraction of the letter dated 1st August 1992 would have been so swift (on 3rd August 1992), and laced with multiple explanations. The admissions that some articles from the locker were returned to the plaintiff on 1st August 1992 are compatible with the assertions in the letters dated 3rd August 1992 (Exh.D-10) and 4th January 1993 (Exh.D-1 Colly.) that defendant No. 8 had returned few articles on 1st August 1992 and the balance articles were not returned. In such a situation, the assertion in the letter dated 3rd August 1992 and 4th January 1993 that the letter dated 1st August 1992 be treated to have been withdrawn as if it was never signed can only refer to the letter dated 1st August 1992 (Exh.D-5A). There was no reason to either withdraw the letter (X-13) or allege that the said letter (X-13) was obtained under coercion and duress when it was contingent and executory in nature sans any admission or obligation.

92. For the foregoing reasons, I am persuaded to hold that the letter dated 1st August 1992 (Exh. D-5A) was issued by the plaintiff and the plaintiff could not establish that it was forged and fabricated. Issue No. 3 is thus required to be answered to the effect that the letter dated 1st August 1992 (Exh.D-5A) was issued by the plaintiff to the defendant No.1-Bank.

93. The situation which thus emerges is that the factum of the deposit of the articles enumerated in the list (X-1) cannot be said to have been established nor there is any evidence in support of the claim that the value of those articles on the date of the institution of the suit was approximately Rs.1,20,00,000/-. No endeavour was made to prove the value thereof. The evidence on record further indicates that articles were returned to the plaintiff on 1st August 1992 and pursuant to the consent terms arrived at before the Supreme Court on 17th January 1994. The plaintiff acknowledged that the dispute was resolved and he had no claim against the defendant No.1 Bank vide letter dated 1st August 1992 (Exh.D-5A). The case of wrongful conversion, in the circumstances, cannot be said to have been established.

94. Mr. Anand, the learned counsel for the plaintiff lastly urged that the counter version in the written statement of defendant Nos. 7 and 8 as regards the items which were kept in the locker and alleged return of some of those articles to the plaintiff and no proof in support thereof would lend credence to the plaintiff's case that the locker contained jewelry and ornaments and the defendant No.7

wrongfully removed the same. On the one hand, the testimony of Mr. Uma Shanker, defendant No.8 is bereft of any evidentiary value, being hearsay. On the other hand, the non-examination of defendant No.7 in proof of the said competing version, according to Mr.Anand, warrants drawing of an adverse inference.

95. There can be no dispute about the proposition that if a party does not enter into the witness box in support of the case set up by him, an adverse inference can be legitimately drawn that the case set up by such party is untrue. However, in the facts of the instant case, in view of the failure of the plaintiff to establish the case set up by him and the evidence and material on record which not only substantially dismantle the plaintiff's case but also render the defence version as regards return of articles preponderately probable, the non-examination of defendant No.7 doesn't tilt the scale in favour of the plaintiff. On balance, the plaintiff's case doesn't seem to be nearer to the truth.

96. The upshot of the aforesaid consideration and findings on issue Nos. 1 to 5 is that the plaintiff has not succeeded in establishing that the jewelries and valuables, as enumerated in the list (X-1), were kept in the locker No. 243, and the defendant No.1-Bank allowed the defendant No.7 to operate the said locker illegally or unlawfully and thereby there was wrongful conversion of those movables. Even otherwise, the claim for wrongful removal of movables, even if assumed to be proved as against defendant No.7, is barred by limitation. Thus, the suit deserves to be dismissed with costs. Hence, the following order :

O R D E R

The suit stands dismissed with costs.

Decree be drawn accordingly.

(N.J. Jamadar, J.)