Atul Mehra And Anr. vs Bank Of Maharashtra on 22 March, 2002

Equivalent citations: AIR2003P&H11, II(2003)BC570, AIR 2003 PUNJAB AND HARYANA 11, 2002 (49) ARBI LR 253, (2002) 3 RECCIVR 81, (2002) 49 ARBILR 253, (2003) 2 BANKCAS 570, (2002) 3 ICC 138, (2003) 1 BANKJ 586, (2002) 4 CIVLJ 208, (2003) 1 BANKCLR 552

Author: S.S. Nijjar

Bench: S.S. Nijjar

ORDER

S.S. Nijjar, J.

1. In Broom's Legal Maxims, Tenth Edition, Indian Economy Reprint 1995, the following passages occur at pages 90, 91 and 120, respectively :--

> "It has been an ancient observation in the laws of England, that, whenever a standing rule of law, of which the reason, perhaps, could not be remembered or discerned, has been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule has in the end appeared from the inconveniences that have followed the innovation (o); and the sages of the law have, therefore, always suppressed new and subtle inventions in derogation of the common law (p).
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> It is, then, an established rule to abide by former precedents, stare decisis, where the same points come again in litigation, as well to keep the scale of justice steady and not liable to waver with every new Judge's opinion, as also because, the law in that case being solemnly declared, what before was uncertain and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent Judge to alter according to his private sentiments; he being sworn to determine, not according to his own private judgment (q), but according to the known laws of the land--not delegated to pronounce a new law, but to maintain the old (r)--jus dicere et non jus dare [s).
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> Accordingly where a rule has become settled law, it is to be followed, although some possible inconvenience may grow from a strict observance of it, or although a satisfactory reason for it is wanting, or although the principle and the policy of the rule may be questioned (z). If, as has been observed, there is a general hardship affecting a general class of cases, it is a consideration for the Legislature, not for a Court of justice. If there is a particular hardship from the particular circumstances of

> the case, nothing can be more dangerous or mischievous than upon those particular circumstances to deviate from a general rule of law (a); "hard cases", it has repeatedly been said, are apt to "make bad law" (b).
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> It may seem a hardship upon the person suffering the damage that he is without remedy; but by that consideration the Courts ought not to be influenced. "Hard cases, it has frequently been observed, are apt to introduce bad law" (u).

2. I am constrained to reiterate the aforesaid principles at the very threshold of the judgment as a reminder to myself. This was necessitated by the eloquent and persistent arguments of Mr. R. K. Chhibbar, learned Senior Counsel, who has argued with a great deal of compassion and made every effort to evoke sympathy of this Court for plaintiff No. 2, Smt. Pushpa Mehra.

3. This Regular Second Appeal has been directed against the judgment and decree dated 17-10-1998 passed by Shri P. S. Virk, Additional Civil Judge (Senior Division), Amritsar, whereby the suit for recovery for a sum of Rs. 4,26,160/- instituted by the appellants against the defendants-bank, has been dismissed with costs and the judgment and decree passed by the learned District Judge, Amritsar, on 9-1-2001, whereby the appeal filed by the appellants against the judgment and decree dated 17-10-1998, has been dismissed. The learned Lower Appellate Court has ordered that the parties are left to bear their own costs.

4. The pleaded case of the appellants i.e., plaintiffs in the trial Court is that they hired locker No. 75 on 15-1-1986 from the respondent-bank i.e. defendant in the trial Court and respondent in the Lower Appellate Court as well as in this Court. According to the appellants, they had deposited jewellery in the value of Rs. 4,26,160/- as detailed in Annexure-A to the plaint. The respondent-bank on account of its misconduct and negligence did not take proper care of the lockers and the strong room which were built at the back of the building. According to the appellants, the alleged strong room was made up affair and it was made only of plywood, whereas it ought to have been made of iron and concrete. All the 44 lockers in the alleged strong room of the respondent-bank were broken by miscreants and the contents thereof were stolen. The value of the jewellery which was kept in the locker by the appellants was Rs. 4,26,160/-. First Information Report was lodged with the police on 9-1-1989. All the 44 locker holders made representation to the defendant on 2-2-1989 by a registered acknowledgment due pointing out the gross negligence and misconduct of the respondent-bank in maintaining the lockers. A representation to this effect was also made to the Ministry of Finance, Government of India, on 20-2-1989, The Senior Superintendent of Police, Amritsar, was also informed regarding the burglary. The appellants made several representations to the defendant-bank, but the respondent-bank went on to evade the demands on one pretext or the other. None of the representations of the appellants was answered by the defendant-bank. In the meantime, the police made a report on 21-7-1989 about the defective strong room and the lockers therein. Since the bank had failed to return the jewellery, the appellants were constrained to institute suit in the trial Court.

5. The respondent-bank appeared and contested the suit. It was claimed that no cause of action has arisen in favour of the appellants to file the suit. The appellants had no locus standi to bring the suit

against the respondents. It was specifically pleaded that there was no statutory or contractual liability on the respondent to make good the loss allegedly suffered by the appellants. On merits, the respondent-bank denied the averments made by the appellants in the plaint. The bank has, however, admitted that the appellants had taken locker No. 75 from the respondent-bank on 15-1-1986. It was categorically denied that Jewellery in the value of Rs. 4,26,160/- was kept in the locker. It was also denied that there was any misconduct or negligence on the part of the respondent-bank in taking care of the lockers and strong room. The respondent-bank denied the so-called police report dated 21-7-1989. It was, however, admitted that the lockers were broken by miscreants and content of the same were stolen.

6. The appellants filed replication. They controverted the contents of the written statement and reiterated the facts stated in the plaint.

7. On the pleadings of the parties, the trial Court framed the following issues :--

> 1. Whether the plaintiffs have suffered loss due to misconduct and negligence by the defendant? OPP
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> 2. If issue No. 1 is proved, whether the plaintiffs are entitled to recover any amount. If so, to what amount? OPP
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> 3. Whether the defendant-Bank has no contractual liability to make good loss incurred by the plaintiffs? OPP
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> 4. Whether the plaintiffs have no cause of action or locus standi to file the present suit? OPD
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> 5. Relief.

8. In order to prove their case, the appellants examined PW-1 Madan Lal Wadhwa, PW-2 Rajesh Kumar, Constable who proved copy of F.I.R. Ex. PW-2/2 and copy of report of Police, Ex. PW-2/3, PW-3 Ranjit Singh, Manager of the respondent-bank, PW-4 Gurmit Chand, DSP, PW-5 Sushil Kumar Verma, PW-6 Smt. Urmil Sagar and the appellants stepped into witness box as PW-7 and PW-8, respectively, before they closed their evidence. On the other hand, the respondent-bank examined its Senior Manager as DW-1 and closed its evidence.

9. After considering the evidence, produced by the rival parties, the learned trial Court decided issue Nos. 1, 2 and 3 against the appellants and issue No. 4 was not pressed and thus, it was decided against the respondent. Vide impugned judgment and decree the suit of the appellants was dismissed with costs.

10. The learned Lower Appellate Court has upheld the findings given by the learned trial Court. Hence, the present Regular Second Appeal.

11. I have heard the learned Counsel for the parties at length and gone through the record of the case very carefully.

12. Mr. R. K. Chhibbar, learned Senior Advocate, has argued the matter with his usual tenacity backed by meticulous preparation. In the memorandum of appeal, six substantial questions of law have been formulated. At the time of argument, Mr. Chhibbar has raised six additional points. In my view, the points sought to be raised are covered by the issues framed by the trial Court. One additional question of law can be formulated thus :--

> "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?"

13. Thereafter, on facts, the controversy in the present case has been aptly summed up in issue Nos. 1 to 3 framed by the learned trial Court. To be fair, it must be noticed that Mr. Chhibbar has also argued that the findings recorded by both the learned Courts below are based on misreading of the evidence. He has further submitted that the findings of the learned Courts below are erroneous, as they are based on the judgment of this Court in the case of Mohinder Singh Nanda v. Bank of Maharashtra, 1998 ISJ (Banking) 673, which according to the learned Counsel, is per incuriam.

14. Firstly, Mr. Chhibbar had argued that both the learned Courts below have failed to consider vital pieces of evidence. This failure in Itself would raise a substantive question of law. There is no dispute with the aforesaid proposition of law. The law on this point has been recently reiterated by the Hon'ble Supreme Court in the case of Ishwar Dass Jain (dead) through L.Rs. v. Sohan Lal (dead) by L.Rs. 1999 (9) JT (SC) 305 : (AIR 2000 SC 426). It has been held that the High Court can interfere with the concurrent findings of fact recorded by the Courts below if vital pieces of evidence have not been considered which, if considered, would have led to a different conclusion. In light of the aforesaid ratio, I have perused the Judgments of both the learned Courts below very carefully and I have also gone through the record of the case meticulously. A perusal of the Judgment of the learned trial Court shows that learned trial Court has meticulously considered the entire evidence led by the parties. It has been held that there was a legal contract between the appellants and the respondent-bank. The learned trial Court on the basis of the evidence came to the conclusion that a robbery did take place in the bank. The lockers were opened with a gas cylinder. The robbery was beyond the control of the Bank Manager. It has further been held that the respondent-bank was obliged to keep the locker intact. Thereafter, it has been held that the locker is operated without any knowledge to the respondent-bank as to how many articles and of how much weight and value have been stored in the locker. These facts are personal to the customer. It has been held that the contents of the locker were never brought to the notice of the respondent-bank. There is merely oral statement of the appellants with regard to the contents of the locker. Therefore, the judgments cited by the learned Counsel for the plaintiffs have been distinguished by the learned trial Court. The learned trial Court has also held that there was no negligence on the part of the Bank Manager. The report given by the police Ex. PW-2/3 has been ignored on the ground that the Police Officer was not an expert. It has also been held by the learned trial Court that he was not required to give a

report with regard to the construction of the strong room or the lockers. The learned trial Court, thereafter, held that the appellants could have produced a building expert who could have thrown some light as to whether the strong room was built in accordance with the norms. No such expert having been produced, the report Ex. PW-2/3 has been ignored. I am of the considered opinion that the aforesaid findings given by the learned trial Court can neither be said to be based on no evidence, nor can they be said to be perverse.

15. The learned Lower Appellate Court while confirming these findings of fact has noticed the submissions made by the learned Counsel for the appellants. The evidence has also been thoroughly examined. It has been held that from the evidence pro-

duced by the parties, negligence cannot be attributed to the respondent-bank because it was a case of burglary and the officials cannot apprehend that such a situation shall arise. This apart, the learned Lower Appellate Court takes note of the fact that not only the respondent-bank denied the knowledge about the contents of the locker, but, even PW-7 Smt. Pushpa Mehra, plaintiff No. 2, had admitted in her cross-examination that the list of the contents of the locker were never supplied to the respondent-bank. Therefore, the learned Lower Appellate Court came to the conclusion that there was no entrustment of the goods allegedly kept in the locker by the appellants. The learned Lower Appellate Court again held that the contents of the strong room/ lockers could not be proved by the report of Deputy Superintendent of Police, Gurmit Chand (PW-4) and the statements of the witnesses alone. Again it has been held that the appellants could have proved the factual position with regard to the nature and quality of the strong room and the lockers by producing an expert witness, such as Civil Engineer. In such circumstances, it would not be possible to agree with the submissions made by Mr. Chhibbar that the concurrent findings of fact recorded by the learned Courts below are based on a misreading of the evidence.

16. Mr. Chhibbar has, painstakingly, argued that the relationship between the appellants and the respondent-bank was that of a bailor and bailee as given in Section 148 of the Indian Contract Act, 1872. According to the learned Counsel, once it is accepted that the relationship between the parties is that of "bailment", the lack of knowledge of the contents of the locker by respondent-bank would not affect their liability to compensate the appellants. Learned Counsel relied on the commentary contained in Paget's Law of Banking, Ninth Edition. 1982, Chapter II, Relation of Banker to Customer, VII-Safe Custody.

17. In this commentary, it is stated that "the banker's knowledge or ignorance of the nature of the goods entrusted to him would seem not to affect his liability". This observation has been made on the basis of the law laid down in the case of Giblin v. Me Mullen, (1868) LR 2 PC 317, wherein it is held that "a gratuitous bailee is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description". A perusal of the very same commentary, however, shows that the aforesaid decision was "gravely doubted" by the Privy Council in the case of Port Swettenham Authority v. T. W. Wu and Co. (M) SDN, BHD, 1979 Appeal Cases 580 at 589. On the basis of the aforesaid judgment of the Privy Council, it has been observed in the same commentary that "a banker is under no obligation to accept a parcel for safe custody and where he is asked to do so, could ask to know its contents and

value in order to gauge the nature and extent of any possible liability; but it is submitted that he need not inquire". I am of the considered opinion that these observations are clearly contrary to the submissions made by Mr. Chhibbar. The respondent-bank could only be fastened with liability on the contents of the locker being disclosed to it. In the absence of this information, it would have to be held that there was no entrustment of the goods to constitute bailment as required under Section 148 of the Indian Contract Act, 1872.

18. Mr. Chhibbar has also cited a number of cases to illustrate the law in England with regard to bailment. The authorities cited by the learned Counsel are as follows :--

> 1. Coldman v. Hill, 1919 (1) KB 443. This case related to the loss of cattle which were left in the custody of an Agister of cattle. It was held that the farmer had failed to inform the owner or the police of the theft of the cattle. It was held that even though the cattle had been stolen without the fault of the farmer, he was liable to pay for the loss.
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> 2. Hunt & Winterbotham (West of England) Ltd. v. B.R.S. (Parcels) Ltd., (1962) 1 QB 617. In this case, it has been held as follows :--
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> "If an owner of goods leaves them with another person, who undertakes to mind them for reward, and then fails to produce them when they are wanted, it is a reasonable inference, in the absence of any explanation, that he cannot have looked after them properly : in other words, that he has at least been negligent. Accordingly, it is right to say in such a case, as McNair, J. did in Woolmer v. Delmer Price Ltd., that it is for the depositee to show that he has not been negligent, and that to such an extent, at any rate, the onus is upon the depositee."

3. Houghland v. R. R. Low (Luxury Coaches) Ltd., (1962) 2 All England Reporter 159, again it is held that it is for the defendant to establish affirmatively, not only that the goods were stolen, but that they were stolen without default on his part; in other words, that there was no negligence on his part in the care which he took of the goods. In that case, the plaintiff and her husband had placed the suit cases which were loaded into the boot of the coach which was locked by the driver. The coach developed some mechanical trouble. It was necessary to load the luggage into the relief coach. On arrival at the destination, the couple found that their suit cases were missing from the boot of the relief coach. Since, the suit cases were in the exclusive custody of the coach driver, damages were awarded to the plaintiffs.

4. Port Swettenham Authority v. T. W. Wu and Co. (M) SDN BHD, 1979 AC 580. it has been again held that where bailed goods were lost from the custody of the bailee (whether he was a gratuitous bailee or bailee for reward) the onus was on him to prove that the loss was not due to his failure to exercise the care required by law.

5. Union of India v. M/s. Udho Ram & Sons, AIR 1963 SC 422, it has been held that evidence should be offered by the bailee with respect to the extent of the precautions taken to protect the goods

entrusted. It has been held that Section 151 of the Indian Contract Act, 1872, states that in all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinaiy prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. It was found that the railway administration had failed to exercise due care for protecting the goods of the bailor.

6. The New India Assurance Co. Ltd. v. The Delhi Development Authority, (1991-2) PLR (Delhi Section) 82, it has been held that the essence of bailment is possession. The possession of the truck was handed over to the defendants when the truck was parked in the Parking Centre of the defendants. The defendants had issued a receipt and charged Rs. 3/- for the safe keeping of the vehicle for a period of 24 hours. Immediately at that time a contract of bailment came into being. The defendants as bailee having failed to deliver the vehicle back to the second plaintiff within the contracted period and not having shown to have exercised any prudent care for the safety of the truck, are liable for its loss.

19. These authorities are of no assistance to the appellants in the present, rase. In all these cases, exclusive possession of the property had been handed over by the bailor to the bailee. 1 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 !hat 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 ot 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.

20. Mr. Chhibbar, had placed heavy reliance on the judgment of this Court in Na tional Bank of Lahore Ltd., Delhi v. Sohan Lal Saigal, AIR 1962 Punjab 534, wherein it has been held that "a person who hires, a locker retains some control over it by having one key with himself but if the locker can be operated without any key, (as was possible in the lockers which were rented out to the plaintiffs), then at once any impediment in the way of control and possession of the Bank to whom the locker belongs and in whose strong room it is to be found, wuld be removed mid it can well be said that the

bank is strictly in the position of a bailee. This is an additional ground for making the Hank liable along with his liability as the master for the fraudulent and criminal acts of the servant committed in the course of his employment."

21. Mr. Chhibbar has also argued that both the learned Courts below have wrongly relied on the judgment of this Court rendered in the case of Mohinder Singh Narida v. Bank of Maharnshtra. 1998 KSJ (Banking) 673. In paragraph 4 of this judgment, it is observed as follows :--

> "It is an admitted fact that the plaintiffs hired a locker bearing No. 11 from the defendant-bank and according to them they placed certain jewellery in the locker and there was a theft on 9-1-1989 in the strong room which was broken by the miscreants. But there is no evidence on record to show that the defendant-Bank had the knowledge of the articles in the locker. Unless there is entrust ment of the property to the defend ant-Bank, the Bank cannot be held responsible for the theft. The plaintiffs have miserably failed to prove that there was by en-trustment of ihe articles with the defendant-Bank and that the Bank authorities were aware of the articles placed in the locker. The plaintiffs have also tailed to prove that there was any contract between the Bank and the plaintifls to reimburse the plaintiffs for any loss of the articles kept in the locker. In the absence of any such evidence, the defendant-Bank cannot be held responsible for the theft of the articles in the locker. It is not a case where any employee of the Bank committed a theft. In this view of the matter, I am of the opinion that both the Courts below have rightly come to the conclusion that the defendant-Bank is not liable for any loss of the articles kept in the locker."

22. The aforesaid judgment does not lay down any law which can be said to be contrary to law laid down by the Division Bench of this Court in the case of National Bank of Lahore Ltd., Delhi v. Sohan Lal Saigal, AIR 1962 Punjab 534. In that case, the learned trial Court had held that entrustment and the valuation of the jewellery had been proved. The discussion with regard to this point is in paragraph 9 of the aforesaid judgment. On the twin grounds of exclusive possession of the jewellery deposited in the locker and entrustment thereof to the Bank, it has been held that the Bank would be in the position of bailee. Thereafter, the Bank was held liable because the jewellery was stolen by the Manager. This could not have been done without the negligence of the Bank. The observations of the Division Bench, made in paragraph 9 of the judgment, are as under (at Pages 538-539) :--

> The next submission on behalf of the appellant relates to the finding given by the trial Court on issue No. 9. There is a full and complete discussion of the evidence and other facts and circumstances on which it was found that the plaintiffs had suffered loss to the extent to which the suits were decreed.
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> There can be no doubt that the plaintiffs had adduced all the evidence that could in the very nature of things be produced in a matter like this and the learned Counsel for the appellant has not been able to satisfy us that the appreciation of that evidence by the Court below is in any way defective or open to criticism. His sole attack was confined to one aspect of the matter. It has been urged that the lists of articles of

jewellery which the plaintiffs claimed to have deposited in the lockers had been exaggerated inasmuch as the original lists which the plaintiffs claimed to have in their possession and which were prepared every time they operated upon the lockers, were not produced before the police along with the first information report which was lodged as soon as it was found that the articles had disappeared from the lockers.

Plaintiff-Sohan Lal Saigal, who appeared as C.W. 18, stated that the Station House Officer did not ask for the production of the original lists of the property in the lockers which had been prepared by the plaintiffs for their private reference. Actually, as has been noticed by the trial Court, Shrimati Durga Devi who appeared as C.W. 16 stated that she wanted to give the list in Gurmukhi (Exhibit C.W. 16/3) to the police at the time of making the first information report but the police said that they wanted a list of the stolen property only. These lists were subsequently produced in Court before the Magistrate in the criminal trial. The statement of the plaintiff is corroborated by Shri Baij Nath (P.W. 9), who was the Investigating Officer in the criminal case (page 123). The learned Counsel for the appellant has not been able to show that there was any discrepancy in the lists which were given at the time when the first information report was recorded and the so-called original lists which had been kept by the plaintiffs for their private record and which were produced later on at the trial except that in the lists given with the first information report, the names of jewellers etc. were given. But there was admittedly no discrepancy so far as the number and description of articles were concerned. The trial Court accepted the explanation given by the plaintiffs in the matter of non-production of the original lists at the earliest opportunity and we are satisfied that in view of the police not having demanded the same earlier, the plaintiffs were not bound to produce these lists along with the first information report. In any case this fact alone will not take away the authenticity and veracity of the other evidence which had been believed by the trial Court and against which the learned Counsel for the appellant has not been able to point out anything. The finding arrived at must consequently be confirmed."

23. These observations make it abundantly clear that the plaintiffs therein had given all possible evidence to prove exclusive possession of the jewellery by the bank. Both the learned trial Court as well as the learned lower Appellate Court had held that entrustment of the jewellery to the Bank stood established. These concurrent findings of fact have been affirmed by the Division Bench of this Court. The observations of the Division Bench are of no assistance to the appellants in the present case. The fact situation in Mohinder Singh Nanda's case (supra) is wholly different, where both the learned Courts below, after appreciating the evidence have concluded that the plaintiffs have failed to prove entrustmerit of the jewellery to the Bank. Therefore, the judgment cannot be labelled as per incurium. What is meant by expression per incurium, was considered by the Hon'ble Supreme Court in the case of The Punjab Land Development & Reclamation Corporation Ltd., Chandigarh v. The Presiding Officer, Labour Court, Chandigarh, 1990 (2) JT (SC) 489. In this case, it has been held that the Latin expression per incurium means through inadvertence. In paragraph 44 of the judgment aforesaid, it has been observed that "in England a decision is said to be given per incurium when the Court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate

jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords". This meaning of the expression per incurium has been approved in paragraph 45 of the judgment wherein it is observed that "the position and experience in this Court could not be much different, keeping in view the need for proper development of law and justice".

24. Having come to the conclusion that the judgment in Mohinder Singh Nanda's case is not per incurium, it has to be noticed that the aforesaid judgment pertains to the same incident in which 44 lockers were broken and the contents of the same were stolen. The judgment is, therefore, binding on this Court.

25. Mr. Ashok Pal Jagga, learned Counsel for the respondent-Bank, countering the arguments of Mr. Chhibbar. has argued that agreement between the parties constitute the relationship of landlord and tenant. The agreement uses the term "rent and hirer". A hiring agreement cannot be equated with the bailment. Furthermore, the agreement provides for a written notice to be given for termination of the agreement. This, according to Mr. Jagga, is in consonance with Section 106 of the Transfer of Property Act, which provides for giving a notice for termination of the tenancy. This argument of Mr. Jagga, is without any merit. I am of the considered opinion that hiring of a locker is a transaction wholly distinct in nature from a transaction that would create the relationship of landlord and tenant. In the case of tenancy exclusive possession of the demised premises has to be surrendered by the landlord to the tenant. In the case of bailment exclusive possession of the property has to be given by the bailor to the bailee. Whatever property is deposited in the locker is, undoubtedly, in the custody and possession of the bank. Merely because the locker can be operated only in the presence of the locker hirer would not amount to joint possession of the locker. The Banker can always open the locker with a "master key". The hirer of the locker is not in a position to open the locker without the assistance of the bank. The hirer has access to the locker only during specified banking hours. The banker has no such limitation. It must, however be noticed thai, the transaction of bailment would only be established if the provisions of Section 148 of the Indian Contract Act are complied with. With regard to this, it is the submission of Mr. Jagga that the plaintiffs have miserably failed to prove that the jewellery was kept in the locker as claimed in the plaint. There being no entrustment or delivery of possession. Section 148 of the Act cannot be invoked by the plaintiffs. I find substance in this submission of the learned Counsel. The plaintiffs have failed to make out a case of bailment, in accordance with Section 148 of the Indian Contract Act. which provides the conditions precedent for constituting bailment. These are : (1) There has to be delivery of goods by bailor to bailee; (ii) There has to be a contract to return the goods or the property on the instructions of the bailor. The explanation to Section 148 of the Indian Contract Act, 1872, shows that possession by itself is not enough. Section 149 of the Act envisages that delivery may be made by doing anything which has the effect of putting the goods in the possession of the bailee. As observed in the earlier part of this judgment, there is no evidence on the record except the bald statement of plaintiff No. 2 and the list Annexure-A, to prove that the jewellery was kept in the locker at the time when the robbery took place. Thus, the learned Courts below have correctly held that the plaintiffs have failed to prove entrustment of the jewellery to the Bank. In the case of Kaliaperuman Pillai v. Visalakshmi Achi, AIR 1938 Mad 32, considering the provisions contained in Sections 148 and 149 of the Indian Contract Act, 1872, it has been held as follows (at Pages 32-33) :--

"Under the provisions of Sections 148 and 149, Contract Act. delivery is necessary to con-

stltute the bailment. It is true that the delivery may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee; but the mere leaving of the box in a room in the defendant's house, when the plaintiff herself took away the key of that room, cannot certainly amount to delivery within the meaning of the provision in Section 149. If on these facts, the plaintiff wanted to fasten a liability upon the defendant for the loss of the goods, she must make out an affirmative ground of liability, and cannot ask the Court to treat the defendant as a bailee and throw upon him the onus of accounting for the loss of the jewels. The evidence shows that one morning, when the plaintiff went into the room to take out the jewels for further work, the jewels were found missing. It is not the plaintiffs case that on the previous day she handed over the unfinished jewels to the defendant. I cannot agree with the contention of the learned Counsel for the respondent that because in the first instance the old jewels were handed over to the defendant the bailment thereby constituted continued for all time. Everyday when the unfinished jewels were handed back by the goldsmith to the. plaintiff, the jewels came back to her possession and if at the later stages she desires to throw upon the defendant the onus of exonerating himself from the obligations of a bailee, she must prove some acts whereby the articles could be held to have gone into the defendant's possession. I find no such proof in the present case.

In these circumstances, I do not think it necessary to consider whether, even if the defendant could be regarded as a bailee, the circumstances are such as to protect him under Sections 151 and 152 of Contract Act. I must, however, observe that I see nothing whatever in the evidence and in the circumstances of the case to warrant the learned Judge's suggestion that "It is not unlikely that the defendant appropriated the property and made a show of theft in his house". Though the plaintiff denies any knowledge of the defendant having complained of theft in his house, her second witness admits that the defendant did complain of a theft and that the plaintiff was also aware of such compjalnt. But in the view that I have taken that no bailment has been proved, it is unnecessary to consider this question further. The revision petition must be allowed and the decree of the lower Court set aside. The. petitioner will be entitled to his costs in this Court; but I direct that in the lower pourt each party will bear his costs'."

26. These observations seem to be fully applicable to the facts and circumstances, of this case. There is no evidence whatsoever to suggest that the jewellery was ever deposited in the locker. Furthermore, there is no evidence to prove that the value of the jewellery was as claimed by the plaintiffs. Section 151 of the Act provides for the degree of care to be taken by the bailee of the goods bailed. In all cases, of bailment 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. No liability can be fastened on the bailee when the goods are returned in a condition similar to the condition of

the goods at the time of deposit. In any event, Section 152 of the Indian Contract Act. 1872, provides, that the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151. In these observations of mine, I am fortified by the observations made by a Division Bench of the Allahabad High Court in. the case of Shanti Lal v. Tara Chand Madan Gopal, AIR 1933 All 158, Considering the provisions, of Sections 151 and 152 of the Indian Contract Act, 1872, it has been observed as under (at Page 159) :--

> "The standard of diligence required of a bailee under Sections 151 and 152. Contract Act, is that of the average prudent man; and where the bailee has laken the same care of the property entrusted to him as a reasonably careful man may be expected to take of his own goods of the same bulk, quality and volume as the goods bailed, he is not responsible for the loss, destruction or deterioration of the thing bailed. No cast-iron. standard can be laid down for the measure of the care due from him and the nature and amount of care must vary with the posture of each case. The Courts below have arrived at a definite finding that in view of the peculiar circumstances of this case, the bailee has not been remiss in his obligations to his principal and has not been negligent in the care of the goods bailed to him, The position of the bailee in this case was one of supreme difficulty. The appearance of a flood was unknown and unprecedented in the annals of Agra. The factors and godown keepers had no past experience to guide them. It could not be predicted with certainty that the river would rise in flood. No forecast could be made of the time of its advent. The plaintiff may well have thought that if the river rose in flood it may not reach the area where his godown stood. The removal of the goods to some other locality was perhaps out of the question. For who could say that the flood would come so far and no further? We are clearly of opinion that the plaintiff was not guilty of negligence in the discharge of his statutory liability to his principals with reference to the goods entrusted to him, that he was not responsible for the loss, destruction or deterioration of the thing bailed and that he was justified in claiming the price thereof from the defendants."

27. These observations are fully applicable to the facts and circumstances of the present case. There is merit in the submission of the learned Counsel for the respondent bank, that both the learned Courts below have correctly held that negligence on the part of the respondent-bank has not been proved.

28. Mr. Chhibbar, learned Senior Advocate, has, however, argued that both the learned Courts below have failed to take notice of the fact that the strong room as well as the lockers had been built in contravention of the guidelines on security arrangements in the banks issued by the Indian Banks Association and the guidelines issued by the Reserve Bank of India. According to the learned Counsel, these guidelines are to be strictly construed and strong room was to be built in accordance with the specification given therein. Learned Counsel has further pointed out that even DW-1, P. K. Aggarwal, Senior Manager of the respondent-Bank, had admitted that the guidelines issued by the Indian Banks Association are binding. According to the learned Counsel, both the learned Courts below have erred in not relying on the report Ex. PW-2/3 given by the police. This witness was not

cross-examined on the point that strong room had not been properly constructed. This evidence was unimpeachable. In support of this proposition, learned Counsel for the appellants relied on a Division Bench judgment of the Calcutta High Court in the case of A.E.G. Carapiet v. A. Y. Derderian, AIR 1961 Cal 359. The learned Courts below, according to the learned Counsel, have also failed to take note of the admission of DW-I, P. K. Aggarwal, Senior Manager of the respondent-bank, to the effect that the security guards for protecting the lockers Was only on duty from 10 a.m. to 5.30 p.m. Mr. Chhibbar has argued that all these facts put together, clearly prove the negligence on the part of the respondent-bank. According to Mr. Chhibbar the negligence is so gross that there was no need to offer any independent evidence, as the principle of res ipsa loquitur would be fully attracted to the facts of the case. These submissions have been made by Mr. Chhibbar on the presumption that both the learned Courts below have wrongly held that the plaintiffs have failed to establish a case of bailment, as provided in Section 148 of the Indian Contract Act.

29. I am unable to agree with the submissions made by the learned Counsel for the appellants. A perusa! of the judgment of the learned lower Appellate Court shows that the Court was fully alive to the arguments with regard to the principle of res ipsa loquitur. In fact, whole of the evidence pointed out by the learned Senior Counsel, has been noticed in paragraph 9 of the judgment of the learned lower Appellate Court. The submissions made by the learned Counsel for the appellants have been considered in paragraph 11 of the judgment. In support of the submission with regard to the principle of res ipsa loquitur, Mr. Chhibbar had relied on three judgments. He, first, relied on in the case of Ramkrishna Ramnath Shop, through Proprietor Radhakisan Ramnath, Kamptee v. Uniori of India, AIR 1960 Bom 344, wherein a Division Bench has held that the principle of res ipsa loquitur may be applied to infer negligence but it cannot be applied to infer misconduct. The aforesaid judgment would not be applicable to the facts of this case as in that case handing over of 340 bags of Tobacco to the Southern Railway for being carried to its destination, was admitted. In the present case, it has come in evidence that the respondent-bank has no knowledge of the contents of the locker. Mr. Chhibbar has then relied on a judgment in the case; of Shri Ram Pertap s/o Ch. Ratti Ram v. General Manager, Punjab Roadways, Ambala, AIR 1962 Punjab 540. In the aforesaid case, it has been held as follows (at Page 542) :--

> "Insofar as the first point, is concerned, the contention raised is really based on the maxim res ipsa loquitur. This maxim, as I understand its purport, suggests that on the circumstances of a given case the Res Speaks and is eloquent because the farts stand unexplained, with the result that the natural and reasonable inference from the facts--not a conjectural inference--shows that the act is attributable I o some person's negligent conduct. The effect of this maxim, however, depends on the eogeney of the inferences to be drawn and must, therefore, vary in each case. Its effect appears to be to shift the burden or onus of proof on to the defendant who is expected to show as to how the accident may have occurred without his negligence. There is undoubtedly a divergence of judicial opinion as Lo the extent of the onus but in the case in hand that question does not arise and, therefore, it is unnecessary for me to advert to it. The Claims Tribunal has found that the bus in question skidded on account of the wet condition of the road, as originally mentioned by the claimant in the complaint book. This finding has not been successfully challenged on behalf of the appellant and as a

matter of fact no argument has been addressed in respect of this finding on the merits.

The contention raised, however, is that it was not possible for the vehicle to skid if there had been no negligence on the part of the driver; in other words, the vehicle could only skid if there was some serious defect in it. I would grant that a skid in itself does not excuse the accident and it may not suffice, by itself, to displace the prima facie inference of negligence arising from the vehicle being where it has no right to be for a skid may be caused by bad, careless or fast driving. The skid is thus by itself a neutral factor and it may or may not be due to the driver's negligence. But in the instant ease the finding of the Court below based on the earliest representation made by the claim ant in the complaint book has not been successfully displaced on behalf of the appellant. It was, I may here mention, for the claimant-appellant to dislodge this finding of the Tribunal by showing it to be clearly erroneous in which attempt he does not seerrvto have succeeded.

I have, therefore, no option but to repel this contention as well."

30. Thereafter, Mr. Chhibbar. learned Senior Counsel has relied on another judgment of this Court in the case of Mela Ram v. Mohan Singh, AIR 1978 Punj & Bar 323. In this case, it has been held that the maxim of res ipsa loquitur can be invoked when an accident may by its nature be more consistent with its being caused by negligence for which the respondent is responsible than by any other causes and that in such a case the mere fact of the accident is prima facie evidence of such negligence.

31. There is no dispute with the aforesaid propositions of law enumerated in the aforesaid decisions. However, the principles set out above, will have to be applied to the peculiar facts of the present case. I am of the considered opinion that there is no sufficient material on record to hold that any reasonable inference can be drawn in the facts and circumstances of this case to establish and to say that the robbery occurred due to the negligence on the part of the respondent-bank. The robbery in this case, like "the skid" of the bus in Ram Pertap's case (supra), is a neutral factor. By no stretch of imagination can it be said that the robbery could not have taken place if the lockers and the strong room had been built according to the guidelines issued by the Indian Bankers Association and the Reserve Bank of India. No evidence has been produced by the plaintiffs to prove that the strong room and the lockers had not been built according to the specifications. The fact that a robbery had taken place cannot lead to the presumption that the strong room and the lockers were not built according to specifications. Therefore, even if, bailment is held to be proved, the respondent-bank has been correctly held to be not liable by both the learned Courts below.

32. Mr. Jagga, thereafter, proceeded to meticulously distinguish the Judgments cited by Mr. Chhibbar which have already been noticed above. 1 have no hesitation in accepting the submissions made by Mr. Jagga to the effect that the plaintiffs have miserably failed to prove the entrustment of the jewellery which was allegedly kept in the locker. There is no proof of any kind to show the value of the Jewellery which was kept in the locker, No expert witness has been produced to show that the

jewellery mentioned in the list Annexure-A to the plaint would be worth the amount claimed.

33. Consequently, I find no merit in the present appeal. The same is, therefore, dismissed with no order as to costs.