IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui
Mr. Justice Omar Sial

High Court Appeal No. 202 of 2019

Mahmooda Tapal & another ……. Appellants

Versus

Standard Chartered Bank (Pakistan) Ltd and another ……. Respondents

Mr. Zahid F. Ebrahim, Advocate for the Appellants.
Mr. Hassan Arif, Advocate for the Respondents,

Date of hearing : 13.02.2024, 19.03.2024 & 20.03.2024
Date of judgment : 20.05.2024

JUDGMENT

OMAR SIAL, J.: On 14.04.2011, one of Standard Chartered Bank's (interchangeably referred to as "**SCB**" and "**the Bank**") customers complained that items were missing from the locker (Locker No. 439) he had rented at the SCB's Hill Park Branch. A similar complaint was made by another customer who had been allocated Locker No. 455 the following day. SCB reviewed the record of those who had visited the lockers and found that a customer, Ali Kashif (allocated Locker No. 556), had made unusually frequent and prolonged trips to the locker room. The SCB management questioned Ali Kashif, and it was alleged that he admitted that besides Locker No. 439 and 455, he had also opened and stolen belongings from three other lockers, Locker Nos. 439, 049 and 422. He facilitated partially recovering the stolen

goods from his house and a jeweller's shop. Some stolen valuables he had sold, for which he issued cheques in favour of the Bank. An F.I.R. was registered against Ali Kashif, and he was arrested. It was also found that Ali Kashif had remained SCB's employee from July 2006 to May 2007. Ali Kashif disclosed that he had opened all five lockers with a single key. Asked to demonstrate his modus operandi by the Bank officials, he could only open Locker No. 049 with a single key, whereas his attempts to open the remaining four lockers failed.

2. On 27.06.2011, another customer reported a theft from her locker (Locker No. 302). On 18.08.2011, Mehmooda Tapal, who operated Locker No. 427, informed the Bank that her locker was empty when she and her son Mustafa visited it. The Tapals claim that their jewellery and cash were stolen and that certain Bank officials promised them compensation. However, the Bank later informed the Tapals that they would only be compensated up to Rs. 1 million, as per the State Bank of Pakistan's directives.

3. The Tapals, being aggrieved with the stance taken by the Bank in putting a limit to its liability, filed Suit No. 1492 of 2011 in this Court seeking recovery of the loss that they had incurred. On 06.03.2019, a learned Single Judge of this Court dismissed the Tapals suit after trial. The Tapals have preferred this appeal against the judgment.

4. Mr Zahid Ebrahim, learned counsel representing the Tapals facing a difficult situation, has eloquently and extensively argued his

stance. His arguments focused primarily on highlighting SCB's negligence. He argued that the fact that a former employee of the Bank opened the lockers with a single key, coupled with the fact that valuables recovered at Ali Kashif's lead were distributed to five locker holders without the Bank verifying from the Tapals whether any of those items belonged to them, indicated blatant negligence by the Bank. Mr. Ebrahim, while conceding that the Tapals had signed documents containing limitation of liability, argued that they were made to sign documents hurriedly and, as such, were not aware of the terms and conditions. He also identified three Bank employees who had initially assured the Tapals that they would be compensated for the loss and stressed that the malafide of the Bank was apparent from the fact that the Bank summoned none of the three employees as witnesses at trial. In passing, Mr. Ebrahim also referred to Articles 70 and 126 of the Qanun-e-Shahadat Order, 1984 and argued that the onus to prove that the valuables claimed by the Tapal were not in the locker was on SCB as the Tapals had successfully demonstrated the availability of the claimed items in the locker.

5. Mr. Hasan Arif, learned counsel for SCB, on the other hand, submitted that Ali Kashif had been an employee four years before the incident; that during interrogation, he had only admitted to stealing valuables out of five lockers (which did not include the Tapals' locker); the Tapal locker was in pristine condition from the outside whereas the ones broken in had signs of a forced entry and

that it was incorrect to say that Ali Kashif had opened the lockers with only one key. The case law cited by counsels has been read and considered by us. It forms a part of the record. For that reason and brevity, we have not reproduced it here. However, we have not found it helpful in resolving the dispute.

6. The case law cited by learned counsels was on general principles of the law of bailment and the Qanun-e-Shahadat Order, 1984. Mr. Zahid Ebrahim has cited the following precedents on behalf of the appellant: (i) **Pune Zilla Madiyawarti Sahakari Bank Limited & others v. Ashoq Bayaji Ghoghare** (a judgment of the National Consumer Disputes Redressal Commission New Delhi where it was observed that *"in a case where deficiency on the part of the ban in rendering services to its customers is proved the affidavit of the locker holder should ordinarily be accepted unless the same stands impeached by way of cross-examination."*) **Amitabha Dasgupta v. United Bank of India & others** (the case has been referred to above), **(ii) Mahmooda Tapal & another v. Standard Chartered Bank, PLD 2021 Sindh 28** (coincidentally this is the very judgment from which the appeal rises.), (iii) **New India Insurance Company Limited & another v. the Delhi Development Authority and others**, **AIR 1991 Delhi 298** (Case pertained to a vehicle parked in a parking lot in which the receipt issued by the defendant authority for its safe keeping was held to be bailment and the bailee held liable for its theft.), (iv) **Bank of Chitur Limited v. P Narasimhulu**

Nidu & others, **AIR 1996 Andrapradesh 163** (The delivery to the bailee may be made by the bailor by doing anything which has the effect of putting the goods in possession of the bailee.), (v) **Morvi Mercantile Bank Limited v. Union of India**, **AIR 1965 SC 1954** (Railway receipt was held to be a document of title), (vi) **Cooperative Hindustan Bank Limited v. Surindranath Dey & others**, **AIR 1932 Calcutta 524** (Definition of bailment has been reiterated). Apart from the above, **Sikandar Hayat v. Sughra Bibi (2020 SCMR 214)**, **Hafiz Tassaduq Hussain v. Lal Khatoon (PLD 2011 SC 296)**, **Noor Jehan Begum v. Mujtaba Ali Naqvi (1991 SCMR 2300)**, **Mali Tariq Mehmood v. Province of Punjab (2023 SCMR 102)**, **Farzand Ali v. Khuda Buksh (PLD 2015 SC 187)** and **Muhammad Rafique v. Abdul Aziz 2021 SCMR 1805** were cited in support of the proposition as to what the effect of the failure to cross examine the witness on a specific point would be. **Mahmood Khan v. Sara Akhter (2024 SCMR 178) and Jahangir v. Mst. Shams Sultana (2022 SCMR 309)** were cited in support of the proposition that under Article 129 of the Qanun-e-Shahadat Order if a witness does not appear to testify it may be presumed that had he seemed he would have not supported the case.

7. We have heard the learned counsels and re-appraised the evidence led at trial. Our observations and findings are as follows.

8. On 03.09.1999, the Tapals requested SCB to allow them to use a safe deposit locker of type “A” on a rental basis at the Bank’s Hill

Park Branch. At that point in time, the Hill Park Branch offered two types of lockers to its customers. A large locker with a capacity of 2.0 cubic feet and a medium locker with a capacity of 0.75 cubic feet. Both parties deemed it appropriate at trial not to establish whether the locker allocated to the Tapals was of large or medium capacity; however, we have assumed that a type A locker corresponded to the large capacity locker.

9. Clause 9 of the locker rental application, a term to which the Tapals agreed, provided as follows:

> *"The Lessee(s) agree(s) and understand that the locker is being hired by the Lessee(s) at the Lessee(s) own risk and responsibility. The Bank assumes no responsibility or liability on any count whatsoever for any loss or damage occasioned by any theft, dacoity, armed holdup, fire, acts of God, war, riot, civil commotion, irresistible force or other elements beyond the control of the Bank; the Bank has no arrangement to insure the articles in the locker. It is the lessee's responsibility if they wish to insure the contents of their locker by taking out appropriate insurance cover."*

10. In essence, the Bank allotted the locker to the Tapals, clarifying that they would not be responsible if the locker's contents were stolen or destroyed and further disclosed that the Bank does not insure the contents of the locker. This position changed after the State Bank of Pakistan issued BPRD Circular No. 05 of 2007, which asked banks in Pakistan to provide insurance cover to locker holders. The Circular, amongst other directions, asked banks to:

> *"iii) The banks/DFIs shall review their existing insurance agreements. They shall obtain comprehensive insurance with clear-cut "Cap Limits" on various sizes of lockers at competitive rates from the insurance companies ready to*

cover the act of vandalism of lockers both by the security guards and employees of the banks/DFIs.

iv) The banks/DFIs shall properly convey the terms & conditions (including size, rent/p.a, insurance ceiling, etc.) to the existing locker holders / new locker holders. Consent of all existing/new locker holders shall be obtained for the insurance ceiling, etc.

v) In case of breakage /damage to the locker by any means, the locker holder shall be compensated by the bank/DFI immediately as per the insurance ceiling of the locker."

11. Due to the State Bank's directives, Clause 21 was added to the locker rental terms and conditions. This new clause is provided as follows:

"*Standard Chartered Bank (Pakistan) Limited shall arrange insurance cover for the valuables placed in the lockers. Any losses which are sustained and discovered because of damage, destruction, fire, armed robbery and housebreaking to any securities, bonds, certificates, bills of exchange, bank notes, jewellery or any other property of intrinsic value contained in the safe to the maximum limit per locker, as mentioned below or actual, whichever is less. The said loss will be assessed by the surveyors/bank authorities based on the information/proof provided by the customer.*

Small:	*Rs. 500,000*
Medium:	*Rs. 750,000*
Large:	*Rs. 1,000,000*

Please note that items in excess of the above value(s) will have to be insured by the customers, and insurance arranged by the Bank shall only be maximum up to the amounts mentioned above against each category of lockers. Additionally, claims of items lost from the locker during the ordinary course of business where there is no proof of any of the above instances will not be entertained."

12. On 15.08.2011, the Tapals signed a fresh application requesting SCB to allow them to rent a safe deposit locker of type "A" at the Bank's Hill Park Branch. They agreed to the limitation of liability provided in Clause 21.

13. In what appears to be a partial contradiction with the terms contained in Clause 9, Clause 21 neither gels in with the rest of the rental terms nor is it happily worded. Clause 21 does not include theft as a situation where the Bank would be obliged to compensate the customer. We also see no reason for "house-breaking" to be included as a situation where a bank would be liable. We have not delved further into this aspect, as it is an admitted position that the Bank was/is willing to compensate the Tapals up to the limit of Rs. 1,000,000 (which also lends support to our observation that the Type A locker allocated to the Tapals was a large locker).

14. The Tapals indicated their acceptance of the above terms. They agreed that they had "*read and understood the terms and conditions governing the safe deposit locker facility*" and agreed "*to be bound by the terms and conditions*". It is not Tapals' case that they were illiterate or could not read or understand the English language. While we can understand that there are many situations where one signs a form without reading the fine print, and as unfortunate as that might be, it cannot be said that the contractual term agreed upon would be void for this reason. Pakistan does not have laws akin to the English Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. With much respect, we disagree with Mr. Ebrahim's argument that the Tapals signed the terms and conditions for locker rental under duress, coercion, or undue influence. It is a matter of record that the Tapals themselves asked

SCB to give them the locker, not the other way around. The Tapals continued availing the locker services from SCB from 1999 to 2011 without any demur or protest. This was when they agreed that the Bank would have no liability towards its customers for items stolen from bank lockers. Clause 21, as badly worded as it might be, enhanced the Bank's liability from zero to Rs. 1 million for theft in large lockers. Had the Tapals not signed the new rental form, they would have been far worse off than what they are after signing the form. No evidence was provided at trial to establish coercion, undue influence, or duress. No evidence was led at trial to show that the Tapals were unhappy with SCB but that SCB would not let them close their lockers and take home their content.

15. A bare reading of the terms and conditions shows that the Tapals contractually agreed that the Bank's liability would be limited to Rs. 1 million for large lockers. We hold that offering the Tapals Rs. 1 million for the alleged theft follows the terms settled between the parties. SCB is not in breach of any contractual liability it took.

16. In their arguments, the learned counsels did not address the nature of the relationship between a locker holder and the bank. To do justice, we have, in our research, analysed the Bank's potential liability under statutory as well as common law. There is no authoritative decision on this issue that we came across from courts in Pakistan. However, courts in foreign jurisdictions have leaned heavily towards considering the relationship between a locker holder

and a bank as one between bailor and bailee. A detailed and comprehensive review of some such decisions was undertaken by the Supreme Court of India in ***Amitabha Dasgupta vs United Bank of India (AIR 2021 SC 1193)***. For the sake of brevity, we have not reproduced those decisions as the *Amitabha judgment* (supra) is readily available in the public sphere. Suffice it to say, "*The dominant view of courts around the globe has been that the bank is in the position of a bailee concerning the goods placed inside the locker by a locker holder.*" (paragraph 5 of the Amitabha judgment). In Pakistan, the law of bailment is contained in sections 148 to 171 of the Contract Act 1872. Section 148 of the Act defines that a "*bailment*" is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the objective is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "*bailor*". The person to whom they are delivered is called the "*bailee*". Section 151 of the Act provides 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 ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. Section 152 stipulates 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.*" It is clear from a bare reading of the

law that no responsibility would hinge on SCB under the law of bailment if (i) bailment is proved and (ii) if SCB had taken as much care of the goods bailed to them as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

17. To make out a cause of action in bailment, the Tapals had to prove (i) a transfer of possession of the property and (ii) an obligation to do something with the property, such as to store it, use it for a specified purpose, or hold it subject to the satisfaction of security, whether or not for payment. For a contract of bailment, a transfer of possession (delivery) of the bailed goods must occur. Section 149 stipulates that the delivery to the bailee may be made by doing anything that puts the goods in possession of the intended bailee or of any person authorised to hold them on his behalf. The Tapals failed to prove entrustment of property and thus could not prove bailment. The learned Single Judge conducted an extensive exercise to run through all the documents that the Tapals provided at trial and concluded that the documentary evidence produced at trial was insufficient to prove the entrustment of property. We agree with the analysis of the learned Single Judge. Liability under the Act of 1872 did not arise as property entrustment; thus, bailment was not proved at trial. SCB could also have incurred liability under section 154 of the Act of 1872 if it had made any use of the goods bailed, which is not according to the conditions of the bailment. No such allegation was

raised at trial; thus, we have not addressed it. Liability could also have arisen under section 162 of the Act of 1872, which provides that if, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time. Once again, this liability was contingent on the Tapals establishing bailment, which they could not do. There is also a solid argument to say that in the present case, as there was a contract between the Tapals and SCB (which was the rental application terms and conditions) therefore, on this count, too, section 152 of the Act of 1872 would not be applicable. We, however, give no definite finding on whether a contract between parties would absolve them of statutory liability under section 162, read with section 151 of the Act of 1872. This aspect was not argued before us and is not necessary for resolving the dispute under consideration because of our findings on the issue of bailment.

18. We have noticed in our research that there have been occasions when the relationship between a locker holder and the bank has been considered to be that of a depository on hire or a lessor-lessee relationship. Indeed, it is interesting that SCB's locker rental terms and conditions (sporadically) have referred to a lessor-lessee relationship. Perhaps the thought process of the draftsman was to limit the Bank's liability further. Based on our other findings and our opinion that it would not benefit the Tapals in any manner if we delve deeper into this aspect, and as the same has not been argued before us, we give no finding on the situations where it can

be said that a lessor-lessee relationship would exist between the bank and its locker holder.

19. We have also examined whether SCB could be liable under the common law of negligence. Mr. Ebrahim indirectly argued this aspect of the case. He believed that SCB is a bank of international repute, and when a customer goes to it, the customer goes with the expectation that their goods will remain in safe custody. Mr. Ebrahim also argued that Ali Kashif (the alleged thief) could open the lockers with only one key, proving the Bank's negligence. We have considered the arguments made by Mr. Ebrahim and, with much respect, disagree with him. It is well settled that to prove negligence, three ingredients have to be satisfied: (i) that SCB owed the Tapals a duty of care towards the goods entrusted to them, (ii) that SCB was in breach of that duty and (iii) that as a consequence of that breach, damage that was not too remote, was caused. In the present case, there is little argument that SCB owed its customers (including the Tapals) a duty of care. The first hurdle for the Tapals to cross was whether a breach of that duty occurred. It is pertinent to point out that the Fraud Investigation Report upon which Mr. Ebrahim has relied to show the breach also mentions that Ali Kashif did not identify the Tapals' locker as one he had broken into. He could open only one locker (out of the five he admitted to having looted) with one key while failing to open the remaining five. We have not commented on the admissibility of the extra-judicial confession

made by Ali Kashif before the Bank's officials. Prima facie, the extra-judicial confession allegedly made by Ali Kashif may be inadmissible in evidence according to Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984. The record reflects that the recovery, if any, of the stolen goods was made before the F.I.R. registration; therefore, Article 40 of the Order of 1984 will not come into play. Be that as it may, this is an issue for the criminal court to decide.

20. The five lockers broken into by Ali Kashif (according to the Fraud Investigation Report) contained marks of forced entry, whereas the Tapals' locker, by the Tapals' admission, was in pristine condition. SCB compensated the five locker holders; however, compensation, if any, given to them would not significantly help the Tapals as their case was on a different footing (the thief had not admitted to having stolen goods out of the Tapals locker). Mr. Ebrahim has also argued that SCB would incur liability as Ali Kashif was a former employee of the Bank. This argument, too, does not come to the Tapals' aid. For one, Ali Kashif worked for a short while with the Bank 5 years before the incident and that too in a completely different capacity. It would be unfair to hinge the Bank with vicarious liability for the individual acts of Ali Kashif, their former employee. To prove vicarious liability, SCB also had to show that it was liable for Ali Kashif's unlawful and illegal acts. No evidence in this regard was produced at trial. Apart from not proving a breach of duty of care, the Tapals also failed to show that damage was caused to

them. We have covered this aspect earlier in this opinion. The Tapals' inability to show, either through their tax returns or any other documentary evidence, that the valuables they claimed to have been stolen were ever owned by them and/or kept in the locker. Mr. Mustafa Tapal admitted candidly at trial that their respective tax returns had not disclosed the valuables or cash they said had been stolen from the locker. To conclude, a claim under the law of negligence was also not established.

21. Mr. Ebrahim argued that three identified employees of the Bank had assured the Tapals that they would be compensated, but the Bank did not include them on their list of witnesses. However, Mr. Ebrahim agreed that if the witnesses were helpful in the Tapals' claim, nothing stopped them from summoning those individuals as witnesses.

22. Security in banks is taken seriously because that is the very backbone of the industry, and its goodwill substantially hinges on this aspect. Incidents such as the current ones can have an adverse impact on all players. The safety and confidence of the banking industry have to be protected. We are mindful that any observation or conclusion in this opinion has to be balanced with the risk of fraudulent claims. One cannot allow situations (though that does not seem to be the situation in the current case) where a person takes a locker, keeps it empty, and then takes advantage to sue the bank for the losses he claims occurred. Allowing such a situation would be

equivalent to the demise of the banking industry. Simultaneously, it must not be forgotten that the Tapals trusted the bank's reputation and kept their belongings in safe custody in SCB. While we do not doubt the integrity and honesty of the Tapals, we are mindful that we are an appellate court and have to decide this case within specific parameters. Therefore, we must see if the laws and the evidence allow the Tapals' claim. Unfortunately, we are of the view that the Tapals failed to establish their case.

23. The appeal is dismissed.

JUDGE

JUDGE