

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 1492 of 2011

Before:

Mr. Justice Arshad Hussain Khan.

Mahmooda Tapal & another.

VersusStandard Chartered Bank
(Pvt.) Ltd. & 5 others.

Plaintiffs: Mahmooda Tapal & another
Through Mr. Zahid F. Ebrahim, Advocate.

Defendants 1 & 6 Standard Chartered Bank (Pvt.)
Through M/s. Liaquat Merchant Associate
Mr. Hassan Arif Advocate.

Date of hearing. 23.11.2018.

JUDGMENT

Arshad Hussain Khan-J. The plaintiffs have filed the present suit for damages against the defendants with the following prayers:

- “A. Grant decree for damages in the amount of PKR 31.05 million, for loss suffered by the plaintiffs due to the missing valuables and cash due to the omission and commission as well as complicity and/or negligence of the defendants.
- B. Grant decree for damages in the amount of PKR 150 million for loss, trauma and mental agony suffered by the plaintiffs at the hands of the defendants.
- C. Costs and any other relief that this Hon’ble Court may deem as just and fair in the circumstances.”

2. The facts give rise to the filing of the present suit as averred in the plaint are that the plaintiffs established in Pak Rupee and US Dollar personal accounts, and obtained safe deposit locker bearing No. 427 at the defendant-bank, Hill Park Branch, Karachi and have continued to manage such accounts and safe deposit locker with the defendants’ bank for more than one decade. Further averred that on 15.8.2011 the plaintiffs visited the branch to operate their accounts as well as locker bearing No.427[subject locker], where the plaintiffs noted that the officer dealing with the branch vault had been replaced and a new

officer was on duty and before entering into the vault the plaintiffs were asked to hurriedly sign a form which they did so without reading to the contents of the same on the assurance that it is merely a procedural form to improve customer service. However, later on, it came to the plaintiffs' notice that the document, which was made to sign on 15.8.2011, was a form for limitation of liability. It is also averred that when the plaintiffs opened the safe deposit box out of the locker and opened it they were shocked to see that it was empty of all contents. All the plaintiffs' valuable jewellery and cash were missing and they were left holding an empty locker box and pouch in a state of shock and disbelief. The plaintiffs immediately raised alarm upon which Mr. Zaigham Sayani, the Regional Manager South of the defendants informed the plaintiffs that there had been a theft which was discovered by the defendants in April 2011 and the plaintiffs were amongst seven-high-net worth individuals who had been targeted. The plaintiffs were assured that the culprits have been apprehended and the defendants vigorously pursuing the prosecution. The plaintiffs were also assured that once a list of the missing valuable and details of cash missing from the locker is provided to the defendants, their losses will be fully compensated. The plaintiffs were also told that the Standard Charter having international repute would stand by its name and repute in honoring the losses of the plaintiffs. On 17.8.2011, the plaintiffs submitted a formal letter of complaint and provided the defendants with a detailed list of valuable jewellery and cash which were missing from the locker. It is also averred that although many jewellery and valuable items had great sentimental value for the plaintiffs and could never be compensated in terms of money, however, the plaintiffs were assured that at least financial losses suffered by the plaintiffs will be made good by the defendants. The plaintiffs were initially assured by the defendants that the compensation approval is under process, however, later on the plaintiffs were told that the bank in the process of compiling details of the case and would send them a detailed reply once the investigation is completed. Thereafter, in a meeting held on 21.9.2011 a complete turnaround was made by the same officers of the defendants who had earlier assured the plaintiffs for full compensation. In the said meeting the plaintiffs were told that they would not be compensated except to the extent of meager sum supposedly covered

under the aforementioned retrospective limitation of liability form which the plaintiffs were made to sign on 15.8.2011. The plaintiffs having not agreed with such proposal, sent a legal notice on 5.10.2011 and in respect thereof an interim response received on 12.10.2011, the counsel for the plaintiffs against the said response replied the letter dated 18.10.2011, thereafter, defendants No.1 and 6 subsequently issued a continuation of interim response making incorrect and baseless denial. It is also averred that the defendants are directly or indirectly responsible for (i) gross dereliction of fiduciary duty, (ii) conspiracy to suppress and cover up the officers' personal culpability in the theft in the Locker, (iii) failure to maintain due care and safeguards expected by a multinational bank (iv) deceit and criminal negligence; and (v) causing financial loss, trauma, and mental agony to the plaintiffs.

3. Upon summons of the present case, the defendants filed their statement wherein while raising preliminary legal objections regarding misjoinder of defendants No.2, 3, 4 and 5, denied the allegations leveled in the plaint. It is stated in the written statement that the plaintiffs have a safe deposit lockers No. 427 at the Hill Park Branch of defendant No.1. The said locker was rented/leased to the plaintiffs pursuant to a locker rental application dated 03.09.1999. The second locker rental application was signed by the plaintiffs on 15.8.2011. It has been further stated that both the lockers rental applications contain rules and regulations which are printed on the reverse of the applications. It was denied that signatures of the plaintiffs were obtained surreptitiously for mala fide reasons with the intention of limitation of liability. It has also been stated that the contents of the locker were confidential to the defendants and the allegations that the locker when opened was found empty of all its contents including valuable jewellery and cash are denied. It has been denied that any assurance was extended to the plaintiffs that they would be compensated for missing valuables and cash by the defendants being an international bank. It has been further stated that in the meeting held on 21.9.2011, the plaintiffs were informed that at the highest liability, if any, of defendant No.1 was to the extent of the insurance of the contents of the locker in accordance with the directives of State Bank of Pakistan for which purpose, the plaintiffs would have to establish

their claim and the matter would be referred to the insurer for payment of claim by the insurer based on the size of the locker and this amount would be paid over to the plaintiffs. It is also denied that the defendants are liable to pay any amount to the plaintiffs towards damages in respect of alleged valuables missing from the locker and/or towards loss, trauma and mental agony. It has been further stated that defendant No.1 is one of the Pakistan's reputed bank which renders banking, financial as well as other facilities in Pakistan with which its customers are satisfied and accordingly defendant No.1 developed and maintained a large client and valued customer based in Pakistan. It is also stated that the terms and conditions pertaining to the opening and operating of safe deposit locker are signed by the customers while general terms and conditions are also sent to the customers in writing by post and specific contention relating to insurance was also published in the local newspapers in English and Urdu on 14.1.2011. It is also stated that the locker's rental application and the rules and regulations pertaining to safe deposit locker which the plaintiffs signed voluntarily was requested by defendant No.1 as a matter of course as customers generally sign such documents only on their visits to the Bank for operation of their lockers. It is also stated that one locker holder/lessee who had visited the premises of defendant No.1 [Bank] frequently during April 2011 was apprehended when complaints were received from the locker holders/lessees with regard to valuables which were found missing from their lockers. The concerned locker holder/lessee was apprehended by the officials of defendant No.1 and an FIR was lodged. It has also been stated that under clause 21 of the Locker Rules and Regulations / terms and conditions defendant No.1 is only required to obtain insurance cover based on the size of the locker and not on the basis of contents. If any loss is sustained for the reason specified in clause 21, the loss is required to be assessed by the Surveyors / Bank authorities in the first instant while insurance arranged by the Bank / Defendant No.1 at its own cost shall be up to the maximum amount mentioned in clause 21 against each category of locker. This clause was introduced on the basis of State Bank of Pakistan BPRD Circular No.5 of 2007 which required holder/lessee based on the size of the plaintiffs' locker, which in the plaintiffs' case is Rs. One million. Further stated that since liability arises under S.B.P. BPRD Circular No. 5 of 2007,

defendant No.1 would at the highest be liable for payment in full and final settlement subject to plaintiffs' establishing loss from their locker leased/rented from the defendant. In the last, the defendants sought dismissal of the suit.

4. On 10.09.2013 learned counsel for the plaintiffs, in view of para 14 (xviii) of the written statement filed on behalf of defendants No.1 and 6, did not oppose the application filed by the defendants for deleting the names of defendants No. 2, 3, 4 and 5 from the array of the defendants in the instant case. Consequently, the names of defendants No.2, 3, 4 and 5 were deleted from the present case.

5. On 24.09.2013 by consent of the parties, following issues were settled:

- 1) Whether the plaintiffs leased/rented and maintained locker No.427 at Shahrae Faisal Branch of the defendant No.1 and on what terms and conditions?
- 2) Whether the defendants owed the plaintiffs any duty of protection and safety in respect of the contents of the plaintiffs locker No.427 and whether there was any breach of such duty in April 2011?
- 3) What is the effect, if any, of the limitation of liability from (Annexure D/1 & D/2 of the written statement) which the plaintiffs signed?
- 4) What is the effect of State Bank of Pakistan BPRD Circular No.5 of 2007?
- 5) Whether the plaintiffs suffered any financial loss or damage due to the alleged loss of contents of the locker No.427 and whether the defendants are liable to compensate the plaintiffs? If so to what extent?
- 6) Whether the plaintiffs suffered any mental hurt/trauma or agony at the hands of the defendants officers? If so to what extent?
- 7) Whether the plaintiffs are entitled to receive compensation and damages in the sum of Rs.181.05 Million or any other amount from the defendants and if so, from which defendant(s)?
- 8) What should the decree be?

And the Commissioner was appointed for recording of evidence in the matter who after completing the evidence returned commission vide his report dated 14.04.2018.

6. The plaintiffs in support of their stance in the case examined plaintiff No.2 as PW-1, who deposed for himself as well as attorney of plaintiff No.1 and produced the following documents:-

01	Affidavit-in-evidence	Exh.P-5/1.
02	Half yearly report of defendant No.1 from January to June, 2011.	Exh.P-5/2.
03	Locker Rental Application dated 15.8.2011.	Exh.P-5/3.
04	Letter dated 17.08.2011.	Exh.P-5/4
05	List of valuable lost	Mark as O/1.
06	Original 52 receipts of jewellery	O/2.
07	Letter dated 22.10.2013 sent through e-mail by the plaintiff No.2	Exh.P-5/5
08	Letter dated 23.10.2013 sent through e-mail by plaintiff No.2.	Exh.P-5/6.
09	Letter dated 05.09.2011 to the plaintiff No.2 from defendant.	Exh. P-5/7
10	Legal notice dated 05.10.2011 on behalf of the Plaintiffs.	Exh.P-5/8.
11	Reply legal notice dated 12.10.2011 on behalf of defendants.	Exh.P-5/9
12	Reply dated 18.10.2011 on behalf of plaintiffs to defendants' reply legal notice.	Exh.P-5/10.
13	Reply Letter dated 21.10.2011 of M/s. Liaquat Merchant Associates advocates addressed to M/s Fakhrudin G. Ebrahim Company advocates dated 18.10.2011.	Exh.P-5/11.

7. On completion of the plaintiffs' evidence, the defendants in support of their stance in the case examined four (4) witnesses namely; (i) Abdul Rehman Choudhry as their witness DW-1, who produced his affidavit-in-evidence as Exh.D-1/1. Application for allotment of a locker dated 30.9.1999 as marked O/1, Rent application form dated 15.8.2011 as marked O/2, Safe deposit locker access card as marked O/3, cutting of newspaper daily Dawn dated 14.01.2011 as marked O/4, copy of newspaper daily Jung dated 14.01.2011 as marked O/5 and

confidential interim investigation report dated 10.05.2011 as marked O/6, (ii) Junaid Shah as DW-2, (iii) Jehangir Adil Qazi as DW-3 who produced written statement as Exh.D-3/1, and (iv) Mohsin Ali Nathani as DW-4. These witnesses were duly cross examined by the learned counsel for the plaintiffs.

8. Learned counsel for the plaintiffs during the course of his arguments while reiterating the stance taken in the case has argued that the plaintiffs in the year 1999, keeping in view the defendants' global brand promise, proclaimed values of trust and commitment to stakeholders/customers as one of the most reliable international Bank in Pakistan, opened Pak rupee and US Dollar bank accounts at defendant No.1's Hill Park Branch, Karachi and obtained safe deposit locker having No.427 thereat. Ever since the said safe deposit locker is obtained, the plaintiffs have continued to maintain the same. The plaintiffs' idea of having safe deposit locker in defendant bank was to keep their valuables properly protected. It is also argued that the defendant got signed another locker rental application from the plaintiffs on 15.8.2011, on the date when they visited the Bank and discovered that the contents of their locker were missing. It is also argued that though the subject locker rental application dated 15.8.2011, contains a limitation of liability term and the bank is placing heavily reliance on the same, however the said rental application has no value in the eyes of law as firstly; the said application was got signed hurriedly without providing any proper opportunity to the plaintiffs to read and understand the terms and conditions mentioned therein and secondly; the said rental application was also not exhibited in evidence due to the objections raised by the plaintiffs' counsel at the time evidence. Even otherwise, the terms and conditions do not assist the Bank in avoiding the claim of the plaintiff's. It is also argued that the duty of protection and safety owed by the defendants to the plaintiff is evident from the language of SBP Circular No. 5 of 2007, which, inter-alia, provides that the bank/DFIs shall ensure that safe deposit locker rooms in their respective branches are adequately secured from all sides and the security arrangements in place are fool proof and meet the security standards developed by each bank/DFI. It is also argued that Circular No.5 of 2007 also relies on an earlier Circular No.27 of 2004,

which notes that a number of incidents involving breaking of lockers/attempts to break/open locker have occurred which have serious repercussions on the banking business besides having direct bearing on public confidence in the banking system, thus, it is imperative that banks should improve the standards for the safety and security of the lockers. Further argued that in the given fact, the plaintiffs had rented locker from the defendant Bank for valuable consideration and keeping in view the language of the SBP circulars relied on by the Bank itself, there is no doubt that the defendant owed a duty of protection and safety in relation to the plaintiff's locker and that the same stood breached. It is also argued that the most elementary obligations of Bank in respect of protection and safety towards its locker holder stood flagrantly violated when it's own report acknowledged that the locking mechanism on the lockers were defective and its own ex-employee (Mr. Kashif) was involved in the theft. It is also argued that the theft at the lockers of the Hill Park Branch was discovered by the defendant bank in the month of April 2011, when certain other locker holders complained and the alleged perpetrator Mr. Kashif was apprehended by the defendant bank and many valuables recovered from that person. However, the defendant bank chose to suppress the incident and even failed to inform the other locker holders at the said branch. The plaintiffs only discovered the theft in their locker when they visited the branch on 15.8.2011. It is also argued that the plaintiffs' witness in his testimony had given the names of Branch officials namely (i) Mr. Zaigham Sayani, (ii) (iii) Mr. Ahmed Nizam and (iv) Mr. Aman ur Rehman, the plaintiffs had met after the theft and the said officers had assured them of full compensation on furnishing of details of valuables. However, the defendants in their evidence did not produce any of them to controvert the stand of the plaintiffs and instead the defendant's bank chose to produce witnesses none of whom ever met with the plaintiffs. It is also argued that plaintiff No.1, being a senior citizen and widow, led her evidence through plaintiff No. 2, her son and joint locker holder, who testified not only on his own account but also as attorney of his mother and therefore it cannot be said to be a case of no evidence on behalf of the plaintiff No.1. It is argued that plaintiffs' witness in his evidence produced 52 original receipts of purchases of jewellery over a period of

two decades. He was vigorously cross examined that such receipts were not in fact receipts of purchase and payments but estimates, yet he withstood such challenge and remained resolute that these were evidence of purchase. Further argued that it is not uncommon in our society that receipts, especially from jewellers are issued in a less formal manner. Furthermore, the plaintiffs' witness also admitted that the valuables in the locker were not mentioned in their wealth statement. However, failure to do so, could at best be a taxation issue, but not does in itself dilute plaintiffs evidence that such valuables were in the locker, especially, when such testimony was not challenged in the cross-examination. Therefore, the loss, as per Ex P-5/4 stands proved. Even defendants own witnesses did not deny the plaintiffs' claim when the former President of the Bank, DW 4 stated in evidence that "I am not aware if the Bank had wrongly denied the claims of the plaintiffs." It is also argued that the plaintiffs' letter of claim dated 17.8.18, Exhibit P 5/4 with details of valuables was submitted within 48 hours of the incident at the instructions of the Bank. Yet, the Bank did not deny or challenge the same at any point whatsoever. The plaintiffs' witness testified that the valuables (jewellery and cash) were in the locker. He testified that they provided the detailed list of valuable jewellery and cash missing from the locker and Bank Officers including Mr. Zaigham Sayani assured them of full compensation. Yet, such testimony was not challenged and was not cross examined on this point at all. Therefore, the case of the plaintiffs' as to valuables in their locker and loss suffered on account of theft stands proved. Whereas the material witnesses of the defendant bank who dealt with the plaintiffs were withheld and the presumption in respect of the same is inescapable. Lastly argued that plaintiffs have successfully proved their case through evidence hence entitled to the reliefs claimed in the case and the plaintiffs are entitled to decree as prayed. Learned counsel in support of his stance in the case has placed reliance on the following case law:

- (i) 2018 CLD 1313 Mst. SOBIA BANO v. EFU LIFE ASSURANCE LTD. Through Chairman and another.
- (ii) 2018 CLD 1300 STATE LIFE INSURANCE CORPORATION OF PAKISTAN through Chairman and another v. MUZAFAR ALI.

9. Conversely, learned counsel for the defendants in his argument has urged that plaintiffs only recorded the evidence of plaintiff No.2 whereas plaintiff No.1 did not appear in the witness box and give evidence in support of the case. It is also urged that the plaintiffs have failed to establish their claim in the case either through oral or documentary evidence as most of the documents in respect purchase of the jewellery produced by the plaintiffs' witness were either estimates or valuations while only 4-5 invoices relate to alleged purchase but even these invoices were not produced by the shop-keeper/author and were un-signed and as such the plaintiffs are not entitled to the reliefs claimed in the present case. It is also urged that the plaintiffs' claim as holder of a locker on rental basis is misconceived as only the locker was given on rent to the plaintiffs with no attached or any other liability with regard to contents. Further urged that the contents of a locker are confidential/secret to the locker holder only and no other person and as such the defendants are not liable to compensate the plaintiffs alleged loss of missing contents of the locker. It is also urged that the plaintiffs have also failed to establish through evidence with regard to their claim for damages or loss in the sum of Rs.150 million as set out in the plaint and such the plaintiffs are not entitled to any relief on this account as well. It is also urged that based on the investigation carried out by Mr. Abdur Rehman Chaudhary as a Fraud Investigation Officer at defendant No.1, the claim of other locker holders was examined on merits and the description of jewellery given by them to the said Officer was compared with the items of jewellery/valuables recovered from the accused Kashif and on the basis of this matching identification whatever jewellery was recovered from the accused Kashif and from a jewellery shop in Karachi was handed over to the respective locker holders and the matter was amicably settled. Whereas there was nothing found from the accused Kashif or the jewellery shop which matched the description given by the plaintiff and accordingly no item of jewellery / valuables could be returned to the plaintiff and the plaintiffs were advised that their claim could only be considered under the State Bank of Pakistan circular for insurance of locker holders which provides for a maximum insurance cover of Rupees One (1) million. The defendant No.1 was always ready and willing to extend such insurance cover for the benefit of the plaintiffs subject to

submission of necessary claim forms. It is also urged that the defendants substantiated their stance in the case through their evidence and in this regard the evidence of their witnesses had been consistent. Lastly, argued that the plaintiffs have completely failed to make out any case against the defendants in relation to their valuables/jewellery allegedly placed in her locker No.427 and no judgment and decree is liable to be passed in favour of the plaintiffs based only on the bare statement of plaintiff No.2. The documents produced by the plaintiffs witness (plaintiff No.2) do not constitute a basis for grant of any judgment and decree for the amount claimed in the suit and as such the suit against defendants is also liable to be dismissed with costs. Learned counsel in support of his arguments has placed reliance on the case law:

- (i) PLD 1994 Karachi 492 MUHAMMAD LUQMAN v. BASHIR AHMED.
- (ii) 1996 MLD 1819 MUHAMMAD ASHRAF v. SHAH NOOR KHAN and another.
- (iii) 2005 MLD 646 Mst. SAFIA v. Mst. BIBI and 14 others.
- (iv) PLD 1976 SC 767 SHAH NAWAZ and another v. NAWAB KHAN.
- (v) PLD 1979 SC 890 ABDUL AHAD and others v. ROSHAN DIN and 36 others.
- (vi) 1982 CLC 954 Syed ABDUL RASHEED v. Mst. TAJUNNISA.
- (vii) 2001 MLD 2007 Mst. ALAM BIBI v. AKBAR ALI and others.
- (viii) 1998 SCMR 96 MUHAMMAD IBRAHIM through legal heirs and others v. Mst. BASRI through legal heirs and others.
- (ix) PLD 2005 Karachi 585 Mst. MOHSINA SAEED TAUNI v. MUHAMMAD ASIF and others.
- (x) 2006 SCMR 470 MAQBOOL AHMED v. PAKISTAN AGRICULTURAL and others.
- (xi) 2010 CLD 338 M.C.B. BANK LTD. through Authorized representative v. STATE BANK OF PAKISTAN through Governor and 2 others.
- (xii) 1988 CLC 2023 Mst. MUMTAZ BEGUM and others v. ABDUR RASHID and others.

10. I have given due consideration to the arguments advanced by the learned counsel for the parties, minutely perused the material/evidence available on the record, the applicable laws and the case law cited at the bar. My findings on the issues framed in this matter are as under:

11. **ISSUE NO.1**: This issue has two parts; first part relating to Plaintiffs' maintaining the locker No.427, and second part relating to the terms and conditions on which the said locker was hired. As regards the first part of this issue, since there is no dispute between the parties in respect thereof, therefore, no finding is required to be made in this regard. Insofar as second part of the issue is concerned, the plaintiffs at the time of recording evidence raised objections to the production of locker rental applications dated 03.09.1999 marked as O/1 and application dated 15.08.2011 marked as O/2, wherein terms and conditions for acquiring the locker under the heading of Rules & Regulations: Safe Deposit Lockers, were appearing. The objections taken by the plaintiffs' counsel at the time of evidence for the sake of ready reference are reproduced as under:

“ 1. Photostat copy of application for allotment of a locker dated 03.09.1999 subject to the objection of the learned counsel for the plaintiff on the ground that the original has some writing on the top of its first page on figures “505-0” which does not appear on the copy filed with the affidavit in evidence and copy supplied to him as mark O/1.

Note: page No.2 has also over writing on the top of the application which do not appear on the copy filed with affidavit in evidence & the one supplied to the advocate for the plaintiff. Besides reverse of page No.2 also bears same type of over writing which are not available on the copies filed with evidence as well as those supplied to the advocate for the plaintiff.

2. Photostat copy of Rental Application form dated 15.08.2011 subject to the same objections as on the earlier documents as mark O/2.”

From the record, it appears that defendants No.1 and 6 along with their written statement also filed the copies of Locker Application Form dated 03.09.1999 as annexure-D/1 and Locker Rental Application dated 15.08.2011 as annexure D/2 in respect of subject locker, both the documents containing signatures of plaintiffs. The plaintiffs did not raise any objection in respect of said documents except that the signatures of the plaintiffs on Locker Rental Application dated 15.08.2011 were obtained hurriedly without providing them opportunity to properly read and understand the said document, however, the plaintiffs did not dispute their signatures on the said documents, either in their affidavit in evidence or the witnesses of the defendants were cross examined in this regard. Besides this, though the

documents having over writing on them are also not available on record however, the defendants neither in their pleadings nor in their evidence either relied upon or have tried to take any advantage of over written contents on the documents marked as O/1 and O/2. Moreover, any document brought on record by any of the parties whether in the shape of an exhibited or marked document the same can be taken into consideration by the court of course in accordance with law. In addition to the above, the cross examination of the plaintiffs' witness in this regard is also self-explanatory, which for the sake of ready reference is reproduced as under:

“I see Ex.P-5/3 front page & reverse. It bears my signature and the signature of my mother. It is correct that prior to signing Ex.P-5/3, my mother & myself had signed a similar rental application form dated 03.09.1999. I see documents D-1 (2 pages) filed with written statement. It bears my signature & the signature of my mother. It is correct that when we had taken the locker on rental basis in 1999, we knew that it was taken on rent & not purchased. It is correct that terms and condition of the rental are mentioned on the reverse of the application form. We had read these terms & condition before we signed it.

Voluntarily states that they had not read the terms & conditions of Rental application given by them on 15.08.2011, they had signed it.”

In the circumstances, I am of the view that these documents (O/1 and O/2) produced by the defendants cannot be brushed aside merely on the objection that there is some overwriting on the top of the original documents, especially when there is no dispute that the plaintiffs signed two locker rental applications forms first one on 03.09.1999 and second one on 15.08.2011 and above all there is also no dispute regarding their signatures on the said documents. This issue is answered accordingly.

12. **ISSUES 2, 3 & 4:** Since these issues are inter connected therefore same are being taken up together.

It is an admitted fact that the plaintiffs hired a safe deposit locker bearing No. 427 from the defendant-bank in the year 1999 and since then the same is being maintained by the plaintiffs. And according to plaintiffs they established bank account and hired the safe deposit locker from defendant-Bank keeping in view their global brand promise, proclaimed values of trust and commitment to stake holders and customers as one of the most reliable international Bank in

Pakistan. The witness of the plaintiffs also reiterated such fact in paras No.4 and 5 of his affidavit in evidence, which for the sake of ready reference is reproduced as under:

“4. That Defendant No.1 is an international bank established in Pakistan and the Defendant, Mr. Mohsin Ali Nathani is the chief Executive Officer of Defendant No.1. That the Defendants have made many specific assurances and commitments to proclaimed values of trust and services to stakeholders and customers. (I hereby produce photocopy of extracts of some of the assurances of the defendants as Exhibit PW.1/2)

5. That in view and reliance on the above, we established Pak Rupee and US Dollar personal accounts, and obtained a safe deposit locker at the Defendants’ Hill Park Branch, Karachi, Pakistan (“the Branch”). Despite encouragement from other competitor banks to shift, we have continued to maintain such accounts and safe deposit locker with the defendants for more than one decade due to the claims, assurances and public commitments made by the Defendants.”

Records reflects that the said testimony of the witness of the plaintiffs was not cross examined.

13. Before going into further discussion, it would be appropriate to discuss the dominant aspect involved in hiring bank lockers by the public. The public go to Bank for hiring Lockers not because they lack a Locker at their residence, but because of the safety and security, which is maintained by the Bank and which is not available at the individual residence. Normally iron chest/Safe Deposit Locker of high thickness of steel conceives safety. The class of customers, who go to Bank for depositing their valuables in Lockers must have the capacity to possess such iron chest in their house, but instead of making this arrangement at their residence, people prefer to go to a Bank to hire a Locker thereat in order to keep their valuables in such Lockers. One would not like to keep his valuables at a place which is not in his control or possession instead of keeping it in his house under constant watch unless the reasons for such are so compelling. The foremost compelling reason which can easily be conceived is safety and security available to the Bank Lockers. The Safe Deposit Lockers of Banks are located in impregnable strong rooms and a stranger cannot get access into these strong rooms of the Bank. The high security alarms installed by the Bank provides a feeling of safety to the customers who prefer to have a Locker in the Bank for keeping his valuable therein instead of a

Locker at his residence. Even several Government Departments hire Bank Lockers to keep their valuables/important documents due to high degree of safety available therein. Therefore, the rental paid by such person to the Bank cannot be said to be mere rental charges for hiring the Locker but it includes comprehensively the cost of maintaining high safety standards and arrangements at the Bank. In other words, it can be said that a person pay rent for the locker not only for right to use the Locker but also of a host of other services closely associated with maintenance of Lockers by the Bank. In fact the use of Lockers is predominant by other services available at the Bank. Furthermore, the customer is not given exclusive control of the Locker inasmuch the Bank retains control over the Locker all through and a double locking system ensures that the locker cannot be opened by a customer except with the aid and assistance of the Bank.

In the back drop of the above, though the agreement, between bank and customer in respect of the safe deposit locker, provides the relationship of lessor and lessee yet in fact, it is slightly a bid complex in nature inasmuch the Locker can be used by the customer for keeping his valuables but he cannot operate the same according to his free will as and when he likes and is bound to follow the regulations and conditions imposed by the Bank in this regard. Neither the strong room nor the steel cabinet in which the Lockers are fitted is rented out to any particular person. Even the Locker cannot be opened by the customer on his own unless it is first unlocked by the Bank with master key kept by it. The arrangement, therefore, made by the customer with the Bank with respect to Locker cannot be equated with that of hiring of an steel cabinet or drawer of an steel cabinet, or an iron chest and rental for the Locker cannot be said to be consideration for only use of storage space in the cabinet. The dominant aspect involved in the transaction is the security and safety of valuable which is kept by the customers in the Locker of the Bank instead of keeping it at their residence.

14. In the present case as well, the plaintiffs at the time of hiring lockers from bank signed a Locker Rental Application form dated 03.09.1999 [Marked O/1] wherein rules and regulations: safe deposit locker were mentioned which, inter alia include, clause of disclaimer of responsibility. Furthermore, the defendant bank got another Locker

Rental Application form signed on 15.08.2011 [Marked as O/2] wherein two more clauses in respect limitation of liability of the bank were added. In view of the discussion made in the preceding paras, I am of the considered opinion that such a disclaimer would be effective only in the event of force majeure situations and when no negligence on the part of bank could be attributed. Insofar as the clause of limitation of liability of the bank, as stipulated in the Locker Rental Application dated 15.08.2011 [Marked as O/2], is concerned, the record reflects that the said application was got signed by the defendant bank after the date of incident that too when the plaintiffs visited the bank to operate their subject safe deposit locker. The plaintiffs in their pleadings as well as their deposition have specifically stated the fact that the signatures of the plaintiffs were obtained by the officer of the defendant bank posted at the vault/strong room on the said date i.e. 15.08.2011, in a hurried manner without providing any proper opportunity to read and understand the terms mentioned in the said documents. The said part of the testimony of the plaintiffs were also not cross examined. Besides, this document cannot constitute a valid 'contract' as the same appears to have been obtained under the influence, whereas a valid contract also requires the parties' consent, which must be free, mutual and communicated to each other. Consent is not free when obtained through duress and undue influence. The concept of undue influence has been expounded by the Honourable Supreme Court in its various judgments wherein the Honourable apex court have viewed transactions between the parties enjoying unequal bargaining position with suspicion and has held that undue influence can also be inferred from circumstances. In *HAMIDA BEGUM v. MURAD BEGUM* (PLD 1975 SC 624), the Honourable Supreme Court has held that undue influence may be inferred when the benefit is such as the taker has no right to demand either in law or equity and the grantor has no rational motive to give. In the present case, as discussed above, it is apparent from the record that the said document was signed by the plaintiffs before entering the vault to operate their subject locker, hence the document, containing retrospective limitation of liability, is not liable to be considered.

15. Deposit for safe custody is a branch of the law of bailments. A bailment is the delivery of movable property by one person (the bailor to another the bailee) on condition that it shall, in due course, be redelivered to the bailor on his order. It may be stated that the 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 then at once any impediment in the way of control and possession of the Bank to whom the locker belonged and in those strong-room it was to be found, would be removed and it could be said that the bank was in the position of a bailee. Keeping banker as bailees, one may say that the care which a banker is obliged to take is such care as an ordinarily efficient and prudent person can take in similar circumstances. The bank will not be liable if property held in safe custody is destroyed by fire or otherwise, lost or stolen unless there is negligence on the part of the bank, and the degree of negligence required to establish liability will depend on the relevant circumstances of the case.

16. Insofar as Circular No.5 of 2007 issued by Banking Policy & Regulations Department, State Bank of Pakistan, is concerned though the said document is not produced in the evidence by either side yet, since this document is not disputed one as both the parties are relying on this document, therefore, this document which was placed on the record by the counsel for the plaintiff through a statement against which the counsel did not raise any objection, which is taken into consideration. For the ease of reference the same is reproduced as under:

“BPRD Circular No.05 of 2007

June 05, 2007

The Presidents/Chief Executives
All Banks/DFIs

Dear Sirs/Madam,

**MASTER CIRCULAR ON SECURITY STANDARDS FOR
ENHANCEMENT OF SECURITY OF THE LOCKERS**

Please refer to BPD Circular No.27 read with DPD Circular Letter No.48 of 2004 on the above subject.

2. It has been brought to the knowledge of State Bank of Pakistan that some banks are reluctant to honour the claims with regard to vandalism of lockers by the security guards or by their employees. This is being attributed to a clause in their agreement with the Insurance companies, which restrict them to honour such claims. This position has been reviewed and it has been decided to issue following instructions on the subject.

i) The banks/DFIs shall ensure that safe deposit locker rooms in their respective branches are adequately secured from all sides, and the security arrangements in place are fool-proof and meet the security standards developed by each bank/DFI. The banks/DFIs may review their existing security arrangements to outsource the same to a security agency enlisted on the approved panel of Pakistan Banks Association (PBA). The banks may decide at their own to obtain or otherwise, any undertaking from the head of the security company for recovery of losses incurred on breakage of lockers by the security guards.

ii) In case the bank branches are providing safe deposit locker facility in areas where security agency on the PBA approved panel is not available, the bank/DFI shall carry out due diligence at the branch for the appointment of their own security guard(s).

iii) The banks/DFIs shall review their existing insurance agreements and 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.

3. The banks/DFIs are free to take further measures in addition to above for safety & security of lockers.

4. Apart from strengthening security arrangements, the banks/DFIS should also bolster/reinforce their internal controls for smooth operation of lockers.

5. This circular supersedes all previous instructions on the subject.

Yours truly,

Sd/-
(SYED IRFAN ALI)

Director”
[Emphasis supplied]

From the perusal of the above circular it appears that the State Bank Of Pakistan, the supervisory and regulatory authority of Commercial Banks, Islamic Commercial Banks, Development Financial Institutions (DFIs), Micro Finance Banks and Exchange Companies in Pakistan, having conscious of the fact that some banks are reluctant to honour the claims of their customers with regard to vandalism of lockers, issued instructions through the above said circular. Clause 2 (iv) of the above clearly states that banks/DFIs shall convey the terms & conditions (including size rent/p.a insurance ceiling etc. to the existing locker holder/new locker holders. Consent of all existing/new locker holders shall be obtained for the insurance ceiling etc. Though the said circular was issued in the year 2007, there is nothing available on record which could show that the defendant bank ever communicated it to the plaintiffs, the customer of the defendant-bank maintaining their accounts and subject locker since 1999, and obtained their consent, except the documents (Locker Rental Application form dated 15.08.2011) which was got signed by the defendant-bank that too when the plaintiff visited the branch, much after the date of incident of theft, to operate the subject locker. From the above it appears that the defendant-bank has also failed to comply with the direction of its regulatory authority.

17. In view of the above discussion, I am of the view that the defendant-Bank has owed a duty of protection and safety in respect of plaintiffs' subject locker, however, whether the same has been breached or not and any negligence could be attributed towards the defendant-bank, and further whether the plaintiffs suffered any loss due to missing of their contents of the locker, would only be possible after discussion of the evidence, led by the parties in the present case, which has been done in the later part of this judgment. These issues are answered accordingly.

18. **ISSUE NO. 5:** The claim of the plaintiffs in this case is that the plaintiffs in the year 1999, opened Pak rupee and US Dollar bank account at defendant No.1's Hill Park Branch and obtained

subject safe deposit locker thereat. Ever since the said safe deposit locker is obtained, the plaintiffs have continued to maintain the same and keep their valuables, including jewellery and foreign and local currency in the said locker. On 15.8.2011, the plaintiffs visited the branch to operate their accounts as well as the subject locker, when the plaintiffs opened the safe deposit box it was empty of all contents and all the plaintiffs' valuable jewellery and cash were missing. However, upon the complaint, the plaintiffs were assured that the culprits have been apprehended and once a list of the missing valuables and details of cash missing from the locker is provided to the defendants, their losses will be fully compensated. On 17.8.2011, the plaintiffs submitted a formal letter [Exh. P-5/4] of complaint and provided the defendants with a detailed list [marked as O/1] of valuable jewellery and cash which were missing from the subject locker. Record reflects that the list of valuables provided by the plaintiffs to the defendant-Bank was also mentioned in the Confidential Interim Investigation report [marked as O/6] in respect of Lockers break-in Hill Park Branch, Karachi, produced by the defendant-Bank in the present case. For the sake of ready reference the said list provided by the plaintiffs is reproduced as under:

[Marked as O/1]

Kara with ruby in gold	01	59.696
Bangle with ruby emerald & pearl in gold	01	30.135
Bangle (pardas rodium)	02	32.18
Bangles (machine cutting rodium	04	46.9
bangles	04	58.10
Kara of pearls	01	42.515
Bangles with 110 emeralds (Emeralds=22.7CT)	02	58.7
kara	01 pair	54.10
bangles	10	137.5
Chain in meena	01	23.4
Bangles in pearls	02	44.4
Set in Lapiz & pearls	01	39.7
bangles	08	100
bangles	08	169
kara	01	51.56
Bangles in pearls	02	36.90
Ring of ruby & diamond (Ruby=3.1CT&Diamonds=0.46CT)	01	6.95
Bangles	03	88.3
Ring in ruby & diamond	01	15.43

(Ruby=Rs.25,000/- & Diamonds 9.22CT)		
Set in ruby & pearls	01	96.4
Chain set of ruby of ruby & Zarkon	01	22.22
Chain set of sapphire zarkon	01	31.57
Locket of ruby & Emerald	01	13.421
Tops	01	6.785
Bracelet	01	6.267
Set of zarkon	01	35.4
Necklace set	01	113.05
100 tola pure gold		1166
100 tola pure gold		1166
Gold coin weighing 1 tola each	06	70
Gold biscuit weighing 1 ounce each	03	93
Bangles set in gold	08	148
Gold bangles set	24	450
Phool harr set of pearls 7 gold	01	233
Total gold & jewellery weight		5551.624(grams)

16. Customer also provides estimated value of the claimed missing articles as detailed below:

Particulars	Rate	Estimated Value PKR in Million
Total Gold weight in Grams 5552	@ 5,015	27.84
Total diamond value in CT 4.288	@ 85,000	0.36
Total Emerald value in CT 25.81	@ 25,000	0.65
Total Rubbies value in lumpsum		0.02
Total Jewellery		28.87
Currency		
Cash in Pak Rupees		1.50
US Dollars (8,000x85)		0.68
		2.18
Estimated value of claim customer		PKR 31.05 million

19. It is an admitted position that the plaintiffs at no point in time after obtaining the subject locker ever disclosed the contents of the same to the defendant bank, hence in order to substantiate their claim the plaintiffs had to show firstly that; the plaintiff had the jewellery and cash as mentioned in the list and secondly the same were in the locker before the date when the plaintiffs complained that their jewellery and cash are missing from the subject locker. In this regard plaintiffs' witness in his evidence produced 52 receipts of jewellery as PW-1/6 to PW-1/57. Learned counsel for the defendant-Bank raised objection to the production of the said documents on the ground that same can be produced by their authors and not by the plaintiffs' witness. The said witness of the plaintiffs was also cross-examined by the defendants' counsel, relevant excerpts in this regard for the sake of ready reference is reproduced as under:

“I see documents marked O/1. I had prepared it. My mother was involved in it. The items listed in documents mark O/1 belonged to my mother. My mother has investment of 250 million from which she has income of 250 thousand per month. She is an income tax payer. She files annual income tax returns. She has not mentioned these item in her wealth tax statement. The value of jewellery mentioned in her wealth tax statement is Rupees 200 thousand. I went with her whenever she went to purchase the jewellery. I went with her to Maria Jewellers, Tahir Ali Sharaf Jewellers, Aftab Jewellers, Matloob Jewellers, Hussaini Jewellers & Shirin Bandukwala for purchase of Jewellery. The jewelers had issued receipts to her for payment made by her for purchase of the jewellery. I see documents marked as O/2 (PW-1/6 to PW-1/57).

Question: Please show me any receipt money issued to you or your mother from the documents PW-1/6 to PW-1/57.

Answer: All of these documents are receipts of money.

I do not agree that none of these documents are receipts of money received by the jewellers from us. The receipt issued by Huzaifa jewelers for Rs.25,000/- bears signature. It is not mentioned in the documents itself if it is a receipt or invoice. The documents dated 13.06.2006 of Hussaini Jewellers being PW-1/13 & 14 bears signatures of the Jeweller on their reverse. It is signed by Hussain. It is correct that Rs.20,000/- is shown as receipt on the reverse of this document. I see documents PW-1/37 & 38 issued by Hussaini Jewellers. The words RC written on these documents mean received. The amount of these receipts is Rs.36500/- i.e., items PW-1/45 & 46. These do not bear any signature. These documents only show R.C. I see PW-1/48. It is receipt dated 15.08.2006 issued by Hussaini Jewellers for Rs. 17000/- It bears signature of the Jeweller. I see items Pw-1/51 to 57. These are receipts.

Question: I suggest that items Nos. Pw-1/51 to 57 are not receipts.

Answer: I do not agree.

Question: I suggest that these 7 documents are estimates and not receipts.

Answer: I do not agree.

It is incorrect that on all of these 7 documents word “Estimate” is written.

Voluntarily states that he reiterates that these are receipts.

Whenever I make payment I get a receipt. There are no other receipts in Exs.Pw-1/6 to 57 which bear the signature of the person receiving the money.

It is incorrect that the document bearing Pw-16 to 57 are either estimate or valuation or certificates & not receipts. I see 28 documents out of Pw-1/6 to 57 and say that word Estimate is

written thereon. It is correct that word certificate is written on 7 of these documents.

I am not aware of the circular of the State Bank of Pakistan regarding claims against Banks relating to lockers. I am not aware of Circular No.05/2007 dated 05.06.2007 regarding limitation of liability of Bank in respect of lockers. I am also not aware of the Public Notice in Daily Dawn dated 14.01.2011 regarding revised liability of the Banks in respect of the lockers. I am shown copy of the said notice published in the Newspapers for the information of customers of the Bank and say that I had not seen it.

Question: Can you produce copies of your mother's income tax returns & wealth tax Statements for the last 5 years?

Answer: I will consult my Tax Advisor & produce the same on the next date of hearing, if available with him.

My mother is not in possession of copies of those documents. I will make a positive statement about these documents on the next date of hearing and produce the same if available. My mother or myself had not disclosed the contents of the locker to anyone. I had not taken out any insurance policy in respect of the of the contents of the documents. It is correct that the contents of the locker were confidential to me & my mother. I have one sister. The contents of the locker were not disclosed to her. It is incorrect that my claim against the Bank is incorrect, baseless and unjustified. It is incorrect that the Bank is not liable to pay to my mother the amount claimed in this suit. It is incorrect that I and my mother were aware of the public notice regarding limitation of liability of the Bank made in the circular of State Bank of Pakistan. It is incorrect that there was no breach of duty on the part of the bank. I and my mother had not given evidence about the locker in any other case. Neither I, nor my mother had lodged FIR with police regarding contents of our locker. I do not know Dr. Merwin Hosen or his wife Tasleem Hosen personally. I did not discuss my case with any of them. I am not aware if Dr. Merwin Hosen or his wife Tasleem Hosen had filed any claim against the Bank. I am not aware of outcome of the case filed or claim made by them. I know that defendant No.1 is incorporated in Pakistan. It is incorrect that the Bank is not liable for the amount claimed in this suit as no loss was caused to me & my mother. It is incorrect that the maximum liability of the Bank can be to the extent specified in the circular of State Bank of Pakistan. I & my mother had not rented any locker in any other Bank.

I cannot produce copies of income Tax-returns & wealth tax statements of my mother for the last five years as the same are neither available with her nor are the same available with her tax advisor."

[Emphasis supplied]

20. I have examined the documents (**Exh.PW-1/6 to 1/57**) produced by the plaintiffs' witness and perusal whereof reflects as under:-

Exh.PW-1/6 to 1/9 and **PW-1/11,1/12**: These documents do not show that the same are payment receipts and were issued to the plaintiffs. Furthermore, except **PW-1/6** none of the above documents bear the signature of the author/executant of the documents.

Exh. PW-1/10 is a certificate issued by Maria Jewellers does not show the same was issued in the name of plaintiffs and signature of the author of the document is also missing.

Exh. PW-1/13 and **1/14**: On the top of these documents the word 'Estimate' is appearing. Furthermore, no payments appear to have been made by the plaintiffs through these documents and signature of the author of the documents are also missing.

Exh. PW-1/15, 1/16 and **1/17**: These are certificates issued by Maria Jewellers in the name of Plaintiff No.1 and signature of the author of these documents are also missing.

Exh. PW-1/18: On the top of this documents word 'Estimate' is appearing. This document was issued in the name of one Zainab Rangoonwala and signature of the author is also missing.

Exh. PW-1/19 and **1/20**: On the top of the documents word 'Estimate' is appearing. Though these documents were issued in the name of Plaintiff No.1, yet from these documents it does not appear that the plaintiffs paid any amount towards the purchase of the jewellery.

Exh. PW-1/21, 1/22, 1/23, 1/24 and **1/25**: On the top of these documents the word 'Estimate' is appearing. These documents also do not reflect that the same were issued to the plaintiffs and signature of the author of the documents are also missing.

Exh. PW-1/26 and **1/27**: These are certificates issued by Maria Jewellers. These documents do not show that these were issued in favour of the plaintiffs. Further signature of the author of the documents are also missing.

Exh. **PW-1/28** and **1/29**: these documents do reflect the same were issued to plaintiffs. Further the signature of the author is also not appearing. These documents do not show that any payment have been made by the plaintiff in respect of the Jewellery mentioned in the documents.

Exh. **PW-1/30**: On the top of the document word 'Estimate' is appearing. Document does not show that the same was issued to the plaintiffs and signature of the author of the document is also missing.

Exh. **PW-1/31**: On the top of the word 'Estimate' is appearing and the document was issued in the name of the one Mrs. Huzaifa Rangoonwala. No payment appears to have been made for the purchase of the jewellery mentioned in the said document. No signature of the author is appearing on the document.

Exh. **PW-1/32**: This is a certificate issued by Maria Jewellers in the name of plaintiff No.1 and signature of author is missing.

Exh. **PW-1/33, 1/34, 1/35, 1/36**: On the top of these documents the word 'Estimate' is appearing. Neither the names of the plaintiffs are appearing nor any amount in respect of payment of jewellery mentioned in these documents appears to have been paid. The signature of the authors on these documents are also not appearing.

Exh. **PW-1/37**: This document issued in the name of the plaintiff No.1, does not show that who had issued this document and further any payment has been made in respect of this document.

Exh. **PW-1/38**: On the top of this document a rubber seal of Hussaini Jewellers is appearing. This document, issued in the name of the plaintiff No.1, does not bear the signature of the author of the document.

Exh. **PW-1/39**: On the top of this document the word 'Estimate' is appearing. Neither any amount, in respect of the jewellery mentioned in the document appears to have been made nor the signature of the author of the document is available.

Exh. **PW-1/40, 1/41, 1/42, and 1/43**: These documents do not show that who had issued the same and further the signature of the authors is also not appearing on these documents.

Exh. **PW-1/44**: On the top of the document the word 'estimate' is appearing. Neither the names of the plaintiffs are appearing nor any amount in respect of payment of jewellery mentioned in these appears to have been paid.

Exh. **PW-1/45, 1/46, 1/47**: On the top of these documents a rubber seal of Hussaini Jewellers are appearing. These documents, issued in the name of the plaintiff No.1, does not bear the signature of the author of the document. Only word 'R.C' are appearing on the bottom of the documents.

Exh. **PW-1/48**: On the top of the documents the word 'Estimate' is appearing and on the bottom of the document word 'R.cash' is appearing and signature of the author is not appearing on this document.

Exh. **PW-1/49**: On the top of this document the word 'estimate' is appearing. Neither the name of the plaintiffs nor the signature of the author of these documents are appearing.

Exh. **PW-1/50**: On the top of this document the word 'estimate' is appearing. In this document though the name of plaintiff No.1 is appearing however, neither the signature of the author of this document appearing nor any amount towards purchase of the jewellery mentioned in the document appears to have been paid.

Exh. **PW-1/51 to P/57**: On the top of these documents the word 'estimate' are appearing. Some initials are appearing however from the documents it does not clear that whether any payment in respect of purchase of the jewellery mentioned in these documents have been made or not.

21. From the perusal of all the above documents it cannot be said that these are the payment receipts of the jewellery mentioned in the said documents. Furthermore, from the record, it also appears that despite objections raised by the defendants' counsel, the plaintiffs

neither produced the authors of any of the above documents (Exh.PW-1/6 to 1/57) nor any other witness to prove that the jewellery mentioned in these documents have been purchased by the plaintiffs. If, for the sake of argument, we assume that the jewellery mentioned in the documents were purchased by the plaintiffs, yet there is no evidence available on the record, which could show that the jewellery either mentioned in the list of missing valuables or mentioned in the documents (Exh.PW-1/6 to 1/57) were available in the subject locker before the date [i.e.15.08.2011] of complaint of the plaintiffs regarding missing of their jewellery from the subject locker. It is a settled law that documents placed on the record or exhibited without objection of the opposite party, if not duly proved cannot be considered as admissible piece of evidence. Reliance in this regard can be placed in the case of Khan MUHAMMAD YUSUF KHAN KHATTAK v. S. M. AYUB and 2 others (**PLD 1973 SC 160**).

22. Learned counsel for the plaintiffs though in his arguments emphasized the negligence of the defendant-bank and referred to the cross-examination of the defendants to show the negligence on the part of the defendant-bank but the cardinal principal about the discharge of burden of proof is that, a party approaching the Court of law for grant of relief is to discharge its own burden and has to stand on its own legs to succeed and no benefit of any weakness in the case of opposite party can be availed by him as observed by the Honourable Supreme Court of Pakistan in the case of *SULTAN MUHAMMAD and another v. MUHAMMAD QASIM and others (2010 SCMR 2030)*.

In addition to the above, the plaintiffs have also failed to lead any evidence to substantiate their stance in respect of missing cash (foreign and local currency) as mentioned in the list of missing valuables. The plaintiffs had to prove by independent evidence regarding quantity, quality and value of the property claimed. In the present case, there is no proof to show that the Jewellery was kept in the locker and no expert witness has been produced to show that the jewellery mentioned in the list would be worth to the amount claimed.

23. In view of the above discussion, I am of the considered opinion that the plaintiffs through the evidence produced in the case could not

substantiate their claim regarding the existence of their valuables (jewellery and cash; foreign and local currency) in the subject locker before the date of complaint i.e. 15.08.2011. In the circumstances, this issue is answered in negative.

Insofar as the breach of duty on the part of the Defendant-Bank is concerned, it is imperative to mention here that the question of breach of duty would arise only after the plaintiffs successfully establish their claim of missing valuables from the subject locker, which they have failed to prove as discussed above. Thus, in the circumstances, any discussion in respect of defendants' evidence in the case, relates to the breach of duty of Defendant-Bank, would be nothing but an exercise in futility.

24. **ISSUES 6 & 7:** Since these issues are connected with each other, therefore, the same are taken up together. From the perusal of the record, it appears that the plaintiffs in the plaint as well as in the affidavit-in-evidence have mentioned that owing to missing of their valuables mentioned in the list (marked O/1) produced by the plaintiffs' witness, caused mental torture, agony and financial losses and as such the Defendant-Bank is liable to pay damages and compensation to the extent of Rs.150 million to the plaintiffs. It shows that nature of the damages claimed by the plaintiffs in the instant case falls within the ambit of general damages. It is settled principle of law that the question of mental agony was required to be established through cogent and reliable evidence mere feeling of resentment in one's mind is not sufficient to establish mental agony. If a person claims mental torture/agony or damage/injury, initial burden would lie upon him to lead evidence on such point. Furthermore, it is also settled that for determining the general damages for mental torture, agony, defamation and financial loss were to be assessed following the "rule of thumb" and said exercise falls in the discretionary jurisdiction of the court, which has to decide in the facts and circumstances of each case. Reliance in this regard can be placed to the cases of *GOVERNMENT OF KHYBER PAKHTUNKHWA and others v. Syed JAFFAR SHAH (2016 MLD 223)* and *MUBASHIR AHMAD v. Syed MUHAMMAD SHAH through Legal Heirs (2011 SCMR 1009)*. Since, the plaintiffs claim damages, therefore, the onus to prove this issue was upon the

plaintiffs and from the perusal of the evidence it appears that the plaintiffs have failed to lead evidence in this regard hence, I am of the opinion that the plaintiffs have failed to discharge their burden to prove their stance on the issues. Accordingly, these issues are answered in negative.

25. **ISSUE NO. 8.** In the circumstances, and in terms of the findings on issues 5 to 7, I am of the considered view that in the instant matter the plaintiffs have failed to establish their claim. Accordingly, the suit of the plaintiffs is dismissed with no order as to cost.

JUDGE

Karachi
Dated: 06.3.2019

*Jamil****