Applying the principles enunciated in the cases cited above, I entertain no doubt whatever that Mst. Ram Rakhi obtained possession of the property in her own independent right, and with the intention of appropriating and using it as her own to the exclusion of all others. There is not an iota of evidence on the record to justify the conclusion that she was entitled to a full estate or to a widow's estate or that the property was obtained by her in lieu of maintenance or with the consent, or in recognition of the title, of the true owner.

Bhandari, C. J.

Our attention has been invited to certain admissions by the appellants *qua* the status of Mst. Ram Rakhi but these admissions cannot, in my opinion, alter the fact that she took possession of the property of her father-in-law in her own independent right and not in her capacity as a widow of the family who was entitled to maintenance.

For these reasons, I would hold that Mst. Rakhi's possession ripened into ownership by efflux of time and that she had full power to deal with it in any way she pleased. I would accordingly allow the appeal, set aside the orders of the Courts below and dismiss the suit brought by Raunqi Ram and his brothers. Having regard, however, to the peculiar circumstances of the case, I would leave the parties to bear their own costs.

FALSHAW, J. I agree.

Falshaw, J.

SUPREME COURT.

Before Vivian Bose, B. Jagannadhadas and Bhuvaneshwar Prasad Sinha, JJ.

The Delhi Cloth and General Mills Co. Ltd,—*Appellant.*

versus.

Harnam Singh and others,—*Respondents.*

Civil Appeal No. 200 of 1954

1955

April, 21st

Private International Law—Business carried on by Plaintiffs as Cloth dealer at Lyallpur (Pakistan)—Plaintiffs having running account with the supplier Defendant

Company—Account standing in Plaintiffs' favour—After partition plaintiffs coming to India and declared evacuee—Defendant Company required to deposit all evacuee assets—Suit by Plaintiffs in Delhi Court—Defence of exoneration under Pakistan law—Proper law of Contract—Rule of situs—Liability of Defendant Company—Rule in banking and Insurance cases.

Held, (1) that the facts and the elements of contract out of which the obligation to pay arose, were most densely grouped at Lyallpur and that was its natural seat and the place with which the transaction had its closest and most real connection. Accordingly the "proper law of the contract" in so far as that is material was the Lyallpur law;

(2) that the English rule of suits was not logical and would lead to practical difficulties when there was succession of assignment because it was not possible to fix the situation of a debt under the rules in one place and only in one place;

(3) that a proper law intended as a whole to govern a contract is administered as a living and changing body of law and effect is to be given to any changes occurring in it before its performance falls due. The proper law, in the present case, will be the law at Lyallpur applied as a living and changing whole;

(4) that under modern conditions, choses in action arising out of contract have two aspects : (1) as property and (2) as involving a contractual obligation for performance. The property aspect is relevant for purposes of assignment, administration, taxation and the like; the contractual aspect for performance. In the present case, we are primarily concerned with the property aspect because the Pakistan Ordinance regards debts as property and vests all evacuee property in the Custodian and requires every person holding such property to surrender it to the Custodian on pain of penalties prescribed by the Ordinance, and section 11(2) states that—

> "Any person who makes a payment under sub-section (1) shall be discharged from further liability to pay to the extent of the payment made".

The payment was made and that, in our opinion, exonerated the defendant from further liabilities. And, therefore, whether the proper law of the contract applies or the English law of situs in a case of this kind, the defendant is exonerated because, the debt being "property" the Ordinance divested the plaintiffs of ownership in it and vested the debt in the Custodian and at the same time interfered with the obligation for performance by providing that payment to the Custodian shall operate as a discharge of the obligation.

(5) that the Pakistan ordinance cannot be condemned as opposed to Public policy of this country.

(6) that in banking transactions the following rules are well settled:—

(i) the obligation of the bank to pay the cheque of a customer rests primarily on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch;

(ii) the customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank. The rule is the same whether the account is a current account or whether it is the case of a deposit. The aforesaid rules have also been applied to Insurance cases.

Appeal from the Judgment and Decree dated the 6th day of December 1952 of the Circuit Bench of the Punjab High Court at Delhi in Regular First Appeal No. 72 of 1952 arising out of the Judgment and Decree dated the 14th day of April, 1952, of the Court of Subordinate Judge, Delhi, in Suit No. 657 of 1950.

N. C. CHATTERJEE with TARACHAND BRIJ MOHAN LAL and B. P. MAHESHWARI, for Appellant.

R. S. NARULA, for Respondents.

JUDGMENT

The Judgment of the Court was delivered by

BOSE, J.—The defendant appeals. Bose, J.

The Delhi Cloth and General Mills Co., Ltd. v. Harnam Singh and others

Bose, J.

The plaintiffs were the partners of a firm known as Harnam Singh-Jagat Singh. Before the partition of India they carried on the business of cotton cloth dealers at Lyallpur which is now in Pakistan.

The defendant is the Delhi Cloth and General Mills Co., Ltd. It is a registered company carrying on business at Delhi and other places and has its head office at Delhi. One of the places at which it carried on business before the partition was Lyallpur.

The plaintiffs' case is that they carried on business with the defendant company for some three or four years before 1947, and purchased cloth from the company from time to time. In the course of their business they used to make lump sum payments to the defendant against their purchases. Sometimes these were advance payments and at others the balance was against them. When there was an adverse balance the plaintiffs paid the defendant interest: see the plaintiff Sardari Lal as P.W. 3.

On 28-7-1947 the account stood in the plaintiffs' favour. There was a balance of Rs. 79-6-6 lying to their credit plus a deposit of Rs. 1,000 as security. On that day they deposited a further Rs. 55,000 bringing the balance in their favour up to Rs. 56,079-6-6.

The defendant company delivered cloth worth Rs. 43,583-0-0 to the plaintiffs against this amount at or about that time. That left a balance of Rs. 11,496-6-6. The suit is to recover this balance plus interest.

The claim was decreed for Rs. 12,496-6-6 and this was upheld on appeal to the High Court. The defendant appeals here.

The defendant admits the facts set out above but defends the action on the following ground. It contends that when India was partitioned on 15-8-1947, Lyallpur, where these transactions took place and where the money is situate, was assigned to Pakistan. The plaintiffs fled to India at this time and thus became evacuees and the Pakistan Government froze all evacuee assets and later compelled the defendant to hand them over to the Custodian of Evacuee Property in Pakistan. The defendant is ready and willing to pay the money if the Pakistan Government will release it but until it does so the defendant contends that it is unable to pay and is not liable. The only question is, what are the rights and liabilities of the parties in those circumstances? The amount involved in this suit, though substantial, is not large when compared with the number of claims by and against persons in similar plight. The defendant itself is involved in many smilar transactions. A list of them appears in Ex. D-11. Mohd. Bashir Khan, D. W. 1, says that the total comes to Rs. 1,46,209-1-9. The defendant has accordingly chosen to defend this action as a test case.

The further facts are as follows. At the relevant period, before the partition, cloth was rationed and its distribution controlled in, among other places, the Punjab where Lyallpur is situate. According to the scheme, quotas were allotted to different areas and the manufacturers and suppliers of cloth could only distribute their cloth to retailers in accordance with those quotas, and the dealers in those areas could only import cloth up to and in accordance with those quotas allotted to them. If the suppliers themselves had a retail shop or business in a given area, then the quota for that area was divided between the supplier and a

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Government quota-holder or quota-holders called the nominated importer or importers. The local agency of the suppliers was permitted to import up to the portion of the quota allotted to it in that area and the suppliers were obliged to give the balance of the quota to the Government quota-holder or holders. The plaintiffs were the Government quota-holders for Lyallpur and the defendant company also carried on business there through the General Manager of the Lyallpur Mills.

It is admitted that the defendant owns these mills but it is a matter of dispute before us whether the mills are a branch of the defendant company; but whatever the exact status of the Lyallpur mills may be, it is clear from the evidence and the documents that the General Manager of these mills conducted the defendant's cotton business at Lyallpur.

It seems that the details of the cloth distribution scheme for Punjab, in so far as it affected the defendant company, were contained in a letter of the 24th October 1945 from the Secretary, Civil Supplies Department, Punjab. That letter has not been filed and so we do not know its exact contents but reference to it is found in a series of letters written by the defendant company from Delhi to the District Magistrate at Lyallpur. Those letters range in date from 3-1-1946 to 19-4-1947 : (Exs. P-5 to P-12). They are all in the same form, only the figures and dates differ. It will be enough to quote the first, Ex. P-5. It is dated 3-1-1946 and is from the Central Marketing Organisation of the defendant company, the Delhi Cloth and General Mills Co. Ltd. It is written

from Delhi to the District Magistrate, Lyallpur, and is as follows:

"The District Magistrate, Lyallpur.

Re: Cloth Distribution Scheme.
Dear Sir

Ref: Letter No. 15841-CL-(D)-45/8342 of 24th Oct. 1945 from Secretary, Civil Supplies Deptt., Punjab Govt., Lahore.

Kindly note that we have allotted 28 bales for your district for the month of January 1946. Out of this a quantity of 18 bales will be despatched to our Retail stores in your district/State and the balance of 10 bales will be available for delivery to your nominated importer.

We shall be obliged if you kindly issue instructions to your nominated importer to collect these goods from us within 15 days of the two dates for delivery fixed, namely by the 20th of January and 15th of February 1946, respectively. It may be noted that the first half quota will lapse in case delivery is not taken by you by the former date and the second half will lapse if not taken by the latter date.

Yours faithfully,

D.C. & Gen. Mills Co., Ltd."

In each case a copy was sent to the plaintiffs marked as follows:

"Copy to nominated importer:—

Jagat Singh-Harnam Singh,
Cloth Merchants,
Lyallpur".

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The Indian Independence Act, 1947 was passed on 18-7-1947 and the district of Lyallpur was assigned to Pakistan subject to the award of the Boundary Commission. Then followed the partition on 15-8-1947 and at or about that time the plaintiffs fled to India. This made them evacuees according to a later Ordinance. But before that Ordinance was promulgated the Assistant Director of Civil Supplies, who was also an Under-Secretary to the West Punjab Government, wrote to the defendant's General Manager at Lyallpur (the General Manager of the Lyallpur Cloth Mills) on 17-2-1948 and told him that—

> "The amount deposited by the non-Muslim dealers should not be refunded to them till further orders". (Ex. D-1)

The defendant did all it could, short of litigation, to protest this order and to try and get it set aside. Its General Manager at Lyallpur wrote letters to the Assistant Director of Civil Supplies on 14-4-48, 9-8-48 (Exs. D-2 and D-4), 23-4-49 (Ex. D-7) and 6-6-49 (Ex. D-8), but the replies were unfavourable. On 30-4-48 the Assistant Director said that "in no case" should the sums be refunded (Ex. D-3) and on 1st November 1948, directed that these amounts should be deposited with the Custodian of Evacuee Property (Ex. D-5). This was in accordance with an Ordinance which was then in force. Later, on 8th November 1948, the General Manager received orders from the Deputy Custodian that the moneys should be deposited with the Deputy Custodian (Ex. D-6) and on 23rd June, 1949, these orders were repeated by the Custodian (Ex. D-9).

Meanwhile, the plaintiffs, who by then had shifted to Delhi, made a series of demands on the defendant in Delhi for payment. These are dated

3rd January, 1949 (Ex. P.W. 4/4), 27th January, 1949 (Ex. P.W. 4/1), 11th March, 1949 (Ex. P.W. 4/3) and 26th March, 1949 (Ex. P.W. 4/2). The defendant's attitude is summed up in its letter to the plaintiffs dated 12-2-49 (Ex. P-3). The defendant said that it had received orders from the West Punjab Government, through the Assistant Director of Civil Supplies, not to make any refunds without the orders of the West Punjab Government.

On 15th October, 1949, the Ordinance of 1948, was replaced by Ordinance No. XV of 1949 (Ex. D-26) but that made no difference to the law about evacuee funds and properties.

On 4th July 1950, the plaintiffs served the defendant with a notice of suit (Ex. P-14). This notice was forwarded to the defendant's General Manager at Lyallpur by the defendant's Managing Director in Delhi urging the General Manager to try and obtain the sanction of the West Punjab Government for payment of the money to the plaintiffs; and on 27th July 1950, the defendant wrote to the plaintiffs saying—

> "We confirm that the sum of Rs. 11,496-6-6 and Rs. 1,000 are due to you on account of your advance deposit and security deposit respectively with our Lyallpur Cotton Mills, Lyallpur, and the sum will be refunded to you by the said Mills as soon as the order of prohibition to refund such deposits issued by the West Punjab Government and served upon the said Mills is withdrawn or cancelled, and that your claim shall not be prejudiced by the usual time limit of three years having been exceeded". (Ex. P-4).

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The defendant's reply did not satisfy the plaintiffs, so they instituted the present suit on 16th December, 1950.

After the suit, the defendant's Managing Director wrote personally to the Joint Secretary to the Government of Pakistan on 2nd April 1951, but was told on 21st April 1951, that the matter had been carefully examined and that the money must be deposited with the Custodian (Ex. D-25). A second attempt was made on 30th April 1951 (Ex. D-24) and the Joint Secretary was again approached. Soon after, an Extraordinary Ordinance was promulgated on 9th May 1951 (Ex. D-27), exempting "cash deposits of individuals in banks" from the operation of the main Ordinance. But the Joint Secretary wrote on the 2nd June, 1951 that this did not apply to private debts and deposits and again asked the defendant to deposit the money with the Custodian (Ex. D-23). Finally, the Custodian issued an order on the 6th day of November, 1951 directing that the deposits be made by the 15th of that month, "failing which legal action will have to be taken against you". (Ex. D-10). The money was deposited on the 15th November, 1951 on the last day of grace (Ex. D-12).

The first question that we must determine is the exact nature of the contract from which the obligation which the plaintiffs seek to enforce arises. The sum claimed in the suit, aside from the interest, is made up of three items: —

(1) Rs. 79-6-6 outstanding from a previous account;

(2) Rs. 11,496-6-6 being the balance of a sum of Rs. 55,000 deposited on 28th July, 1947; and

(3) Rs. 1,000 as security.

The three items appear to be linked up but we will, for the moment, concentrate on the largest, the deposit of Rs. 55,000. Both sides have spoken of it as a "deposit" throughout but we will have to examine its exact nature because deposits are of various kinds and it will be necessary to know which sort this was before we can apply the law.

Unfortunately, the evidence is meagre and scrappy, so we have been obliged to piece much disjointed material together to form an intelligible pattern. It is admitted that the distribution of cloth in this area was controlled by the Government of Punjab (in undivided India) at all material times. It is also admitted that the plaintiffs were, what were called, "Government nominees" for Lyallpur. In the plaint the plaintiffs also called themselves the "reserve dealer". This term has not been explained but the use of these words, and the words "nominated importer", indicates that the plaintiffs occupied a privileged position. The letters (Exs. P-5 to P-12), on which the plaintiffs rely very strongly, also point to that; Ex. P-5, for example, shows that the defendant was obliged to give 10 bales out of a quota of 28 for that area to the plaintiffs under the orders of the Punjab Government and could only keep 18 for its own retail stores in the month of January, 1946. In April the defendant was allowed to keep all 28 but in July the distribution was 35 : 25 in the plaintiffs' favour. In September, November (1946) and April 1947 it was half and half. In February and March 1947 it was 10 : 26 and 29 : 26 for the plaintiffs and the defendant's stores respectively.

Now, ordinarily, a privilege has to be paid for and it seems that the price of this privilege was

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(1) payment of a security deposit of Rs. 1,000 and (2) payment of a second deposit against which cloth was issued from time to time in much the same way, as a banker hands out money to a customer against deposits of money in a current account, only here the payments were issues of cloth instead of sums of money. We draw this inference from what we have said above and from the following facts:

(1) Both sides have called the payment a "deposit" in their pleadings;

(2) The plaintiffs speak of receiving goods "against this deposit" (paragraph 3 of the plaint) and Mohd. Bashir Khan (D. W. 1) of delivery being made "against this advance";

(3) The plaintiff Sardari Lal (P. W. 3) says that the parties have been carrying on dealings for 3 or 4 years and that "advances used to be made to the mills from time to time. Sometimes our balance stood at credit";

(4) Sardari Lal says that when their balance was on the debit side, they paid the defendants interest but the defendant paid no interest when the balance was in the plaintiffs' favour. (This is the position when there is an overdraft in a bank);

(5) There was a balance of Rs. 79-6-6 standing in the plaintiffs' favour when the deposit of Rs. 55,000 was made;

(6) The plaintiffs said in their letter (Ex. P. W. 4/1) to the defendant that they had a "current account" with the defendant in which a sum of Rs. 11,496-6-6 was in "reserve account". This figure of Rs. 11,496-6-6 is made up by including the old balance of Rs. 79-6-6 in this account;

(7) In their letter Ex. P-14 the plaintiffs said that they had "deposited" money in the plaintiffs' account at Lyallpur "as reserve dealers", *against that* they received goods leaving a balance of Rs. 11,496-6-6. Again, this figure includes Rs. 79-6-6.

All this shows that the payment of Rs. 55,000 was not just an advance payment for a specified quantity of goods but was a running account very like a customer's current account in a bank. The only matter that can be said to indicate the contrary is the fact that the defendant has listed this money in Ex. D-11 under the head "Purchaser's advance". But the *mere* use of this term cannot alter the substance of the transaction any more than the *mere* use of the word "deposit". The fact that the parties choose to call it this or that is, of course, relevant but is not conclusive, and in order to determine the true nature of a transaction it is necessary to view it as a whole and to consider other factors. But in this case we need not speculate because the plaintiffs have themselves explained the sense in which the term "Purchasers' advance acount" is used. In their statement of the case which they filed there, they say—

> "The defendants maintained a 'Purchasers' advance account' in their books at Delhi. The plaintiffs used to pay the defendants advance amounts *against which cloth was supplied and the balance had to be adjusted periodically*".

But the banking analogy must not be pushed too far. The stress laid by the parties on the

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terms "Government nominees", "nominated importer" and "reserve dealer", both in the correspondence and in the pleadings and evidence, suggests that the defendant was dealing with the plaintiffs in their capacity of "Government nominees" and that, in its turn, imports the condition that the dealings would stop the moment the plaintiffs ceased to occupy that privileged position. As we have seen, the import of cloth was controlled by the Punjab Government at all relevant times with the result that the defendant could not sell to anybody it pleased. The sales had to be to the Government nominees. Therefore, if Government withdrew their recognition, the defendant would not have been able to sell to the plaintiffs any longer and it is fair to assume that the parties did not contemplate a continuance of their relationship in such an eventuality. But, as this was not a definite contract for the supply of a given quantity of goods which were to be delivered in instalments but a course of dealings with a running account, it is also reasonable to infer that the parties were at liberty to put an end to their business relationship at any time they pleased by giving due notice to the other side and in that event whichever side owed money to the other would have to pay. But, either way, the place of performance would, in these circumstances, be Lyallpur. We say this because all the known factors were situate in Lyallpur. The plaintiffs were the Government nominees for Lyallpur and they were resident there. The defendant carried on business there and the goods had to be delivered at Lyallpur and could not be delivered elsewhere, and so performance was to be there. The accounts were kept at Lyallpur, and though copies appear to have been forwarded to Delhi from time to time, the books were situate there and the Lyallpur office would be the only

place to know the up-to-the minute state of the accounts. In the circumstances, it is reasonable to assume, as in the case of banking and insurance (matters we shall deal with presently), that on the termination of the contract the balance was to be paid at Lyallpur and not elsewhere. That localises the place of primary obligation.

This also, in our opinion, imports another factor. The defendant in Delhi would not necessarily know of any change of recognition by the Lyallpur authorities. The correspondence with the Collector indicates that the Government nominee cleared the goods from the defendant's Lyallpur godowns under the orders of the District Magistrate. If, therefore, the nominee was suddenly changed, intimation of this fact would have to be given to the defendant at Lyallpur and not at Delhi, otherwise there would be a time lag in which the defendant's Lyallpur office might easily deliver the goods to the plaintiffs as usual despite withdrawal of the recognition. Everything therefore points to the fact that the notice of termination would have to be given at Lyallpur and the obligation to return the balance would not arise until this notice of termination was received. That obligation would therefore necessarily arise at Lyallpur.

The plaintiffs' learned counsel argued very strongly that the defendant's Lyallpur business was carried on from Delhi and that the accounts were kept there, that there was no branch office at Lyallpur and that Lyallpur had no independent local control of the business. He relied on the letters written by the defendant to the District Magistrate, Lyallpur, about the allotments of

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quotas (Exs. P-5 to P-12) and also on Ex. D-7, a letter written by the defendant's General Manager at Lyallpur to the Deputy Custodian of Evacuee Property at Lyallpur in which he says that a

> "complete list showing the list of all non-Muslims falling under item (3), with the amount to be paid has been asked for from our Head Office and will be submitted as soon as received".

Counsel contended that the Lyallpur people had so little to do with the accounts that they were not able to supply even a list of the persons who dealt with them. They had to find that out from Delhi.

These matters should have been put to the defendant's witnesses. Ex. D-7 was written in reply to a letter from the Deputy Custodian of Evacuee Property. That letter is Ex. D-6 and in it the Deputy Custodian refers to some earlier correspondence with the Under-Secretary to the West Punjab Government, *Lahore*, which has not been filed. When we turn to the list that was eventually supplied from Delhi (Ex. D-11) we find that it relates to accounts from all over Pakistan such as, Multan, Peshawar, Lahore, Sialkot, Rawalpindi and even Karachi and Sukkar. Obviously, a local office like the Lyallpur office would not be in a position to supply that sort of information. The defendant's accountant at Lyallpur, Sewa Ram (P. W. 4), says that—

> "Purchasers' deposits at Lyallpur were not recorded in the books of the defendant at Delhi but statements used to be despatched from there to Delhi. An account book was prepared from statements received from Lyallpur. That book is known as 'Reference Book' ".

Presumably, that would also be the practice of the other branch offices, so the head office would be the only place from where a general overall picture (which appears to be what was asked for) could be obtained.

Now, the plaintiffs resided at Lyallpur at all relevant times and the defendant carried on business there through a local General Manager. We do not know where the contract was made but we do know that the plaintiffs contracted in a special capacity that was localised at Lyallpur, namely as the Government nominees for Lyallpur. We know that the goods were to be delivered at Lyallpur and could not be delivered anywhere else. We know that there was a running account and that that account was kept at Lyallpur, and we have held that the "debt" did not become due till the defendant was given notice at Lyallpur that the business relationship between the parties had terminated. The termination came about because of acts that arose at Lyallpur, namely the assignment of Lyallpur to the newly created State of Pakistan and the flight of the plaintiffs from Lyallpur which made further performance of the primary contract impossible. The only factors that do not concern Lyallpur are the defendant's residence in India and the demands for payment made in Delhi. The fact of demand is not material because the obligation to pay arose at the date of termination and arose at Lyallpur, but if a demand for payment is essential, then it would, along the lines of the banking and insurance cases to which we shall refer later, have to be made at Lyallpur and a demand made elsewhere would be ineffective. On these facts we hold that the elements of this contract, that is to say, the contract out of which the obligation to pay arose, were most densely grouped at Lyallpur and that that was its natural seat and the place

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with which the transaction had its closest and most real connection. It follows from this that the "proper law of the contract", in so far as that is material, was the Lyallpur law.

We have next to see when notice to close the account and a demand for return of the balance was made and where. The plaintiff Jagat Singh (P.W. 5) says that he made a written demand in October 1947. But the earliest demand we have on record is Ex. P.W. 4/4, dated 3-1-1949. It is understandable that the plaintiffs, who had to flee for their lives, would have no copies of their correspondence, but it is a matter for comment that the demand which is filed (Ex. P.W. 4/4) does not refer to an earlier demand or demands. The defendant was asked to produce all the correspondence because the plaintiffs had lost their own files. The defendant produced all we have on record and no suggestion was made that anything had been suppressed. Consequently we are not prepared to accept the plaintiffs' statement and we hold that there was no demand before 3-1-1949.

Another point is that the earlier demand, even if made, could not have been made at Lyallpur. The plaintiff Jagat Singh says he made the demand to the defendant's Managing Director. He resides in Delhi and the plaintiffs had by then fled from Pakistan. Therefore, the demand could not have been made at Lyallpur, and apart from those demands, there is no other notice of termination, so, technically, the defendant would have been justified in declining to pay on the strength of a demand made in Delhi. The same defect attaches to Ex. P.W. 4/4. However, we are fortunately absolved from the need to base on so technical a ground.

Now at the date of the demand the Pakistan Ordinance (Ex. D-26) was in force and under it the

defendant was prohibited from paying the money to the plaintiffs who were evacuees according to Pakistan laws. The defendant was directed, instead, to deposit the money with the Deputy Custodian of Evacuee Property. This was done on 15-11-1951 (Ex. D-12) and the deposit was made along with other similar deposits.

We now have to determine the legal liabilities which arise out of these facts. This raises complex questions of private international law, and two distinct lines of thought emerge. One is that applied by the English Courts, namely, the *lex situs;* the other is the one favoured by Cheshire in his book on Private International Law, the "proper law of the contract".

The English approach is to treat the debt as property and determine its *situs* and then, in general, to apply the law that obtains there at the date when payment is due. But the difficulty of the English view is that they have different sets of rules for ascertaining the *situs*, with the result that the *situs* shifts from place to place for different purposes, also that it is determined by intention. Thus, it can be in one place for purposes of jurisdiction and in others for those of banking, insurance, death duties and probate. The *situs* also varies in the cases of simple contract debts and those of speciality.

That a debt is property is, we think, clear. It is a chose in action and is heritable and assignable and it is treated as property in India under the Transfer of Property Act which calls it an "actionable claim" : sections 3 and 130. But to give it position in space is not easy because it is intangible and so cannot have location except notionally and in order to give it notional position rules have to be framed along arbitrary lines.

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Cheshire points out in his book on Private International Law, 4th edition, pages 449 to 451 that the *situs* rule is not logical and leads to practical difficulties when there is a succession of assignments because it is not possible to fix the situation of a debt under the *situs* rule in one place and only one place. Speaking of that Cheshire, quoting Foote, where Foote says that the assignment of a chose in action arising out of a contract is governed by the "proper law of the contract", paraphrases Foote thus at page 450—

> "If we understand him correctly, the appropriate law is not the 'proper law' (using that expression in its contractual sense) of the assignment, but the proper law *of the original transaction* out of which the chose in action arose. It is reasonable and logical to refer most questions relating to a debt *to the transaction in which it has its source and to the legal system which governs that transaction* ..... One undeniable merit of this is that, where there have been assignments in different countries, no confusion can arise from a conflict of laws, since all questions are referred to a single legal system".

The expression the "proper law of the contract" has been carefully analysed by Cheshire in Chapter VIII of his book. In *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society* (1) Lord Wright defined at page 240 as

> "that law which the English or other Court is to apply in determining the obligations under the contract,"

(1) 1938 A.C. 224

that is to say, obligation as contrasted with performance. Lord Wright drew the distinction between obligation and performance at page 240. In a later case, Lord Simonds described it as

> "the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connexion". *Bonython* v. *Commonwealth of Australia* (1).

Cheshire sets out the definition given by some American Courts at page 203 and adopts it:

> "It is submitted that, at any rate with regard to the question of valid creation, the proper law is the law of the country in which the contract is localized. Its localization will be indicated by what may be called the grouping of its elements as reflected in its formation and in its terms. The country in which its elements are most densely grouped will represent its natural seat.....the country with which the contract is in fact most substantially associated and in which lies its natural seat or centre of gravity".

This involves two considerations. The first is whether the proper law is to be ascertained objectively or whether parties are free to fix it subjectively by ranging over the world and picking out whatever laws they like from any part of the globe and agreeing that those laws shall govern their contract. Cheshire points out at page 202 that "the subjective theory may produce strangely unrealistic results". It is also obvious that difficulties will arise if the contract is illegal or against public policy according to the laws of the country in

(1) 1951 A.C. 201 at p. 219

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which it is sought to be enforced though lawful according to the laws of the country which the parties choose: see Lord Wright in *Mount Albert Borough Council* v. *Australasian Temperance etc. Society* (1) at page 240. Cheshire prefers the view of an American Judge which he quotes at page 203—

> "Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes".

The contract we are considering is silent about these matters. There is no express provision either about the law that is to obtain or about the *situs*. We have therefore to examine the rules that obtain when that is the case.

The most usual way of expressing the law in that class of case is to say that an intention must be implied or imputed. In the *Bank of Travancore* v. *Dhrit Ram* (2), Lord Atkin said that when no intention is expressed in the contract the Courts are left to infer one by reference to considerations where the contract was made and how and where it was to be performed and by the nature of the business or transaction to which it refers. In the *Mount Albert Borough Council case* (1), Lord Wright put it this way at page 240—

> "The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract".

(1) 1938 A.C. 224
(2) 69 I.A. 1 at 8

But, to us, it seems unnecessarily artificial to impute an intention when we know there was none, especially in a type of case where the parties would never have contracted at all if they had contemplated the possibility of events turning out as they did. In our opinion, what the Courts really do, when there is no express provision, is to apply an objective test, though they appear to regard the intention subjectively, and that is also Cheshire's conclusion at page 201 where, after reviewing the English decisions, he says—

> "In other words, the truth may be that the judges, though emphasising in unrestricted terms the omnipotence of intention, in fact do nothing more than impute to the parties an intention to submit their contract to the law of the country with which factually it is most closely connected".

If driven to a choice, we would prefer this way of stating the law but we need not decide this because, so far as the present case is concerned, the result is the same whether we apply the proper law of the contract or the English rules about the *lex situs*. It may be that in some future case this Court will have to choose between these two views but the question bristles with difficulties and it is not necessary for us to make the choice here. All we wish to do here is to indicate that we have considered both and have envisaged cases where perhaps a choice will have to be made.

We gather that English judges fall back on the *lex situs* and make rules for determining the position of a debt for historical reasons. Atkin, L. J., said in *New York Life Insurance Company* v. *Public Trustee* (1) that the rules laid down in England

(1) [1924] 2 Ch. 101 at 119

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are derived from the practice of ecclesiastical authorities in granting administration because their jurisdiction was limited territorially.

> "The ordinary had only a jurisdiction within a particular territory, and the question whether he should issue letters of administration depended upon whether or not assets were to be found within his jurisdiction, and the test in respect of simple contracts was: Where was the debtor residing? ..... the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt".

(See also Dicey's Conflict of Laws, 6th edition, page 303). The rules, therefore, appear to have been arbitrarily selected for practical purposes and because they were found to be convenient.

But despite that the English Courts have never treated them as rigid. They have only regarded them as *prima facie* presumptions in the absence of anything express in the contract itself: see Lord Wright's speech in *Mount Albert Borough Council case* (1) at page 240. Also many exceptions have been engrafted to meet modern conditions Atkin, L. J., draws attention to one in *New York Life Insurance Company* v. *Public Trustee* (2) at page 120 where he says—

> "therefore, cases do arise where a debt may be enforced in one jurisdiction, and the debtor, being an ordinary living person, resides elsewhere".

(1) 1938 A.C. 224
(2) (1924) 2 Ch: 101

So also Lord Wright in *Mount Albert Borough Council case* (1), at 240—

> "It is true that, when stating this general rule, there are qualifications to be borne in mind, as for instance, that the law of the place of performance will *prima facie* govern the incidents or mode of performance, that is, performance as contrasted with obligation".

and at page 241 he says—

> "Again, different considerations may arise in particular cases, as, for instance, where the stipulated performance is illegal by the law of the place of performance".

And so also Lord Robson in *Rex* v. *Lovitt* (2) at page 220—

> "It cannot mean that for all purposes the actual situation of the property of a deceased owner is to be ignored and regard had only to the testator's domicile, for executors find themselves obliged in order to get the property at all to take out ancillary probate according to the locality where such property is properly recoverable, and no legal fiction as to its 'following the owner' so as to be theoretically situate elsewhere will avail them".

And he says at page 221 that these rules are only "for certain limited purposes".

In banking transactions the following rules are now settled: (1) the obligation of a bank to pay the cheques of a customer rests *primarily* on the branch

(1) 1938 A.C. 224
(2) 1912 A.C. 212

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at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch: *Rex* v. *Lovitt* (1) at 219, *Bank of Travancore* v. *Dhrit Ram* (2), and *New York Life Insurance Company* v. *Public Trustee* (3) at page 117; (2), a customer must make a demand for payment at the branch where his current account is kept before he has a cause of action against the bank: *Joachimson* v. *Swiss Bank Corporation* (4) quoted with approval by Lord Reid in *Arab Bank Ltd.* v. *Barclays Bank* (5). The rule is the same whether the account is a current account or whether it is a case of deposit. The last two cases refer to a current account; the Privy Council case [*Bank of Travancore* v. *Dhrit Ram* (2),] was a case of deposit. Either way, there must be a demand by the customer at the branch where the current account is kept, or where the deposit is made and kept, before the bank need pay, and for these reasons the English Courts hold that the *situs* of the debt is at the place where the current account is kept and where the demand must be made.

This class of case forms an exception to the rule that a debtor must seek his creditor because, though that is the general rule, there is nothing to prevent the parties from agreeing, if they wish, that that shall not be the duty of the debtor and, as Lord Reid explains in the *Arab Bank case* (5), at page 531, a contract of current account necessarily implies an agreement that that shall not be the bank's duty, otherwise the whole object of the contract would be frustrated.

We have stressed the word "primarily" because the rules we have set out relate to the *primary* obligation. If the bank wrongly refuses

(1) 1912 A.C. 212
(2) 69 I.A. 1 at 8 and 9
(3) [1924] 2 Ch. 101
(4) [1921] 3 K.B. 110
(5) 1954 A.C. 495 at 531

to pay when a demand is made at the proper place and time, then it could be sued at its head office as well as at its branch office and, possibly, wherever it could be found, though we do not decide that. But the reason is that the action is then, not on the debt, but on the breach of the contract to pay at the place specified in the agreement: see Warrington, L. J., at page 116 and Atkin, L. J., at page 121 of *New York Life Insurance Co.* v. *Public Trustee* (1).

Now the rules set out above are not confined to the business of banking. They are of wider application and have also been applied in insurance cases: *Fouad Bishara Jabbour* v. *State of Israel* (2) and *New York Life Insurance Co.* v. *Public Trustee* (1).

Similar considerations obtain in England when an involuntary assignment of a debt is effected by garnishment. Cheshire has collected a list of English cases at pages 460 to 463 of his Private International Law from which we have quoted above. He sums up the position at page 461 thus—

> "It is difficult to state the rule with exactitude, but it is probably true to say that a debt is properly garnishable in the country where, according to the ordinary usages of business, it would normally be regarded as payable".

But when all is said and done, we find that in every one of these cases the proper law of the contract was applied, that is to say, the law of the country in which its elements were most densely

(1) [1924] 2 Ch. 101
(2) [1954] 1 A.E.R. 145

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grouped and with which factually the contract was most closely connected. It is true the judges purport to apply the *lex situs* but in determining the *situs* they apply rules (and modify them where necessary to suit changing modern conditions) which in fact are the very rules which in practice would be used to determine the proper law of the contract. The English Judges say that when the intention is not express one must be inferred and the rules they have made come to this: that as reasonable men they must be taken to have intended that the proper law of the contract should obtain. The other view is that the intention does not govern even when express and that the proper law must be applied objectively. But either way, the result is the same when there is no express term. The "proper law" is in fact applied and for present purposes it does not matter whether that is done for the reasons given by Cheshire or because the fluid English rules that centre round the *lex situs* lead to the same conclusion in this class of case.

That, however, raises a further question. Which is the proper law? the law that obtains when the contract was made and the obligation fashioned or the law in force at the time when performance is due? Here again, we think the answer is correctly given by Cheshire at page 210, quoting Wolff's Private International Law, page 424, and *Re. Chesterman's Trusts* (1).

> "A proper law intended as a whole to govern a contract is administered as 'a living and changing body of law' and effect is given to any changes occurring in it before performance falls due."

(1) [1923] 2 Ch. 466 at 478

This is what the English Courts did in *New York Insurance Co.* v. *Public Trustee* (1), *Re. Banque Des Marchands De Moscou* (2), *Fouad Bishara Jabbour* v. *State of Israel* (3) and *Arab Bank Ld.* v. *Barclays Bank* (4). They were all cases in which the law changed because of the outbreak of war and where performance became impossible because of local legislation. In the last two cases, the debts vested in the Custodian because of local legislation and payment by the debtor to the Custodian was regarded as a good discharge of the debt. The position in those two cases was just what it is here.

Counsel argued that as Lyallpur was part of India, when the contract was made, the Indian law must be applied and that no different intention can be imputed to the parties. But that is not the law, as we understand it, whether we apply the "proper law" or the *situs* rules. The proper law will be the law at Lyallpur applied as a living and changing whole, and this would have been the case even if India had not been divided, because each State had the right to make different local laws even in undivided India, as witness the different money lending laws and the cloth and grain control orders: indeed this very case is an illustration of that, for the controls which gave rise to this very contract were not uniform throughout India. But even apart from the "proper law" the decision of the Privy Council in *Arab Bank, Ld.* v. *Barclays Bank* (4) and of the Queens Bench Division in *Fouad Bishara Jabbour* v. *State of Israel* (3) negatives this contention when an intention has to be imputed or a clause in the contract implied.

(1) [1924] 2 Ch. 101
(2) [1954] 2 A.E.R. 746
(3) [1954] 1 A.E.R. 145
(4) [1954] A.C. 495, 529

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It is necessary, however, to bear in mind that, under modern conditions, choses in action arising out of contract have two aspects: (1) as property and (2) as involving a contractual obligation for performance. The property aspect is relevant for purposes of assignment, administration, taxation and the like; the contractual aspect for performance. In the present case, we are primarily concerned with the property aspect because the Pakistan Ordinance regards debts as property and vests all evacuee property in the Custodian and requires every person holding such property to surrender it to the Custodian on pain of penalties prescribed by the Ordinance, and section 11(2) states that—

> "Any person who makes a payment under sub-section (1) shall be discharged from further liability to pay to the extent of the payment made."

The payment was made and that, in our opinion, exonerated the defendant from further liability. Such payment would operate as a good discharge even under the English rules: see *Fouad Bishara Jabbour* v. *State of Israel* (1) at page 154 where a number of English authorities are cited, including a decision of the Privy Council in *Odwin* v. *Forbes* (2). That was also the result of the decisions in the following English cases, which are similar to this, though the basis of the decisions was the *situs* of the debt and the multiple residence of corporations: *Fouad Bishara Jobbour* v. *State of Israel* (1), *Re Banque Des Marchands De Moscou* (3) and *Arab Bank, Ld.* v. *Barclays Bank* (4).

(1) [1954] 1 A.E.R. 145
(2) 1817 Buck. 57
(3) [1954] 2 A.E.R. 746
(4) [1954] A.C. 495

The same result follows from the decision of the Judicial Committee in the *Bank of Travancore, Ld.* v. *Dhrit Ram* (1) where Lord Atkin said—

> "When consideration is being given to the question, what law did the parties intend to govern the contract? it seems proper to bear in mind that the promisor is a bank incorporated under Travancore law with, apparently, some connection with the State of Travancore, and governed as to its business by any law of Travancore that may affect banking.....".

The only difference between that case and this is that at the date of the deposit in this case there was no difference between the laws of Punjab and Delhi on the present point. But they could have differed even if India had not been divided, as we have just pointed out. The English cases are, however, in point and we can see little in principle to distinguish them from this case.

The learned counsel for the plaintiffs-respondents argued that even if the law is what we have said, the Pakistan Ordinance does not apply to this case because "a cash deposit in a bank" is excluded. The argument was based on the definition of "property" in section 2(5) of the Ordinance. But this is not a cash deposit in a bank as between the plaintiffs and the defendant. It is a debt which the defendant owes, or owed, to the plaintiffs, and the same definition states that "property" means, among other things, "any debt or actionable claim". The portion of the definition which speaks of a "cash deposit in a bank" means that such a deposit is not to be treated as "property" for the purposes of the Ordinance as between the bank and the customer

(1) 69 I.A. 1 at 9

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who owns or controls the deposit. We hold, therefore, that whether the proper law of the contract applies or the English law of *situs* in a case of this kind, the defendant is exonerated because, the debt being "property", the Ordinance divested the plaintiffs of ownership in it and vested the debt in the Custodian and at the same time interfered with the obligation for performance by providing that payment to the Custodian shall operate as a discharge of the obligation.

But we wish to emphasize that we decide this because payment was in fact made to the Custodian and that we express no opinion about what would happen in a case where there is no payment and the defendant has no garnishable assets in Pakistan out of which the West Punjab Government could realise the debt by the attachment of the defendant's property. Different conclusions might possibly arise in such a case.

Lastly, it was urged that the Pakistan Ordinance is a penal law and is confiscatory in character, therefore, no domestic tribunal will recognise it or give effect to it. That proposition is, in any event, too widely stated, but we are unable to condemn this law as opposed to the public policy of this country because we have exactly the same kind of laws here, as do other civilised countries which find themselves in similar predicament or at the outbreak of war ; see *Arab Bank, Ltd.* v. *Barclays Bank* (1) and also *Fouad Bishara Jabbour* v. *State of Israel* (2) and *Re. Munster* (3) where a like argument was repelled. We hold that this legislation is not confiscatory.

(1) 1954 A.C. 495
(2) [1954] 1 A.E.R. 145.
(3) [1920] 1 Ch. 268

The same rules apply to the item of Rs. 79-6-6 and to the deposit of Rs. 1,000 as security.

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The appeal succeeds. The decrees of the lower Courts are set aside. A decree will now be passed dismissing the plaintiffs' claim, but in the special circumstances of this case the parties will bear their own costs throughout.

FULL BENCH

Before Bhandari, C. J., Falshaw and Bishan Narain, JJ.

PREM SINGH AND OTHERS,—*Petitioners*

v.

DEPUTY CUSTODIAN-GENERAL, EVACUEE PROPERTY AND OTHERS,—*Respondents*

Civil Writ No. 269 of 1953

1955

April, 26th

Administration of Evacuee Property Act (XXXI of 1950) —Section 56—Rules framed by the Central Government under—Rule 14(6)—Whether ultra vires*—Amendments made to the rule on 13th February, 1953 and 25th August, 1953—Effect of, on orders passed by Custodian and Custodian-General before the respective dates—Sections 26 and 27—Whether powers of revision of the Custodian and Custodian-General affected by the amendments.*

Held, (1) that Rule 14 (6) of the Administration of Evacuee Property (Central) Rules made under section 56 of the Administration of Evacuee Property Act is not *ultra vires* as it neither goes beyond the rule-making power nor is inconsistent with any of the provisions of the Act;

(2), that orders passed by either the Custodian or the Custodian-General in exercise of their powers under Section 26 or 27 cancelling allotments in pending cases regarding orders passed before the 22nd of July, 1952, were valid even if passed by the Custodian before the 13th of February, 1953 and by the Custodian-General before the 25th of August, 1953;

(3) that there was nothing in the sub-rule as it originally stood which took away the power of the Custodian to revise any order passed before the 22nd of July, 1952, in