

**IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: 18.04.2023*
Judgment Delivered on: 11.07.2023

+ **CS(COMM) 180/2017 & I.A. 2387/2014 (O-XXXVIII R-5 of CPC)**

J.H.JEWELERS Plaintiff

Through: Mr.Manav Gupta, Mr. Sahil Garg,
Mr.Abhinav Jain and Ms.Samiksha
Jain, Advocates.

versus

UMED CHINDALIYA & ORS Defendants

Through: Mr. Siddharth Yadav, Advocate for D-
1 & 2.
Mr. Ravinder Sethi, Senior Advocate
with Mr. Ateev Mathur, Mr.Rajnish
Gaur, Mr.Tushar Sahu, Ms. Divya
Rana and Mr.Puneet Sharma
Advocates for D- 4/Kotak Mahindra
Bank.

CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL

JUDGMENT**AMIT BANSAL, J.**

1. The present suit has been filed seeking recovery of Rs.10,17,42,213/- along with pendente lite and future interest and a decree of permanent injunction restraining the defendants from interfering with the properties purchased from the money misappropriated from the plaintiff.

2. In the plaint, it has been pleaded that:

2.1 The plaintiff is a partnership firm duly registered with the Registrar of



Firms.

- 2.2 The plaintiff is engaged in the business of manufacturing and selling precious metal jewellery. The plaintiff has been in this business since 1996.
- 2.3 The defendant no.1 joined the plaintiff company in the year 2011 as an accountant. During his tenure, the defendant no.1 gained the trust of his employers. The defendant no.1 was solely and exclusively responsible for depositing the cheques that were entrusted to him by the plaintiff's partners and for the maintenance of the plaintiff's bank accounts.
- 2.4 The defendant no.2 is the wife of the defendant no.1.
- 2.5 On 6th July, 2013, one of the partners of the plaintiff, Amit Sankhwal, asked the defendant no.1 about the bank statement of the previous financial year, which the defendant no.1 failed to provide. On enquiring, it was found out that two cheques from Amit Sankhwal and Priti Sankhwal amounting to Rs. 1,00,00,000/- and Rs. 2,30,00,000/- respectively did not reach the bank account of the plaintiff firm at HDFC Bank, and instead were deposited by the defendant no.1 in a pseudo account bearing account no. 683011000856 in ING Vysya Bank in its Yamuna Vihar branch opened in the name of 'J.H. Jewellers', of which he represented himself as the sole proprietor (hereinafter referred to as pseudo account'). On the same date itself, the plaintiff lodged an FIR against the defendant no.1.
- 2.6 The defendant no.3 is a company to which substantial amounts of the money, misappropriated from the plaintiff, have been transferred by the defendant no.1.



- 2.7 On further enquiries, it was revealed that all the cheques that were given to the defendant no.1 for depositing them in the account of the plaintiff at HDFC Bank, Khan Market, were instead deposited by him in the aforesaid pseudo account opened by him with the defendant no. 4 bank. It was also revealed that money was transferred from this pseudo account by the defendant no.1 to his personal account and to the accounts of the defendants no.2 and 3. Bank statements of the pseudo account and the accounts in which money had been transferred from the pseudo account have been filed along with the plaint.
- 2.8 An analysis of the bank statement of the pseudo account makes it clear that 41 cheques were deposited fraudulently in the said account by the defendant no.1. Out of these 41 cheques, some had been issued directly by the customers as payment of the jewellery bought by them from the plaintiff, and others had been issued by the partners of the plaintiff and plaintiff's sister concern, J.H. Jewellers Pvt. Ltd.
- 2.9 All the customers who had collectively issued 14 cheques, confirmed that as per their accounts the money paid had been credited into account of 'J.H. Jewellers' with the defendant no.4 bank. Confirmation letters of the customers of the plaintiff, who have issued the aforesaid cheques, have also been filed along with the plaint. Further, the bank account statements of the partners of the plaintiff and the plaintiff show that the money have been debited from their accounts and credited to the pseudo account.
- 2.10 A meagre amount of Rs.44,17,759 was transferred back to the account of the plaintiff by the defendant no.1 when the defendant no.1 became wary of his plan being uncovered.



- 2.11 The plaintiff lodged an FIR against the defendant no.1 and the police investigation revealed that the pseudo account opened by the defendant no.1 with the defendant no.4 was done without complying with KYC norms. The entire plan of the defendant no.1 to defraud the plaintiff had been enabled by the defendant no.4 bank and its officials.
- 2.12 A total sum of around Rs. 5.99 crores was transferred by the defendant no.1 to the account of the defendant no.3. The director of the defendant no.3, Mr. Manoj Poddar, is a co-conspirator and committed these illegal transactions along with the defendant no.1.
- 2.13 On police investigation, it came to light that various properties have been purchased by the defendants no.1 and 2 after misappropriating funds of the plaintiff. Details of the said properties purchased by the defendants no.1 and 2 are given in paragraph 16 of the plaint. Further, three cars were also purchased by the defendants no.1 and 2, which were impounded by the police.
- 2.14 On 12th July, 2013, the defendant no.1 was apprehended by the police at Ahmedabad Domestic Airport. On 13th July, 2013, during investigation, the defendant no.1 voluntarily made a disclosure statement, whereby he explained his manner of operation and intention and how he committed fraud on the plaintiff and defrauded it of Rs.10.18 crores. Details of where and how the money has been invested/utilized by him were also provided by him. The Disclosure statement made by the defendant no.1 has been filed along with the plaint.
- 2.15 The Metropolitan Magistrate ordered freezing of all the bank accounts of the defendants no. 1 and 2 and attached all the aforementioned



properties purchased by them from the misappropriated money.

- 2.16 The defendants no.1 and 2 have failed and neglected to pay the amount to the plaintiff despite the fact that the defendants no. 1 and 2 had admitted to having committed the said offences in their disclosure statements, which also led to recoveries.
- 2.17 Upon investigation and examination of witnesses, the police filed a detailed chargesheet dated 9th September, 2013 concluding that the defendants no. 1 and 2 hatched a conspiracy with a motive to misappropriate funds of the plaintiff and then with a view to conceal the misappropriated money, the defendants no.1 and 2 purchased properties and other assets.
- 2.18 The defendant no.1 misused his position as an accountant with the plaintiff to gain an undue benefit for himself, thereby causing wrongful loss to the plaintiff and wrongful gain to himself. The defendant no.1 and the other defendants are liable to pay/return the entire amount misappropriated by them from the plaintiff, by way of the 41 cheques as detailed in paragraph 14 of the plaint.
3. Accordingly, the present suit has been filed on behalf of the plaintiff claiming the following reliefs:

“(a) pass and pronounce a money decree in favour of the Plaintiff and against the Defendants in the sum of Rs. 10,17,42,312/- along with interest, pendente lite and future @ 24 per cent per annum till the date of realization;

(b) Pass and pronounce a decree of Permanent Injunction restraining the Defendants from in any way dealing with or interfering with the properties mentioned in Paragraph No. 16 of the Plaint;



(c) award the cost of the suit; and

(d) award damages @ 12 percent per annum on the decreed amount, both pendent lite and future; and

(e) pass such other and further orders as this Hon'ble Court may deem fit and proper.”

4. Summons in the suit were issued on 7th February, 2014, when an ad interim injunction was granted in favour of the plaintiff, restraining the defendants no.1 and 2 from creating any third party rights in the properties mentioned in paragraph 7 of the application. On the same date, the aforesaid properties were also attached.

5. The defendant no.1 has contested the present suit by filing written statement, in which it has been pleaded that:

5.1 The plaintiff is seeking recovery on behalf of various individuals/entities, which have not been impleaded in the present suit. Hence, the present suit should be dismissed on account of non-joinder of necessary and proper parties.

5.2 The plaintiff and its partners involved the defendant no.1 in various roles. The plaintiff and its partners planned to make investments through the defendant no.1 for earning profits by way of such investments.

5.3 The plaintiff and its partners instructed the defendant no.1 to open a separate bank account for the transactions relating to the aforesaid investments. Since the amount involved was considerable, the plaintiff and its partners insisted that the defendant no.1 open a separate bank account in the name of 'J.H. Jewellers', so as to



safeguard their interests.

- 5.4 The plaintiff made the defendant no.1 a scapegoat once the various investments made on the instructions of the plaintiff and its partners resulted in losses. In order to cover the losses and safeguard themselves, the plaintiff and its partners initiated malicious proceedings against the defendant no.1.
- 5.5 The defendant no.1 invested the money of the partners of the plaintiff with the defendant no.3, upon the oral instructions of partners of the plaintiff. Therefore, the defendant no.1 did not cause any wrongful loss to the plaintiff.
- 5.6 The partners of the plaintiff were actively involved in the business of the plaintiff and used to regularly check and verify the balance sheets, statement of accounts, ledgers, cash books, etc. The accounts of the plaintiff were also regularly audited by the Auditors.
6. The defendant no.2, in her written statement, has supported the case of the defendant no.1. In addition, the defendant no.2 has pleaded that the defendant no.2 did not play any role in the controversy involved in the present suit and that the defendant no.2 has been unnecessarily made a party in the present suit only on account of being the wife of the defendant no.1.
7. The defendant no.3 has also contested the present suit by filing a written statement, in which it has been pleaded that:
- 7.1 The defendant no.3 is a member of National Multi Commodity Exchange of India Ltd. situated at Ahmadabad and is involved in trading in various commodities as a commodity broker.
- 7.2 The defendant no. 1 opened a trading account with the defendant no. 3 from where it used to trade in commodities. The defendant no.3 has



no concern as to how an account holder manages the amount for trading in his trading account.

7.3 There is no privity of contract between the plaintiff and the defendant no.3. Therefore, the defendant no.3 is not liable to pay any amount to the plaintiff.

7.4 As per the statement of accounts of the defendant no. 1 with the defendant no.3 company till April, 2013, the defendant no.1 was liable to pay a sum of Rs. 83,64,995.89/-. A suit for recovery of Rs. 91,77,660.79/- has also been filed by the defendant no.3 against the defendant no. 1 and same is pending adjudication before High Court of Calcutta.

7.5 The liability of the defendant no.1 towards the plaintiff cannot be fastened upon the defendant no.3 for the genuine trading done in the account opened by the defendant no.1 with the defendant no.3. Hence, no recovery can be claimed against the defendant no.3 by the plaintiff.

8. The right to file written statement of the defendant no.4 bank was closed by the Joint Registrar vide order dated 16th October, 2014. Chamber Appeal against the aforesaid order along with the condonation of delay application filed by the defendant no.4 bank, was dismissed on 23rd September, 2015. The said order of the Joint Registrar was challenged and upheld up to the Supreme Court.

9. In its replications, the plaintiff has re-affirmed the assertions made in the plaint.

Issues

10. The issues in the present suit were framed on 18th September, 2017 and were amended on 2nd November, 2017. The final issues framed in the suit are



set out below:

“i. Whether the suit is bad for mis-joinder or non-joinder of necessary parties? OPD

ii. Whether the plaint do not disclose any cause of action, as alleged? OPD

iii. Whether there is no privity of contract between the parties as alleged? OPD

iv. Whether the plaint is not filed by a duly authorised person? OPD

v. Whether the defendant No.1 has not illegally acquired the funds belonging to the plaintiff? OPD 1 & 2

vi. Whether the subject properties have not been acquired from such illegal funds by defendants No.1 and 2? OPD 1 & 2

vii. Whether the plaintiff is entitled to a decree against the defendants jointly and severally for an amount of Rs.10,17,42,312/-? OPP

viii. Whether the plaintiff is entitled to interest, and if so, at what rate and for which period? OPP

ix. Whether the plaintiff is entitled to a decree of injunction as prayed? OPP

x. Relief, if any.”

11. The evidence in the present matter was recorded before the Local Commissioner between 5th December, 2017 and 27th September, 2018. Mr. Amit Sankhwal (PW-1) being the partner of the plaintiff deposed as a witness on behalf of the plaintiff. PW-1 was cross-examined by the defendant no.4 on 19th May, 2018 and 26th September, 2018. However, no cross-examination



was conducted on behalf of the defendants no.1, 2 and 3.

12. No evidence has been led on behalf of any of the defendants.

13. The defendants no.1 and 2 appeared intermittently in the suit and stopped appearing before this Court after 10th February, 2020. Therefore, the said defendants were proceeded against *ex parte* on 25th July, 2022. Subsequently, an application under Order IX Rule 7 of the Code of Civil Procedure, 1908 (CPC) was filed on behalf of the defendants no.1 and 2 for setting aside the aforesaid *ex parte* order. Vide order dated 1st November, 2022, the said application was allowed by this Court subject to payment of costs of Rs.20,000/- and the defendants no.1 and 2 were permitted to join the proceedings from the current stage of the suit. However, the defendants no.1 and 2 did not pay costs and therefore, continued to remain *ex parte*.

14. Written submissions have been filed on behalf of the plaintiff and the defendant no.4 bank. In the written synopsis filed on behalf of the plaintiff, it has been clarified that there is an arithmetic error in computing the aforesaid amount of Rs.10,17,42,312/- in the plaint. The plaintiff seeks a money decree of Rs.10,61,60,071/- against the defendants jointly and severally.

15. The final arguments in the present suit were heard on 6th September, 2022, 1st November, 2022, 10th January, 2023, 1st March, 2023 and 18th April, 2023.

16. I have heard the counsels for the parties and perused the record of the suit.

17. My issue wise findings are as under:

Issue No. 1: Whether the suit is bad for mis-joinder or non-joinder of necessary parties?

Issue No.4: Whether the plaint is not filed by a duly authorised person?



18. By way of the present suit, the plaintiff claims recovery of a sum of Rs.10,17,42,312/- belonging to the plaintiff against the defendants no.1 and 2 as the same has been misappropriated by the said defendants.

19. The case set up by the defendants no.1 and 2 in their written statements is that the plaintiff is seeking to recover amounts on behalf of the partners of the plaintiff, i.e., Amit Sankhwal, Anil Sankhwal and Priti Sankhwal and the sister concern of the plaintiff, J.H. Jewellers Pvt. Ltd. However, the said individuals/entities have not been impleaded in the present suit.

20. I do not find merit in the aforesaid submission of the defendants no.1 and 2. By way of the present suit, the plaintiff is seeking to recover amounts that belonged to the plaintiff and which have been fraudulently misappropriated by the said defendants. It is a matter of record that 41 cheques that were deposited in the pseudo account opened by the defendant no.1 with the defendant no.4 bank, were issued in favour of the plaintiff. It was the plaintiff who was the beneficiary of the aforesaid cheques. Therefore, it is the plaintiff who has the right to seek recovery of the amounts misappropriated by the said defendants. There was no requirement to implead the partners of the plaintiff or the sister concern of the plaintiff. Neither did the plaintiff need any authorisation from such persons to file the present suit.

21. Accordingly, the issues no. 1 and 4 are decided in favour of the plaintiff and against the defendants no.1 and 2.

Issue No.2: Whether the plaintiff do not disclose any cause of action, as alleged?



Issue No.3: Whether there is no privity of contract between the parties as alleged?

22. The aforesaid issues have been framed in view of the stand taken by the defendant no.3 in his written statement that (i) there is no privity of contract between the plaintiff and the defendant no.3 and (ii) the suit filed against the defendant no.3 is without any cause of action.

23. The defendant no.3 in its written statement has stated that the defendant no.3 is involved in trading in various commodities as a commodity broker. It is further stated that a sum of Rs.5.99 crores was received from the defendant no.1 towards trading in commodities and the said amount has been credited in the account of National Multi Commodity Exchange of India. The defendant no.3 has no concern as to how an account holder manages the amount for trading.

24. The defendant no.3 has also contended that up to April 2013, the defendant no.1 was liable to pay a sum of Rs.83,64,995/- for which a recovery suit has been filed by the defendant no.3 against the defendant no.1 and the same is pending adjudication before Calcutta High Court. Therefore, the defendant no.3 is not liable for refund of the aforesaid amount of Rs.5.99 crores and the suit is not maintainable against the defendant no.3.

25. The plaintiff has failed to lead any evidence to substantiate its claim that the money was transferred by the defendant no.1 to the defendant no.3 to turn cheque amounts into black money or that the defendant no.3 had showed bogus trade and bogus losses in its statement. The plaintiff has failed to lead any evidence to show that the defendant no.3 has committed any fraud or illegality or that the director of the defendant no.3, Mr. Manoj Poddar, was a co-conspirator with the defendant no.1. Therefore, the plaintiff has failed to



show any cause of action against the defendant no.3. There is no privity of contract between the plaintiff and the defendant no.3. In view of the discussion above, the defendant no. 3 is not liable to pay any amount to the plaintiff firm.

26. Accordingly, the issues no. 2 and 3 are decided in favour of the defendant no.3 and against the plaintiff.

Issue no.5: Whether the defendant no.1 has not illegally acquired funds belonging to the plaintiff?

Issue no.7: Whether the plaintiff is entitled to a decree against the defendants jointly and severally for an amount of Rs.10,17,42,312/-?

Issue No.8: Whether the plaintiff is entitled to interest, and if so, at what rate and for which period?

27. Insofar as the claim of the plaintiff against the defendants no.1 and 2 is concerned, it is the case of the plaintiff that the defendant no.1, who was working as an accountant with the plaintiff, opened a pseudo bank account bearing no. 683011000856, with the defendant no.4 bank in its Yamuna Vihar Branch, in the name of the plaintiff, i.e., J.H. Jewellers, claiming himself to be the sole proprietor of the plaintiff. A total of 41 cheques [**Exhibit PW1/6 (Colly)**] that were given to the defendant no.1 for depositing in the bank account of the plaintiff were instead deposited by him in the said pseudo account. The said cheques were issued by the customers towards the purchase of jewellery from the plaintiff firm and by the partners of the plaintiff firm, and the sister concern of the plaintiff. Subsequently, the money from the pseudo account was transferred by the defendant no.1 to his personal accounts and from there to the accounts of his wife, defendant no.2 and other entities, including defendant no. 3.



28. In its evidence, the plaintiff has also produced copy of the account opening form and documents submitted with it by the defendant no. 1, which shows that the defendant no.1 fraudulently opened the pseudo account by falsely showing himself to be the sole proprietor of the plaintiff firm [**Exhibit PW-1/5 (Colly)**].

29. A statement of the pseudo bank account for the period 14th February, 2011 to 16th April, 2013 has been filed, which shows that a total of 41 cheques amounting to Rs.10,61,60,071/- were deposited therein during the said period [**Exhibit PW-1/7**]. The plaintiff has also placed on record confirmation letters from the clients of the plaintiff, who had collectively issued 14 cheques in favour of the plaintiff, confirming that the money in respect of the said cheques had been credited to the account of J.H. Jewellers with the defendant no.4 bank [**Exhibit PW-1/8 (Colly)**]. The plaintiff has also placed on record the bank account statements of the plaintiff's partners from which some of the cheques were issued in favour of the plaintiff, to show that the money in respect of the said cheques has been debited from their accounts [**Exhibit PW-1/9 (Colly)**].

30. A perusal of the statement of the pseudo account also shows that the amounts from the said account have been transferred to the personal accounts of the defendant no.1 and from there to personal account of the defendant no.2 and to other entities. The plaintiff has filed banks statements of the personal bank accounts of the defendant no.1 [**Exhibit PW-1/10 Colly**] and the defendant no.2 [**Exhibit PW-1/11**] to show that the money has been received in the said accounts from the pseudo account. A perusal of the statements of the personal bank accounts of the defendants no.1 and 2 reveals that certain amounts have been withdrawn by the defendants no.1 and 2 through ATM or



by way of self-cheques while other sums have been transferred to other individuals as well as entities. A summary of the utilization of the money misappropriated by the defendants no. 1 and 2 is summarised in the table given below:-

PARTICULARS	AMOUNT
Withdrawal from ATM	Rs.19,44,000/-
Withdrawal by way of self – cheque	Rs.30,90,000/-
Transfer to Defendant no.1's other accounts/ entities	Rs.8,80,10,000/-
Paid to others	Rs.1,30,34,426/-
Not identified	Rs.81,645/-
TOTAL	Rs.10,61,60,071/-

31. The plaintiff has also deposed in its evidence that the plaintiff filed a criminal case against the defendants no.1 and 2, which resulted in an FIR being lodged against the said defendants. Upon investigation, the police filed a detailed chargesheet dated 9th September, 2013 against the defendants no.1 and 2 [**Exhibit PW-1/18**].

32. On the other hand, the defendant no.1 in his written statement has denied any misappropriation of money belonging to the plaintiff. He has pleaded that the pseudo account was opened by the defendant no.1 upon oral instructions of the partners of the plaintiff, for the purposes of making investments on their behalf. Since considerable amount was involved, the partners of the plaintiff insisted that a separate account be opened in the name of the plaintiff so as to safeguard their interests. It was upon instructions of



the partners of the plaintiff that the money was invested by the defendant no.1 in the defendant no.3 company. The defendant no.1 has been made a scapegoat since the said investments made on behalf of the partners of the plaintiff resulted in losses. He has further stated that the money was also received as commission by the defendant no.1 for the additional role he performed for the partners of the plaintiff.

33. It is pertinent to note that the defendants no.1 and 2 have not led any evidence in support of the aforesaid averments made in their written statements. Nor have the defendants no.1 and 2 cross-examined the witness of the plaintiff. In the absence of any evidence, no credence can be given to the said averments made by the defendants no.1 and 2 in their written statements.

34. In their written statements, the defendants no. 1 and 2 have not disputed the bank statements of the pseudo account as well as the personal bank accounts of the defendants no.1 and 2, as filed by the plaintiff. The defendants no.1 and 2 have also not disputed that a sum of Rs. 5.99 crore was transferred to the defendant no.3 from the accounts of the defendants no.1 and 2.

35. A perusal of the bank statements filed on behalf of the plaintiff of the pseudo account as well as the personal accounts of the defendants no.1 and 2, makes it clear that 41 cheques in the name of plaintiff firm were deposited in the pseudo account and the amounts from the pseudo account were subsequently transferred to the personal accounts of the defendant no.1 and from there to the personal accounts of the defendant no.2 and to other entities.

Claim of the plaintiff against the defendant no.4 bank

36. The plaintiff has claimed a sum of Rs. 10,17,42,312/- against the



defendant no.4 bank on the basis that the defendant no.4 bank in connivance with the defendant no.1 opened a pseudo account in the name of J.H. Jewellers without complying with the KYC norms. The relevant pleadings as contained in paragraph 7 of the plaint are set out below:-

“7. The Police investigation has revealed that the pseudo account opened by the Defendant No.1 with the Defendant No.4 was done without complying with KYC norms. The entire plan of the Defendant No.1 to defraud the Plaintiff had been enabled by the Defendant No.4 and its various officials.”

37. However, in the evidence filed on behalf of the plaintiff, the plaintiff has sought to go beyond the pleadings by making out a case of negligence even though the same has not been pleaded in the plaint. It is a settled position of law that no evidence can be led in the absence of relevant pleadings.

38. It is submitted on behalf of the plaintiff that since the pseudo account was opened for running a business for trading of jewellery items in the name of J.H. Jewellers, which was categorized by the Reserve Bank of India (RBI) as a high-risk customer, the defendant no.4 bank should have applied the enhanced due diligence measures as mandated by RBI before opening the said account. As per the RBI KYC norms/guidelines, it was mandatory for the defendant no.4 bank to have taken an introduction from the existing customer and diligently verify the particulars and documents furnished by the defendant no.1 at the time of opening of the said account.

39. It is further submitted on behalf of the plaintiff that the defendant no.4 bank did not ask for any introduction from the defendant no.1 before opening the pseudo bank account, nor did it intentionally verify the particulars/documents furnished by the defendant no.1 and other details as mentioned in the account opening form. Even the CA certificate furnished by



the defendant no.1, which was a forged document [**Exhibit PW-1/25**], was not verified by the defendant no.4 bank. Reliance in this regard is placed on the judgments of the Supreme Court in *Indian Overseas Bank v. Industrial Chain Concern*, (1990) 1 SCC 484, and *Kerala State Cooperative Marketing Federation v. State Bank of India*, (2004) 2 SCC 425.

40. It is stated on behalf of the plaintiff that even after the pseudo account was opened, the defendant no.4 bank was negligent in monitoring the large and suspicious transactions being done from the said bank account.

41. *Per contra*, it has been submitted on behalf of the defendant no.4 bank that the account in the name of J.H. Jewellers was opened in compliance with the applicable RBI KYC norms/guidelines and therefore, no liability can be fastened on the defendant no.4 bank. It is further submitted that the plaintiff has failed to prove any negligence or bad faith on behalf of the defendant no.4 bank.

42. The plaintiff has filed the following documents along with the plaint that were taken by the defendant no.4 bank from the defendant no.1 towards conducting KYC [**Exhibit PW-1/5 (Colly)**]:

- (i) Ration card
- (ii) PAN card
- (iii) Income Tax Returns

43. From a perusal of the aforesaid documents, it is evident that the defendant no.4 bank had conducted KYC before opening of the pseudo account. A perusal of the aforesaid documents also shows that the defendant no.4 bank also carried out the enhanced due diligence before opening the said



account. The documents record that an official of the bank duly visited the premises of the defendant no.1 and met defendant no.1 at the said address. As a part of the enhanced due diligence, the defendant no.4 bank also collected CA Certificate from the defendant no.1 to the effect that the defendant no. 1 is the proprietor of J.H. Jewellers. The income tax returns submitted by the defendant no.1 [**Exhibit PW-1/14 (Colly)**] duly showed that the defendant no.1 was trading in the jewellery items under the name of J.H. Jewellers from the same address as mentioned in the other documents. There was no basis to arouse the suspicion of the defendant no.4 bank on the basis of the aforesaid documents. Even if the CA Certificate was fake, as alleged by the plaintiff, there was no basis for the defendant no.4 bank to have known about it. The defendant no.4 bank cannot be expected to play a role of a detective.

44. It is also an admitted position that the pseudo account was opened by the defendant no.1 and therefore, the identity of the defendant no.1 is not in dispute in the present matter. It was not a case of impersonation or mistaken identity. It is not the case that the defendant no.1 could not open an account in the name of J.H. Jewellers.

45. In light of the above, the plaintiff has failed to establish that the defendant no.4 acted negligently or without good faith. The plaintiff has merely relied upon the documents filed by the police along with its chargesheet in the criminal case in support of its submission that the defendant no.1 had created forged and fabricated documents to facilitate opening of the pseudo bank account with the defendant no.4 bank. However, no independent evidence has been led before this Court to show that the aforesaid documents including CA Certificate were false or fabricated.

46. No doubt, the right of the defendant no.4 bank to file written statement



was closed in this case and therefore, no written statement has been filed on behalf of the defendant no.4 bank. However, even in the absence of a written statement, the plaintiff has to prove its case in order to obtain the relief claimed in the present suit. Reliance in this regard is placed on the judgment of the Supreme Court in *Dr. N.G. Dastane v. Mrs. S. Dastane*, (1975) 2 Supreme Court Cases 326.

47. As regards the submission of the plaintiff that the defendant no.4 bank did not take any introduction from an existing customer before opening the pseudo account, the defendant no.4 bank has placed reliance on a circular issued by the Reserve Bank of India (hereinafter 'RBI') being RBI/2012-13/322DBOD.AML.BC. No.65/ 14.01.001/2012-13 dated 10th December, 2012, wherein RBI has noted that despite KYC guidelines under Prevention of Money Laundering Act, 2002, the banks were insisting for introduction by existing customers, which in the opinion of RBI was not required under RBI guidelines. The relevant extract from the circular is set out below:

“Introduction not Mandatory for opening accounts - Before implementation of the system of document-based verification of identity, as laid down in PML Act/Rules, introduction from an existing customer of the bank was considered necessary for opening of bank accounts. In many banks, obtaining of introduction for opening of accounts is still a mandatory part of customer acceptance policy even though documents of identity and address as required under our instructions are provided. This poses difficulties for prospective customers in opening accounts as they find it difficult to obtain introduction from an existing account holder.

“Since introduction is not necessary for opening of accounts under PML Act and Rules or Reserve Bank’s extant KYC instructions, banks should not insist on introduction for opening bank accounts of customers.”



48. In light of the aforesaid circular, in my considered view, there was no mandatory requirement for the defendant no.4 bank to take an introduction from an existing account holder before opening the account. Further, the pseudo account was opened on the basis of a cheque from a nationalized bank drawn on an existing bank account of the defendant no.1, which was presented by the defendant no.1 for encashment.

49. As regards the connivance of the officials of the defendant no.4 bank with the defendant no.1 in opening of the bank account is concerned, it has been admitted by PW-1 in his cross-examination that the bank officials of the defendant no.4 bank have been discharged in the criminal case. Further, no evidence has been led by the plaintiff to show such connivance.

50. In paragraph 9 of the PW-1's affidavit, details of 41 cheques amounting to Rs.10,61,60,071/- that were deposited in the pseudo account with the defendant no.4 bank for the period 14th February, 2011 to 16th April, 2013, have been provided. It is evident that for a period of more than two years, the defendant no.1 had been depositing cheques in the name of the plaintiff in the pseudo account and yet the plaintiff did not notice it.

51. The PW-1 in his cross-examination has admitted that the accounts of the plaintiff firm were audited. Yet the plaintiff has failed to explain as to how the non-receipt of such huge amounts of cheques in the accounts of the plaintiff skipped the attention of the auditors. It is hard to believe that a business entity like the plaintiff would not be aware for a period of more than two years if such large sums of money to be deposited in its account are not reflected in its bank account, especially when the accounts of the plaintiff had been audited regularly.



52. In his cross-examination, PW-1 has also stated that it is the practice of the plaintiff firm that the partners of the plaintiff firm deposit cheques from their personal accounts in the account of the plaintiff firm as and when required. The relevant extract from the cross-examination in this regard is set out below:-

“Q.l. Can you give me the detail with regard to number of bank accounts which the plaintiff firm had during the years 2011 to 2013?”

Ans. Plaintiff had only one bank account in HDFC Bank, Sundar Nagar Branch, New Delhi.

It is the practice with the plaintiff firm that the partner of the plaintiff firm deposit cheques from their personal accounts in the account of plaintiff firm as and when required. When the plaintiff is requiring funds on account of shortfall in the balance available in the bank account, then the partners deposit their individual cheques in the plaintiffs bank account for business related purposes.”

53. It has also come on record that the substantial amounts that were collected in the pseudo account with the defendant no.4 bank were by way of loans given by the partners of the plaintiff firm. Out of a sum of Rs.10,61,60,071/- deposited in the pseudo account with the defendant no.4 bank, a sum of Rs.7,77,12,497/- was given towards loans by way of cheques issued by the partners of the plaintiff, Anil Sankhwal, Amit Sankhwal and Priti Sankhwal and its sister concern.

54. PW-1 has admitted in his cross-examination that payments which came from the partners were in the nature of temporary loans or repayment of money withdrawn from the plaintiff firm in the past. The relevant portion of the cross-examination of the PW-1 is set out below:



“Q.3 Can you explain the head under which the payments were received by the plaintiff as indicated in para 9 other than those from your customers/clients.

Ans. The payment which came from the partners were either temporary loans given to the plaintiff firm or repayment of the money which had been withdrawn by the partners from the plaintiff firm in the past. Today I am not in a position to identify as to which of the entry is reflected in paragraph 9 is towards loan and which entry towards repayment. However, I can check the record and inform the court of the exact detail.

Q.4. For what purpose the plaintiff takes money other than towards sale of jewellery and gems and by way of loan?

Ans. The money will come either by the sale of jewellery and gems or loans, to the best of my knowledge.”

55. No explanation has been given by the plaintiff as to why the plaintiff borrowed money from its partners and sister entities when there were no planned expenses for the same.

56. At this stage, a reference may be made to Section 131 of the Negotiable Instruments Act, 1881, which is set out below:

“131. Non-liability of banker receiving payment of cheque — A banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment.”

57. In *Indian Overseas Bank* (supra), the Supreme Court has held that there must be sufficient connection between opening of the account and collection of a cheque before a defence under Section 131 of the Negotiable Instruments Act, 1881, could be held to be barred. The relevant observations



contained in paragraph 26 of the judgment are set out below:

*“26. We have already observed that the principle enunciated in the Commissioners of Taxation v. English, Scottish and Australian Bank [1920 AC 683] is that the opening of the account is material as shedding light on the question **whether there was negligence in collecting a cheque does bring out the true position that there must be sufficient connection established between the opening of the account and the collection of the cheque before a defence under Section 131 could be held to be barred. The question would then be one of facts as to how far the two stages can be regarded as so intimately associated as to be considered as one transaction. We have already found that in the instant case there was no evidence to show that the opening of the account and the collection of the cheques and drafts formed part of the same transaction. Where a banker in good faith and without negligence receives payment for a customer of a cheque and the customer has no title or a defective title to the cheque, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment. The banker is not to be treated for purposes of the protective section as having been negligent by reason only of his failure to concern himself with absence of, or irregularity in, endorsement of the cheque or other instrument to which the section applies. This has to be so because the drawer of the cheque is not a customer of the bank while the payee is.....***

*In the instant case Sethuraman having been believed to have been the proprietor of Industrial Chain Concern the cheques payable to Industrial Chain Concern left little scope to have aroused any suspicion in the minds of the Bank. **The position may have been different if Sethuraman was known as acting as an employee of Industrial Chain Concern and the cheques were payable to that concern, but were deposited into personal account of the employee which was not the case here.** The requirement of receiving payment for a customer enunciated clearly Capital and Counties Bank Ltd. v. Gordon [1903 AC 240 : 88 LT 574 : 19 TLR 402 : 8 Com Cas 221] was extended in Barclays Bank Ltd. v. Astley Industrial Trust Ltd. [(1970) 1 All ER 719] , wherein it was held that the banker may receive payment for himself and yet be entitled*



to the protection where, acting in a purely collecting capacity, he has nevertheless a lien or is otherwise a holder for value.”

58. The aforesaid observations of the Supreme Court are fully applicable in the present case. In the present case also, there is nothing to show that the opening of the account and the collection of the cheques form part of the same transaction. The defendant no.4 bank opened the bank account believing the defendant no.1 to be the proprietor of J.H. Jewellers and therefore, there cannot be any cause of suspicion if the bank collected cheques drawn in the name of J.H. Jewellers. It is not a case where the defendant no.1 fraudulently opened the account one day, deposited a misappropriated cheque and immediately withdrew the said amount in the next few days. In the present case, 41 cheques were deposited over a period of two years and the amounts were withdrawn in a phased manner. Therefore, it cannot be said that the loss was caused to the plaintiff on account of negligence of the defendant no.4 bank in opening of the bank account. Even if it is assumed that there was negligence in opening of the account, it cannot be said that by itself resulted in loss being caused to the plaintiff.

59. The plaintiff has placed reliance on the judgment of the Supreme Court in *Kerala State Cooperative* (supra). In the facts of the aforesaid case, the transaction of opening of the account and deposit of the cheque and the withdrawal were part of the same transaction as they took place in close proximity to each other. Further, there was gross negligence on the part of the bank at the time of opening of the bank account as the bank did not make any enquires with regard to the address or telephone numbers.

60. In the aforesaid judgment, the Supreme Court laid down the principles governing the liability of a collecting banker, which are set out below:



“11. The principles governing the liability of a collecting banker have also been extracted in the impugned judgment. They read as follows:

“(1) As a general rule the collecting banker shall be exposed to his usual liability under common law for conversion or for money had and received, as against the ‘true owner’ of a cheque or a draft, in the event the customer from whom he collects the cheque or draft has no title or a defective title.

(2) The banker, however, may claim protection from such normal liability provided he fulfils strictly the conditions laid down in Section 131 or Section 131-A of the Act and one of those conditions is that he must have received the payment in good faith and without negligence.

(3) It is the banker seeking protection who has on his shoulders the onus of proving that he acted in good faith and without negligence.

(4) The standard of care to be exercised by the collecting banker to escape the charge of negligence depends upon the general practice of bankers which may go on changing from time to time with the enormous spread of banking activities and cases decided a few decades ago may not probably offer an unfailing guidance in determining the question about negligence today.

(5) Negligence is a question of fact and what is relevant in determining the liability of a collecting banker is not his negligence in opening the account of the customer but negligence in the collection of the relevant cheque unless, of course, the opening of the account and depositing of the cheque in question therein form part and parcel of one scheme as where the account is opened with the cheque in question or deposited therein so soon after the opening of the account as to lead to an inference that the depositing the cheque and opening the account are interconnected moves in a integrated plan.

(6) Negligence in opening the account such as failure to fulfil the



procedure for opening an account which is prescribed by the bank itself or opening an account of an unknown person or a non-existing person or with dubious introduction may lead to a cogent, though not conclusive, proof of negligence particularly if the cheque in question has been deposited in the account soon after the opening thereof.

(7) The standard of care expected from a banker in collecting the cheque does not require him to subject the cheque to a minute and microscopic examination but disregarding the circumstances about the cheque which on the face of it give rise to a suspicion may amount to negligence on the part of the collecting banker.

(8) The question of good faith and negligence is to be judged from the standpoint of the true owner towards whom the banker owes no contractual duty but the statutory duty which is created by this section and it is a price which the banker pays for seeking protection, under the statute, from the otherwise larger liability he would be exposed to under common law.

(9) Allegation of contributory negligence against the paying banker could provide no defence for a collecting banker who has not collected the amount in good faith and without negligence.”

61. Applying the aforesaid principles to the facts and circumstances of the present case, it cannot be said that the defendant no.4 bank did not act in good faith or negligently collected cheques on behalf of a customer. The aforesaid conclusion is on account of the following factors:

- (i) There was no negligence in opening of the bank account as the defendant no.4 bank complied with all the prescribed formalities before opening the pseudo account including conducting the enhanced due diligence.



- (ii) The account was opened by the defendant no.4 bank on the basis of the defendant no.1's cheque drawn on a nationalized bank.
- (iii) There was no connection between opening of the account and depositing of the cheques, inasmuch as this was not the case where the account was specially opened for the purposes of deposit of a particular cheque and immediate withdrawal of the amount therefrom.
- (iv) The cheques were deposited over a period of two years and there was no immediate withdrawal of the entire amount.
- (v) There were no suspicious circumstances with regard to the cheques that were deposited. It is not the case of the plaintiff that the cheques were interpolated by the defendant no.1.

62. In the present case, it cannot be denied that the loss caused to the plaintiff was on account of acts conducted by the defendant no.1, who was an employee of the plaintiff. The entire case of the plaintiff is based on fraudulent misappropriation of funds carried out by the defendant no.1 over a period of two years. In this regard, the plaintiff has correctly placed reliance on the judgment of US Court of Appeal, New York in *Frederic A. Potts & Co. v. Lafayette Nat'l Bank*. In the aforesaid case, one of the employees of the plaintiff conspired with an officer of a bank to divert the proceeds of the cheques belonging to the plaintiff to his own account. Upon discovering the fraud, the plaintiff sued the bank to recover the proceeds of the cheque so diverted. The Court of Appeal dismissed the claim of the plaintiff holding that the plaintiff with exercise of reasonable care should have discovered that the proceeds of its cheques were not credited to his account. If the plaintiff had



examined the monthly statement of account sent by the bank, it could have been discovered that the plaintiff had not received credit for the cheques that it had sought to deposit in the bank.

63. I am in full agreement that the ratio of the aforesaid judgment is squarely applicable in the facts of the present case. In the present case also, it was sheer negligence of the plaintiff which permitted its employee, i.e., defendant no.1, who had joined the services of the plaintiff only in 2011, to perpetuate fraud on the plaintiff by misappropriating the cheques drawn in favour of the plaintiff in the pseudo account. Had the plaintiff been vigilant in monitoring its statements/bank account and had immediately alerted the bank about the fraud, the losses could have been avoided.

64. In these circumstances, the defendant no.4 bank cannot be held liable for the amounts misappropriated by the defendants no.1 and 2.

65. In view of the discussion above, the plaintiff has failed to establish that the defendant no.4 bank did not act in good faith or in accordance with the established banking procedure

66. Accordingly, the plaintiff is entitled to recovery of a sum of Rs.10,61,60,071/- only from the defendants no.1 and 2 jointly and severally. The plaintiff shall be liable to pay the additional court fee on the differential amount awarded in favour of the plaintiff, since the plaintiff at the time of filing of the suit, paid court fee on the sum of Rs.10,17,42,213/- claimed in the plaint.

67. Though the plaintiff has claimed pendente lite and future interest @ 24% per annum, it is deemed appropriate to award interest @ 7% per annum on the aforesaid amount of Rs10,61,60,071/- from the date of filing of the present suit till the realisation of the aforesaid sum.



68. Issues no.5, 7 and 8 stand answered accordingly.

Issue No. 6: Whether the subject properties have not been acquired from such illegal funds by defendants No.1 and 2?

Issue No.9: Whether the plaintiff is entitled to a decree of injunction as prayed?

69. It is the case of the plaintiff that the defendants no.1 and 2 have used the funds belonging to the plaintiff misappropriated by them towards purchase of the following properties, of which the plaintiff has also filed Sale Deeds/Agreement to Sell [**Exhibit PW-1/13**]:

Properties purchased by the defendant no.2

1. 16/28, Orange County, Indrapuram, Ghaziabad, Uttar Pradesh, vide Sale Deed dated 12th September, 2012.
2. Old Ward no.21, present Ward No. 16, Near Meena ka kuan, Sardarsahar, vide Sale Deed dated 1st June, 2012.
3. Commercial Plot at Khasra No. 722/660/617, measuring 3.12 bigha 2 biswa in Rohi Jeewandesar, Mega Highway, near Acharya Mahapragya Samadhi, Sardarsahar, Rajasthan, vide Sale Deed dated 28th June, 2013.
4. Ward No. 21, next to Chottu La' Sethia Haveli, Sardarsahar, Rajasthan, vide Sale Deed dated 10th December, 2012.

Properties purchased by the defendant no.1

1. Commercial Plot at Khasra No. 722/660/617, measuring 3.12 bigha biswa in Rohi Jeewandesar, Mega Highway, near Acharya Mahapragya Samadhi, Sardarsahar, Rajasthan, vide Sale Deed dated 28th June. 2013.



2. Booking at Earth Studios-2 measuring 495 Sq. ft. in Earth Infrastructure Ltd, vide Agreement to Sell dated 1st June, 2012.

70. The defendants no. 1 and 2 in their written statements have stated that the aforesaid properties have been duly purchased by the said defendants from their own funds. However, the said defendants have not denied that the aforesaid properties have been purchased by them on the aforementioned dates. No evidence has been led on behalf of the said defendants to show that the aforesaid properties were purchased using personal funds belonging to the said defendants.

71. On the other hand, the plaintiff has shown that the aforesaid properties were purchased within close proximity of the dates on which the amounts were credited to the pseudo account and subsequently transferred to the personal accounts of the defendants no. 1 and 2. A perusal of the statement of the bank accounts shows that the amounts were transferred from the pseudo account to the defendant no.1's personal accounts. Thereafter, the said amounts were either withdrawn from the personal account of the defendant no.1 or transferred to the personal account of the defendant no.2 and used for purchasing the aforesaid properties in the name of the defendant no.2. For instance, an entry in the bank statement of the personal account of the defendant no.2 shows that an amount of Rs.12,00,000/- was transferred by way of RTGS by the defendant no.1 to the personal account of the defendant no.2 on 5th September, 2012. Subsequently, on 7th September, 2012, an amount of Rs.12,49,000/- was transferred to ABA Builders from the same account of the defendant no.2.

72. Similarly, the amounts were transferred from the pseudo account to the personal account of the defendant no.1 and then used for purchasing the



aforesaid properties. An entry dated 21st July, 2012 in the bank statement of the personal account of the defendant no.1 shows that an amount of Rs.1,70,000/- was transferred to Earth infrastructure, from whom a flat has been booked by defendant no.1.

73. The plaintiff has also placed on record the income tax returns of the defendants no. 1 and 2 to show that they did not have the requisite income to purchase the aforesaid properties [**Exhibit PW1/14 (Colly)**].

74. In view of the above, I have no doubt in my mind that the aforesaid properties have been acquired by the defendants no. 1 and 2 from the funds belonging to the plaintiff, which were misappropriated by the defendants no. 1 and 2. Accordingly, the plaintiff is entitled to a decree of permanent injunction restraining the defendants no.1 and 2 from dealing with the properties detailed in paragraph 69 above, in any manner till the realisation of Rs.10,61,60,071/- by the plaintiff.

Relief

75. A decree is accordingly passed in favour of the plaintiff and against the defendants no.1 and 2 in the following terms:

- (i) Recovery of Rs.10,61,60,071/- along with pendente lite and future interest @ 7% per annum from the date of filing of the suit till the realisation of the said amount. The plaintiff shall pay the additional court fees on the differential amount awarded in favour of the plaintiff, within 10 days from today.



- (ii) The defendants no.1 and 2 are restrained from dealing with the properties detailed in paragraph 69 above, in any manner till the realisation of Rs.10,61,60,071/- by the plaintiff.
 - (iii) The plaintiff shall also be entitled to costs of the suit.
76. Decree sheet be drawn up.
77. All pending applications shall stand disposed of.

AMIT BANSAL, J.

JULY 11, 2023

at/rt/sr