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

Judgment reserved on: 16.05.2024

Judgment pronounced on: 16.08.2024

\+ **CS(OS) 1154/1993,CRL.M.A. 5936/2001, I.A. 4053/2010, I.A.385/2020**

SH. MOHAN MURTI SHANDILYA ..... Plaintiff
Through: Ms. Ananya Bhattacharya, Adv.

versus

BANK OF BARODA AND ORS. ..... Defendant
Through: Mr. Vaibhav Dang, Adv.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J**

1. The present suit has been filed seeking recovery of Rs. 2,78,00,000/- by the plaintiff against the defendant bank. The plaintiffs are Non-Resident Indians ('NRIs') carrying the business of Import and Export. The plaintiffs came to India for exploring business opportunities. The plaintiff no. 2 is the wife of plaintiff no. 1, who subsequently is said to have obtained a status of Resident Indian.

2. The defendant no. 1 (erstwhile Vijaya Bank) is a bank constituted and incorporated under the Banking Companies (Acquisition and Undertakings) Act, 1974 offering financial services to individuals as well as the corporate sector. The Vijaya Bank merged with the Bank of Baroda on 02.01.2019. The amended memo was filed on 05.07.2019. The erstwhile defendant no. 2 is the

branch of defendant no. 1 in Defence Colony, New Delhi wherein the plaintiffs opened their bank accounts with the defendant bank.

Factual Background

3. The case as set out by the plaintiffs in a nutshell is that that the plaintiffs opened a Savings Bank Account with the defendant bank under the Non-Resident External Account ('NRE Account') bearing no. 6523 in March of 1990 at the Defence Colony Branch, New Delhi. The plaintiffs opened the same after completing of all the necessary formalities including submission of the Account Opening Form and Specimen Signature Card.

4. The plaintiffs deposited Rs. 4,00,00,000/- (Four Crore Rupees) from their Moscow office account on 28th March 1990 in the said NRE Account. The account was originally opened by plaintiff no. 2 as a Non-Resident Indian, however since she subsequently changed her residential status, she is said to have ceased to be a joint signatory in the said NRE Account.

5. It is stated that in the absence of plaintiff no.1 from Delhi, plaintiff no. 2 on 23.04.1990 received a note from the then Branch Manager of defendant no. 2 requesting a blank cheque (only bearing signature of plaintiff no. 2) on urgent basis.

6. On the return of the plaintiff no. 1, the plaintiff no. 1 learnt that a sum of Rs. 2,00,00,000/- has been transferred from his NRE Account to the defendant's Hyderabad Branch.

7. After repeated inquiries, the plaintiffs learnt that the money has been transferred by the defendant bank claiming to have adjusted the same against certain liabilities of M/s. Asian Wire Ropes Ltd. of which plaintiffs were neither shareholders, directors nor guarantors on the said date. Hence, the plaintiffs were neither liable nor responsible for debts and liabilities of M/s. Asian Wire Ropes Ltd..

8. It is alleged by the plaintiffs that the officials of defendant no. 2 had obtained a blank cheque from the plaintiff no. 2 and in a clandestine manner, filled entries in the cheque and added detailed instructions on the back of the cheque without any such directions by the plaintiffs. It is stated that since the account was an NRE account, no amount could have been invested out of it without prior approval of the Reserve Bank of India, as provided under the provisions of Foreign Exchange Regulation Act, 1973 ('FERA, 1973'). Further, plaintiff no. 2 had ceased to be an NRI, therefore the cheque could not have been encashed without prior approval of RBI.

9. The plaintiff took up the matter with the defendant bank, officials of the Ministry of Finance and the Reserve Bank of India but failed to receive a refund of the amount.

10. On 18th February of 1991, a joint meeting was held between the senior officials of the defendant bank and directors of M/s Asian Wires Ropes Ltd. wherein it was decided that the amount of Rs. 2,00,00,000/- will be refunded to the plaintiff, however the same was not done.

11. It is stated that even if assuming without admitting that the plaintiff no. 1 had entered into any agreement such as the Memorandum of Understanding dated 20.04.1990 regarding the Assets and Liabilities of the company M/s Asian Wire Ropes Ltd and M/s Asian Ispat Pvt Lt., the defendant could not have adjusted the amount belonging to the plaintiffs against the liabilities of the above two companies. The same is violative of provisions of FERA Act, 1974, Banking Regulation Act, 1949 and the Banking Rules and Practices laid down by the Reserve Bank of India.

12. The plaintiff on 11.05.1992 served a legal notice on defendant no. 2 calling upon the defendants for refund of the amount of Rs. 2,00,00,000/- to the account of the Plaintiffs.

13. Since the amounts were not refunded, the present suit was filed.

14. The defendant bank in their written statement have denied the averments made by the plaintiffs and stated that the suit is barred by limitation. It is further stated that the plaintiff had earlier filed a claim petition before the National Consumer Disputes Redressal Commission bearing Original Petition No. 150 of 1992 on the same cause of action which was dismissed on 19.03.1993. There are contradictory pleas raised in the present plaint.

15. The defendant bank state that the change of residential status of the plaintiff no. 2 was never conveyed to them. They deny that the then Branch Manager of defendant no. 2 requested blank cheques from the plaintiff no. 2, rather it is alleged that that the plaintiff no. 2 issued a cheque bearing no. 432283 dated 23.04.1990 for an amount of Rs. 2 crore on 'yourself' with instructions on the back on the cheque to the defendant bank to "please issue a telegraphic transfer on your Hyderabad Branch (Bank St.) favoring Asian Wire Ropes Ltd." Simultaneously, a telex message was received from the plaintiff no. 1 dated 23.04.1990 stating that formalities for taking over M/s. Asian Wire Ropes Ltd. have been finalized and a request for transfer of Rs. 2 crore to the Asian Wire Ropes Ltd Account at the Vijaya Bank Bank St., Hyderabad was made. It is stated that the plaintiffs also sent a letter dated 23.04.1990 to the Bangalore office authorizing the payment. A copy of Memorandum of Understanding dated 20.04.1990 between the plaintiffs and the management of the companies namely M/s Asian Wire Ropes Ltd and M/s Asian Ispat Pvt Ltd. was also shared with defendant bank in this regard.

16. The defendant bank state that the plaintiff no.2 was joint signatory to the account and the cheque was issued by plaintiff no. 2 who was authorized to issue the cheque which was made in pursuance of the Memorandum of Understanding for taking over M/s. Asian Wire Ropes Ltd. The defendant bank

state that the company did not do well subsequently so the plaintiffs wanted to wriggle out of their obligations. It is stated that the communications from the plaintiffs regarding the refund of the amount started only in 1992 when apparently the plaintiffs did not succeed in reviving the company M/s. Asian Wire Ropes Ltd.

17. Further, it is denied by the defendant bank that any decision was arrived at regarding refund of money in the joint meeting held on 18.02.1991 rather the meeting of minutes only records the claim of plaintiff no. 1 for the refund. The defendant bank states that it is not concerned with the liabilities of the plaintiffs towards M/s. Asian Wire Ropes Ltd and in fact it only transferred the amount as per plaintiffs' own instructions.

18. The following issues were framed based upon the pleadings of the parties:-

i. Whether the suit is within time?

ii. What is the effect of the pleadings filed by the plaintiff before the Consumer Disputes Redressal Commission in OA.No.150/92?

iii. When did plaintiff No.2 changed her status from non-resident Indian to resident Indian and whether an intimation thereof was given to the bank? If so, on which date?

iv. Whether plaintiff No.2 had signed any blank cheque? If so, to what effect?

v. Whether the transfer of Rs.2 crores from the account of the plaintiffs by the defendant bank to the account of Asian Wire Ropes Limited, Hyderabad, was illegal, improper or without instructions? If so, to what effect?

vi. Whether, the transfer of Rs.2 crores is hit by the provisions of Foreign Exchange Regulation Act? If so, to what extent?

vii. To what amount, if any, is the plaintiff entitled?

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

ix. Relief.

Evidence led by the parties

19. The plaintiffs examined the following witnesses:

a. PW1: *Shri Mohan Murti Shandilya* (Plaintiff no. 1) tendered his evidence by way of affidavit, i.e. Ex. PW1/1, and was cross-examined.

b. PW2-Mrs. Renu Murti Shandilya tendered her evidence by way of an affidavit, i.e. Ex. PW2/1. Since she executed a Special Power of Attorney in favor of her husband, PW1 tendered his affidavit on her behalf, i.e. EXH PW 2/A. PW2 did not enter the witness box for being cross-examined.

20. The defendant bank examined the following witnesses:

i. DW1: *Sh. Rajeev Shetty,* (then Branch Manager of the defendant bank) tendered his evidence by way of affidavit and relied upon the following documents:

a. *Exhibit PW1/D5:* The Original letter dated 14.10.1989 by M/s. Gambro Nexim (India) Medical Ltd.

b. *Exhibit PW1/D4:* The Original abstract of the Resolution dated 14.10.1989 passed by the Board of M/s. Gambro Nexim (India) Medical Ltd. handed over to the Defendant Bank by the Plaintiff No.1.

c. *Exhibit PW1/D6:* The Original Specimen Signature Card in current account no. 1571 belonging to company M/s. Gambro Nexim (India) Medical Ltd. signed by the Plaintiff No.1.

d. *Exhibit PW1/D8:* The Original declaration form dated 16.10.1989 signed by the Plaintiff No.1 and Plaintiff No.2 for opening of current account in the name of M/s. Gambro Nexim (India) Medical Ltd.

e. *Exhibit PW1/D9:* The Original Account Opening Form of current account in the name of M/s. Gambro Nexim (India) Medical Ltd. bearing the signatures of the Plaintiff No.1 and Plaintiff No.2.

f. *Exhibit PW1/D49, Exhibit PW1/D50, Exhibit PW1/D51, Exhibit PW1/D52, Exhibit PW1/D53, Exhibit PW1/D54:* The Original Cheques issued by the Plaintiff No.2 from the current account No. 1571 in the name of M/s. Gambro Nexim (India) Medical Ltd.

g. Exhibit PW1/D44: The Opening Form of NRE Account no. 6523 signed by the Plaintiff No.1 and Plaintiff No.2.

h. Exhibit PW1/D33, Exhibit PW1/D35, Exhibit PW1/D36 and PW1/D37: The Specimen Signature Cards so signed by the Plaintiffs in relation to account No. 6523.

i. Exhibit PW1/D43: Savings Bank Account opening form signed by the Plaintiff No.2.

j. Exhibit PW1/D56: Plaintiff No. 2 issued a cheque for Rs. 5,00,000 (Rupees Five lakh Only) from her NRE account no. 6523 dated 28.03.1990.

k. Exhibit PW 1/D57: The Original Cheque issued by the Plaintiff No.2 for Rs. 95lakhs from NRE Account no. 6523.

l. *Exhibit PW1/D31*: Cheque bearing No. 432283 for Rs. 2 crore. (in dispute)from her NRE account no. 6523

m. Exhibit PW1/D58: Original Cheque issued by the Plaintiff No.2 bearing No.432284 amounting to a sum of Rs.1 Crore from her joint NRE Account No.6523.

n. *Exhibit PW1/D68*: Original Memorandum of Agreement between M/s Gambro Nexim (India) Medical Ltd. and Defendant bank.

o. *Exhibit PW1/D67*: Letter of Lien in favour of the Defendant Bank signed by P2.

p. *Exhibit PW1/D66:* Demand Promissory Note executed by plaintiff no. 2

q. *Exhibit PW1/D71:*Original letter dated 23.07.1990 for dissolving of FDR and transfer in the name of M/s. Gambro Nexim (India) Private Ltd. for opening current account bearing no. 1571.

r. *Exhibit PW1/D7:* Original Specimen Signature Card signed by the Plaintiff No.1.

s. *Exhibit PW1/D10:* Original Account Opening Form on behalf of M/s. Asian Wire Ropes Ltd. signed by the Plaintiff No.1.

t. *Exhibit PW1/D70:*Original letter dated 26.09.1990 by Plaintiff No.2

u. *Exhibit PW 1/D62*: Extracts of the minutes of meeting dated 18.02.1991.

v. *Exhibit PW 1/D1:*Petition filed by the Plaintiff No.1 in NCDRC.

w. *Exhibit PW1/D49*, Exhibit PW 1/D50; Exhibit PW 1/D51; Exhibit PW 1/D52; Exhibit PW1/D53; Exhibit PW 1/D54; Exhibit PW 1/D55; Exhibit PW 1/D 58; Exhibit PW 1/D 59; Exhibit PW 1/D60: Original Cheques from three account numbers.

x. *Exhibit PW1/D64*: letter dated 20.02.1992, 27.04.1992 and dated 13.07.1992 sent by DW1.

ii. DW2: *Shri Achyuth Kunjathaya*, (then Assistant Branch Manager of the defendant bank) tendered his evidence by way of affidavit and relied on the same documents as DW1.

iii. DW3: *Mr. Sreedhar Rai*, Chief Manager, Hyderabad Branch tendered his evidence by way of affidavit. However, *vide* order dated 27.04.2013, the defendant bank submitted before the learned Joint Registrar that the defendant bank do not wish to examine DW3 and dropped him as a witness.

iv. DW-4: Mr. M. Janakiram, Chairman and Managing Director of M/s. Asian Wires Ropes Ltd. tendered his evidence by way of an affidavit. However *vide* order dated 27.04.2013, the defendant bank submitted before the learned Joint Registrar that the defendant bank do not wish to examine DW4 and dropped him as a witness.

21. Final arguments have been advanced at length on behalf of the parties and they have also filed their written submissions. I have heard the arguments and perused the material on record.

22. My issue-wise findings are as under:-

Issue No. I: ***Whether the suit is within time?***

23. The cause of action paragraph in the plaint reads as under:

> *" 17. That the cause of action for filing the present suit arose on 28th March, 1990 when the plaintiffs opened above NRE Account by depositing Rs. 4,00,00,000/- and again on 23rd April, 1990 when the above said sum of Rs. 2,00,00,000/- was unauthorizedly, illegally and in a clandestine manner was transferred by the defendant No.2 and finally on the expiry of the period of the lawyer's notice dated 11th May, 1992 served on the defendants as mentioned above. The cause of action is continuing from day to day from the failure of the defendants to pay the said sum of Rs. 2, 00,00,000/- together with interest which the plaintiffs are justly entitled to.*"

24. Admittedly, the suit is based on the fact that on 23.04.1990 money was illegally transferred from plaintiffs account by the defendant bank. The suit was filed on 22.04.1993, i.e. within three years from the date of cause of action. Therefore, the suit as filed was within the limitation period of three years.

25. The Court fees of Rs. 2,70,000/- was filed along with the suit and since the court fee of Rs. 3,672 was not available on the said date, it was purchased and deposited on 07.05.1993. All objections were duly removed and the matter was re-filed on 17.05.1993.

26. It is settled proposition that the deficiency in court fee is not fatal and the payment of deficit court fee is a curable defect. Section 149 of the Civil Procedure Code, 1908 is referred in this regard. It reads as under:-

> *"**Section 149: Power to make up deficiency of Court Fees.-** Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, <u>the Court may, in its discretion, at any stage, allow the person</u>, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."*

27. Under section 149 of CPC, the courts have been granted the discretion to permit receiving the deficit court fee at any stage, even in the absence of an application praying for the same, subject to the said discretion being exercised equitably.

28. The plaintiff has cured the defect of deficit court fee within 30 days of the objections. A minor delay in payment of balance court fee cannot act as an impediment in entertaining the suit filed by the plaintiff.

29. Hence, the present suit is held maintainable and within the period of limitation.

Issue No. III: When did plaintiff No. 2 change her status from non-resident Indian to resident Indian and whether an intimation thereof was given to the bank? If so, on which date?

30. The plaintiff submits that it is at the insistence of defendant bank that the plaintiff no.2 had to change her NRI status to that of a resident Indian on 17.04.1990 by filing an affidavit to that effect and delivering a certified true copy of the same to the defendant bank on the same date because the plaintiff no.2 was informed by the defendant bank that as per FERA, 1973, no NRI could make investments without prior written permission of RBI *vide* Form A4. Therefore, the defendant bank could not have allowed the operation of the said NRE 6523 account by transfer without prior RBI permission.

31. PW1 in this regard deposed the following in his cross-examination-:

> **Dated 16.08.2005**
>
> *"Que.9: Is the expression ordinary residence identically considered and treated under the FERA and the Income tax Act?*
>
> *Ans.: I think the question is irrelevant and there are only three definitions described is only two Act which can be stated as 'resident,' "Non-resident" and resident but not "ordinarily resident". The correct definition may kindly be sought in the relevant Acts. Vol. As far as I am concerned I am an NRI for the purpose of FERA. (FEMA) so was my wife till the defendant Bank, their Chief Manager Mr. Rajiv Shetty at material time forced her to submit an affidavit declaring her to have become resident Indian under FERA, so as to have excess to her NRI funds to purchase Immovable properties at Garden Estate Gurgaon. She did submit her Affidavit to the Bank and purchased properties. So the defendant Bank and Mr. Rajiv Shetty is particular are under legal obligation to correctly understand and correctly guide their high not worth clients with regard to transactions of their NRI Accounts.*
>
> *Ques. 10: It is suggested to you that 1993 March, 28 till 1996 Dec. 31, you did not make any complaint to the police that your wife being*

forced by Rajiv Shetty in the manner you answered in the volunteered text given above?
Ans.: It is incorrect.

Ques.10: Are you in possession of any complaint copy that you claimed to have filed and have brought today to the Court?
Ans.: I may have to trace, if any.
…
Dated 16.11.2005
"Ques.9: You have not brought today any document acknowledged by the defendant having been intimated or change of status of plaintiff No.2 from a non-residential Indian to a residential Indian. Is it correct?
Ans.: As per my memory I was to submit a reply to the Hon'ble Court regarding production of any document. I do not remembering there is any order of the Court directing me to bring today any document to be produced during these proceedings. Vol. The original document is suppose to be in the safe custody of defendant Bank because the same was taken from my wife by Mr. Rajiv Shetty, the then Chief Manager/Sr. Manager of defendant Bank, by insisting that she has to submit an Affidavit stating that she has changed her status from NRI to Resident Indian in order to purchase Real Estate in India.
Ques.10: I suggest to your that at the time which you allege that Mr. Shetty or defendant took the document from plaintiff No.2 you were personally not present.
Ans.: I do not remember.
Ques.11: I suggest to you that at the time when you allege that the Bank retained the aforesaid document you were personally not present?
Ans.: I do not remember.
Ques.l2: Are you carrying the copy of Affidavit of plaintiff No.2. That you claimed you delivered to the Bank?
Ans.: I undertake to make an effort to locate the one if available."

32. The defendants submits that no information of change in residential status of plaintiff no. 2 was ever brought to the knowledge of the defendant bank. No request for withdrawal/removal as signatory was ever made by either of the plaintiffs, which is the obligation of the plaintiffs towards the defendant bank. Rather, the plaintiff no. 2 has continued to issue cheques from the NRE Account no. 6523 clearly showing that there was no change. In this regard, DW1 in his evidence by way of affidavit has deposed as under:-

> *"14. I deny that subsequent to opening of the NRE Account No.6523, the Plaintiff No.2 ever informed me of her change in status from Non-Resident Indian to Resident Indian. I deny this allegation of the Plaintiffs particularly because neither had the Plaintiff(s) given any such information to the Defendant Bank nor have they placed on record any document in support of this contention. I say that the allegations made by the Plaintiffs are bald and mischievous and the same are intended to cause wrongful loss to the Defendant Bank and wrongful gains to the Plaintiffs.*
>
> *15. I also deny that the Plaintiff No.2 subsequently ceased to be a joint signatory in respect of the NRE Account No.6523. 1 say this because as per the records available with the Defendant Bank, no such request, for her withdrawal/removal as signatory ever made by either of the Plaintiffs. I say that since the Plaintiffs were joint signatories and joint holders of the NRE Account, as such, either of them was competent to instruct the Defendant Bank in respect of the operations of their joint NRE SB account."*

33. Further, the defendant submits that the plaintiff has led no evidence to support their averment that on 17.04.1990 the status of plaintiff no. 2 was changed and was duly informed to the defendant bank. Alternatively, the defendant bank states that as late as 07.05.1990, the plaintiff no.2 issued another cheque bearing no. 432284 for an amount of Rs. 1 crore (EX.PW1/D58) for the purpose of opening a Fixed Deposit of Rs.1 Crore (EX. PW1/D69) with the same Defence Colony branch of the defendant bank. The transaction made

through cheque (Ex PW-I/D58) has never been disputed or questioned by the plaintiffs much less on the ground of change in status of plaintiffno.2. EX. PW-1/D58, therefore proves that as on 23.04.1990 there was no change in status of plaintiff no.2 and she had not ceased to be an NRI or joint signatory of the NRE account No.6523.

34. It is stated that the FDR (Ex.PW1/D69) also proves that the allegation of unauthorized transfer is completely frivolous as the plaintiff would not have made fresh deposit of Rs.l Crore with the Defence Colony if there was any wrong doing on the part of the bank or its manager.

35. There is no evidence on record to prove that on 17.04.1990, the plaintiff no.2 ceased to be an NRI. There is no evidence on record to show that the defendant bank was duly informed by the plaintiff no. 2.The NRE Account Opening Form, i.e. PW1/D44, clearly casts an obligation upon the plaintiffs the duty to inform the defendant bank a change in their residential status. The operative portion of PW1/D44 reads as under:-

> *"A set of specimen signatures duly authenticated by a Bank Indian Embassy/Notary public /person known to your bank is furnished below for your records. I/We hereby undertake to intimate to you about my/our return to India on coming back to India for permanent residence."*

36. Even if it is assumed that there had been a change, the plaintiff no. 2 continued to issue cheques from the same account, i.e. (Ex. PW1/D58) cheque dated 07.05.1990 for Rs. 1,00,00,000/- issued from NRE Account No. 6523 to create a Fixed Deposit with the Defence colony branch, i.e.(Ex PW1/D68). The said transaction shows that the plaintiff no. 2 continued to issue cheques in the capacity of a joint account holder and continued to sign from the NRE account.

37. Therefore, in the absence of any material evidence being on record to show that there was a change in residential status of plaintiff no.2and that the

same was duly informed to defendant bank, the Issue no. III is decided against the plaintiff and in favour of the defendant bank.

Issues No. II, IV and V

38. Issue No. II, IV, and V are inter-connected and therefore I shall be dealing with them together being:

II. What is the effect of the pleadings filed by the plaintiff before the Consumer Disputes Redressal Commission in the OA.No.150/92?

IV. Whether plaintiff No. 2 had signed any blank cheque? If so, to what effect?

V. Whether the transfer of Rs.2 crores from the account of the plaintiffs by the defendant bank to the account of Asian Wire Ropes Limited, Hyderabad, was illegal, improper or without instructions? If so, to what effect?

39. In civil suits, when clear and clinching evidence is amiss, the court must decide the case on preponderance of probabilities. The Hon'ble Supreme Court in *N.G. Dastane (Dr) v. S. Dastane*, (1975) 2 SCC 326 has held as under:-

> *"24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often*

intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear". But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."

40. To my mind, both parties have been unable to give clear and clinching evidence in support of their case therefore the issues are being decided on preponderance of probabilities as well as on discharge of onus of proof. The Hon'ble Supreme Court in *Rangammal v. Kuppuswami*, (2011) 12 SCC 220 held as under:-

"21. ……

Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."

41. The case set up by the plaintiff is found in paragraphs 7, 8, 11, 13 and 15 of the plaint. The same read as under:-

"7. That it may be pertinent to mention here that the officials of Defendant No. 2 had obtained a blank cheque from the plaintiff No, 2 had in a clandestine manner and had got it filled in the entries in the said

cheque and had also made necessary instructions on the reverse side of the said cheque Since the account was an NRE Account and, therefore, no amount could have been invested out of it without prior approval of the Reserve Bank of India as provided under the provisions of Section 8 of the Foreign Exchange Regulation Act, herein after referred to as FERA. Moreover, since the plaintiff No. 2 ceased to be a Non-Resident Indian, therefore, the cheque, which had been obviously obtained by the officials of the defendant No. 2 from her in a clandestine manner, could not have been encashed without prior written permission of RBI as said above.

8. That the plaintiffs submit that the plaintiff No. 2 had never agreed to pay off any liabilities of M/s Asian Wire Ropes Ltd., and as such the utilisation of the amount for payment of the alleged liabilities of the said Company was illegal and done with the mala fide motive to protect certain senior officials of the defendant No. 1 who may have been connected with the affairs of the said Company.

....

11. That even otherwise, the defendants have no right or lien over the amount lying to the credit of the plaintiffs in the above said NRE Account and had absolutely no right to appropriate or adjust the said amount without instructions or authority from the plaintiff on the frivolous plea of liabilities owing by M/s. Asian Wire Ropes Ltd., to the bank.

....

13. That the plaintiffs submit that by imposing liabilities of the above said two companies on the plaintiff No.1 and thereafter surreptitiously and unscrupulously adjusting/transferring the amount of Rupees Two Crores from the NRE Account which otherwise could not have been transferred and adjusted against the existing liabilities of the two Companies without prior permission/instructions of the Reserve Bank of India or proper written instructions from the plaintiff is violative of the provisions of FERA Act, 1974 and tantamount to providing wilful deficiency services to the Plaintiff. The defendant Bank is further guilty of non compliance with the mandatory provisions of Banking Rules and Practice and the guidelines laid down by the Reserve Bank of India and have failed to adhere to the provisions of the Banking Regulation Act, 1949. The defendant bank is also, therefore, guilty of not providing honest and clean services to its *customers and is bound to refund the sum of Rs. 2,00,00,000/- together with interest and other charges accrued thereon to the plaintiffs, wrongly and willfully misappropriated and transferred from the plaintiffs account, as mentioned above.*

....

15. That the plaintiff submits that on account of unauthorised misappropriation of the above said sum of Rs. 2,00,00,000/- from the account of the plaintiff, the plaintiffs have suffered a huge loss and damages for the past about 3 years, which they would have otherwise utilised in connection with and expansion of their business activities. Without prejudice to the plaintiffs right to claim such other and further damages as they may be entitled to for the various losses suffered by them by way of loss in business, loss in reputation, mental agony and tensions and the various expenses which the plaintiffs were forced to incur in connection with the above said misappropriation by the defendants, the plaintiffs have reserved their right to file a separate suit or to file, an additional claim in respect thereof."

42. A perusal of the above reproduced paragraphs shows that the case set up by the plaintiff is that the defendant bank unauthorizedly and without permission of the plaintiffs misappropriated an amount of Rs. 2 crores towards the liability of M/s Asian Wire Ropes Ltd.

43. During the course of the arguments, the learned counsel for the plaintiff has argued extensively on the ground that the cheque in question has been signed as "*R. Murti"* when the specimen signature card and the account opening form has the signature of the plaintiff no. 2 as *"R. Shandilya."* Even though there is no averment in the plaint that the plaintiff No.2 in her NRE account No. 6523 was signing as "*R. Shandilya*" and the cheque in question could not be encashed since the same carried the signature as "*R. Murti,*" but the same is alleged by the plaintiff no. 1 in the affidavit by way of evidence, i.e. Ex. PW1/1. It reads as under:-

"<u>21. In fact, the said cheque could not have been honoured as per law because the signature on the said cheque do not match at all with the signature as registered on my wife's Specimen Signature Card of my said NRE 6523 Account. Further, the statement on Solemn Affirmation by the defendant Bank's manager, the Court Witness CW3 in the criminal proceedings bearing No. Criminal Complaint No. 43 of 1993 at Patiala House Courts before the Ld MM Shri V K Malhotra, conclusively prove that there was on record of the bank only one Specimen Signature Card of my wife carrying signature as "R.Shandilya". Even a letter from Reserve Bank of India supports this fact, namely that there cannot be more than one Specimen Signature Card of one person/holder of an account at any given time. And also that a cheque bearing signature different than the signature registered on the Specimen Signature Card of that account from which the said cheque is issued shall not be encashed</u>."

44. PW1 in this regard has also deposed as under:-

<u>12.08.2005</u>

"Que.: The witness how been confronted with a document by the defendant and at point 'A' has been asked to identify the signature of the person on it.
Ans.: The document is also not on record of the case file and is irrelevant, rather misleading since it relates to an account which is different man the one which the suit for recovery has been filed by the plaintiff's against the defendant's.
Que.: The defendant counsel has reiterated the question.
Ans.: It is irrelevant and misleading, in as much as the defendant's have fabricated the specimen signature cards of my wife's Indian Rupee accounts No.6524, original of which have not been produced till date in any proceedings initiated against the defendant's and had been filed in the present proceedings after interpositions of the words "Defence Colony" and "NRE 6523" as the original on 11.1.1996 at page No.4 of the said list. The photocopy of the same filed by the defendant's on 1.2.94 does not match with this original being absolutely blank in two relevant column meant for the Branch name and the account no.

Ans.: The signatures appearing at point encircled 'A' on Ex.PW1/D4 appears to be similar to that of plaintiff 2."

...

16.08.2005

Ques.11: Was any statement either of yours or of plaintiff no.2 recording by any investigating authority in relation to the alleged complaint made referred to above?

Ans.: Vol. I do not remember but I do remember very well without any particulars of time that one investigation officer of P.S. Lajpat Nagar had confirmed my view that Mr. Rajiv Shetty in conspiracy with other employees of defendant Bank have fabricated the specimen signature card of my wife's account no.6524 to create a defence by using the same as a specimen signature card of my NRE account no.NRE 6523 and also that the cheque of Rs.2 crores taken from my wife by the defendant Bank pertaining to our account no. NRE 6523 should not have been honoured by the defendant Bank and Mr. Rajiv Shetty in particular, since the signatures on the particular cheque did not match the signatures of my wife on the specimen signature card of the account NRE 6523 namely "R.Shandliya"."

45. The plaintiffs submit that with respect to the cheque in question, i.e.PW1/D31, Mr. Rajeev Shetty asked the plaintiff no.2 to sign both the face as well as the reverse side of the cheque leaf by plaintiff no. 2. However, no instructions were written on the cheque by plaintiff no. 2, and the same were stated to be filled in by the defendant bank without PW2's authorization and knowledge. The plaintiff no. 1 submits that no form for telegraphic transfer was ever filled by him and no authorization in this regard was ever given to the defendant bank by him. The same has been deposed by plaintiff no. 1 in his evidence by way of affidavit, i.e. Ex. PW1/A. It reads as under:-

"7. That it is specifically stated that my wife was asked by Mr Rajiv Shetty to sign on the face as well as on the reverse of the said cheque leaf, which she did, but was not asked to write any instructions on the reverse side and she did not write any instructions. The instructions

were filled in by the defendant bank without her authorisation and knowledge. In fact, if at all she wanted any transfer she would have gone to the Bank herself. But she did not go to the. defendant bank.
8. That I never filled in any form for telegraphic transfer, which now I learn is mandatory. Therefore, I never authorised the defendant bank to carry out the said illegal transfer. Thus, the defendant bank is clearly guilty of having caused criminal breach of trust and fraud on an unsuspecting house wife in the absence of her husband."

46. The plaintiff has also placed reliance on the RTI reply dated 13.08.1999 wherein the RBI has categorically stated that the funds can be transferred from an NRE account only when signature on the cheque tally with the signature received in the Specimen Signature Card. Further, RBI also stated that there cannot be more than one Specimen Signature card of a NRE Account at one point of time. The queries dated 22.08.1998 raised by the plaintiffs and the RTI reply dated 13.08.1999 by the Reserve Bank of India is reproduced respectively as under:-

22.8.1998 to Echange Control Department of Reserve Bank of India (ECD – RBI):

Would you please be so kind as to inform me whether

1. funds can be transferred from an NRE account on the basis of a cheque carrying signatures different from the signature as recorded in the Specimen Signature Card of that NRE account?

2. Can there be more than one Specimen Signature Card of a NRE account?

3. Is it necessary that the signature on the Specimen Signature Card belonging to a NRE account must match with the signature on the passport of the NR1 account in whose the said NRE account is opened?

Thanks & with best regards.

Mohan Murti Shandilya

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तार : "रिज़र्वबैंक"
Telegrams : "RESERVE BANK"
मुंबई
Mumbai

भारतीय रिज़र्व बैंक
विदेशी मुद्रा नियंत्रण विभाग
केन्द्रीय कार्यालय
केन्द्रीय कार्यालय भवन
मुंबई 400 001.

पोस्ट बॉक्स सं. :
Post Box No. : 1055
फैक्स सं. : 022 - 2665330
FAX NO. : 022 - 2654121

कृपया उत्तर में संदर्भ सं. लिखें
Please quote Ref. In reply

RESERVE BANK OF INDIA
EXCHANGE CONTROL DEPARTMENT
CENTRAL OFFICE
CENTRAL OFFICE BUILDING
MUMBAI - 400 001.

संदर्भ सं. इसी.
Ref. No. EC CO.NRFAD. 360/22.13.18/99-2000 — 13 ~~12~~[th] August 1999 199 (शक) 199 (SAKA)

Shri Mohan Shandilya
D-37, Defence Colony
New Delhi – 110 024.

Dear Sir,

Queries regarding NRE Accounts
Sent by E-Mail

Please refer to your E-Mail queries dated 22[nd] August 1998 regarding NRE accounts. In this connection we reproduce the replies in seriatum sent by E-Mail on 15[th] October 1998 for your record.

1) No. Signature on the cheque should tally with the signature received in the specimen signature card.

2) No. However the account holder can give fresh specimen signature in place of the existing one .

3) It is not necessary that the signature on the specimen signature card of the NRE account holder should match with the signature on his/her passport.

Yours faithfully,

(K.S. Shetty)
for Chief General Manager

amol.nri

47. In this view, it is submitted by the plaintiff that the stand taken by the Bank that on the request of the plaintiff No 2 that she generally signs as "*R. Murti*," therefore she will sign two specimen signature Card for one account

does not hold good. Further, assuming but not admitting that plaintiff No. 2 ever requested the Bank to allow her to have two specimen signature card and the bank allowed also then it is evident that the bank was not discharging its duties as per the settled guidelines of RBI and therefore, defendant is liable to be punished for acting in derogation of guidelines of RBI.

48. The plaintiffs further challenge the reliance by the defendant bank on the telex message and the letter dated 23.04.1990 of Gambro Nexim (India) Medical Ltd (EX. PW1/D26) to transfer the amounts. It is stated that there is absolutely no way to ascertain the identity of the sender of a telex. Fax can transmit signature of a person, but telex cannot transmit the signature. There is no way to visually see the sender or operator of the telex machine from the telex message received, further the telex is not a Negotiable instrument. The said telex was not carrying any code or coded message so as to establish the authenticity of the instructions. The entire text content of the said telex is absolutely silent regarding the Savings Bank NRE 6523 account, therefore, it cannot by any stretch of imagination be construed to mean any authorization for the said illegal transfer of Rs 2 Crores from the NRE Account bearing no. 6523. There was no instruction to the defendant bank or any person in the telex to go to the house of the plaintiffs and ask plaintiff no. 2 for a cheque leaf of Rs 2 Crores from Savings Bank NRE 6523 account.

49. Plaintiff No.1 also disputes the letter of Gambro Nexim (India) Medical Ltd (EX. PW1/D26) on the grounds that (i) no mention of the NRE Account no 6523, (ii) letter addressed to Bangalore Branch and not Defence Colony Branch, (iii) The letter could not have reached Delhi and Bangalore on the same day and (iv) there were no instructions in the letter to Mr. Shetty to go to the plaintiff's house to obtain a cheque leaf of Rs. 2 Crore from plaintiff no.2.

50. The defendant bank submits that on 28.03.1990 the Plaintiff No.1 and Plaintiff No.2 approached the Defendant No.2 with a request to open two accounts, one being a Non-Resident External (NRE) Savings Bank Account in their joint names and another ordinary Savings Bank Account in the individual name of the Plaintiff No.2.The Plaintiff No.1 signed the NRE Account Opening form, i.e. PW1/D44, under the signatures *"Mohan Murti"* i.e. PW1/D36and the Plaintiff No.2 signed the same as *"R. Shandilya,"* i.e. PW1/D35. It is submitted that the Plaintiff No.2 herself stated that she generally issues Cheque under the signatures *"R. Murti*", as such, in respect of the NRE Account, she would sign another Specimen Signature Card form, i.e. PW1/D37, with the signature *"R. Murti"*. Considering, the request of the Plaintiff No.2, another Specimen Signature Card form was given to the Plaintiff No. 2 which she signed under *"R.Murti"*.

51. *DW1* in this regard has deposed as under:-

> ***<u>18.07.2007</u>***
> *"Q.6: Were the account Nos. of the said specimen signature cards and account opening forms filled in after the account holder left your bank?*
> *Ans.: No necessarily.*
> *Q.7: Question No.6 is again repeated with emphasis on seeking an exact answer on fact, whether the account Nos. were filled in, as stated in the forgoing question in the presence of the account holders?*
> *Ans.: The account Nos. are allotted by the concerned department officer incharge and the plaintiffs were sitting in my chamber. I do not know exactly whether these account Nos. were allotted during, their stay in my chamber or not. I further state that it is filling of account no's on the account opening forms and S.S. cards, and not the allotment of account Nos.*
> *The plaintiff is seeking an explanation to the answer given by the witness above.*

The filling of the account nos. in the respective account opening forms and S.S.cards are done by ·the Savings Bank Department Official/Staff. I do not remember exact whether this has been done during the stay of plaintiffs in my chamber.

...

<u>12.09.2007</u>

Que.l2: Did you take the specimen signature card of Mrs. Renu Murty pertaining to this account No.6524?

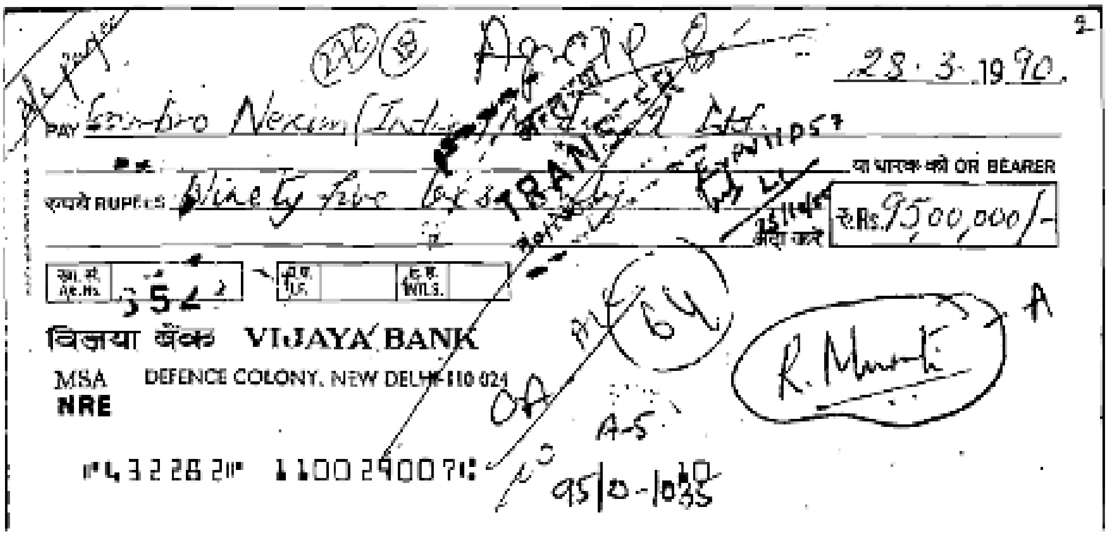
Ans.: Yes.

...

Que.20: Can you pass a cheque onthe basis of a signature placed by the account holder on the account opening form?

Ans.: Normally we obtain invariably specimen signature card while opening the accounts. In case the specimen card of the particular account holder is not available on record we immediately obtain another fresh specimen card for that particular account. However, in the meanwhile, we pass cheques based on the specimen signature available on the account opening form.

52. The defendant bank submits that on 28.03.1990 itself, the Plaintiff No.2 issued another Cheque bearing No.432282 amounting to Rs. 95 lakhs from the joint NRE Account No. 6523 signing thereon in DW1's presence as "*R. Murti"* (EX.PW1/D57). In these circumstances, it is evident that plaintiff no. 2 would use *"R. Murti"* for issuance of cheques for the NRE Account No. 6523. It is reproduced as under:-



53. The defendant bank has also referred to a cheque dated 07.05.1990 bearing no. 432284 from NRE account no. 6523 for an amount of Rs. 1 crore wherein the plaintiff no. 2 has signed as *"R. Murti"* for the purpose of opening a Fixed Deposit of Rs. 1 Crore with the Defence Colony branch of the defendant bank. The defendant bank submits that allegation of unauthorized transfer is completely frivolous as the plaintiff would not have made fresh deposit of Rs. 1 Crore with the Defence Colony branch if there was any wrongdoing on the part of the bank or its manager.

54. The defendant bank submits that the allegation levelled by the Plaintiffs, stating that the official of the defendant bank had fraudulently got a blank cheque issued from the Plaintiff No.2 is baseless, sham and bogus. The Plaintiff No.2 had issued cheque amounting to Rs. 2 Crores so as to facilitate the takeover of the Companies namely M/s. Asian Wires Ropes Ltd. and M/s. Asian Ispat Pvt. Ltd. It is stated that the Defendant Bank has never imposed the

liabilities of M/s Asian Wire Ropes Ltd. on the Plaintiffs and the Plaintiffs have willfully and consciously undertaken the aforesaid transaction.

55. DW1 has deposed the following in this regard:-

<u>01.11.2007</u>

"Que. 14: Did Mrs. Renu Murthy tell you me the alleged telephone call the mandate which you have mentioned she has said is given on the cheque?

Ans.: On 23.4.90, when plaintiff No.2 called up, she had given the clear mandate on the reverse of the cheque and requested me to do the needful as per the mandate given on the reverse of the cheque.

Que. 15: Did she read out the mandate?

Ans.: No she did not read out the mandate. Vol. On 23.4.90 she told me on phone that money is to be transferred telegraphically to Hydrabad favouring Asian Wire Ropes Ltd. today itself, as she is going to become a Director in Asian Wire Ropes Ltd. However these details are already written on the reverse of the cheque as stated by her."

56. Further, the defendant bank submits that the plaintiffs have approached this Court with unclean hands and they have deliberately and dishonestly changed their stand while moving from one forum to the other. It is stated that there is no consistency or honesty in the pleadings of the plaintiffs in as much as the averment in para 3 (b), (c), (d), (h), (i), 4, 5 and 6 of the Consumer Complaint is either contrary to the averment in para 4, 5, 6 and 13 of the plaint or the same is altogether missing in this suit. This shows that the plaintiffs have levelled baseless and wild allegations only to make wrongful gains for themselves and cause wrongful loss to the defendant bank. The inconsistencies as alleged is reproduced in a tabular form as under:-

S. No.	Pleading in OA No. 150 of 92 (Before the learned NCDRC)	Pleading in this Suit

i.	In paragraph 3(b) and (c) it is stated that Sh. Sadanand Shetty (the then Chairman of Vijaya Bank) wanted a temporary bridging loan of Rs. 2 Crore for *M/s.* Asian Wire Ropes Ltd. as the irregularities In the companies (namely *M/s.* Asian Wire Ropes Ltd. and *M/s.* Asian Ispat Ltd.) were likely to put him in difficulty.	No allegation against Sh Sadanand Shetty. In paragraph 4 and 5 it is stated that the plaintiff no.1 had gone out of Delhi in connection with his business in April 1990. During his absence the defendant no.2 on 23rd April 1990 sent a note to the plaintiff no.2 requesting her to send a blank cheque (only bearing the signature of the plaintiff no.2). On his return to Delhi, the plaintiff no. 1 was shocked and surprised to learn from an entry in the pass-book relating to the NRE account that the defendants had arbitrarily and without any instructions from the plaintiff transferred a sum of Rs. 2 Crore to their Hyderabad branch.
ii.	In paragraph 3(d) it is stated that Rs.2 Crore was unauthorizedly transferred and adjusted by the bank against the bogus liability of bills of Asian Wire Ropes Ltd., with a view to avoid criminal prosecution of the ex-Chairman and other officials of	In paragraph 6 it is stated that Rs.2 Crore was transferred to adjust against some liabilities of M/s. Asian Wire Ropes Ltd. of which the plaintiffs were neither shareholders nor Directors or guarantors.

	the bank.	
iii.	In para 3(h) it is stated that when the amount of Rs. 2 Crore was not refunded, by the bank, the complainant was forced to take the shares in aforesaid companies and he started looking after their affairs.	In paragraph 13 it is stated that the liabilities of the above said two companies were imposed on the plaintiff no. 1 and thereafter the amount of Rs.2 Crore was adjusted/transferred from the NRE account.
iv.	In para 3(i) it is stated that the complainant with his hard labour and involvement of Rs. 2 Crore made substantial progress in realizing the dues of Asian Wire Ropes Ltd. but after retirement of Sh. Sadanand Shetty the operation of the accounts of aforesaid companies were stopped by the bank.	No such averment.
v.	In paragraph 4 it is stated that Sh. Sadanand Shetty had supressed the factum of pendency of criminal proceedings before Directorate of Revenue Intelligence, Bombay in respect of violations of Customs Act, Imports and	No such averment.

	Exports (Control) Act, etc. committed by the said company and he took the plaintiff no.l in his web to save his own skin.	
vi.	In paragraph 5 and 6 it is stated that the complainant was allured, befooled and cheated by Sh. Sadanad Shetty by giving rosy picture about the economic viability of the aforesaid two units while bank officials were aware about the violations of Income Tax, Excise, Sales Tax, ESI and Provident Fund Act, etc. committed by the previous management and various pending cases. It is alleged that the aforesaid sick companies, with huge liabilities and criminal cases, were thrusted on the complainant and the bank abruptly withdrew the credit facilities enjoyed by the aforesaid two companies which made it virtually impossible for the complainant to run the same.	No such averment or allegation.

vii.	The action of the bank constitutes deficiency in service.	No such averment.

57. In the present case, the hurdles that arise on preponderance of probabilities *vis-à-vis* the case set out by the plaintiffs are:- a) inconsistent stands taken by the plaintiffs before different forums; (b) continuation in dealing with defendant bank after the alleged fraud; (c) Other cheques issued in NRE account no. 6523 by plaintiff no. 2 as *"R. Murti"* in EX. PW1/D 58, EX. PW 1/D57, EX. PW1/D56; (d) not been specifically pleaded in the plaint that the plaintiff No.2 was signing as "*R. Shandilya*" in her NRE account No. 6523 and the cheque in question carried the signature as "*R. Murti.*"

58. A perusal of the complaint filed before NCRDC, i.e.*Ex. PW1/D1,*clearly shows that contrary to the averments made by the plaintiffs in the present case, there was some prior involvement of the plaintiffs in M/s. Asian Wire Ropes Ltd. and its subsidiary Asian Steel Pvt. Ltd. The plaintiffs have intentionally concealed the said facts before this court and have attempted to avoid from placing the same on record. It is a settled principle in law that a litigant cannot suppress material facts and raise inconsistent stands before different forums. The consumer complaint filed before NCRDC is exhibited as EX. PW1/D1 and supported by affidavits by both the plaintiffs. Contrary to what has been implied by the plaintiffs in the present suit, the plaintiffs were not total strangers to the affairs of M/s Asian Wire Ropes Ltd..

59. The plaintiffs before the learned NCDRC have admitted that on suggestion and invitation by the then chairman of the defendant bank, the plaintiffs were participating in revival of M/s Asian Wire Ropes Ltd. and its subsidiary Asian Steel Pvt. Ltd.. The plaintiffs have even opened a bank account in the name of M/s. Asian Wire Ropes Ltd (Ex. PW1/D10) with the

defendant bank, showing active involvement of the plaintiffs with M/s. Asian Wire Ropes Ltd. The account opening form duly exhibited as Ex. PW1/D10 is reproduced below:-

2024:DHC:6247

ACCOUNT OPENING FORM

PLACE 12/8/05

DATE 29 . 8 . 90

☑ CURRENT A/C ☐ SAVINGS BANK A/C

ACCOUNT No. 1716

To
Vijaya Bank Defence colony

Dear Sir,
I/We tender herewith initial deposit of Rs ....
(Rupees .... only)

and request you to open CURRENT ACCOUNT/.......... ACCOUNT in the name and style of M/s. Asian .... Ltd. Asian House Panjagutta Hyderabad.

The constitution is INDIVIDUAL/JOINT ACCOUNT/HINDU UNDIVIDED FAMILY/PROPRIETORSHIP/PARTNERSHIP/CLUB/ASSOCIATION/SOCIETY/TRUST/PRIVATE LIMITED COMPANY/PUBLIC LIMITED COMPANY.

Please issue me a cheque book .... accounts ....

I/We furnish hereunder my/our .... address/es and other details.

...... Account

Branch Manager

If minor Indicate Date of Birth

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Sl.	Name/s*	Occupation and Address (with Telephone Number) Office	Residence
1	Mr. Mal.. Mc..		47, Ring Rd N.D.
2	Mrs.		— do —
3	Mr. N.. Sim..		

* In case of foreign nationals .... nationality .... with passport number ....

DECLARATIONS

☑ Tick the appropriate

☐ I/We shall maintain the prescribed minimum balance in the Account.

☐ I/We intend/do not intend .... Relevant nomination form No. DA - 1 is enclosed.

☐ In the event of any change in my/our residential .... or any change in the constitution of the firm, I/We undertake .... the Bank immediately as required by the relevant .... regulations.

☐ I/We have current/SB .... with ....

☐ I/We do not have any account with any .... Bank.

☐ In case of joint account .... amount is payable .... or survivor/either or ....

☐ In case of HUF I am the Karta of the HUF. Form .... is enclosed.

Affix passport size photo in case of illiterate persons

The firm is a propri...

For Partnership Ac...
Ours is a partnership ... the partner's ... is enclosed. T... copy of the partnership deed is enclosed/we do not have partnership deed.

For Club/Society/Association Account :
We have resolved to open our SB/Current A/c with you with copy of Resolution dated ...
(enclosed). The copy ... rules/constitution ... Society is enclosed.

For Trust Account
Ours is a trust and ... enclosed ... copy of the Trust D...

510

For Private/Public Limited Companies :
Ours is a .... Limited Company and we enclose the following :-
i) xerox copy of certificate of a) incorporation ... b) Commencement of business
ii) certified copy of ... and ... certified to be correct and up-to-date)
iii) resolution for the conduct of the Company's A/c with the Bank.

The account will be operated by ... Mohan Murti ... individually ... 'A'

Name	Specimen signature (with full ...)	Yours faithfully
Mohan Murti	Mohan Murti	Mohan Murti
Mrs. Renu Murti		
Mr. Nara...		

INTRODUCTION : Signature

I/We confirm the identity of the ... depositor and ... in ... correct to the best of my/our knowledge and belief.

Name & Address

Occupation PL...

Telephone No. DA... Signature

For Office use Ent... ...ed

...al of Account

Transferee Branch

Account No ... VERIFIED

60. On preponderance of probabilities, it cannot be ruled out with certainty that in lieu of the proposed business relationship, the plaintiffs had partaken in the alleged transaction.

61. Even otherwise, the plaintiffs have relied on two grounds to prove its case that the encashing of the cheque in question was illegal, improper and unauthorised (a) the plaintiff No.2 signed as "*R. Shandilya*" in the Account Opening Form (Ex. PW1/D10) and Signature Specimen Card (Ex. PW1/D35) of NRE account No. 6523 and that the cheque in question carried the signature as "*R. Murti.*" and (b) only one Specimen Signature Card for an account can exist in accordance with the RTI reply dated 13.08.1999 by the Reserve Bank of India.

62. There may be merit in the plaintiffs submission that a cheque enchased in contravention of the Account Opening Form and the Specimen Signature Card of the NRE Account No. 6523 is against the banking regulations but an averment/foundational fact to this effect is amiss from the pleadings filed by the plaintiff. It is only at the stage of filing the Evidence by way Affidavits by the plaintiffs that the averment of the *'cheque in question being signed as "R. Murti" cannot be encashed since the Specimen Signature Card of the plaintiff no. 2 in NRE Account No. 6523 reads as "R. Shandilya'* has been brought on record. It is a settled principle in law that no evidence can be led beyond pleadings. This court in *Prakash Rattan Lal v Mankey Ram*, 2010 DHC 266 has held as under:-

> *"4. The sole purpose of pleadings is to bind the parties to a stand. When the plaintiff makes certain allegations, the defendant is supposed to disclose his defence to each and every allegation specifically and state true facts to the court and once the facts are stated by both the parties, the court has to frame issues and ask the parties to lead evidence. It is settled law that the parties can lead*

evidence limited to their pleadings and parties while leading evidence cannot travel beyond pleadings. If the parties are allowed to lead evidence beyond pleadings then the sacrosancy of pleadings comes to an end and the entire purpose of filing pleadings also stand defeated. The other purpose behind this is that no party can be taken by surprise and new facts cannot be brought through evidence which have not been stated by the defendant in the written statement. The law provides a procedure for amendment of the pleadings and if there are any new facts which the party wanted to bring on record, the party can amend pleadings, but without amendment of pleadings, a party cannot be allowed to lead evidence beyond pleadings."

63. Even in the complaint filed before the NCDRC, the plea with respect to the signature of the plaintiff no. 2 being different on the cheque in question from that of the Specimen Signature Card and Account Opening form in NRE Account no. 6523 is amiss. In view of these facts, it appears that the said submission/ground appears to be an after-thought on the part of the plaintiffs and cannot be entertained.

64. The Hon'ble Supreme Court in *Bacchaj Nahar v Nilima Mandal and Anr.*, (2008) 17 SCC 491 has held that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief. It reads as under:-

"12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to

prevent any deviation from the course which litigation on particular causes must take.

13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief."

Emphasis Supplied

65. Additionally, the plaintiff in their written submissions have themselves admitted that plaintiff no. 2 would inadvertently and mistakenly sign as *"R. Murti"* for the account bearing number NRE 6523. *Exhibit PW 1/D58, Exhibit PW 1/D57, Exhibit PW1/D56, i.e.* cheques issued in NRE Account no. 6523, were also issued by the plaintiff no.2, by signing as *"R. Murti"* and were duly honoured by the bank in due course. Yet, the allegation of misuse and misappropriation of amount has been made only in respect of cheque in question, i.e. *Ex. PW-1/D31.*

66. When the plaintiffs have themselves admitted that plaintiff no. 2 would mistakenly sign as *"R. Murti,"* the allegation with respect to forgery no longer stands. Furthermore, the date of the so called alleged illegal transaction is 23.04.1900, even thereafter the plaintiff no. 2 on 07.05.1990 issued another cheque, i.e.(EX.PW1/D58), for an amount of Rs. 1 crore for the purpose of opening a Fixed Deposit of Rs.1 Crore (EX. PW1/D69) with the same Defence Colony branch of the defendant bank signing as *"R. Murti*".This conduct of the plaintiffs alongwith the opening of a bank account in the name of the M/s. Asian Wire Ropes Ltd. *(Ex. PW1/D10)* also raises doubts with respect to the case put forth by the plaintiffs.

67. Additionally, the plaintiffs have heavily relied upon the RTI reply by the Reserve Bank of India to allege that there cannot be more than one Specimen Signature card of any Account at one point of time. However, once again the said averment has only been alleged at the stage of filing of Evidence. Even at the stage of filing of Evidence, the RTI reply dated 13.08.1999 of the Reserve Bank of India has not been specifically relied upon but only a bald statement has been made, i.e. "*Even a letter from Reserve Bank of India supports this fact, namely that there cannot be more than one Specimen Signature Card of one person/holder of an account at any given time.*"

68. The RTI reply of RBI is not proved in accordance with law. The said letter/reply/RTI by the RBI has not been exhibited and the Evidence by way of Affidavit is completely silent on the material particulars of the said RTI reply. No witnesses were examined with regard to the RTI reply and at the time of cross-examination, only general and non-specific questions were put to DW2. The deposition of DW2 in this regard reads as under:-

> **<u>13.03.2012</u>**
>
> *"Q. Have you ever issued two specimen signature cards to one customer in one account simultaneously?*

Ans. 1 do not remember.
I do not know about the proceedings going on, if any, in the Economic Offences Wing against the Bank. When plaintiff no.2 requested orally for issuance of another specimen signature card, the issuance of the second specimen card to her was not reduced into writing by the bank.
Q. It is put to you that by issuing two specimen signature cards to plaintiff no.2 simultaneously the bank has acted in direct derogation of the mandatory RBI guidelines pertaining to account opening. What do you have to say? (Ld. counsel for defendant has objected to the question on the ground that it is vague).
Ans. There is no violation.
Vol. Plaintiff no.2 had mentioned on the back of cheque Ex.PW1/D-31 that "please issue a telegraphic transfer on your Hyderabad Branch (Bank Street) favouring Asian Wires Ropes Ltd." and it was signed by her. Plaintiff no.2 did not sign in my presence. I do not know if the writing on the back of the said cheque is in the hand of plaintiff no.2 or not. It is not in my knowledge if the bank approached CFSL New Delhi for comparison of the writing on the back of cheque Ex.PW1/D-31 with the writing of plaintiff no.2."

69. In view of the aforesaid, the reliance of the plaintiffs on the RTI reply by the RBI to prove its case cannot be accepted.

70. Additionally, the plaintiffs have themselves admitted that a blank cheque was issued by the plaintiff no. 2 to the defendant bank, however what is alleged is that no instructions were written on the reverse side of the same**.** The onus of proving that the cheque was a blank cheque and the instructions were written by the DW1 was on plaintiffs. In discharge of the onus, the plaintiff no. 2 in her Evidence by way of affidavit (Exh. PW2/A) has stated as under:-

"10. That it is specifically stated that the plaintiff No. 2 was asked by Mr Rajiv Shetty to sign on the face as well as on the reverse of the said cheque leaf, which she did, but was not asked to write any instructions on the reverse side and that she did not write any instructions. The instructions were filled in by the defendant bank without plaintiffs'

authorisation and knowledge. In fact, if at all the plaintiffs wanted any transfer of money they would have gone to the Bank themselves. But they did not go to the defendant bank."

71. The same is denied by the defendant bank in the written statement and their Evidence by way of Affidavit. The written statement read as under:-

> *"4. Contents of para 4 as stated are wrong and are denied. It is denied for want of knowledge that the plaintiff no.1, had gone abroad in April, 1990. It is further stated that the plaintiff no.1 had sent a telex on 23.4.1990 from Hyderabad to the plaintiff bank. It is specifically denied that the defendant no. 2 sent any note to the plaintiff no.2 requesting her to send blank cheques. It is denied that any communication was sent to plaintiff no.2 that any blank cheque was required by the branch officials. The allegation is totally false and incorrect and is sought to be made to evade the liability of the plaintiff to the defendant bank. It is further inconceivable that the plaintiffs including plaintiff no. 2 would send any blank cheque being businessmen who alleged that they had come to India for carrying on the business. The correct facts are that defendant no.2 issued a cheque bearing no. 432283 dated 23.4.1990 for an amount of. Rs.2 crores on 'yourself' with instructions at the back to "please issue a telegraphic transfer on your Hyderabad Branch (Bank St.) favouring Asian Wire Ropes Ltd." Simultaneously, a telex message was received from the plaintiff no.1 dated 23.4.1990 stating that the formalities for taking over of Asian Wire Ropes Ltd had been finalised and making a request for transfer of Rs. 2 crores to the Asian Wire Ropes Ltd Account at Vijaya Bank St., Hyderabad. It transpired that the plaintiffs had entered into a business transaction for taking over the M/s Asian Wire Ropes Ltd and for that purpose, the transfer was sought. In fact a copy of the memorandum of understanding dated 20.4.1990 arrived that the then management of M/s Asian Wire Ropes Ltd and plaintiff no.1 was also sent to the plaintiff bank. The plaintiff also sent a letter dated 23.4.1990 to the Bangalore office authorising the payment of Rs. 2 crores. Thus the story now sought to be set up by the plaintiff 1 completely false. It is also relevant to point out that the stand now sought to be taken by the plaintiffs contradicts that the pleadings in earlier petition bearing no. 150*

of 1992 filed before the National Consumer Disputes Redressal Commission by plaintiff no.1 which was dismissed by order dated 19.3.1993."

72. The plaintiffs have failed to examine any expert witness, or handwriting expert to prove the allegation that the instructions on the reverse side of the cheque was not written by the plaintiffs but by the defendant bank without instructions by the plaintiffs. The plaintiffs have also not sought the cheque to be sent for forensic analysis for evaluation to prove their case, as set out in the plaint.

73. In the cross examination of the plaintiffs, the defendant bank put the following suggestions. It reads as under:-

" **PW1 on 25.10.2005**

Ques.20: I suggest that the signatures encircled in Red on Ex.PW1/D-31 are those of plaintiff No.2.

Ans.: Denied. Vol. The Bank had fraudulently obtained this cheque from my wife to unauthorisedly transfer the said sum of Rs.2 crores from my NRE account 6523.

Ques.21: Would you please look at the figures 23.4.90 at point encircled A; and identify the another thereof?

Ans.: I am sorry I cannot.

Ques.22: Would you please identify the signatures at point encircled 'B' and identify whose they are?

Ans.: As already stated, the said cheque has been fraudulently obtained from my wife by misrepresentation in order to unauthorisedly transfer the amount of Rs.2 crores from my NRE Account 6523, As stated in my evidence Para 4,5 & 7, the signatures of my wife were obtained fraudulently.

Ques.23: The signatures referred it by you in answer above are those encircled at points B and Bl on Ex.PW1/D-31.

Is that correct?

Ans.: Yes. As repeatedly earlier, the said signatures were obtained fraudulently by defendant Bank through its officials, namely Shri. Rajiv Sethi and Ors.

....

06.01.2006

Ques.1: Please look at point encircled 'B' on Ex.PW1/D-25 and answer whether it is your position that the sum mentioned as encircled at point 'B' is the amount that is referred to in Ex.PW1/D-31?
Ans.: NO."

74. Relevant cross-examination of DW1 and DW2 reads as under:-

Cross-examination of DW1 on 12.09.2007

"Que.20: Can you pass a cheque on the basis of a signature placed by the account holder on the account opening form?
Ans.: Normally we obtain invariably specimen signature card while opening the accounts. In case the specimen card of the particular account holder is not available on record we immediately obtain another fresh specimen card for that particular account. However, in the mean while, we pass cheques based on the specimen signature available on the account opening form.
Que.21: Did you pass the cheque of Rs.2 crores, which is Ex.No.PWl/D-31 on the basis of signatures of account holder on the specimen signature card or on the basis of account opening form?
Ans.: The cheque is passed by the concerned S.B. department officer and not by me.
Que.22: Did you authorise the encashment of Ex.PWl/D-31?
Ans.: The cheque is authorized by the concerned department. Again said, the authorization for payment is done by the concerned department officer, however whenever the large amount is withdrawn, such cheques are initiated by the Branch Head for the information purpose: That is why I have initiated at point encircled DW1/A-22, on the said cheque.
Que.23: Therefore you did not authorise the encashment of this cheque, which was initiated by you only for purpose of information?
Ans.: Yes, this was not authorized by me. Vol. Normally the concerned department officer passes the cheque for payment after verifying the correctness of the instrument i.e. date, payee, amount in words and

figures, and verify of the specimen signatures. If the cheque amount is fifty thousand and above, he brings the cheque to me for my initial and information."

<u>Cross-examination of DW2</u>

<u>25.03.2011</u>

"Q. On the basis of records, can you say as to who brought this cheque Ex.PWl/D-31 to the bank?
Ans. Some representative of plaintiff no. 2 brought this cheque to the bank.
Q. So as you said that this is a bearer cheque. Why did you transfer this amount to the third party instead of encashing to the person bringing the cheque?
(Question is objected to by ld. counsel by the defendant as misleading)
Ans. The cheque in question was payable to yourself with the mandate on the back of the cheque duly authorized by the drawer of the cheque as what should be done with ... money.
Q. Is it correct that when a cheque is carrying corrections of "yourself" then, the bank can only issue pay order or demand draft?
Ans. It is incorrect.
....
Q. Please see the cheques Ex. PW1/D-31 and Ex. PW1/D56. Where account number NRE 6523 is mentioned, Was this put by the Bank.
Ans. Yes.
Q. Was this account number put on the said cheques in the presence of plaintiffs?
Ans. It might have been.
...
Q. It is put to you that the portion at mark on the reverse of Ex.PW1/D-31 is not in the handwriting of plaintiff no. 2. What have you to say?
Ans. I cannot comment.
...

<u>12.05.2011</u>

Q. Please see the document Ex. PW1/D-31 and on the reverse of this document, portion circled as "Q-1". Do you know, in whose handwriting is this portion i.e. "Q-1"?
A. I do not know.
Q. Do you know at what stage, the word "Q-1" was marked on the reverse of the document Ex.PW1/D-31?
A. I do not know.
I have gone through the record of this case before agreeing to appear as a witness. I had seen the document Ex. PW1/D-46 in the Branch file. I was not posted in Defence Colony Branch of the Bank 16.11.1995, which is the date of this document Ex. PW1/D-46. I am not aware as to on which date Mr. Rajiv Shetty was arrested.
...

13.03.2012
Q. It is put to you that by issuing two specimen signature cards to plaintiff no.2 simultaneously the bank has acted in direct derogation of the mandatory RBI guidelines pertaining to account opening. What do you have to say?
(Ld. counsel for defendant has objected to the question on the ground that it is vague).
Ans. There is no violation.
Plaintiff no.2 had mentioned on the back of cheque Ex.PW1/D31 that "please issue a telegraphic transfer on your Hyderabad Branch (Bank Street) favouring Asian Wires Ropes Ltd." and it was signed by her. Plaintiff no.2 did not sign in my presence. I do not know if the writing on the back of the said cheque is in the hand of plaintiff no.2 or not. It is not in my knowledge if the bank approached CFSL New Delhi for comparison of the writing on the back of cheque Ex.PW1/D-31 with the writing of plaintiff no.2.
Q. When Ex.PWI/D-31 was sent to CFSL vide Ex.PW1/D-46, please tell as to why the writing on the reverse of the said cheque was not sought to be examined by CFSL as to the identity of the writer?
Ans. I do not know."

75. From the evidence discussed above, it is clear that the plaintiffs have not been able to discharge the onus to prove the allegation against the defendant bank that the instructions on reverse were not written by the plaintiff no. 2 but written by the defendant bank.

76. What weighs with me, assuming and giving benefit of doubt to the plaintiffs, that (a) the cheque was unauthorisedly encashed by the defendant bank to withdraw the amounts and (b) no instructions were written on the reverse side of the cheque in question; is the subsequent conduct of the plaintiffs. The plaintiffs have continued their business relationship with the defendant bank subsequent to the alleged fraud. The plaintiffs have opened a bank account in the name of M/s. Asian Wire Ropes Ltd (Ex. PW1/D10) showing active involvement of the plaintiffs with M/s. Asian Wire Ropes Ltd.

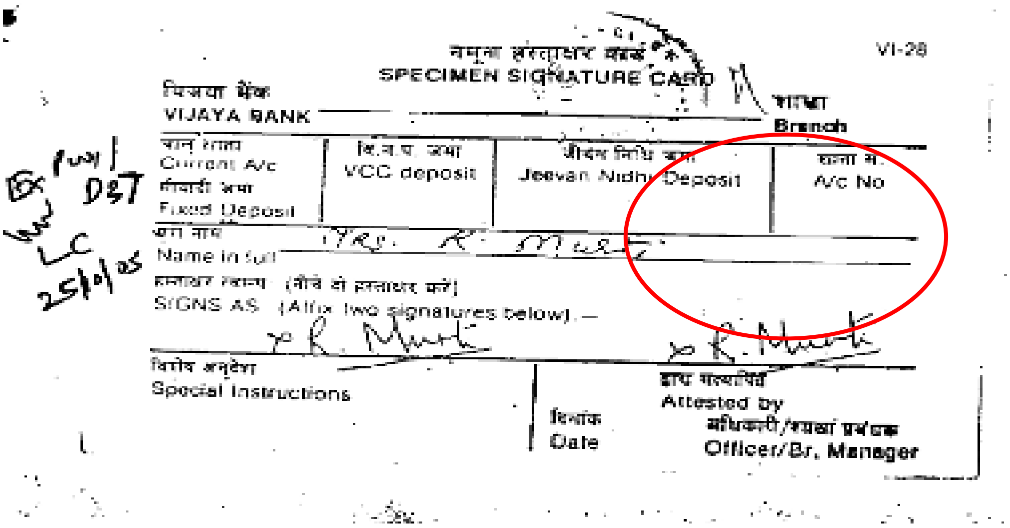
77. In addition, the plaintiffs have also issued another cheque dated 07.05.1990 bearing no. 432284 from NRE account no. 6523 for an amount of Rs. 1 crore wherein the plaintiff no. 2 has signed with *"R. Murti"* for the purpose of opening a Fixed Deposit of Rs. 1 Crore with the Defence Colony branch of the defendant bank.

78. It is incomprehensible that the plaintiffs, who are business persons, would wish to continue their relationship with the defendant bank especially since they were alleging fraud of Rs. 2 crore by the defendant bank against the plaintiffs.

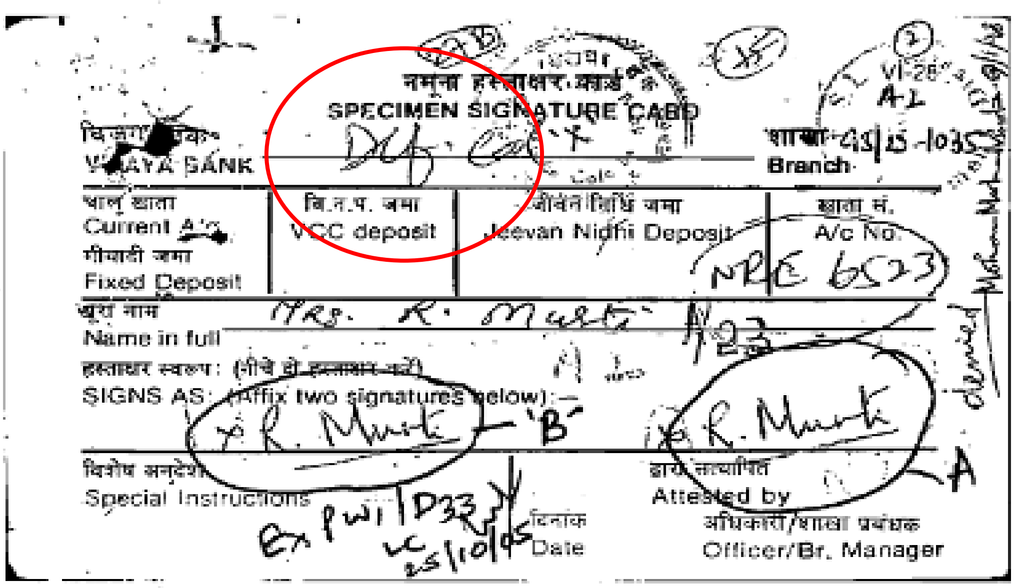
79. I am also of the view that there is some merit in the contentions of the plaintiffs that (i) the defendant bank could not have two Specimen Signature Cards for NRE Account 6523 one signed as *"R. Murti"* and the other signed as *"R. Shandilya"*; (ii) that the cheque should not have been encashed when signed as *"R Murti,"* especially when the account opening form of NRE Account No. 6523 shows the account holder's signature as *"R. Shandilya;"* and lastly (iii) there is interpolation in the Specimen Signature Cards signed as "*R. Murti"*

brought on record by the defendant bank before court. They are reproduced and encircled, to show that the account numbers are written at different places on the Specimen Signature Cards, as under:-

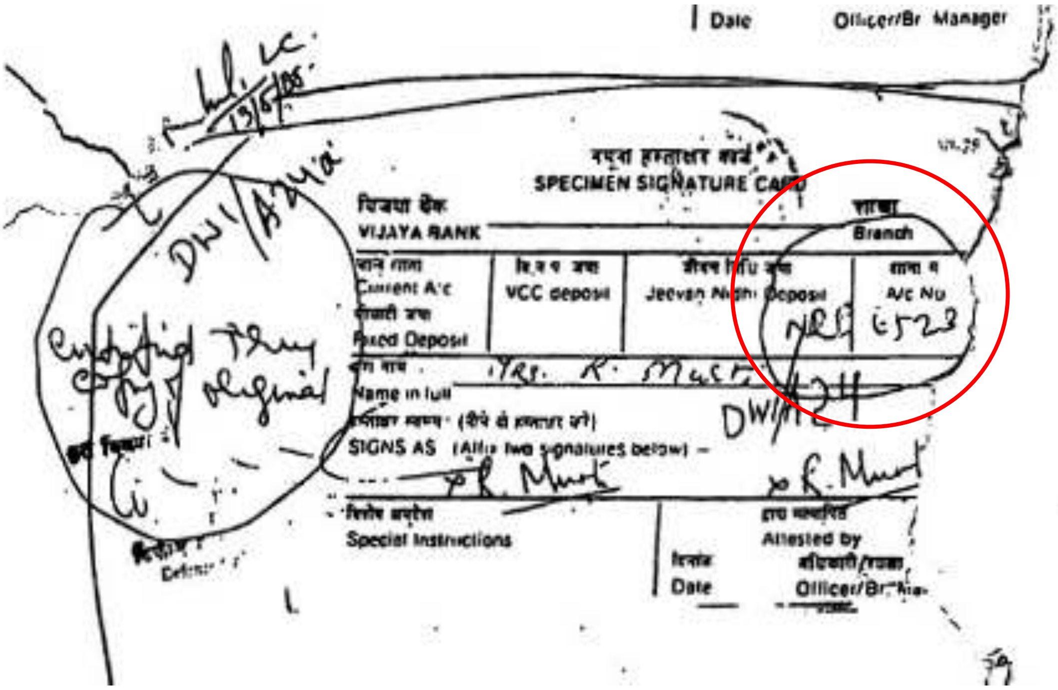
i. **<u>EX. PW1/D37</u>**: (No Branch Name given and No Account Number)



ii. **<u>EX.PW1/D33: (Branch Name Given and Account Number Given)</u>**



iii. **<u>DW1/A24 'a' (No Branch name written but Account Number written)</u>**


Date Officer/Br. Manager

SPECIMEN SIGNATURE CARD

VIJAYA BANK

Branch

Current A/c | VCC deposit | Jeevan Nidhi Deposit | A/c No

Fixed Deposit

NRE 6523

Name in full Mrs. R. Murti

SIGNS AS (Affix two signatures below)

Special Instructions

Date

Attested by

Officer/Br. Manager

DW1/A24 'a'

Certified True copy of original

80. The question is whether the above three circumstances discharge the onus of proof on the plaintiffs in order to allow issues II, IV and V?

81. There is no doubt that a bank cannot be callous or deal with its customers in a causal manner. The defendant bank does not have a Specimen Signature Card for Saving Bank Account bearing No. 6524, wherein as per the plaintiff no. 2 she signed as *"R Murti"*. The defendant bank has two Specimen Signature Cards for NRE Account No. 6523 alongwith multiple photocopies of the Specimen Signature Card NRE Account no. 6523 for absolutely no reason or explanation. The defendant bank may have personal equations with clients but they are bound to follow the procedure and mandate of law. If a Specimen Signature Card is missing (which is a mandatory requirement for clearing of cheques and bank operations) the bank is required to take action, including but not limited to conducting an inquiry and registering of an FIR. The defendant

bank cannot be accepted to say that a Specimen Signature Card of an individual is lost and the defendant bank did nothing about it.

82. However, the issue with regard to dereliction of duty of the defendant bank is not before me. The plaintiffs have alleged fraud and forgery by the defendant bank, the onus of which lay on the plaintiffs in view of Section 104 of the Bharatiya Sakshya Adhiniyam, 2023. It reads as under:-

> *"104. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist, and when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person"*

83. The party which comes to the court and seeks the courts adjudication on issues in its favour has to discharge the onus of proof.

84. In view of the evidence discussed, the plaintiffs have failed to prove that the instructions written on the reverse side of the cheque were not given by the plaintiff no. 2 but written by the defendant bank. The plaintiffs have failed to prove that the act of encashing the cheque in question, i.e. Ex. PW1/D31, is improper especially since the defendant bank has sufficiently proved that the plaintiff no. 2 would continually sign cheques both signed as *"R. Murti" and "R. Shandilya"* in the NRE Account no. 6523.

85. For the reasons stated above, the plaintiffs have not been able to discharge the onus of proof with regard to issues II, IV and V.

86. In this view, the issues no. II, IV and V are decided against the plaintiffs.

Issue No. VI Whether, the transfer of Rs.2 crores is hit by the provisions of Foreign Exchange Regulation Act? If so, to what extent?

87. The plaintiff submits that since the account was an NRE account, no amount could have been invested out of it by the defendant bank without prior

approval of the Reserve Bank of India under the provisions of section 8 of the Foreign Exchange Regulation Act, 1973 ('FERA, 1973').

88. The same is denied by the defendant bank, it is stated that no prior written permission was required from RBI for encashment of the cheque. The transaction by way of cheque dated 23.04.1990 were admittedly done in Indian Rupees, at Hyderabad, therefore, the provisions of said Act, particularly section 8 thereof, are not attracted in this case.

89. Section 8 of the FERA, 1973, reads as under:-

*"**Section 8 - Restrictions on dealing in foreign exchange***

(1) Except with the previous general or special permission of the Reserve Bank, no person other than an authorised dealer shall in India, and no person resident in India other than an authorised dealer shall outside India, purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange:

Provided that nothing in this sub-section shall apply to any purchase or sale of foreign currency effected in India between any person and a money-changer.

Explanation. For the purposes of this sub-section, a person, who deposits foreign exchange with another person or opens an account in foreign exchange with another person, shall be deemed to lend foreign exchange to such other person.

(2) Except with the previous general or special permission of the Reserve Bank, no person, whether an authorised dealer or a money-changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank.

(3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply

with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a moneychanger.

(4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.

(5) Nothing in this section shall be deemed to prevent a person from buying from any post office in accordance with any law or rules made thereunder for the time being in force, any foreign exchange in the form of postal orders or money orders."

90. Even though the issue has been framed, the petitioner has not advanced any arguments or led any evidence in this regard. There is only a bald averment in para 7 of the plaint. There is nothing before me to hold that the the alleged transfer by the defendant bank is in contravention of FERA.

91. FERA is a special legislation, containing exhaustive provisions of investigation, inquiry, trial and appeal. It is a self-contained code, including statutory functionaries specifically and specially constituted to inquire and adjudicate upon any contraventions, as alleged. The provisions under FERA empowers the Directorate of Enforcement and its officers to search, recover,

arrest, hold trial for offences and impose punishment for offence under the Act.

92. Furthermore, the proceedings under FERA are *quasi-criminal* in nature. The courts have held that the power to adjudge any contravention alleged under the act would lie with Directorate of Enforcement in the first instance. The judgement of the Hon'ble Supreme Court in ***Shanti Prasad Jain v. Director of Enforcement***, **FERA,** 1962 SCC OnLine SC 167 has held as under:-

> *"6. It will be seen that when there is a contravention of Section 4(1), action with respect to it is to be taken in the first instance by the Director of Enforcement. He may either adjudge the matter himself in accordance with Section 23(1)(a), or he may send it on to a court if he considers that a more severe penalty than he can impose is called for. Now the contention of the appellant is that when the case is transferred to a court, it will be tried in accordance with the procedure prescribed by the Criminal Procedure Code, but that when the Director himself tries it, he will follow the procedure prescribed therefor under the rules framed under the Act, and that when the law provides for the same offence being tried under two procedures, which are substantially different, and it is left to the discretion of an executive officer whether the trial should take place under the one or the other of them, there is clear discrimination, and Article 14 is contravened. Therefore Section 23(1)(a) must, it is argued, be struck down as unconstitutional and the imposition of fine on the appellant under that section set aside as illegal.*
>
> *...*
>
> *7. It is not disputed by the appellant that the subject-matter of the legislation viz. foreign exchange, has features and problems peculiarly its own, and that it forms a class in itself. A law which prescribes a special procedure for investigation of breaches of foreign exchange regulations will therefore be not hit by Article 14 as it is based on a classification which has a just and reasonable*

relation to the object of the legislation. The vires of Section 23(1)(a) is accordingly not open to attack on the ground that it is governed by a procedure different from that prescribed by the Code of Criminal Procedure. That indeed is not controverted by the appellant. That being so, does it make any difference in the legal position that Section 23-D provides for transfer by the Director of Enforcement of cases which he can try, to the court? We have not here, as in State of West Bengal v. Anwar Ali [(1952) 1 SCC 1 :(1952) SCR 284] a law, which confers on an officer an absolute discretion to send a case for trial either to a court or to a Magistrate, empowered to try cases under a special procedure. Section 23-D confers authority on the very officer who has power to try and dispose of a case to send it on for trial to a court, and that too only when he considers that a more severe punishment than what he is authorised to impose, should be awarded. In a judicial system in which there is a hierarchy of courts or tribunals, presided over by Magistrates or officers belonging to different classes, and there is a devolution of powers among them graded according to their class, a provision such as Section 23-D is necessary for proper administration of justice. While on the one hand a serious offence should not go without being adequately punished by reason of cognizance thereof having been taken by an inferior authority, the accused should on the other hand have in such cases the benefit of a trial by a superior court. That is the principle underlying Section 349 of the Criminal Procedure Code, under which Magistrates of the Second and Third Class, are empowered to send the cases for trial to the District Magistrate or Sub-Divisional Magistrate, when they consider that a more severe punishment than they can inflict is called for. In our view the power conferred on the Director of Enforcement under Section 23-D to transfer cases to a court is not unguided or arbitrary, and does not offend Article 14 and Section 23(1)(a) cannot be assailed as unconstitutional.

93. In view of the above, no complaint has been filed to FERA. The plaintiffs have also failed to show how the provisions under FERA will be applicable against the defendant bank.

94. For the above said reasons, in these circumstances, the issue no. VI is decided against the plaintiffs.

Issue No. VII, VIII and IX

95. Issue No. VII, VIII and IX are inter-connected and therefore I shall be dealing with them together being:

VII. To what amount, if any, is the plaintiff entitled?

VIII. Whether the plaintiff is entitled to interest? If so, at what rate and for what period?

IX. Relief.

96. In view of the findings in the issues no. IV and V, the plaintiffs are not entitled for recovery of any amount.

97. The suit alongwith pending applications are dismissed.

98. Decree sheet be prepared accordingly.

JASMEET SINGH, J

AUGUST 16, 2024

DJ