

(2019) 05 CAL CK 0017

In the Calcutta High Court

Case No : Appeal From Decree (APD) No. 52 Of 2017, General Application (GA) No. 447 Of 2019 With Civil Suits (CS) No. 169 Of 2013, Original Side Cross Objection Tender (OCOT) No. 2 Of 2017

UCO Bank

APPELLANT

Vs

West Bengal Infrastructure Development Finance Corporation Ltd

RESPONDENT

Date of Decision : 08-05-2019

Acts Referred:

Indian Penal Code, 1860 — Section 120B, 420, 467, 468, 471
Prevention Of Corruption (Amendment) Act, 2018 — Section 13(1)(c)(1)
Partnership Act 1890 — Section 10
Code Of Civil Procedure, 1908 — Order 2 Rule 2, Order 37 Rule 3

Citation : (2019) 05 CAL CK 0017

Hon'ble Judges : Soumen Sen, J; Ravi Krishan Kapur, J

Bench : Division Bench

Advocate : Sabyasachi Chowdhury, Rajarshi Dutta, A. Mookherjee, M. Seal, S. Santra, Jayanta Kumar Mitra, Tilak Bose, Anil Kumar Dhar, Sayak Chakraborty, Swarbhanu Bhattacharya

Judgement

Ravi Krishan Kapur, J

1. The facts of this case are abominable, shocking and scandalous.
2. This is an appeal preferred against an order dated 24.11.2016 passed in an application under Chapter XIII A of the Original Side Rules of this High Court which provides for summary judgments in suits for recovery of a debt or a liquidated demand.
3. The suit is for recovery of money had and received. The cause of action in the plaint is based on two fixed deposits made with the Circus Avenue Branch of the appellant bank for the value of Rs.59 and 61 crores dated 30.08.2012 and 10.01.2013 respectively.
4. The plaintiff is a registered non-banking financial company wholly owned by

the Government of West Bengal, primarily involved in providing loans for infrastructure projects in the State of West Bengal. It is alleged in the plaint and the application that the plaintiff had a long-standing relationship with the appellant bank and has maintained various term deposits in different branches of the appellant bank including the said branch. In 2005, an aggregate term deposit of Rs.278 crores was made with the different branches of the appellant bank out of which a term deposit of Rs.9 crores was made with the said branch of the appellant bank. In 2010, a term deposit of Rs.50 crores was also made with the Howrah Branch of the appellant bank which matured on 31.08.2012 and a fresh term deposit was thereafter made with the said branch of the appellant bank.

5. In or about August 2012, the petitioner intended to make a term deposit of Rs.59 crores with a public sector or a private bank for the purpose of creating a fund for one of its bond series. Accordingly, the petitioner approached various banks which submitted offers including their offers for rates of interest for different periods. In the offer letters, some of the branches gave the particulars of their Real Time Gross Settlement (RTGS) Code number and the Indian Financial System Code (IFSC) which represent a particular bank or branch to which any proposed transfer could be made. The offer letters also contained a particular account number in which such sum could be transferred. In some of the offer letters, the name of the account number was specifically provided as for example, "Yes Bank Limited Account Term Deposit" whereas a number of other offer letters simply provided an account number.

6. It is further alleged in the application, that by a letter dated 30.08.2012 the Circus Avenue branch of the appellant bank provided its rate of interest for creation of bulk deposits in respect of amounts exceeding Rs.10 crores. That letter specifically contained an account number being 08070210000496 and the RTGS Code No.UCBA 0000807 for transfer of funds by way of RTGS to the branch. It is specifically alleged in paragraph 8 (i) of the application that upon receipt of that letter the Senior Manager of the said branch of the appellant bank was contacted via telephone by a representative of the plaintiff and a conversation took place in course of which the details in the letter dated 30.08.2012 provided by the said branch of the appellant bank were verified and confirmed. Since the plaintiff received the highest rates from the said branch of the appellant bank, the plaintiff decided to have the funds transferred by way of RTGS to the said branch of the appellant bank with an intention of making a term deposit of Rs.59 crores.

7. By a letter in writing dated 30.08.2012 the petitioner instructed its bankers namely the Bank of India, Corporate Banking Branch, to transfer an amount of Rs.59 crores from the plaintiff's existing overdraft account to the account number i.e. 08070210000496 provided by the said branch of the appellant bank in terms of the letter dated 30.08.2012 specifically in the name of the plaintiff as the beneficiary.

8. On the basis of the instructions of the plaintiff, the banker of the plaintiff

namely Bank of India, duly transferred via RTGS on 30.08.2012 a sum of Rs.59 crores to account no.08070210000496 to the said branch of the appellant bank. Immediately upon receipt of the amount, the plaintiff's banker namely Bank of India, issued a confirmation letter which was intimated by the plaintiff to the said branch of the appellant bank with appropriate directions to keep the said amount in a term deposit for a term of 3 years @ 9.65%. This was duly acknowledged by the appellant bank. It is pertinent to mention as alleged in paragraph 8 (i) of the application, that the RTGS statement provided the necessary details of the bank/branch code of both the remitting bank and the receiving bank and also the necessary instructions to the receiving bank to the effect that the funds were being remitted in the name of "WBIDFC" as per the letter dated 30.08.2012. The appellant bank duly acknowledged the receipt of the aforesaid sum of Rs.59 crores and issued a term deposit receipt dated 30.08.2012 in respect of the said sum of Rs.59 crores for a period of 3 years @ 9.65% p.a. in favour of the plaintiff duly signed by the Manager and the Assistant Manager of the said branch of the appellant bank.

9. Subsequently, as per the instructions provided by the plaintiff in its letter dated 30.08.2012, a lien was created in respect of the aforesaid sum of Rs.59 crores with a Trustee namely Axis Bank Limited. This was confirmed by a letter dated 31.08.2012 by the Senior Manager of the said branch of the appellant bank. Thereafter, at the request of the plaintiff, the defendant created a further lien in respect of the aforesaid term deposit in favour of another bond trustee namely Axis Trustee Service Limited and confirmed the same by a letter in writing dated 10.10.2012 issued by the appellant bank. This document is also signed by the Senior Manager of the said branch of the appellant bank.

10. In or about January 2013, the plaintiff intended to make a further term deposit of a sum of Rs.61 crores in a public or private bank for creation of another bond series. Various banks submitted their offers including their rate of interest for the different periods in respect of the said term deposit. Again, by a letter dated 08.01.2013, the said branch of the defendant submitted a letter on similar lines as it had submitted on 30.08.2012 providing their RTGS Code and the same account number being 08070210000496. On the basis of the instructions of the plaintiff, to its bankers namely Indian Bank a further sum of Rs.61 crores was transferred on 10.01.2013 to the said account in the said branch of the appellant bank. The RTGS document provided by the remitting bank contained the necessary details of the bank code of both the sender bank and the receiving bank and also the necessary instructions to the receiving bank to the effect that the funds were being remitted to the plaintiff as beneficiary. The bankers of the plaintiff namely Indian Bank duly issued a confirmation having transferred such funds on 10.01.2013 to the said branch of the appellant bank.

11. The appellant bank duly acknowledged the receipt of the aforesaid sum of Rs.61 crores and by a letter dated 10.01.2013 issued a term deposit receipt

dated 10.01.2013 in respect of the said sum of Rs.61 crores for a period of 3 years @ 9.57% p.a. A similar lien was created in respect of this deposit by Axis Bank Limited and the said Axis Bank duly intimated to the appellant bank that a lien had been created in respect of the said deposit.

12. It is thereafter alleged in the application (paragraph 8 z), that on or about 12.03.2013 the plaintiff came to learn that, a substantial part of the aforesaid term deposit of Rs.59 crores and Rs.61 crores which had been received by the said branch of the appellant bank are no longer lying to the credit of the plaintiff.

13. By a letter dated 26.03.2013, issued by the plaintiff through its Advocate, the plaintiff put an end to the aforesaid two term deposits and called upon the appellant bank to refund and pay the proceeds along with the interest back to the plaintiff for an aggregate sum of Rs.1,24,77,15,252.03. By a letter dated 04.04.2013, the defendant through its Advocate replied to the demand of the plaintiff and refused to refund the said sum or any portion thereof to the plaintiff.

14. Significantly, the appellant bank had prior to the filing of the instant suit filed an earlier suit being CS No.140 of 2013 against the plaintiff inter alia seeking a declaration that the said two fixed deposit receipts bearing receipt No.828398 dated 30.08.2012 and 983882 dated 10.01.2013 for Rs.59 and 69 crores respectively be declared null and void and be delivered and cancelled. In that suit, it is the case of the appellant bank that the two fixed deposit receipts had been issued by forgery. It is also alleged in that suit that the account number being 08070210000496 belonged to one M/s. S.A. Enterprise under the proprietorship of one Shri Pradip Chongdar. It further appears from the said account number, that after the credit of approximately Rs.120 crores a sum of Rs.82.69 crores had been withdrawn and remitted through RTGS and pay orders to various accounts of third parties maintained in various other banks at Kolkata and also some amount had been withdrawn in cash. It is also alleged in the plaint filed in that suit that the role of the plaintiff and the possibility of its officers being involved with others in the perpetration of fraud and forgery was under investigation. The appellant bank has also alleged in the earlier suit that on 14.03.2013, a complaint has been lodged with the office of the DIG, CBI New Delhi with a request to investigate the matter. A similar complaint had also been filed by the appellant bank on 15.03.2013 with the Joint Commissioner of Police, Crime Kolkata and a case has been registered being P.S DD case no.172 dated 13.03.2013 with the Hare Street Police Station.

15. In this background, the plaintiff has filed the instant suit and prayed for a decree of Rs.1,24,77,15252.03 together with interest at 18% p.a. After filing of the suit since a sum of Rs.37 crores was still lying in the account being 08070210000496 in which the funds had been transferred by the plaintiff. By an interlocutory application, the plaintiff prayed for a Receiver in respect of the said sum and by an order dated 06.09.2013, this Hon'ble Court appointed Joint Receivers being the Advocates of the respective parties to keep the aforesaid amount of Rs.37 crores in a fixed deposit until further orders.

16. The appellant bank filed its affidavit in opposition and had primarily taken the defence that on 13.03.2013 the appellant bank received a telephonic call from the plaintiff requesting the appellant bank to attend an urgent meeting relating to confirmation of two high value fixed deposit receipts which had been issued by the said branch of the appellant bank. Upon deputing the then Zonal Manager of the appellant bank, the appellant bank came to learn that said two FDRs bearing receipt no.828398 dated 30.08.2012 and receipt no.983882 dated 10.01.2013 of Rs.59 crores and Rs.61 crores respectively were forged and fabricated documents and these were not listed in the said branch FDR Security Printing Register. It was alleged by the appellant bank that there were several discrepancies and anomalies ex facie evident on the said FDRs. The appellant bank also alleged that it came to learn that a number of letters dated 13.08.2012, 10.10.2010, 08.01.2013 and 11.01.2013 alleged to have been issued by the appellant bank were all found to be forged and fabricated. It is alleged that the entire series of events, beginning with the offer letter written by the appellant bank, the proposed interest rate, the deposit of Rs.59 crores and Rs.61 crores respectively being routed through RTGS to a particular account number and the subsequent letters issued by the Branch Manager were without authority, forged and fabricated. It is further alleged in paragraph 4 (ix) of the affidavit in opposition, that the role of the officers of the plaintiff and the possibility of others being involved in the perpetration of fraud and forgery was under investigation. The appellant bank also referred to the earlier suit being C.S. 140 of 2013 which it had filed for delivery up and cancellation of the two fixed deposit receipts.

17. In the affidavit-in-reply filed on behalf of the plaintiff to the application, it has been alleged that all acts which are now sought to be impugned by the appellant bank had been primarily carried out by Mr. Alois Lakra, the Manager of the said branch of the appellant bank in the course of his employment.

18. By the impugned order the Learned Judge held that the plaintiff had made out a good case for judgment. Accordingly, a judgment and decree was granted for Rs.120 crores towards principal and interest was awarded @ 9.65% p.a. and appropriate directions were also given for taking into consideration the amount of Rs.37 crores lying with the Joint Receivers. In passing the impugned judgement and decree, the Learned Judge held that since transfer of the amount of Rs.120 crores to the said branch of the appellant bank was not in dispute, if any forgery had been committed by the bank manager of the appellant bank, the plaintiff could not suffer for such acts committed within the course of employment. The Learned Judge further held that the Bank Manager of the said branch of the appellant bank had acted as an agent on behalf of its principal and the principles of vicarious liability made the appellant bank liable for the acts of its agent. The Learned Judge categorically came to a finding that the appellant bank did not have any defence to the claim of the plaintiff and such held there was no triable issue which warranted a trial.

19. Counsel on behalf of the appellant bank assailed the impugned judgment and decree on the ground that the learned Judge had erred both in law and in facts. He submitted that the factual premise of the impugned judgment and decree that receipt of money in an account of a third party of a bank makes the bank itself liable is per se erroneous. He submitted that the Learned Judge failed to appreciate that the money was not received in the account of the appellant bank but in an account of a third party maintained by the appellant bank. He submitted that this by itself raises a triable issue. He argued that the impugned judgment and decree was based on the premise that only the officers of the appellant bank were exclusively and solely liable in perpetrating the fraud. He submitted that no contract was or could have been in existence on 30.08.2012. He placed much emphasis on the fact that the hand receipt of the letter dated 30.08.2012 was on 31.08.2012 itself. He submitted that the factum as to when the contract was entered into by the plaintiff itself is doubtful. He further submitted that in the facts and circumstances of the instant case and in view of the correspondence relied on by the plaintiff it would be evident that the officers of the plaintiff were also involved in the fraud which had been perpetrated. He submitted a list of triable issues which arose for consideration on the facts and circumstances of the instant case. Accordingly, he submitted that no decree under Chapter XIII A could have been passed by the learned Trial Judge. He relied on the decision of the Hon'ble Supreme Court in *Mechelec Engineers & Manufacturers vs. Basic Equipment Corporation* (1976) 4 SCC 687. He also relied on five principles formulated by this Court in *Smt. Kiranmoyee Dassi vs. Dr. J. Chatterjee* [1945] 49 CWN 246. He submitted that the appellant bank had a substantial defence and was entitled to unconditional leave to defend following the terms of the ratio laid down in *IDBI Trusteeship Services Limited vs. Hubtown Limited* [(2017) 1 SCC 568]. He submitted that in a case involving fraud in a summary proceeding, unconditional leave should be granted as a matter of course.

20. Counsel appearing on behalf of the plaintiff submitted that the impugned judgment and decree was justifiably and correctly passed in the facts and circumstances of the instant case. He submitted that the only evidence that could and should be relied on was the affidavit evidence that was before the Trial Court. He submitted that there was no error either in fact or in law in the impugned judgment and decree. He submitted that his entire case was about money had and received. He submitted that the receipt of the money by the appellant bank was not disputed. He submitted that it was the appellant bank who put it in a different account. He submitted that till the filing of the suit he had no reason to be suspicious. He submitted that the money belonged to the respondent and the money has been received by the appellant and a decree should follow as a matter of course. He submitted that the entire defence of fraud involving the plaintiff was concocted and no reliance should be placed on the same. He submitted that, in any event, the appellant bank was vicariously liable for the fraud committed by its employees. He further submitted that

admittedly the employees of the appellant bank were acting in the course of employment. He submitted that the money unequivocally belonged to the plaintiff. It was handed over to the appellant bank. He submitted that there was no triable issue nor glaring fact that deserved adjudication in a trial. He submitted that there was no bona fide defence nor any iota of defence which the appellant could have against the claim of the plaintiff. He submitted that the officers of the plaintiff had no occasion to be suspicious of any fraudulent conduct on the part of the appellant bank. He further submitted that it is indisputably the case that the money belonged to the plaintiff and was received by the appellant bank. He submitted that the earlier civil suit filed by the appellant bank was a pre-emptive suit and was filed with the sole intention of evading the bank's liability. He submitted that at all material times the Senior Manager of the said branch of the appellant bank was acting in the course of employment. He submitted that the appellant bank was only interested in protecting its officers who had perpetrated the fraud. He submitted that the bank had wrongfully refused to pay the money when demanded. He placed strong reliance on a number of letters received by the appellant bank which had not been disputed nor challenged in the earlier suit filed by the appellant bank. He submitted that right at the inception if the appellant bank had discovered a mismatch in the name of the account number it should have withheld crediting the amount in the account of Pradip Chongdar. He submitted that there was no other option but for the learned Trial Judge to pass an unconditional decree in favour of the plaintiff. He submitted that the entire defence of the appellant bank was pure myth, sham and moonshine. He submitted that the plaintiff has filed a cross-objection against the judgment and decree since the same did not award compound interest as stipulated in the fixed deposit receipts. In this background, he submitted that the appeal filed by the appellant bank should be dismissed and the cross objection be allowed.

21. The appellant relied on Smt. Kiranmoyee Dassi (*supra*) wherein the following principles were formulated for grant of summary judgment:

"(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may

in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or defence illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

The aforesaid principles have been repeatedly approved of, adopted and enunciated by different Courts of India including the Supreme Court in *Mechalec Engineers* (supra) (paragraph 8). In the said decision, the Hon'ble Supreme Court also approved of an old decision of the English Courts in *Jacobs vs. Booth's Distillery Company* (1901) 85 LT 262 (HL) wherein it was held that whenever a defence raises a really triable issue, leave must be given.

Subsequently, these principles have also been followed by the Hon'ble Supreme Court in *Sunil Enterprise and Others vs. SBI Commercial and International Company Ltd.* reported in (1998)5 SCC 354 at paragraph 4 and in *State Bank of Sourashtra vs. A. Shipping Pvt. Ltd & Another* reported in (2002) 4 SCC 736 at paragraph 10.

22. In the most recent decision of the Supreme Court, in *IDBI Trusteeship Services Limited vs. Hubtown Limited* reported in (2017) 1 SCC 568 the entire case law pertaining to summary judgments has been reviewed and it has been held at paragraph 17 as follows:

17. Accordingly, the principles stated in para 8 of *Mechelec case* [*Mechelec Engineers & Manufacturers v. Basic Equipment Corpn.*, (1976) 4 SCC 687] will now stand superseded, given the amendment of Order 37 Rule 3 and the binding decision of four Judges in *Milkhiram case* [*Milkhiram (India) (P) Ltd. v. Chamanlal Bros.*, AIR 1965 SC 1698 : (1966) 68 Bom LR 36], as follows:

17.1. If the defendant satisfies the court that he has a substantial defence, that is, a defence that is likely to succeed, the plaintiff is not entitled to leave to sign judgment, and the defendant is entitled to unconditional leave to defend the suit.

17.2. If the defendant raises triable issues indicating that he has a fair or reasonable defence, although not a positively good defence, the plaintiff is not entitled to sign judgment, and the defendant is ordinarily entitled to unconditional leave to defend.

17.3. Even if the defendant raises triable issues, if a doubt is left with the trial Judge about the defendant's good faith, or the genuineness of the triable issues,

the trial Judge may impose conditions both as to time or mode of trial, as well as payment into court or furnishing security. Care must be taken to see that the object of the provisions to assist expeditious disposal of commercial causes is not defeated. Care must also be taken to see that such triable issues are not shut out by unduly severe orders as to deposit or security.

17. 4. If the defendant raises a defence which is plausible but improbable, the trial Judge may impose conditions as to time or mode of trial, as well as payment into court, or furnishing security. As such a defence does not raise triable issues, conditions as to deposit or security or both can extend to the entire principal sum together with such interest as the court feels the justice of the case requires.

17.5. If the defendant has no substantial defence and/or raises no genuine triable issues, and the court finds such defence to be frivolous or vexatious, then leave to defend the suit shall be refused, and the plaintiff is entitled to judgment forthwith.

17.6. If any part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit, (even if triable issues or a substantial defence is raised), shall not be granted unless the amount so admitted to be due is deposited by the defendant in court.

23. Counsel on behalf of the plaintiff took us through the entire law of vicarious liability. He placed reliance upon Lloyd (Pauper) vs. Grace Smith & Company (1912) Appeal Cases AC 716, United Africa Company Limited and Saka Owoade LR (1955) Appeal Cases Page 130, Uxbridge Permanent Benefit Building Society vs. Pickard LR (1939) 2 K.B. 248, Lister and Others vs. Hesley Hall Ltd. (2001) UKHL 22 and Mr. A M Mohamud vs. WM Morrison Supermarkets Plc (2016) UKSC 11. Counsel on behalf of the appellant bank did not dispute the propositions laid down in those decisions. He only tried to distinguish the decisions on the ground that all the decisions were decided after a full-fledged trial and were inapplicable at this stage of the proceedings.

24. On the aspect of vicarious liability an individual defendant in a tort action is frequently a man of straw. The principles of vicarious liability that have troubled the Courts for a long time relate to an old legal mechanism which enables the plaintiff to fix responsibility on someone other than the impecunious actor. The actor and the person to whom responsibility is imputed are generally made jointly liable to the plaintiff. The most widely accepted theory for this principle is that the person with power of control and direction over the actor is usually best fitted to absorb the loss. As a matter of law, the defendant will be made vicariously liable to the plaintiff in respect of the acts of another person only if the plaintiff shows that:

(i) X has committed a wrongful act which has caused P damage;

(ii) Some special relationship recognised by law exists between D and X, for example a contract of employment, or the delegation of the task of driving a

motor vehicle for the owner's purposes;

(iii) Some connection exists between the act of X and his special relationship with D - in the traditional formula the act must be in the course of X's employment or, what amounts to much the same thing, in the scope of X's authority.

(Hepple & Matthews, Tort Cases & Materials 4th Edn. at page 805)

25. Each of these points has raised difficulties in some form or the other and have been the subject matter of a large number of decisions. The most recent decision of the Supreme Court of England reported in *A M Mohamud vs. WM Morrison Supermarkets Plc* (2016) UKSC 11 (*supra*) provides a further exposition of the law. In an elaborately written judgment, Lord Toulson has delineated the origins and development of vicarious liability from 1908 till the present date.

26. However, the classic statement of law continues to be as stated in a passage from *Salmond & Heuston on Torts* (19th Edn. Page 521) reproduced herein below:

"It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes-although improper modes-of doing them. On the other hand if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it."

27. In such situations the Court has to consider two questions. The first question is, what functions or "field of activities" have been entrusted by the employer to the employee or in everyday language what was the nature of his job? Secondly, the Court must decide

"whether there was sufficient connection between the position in which he was employed and his wrongful conduct to make it right for the employer to be held liable". This is also adumbrated by Lord Toulson in *Mr. A M Mohamud vs. WM Morrison* (*supra*) at page 20.

28. On a careful scrutiny of the case of the plaintiff as made out in the plaint and the application, certain important facets need to be examined. The genesis of the entire incident pertaining to both the fixed deposits took place with the decision of the plaintiff to transmit the funds by way of RTGS in account no.08070210000496 being maintained with the said branch of the appellant bank. It is an admitted position that the plaintiff transmitted these funds via RTGS to a particular account number on the basis of the letter dated 30.08.2012 issued by the said branch of the appellant bank and after a conversation had taken place with the Senior Manager of the said branch of the appellant bank via mobile. Pursuant thereto, written instructions were given to the bankers of the

plaintiff to transmit both the tranches i.e. Rs.59 crores and Rs.61 crores "in the name of WBIDFC Limited". However, admittedly WBIDFC Limited never maintained any account at any point of time with the said branch of the defendant bank. In paragraph 9 of the plaint it is the case of the plaintiff that after the receipt of the letter dated 30.08.2012, the plaintiff contacted the Senior Manager of the appellant bank over the telephone on the given mobile number provided in the said letter to verify and confirm the contents of the said letter. All of these averments raise several questions, for example: Who spoke on behalf of the plaintiff? To whom did he speak to from the appellant bank? What did he speak about? Did he ask whose account number was 08070210000496? What was he told by the concerned officer of the appellant bank? What prompted the plaintiff to specify the name of WBIDFC Ltd as beneficiary in the instructions to their bankers dated 30.08.2012? How could they specify the name of WBIDFC Ltd as beneficiary, when WBIDFC Ltd admittedly never maintained an account with the said branch of the appellant bank? Did the plaintiff use reasonable care, caution and due diligence before giving necessary instructions to remit the money to the said branch of the appellant bank?

29. What is most perplexing is the case of the plaintiff as alleged in paragraph 26 of the plaint is also reiterated in paragraph 8 (z) of the application. In both these paragraphs the identical pleadings are "On or about 12-13 March, 2013 the plaintiff came to learn that a substantial part of the aforesaid deposit of Rs.59 crores and Rs.61 crores which had been received by the Circus Avenue Branch of the defendant is no longer lying to the credit of the plaintiff". On an ex facie reading of the two fixed deposit receipts both were to mature three years later. Then what is it that prompted the plaintiff to learn about the fact that a substantial portion of the aforesaid sum was no longer lying to the credit of the plaintiff. This case of the plaintiff leaves a lot to be answered. How did the plaintiff come to learn that moneys were no longer lying to the credit of the plaintiff? How could the plaintiff know that "a substantial portion" and not the whole of the money was no longer lying to the credit of the plaintiff? What actually prompted the plaintiff to blow the whistle as early as on or about 12/13th March, 2013?

30. Other than the aforesaid two glaring issues which arise for consideration purely on the admitted case of the plaintiff, there are some other aspects which also require consideration. It is alleged in the plaint that the plaintiff that they had a longstanding relationship with the appellant bank (paragraph 6 of the plaint). Admittedly, there were previous transactions. If there had been previous transactions what necessitated the change in the modus for transmission of the present funds? Or whether there was any change on this occasion in the mode of transmission of funds to the appellant bank? If so, why was there a change in the mode of transmission of the funds? We also find some substance in the argument of the appellant that in respect of first remittance, there is some discrepancy as to how the offer letter dated 30.08.2012 issued by the bank (appearing at page 110 and 120 of Vol-I of the Paper Book) was received by the plaintiff. If the letter

from the bank was received by hand on 31.08.2002 as indicated at page 120, then how could the contract have been entered into on 30.08.2012? This aspect of the case is also not open and shut and requires some explanation and investigation at trial.

31. The next aspect that needs to be considered pertains to the filing of CS No.140 of 2013. That suit was filed by the appellant bank prior to the institution of the instant suit. That suit was been carefully drafted to ensure that the appellant bank only sought for a declaration that the two FDR receipts being 828398 dated 30.08.2012 and 983882 dated 10.01.2013 for Rs.59 crores and Rs.61 crores respectively in favour of the plaintiff and the letters dated 30.08.2012, 10.10.2012, 08.01.2013 and 11.01.2013 and all similar instruments be declared void or voidable against the plaintiff and the same be delivered up and cancelled and for consequential injunctions. It is easy to comprehend the reason for filing of the suit. The appellant bank was not interested in recovery of the money which has been siphoned out from the account of Chongdar. Pradip Chongdar was also not made a party to that suit. None of the officers of the appellant bank were made parties to that suit. The law of tracing was given a deliberate and intentional go-bye and the ultimate beneficiaries to whom the money had been siphoned off from the account of Chongdar were also not been made parties. The object of that suit is easy to understand. The appellant bank was only interested to save the skin of its corrupt officers and to make the matter sub-judice in anticipation of any proposed action that the plaintiff would inevitably institute. That suit is simply a red herring and the trick is as old as the hills. During the course of hearing of this appeal, we enquired and were told that no steps whatsoever had been taken in that suit which was pending since 2013. No writ of summons had been lodged nor any amendment been effected by the appellant bank to incorporate subsequent facts nor have any of its bank officials been impleaded in this suit. In any event, nobody is seeking any decision in that suit which has to be decided on its own merits.

32. Both counsel unequivocally admitted before us that undoubtedly fraud was perpetrated in the facts and circumstances of the case. Counsel on behalf of the appellant bank fairly contended that the fraud involved perpetrators from both the sides i.e. from the plaintiff as well as the appellant bank. Counsel on behalf of the respondent contended that the fraud was only that of the officers of the appellant bank. But what is clear is undoubtedly that fraud has been perpetrated. As a proposition of law, I do not agree with the submission on behalf of the appellant bank that in every case where fraud is alleged a summary decree cannot be passed. It all depends on the facts and circumstance of each case. In the peculiar facts of the instant case, I am of the view that at this prima facie stage it cannot be ruled out that the officers of the plaintiff may also have been involved in the perpetration of fraud.

33. On the aspect of the vicarious liability I am in full agreement with the principles of law as laid down in the aforesaid decisions. However, in applying

those principles to the facts of the instant case, I have no doubt in my mind that the bank officials and particularly Alois Lakra were acting within the course of their employment and there is sufficient connection between the position in which they had been employed and their wrongful acts to make the appellant bank liable. However, what cannot be ruled out at this stage prima facie is that on similar principles some of the officers of the plaintiff could also be involved in the perpetration of the fraud which would make the plaintiff equally liable both under the principles of vicarious liability and contributory negligence. So it seems that the only issue which arises for consideration is who are the perpetrators of the fraud and to what extent are they liable?

34. It is not possible for anybody to predict at this stage on the basis of the pleadings and the limited documentary evidence available as to what exactly the oral evidence is going to be at the time of trial. It is only when the actors from both the sides walk into the witness box and answer questions whether in examination or cross-examination that the real story will hopefully be revealed. What the officers of the bank say and what is the evidence of the concerned officers of the plaintiff when they go into the box is anybody's guess. What Lakra may depose is purely conjectural at this stage. Will Pradip Chongdar ever come into the witness box or has he disappeared from the scene? One can imagine that one of the officers either on behalf of the plaintiff or on behalf of the defendant may spill the beans and narrate the entire story as to how the fraud was orchestrated or perpetrated. At this stage, when both counsel have agreed that fraud has been perpetrated but they assign different players to the fraud it cannot be said that the plaintiff is bound to succeed because the witnesses may depose in a particular manner and not otherwise. An academic exercise at this stage is not called for.

35. At this stage it is anybody's guess what a full-fledged trial will reveal. In a world where the common man and indeed the Courts are enlightened everyday about scams which stretch from Mehul Chowksi, Vijay Mallya, Nirav Modi, Chanda Kochar and a never ending list, it is still news that apparently junior public servants are brazenly colluding, conspiring and conniving in such blatant acts of treachery. The facts of this case are more alarming keeping in mind that both the plaintiff and the defendant are public entities and their officers who appear to be the main perpetrators are public servants. Prima facie the magnitude of all that has happened is deplorable. This is a classic example of corruption in uniform.

36. All these facts in our opinion raised triable issues and require a deeper investigation as to what actually happened in this matter. I am of the view with all due respect, that the Learned Trial Judge in passing the impugned decree and failed to recognise the ambiguities in transfer of the moneys to a particular account and what had transpired prior to transmission of the moneys to the account being 08070210000496. Additionally, I am of the view that the Learned Judge erred at an early stage in holding that the officials of the appellant bank were solely and exclusively and wholly responsible for the fraud that had been

perpetrated. Again, I am of the view that the Learned Judge erred in holding that at an early stage the defence did not raise triable issues. Moreover a bank may receive funds into different accounts maintained by it. The receipt of funds in any one of those accounts cannot make the bank per se liable. For these foregoing reasons we set aside the impugned judgment passed by the Learned Single Judge. In my view, the appellant bank has been able to make out a case that triable issues exist warranting the matter to go to trial. I am of the view that there is a case that officers of the plaintiff could also be involved in the forgery and fraud and manipulation complained of by the appellant bank. In this background, I am of the view that although the defence of the appellant cannot be said to be positively good for now I cannot say positively that it shall never be found with any content in the future either.

37. The facts of the instant case are egregious and spine-chilling. It is worth reflecting as to how safe the common man's funds are lying parked with these nationalised banks. In view of the pending criminal complaints filed by the appellant bank with the appropriate authorities we direct that copies of the instant judgment be forwarded forthwith by the Registrar, Original Side to

(a) The Hon'ble Minister of Finance, Union of India; (b) The Minister of Finance, State of West Bengal; (c) The Governor, Reserve Bank of India; (d) The Director, Central Bureau of Investigation, New Delhi;

(e) The Registrar of Companies, Kolkata and (f) The Commissioner of Police, Kolkata for appropriate action.

38. One submission of the appellant bank that needs to be dealt with severely was made at the time of its reply. It was submitted that the suit does not pertain to recovery of money which has been siphoned out from the account of Chongdar and the Court should not tread down that path. This definitely reflected the slanted and convoluted instructions to counsel on behalf of the appellant bank and was a mirror reflecting the earlier subterfuge of filing the pre-emptive suit. However, our role is slightly different. In *Gopal Chandra Mukherjee vs. Food Corporation of India* [AIR 2017 Cal 110] it was held by a Division Bench of this Court that:

"But when it comes to squandering public money or defrauding public exchequer, as has been attempted by this appellant, courts have a bounden duty under our constitutional scheme to arrest the mischief. It would be opposed to the public policy of India to allow public funds to be plundered or squandered. In a matter of the present kind it is the obligation of the court to sift through the maze of legal hurdles that the disingenuous may present to strike at the root and uproot the mischief." (emphasis supplied)

There is an element of step-motherly treatment which is given by all and sundry when it comes to public funds. This phenomenon is common not only in India, but we are sure all around the world. The manner in which public funds in this case have been casually and deliberately made to disappear is what ought to

shock the conscience of any and every Judge. The facts of the instant case give rise to a troublesome but ancient feature where public servants and guardians of public funds are themselves busy looting the country. "Corruption has eaten into the vitals of the body politic and has become deeply entrenched in the psyche of the citizenry" (Fali S. Nariman, The State of The Nation at page 306). This is also what Kautilya said in the following words:

"Just as it is impossible not to taste honey or the poison that one may find at the tip of one's tongue, so it is impossible for one dealing with government funds not to taste a little bit of the king's revenue.

Just as it is impossible to know whether fish moving in water are drinking it, so it is impossible to find out when government servants employed in government work are taking money for themselves"

Arthashastra-

39. In a case like this, it is necessary to ascertain who were the Ultimate Beneficial Owners (commonly referred to as "UBO" in banking and investigative circles) of the ill-gotten money that has been siphoned off from the account of Chongdar. In the complaint filed with the CBI, the appellant bank has enumerated the accounts to which Rs.82.69 crores were surreptitiously removed. The details are set out herein below:

1. Ashtavinayak Commodities

13. Shri Shyam Enterprise

2. Perfect Merchandise

14. Nidhi Enterprise

3. Latest Trade Com Pvt. Ltd.

15. Balaji Traders

4. Tiger Hill Vintrade

16. Soft Link Trade Link

5. Prity Saree

17. Mani Rattan Vanijya

6. Nilam Agency

18. Saha Trading Co.

7. Moondhara Commercial

19. N K Enterprise

8. Jagdamba Agency

20. Raunak Trade Impex

9. Anuman Traders

21. S R Enterprises

10. R B Enterprise

22. Chemico International

11. Sunshine Deal Com.

23. Vikram Sharma

12. Sunfast Commercial

24. Tapas Dey

25. West Bengal State Marketing Board

At first glance, *prima facie*, it appears that most of these accounts belong to what in common parlance are referred to as jamma kharchi companies or shell companies. The canvas appears to be much bigger than what has been painted by either of the parties in their pleadings. One cannot help but comment on the fact that a scam of such proportions could not have been pulled off by one Chongdar or one Lakra alone. The role of *inter alia* a chartered accountant or an accountant to say the least cannot be ruled out. There are myriad possibilities. Perhaps the perpetrators mentioned in the pleadings, are only the "small fish" and the larger picture will never come before any Court. Perhaps, the "big fish" are so big and so sheltered that one cannot expect them to fry. Perhaps, the said branch in its entirety going right to their topmost officials had been compromised. As Cardozo J had said, "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass Judges by." (The Nature of Judicial Process, 1921 at page 168).

40. I am fully aware of the limited jurisdiction which I am exercising whilst hearing an appeal arising out of an application for a summary decree in a civil suit. I cannot hope that the hearing of the suit and the consequent appeals that will take decades provide any form of the elusive or the slippery concept of justice to the people of India. Whoever wins or loses at the trial it is "we the people of India" who will have been ultimately defrauded and duped. Perhaps, it is true, that it is not the severity of punishment but the certainty of punishment which ultimately deters crime.

41. In view of the aforesaid, the primary defence of the appellant bank that, there is a possibility that the officers of the plaintiff were also involved in the perpetration of serious fraud cannot be ruled out at this stage. For the reasons, I am of the firm view that the defences raised by the appellant bank for the reasons aforementioned appear to us to be in the realm of being "plausible but improbable". In the light of these findings we order and direct insofar, as the amount of Rs.37 crores is concerned in respect of which Joint Receivers had been

appointed that money exclusively and solely belongs to the plaintiff. The appellant bank can have no claim to this money. The possibility of Chongdar appearing in the scene to claim this money is close to remote, since Chongdar will have to return more than what he can hope to claim. Anyway, an appropriate Court shall deal with Chongdar as and when he surfaces. Thus, so far as the amount, held in the name of the Joint Receivers in terms of the order dated 06.09.2013 is concerned we direct, the Joint Receivers to forthwith encash the fixed deposits along with accrued interest and make payment of the proceeds thereof to the plaintiff.

42. This being the case the plaintiff needs to be protected, in our opinion, the appellant bank, defendant will be granted leave to defend the suit only upon furnishing security for Rs.83 crores by way of a fixed deposit in favour of Registrar, High Court Original Side within four weeks from date upon intimation to the plaintiff and shall keep the said fixed deposit renewed till the disposal of the suit. In default, the Registrar, High Court Original Side shall immediately invoke the bank guarantee for the balance amount as payable under the decree passed by the learned Single Judge and makeover proceeds thereof to the plaintiff. The original fixed deposit receipt shall be in the custody of the Registrar High Court Original Side. Only upon furnishing the aforesaid security the Registrar High Court Original Side shall discharge and return the earlier irrevocable bank guarantee furnished by the appellant pursuant to the order dated 23rd February, 2017 to the appellant.

43. With the aforesaid directions the appeal stands allowed to the aforesaid extent. The cross objection filed on behalf of the plaintiff stands dismissed, with liberty to the plaintiff to raise this issue before the Trial Court in which case the Trial Court shall decide the same in accordance with law.

44. We note that delay sometimes strangely kills any cause of action whether civil or criminal. Delay can take various forms in the course of any litigation. The actors retire or just refuse to appear or just die a natural death. The evidence disappears or is simply untraceable. The witnesses choose not to appear either deliberately or out of sheer intimidation. Not to mention that the ill-gotten money changes hands so many times and sometimes flies out of the country.

45. In order to expedite the trial, we direct the appellant to file its written statement within four weeks from the date. Discovery and inspection by the parties shall be completed by 30.06.2019. The aforesaid directions are peremptory. None of the parties shall be entitled any extension of time in respect of any of the directions. In the event of non-compliance, the Learned Single Judge is requested to immediately proceed with the trial of the suit. We hope and expect that the suit be tried expeditiously preferably within one year from the completion of the all the formalities subject to the convenience of the learned Single Judge. It is needless to mention that the learned Single Judge shall not be influenced by any observation made by us herein.

(Ravi Krishan Kapur, J.)

Soumen Sen, J.: I have had the advantage of reading the draft judgment of my learned brother Justice Kapur and for the reasons he gives, I too would allow this appeal with the conditions imposed by His Lordship. Though I am in agreement with the conclusion arrived at by my learned brother, I would like to give my own reasons for my concurrence, with narration of so much of the facts as are necessary for my conclusion.

The appeal is directed against a money decree passed in a summary proceeding filed under Chapter XIII A of the Original Side Rules.

The decree is in favour of the West Bengal Infrastructure Development Finance Corporation Limited (hereinafter referred to as "WBIDFC Ltd."). WBIDFC is a registered non-banking financial company engaged, inter alia, in the business of providing loans for infrastructure projects in the State of West Bengal.

The claim of the plaintiff in the suit in nutshell is that in or about August, 2012 the plaintiff intended to make a term deposit of Rs.59 crores in public sector and private sector banks for the purpose of creation of sinking fund for one of its bond series in existence 2005-06. The plaintiff in 2005-06, 2006-07, 2007-08 and 2010-11 issued bond series of Rs.1,000 crores each. The plaintiff had the approved rating for issuance of the aforesaid bond series. Axis Bank Limited and Axis Trustee Services Limited were and still are the bond trustees in respect of the aforesaid 4 bond series.

Various banks submitted their offers including rate of interest for different periods. Some of the banks quoted the particulars of a Real Time Gross Settlement (RTGS) code number or the Indian Financial Systems Code (IFSC) number through which the transfer could be made and allotted a particular account number in which such sum could be transferred.

On 30th August, 2012 the Circus Avenue Branch of the appellant provided the rate(s) of interest for creation of bulk term deposit of amount exceeding Rs.10 crores. The said letter contained an A/c No. 08070210000496 and a RTGS code No. UCBA0000807 for transfer of funds by way of RTGS mechanism. The rate of interest provided in the said letter was verified and confirmed by the plaintiff from the Senior Manager of Circus Avenue Branch of the defendant by contacting the said Senior Manager over telephone at the mobile phone number provided in the said letter. The rate of interest provided by different banks as well as the Circus Avenue Branch of the defendant was duly considered and the rate of interest provided by the Circus Avenue Branch of the defendant was found to be the highest by the plaintiff. The plaintiff also had a longstanding relationship with the defendant. The plaintiff also from time to time had maintained various term deposits with various branches of the defendant. The plaintiff also had prior relationship with the Circus Avenue Branch of the defendant. The plaintiff by a communication dated 30th August, 2012 instructed its banker, Bank of India, Corporate Banking Branch to transfer an amount of Rs.59 crores from the

plaintiff's existing overdraft account to the account number provided by the defendant in its letter dated 30th August, 2012 in the name of the plaintiff as "beneficiary".

On the basis of the said instruction, Bank of India on 30th August, 2012 transferred a sum of Rs.59 crores through RTGS system to the Circus Avenue Branch of the defendant. The Bank of India issued a confirmation evidencing transfer of such fund through RTGS system contained in a transaction slip of Bank of India dated 30th August, 2012.

Upon transfer of the said sum of Rs.59 crores through RTGS system, the plaintiff by a further letter dated 30th August, 2012 requested the defendant to create a term deposit of Rs.59 crores for 3 years at the rate of 9.65% per annum. The defendant acknowledged the receipt of the said sum and a letter dated 30th August, 2012. Thereafter a term deposit receipt dated 30th August 2012 for a sum of Rs.59 crores for a period of 3 years at the rate of 9.65% per annum signed by the Manager and the Assistant Manager of the Circus Avenue Branch of the defendant was issued in favour of the plaintiff. The plaintiff, thereafter by a letter dated 30th August, 2012 created over the said term deposit in favour of the trustee namely Axis Bank Limited. The defendant also had acknowledged creation of lien in favour of the Axis Bank Limited by forwarding a letter dated 30th August, 2012 written by the Senior Manager of Circus Avenue Branch. Subsequently, the aforesaid lien was released by the said trustee namely Axis Bank Limited by letter dated 18th September, 2012. A copy of the said letter was sent to the Circus Avenue Branch by the defendant. Thereafter at the request of the plaintiff the defendant created a further lien in respect of the aforesaid term deposit in favour of another bond trustee namely, Axis Trustee Services Limited and confirmed the same by a letter dated 10th October 2012, issued by the defendant and signed by the Senior Manager, Circus Avenue Branch of the defendant.

In or about January 2013, the plaintiff intended to make a term deposit of a further sum of Rs.61 crores in public sector and/or private sector banks for the purpose of one of the above-mentioned bond series of the various funds received. By a letter dated 8th January 2013, the Circus Avenue Branch of the defendant provided to the plaintiff the prevailing rate of interest for creation of term deposit of amount exceeding Rs.10 crores. The said letter contained the same A/c No. 08070210000496 as mentioned in the earlier letter of the defendant dated 30th August, 2012 and the same RTGS code number i.e., UCBA0000807 for transfer of funds by way of RTGS mechanism.

The plaintiff by a letter dated 10th January, 2013 instructed its banker, Indian Bank, Kolkata Main Branch, to transfer an amount of Rs.61 crores from the plaintiff's existing overdraft account to the account number provided by the defendant in the letter dated 8th January, 2013, in the name of the plaintiff as "beneficiary". The Indian Bank as instructed transferred on 10th January, 2013 a sum of Rs.61 crores to the Circus Avenue Branch of the defendant. The RTGS

document provided by the remitting bank contained the necessary instruction to the receiving bank to the effect that the fund was being remitted by "WBIDFCL" as beneficiary.

Indian Bank thereafter issued a confirmation evidencing transfer to such fund through RTGS system on 10th January 2013. Upon transfer of the said fund the plaintiff by a letter dated 10th January, 2013 instructed Circus Avenue Branch of the defendant to create a sum of Rs.61 crores for 3 years at the rate of 9.57% per annum. The defendant duly acknowledge receipt of the said sum and the letter dated 10th January 2013 and issued a term deposit receipt dated 10th January, 2013 for a sum of Rs.61 crores for a period of 3 years carrying interest at the rate of 9.75% per annum signed by the Manager and the Assistant Manager of the Circus Avenue Branch in favour of the plaintiff.

Like the earlier occasion lien was created in respect of the aforesaid term deposit of Rs.61 crores with the trustee namely, Axis Bank Limited. The defendant acknowledged creation of lien in favour of Axis Bank Limited by its letter dated 11th January, 2013 written by the Senior Manager of Circus Avenue Branch. By a letter dated 14th January, 2013 the Bond trustee, namely, Axis Bank Limited acknowledged lien of the said term deposit of Rs.61 crores and the copy of the said letter was forwarded to Circus Avenue Branch of the defendant. In or about 12/13th March, 2013 the plaintiff came to learn that a substantial part of the aforesaid term deposits Rs.59 crores and Rs.61 crores received by the Circus Avenue Branch by the defendant are no longer lying to the credit of the plaintiff. The plaintiff thereafter immediately on 26th March, 2013 issued a legal notice and called upon the defendant to refund and pay proceeds of the said two term deposits by pre-mature encashment. The defendant, however, refuses to refund and/or make payment of the aforesaid sum of Rs.59 crores and Rs.61 cores.

This has resulted in a suit being filed as C.S.169 of 2013 by the plaintiff on 14th May, 2013.

The plaintiff thereafter had taken out an application under Chapter XIII A of the Original Side Rules for summary judgment.

The defendant has entered appearance in the suit but could not file the written statement due to the pendency of the application for summary judgment.

The plaintiff filed the application for summary judgment in or about 21st August, 2013, praying, inter alia, for a final judgment and decree for a sum of Rs.1,24,77,15,252.30 along with interim interest and interest upon judgment at the rate of 18% per annum.

The application is almost verbatim reproduction of the plaint with the necessary averments required under Chapter XIII A of the Original Side Rules.

The defendant contested the said proceeding and filed an affidavit-in-opposition.

The defence of the defendants in the affidavit-in-opposition are summarized

below:

On 13th March, 2013 the defendant received a telephonic call of the plaintiff requesting the defendant to attend an urgent meeting relating to confirmation of two high value Fixed Deposit Receipts said to have been issued by the defendant from its Circus Avenue Branch. The defendant immediately deputed Sri S.C. Sharma, the then Zonal Manager of the respondent at Kolkata to the office of the plaintiff where the said officer was shown two FDRs, bearing receipt no.828398 dated 30th August 2012 and receipt no.983882 dated 10th January 2013 for Rs.59 crores and Rs.61 crores respectively along with certain correspondence alleged to have been exchanged by the plaintiff with the said branch. On prima facie scrutiny of the said documents produced before the said officer of the respondent suspicion and doubt arose in the mind of the said officer regarding the authenticity of such documents more particularly as the rate of interest mentioned in the two FDRs was found unusual and not sanctioned by the competent authority of the respondent. The said officer accordingly had requested the representatives of the plaintiff to accompany him to the said branch for physical verification of the records.

On the basis of the said request the plaintiff deputed their officers namely, Sri B. Maity, Sri A. K. Singh and another to the Circus Avenue Branch for physical verification. Upon verification it was confirmed that no Fixed Deposit Receipts were made in the name of the plaintiff and there was no question of issuing any Fixed Deposit Receipts and the copies of the alleged Fixed Deposit Receipts shown were never issued by the said branch. The said fact was also confirmed by the respondent in writing by making an endorsement in a copy of the letter dated 13th March, 2013 written by the plaintiff to the respondent seeking confirmation of the said deposits. Upon further enquiries it reveals that the alleged two instruments namely two Fixed Deposit Receipts bearing no. 828398 dated 13th August 2012 and 983882 dated 10th January 2013 for Rs.59 crores and Rs.61 crores were forged and fabricated and were not listed in the branch FDR Security Printing Register. Subsequently it was confirmed that the printed serial number in the said two FRDs were not of the said Circus Avenue Branch. The alleged letters dated 30th August 2012, 10th October 2012, 8th January 2013 and 11th January 2013 claimed to have been issued by the respondent bank were also found to be all forged and fabricated. However, investigation revealed that no FD account existed in the name of the plaintiff who also did not have any other account in the said branch of the respondent. The amount of Rs.59 crores and Rs.61 crores had been routed to the said branch by way of RTGS from the bank of India and Indian Bank at the insistence of the plaintiff and had been credited in the account number as specified, being a current account standing in the name of one M/s. S.A. Enterprise opened at the said branch on 24th May 2012 under the proprietorship of one Sri Pradip Chongdar, son of Sri. Sanat Chongdar of 21/4, B.T. Road, Kolkata. The said account was opened after following all banking norms. It was further revealed from the said account that after credit of the aforesaid sum of Rs.120 crores, a sum of

Rs.82.69 crores was withdrawn and remitted through RTGS and Pay Orders in various account maintained in various banks in Kolkata and some amount was also withdrawn in cash. Upon detection of the said forgery the respondent by its letter dated 14th March, 2013 lodged a complaint with the office of DIG, CBI (BS & FC), New Delhi with a request to investigate into the matter. The respondent also by its letter dated 15th March, 2013 informed the detection of fraud at the Circus Avenue Branch to the Kolkata Police. The respondent had also received a letter dated 19th March, 2013 from the Joint Commissioner of Police (Crime), Kolkata, inter alia, informing that a case has already been initiated being Hare Street P.S. (DD) case No. 172 dated 13th March, 2013 over the self-same issue and investigation has been taken up by the Detective Department of Kolkata Police. It is alleged that the plaintiff with the knowledge of forgery and fabrication of documents claimed refund of the amount along with interest. The defendant through its solicitor denied such claim by a letter dated 26th March, 2013 followed by a further letter dated 4th April, 2013.

Under such circumstances the defendant filed a civil suit in this Court being C.S. No. 140 of 2013, on 19th March, 2013, after obtaining leave under Order 2 Rule 2 of the Code of Civil Procedure, inter alia, claiming for a declaration that the said two FDRs and the alleged letters dated 30th August, 2012, 10th October, 2012, 8th January, 2013 and 11th January, 2013 and all such similar instruments or such documents if any be declared void or voidable against the plaintiff and be delivered up and cancelled. The respondent has also prayed for a decree for perpetual injunction restraining the plaintiff in this suit from giving any effect or further effect to and from raising any claim on the basis of said two FDRs and also the alleged letters dated 30th August 2012, 10th October, 2012, 8th January, 2013 and 11th January, 2013.

During the pendency of the said application in or about 8th August 2013, the plaintiff filed an application being G.A. No. 2390 of 2013, inter alia, praying for attachment of the amount lying in the said account no. 08070210000496 standing in the name of M/s. S.A. Enterprise with the Circus Avenue Branch of the defendant bank and for appointment of Receiver. In the said application the order was passed on 6th September 2013, by which the respondent bank was directed to create a fixed deposit in the joint names of the Advocates-on-record of the parties for a sum of Rs.37 crores under the scheme which would yield the highest interest and to keep the said fixed deposit renewed from time to time until further orders.

The learned Single Judge on consideration of the materials-on-record has allowed an application for summary judgment and decreed the suit for a sum of Rs.120 crores towards principal. The joint receiver was directed to encash the said fixed deposit of Rs.37 crores prematurely and hand over the proceeds to the plaintiff/petitioner with accrued interest thereon. The learned Single Judge has also awarded interest at the rate of 9.65% per annum for 59 crore. Since, the 61 crore was deposited in the term deposit carrying an interest of 9.57% per

annum, the said sum of Rs.37 crore was directed to be adjusted against the same and the interest accrued thereupon was also directed to be adjusted against the said term deposit and the balance interest at the rate 9.57% per annum was to be paid by the respondent. The sum of Rs.59 crores was directed to be paid along with interest at the rate of 9.65% per annum. The interest would be calculated from the date of the respective deposits till its actual payment.

This order of the learned Single Judge is under challenge.

Mr. Sabyasachi Chowdhury, the learned counsel appearing on behalf of the appellant has strenuously argued that in a proceeding under Chapter XIII A of the Original Side Rules, the Court is required to take into consideration the defence of the respondents as disclosed in the affidavit-in-opposition. The application is decided on the basis of the affidavit and the Court is required to keep in mind that at that stage no oral evidence is allowed. The claim of the plaintiff sounds in tort. A claim based on tort is not within the purview of Chapter XIII A of the Original Side Rules.

Mr. Chowdhury, has taken us through Chapter XIII A of Rules 1 and 2 and submits that classification of the matters required to be decided in the summary proceedings does not include any tortious liability or any claim arising out of tort. The learned counsel has submitted that the cause of action of the plaintiff is based on two fixed deposits for a sum of Rs.59 crores and Rs.61 crores respectively, which the plaintiff allegedly claimed to have created with the defendant bank. The said deposit was made by way of RTGS in an account bearing no. 08070210000496, standing in the name of one M/s. S.A. Enterprise a proprietorship concern of Mr. Pradip Chongdar. It is the specific case of the appellant bank that both the fixed deposit receipts are forged and fabricated documents and no fixed deposits have been actually created with the appellant/defendant bank and accordingly the appellant bank could not be held liable or responsible for any money alleged to have been deposited in the account of a third party. Mr. Chowdhury, has referred to the minutes of the Investment Committee meeting of the plaintiff held on 30th August 2012, and submits that the plaintiff was supposed to create a fixed deposit after one of its fixed deposits for Rs.58.59 crores with UCO Bank Howrah Branch mature on 30th August 2012, and accordingly no fixed deposit could have been created on 30th August 2012. The decision of the committee is clear that a fixed deposit would be created at a future date after the aforesaid maturity amount is realized from the said fixed deposit. Mr. Chowdhury, submits that it is unusual that the alleged offer letter of the bank would mention an account number when the fact remains that the plaintiff bank does not have any bank account with the Circus Avenue Branch of the appellant. Mr. Chowdhury was critical about the averments made in the plaint that prior to the creation of fixed deposit there was a conversation between the plaintiff representative and the defendant's representative where such account number was disclosed with an instruction to create fixed deposit in the said

account. Mr. Chowdhury submits that unless an opportunity is given to the appellant bank to cross-examine the witness of the plaintiff with regard to alleged conversation the correct fact would not reveal. The creation of fixed deposit for Rs.59 crores is surrounded by suspicion and the plaintiff would be required to remove such suspicion at the trial of the suit.

Mr. Chowdhury submits that if a trial takes place the plaintiff would be required to establish that there was a contract between the plaintiff and the defendant in relation to fixed deposit for a sum of Rs.59 crores. Mr. Chowdhury has submitted that on 30th August and 31st August 2012, too many unusual things have happened. The plaintiff at the trial would be required to establish that if the letter dated 30th August 2012, was received by the plaintiff on 31st August 2012, then on what basis was the contract entered into and allegedly performed on 30th August, 2012. If the letter dated 30th August 2012, was already received by the plaintiff and acted upon by remitting money as alleged, what was the necessity of having the same document sent and received on the next day that is 31st August 2012.

Mr. Chowdhury submits that it is important to note that who took the decision on behalf of the plaintiff to create a term deposit on 30th August 2012, as the minutes of the meeting of 30th August 2012, supposedly held at 11 AM was signed only on 3rd September 2012. Mr. Chowdhury submits that the alleged letter dated 30th August 2012, does not describe the plaintiff as beneficiary as at that point of time the plaintiff did not have any account with the Circus Avenue branch. Even assuming that the plaintiff could have acted upon such letter, it could have been possible if the said account were of UCO bank and in such a situation, UCO bank should have been the beneficiary as per the mandatory/essential information required to be furnished as per the RBI directive.

Mr. Chowdhury submits that the impugned judgment has overlooked that the receipt of the money was in an account of a third party in the bank and cannot make the bank liable. The bank has not received any money from the plaintiff. The money was not received in any bank account of UCO bank but in an account of a third party maintained by UCO bank.

The learned Judge has assumed that only the officers of the defendant bank are involved and has made an assumption as if none of the officers of the plaintiff, either are or could be, involved in the perpetration of fraud. The learned Judge has, therefore, adopted the principles of vicarious liability. It is a fundamental principle of law that an application under Chapter XIII A of the Original Side Rules of the High Court at Calcutta can only be made if the requirement of Rule 1(A) is satisfied. In other words, the respondent/plaintiff would have to show that it seeks to recover the debt or liquidated demand in money payable by the defendant with or without interest arising on a contract, express or implied.

In the instant case, even on the case as made out by the plaintiff, there is doubt as to how and when the contract itself was created. If the receipt of the alleged

letter of 30th August, 2012 is on 31st August 2012, then no contract could have been created on 30th August, 2012. Although a case was made out from the bar that a copy of the letter dated 30th August 2012, was sent by fax, no such case has been made out either in the plaint or in the application under Chapter XIII A of the Original Side Rules of the High Court at Calcutta. If the alleged letter dated 30th August 2012, was received on 31st August 2012, the defendant bank could not be liable in any manner, assuming but not admitting, that the plaintiff could have acted in terms of that letter as there was no contract in existence as on 30th August, 2012. Even assuming that any officer of the bank would be allegedly involved, such alleged involvement would neither be in course of employment nor in discharge of usual function having authority as there could be no contract in existence as on 30th August, 2012.

The principles of law on which leave to defend should be granted or refused has been well settled in various decisions. Reliance has been placed in the decision of *M/s. Mechelec Engineers & Manufacturers v. M/s.*

Basic Equipment Corporation, reported in (1976)4 SCC 687 and *IDBI Trusteeship Services Ltd. vs. Hubtown Ltd.* reported in (2017)1 SCC 568. The five principles formulated by the Calcutta High Court in the case of *S.M. Kiranmoyee Dassi and Anr. vs. Dr. J. Chatterjee* reported at 49 CWN 246 was recognized by the Supreme Court in paragraph 8 of *Mechelec Engineers (supra)*. The said five principles were reiterated with some modifications in the case of *IDBI Trusteeship (supra)* by reason of amendment to Order XXXVII Rule 3 of the Code of Civil Procedure, as noted in Paragraphs 9.1 and 9.2 of the said report. By reason of such amendment, it was felt that the law laid down in *Mechelec Engineers (supra)* was required to be modified as the same was on the basis of law as it stood prior to amendment of Order XXXVII of the Code of Civil Procedure in the year 1976. In *IDBI Trusteeship (supra)*, in paragraph -17 six principles have been enunciated.

It is submitted that when the creation of the contract itself is in issue, the defendant bank has a substantial defence to be entitled to unconditional leave in terms of the ratio of paragraph 17.1 of the *IDBI Trusteeship (supra)*. In any event, in view of the various issues raised by the appellant in course of argument the defendant has already been able to show that it has a fair or reasonable defence. Even if it is contended & held that the appellant may not have a positively good defence still the appellant is ordinarily entitled to unconditional leave to defend in terms of paragraph 17.2 of *IDBI Trusteeship (supra)*

Mr. Chowdhury taking a cue from the said judgment has submitted that even if a doubt is left about the defendant's good faith or genuineness of triable issues, then only conditions can be imposed both as to the time or mode of trial or conditions regarding payment into court or furnishing security. It is only then the principles of paragraph 17.3 of the *IDBI Trusteeship case (supra)* comes into operation and then also "care must also be taken to see that such triable issues are not shut out by passing unduly orders as to deposit or security". Even if the

court feels that the defendant has raised a defence which is "plausible, but improbable", the conditions may be imposed in terms of paragraph 17.4 of IDBI Trusteeship Case (supra).

It is thus submitted that the issues raised herein does not attract the principles of paragraphs 17.3 and 17.4 of the IDBI Trusteeship (supra) and the defendant is entitled to unconditional leave to defend. The factual background of this case does not attract the principles of paragraph 17.5 at all. The defendant has not admitted any part of the claim of the plaintiff and the question of attracting paragraph 17.6 also does not arise.

The appellant/defendant bank is, therefore, entitled to unconditional leave to defend in the factual background of this case and the security furnished in the form of bank guarantee is liable to be returned.

Mr. Chowdhury has prayed for modification of order dated 23rd February, 2017 passed by the Hon'ble Division Bench at the time of admission of the appeal. Mr. Chowdhury submits that the appellate Court by the said order after noticing that the defendant would be liable to pay the sum of Rs.120,85,23,467/- upon adjustment of Rs.48,66,54,260/- has directed the appellant to furnish and irrevocable bank guarantee for the entire sum of Rs.120,85,23,467/- overlooking the fact that the joint receiver were at the relevant time holding a sum of Rs. 48,66,54,260/- which represents the original Rs.37 crores with accrued interest and it has now become a sum in case of Rs.55 crores. It is submitted that in the event the appellant is called upon to furnish any further security the same may be only for the balance principal amount and not the entirety and to that extent the order of the Hon'ble Appellate Court may be modified. This submission is of course without prejudice to the rights and contention of the appellant and that the appellant is entitled to an unconditional leave to defend. Since the original Rs.37 crores was already lying with the Joint Receivers and interest has accrued thereon making the same presently a sum in excess of Rs.55 crores, even assuming, but not admitting, that the appellant/defendant bank can be called upon to furnish any further security, the same can only be for the balance principal amount and not the entirety. To that extent, the order passed by the Hon'ble Appellate Court is required to be modified, in the event this Hon'ble Court does not accept the earlier contention of the appellant/defendant bank that in such circumstances, the appellant/defendant bank is entitled to unconditional leave.

Mr. Chowdhury has submitted that in cases involving fraud in a summary proceeding, unconditional leave has consistently been granted by the Hon'ble Supreme Court and in support thereof, reliance have been placed in the cases reported in (1998)5 SCC 354 Sunil Enterprises & Ors. Vs. S.B.I. Commercial International Bank Limited, (2002)4 SCC 736 State Bank of Saurashtra Vs. Ashit Shipping Services (P) Ltd. & Ors. and (2015)10 SCC 521 State Bank of Hyderabad Vs. Rabo Bank. It is argued that in fact, in the case of State Bank of Hyderabad v. Rabo Bank, the defendant contended that drawer and drawee of

the bills had perpetrated fraud on the defendant with collusion of some officials of the plaintiff bank and CBI enquiry on the issue was pending. Even under such circumstances, it was held that prima facie case of triable issues have been made out and the defendant was entitled to grant of unconditional leave to defend.

The appellant/defendant bank has also relied on the case of Mahabir Prasad Bubna v. United Bank of India (AIR 1992 CAL 270) to contend that in the event on the principles of tort and the principles of vicarious liability it was found that both the officers of the plaintiff and the defendant were involved and both the plaintiff and the defendant could be held to be vicariously liable for the act of its officers (which can only be ascertained after completion of trial and not otherwise), the question of apportionment of liability would arise on the principles of extent of involvement of the respective officers of the plaintiff and the defendant. The said case has been relied upon as a precedent for such instances of apportionment as the same pertain to principles involving negligence and contributory negligence arising out of torts.

If it is found that the representative of WBIDFC is also involved in the perpetration of fraud then the liability needs to be apportioned between the parties in which case the ratio in Mahabir Prasad Bubna (supra) would apply. This itself calls for a trial. Mr. Chowdhury submits that in the FIR the bank has also imputed the involvement of the officers of the respondent in the creation of forge and fabrication of FD and in the event at this stage the decree is passed in favour of the respondent it would render the suit filed by the UCO bank infructuous.

Per contra, Mr. Jayanta Kumar Mitra, the learned Senior Counsel appearing on behalf of the plaintiff/respondent in the appeal has submitted that the appellant has no defence to the claim of the plaintiff. It is submitted that the defendant cannot deny the fact that a sum of Rs.120 crores in two tranches of Rs.59 crores and Rs.61 crores respectively was received by UCO Bank, Circus Avenue Branch. In fact, in a suit filed by the UCO Bank being C.S. No.140 of 2013 in paragraph 8, UCO Bank has admitted receipt of the said sum. As to what happens to the said sum of Rs.120 cores after the same was received by UCO Bank on 30th August, 2012 and 10th January 2013 by RTGS from Bank of India and Indian Bank is not within the knowledge of the respondent but would be certainly evident from the internal records of the UCO Bank, Circus Avenue Branch which has not been purposely and deliberately disclosed.

Mr. Mitra submitted that in course of submission it is contended on behalf of the UCO Bank that initially the amount was lying in a suspense account with UCO Bank for about 3 days and thereafter credited to account number 08070210000496 which allegedly stood in the name of S.A. Enterprise. If that is the case of UCO Bank, clearly the fraud for crediting the bank account of S.A. Enterprise is the handiwork of the officers of the UCO Bank. The appellant is solely liable for diverting money admittedly belonging to the plaintiff to a bank account not belonging to the plaintiff.

The Civil Suit filed by UCO Bank is clearly a pre-emptive suit and was filed in order to evade the vicarious liability of the Bank for misdeeds of its officers, and more particularly the Senior Manager of Circus Avenue Branch acting in the course of his employment. The head office of the Bank in filing the prior suit was more interested in protecting itself from the liability arising out of the two fixed deposits of the total sum of Rs.120 crores created by Circus Avenue Branch in favour of the plaintiff.

Mr. Mitra has referred to the documents annexure to the plaintiff's application under Chapter XIII A of the Rules of the High Court and submitted that the said document would conclusively establish that i) the said money, namely Rs.120 crores belong to the plaintiff. ii) the said sum were paid to and received by the appellant Bank. iii) the person/officer/employee who received the said sums on behalf of the Bank did so in the regular course of employment of the Bank. iv) the moneys so received by the Bank could not be paid back by the Bank. When demand by the plaintiff. The suit filed by the plaintiff is a simple suit for money had and received by the Bank for the use and benefit of the plaintiff, which the defendant Bank wrongfully failed and neglected to pay back, in spite of demand.

It is submitted that the appellant has admitted that the sums belonging to the plaintiff had been credited in the account number as specified being the current account standing in M/s. S.A. Enterprise, one Mr. Pradip Chongdar is the proprietor. This Pradip Chongdar has been described as the "fraudstar" by the bank in its complaint letter dated 14th March 2013. In the said complaint the bank has alleged that out of Rs.120 crores a sum of Rs.82.69 crores has been surreptitiously remitted through RTGS to 25 identified parties from the said current account no.08070210000496 .

Mr. Mitra submits that although much hue and cry was raised with regard to the genuineness of two Fixed Deposits and it is alleged that said two Fixed Deposits were forged and fabricated, significantly, the signatures of the Manager and the Assistant Manager appearing thereon have not been disputed nor has it been said in the said affidavit of the bank as to what are forgeries and fabrication in relation to the said documents. The appellant has also failed to explain as to why the bank employees/officers did not take the simple precaution of holding the sums in a suspense account when they found that there was a mismatch between the name of the depositor and the account holder.

Mr. Mitra submits that in the affidavit in opposition to Chapter XIII A application, only letters issued by the UCO Bank have been alleged to be forged and fabricated. The two Fixed Deposits Receipts have also been challenged. However, the letters emanating from the plaintiff as also Bank of India and Indian Bank, copies of which were sent to UCO Bank Circus Avenue Branch in the usual course of business, have not been challenged. There is no allegation of non-receipt of the letters of UCO Bank in its plaint or even in the affidavit in opposition. Mr. Mitra has referred to the letter dated 30th August 2012, bearing reference no. 974 addressed to Sr. Manager, UCO Bank and submits that the said letter has

reference to another letter bearing no.971 dated 30th August 2012 which is the letter addressed to Bank of India. It is submitted that RTGS transfer has reference to this letter since that is the letter which was available with Bank of India. The letter dated 30th August 2012, also mentions of a lien existing in favour of Axis Bank Ltd. There is no denial of receipt of a letter dated 18th September 2012, written by Axis Bank Ltd. to both the respondent as well as UCO Bank withdrawing lien over the term deposits. The letter of UCO Bank addressed to the respondent and Axis Trustee Services Ltd., dated 10th October 2012, in response to another letter dated 9th October 2012, addressed by respondent to UCO Bank has not been disputed. The said letter notes creation of lien in respect of the term deposit of Rs.59 crores in favour of new trustee, namely, Axis Trustee Services Ltd.

Mr. Mitra has referred to paragraph 9 of the plaint filed by the UCO Bank and submits that it has been alleged that it is only "after crediting of the aforesaid payments of Rs.120 crores" that a sum of Rs.82.69 crores had been withdrawn and remitted through RTGS and pay orders in various accounts. The receipt of Rs.59 crores and Rs.61 crores on 30th August, 2012 and on 10th January 2013, respectively have been admitted by the defendant. The dates when the sum of Rs.82.69 crores was siphoned off have not been disclosed by UCO Bank although the same is within the special knowledge of UCO Bank. On the other hand in paragraph 8 of the plaint filed by UCO Bank it has been alleged that the account of Pradip Chongdar "was opened after following all banking norms."

Although Mr. Lakra was arrested for being in possession of defrauded amount, which was seized from his possession, however, particulars of the account have not been deliberately disclosed. The opening and operation of the said account and related details are within the special knowledge of the UCO Bank. The relevant details of the account allegedly of Mr. Pradip Chongdar have also not been disclosed. Significantly, the Bank did not initiate any proceedings against Lakra, Chongdar or any of the 25 parties whose names have been disclosed in the complaint made to the Police by the Bank for recovery of the money.

Mr. Mitra submits that argument has been made that the letter dated 30th August 2012 has not been received. This issue was not raised before the learned Single Judge. In any event the plaintiff has relied on this letter being annexure E to the Chapter XIII A application. There may be various modes of sending a letter. The fact that Rs.59 crores was received from the respondent by bank on 30th August 2012 and credited to an account has been admitted by UCO Bank in paragraph 8 of its plaint.

Another cloud was sought to be raised over the fact that meeting of Investment Committee of respondent was at 11 a.m. on 30th August 2012, and the document dated 30th August 2012, was allegedly received on 31st August 2012, the meeting of respondent is always held as per agenda which is circulated in advance, a date and time is always mentioned in the agenda and meetings are commenced more or less at the time fixed. While preparing minutes the schedule

time and date are mentioned, in the agenda. It is to be seen that the creation of Rs.59 crores deposit was the last agenda at the meeting and the time when the same was discussed or the meeting concluded will naturally not appear in the minutes. Significantly no such argument was made in the Trial Court or even raised in the pleadings. Hence the respondent had no occasion or opportunity to give reply thereto by producing appropriate evidence. Now that a decree has been passed against the Bank, frivolous pleas are being raised as afterthoughts at the hearing of appeal. In the 42 grounds mentioned in the Memorandum of Appeal, none of the above grounds has been mentioned.

In the circumstances aforesaid there was no option available to learned Single Judge but to pass a decree on the basis of the evidence on record, inasmuch as the purported defence sought to have been disclosed is no defence at all. The essential facts constituting the cause of action in the Suit, namely, that the said sum of Rs.120 crores belongs to the plaintiff, that the said sum was received by the Bank and that the same could not be returned by the Bank, when demanded, are all facts not disputed by the Bank. In such circumstances, the Bank did not disclose any bona fide or plausible defence to the claim of the plaintiff in the suit. The purported defence sought to be made in the affidavit-in-opposition and the suit filed by the Bank is utterly sham and moon-shine. Hence the learned Judge in the trial Court was fully justified in passing a final judgment on the application of the plaintiff under Chapter XIII A of the Rules of this Hon'ble Court.

The respondent/plaintiff has filed a memorandum of cross objection against the judgment and decree passed since the said decree did not award compound interest with quarterly rests on the decretal amount, though the Fixed Deposit Receipts for the said sums of Rs.59 crores and Rs.61 crores specifically stipulated such rate of interest. The respondent/plaintiff had transferred the amount of Rs.120 crores with a view to earn compound interest on the said amount in order to secure the bonds issued by the respondent/plaintiff, accordingly, not awarding compound interest on the decretal amount would be contrary to the agreement between the parties and would severely prejudice the respondent/plaintiff.

The essential question needs to be decided in this appeal is whether on the given facts and circumstances the defendant is entitled to leave to defend conditionally or unconditionally.

Mr. Chowdhury, learned Counsel appearing on behalf of the appellant at the outset submitted that in view of the principles laid down in IDBI Trusteeship (*supra*) paragraphs 71 and 72, the appellant is entitled to unconditional leave to defend and the bank guarantee furnished is liable to be returned. Thus, the court needs to assess the quality of the defence disclosed in the affidavit-in-opposition before the learned Single Judge in the summary proceeding in order to arrive at whether the appellant is entitled to defend the suit conditionally or unconditionally.

There cannot be any dispute that the plaintiff/respondent wanted to create Fixed

Deposit with the UCO Bank, Circus Avenue Branch. In the 110th meeting of the Investment Committee of the respondent held on 30th August, 2012 the said Committee deliberated on the issue in Agenda nos. 2(iii) (iv) and 3. The extract of the said resolution are reproduced below:-

"Agenda 2: To consider the action taken report of 109th Investment Committee meeting:

iii) Withdrawal of lien on excess sinking fund Minutes: It was reported that though letter has been sent to Axis Bank, the Bond Trustee, regarding withdrawal of lien on excess sinking fund, they have not replied till date. Company Secretary conveyed that if this is not received within the next week, a reminder will be sent to them again.

iv) Proposed investment in FDs carrying higher rate of interest to earn opportunity gain.

Minutes: It was reported that the bank i.e. Andhra Bank has not responded.

Agenda 3: To consider the replacement of sinking fund investment which will mature on 31st August, 2012.

The term deposit of Rs.58.59 crore with UCO bank, Howrah Branch will mature on 31.08.2012. The said term deposit is under lien for the Bond series of IBAD/IBAE/IBAF which will mature on 08.10.2017.

Minutes: After elaborate discussion, members recommended to create a Term Deposit of Rs.59 crore carrying rate of interest of 9.65 % p.a for 3 years, with UCO bank, Circus Avenue Branch. This was the highest rate offered by any bank on the day. Although United Bank of India quoted the same rate, their rate was not confirmed at the material time." (emphasis supplied)

Mr. Chowdhury has drawn our attention to minutes of the meeting held on 30th August 2012 which, inter alia, deals with the creation of the term deposit of Rs.59 crores forming the subject matter of both the suits. Relying on the decision taken in agenda nos. 2 (iii), (iv) and 3 it is submitted that the said decision contemplates creation of FD at a future date after the maturity of sinking fund investment on 31st August 2012.

Mr. Chowdhury was very emphatic with regard to the creation of the initial term deposit of Rs.59 crores. Mr. Chowdhury submitted that the creation of FD on 59 crores is shrouded in mystery. At the trial the plaintiff would be required to dispel the doubt created over the creation of the FD dated 30th August, 2012 if the letter dated 30th August, 2012 was received by the bank on 31st August, 2012 as would be apparent from the document disclosed in the proceeding then on what basis the FD could have been created on 30th August, 2012 at whose instance. Mr. Chowdhury submits that in paragraph 9 of the plaint filed by WBIDFC it is, inter alia, stated that the rate of interest provided in the letter dated 30th August 2012, was verified and confirmed by WBIDFC Ltd., from the

Senior Manager of Circus Avenue Branch over telephone at the mobile number provided in the said letter. If the letter is received by WBIDFC on 31st August 2012, then how come the plaintiff could make a call at the mobile number of the Senior Manager on 30th August 2012, for verification and confirmation and thereafter instructed its banker on 30th August 2012, itself to transfer an amount of Rs.59 Crores from the plaintiff's extending overdraft account to the account number provided by the UCO Bank in its letter dated 30th August 2012 in the name of the plaintiff. Is it not obvious that the unamended undisclosed representative of the WBIDFC Ltd., who claimed to have telephonic conversation with the Senior Manager of the Circus Avenue Branch on 30th August 2012, is also involved in the fraud is what Mr. Chowdhury wanted to impress upon us as a defense to the claim on Rs.59 crores.

Mr. Chowdhury has submitted that the alleged communication dated 30th August 2012 read with the other information disclosed by the respondent in the application would show that in none of the communications received from the other banks there is any reference to any account number. Significantly, the appellant has also received an offer from UCO Bank, Howrah Branch, dated 29th August 2012 which is significantly and materially different from the alleged communication dated 30th August 2012 from UCO Bank, Circus Avenue Branch, to the plaintiff. It is submitted that not only are the rates different, there is no mention of any account number or RTGS code in the offer from the Howrah Branch. It is also unusual that two branches of the same bank are offering different rates for the same period.

As observed earlier pursuant to the decision the said sum of Rs.59 crores was remitted by RTGS from in a designated bank account alleged to have been communicated by UCO Bank in its letter dated 30th August, 2012. The said letter on the face of it mentions an account no.08070210000496 and the RTGS code no UCBA0000807 for transfer of fund to the said account by following RTGS mechanism. The amount had reached the said account. The appellant has denied the said letter on the ground that the said letter is forged and fabricated. The letter bears the signature of Mr. Alois Lakra who during the course of investigation initiated at the instance of the appellant was found to be involved in the fraud. Mr. Lakra was arrested. The appellant before the learned Single Judge has disclosed the complaint dated 14th March, 2013 lodged with the DIG, CBI (BS & FC), New Delhi in respect of fraud perpetrated at the Circus Avenue Branch of the appellant involving 120 crores as also the communication received by the bank on 19th March, 2013 from the Joint Commissioner of Police (Crime), Kolkata informing that pursuant to the registration of the Hare Street Police Station case dated 13th march, 2013 under Section 120B/420/467/468/471 of the IPC read with Section 13(1)(c)(1) of P.C. Act, investigation had been initiated by the Detective Department and during course of investigation Branch Manager of UCO Bank, Circus Avenue Branch namely, Alois Lakra was arrested and pursuant to the statement of Mr. Lakra a portion of defrauded amount has already been seized from his possession. The plaint filed by UCO Bank, however,

did not disclose this communication dated 19th March, 2013. I presume that the communication dated 19th March, 2013 might have been received after the filing of the suit on the same day i.e., on 19th March, 2013 in the High Court at Calcutta. However, significantly the complaint refers to one Mr. Pradip Chongder, proprietor of M/s. S.A. Enterprise through whom the amount deposited by the respondent/plaintiff was routed in favour of the 25 entities. The complaint preceeds the filing of the suit. However, in the suit filed by the UCO Bank Mr. Pradip Chongder was not made a party. The explanation offered is that the plaintiff was unable to ascertain the exact nature and quantum of damages suffered by the plaintiff by reason of fraud, forgery as investigation by the competent authority is yet to be completed and the appellant reserved its right to claim damages against the defendant no.1 West Bengal Infrastructure Development Finance Corporation Limited, the respondent herein and/or against such person as would be ascertained upon discovery, after completion of investigation. The said suit was filed after obtaining leave under Order 2 Rule 2 of the CPC. This averment in paragraph 19 of the plaint filed by the UCO Bank needs to be considered in the light of the complaint dated 14th March, 2013 which has clearly identified Mr. Pradip Chongder as "the fraudster" and thereafter proceeds to mention that some of the officials of the defendant no.1 fraudulently conveyed the account no.08070210000496 of M/s. S.A. Enterprise as the account number of the corporation while giving RTGS remittance instruction of bank of India and Indian Bank for crediting this amount.

The extract of the said complaint, relevant for the present purpose is reproduced below:

"The fraudster viz. Sh. Pradip Chongdar (s/o Sh. Sanat Chongdar), Proprietor - M/s. S.A. Enterprises, resident of 21/4, B.T. Road, Kolkata -56 (Mob No.08620966648) West Bengal has defrauded our bank by routing two fraudulent credit entries as enumerated below:

a) Rs.59 crore dated 03.09.12 - being proceeds of an RTGS from Bank of India, Kolkata Corporate Banking Branch, Kolkata.

b) Rs.61 crore on 10.01.13 through RTGS from Indian Bank, Kolkata Main Branch.

Out of this, funds to the tune of Rs.82.69 crore have been surreptitiously remitted through TRGS to the following named accounts in various banks in Kolkata.

1. Ashtavinayak Commodities
2. Perfect Merchandise
3. Latest Trade Com Pvt. Ltd.
4. Tiger Hill Vintrade
5. Prity Saree

6. Nilam Agency
7. Moondhara Commercial
8. Jagdamba Agency
9. Anuman Traders
10. R.B. Enterprise
11. Sunshine Deal com.
12. Sunfast Commercial
13. Shri Shyam Enterprise
14. Nidhi Enterprise
15. Balaji Traders
16. Soft Link Trade Link
17. Mani Ratan Vanijya
18. Saha Trading Co.
19. N K. Enterprise
20. Raunak Trade Impex
21. S.R. Enterprises
22. Chemico International
23. Vikram Sharma
24. Tapas Dey
25. West Bengal State Marketing Board

The subject current A/c. no.08070210000496 was opened with the branch on 23.05.2012 with an initial deposit of Rs.5000/-. The money was siphoned off through this account by way of RTGS/pay orders sent to various banks on different dated to the credit of above accounts. The above account was introduced by Shri Bablu Mondal, proprietor Boni Construction, 30, Deshopriya Nagar, Kolkata 50 and Debnath Samanta, proprietor M/s. A.P. Enterprise, 21/4, B.T. Road, Kolkata 56.

Some of the officials of M/s. West Bengal Infrastructure Development Finance Corporation Ltd. (WBIDFC) fraudulently conveyed the account no.08070210000496 of M/s. S.A. Enterprise as the account number of their corporation, WBIDFC while giving RTGS remittance instruction of Bank of India and Indian Bank for crediting this amount, although WBIDFC is not having any account with UCO bank Circus Avenue Branch.

Meanwhile, two term deposits of Rs.59 crore and Rs.61 crore have been delivered to WBIDFC by unknown fraudster which on cross verification by WBIDFC with our Circus Avenue Branch have been found out to be fake. At no stage our Bank has issued any FDR for the above amounts on behalf of WBIDFC and FDRs purportedly in their possession are fake. In fact the fraud came to light when cross verification of genuineness of these FDRs was requested by WBIDFC for their internal purposes.

Due to deliberate miscommunication of account number of M/s. S.A. Enterprise (Sr. Pradip Chongdar) as their own account number to Bank of India and Indian Bank by WBIDFC, Rs.120 crore have been credited to the above named account on different dates and withdrawn resulting in a loss of Rs.82.69 crore to our Bank and the rest of the amount Rs.37.31 crore lying in the account has been freezed." (emphasis supplied)

Although UCO bank was in possession of the fact that Pradip Chongdar was a 'fraudster' for some unknown reason, no attempt was made to recover the amount from him nor he was impleaded in the suit filed by the UCO bank. The suit was filed after 14th March, 2013 by which time the UCO bank during its investigation had arrived at a conclusion that Pradip Chongdar is a "fraudster". It is an admitted position that Mr. Pradip Chongdar did not operate the said account after March 14, 2013. In the suit filed by the UCO bank the appellant has prayed for cancellation of four letters namely the letter dated 30th August, 2012, 10th October 2012, 8th January 2013 and 11th January 2013.

The letter dated 30th August, 2012 is a communication from UCO bank to the Managing Director of the respondent furnishing interest rate of bulk deposit. The said communication mentions the rate of interest, RTGS code number and account number. The letter was signed by Mr. Lakra as the Sr. Manager, Circus Avenue Branch of UCO Bank. The landline number of the Branch as well as mobile number of Mr. Lakra was furnished by the said communication. The account number as it now transpires was the account of Pradip Chongdar opened on 23rd May, 2012. This fact is admitted by the appellant in paragraph 11 of its affidavit in opposition.

There is no specific denial that this letter of 30th August, 2012 by Mr. Lakra is not signed by him or the phone number immediately mentioned below the signature of Mr. Lakra is not of the branch or the personal mobile number of Mr. Lakra mentioned therein is incorrect.

The letter dated 10th October, 2012 is a communication from UCO bank to the respondent in response to the letter dated 9th October, 2012. Uco Bank in the said communication took note of the lien on term deposit bearing no.08070210000496 in favour of Axis Trustee Services Ltd., Bond Trustee of WBIDFC Bond Series and confirm that lien marked in their favour would be lifted only after obtaining clearance from Axis Trustees Services Ltd. This letter is also signed by Lakra as Sr. Manager of UCO bank. Significantly prior to the said letter

on 30th August, 2012 the respondent advised the appellant to create a FD of Rs.50 crores for three years carrying interest @9.65% per annum w.e.f. 30th August, 2012 to mature on 30th August, 2015 by utilizing the fund, already transferred to UCO Bank through RTGS vide letter ref. no. FA & CAO/TD-3/2012-13/971 dated 30.08.2012. UCO Bank was requested to issue and deliver the FD at the earliest and to take note of the fact that no penalty would be imposed by pre mature acknowledgement of the FD over the applicable rate for the differential period of deposit.

However, what is significant in the said communication is the request to mark lien in favour of the Axis Bank Ltd. The relevant portion of the said letter is stated below:-

"We request you to please note lien on the said deposit (principal plus interest accrued thereon) in favour of Axis Bank Ltd. (2nd Floor-E, Axis House, Bombay Dyeing Mill Compound, Panduranga Budhkar Marg. Worli Mumbai-400 025) Bond Trustee of WBIDFC Bond Series, with the confirmation that lien marked in their favour will be lifted only after obtaining clearance from Axis bank ltd. being the Bond Trustee of WBIDFC Bond series."

This was followed by issuance of the FD dated 30th August, 2012 for Rs.59 crores for a period of three years at the rate of 9.65% p.a. The existence and knowledge of this letter by UCO Bank is not disputed by the appellant and a subsequent communication from Axis Bank dated 18th September, 2012 to the Managing Director of the respondent no.1 with a copy marked to UCO bank, Circus Avenue Branch regarding withdrawal of lien over term & recurring deposits amounting to Rs.853.94 Crores maintained by WBIDFC Bond Series IBAX/AY/AZ/AZ(Z), IBAA/AB/AC and IBAD/AE/AF aggregating to Rs.3000 crores. The said letter was issued by the Axis bank in its capacity as Bond Trustees for Secured Non Convertible Bonds issued by the WBIDFC aggregating Rs.3000 crores. Under the heading for Bond Series IBAD/AE/AF the Bond Trustee have specifically mentioned the term deposit created with the UCO Bank the entry reads:-

Name of the Bank

Nature of Investment

Account No.

Maturity Value/ Accrued Value

Date of Maturity

"UCO Bank, Circus Avenue Branch, Kolkata - 700017

Term Deposit

08070210000496

Rs.78.54 crores

30.08.2015

The existence and knowledge of this letter by UCO Bank is not in dispute. The UCO bank has not denied the receipt of this letter. The aforesaid two letters preceded the letter dated 10th October, 2012 issued by UCO bank which is now being disputed in the plaint filed by the UCO bank.

However, it cannot be disregarded that the account number mentioned in the purported communication of the UCO Bank dated 30th August, 2012 is not the account of the respondent. Moreover it appears that all banks save and except YES Bank and Canara Bank in their communication to the plaintiff had referred IFCS Code, Bank Code, MICR Code, RTGS Code for transfer of fund for the purpose of creation of FD. The communications dated 29th August, 2012 from YES Bank to the plaintiff in which amongst others the YES Bank describes the account to which the money may be remitted as "account name: YES Bank Limited, Account Term Deposit Suspense". The communication from Canara Bank dated 29th August, 2012 mentions an account no.0303295000001 and other communication do not mention any account number. It is, however, not clear whether the said account number mentioned by the Canara Bank, Canning Street Branch refers to any existing account number of the plaintiff. On such factual matrix it raises a doubt as to the genuineness of the transaction when a huge sum of money is remitted to an account admitted not of the plaintiff. More so, when we find that UCO Bank, Howrah Branch when approached did not mention about any account at all as well as the mode of remittance. The interest rate by two branches of the same bank are also different. The fact remains that the account number 08070210000496 is not of the plaintiff. In the communication dated 30th August, 2012 WBIDFC Ltd. has described itself as a beneficiary of the said account. The real time gross settlement statement dated 30th August, 2012 would show that the sum of Rs.59 crores was "REMITTED TO UCO BANK ACCOUNT NO. 08070210000496 IN THE NAME OF WBIDFC Ltd. AS PER LETTER DATED 30th August, 2012". This document was also disclosed before the learned Single Judge. A reading of the said document would show that WBIDFC Ltd is the account holder and the said account is maintained with the UCO Bank. This is factually incorrect. It is surprising that the plaintiff did not feel it necessary to enquire into the authenticity and genuineness of the said account. When the fact remains that the plaintiff is not the account holder, it was necessary for the plaintiff to ascertain the particulars of the said account and should have followed it up by opening a Fixed Deposit account. The document for creation of Fixed Deposit account on 30th August, 2012 has not been disclosed. I feel to that extent the plaintiff is required to explain the enquiry the plaintiff made before creation of Fixed Deposit, the appellant has made out a case for a trial on the said issue. However, the appellant cannot deny the knowledge of the creation of the Fixed Deposit and its liability to pay the said amount in view of the letter dated 18th September, 2012 emanating from the third party namely, Axis Bank, Bond Trustees. It was incumbent upon UCO Bank to immediately respond to the said letter by denying the transaction altogether. The receipt of the letter dated

18th September, 2012 has not been denied by UCO Bank.

This closes the chapter on Rs.59 crores.

The new chapter opens with the advent of new year in January, 2013.

The creation of FD for Rs.61 crores was pursuant to a resolution passed on 115 meetings of the Investment Committee held on 4th January, 2013 and 10th January, 2013. The Agenda no.3 specifically addressed the said issue. It reads:-

"Agenda no.3. To consider the maturity of Term Deposits and Recurring Deposits within 31st March, 2013 and their replenishment.

Though Shri Sobhon Poddar, Accounts Officer, has given the list of term deposits and recurring deposits which will be matured within 31st March, 2013, in the meeting members considered only those deposits, which will be matured during January, 2013. The deposits which will be matured in this month are as follows:

Sl. No.

Name of the Bank

Principal Value

Maturity value

Maturity date

Lien or not

1

State Bank of Travancore (TD)

503926712

606834350

07.01.2013

IBAA/IBAB/IBAC

2

Axis Bank (TD)

2389291527

2894687764

13.01.2013

IBAF

3

State Bank of Hyderabad (TD)

855000000 (as on 30.09.2012)

1145345623

24.01.2013

Free

Minutes: It was submitted that the deposit with State Bank of Travancore of Rs.60.68 crore approx (maturity value) has been replenished with other deposits i.e. of Rs.13.33 crore with Andhra Bank, Kasba Branch of Rs.13.33 crore with Andhra Bank, Ballygunj Branch and Recurring deposit of Rs.34 crore (17th installment) with Andhra bank, Ballygunj Branch. After reshuffling the fixed deposits, it was observed that fresh deposit of Rs.61 crore is required to be created for a replenishment of the deposit with Axis Bank of Rs.289.46 crore (Maturity value) under lien against Bond Series IBAF which will be redeemed on 04.10.06. After going through the rates collected from the bank, members decided to create deposits with UCO Bank, Circus Avenue Branch at the interest rate of 9.57% for three years being the highest rate for three years tenure. The tenure is very close to the maturity date of the said Bond Series."

On 8th October, 2013 Mr. Lakra as senior Manager of UCO bank furnished particulars of rate of interest on bulk FD above 10 crores. In the said communication the senior manager purported to have furnished RTGS code number and the account number similar to the creation of FD on 59 crores. Significantly the signature of Mr. Lakra was not denied by the UCO bank. This was followed by another letter dated 11th January, 2013 from UCO Bank regarding marking of lien of FD no.983882 in favour of Axis Bank Ltd. By the said communication the bank had confirmed that it had marked lien on the said FD. The said letter is also purported to have been signed by Mr. Lakra. The signature of Mr. Lakra is not denied.

These two letters are also the subject matter of challenge in the suit filed by UCO bank in C.S. no.140 of 2013.

However, it is significant to note that on 14th January, 2013 Axis Bank as bond trustees in its communication to the Managing Director of the respondent no.1 has informed that pursuant to the records made by the respondent on 11th January, 2013. Lien has now been marked on various FD of WBIDFC Ltd. in favour of Axis bank Ltd. which, inter alia, include in serial no.8, FD of Rs.61 crores. The relevant portion reads:

"We also note that lien now been marked on the following deposit of

WBIDFC in favour of Axis Bank Limited so as to maintain the security level:

8.

UCO bank, Circus Avenue Branch, 17, Lower Range, Kolkata - 700 017

Term Deposit

08070210000496

61

10.01.2016

This communication was also marked to UCO bank, Circus Avenue Branch. The receipt of this letter is not denied.

Although factually creation of Fixed Deposit for Rs.61 crores is significantly different from the creation of Fixed Deposit of Rs.59 crores but the fact remains that the said amount was remitted to account number 08070210000496. The plaintiff was equally put to enquiry as the said account never belongs to the plaintiff and having regard to the unusual features noticed in relation to the creation of the Fixed Deposit of Rs.59 crores, in my view the success of Rs.61 crores is also depended upon the fate of Rs.59 crores.

Mr. Chowdhury has submitted that the claim of the respondent sounds in tort and no decree could have been passed under chapter XIII A of the Original Side Rules on a tortious claim.

On the last limb of the argument that this court has no jurisdiction to decide the application for summary judgment as it is a claim in tort and not a claim on any express or implied contract, we are unable to accept the submission of Mr. Chowdhury.

In deciding an application for summary judgment the court is required to find out whether it conforms to Chapter XIII A Rule 1A of the Original Side Rules. The said rule is reproduced below:

1. Nature of cases in which applicable.- The provisions of this Chapter shall not be applicable save to suits,-

(a) in which the plaintiff seeks to recover a debt or liquidated demand in money payable by the defendant with or without interest arising-

(i) on a contract express or implied; or

(ii) on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only; or

(iv) on a trust; or

The claim of the plaintiff needs to be scrutinized on the touchstone of Rule 1A of the Chapter XIII A Rules. The case made out in defence cannot change the nature, completion and character of the claim made in the plaint. The cause of action in the suit is for recovery of money had and received. The creation of two FDs in favour of respondent by the appellant is a contract between the defendant

and the plaintiff that on maturity the appellant would be obliged to remit the proceeds thereof to the respondent.

Accordingly the plaintiff in the suit seeks to recover a debt in money payable by the defendant with interest on the two several FDs. It is a debt of the UCO bank to be discharged on maturity. The claim for money had and received is not an action in tort (see. *Chesworth vs. Farrar* Reported at 1967 (1) QB 407) By creation of the FDs the defendant has acknowledge its liability and promised to pay the proceeds of the FDs on maturity.

The relationship of banker to customer is one of contract in 1833, Chief Justice Denman of the Queen's Bench in *Sims v. Bond* reported in (1833) 5 B. & Ad. 389, in the course of his judgment has said at pages 392-3 that "sums which are paid to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker." This legal principle received the imprimatur of the House of Lords in *Foley v. Hill* (supra), wherein Lord Cottenham LC said:

"Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v. Marchant*, 1 Phillips 360); it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands." (emphasis supplied)

(See: *Foley v. Hill* (1848)2 HL Cas 28]:[1843-60] AII ER Rep 16). It consists of a general contract, which is basic to all transactions, together with special contracts which arise only as they are brought into being in relation to specific transactions or banking services. The essential distinction is between obligations which come into existence upon the creation of the banker-customer relationship and obligations which are subsequently assumed by specific agreement; or, from the standpoint of the customer, between services which a bank is obliged to provide if asked, and services which many bankers habitually do, but are not bound to, provide.

There is only one contract made between the respondent and the bank (See.

Joachimson Vs. Swiss Bank Corporation [1921] 3 KB 110 at 119 and 127).

Mr. Chowdhury has argued that in the meeting held on 30th August, 2012 the members of the Investment Committee could not have taken note of the contents of the letter dated 30th August, 2012 as admittedly the said letter was received by WBIDFC on 31st August, 2012 and accordingly it would be for WBIDFC to explain at the trial as on what basis the said decision was taken. Mr. Chowdhury wants to impress upon us that the creation of FD for Rs.59 crore is the handiwork of the officers of the respondent in connivance with Pradip Chongdar. In such a situation the entire liability cannot come on the shoulder of the UCO bank. This submission, however is in the alternative, as Mr. Chowdhury has categorically submitted that the entire dispute has to be viewed holistically in order to assess whether the appellant has been able to make out a bona fide defence to the claim of the respondent. In the minutes of the meeting held on 30th August, 2012 the Investment Committee has noted that a term deposit for Rs.58.59 crore with UCO bank, Howrah branch would mature on 31st August, 2012. The said term deposit is under lien for the Bond series of IBAD/IBAE/IBAF which would mature on 8th October, 2017. The creation of the FD for Rs.61 crores had taken place on 10th January, 2013. The FD receipts disclosed by the appellant as well as the respondent would show that the FD receipts dated 10th January, 2013 for Rs.61 crores was due to mature on 10th January, 2016 was signed by the Assistant Manager and the Manager of UCO bank. One of the signatories of the said FD on behalf of the bank is Alios Lakra. The signature of Mr. Lakra in any of the letters and documents emanating from the Bank is not disputed. One would have expected Mr. Alois Lakra to affirm an affidavit denying involvement and signature. The four documents namely, the letter dated 10th January, 2013 from respondent to the appellant, FD receipt dated 10th January, 2013, the letter dated 11th January, 2013 from UCO bank to the managing Director of WBIDFC and the letter of the bond trustees dated 14th January, 2013 read together would unmistakably established that the UCO bank was aware of creation of FD of Rs.61 crores and had acknowledge receipt of Rs.61 crores for creation of Fixed Deposits. These documents read with the communication from the Joint Commissioner of Police dated 19th January, 2013 to Zonal Manager of UCO bank clearly establish the involvement of Alois Lakra in the perpetration of fraud. Moreover it appears from the said communication that a portion of defrauded amount has already been realised from his possession. Mr. Lakra remanded to police custody on 26th March, 2013. Surprisingly no recovery proceeding was initiated against Shri. Pradip Chongdar, its constituents although UCO Bank is convinced that Mr. Chongdar is the fraudstar. Mr. Chongdar had siphoned off 82.69 cores leaving behind a sum of Rs. 37 crores before the detection of fraud. Mr. Chongdar since then has neither operated the account nor made any demand nor has he protested against freezing of his current account. It clearly established that the money never belonged to Mr. Chongdar.

This brings us to the quality of the defence raised by Mr. Chowdhury vis a vis the principle of vicarious liability. Where the relationship of employer and employee

exists, the employer is liable for the torts of the employee that are committed in the course of employee's employment. The nature of the tort is immaterial and the employer is liable even where the liability depends upon a specific state of mind and his own state of mind is innocent.

In *Adams Vs. Law Society* [2012] EWHC 980 (QB), Foskett J. recognized the possibility of an institution being held vicariously liable in respect of an employee's misfeasance in a public office. Where they do so occur, and the question of the employer's liability in contribution proceedings arises, the decision of the House of Lords in *Dubai Aluminum Co. Ltd. Vs. Salaam*, [2002] UKHL 48, [2003] 2 A.C. 366 becomes relevant. For it was held there that the innocence of the employer is irrelevant; he should be treated as standing in the employee's shoes. In *Dubai Aluminum* (supra), the issue was whether a firm of solicitors was vicariously liable for a partner's alleged dishonest assistance in a breach of trust under Section 10 of the Partnership Act 1890. It was held that "wrongful acts" were not confined to common law torts and in fact extended to the equitable wrong of dishonest participation in a breach of trust. Applying *Lister v Hesley Hall Ltd*, [(2001) UKHL 22: (2002) 1 A.C. 215]. Lord Millett asserted that the best approach was to ask whether the wrongful conduct was so clearly connected with the acts the partner was authorized to do that "for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partners while acting in the ordinary course of the firm's business or the employee's employment. [Applied in *JJ Coughlam v Ruparelia* (2003) EWCA Civ 1057; (2004) P.N.L.R.]

The question whether a wrongful act is within the course of employment is a mixed question of fact and law, The decision as to whether there is vicarious liability "is a conclusion of law, based on primary facts, rather than a simple question of fact." [Per Etherton L.J. in *HSBC Bank Plc v 5th Avenue Partners Ltd* (2009) EWCA Civ 296 (2009) 1 CLC 503.] and no simple test is appropriate to cover all cases. The hitherto most frequently adopted test was that propounded by Salmond, [Now contained in *Salmond and Heuston on the Law of Torts*, 21st edn (London: Sweet & Maxwell, 1996), p. 443], namely, that a wrongful act is deemed to be done in the course of employment:

"If it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes - although improper modes - of doing them."

Adopting this test, the courts historically sought to distinguish between those acts of an employee which constitute an improper mode of carrying out his duties and those acts which fall outside the scope of his employment. However,

in the light of the leading case, *Lister v Hesley Hall* (supra) that test is now inadequate in case involving an employee's intentional wrongdoing. There, the issue for the House of Lords was whether the employers of a warden of a school boarding house could be vicariously liable for the acts of sexual abuse perpetrated by that warden on boys in his care. Their Lordships held that the Salmond test was unhelpful in cases of intentional wrongdoing, particularly where the employee sets out to benefit himself. Instead, they looked to the close connection between the acts in question and the employment. As Lord Steyn put it, the test for whether an employee has acted in the course of his employment was whether the tort was "so closely connected with his employment that it would be fair and just to hold the (employer) vicariously liable" [ibid at (28) Lord Millett also held, at (70), that the critical issue was "the closeness of the connection between the employee's duties and his wrongdoing". This test has its origins in two decisions of the Supreme Court of Canada: *Bazely v Curry* (1999) 2 SCR 534 and *Jacobi v Griffiths* (1999) 2 SCR 570]. Applying this test to the facts of *Lister* it was held that, rather than the employment merely furnishing an opportunity to commit the sexual abuse, the connection between the employment and the torts was very strong. Lord Steyn noted that, "the reality was that the County Council were responsible for the care of the vulnerable children and employed (the warden)... to carry out that duty on its behalf. And the sexual abuse took place while the employee was engaged in duties at the very time and place demanded by his employment". Thus, he concluded, the sexual abuse was "inextricable interwoven with the carrying out by the warden of the duties". [See also *B v Nugent Care Society* (2009) EWCA Civ 827; (2010) 1 WLR 516.]

In similar vein, the Court of Appeal held in *Gravil v Carroll* [(2008) EWCA Civ 689; (2008) ICR 1222] that a punch thrown by the defendant club's player in the melee that followed the final whistle in a professional rugby match could be regarded as a sufficiently ordinary incident of a rugby match to engage the defendant's vicarious liability. Where, however, an employee returns to his place of work, while drunk, in order to assault a fellow employee who is working a night shift there, there will not be a sufficiently close connection for vicarious liability to be imposed: this would be "an independent venture of (the employee's) own, separate and distinct from (his) employment as a Senior Health Assistant at a care home". [Weddall v Wallbank Fox Designs Ltd (2012) EWCA Civ 25; (2012) IRLR 307, at [45] per Pill L.J.; *Wallbank v Wallbank Fox Designs Ltd*. [2012] EWCA Civ 25; [2012] I.R.L.R. 307 (conjoined appeal with *weddall*) Equally, where a petrol station employee conducts an unprovoked, racially-motivated attack against a customer, there will be no vicarious liability on the part of his employer. There is no close connection in such circumstances, for the nature of the employee's work is not such as to carry with it an inherent risk of "friction, confrontation or intimacy." [Mohamud v WM Morrison Supermarkets Plc (2014) EWCA Civ 116; (2014) 2 All ER 990 at (42) per Treacy L.J.]

Of its very nature fraud involves the deception of the victim and by that

deception his persuasion to part with his property or do some other act to his own detriment and to the benefit of the person practicing the fraud. For this reason the decision whether an employee committed fraud in the course of his employment can only be made after the authority, actual or ostensible, with which the employee is clothed has been ascertained.

The decision in *Barwick v English Joint Stock Bank* [(1867) L.R. 2 Ex. 259] first established the possibility of vicarious liability for fraud, and in *Lloyd v Grace, Smith & Co* [1912] A.C. 716 a solicitor was held liable for the fraud of his managing clerk who induced a client to transfer property to him and then dishonestly disposed of the property for his own benefit.

In *Barwick* (supra), Willes, J. said that "the general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit."

In *Lloyd* (supra) a solicitor's managing clerk who had a general authority to conduct conveyancing business induced a widow to give him instructions to realize properties with a view to reinvestment of the proceeds. For the purpose she handed him her title deeds, for which he gave her a receipt in his principal's name; and, at his request, she signed two documents, which were not read over or explained to her, and which were in fact conveyances of the properties to the clerk. He afterwards disposed of the properties for his own benefit. The principal was liable for the fraud.

In *Uxbridge Permanent Benefit Building Society v. Pickard*, (1939 2 K.B. 248) a case of fraud committed by a solicitor's clerk, counsel for the defendant solicitor argued that the case should be treated as analogous to those cases in which an employee had been held to be on a "frolic of his own", but the argument was rejected. (1939 2 K.B. 248 at 254).

In *Uxbridge* (supra) A solicitor's managing clerk was authorized to carry out conveyancing business and to borrow money from building societies, on behalf of clients, upon security of mortgage. He obtained an advance from a building society by producing a deed which he knew to be forged.

The liability of an employer for fraud committed by his employee, though part of the law of employer and employee, has, in fact, a close connection with the law of principal and agent in contract, for there, too, the liability of the principal depends upon the authority, actual or ostensible, with which the agent is clothed. In *Stone & Rolls Ltd. Vs. Moore Stephens* [2009] UKHL 39: 2009 (1) A.C. 1391, Lord Phillips in rejecting the defence of *ex turpi causa* made plain that the case had to be tackled on the same grounds as attribution in the law of agency. He began by outlining the "imputation principle under which both the knowledge and conduct of an employee or agent are (ordinarily) attributed to his principal where that person is acting in the course of his employment or within his apparent authority."

In *United Africa Co. Ltd. v. Saka Owoade*, (1955 A.C. 130). A, at the request of B, a transport contractor, committed goods to B's servants for carriage by road. In the course of their employment B's servants stole the goods so received. On such facts, The Judicial Committee held:-

"A master is liable for his servant's fraud perpetrated in the course of the master's business, whether the fraud was for the master's benefit or not, if it was committed by the servant in the course of his employment. There is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of employment."

The case was decided upon the ground that the claimant was invited by the firm of solicitors to deal with their managing clerk, who was in fact held out as authorized to transact the claimant's business on behalf of the firm. As Lord Loreburn said: "If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it." In such cases, the court is not entitled to expect a fraud victim to make enquiries about the legitimacy of a transaction even if there are reasonable grounds for suspicion. All that matters is that the defendant's employee had actual or ostensible authority to act in the way that he did and that the claimant was defrauded. (*Quinn v. CC Automotive Group Ltd.* [2010] EWCA Civ 1412)

The principle to be derived from *Lloyd* (supra) is that the employer will be liable if the fraudulent conduct of the employee falls within the scope of the employee's authority, actual or ostensible. This was reaffirmed by the House of Lords in *The Ocean Frost* (1986 1 A. C. 717). There, the vice-president of the defendant company, without actual or ostensible authority, contracted for the sale of the defendants' ship to the claimants and its charter back to the defendants. The claimants sued for deceit and argued that the vice-president had acted in the course of his employment so as to make the defendants vicariously liable for his fraudulent misrepresentation that he had authority for the transaction. The House of Lords rejected the claimants' contention that an employee might be acting beyond the scope of his authority but within the course of his employment, at least in the case of fraud or deceit. Lord Keith asserted that "the essential feature for creating liability in the employer is that the party contracting with the fraudulent servant should have altered his position to his detriment in reliance on the belief that the servant's activities were within his authority, or, to put it another way, part of his job". (ibid. at 781) Such authority may be either actual or ostensible, but as Lord Keith noted, cases of ostensible specific authority, rather than ostensible general authority, would be rare and unusual. A fortiori, the employee cannot confer authority upon himself simply by representing that he has it. The employer must, by words or conduct, have induced the impaired party's belief that the employee was acting within his authority. [See Clerk & Lindsell on Torts, 21st Edition].

The judgment in Mahavir Prasad (supra) has been relied on by both parties in support of their respective cases. Mr. Chowdhury has relied on the said decision on an assumption that the officers of the plaintiff are equally guilty and hence there has to be an apportionment of the loss suffered by UCO Bank and the entire liability cannot be fastened upon UCO Bank alone. Mr. Mitra, on the other hand, has relied upon the observations made in the said judgment that if the bank has not paid in accordance with the contractual mandate, the bank is liable on contract, notwithstanding the issues of negligence or carelessness. In order to escape its liability, the bank would be required to show that the signatures on any one of its letter or the signature of the bank officials on the two FDRs are not genuine. Unless the appellant is able to establish that the signatures on the FDRs or at least one of the signatures are/is not genuine, the appellant is bound to honour the FDRs on maturity.

There is no categorical assertion that the signatures on any one of the four letters or the two FDRs are not of the officers of the appellant. Even if it is assumed that the signatures are genuine, there is no assertion that there is a lack of authority of the officers of the bank who signed the documents, which the respondent could have ascertained with ordinary diligence. Therefore, I am unable to hold that the appellant had a good defense to the claim of the plaintiff.

It would seem to me a defence "full of holes as a colander". The appellant has not asserted that Mr. Lakhra, the signatory in all the letters and a joint signatory to the FDRs, was not authorized to sign the FDRs. The authority of Mr. Lakra and the other officer to sign fixed deposit receipts are not disputed by the appellant. The name of the Joint signatory has not been disclosed. One would have expected that had it been a plea taken that these persons had no apparent or ostensible authority, then the consequence would have been different. Significantly the signatures of none of the officers on the FDRs have been disputed. I am not unmindful of the fact that the doctrine of "indoor management" which is well established applies only to irregularities that otherwise may affect a general transaction and does not apply to forgery, but to succeed on such a plea, a categorical plea is required from the appellant that the signatures of both the officers of the bank had been forged. Over and above, the communications by Axis Bank Ltd., as bond trustees to the appellant, regarding marking of lien of the said two FDRs is sufficient to put the appellant on notice that it had an obligation to discharge to the bond trustees and immediately it puts the appellant to an enquiry as to the genuineness of the said two documents. The appellant has failed to offer any satisfactory explanation on these issues. In any event and in any view of the matter the said sum of Rs.37 crores never belonged to UCO Bank and admittedly the money belongs to the appellant. Mr. Chongdar 'the fraudstar' has not made any claim over this sum since detection of fraud in or about March 2013. Accordingly the respondent/plaintiff is entitled to the sum of Rs.37 crores with accrued interest.

I have already stated the nature of the triable issue raised by the defendant and

I have serious doubt about the defendant's good faith having regard to the facts I have already stated in the preceding paragraphs. Since a doubt is created with regard to the creation of the FDRs and Mr. Lakra may not have been the only person responsible for the fraud I agree with the conclusions arrived at by my brother Justice Kapur.