

IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 752 of 1984

[Cherat Cement Company Limited v. Ghazanfar Ali and two others]

Suit No. 358 of 1985

[Ghazanfar Ali and another v. Cherat Cement Limited and others]

Date of hearing : 10.05.2017

Date of Judgment : 28.07.2017

Claimant : Cherat Cement Company Ltd. (Plaintiff in Suit No.752 of 1984 and Defendant No.1 in Suit No.358 of 1985), through Mr. Khalid Mehmood Siddiqui, Advocate.

Objectors : Ghazanfar Ali, Tasneem Zaki and Mrs. Afsari Begum (Defendants in Suit No.752 of 1984 and Plaintiffs in Suit No.358 of 1985). Nemo for the Objectors.

Precedents cited

Law under discussion: (1) Tort Law.
(2) Civil Procedure Code, 1908.
(3) Qanun-e-Shahadat Order, 1984.

JUDGMENT

Muhammad Faisal Kamal Alam, J: This action has been brought by Plaintiff against three Defendants, two of them, viz. Ghazanfar Ali and Tasneem Zaki, were the employees of Plaintiff's Company, whereas, the Defendant No.3 (Mrs. Afsari Begum) is the wife of Defendant No.1. Following relief has been prayed by the Plaintiff in Suit No.752/1984_

“It is therefore prayed that this Hon’ble Court may be pleased to pass Judgment and Decree as under: -

- (a). ***To declare that the Plaintiff are the owners of:***
- 1. Khas Deposits for Rs.3,70,000/-.***
 - 2. Amount of Rs.3,00,000/- deposited with the Habib Bank Ltd., against Seven days’ Notice deposit (SND).***

3. *Flat No.A-200 Second Floor, Block-I, Chapal Luxury Apartments, Clifton, Karachi.*
4. *Flat No.A-300, Third Floor, Block-I, Chapal Luxury Apartments, G-19/2, Block-9, KDA Scheme No.5, Kehkashan, Clifton, Karachi with deposits of Rs.2,82,000/-.*
5. *Plot No.R-709, Sector 15-A, North Karachi admeasuring 120 Square Yards with all that incomplete house thereon.*
6. *Volkswagon Car No.038-465.*
7. *120 Prize Bonds of Rs.500/- each.*
8. *Gold Ornaments.*
9. *TV Set and VCR. No.6, 7, 8 and 9 with the Police.*

(b). A Decree for Rs.23,57,117.83 against the Defendants No.1, 2 and 3 jointly and severally.

(c). Cost of the suit.

(d). Any other relief which this Hon'ble Court may deem fit and proper.”

2. Summons were issued and Defendants filed their Written Statements and contested the suit.

3. In the intervening period, the above named Defendants No.1 and 3 also instituted a suit being Suit No.358 of 1985, against the Plaintiff and its officers (Defendants No.1 to 7), whereas, Defendant No.8 (Sarwar Ali) was working with Bankers Equity (erstwhile) as its Senior Executive. The present Defendants of Suit No.752 of 1984 for the sake of reference and to avoid confusion, be referred to as the “**Objectors**”, whereas, the Plaintiff-Company shall be called as the “**Claimant**”. In the subsequent Suit No.358 of 1985, the Objectors have claimed that officers / employees of the Claimant-Company, by exercising coercive measures and threats compelled the present Objectors to sign the blank documents in which the present

Objectors have admitted their guilt in respect of the embezzled amount. These documents include Undertaking and Iqarnama.

4. The Prayer Clause of Suit No.358 of 1985 (filed by the Objectors) runs as follows_

“It is, therefore, prayed that the Hon’ble Court will be pleased to pass a decree in terms mentioned hereunder: -

- (a). That the Hon’ble Court will be pleased to hold, and declare that the defendants No.2 to 6 have obtained signatures of the plaintiff No.1 on typed stamp papers or other documents/blank papers the contents of which are not known to them not read over and later know the contents of two documents annexures at 7 filed in suit No.752 of 1984 all having been signed under duress and without fee will consent and accord of the plaintiff No.1 and therefore are of no consequence and are liable to be cancelled and the same cannot be used against the plaintiff No.1 by any of the defendants or at any time.*
- (b). Likewise the Hon’ble Court will be pleased to hold and declare that the defendants No.3 to 6 have in conspiracy with each other defendants, under threat and coercion obtained the signature of the plaintiff No.2 on typed stamp papers / ordinary papers and / or blanks papers without her consent, knowledge, accord of the plaintiff No.2 as well as not knowing therein contents are of no consequences and cannot be used against the plaintiff No.1 at any time by any of the defendants and are also liable to be cancelled.*
- (c). That the Hon’ble Court will further be pleased to hold and declare that the defendants No.2 to 6 for themselves or on behalf of defendant No.1 have illegally and without lawfully authority and forcibly taken possession of the articles mentioned in the schedule “A” attached with the plaint and valued at Rs.730800/- from the lawful custody of plaintiff No.2 and therefore are liable to return the articles mentioned in the schedule to the plaintiffs and upon failure*

to do so each of the defendants named hereinabove are jointly and severally liable to pay the value of the articles and till such payment is made they are also liable to pay interest at the rate of 14% per annum for the value of the articles as from 11.10.1984.

- (d). That the Hon'ble Court will be pleased to award in favour of the plaintiffs and against defendants a sum of Rs.10,00,000/- as damages for causing mental torture, defamation of character, reputation, loss of income and being ostracized by the community on account of humiliation brought in by the defendants and for wrongful dismissal of the Plaintiff No.1 from service due to their wrongful acts and deeds.*
- (e). That in the event the articles in relief (c) are not returned for a decree for the total sum of Rs.1730800/- for the reliefs (c) and (d) be passed with interest at the rate of 14% amount.*
- (f). That the defendants are liable to be restrained from misusing any of the documents/papers, etc. that were made to be signed forcibly by either of the plaintiffs in the manner described hereinabove under threat, coercion and without free will and accord.*
- (g). That the Hon'ble Court will be pleased to grant any other relief / relieves to the Plaintiffs, that the Hon'ble Court may deem fit and proper in the circumstances obtaining in the case with cost of the suit.”*

5. In the earlier round of litigation, from the divergent pleadings of the parties, following consolidated issues were framed_

- “(i). Whether the Director of the plaintiff Company signed cheques in fictitious name under fictitious bills and obtained the proceeds of the cheques through deposit in the joint account of defendant's No.2 and Abdul Jalil Bintory or the defendants drew the benefits thereof?*

- (ii). *Whether the plaintiff Company has shown any misappropriation of the Plaintiff's account in the Audit reports of the year when amounts of cheques were drawn and paid either to the Director Muhammad Akram and Finance Manager Fakhre Alam or appropriated by the defendants for their own use and benefits?*
- (iii). *Whether the defendants No.2 to 6 in Suit No.358 of 1985 confined the plaintiff No.1 in the office of the defendant Company and under threat and coercion obtained his signatures on several blank and written stamped papers without disclosing their contents? If so, what is its effect?*
- (iv). *Whether the defendants No.2 to 6 in Suit No.358 of 1985 likewise, during the mid-night on 11.10.1984 raided the house of the plaintiff No.1 while he was confined in the office and forcibly obtained the signatures of plaintiff No.2 on the papers both stamped and plain ones under threat of bodily injuries as well as taken away the valuables from the house as enlisted in the plaint?*
- (v). *What should the decree and against whom?"*

6. This Court subsequently delivered the common Judgment in both the above Suits on 19.03.2001, which was challenged by the Claimants on various grounds and eventually learned Division Bench of this Court decided both the High Court Appeals No.119 and 125 of 2001 through Judgment dated 20.01.2009 together with certain directions, *inter alia*, by framing following Issues and remanded the case for decision afresh on the basis of the subsequent issues.

7. Following are the Issues framed in High Court Appeals No.119 and 125 of 2001_

- "A. Whether the respondent deposited the amount of the appellant Company in their personal accounts under the directions of Director Muhammad Akram and Finance Manager Syed Fakhar Alam? If so, what is its effect?"*

If the answer of the above issue is in affirmative then:

- B. Whether appellant Company is bound by act of Directors, Finance Manager? If not, its effect?*
- C. How-much amount has been deposited in the personal account of the respondents and how-much amount, if any, respondent has credited / in the account of the appellant out of it?*
- D. Whether Defendants No.1 to 6 in Suit No.358 of 1985 have illegally snatched jewelries, Bank Deposits title deeds etc. as mentioned in Schedule A.*
- E. Whether defendants No.1 and 2 are entitled for damages for the loss of reputation, mental torture, malfeasance and misfeasance? If so, for what amount.*
- F. What should the decree be?"*

8. Evidence was led by the parties.

9. On a query about continuous absence of the Objectors and their counsel from the proceedings, Mr. Khalid Mahmood Siddiqui, learned counsel for the Claimant has referred to different orders, while stating that all the articles, Khas Deposits, which were earlier lying in the custody of the Nazir, were directed to be returned to the Objectors (Defendants No.1 and 3), in terms of the earlier Judgment of 19.03.2001, therefore, all Objectors have lost interest to pursue the matter. To further substantiate his submissions from the record, the learned counsel has referred to order dated 12.03.2012, when the last time Defendants appeared. On 29.03.2012 an Additional Affidavit-in-Evidence was filed after the aforereferred Judgment of learned Division Bench. On 13.08.2015, Plaintiffs/Claimants witness was examined by Claimants' counsel and thereafter few more opportunities were afforded to Defendants / Objectors to cross-examine the witness of Claimants, but the said Objectors failed to do so, which eventually led to

passing of the order dated 20.11.2015 when the side of Defendants to cross-examine the Claimants' witness was closed and cross-examination was marked as 'Nil'. On 22.02.2017, the Office was directed to list both the *lis* for final Arguments.

10. Crux of the pleadings of the Claimant (Cherat Cement Limited) is that the Objectors (Defendants of Suit No.752 of 1984) were guilty of embezzlement by employing deceptive measures, which includes utilizing the Bank Account of Objector No.3 (Afsari Begum) wife of Objector No.1-Ghazanfar Ali, who was maintaining a joint account with her near relative, namely, Abdul Jalil Bintori (“**Bintori**”). The joint Bank Account bearing No. 989-7, maintained at Habib Bank Limited (HBL) PECHS Commercial Area Branch, was used in the transaction in question. Cheques through which the amounts were embezzled were prepared by Objectors No.1 and 2, who were in the Accounts Department of Claimants Company and those cheques were made usually in the name of said Bintori. It is also pleaded by Claimants that the embezzled amount was utilized in purchasing Khas Deposit and invested and diverted into real estate. Objectors were also booked in Criminal Case as well. It has been specifically pleaded by the Claimants Company that the alleged fraud came to light in September, 1984 when the Claimants' Company received a letter from the office of Assistant Collector of Customs (Appraisalment) for payment of Rs.29,311.21 (Rupees Twenty Nine Thousand Three Hundred Eleven and Twenty One Paisas Only). After preliminary inquiry, it transpired that a Cheque No.96717773 dated 25.06.1984 for the above demand amount was already drawn on Muslim Commercial Bank at its Shaikh Sultan Trust Branch, Karachi, but the cash was collected by Objector No.2.

11. On the other hand, pleadings (Written Statement) of Defendants No.1 and 2 (the Objectors) have set up a defense that the Objectors were

misled and trapped by Director and Finance Manager of Claimants' Company and these employees / senior Executives of Plaintiff's Company, namely, Muhammad Akram and Fakhar-e-Alam requested the Objectors that for certain transactions the personal account of Objector / Defendant No.3 should be used, primarily from tax point of view. In Paragraphs-I, IV, V and VI of Written Statement, Objector No.1 has acknowledged the factum of diverting the funds of Claimants Company into the aforereferred HBL Bank Account of his wife / Objector No.3, but with the defense that he was induced by the senior Executive of Claimants Company.

12. Both the Defendants No.1 and 2 (Objectors) were also maintaining their Bank Accounts in the above PECHS Branch being Account No.CD-1372 and Saving Account No.1/4798-8. With regard to two documents, viz. a Declaration and Iqarnama alleged to have been signed by Objectors No.1 and 2, namely, Ghazanfar Ali and Tasneem Zaki, Objectors maintained that these documents were signed under duress and devoid of any legal value.

13. Issue wise determination is as follows_

ISSUE No. A	_____	As under.
ISSUE No. B	_____	Redundant.
ISSUE NO. C	_____	As under.
ISSUE No. D	_____	Negative.
ISSUE No. E	_____	As under.
ISSUE No. F	_____	Accordingly, Suit No.358 of 1985 is dismissed. Suit No.752 of 1984 is decreed as under.

REASONS

ISSUES NO. 'A', 'B' AND 'C':

14. Claimant's side led evidence by examining three witnesses; (i) Rauf Jafrani (Company Secretary of Claimant, as P.W.-1), (ii) Syed Fakhar-e-

Alam (Finance Manager), against whom the Objectors have alleged that the former was the actual beneficiary of the mis-appropriated funds. The said Fakhar-e-Alam was P.W.-2, (iii) Faizan-ul-Haq (Manager, Habib Bank Limited, PECHS Commercial Area Branch), who deposed in a criminal case also, filed by Claimant against the Objectors. Latter was P.W.-3.

15. From the side of the Objectors, only Objector No.1 (Ghazanfar Ali) testified as D.W.-1, and (iv) after remand, one more witness from the Claimant's side was examined, namely, Humayun Akhter Zuberi as P.W.1(a).

16. Since intricate factual dispute is involved about the embezzlement, it would be necessary to give herein under some basic facts and detail of Bank Accounts, which are relevant for the purpose of resolving controversy_

(i). Claimants' Company (Cherat Cement Company Limited), *inter alia*, is claiming that an amount of **Rs.23,57,117.83** (Rupees Twenty Three Lacs Fifty Seven Thousand Eleven Hundred Seven and Eighty Three Paisas Only) has been embezzled by Defendants No.1 and 2, the Claimants' former employees and now the Objectors, through Objector / Defendant No.3 (wife of Objector No.1).

(ii). It is an undisputed position reflecting from Paragraph-8 of the Complaint that Claimants Company at that relevant time was maintaining the following Bank Accounts in Muslim Commercial Bank (MCB) and Bank of Credit and Commerce International (BCCI);

1. Muslim Commercial Bank Ltd.,
Sheikh Sultan Trust Branch, Karachi

i) A/c. No.PLS-330-being operated by Company's Director Mr. M. Akram and Bankers Equity Ltd's Nominee Mr. Sarwar Ali.

ii) A/c. No.161-being operated by Company's Director, Mr. M. Akram jointly with the then Company's Finance Manager, Syed Fakht-e-Alam.

2. Bank of Credit & Commerce International (Overseas) Ltd., BCC House, I.I. Chundrigar Road, Karachi.

A/c. No.010-2377-0 being operated by Company's Director Mr. M. Akram;

(iii) whereas, the embezzlement has been alleged to be done or channelized through the following Bank Accounts of the Objectors_

(I). Bank Account No.989 jointly operated by Defendant No.3 (Afsari Begum) and her brother Abdul Jalil Bintory.

(II). Bank Account No.CD-1372; this was solely operated by Defendant No.1 (Ghazanfar Ali).

(III). Saving Account No.1/4789-8; solely maintained by Defendant No.2 (Tasneem Zaki).

17. Objector No.1 (D.W.-1) in his lengthy Examination-in-Chief has admitted about diverting the funds of Claimant to the personal Bank Accounts (ibid) of the Objectors, *inter alia*, in respect of the following Cheques_

Sr. No.	Cheques #	Dated	Amounts	Drawn on	Account #
1	717773	25.06.1984	29,311.21	MCB	161
2	714244	18.11.1983	1769.13	MCB	161
3	189500	09.05.1989	35,000/-	BCCI	—
4	497730	07.11.1983	15249.37	MCB	330
5	245100	18.04.1983	25,000/-	MCB	161
6	356540	20.06.1983	50,000/-	MCB	330
7	555464	18.08.1984	293368.23	MCB	330

18. The Objector No.1 (Ghazanfar Ali) (D.W.-1) in his Examination-in-Chief has admitted that Cheque No.717773 dated 25.06.1984 for Rs.29,311.21 (Rupees Twenty Nine Thousand Three Hundred Eleven and Twenty One paisas only) drawn on Claimants Official Account No.161

maintained at Muslim Commercial Bank for preparation of pay order in favour of Collector Customs was signed by the then Finance Manager S. Fakhar-e-Alam (PW-2) and Muhammad Akram, Director Finance, but the said cheque was encashed by Defendant No.2 (Tasneem Zaki). Similarly, he has further admitted that Cheque No.189500 dated 09.05.1989 for Rs.35,000/- drawn on MCB was also prepared by the said Defendant No.1 (DW-1) and was signed by above named two Officials of Claimants, which the said Defendant / Objector No.1 deposited in the Bank Account of Abdul Jalil Bintory (his brother in law), whereafter, a Cheque was signed by Objector / Defendant No.3 for withdrawal of funds. However, in the same breath, DW-1 in his Examination-in-Chief stated that the withdrawal amount was to be paid to the above named officials of Claimant Company. Similarly, he has further admitted that a Cheque No.714244 dated 18.11.1983 for Rs.1769.13 drawn on Claimants Company Official Account No.161 at Muslim Commercial Bank, favouring PIA was also encashed by the said D.W.-1.

19. When the said D.W.-1 (Defendant No.1-Ghazanfar Ali) was confronted about his past act of misappropriation done during earlier employment with Haider Bheemji, Chartered Accountant Firm, the said D.W.-1 / Objector No.1 did not deny the suggestion that the matter was settled with former employee and his wife Afsari Begum-Defendant No.3 paid a sum of Rs.10,000/- (Rupees Ten Thousand Only) to the said Chartered Accountant Firm.

20. The main stance of Objector No.1 (Ghazanfar Ali) was shaken in his evidence while answering a question that he did not remember the amount which he paid to P.W.-2 (Fakhar-e-Alam). In his evidence, D.W.-1 could not produce any document of his ancestral or family property, to substantiate his main defense that properties, viz. Plot No.R-709, Sector 15-

A, North Karachi, measuring 120 Square Yards, and Apartments in a multistoried Building Chapal Luxury Apartments, were purchased from the sale proceed of inherited properties.

21. To a question, he has admitted in his cross-examination that the cheque No.200697 dated 27.03.1994 for Rs.2,50,000/- (Rupees Two Hundred Fifty Thousand Only) drawn on one of the questionable Bank Accounts No.1372 bears the signature of said D.W.-1. The credibility of sole witness of Defendants, that is, D.W.-1 was impeached when he made following admissions in his cross-examination and is available on Page-667 of the Evidence File_

“ ... It is correct that I have stated in my examination in chief at P-3 that there is A/C No.989 which is dead and can be operated either by Abdul Jalil Bintory or Afsari Begum. See Ex. PW-11/2 and say that my above statement pertains to this A/C. The statement made at P-6 of my statement relating deposit of 14 Cheques in the A/C No.989 is correct. It is not correct that I had deposited these 14 Cheques in A/C No.989 but were deposited by me and / or Tasneem Zaki on the instructions of S. Fakhar-e-Alam. It is correct that out of 17 cash Cheques 8 Cheques were encashed by me and 8 were encashed by Tasneem Zaki and one by Rashid Mirza. It is correct that Mst. Afasri Begum had also deposed in the case in City Courts. Q. Aid you recover Cheque from A/C 989 and had deposited the same in your own A/C 1372. Ans. It is correct that the exact number of Cheques are not remembered. It is correct that these Cheques were signed by Afsari Begum. I cannot say that Afsari Begum had made a statement in the City Court that she had not signed any Cheques.”

[Underlining to add emphasis]

22. If the above evidence of DW-1 is analyzed with the evidence of P.W.-2 (S. Fakhar-e-Alam), who at that relevant time, was a Finance Manager in Claimants Company, following undisputed position emerges_

- (i). Defendants No.1 and 2 were in the accounts department of Claimants Company working at a relatively junior position

and their duties included, *inter alia*, preparing of vouchers and cheques in respect of Bank Accounts of Claimant.

- (ii). Misappropriation in Company Funds came into the knowledge of Claimant's Manager when they received a letter dated 22.09.1984 from the Customs Department in respect of claim raised by Customs for Rs.29311.21, in this respect a preliminary inquiry was conducted that why the amount was not paid when a cash cheque was earlier given for preparation of demand draft which was the usual mode of paying the Government dues. That cash cheque was encashed by Objector No.2.
- (iii). The Bank Vouchers of Claimant's Funds produced as Exh: PW/13.
- (iv). The amount was embezzled through 31 Cheques; 14 of them were cross-cheques and the rest 17 were cash cheques.

23. The said P.W.-2 has produced documents of Claimant's Bank Accounts starting from various Payment Vouchers together with cheques, of the relevant period; (mid of year 1983 to 01.10.1984), when the mis-appropriation said to have taken place. These payment vouchers were prepared by Defendants No.1 or 2 (the Objectors), in the name of Abdul Jalil (the said Bintory). The deposit slips of Habib Bank Limited (HBL) of the aforementioned joint account (Account No.989-7) of Defendant No.3 are also part of Evidence File; pages-355 to 551 to evidence that once the amount was landed in / credited to the joint Account (aforementioned), it used to be withdrawn by Objector No.3 (Afsari Begum) for onward distribution to other Objectors. This proves that how misappropriation / embezzlement was done by Objectors. To cite one such example in which an amount of Rs.5,00,000/- (Rupees Five Hundred Thousand Only), a considerable amount in the year 1984 was embezzled. A Bank Payment Voucher was prepared in respect of Bank Account maintained at MCB-PLS

Account No.330 (of Claimant) and the Cheque number was 500745. The next document is cheque prepared in the name of Abdul Jalil Bintory for the above amount, which was subsequently deposited through deposit slip dated 21.03.1984 in the joint Bank Account of Objector No.3 and Abdul Jalil Bintory maintained at PECHS, Commercial Branch of Habib Bank Limited. A week thereafter, the said amount was transferred into the respective Bank Accounts of Objectors No.2 and 3. Documents including instruments evidencing this fraud have been produced by said P.W.-2 and available on pages-369 to 379. On this material aspect, the P.W.-2 was not cross-examined, hence, the fraud has been proved by Claimant Company that was committed by the Objectors. The interesting point of this controversy is the pleading / plaint of Suit No.358 of 1985 filed by the present Objectors No.1 and 3. In paragraph-9 of their plaint (*reproduced herein below*), the said Objectors have disclosed the actual *modus operandi* adopted by them to siphon off the funds of Claimant Company, though the plea of the Objectors is that the aforementioned two officials (Muhammad Akram and Fakhar-e-Alam) were the actual beneficiaries:

“.....thus the defendant No.3 explained to the plaintiff No.1 that fictitious bills for work done be prepared in the name of plaintiff No.1’s brother-in-law and presented to him for approval and then a cheque would be drawn in the name of Mr. Bintori and the same would be signed by defendant No.2 and by the defendant No.3 or defendant No.3 would himself secure the signature of proforma defendant No.7 and then would give to the plaintiff No.1 to be deposited in Mr. Bintori’s Account, latter the plaintiff No.1 would take a bearer cheque of like amount from the plaintiff No.2 and encash the same, deposit into his own account and then withdraw the same and hand over the cash, either to defendants No.2 or 3 and none else. The process under the direction of defendant No.3 was that under cash voucher from the Bintori’s Account used to be transferred to the Plaintiff No.1’s account and there as aforementioned withdrawn in

cash and the whole amount of the signed cheque was given by the plaintiff No.1 to either defendants No.2 and 3.”

24. Evidence of Rauf Jaffrani (P.W.-1), who was a Company Secretary of claimant, is also very material. He has specifically stated in his examination-in-chief, that how the embezzled funds were used by objectors in purchasing ‘Khas Deposit Certificates’, Other Bank Certificates (“SNDS”), booking the Apartments in a multistoried project in Clifton area built by Chappal Builders.

25. Exhibit P.W.-8, at page 205, is the certificate of Habib Bank Limited about withdrawal of Rs.694182/- by Objector No.1 (Ghazanfar Ali) from his Account No.CD-1372, the one used for the subject transactions in dispute. It is also mentioned in this certificate by HBL that the part of above amount, that is, Rs.3,00,000/- (Rupees Three Hundred Thousand only) was used in purchase of SNTDS in the name of various persons, whose names are mentioned in the said exhibit including the objector No.1 himself and the objector No.3 (Afsari Begum). Similarly, Exhibit P.W.-9 is list of Khas Deposit Certificates having worth of Rupees One Hundred Thousand, obtained by objector No.2 (Tasneem Zaki). Exhibit P.W.-10-1 to 3 are the payment receipts received by Chappal builders in respect of their multistoried project in which the objector No.1 has booked the apartment. Dates of all these documents are also significant; all these documents correlate with the period when funds of Claimant were siphoned off.

26. All the three witnesses of Claimants Company including said Fakhar-e-Alam have categorically denied that they are in any way beneficiaries of the embezzled amount and in his cross-examination the said PW-2 remained consistent to the fact that he and Muhammad Akram were not the beneficiaries of the embezzlement amount. The above named

Muhammad Akram was not examined, as it is a matter of record that he passed away in the year 1992, even before the evidence proceeding could commence.

27. After a denial on oath by the Claimant's witness that mis-appropriated funds were never paid to the above named Executives of the Claimant Company and to substantiate their testimony, evidence was produced that the mis-appropriated funds were also diverted in purchase of moveable and immoveable properties by the Objectors at the relevant time, a heavy onus was on the Objectors to dislodge this claim; but this main defense of the Objectors that the embezzled amount were paid to the aforementioned senior Executives of claimants' Company has been disproved in the testimony of the sole witness from the Objectors' side, viz D.W.-1 (Ghazanfar Ali). He has admitted that his investments in moveable and immoveable properties were made during his service / employment with Claimant. He has further admitted in his cross-examination that he has no title document as claimed in his pleadings that he owned joint family properties, besides, acknowledging in his cross-examination that out of seventeen (17) cheques in question, through which embezzlement had taken place, eight (8) were encashed by him and eight (8) were encashed by objector No.2 (Tasneem Zaki) and one Rashid Mirza. To a suggestion, he has not denied that from the main joint Account No.989-7 maintained by Objector No.3 and said Bintori, the said Objector No.1 has received the amounts and deposited in his own Bank Account, which is also maintained at the same HBL branch. He has further admitted that all these cheques were signed by his wife Afsari Begum-Objector No.3.

28. The D.W.-1 (Ghazanfar Ali/ Objector No.1) did not deny the suggestion that the latter and his wife-Objector No.3, were introducers for opening a Bank Account for Objector No.2 (Tasnim Zaki) in the

same branch of HBL. The said account opening forms / documents have been exhibited as D.W.-1 and D.W.1/2 bears the signature of objectors No.1 and 3 and date of these documents is 25.06.1983, available at page-855 and page-857 of the evidence file. This clearly establishes the nexus of fraud and misappropriation committed by the objectors in league and collaboration with each other. The deposition of Objector No.1 given in Criminal Case No.213 of 1987, has also been placed on record as Exhibit D.W./2, (starting from page-889 to 935). In the above proceedings, the said Objector No.1 in his cross-examination has admitted that all the amount credited in the aforementioned joint account No.989-7 of HBL, were in respect of the cheques of Claimant Company while further admitting that all credit entries in the personal account of said Objector No.1 (D.W.-1) are basically the transfer of funds from the above mentioned joint account of his wife-Objector No.3. D.W.-1 (Objector No.1). Although the said D.W.-1 (Objector No.1) attempted to improve his case by introducing new facts in his evidence, *inter alia*, about depositing of huge amount running into millions of rupees by Claimant's above named officials in the joint Bank Account of Objector No.3 and said Bintori and on this aspect the witness of the Claimant was confronted in his cross-examination, but it is a settled rule that a party is not allowed to introduce new facts in his evidence, which were never pleaded. Therefore, this particular portion of the evidence and other addition related thereto are discarded while deciding the present case.

29. Counsel for Objector No.1 did ask question about any objection raised by the Bank with regard to forged signature; to which obviously the answer of Claimant's witnesses were in negative. But here the question is not of issuing forged cheques, but diverting the funds / proceeds of the cheques of Claimants Company into the Bank Accounts of Defendants/Objectors. If the above evidence is evaluated in the light of

pleadings of the Objectors in both these suits (*lis*), then it is not difficult to hold that Defendants No.1, 2 and 3 (Objectors No.1, 2 and 3) were guilty of misappropriation and embezzlement of Claimant's funds by diverting the same into their (Objectors') Bank Accounts, but not under the directions of the then Director Muhammad Akram and Finance Manager S. Fakhar-e-Alam (P.W.-2).

30. The other main stance of the Objectors is that all the cheques in question through which the embezzlement is done were not signed by the Objectors, but have been duly signed by the above named officials of Claimant Company. No doubt the Senior Executives of Claimant Company were required to exercise due care and diligence, which appears to be lacking in the present case, but at the same time fraud committed upon Claimant Company cannot be attributed towards the said officials / Executives of the Claimant Company, in view of the scenario that has emerged, *inter alia*, when learned Division Bench of this Court handed down its aforementioned Judgment by dismissing the Acquittal Appeal of the present Objectors against the said officials of Claimant Company. Hence, the aforementioned officials of Claimant Company cannot be held guilty of any fraud or criminal liability, except what has been stated above. Secondly, the defense of the Objectors about non-signing of the disputed cheques further loses significance in view of the quality of evidence that has come forward, *inter alia*, clearly implicating the said Objectors into the fraudulent transaction. Not only the money trail against the Objectors has been proved but diversion of funds in purchase of moveable and immoveable properties has also been established.

31. Depositions of Claimant's witnesses, P.W.-1, (the Company Secretary), P.W.-2 and P.W.-1(a), have corroborated each other's stance. The witnesses were not shaken in cross-examination, particularly, with

regard to their earlier statement on oath that the officials of Claimant Company were not involved in the fraud / mis-appropriation in question. The other significant factor is that evidence of P.W.-2-Fakhr-e-Alam about diversion of embezzled funds by Objectors in purchasing moveable and immovable properties have not been questioned in his detailed cross-examination, thus stands proved against the Objectors No.1, 2 and 3. Not only this, even the sole witness from the Objectors' side, who is objector No.1 (Ganzhfar Ali) in his examination-in-chief has admitted the factum of purchasing those moveable and immovable properties in question, but from his own funds. However, in his cross-examination, his evidence on this very point was shaky and did not carry weight. Applying the rule of preponderance as applicable to such type of civil proceeding, it is not difficult to hold that the claim of Claimant Company about purchase of properties by the Objectors from the embezzlement also stands proved.

32. Therefore, Issues No. 'A' and 'C' are answered accordingly. Though Objectors deposited the amounts of the Claimant Company in their personal Bank Accounts, as the same were siphoned off by them but the said amounts / funds were not deposited in the personal Bank Accounts on the directions of Director and Finance Manager of Claimant Company. Similarly, no amount was credited back to the Bank Accounts of the Claimant by the Objectors. In view of the above, Issue No. 'B' has become redundant and does not require any independent finding.

ISSUE NO. 'D':

33. P.W/-2 (Fakhr-e-Alam) has also denied that the jewelry articles and cash were forcibly taken from the house of objectors No.1 and 3 but the same were handed over by the objector No.1 himself for settling the matter. This fact is further corroborated by P.W.-1(a) (Humayun Akhter Zuberi) in

his deposition given on behalf of Claimant and admittedly said P.W.-1(a) was never cross-examined.

34. Exhibit P.W.-11/2, P.W.-11/3 are the documents, viz. Undertaking and Iqarnama signed by objectors No.1 and 2 respectively, wherein they have admitted their guilt. However, these two documents were challenged and impugned in the subsequent Suit No.358 of 1985 filed by Objectors No.1 and 3, and regarding which the objectors in their present pleadings as well in that of the subsequent suit, have categorically mentioned that those documents were signed under duress and coercion. The Objector No.2 (Tasneem Zaki) admittedly never entered the witness box to lead evidence in support of his written statement / pleadings. Therefore, the exhibit P.W.-11/3, the Iqarnama as signed by Tasneem Zaki, which is dated 27.10.1994, is a document that has been proved by the claimant against the said objector No.2.

35. It is a matter of record that the present Objectors have also lodged a criminal case against the Claimant Company and its officials, on the same facts, including, the complaint about threats, duress, unlawful confinement, snatching of jewelry and articles. That criminal case was finally decided against the present Objectors, against which a Criminal Acquittal Appeal No.196 of 1987 was filed in this Court and same was decided by learned Division Bench against the present Objectors. A certified copy of the Judgment is available in the Evidence File at page-1077 and exhibited as D.W.-2/44. In this Judgment, learned Division Bench while discussing in detail the incident on the basis of which the present Objectors are claiming that they were coerced to sign documents and jewelries and other articles of Objector No.3 were snatched away by representative of Claimant Company, was repelled, while observing that the criminal proceeding initiated by present Objectors against Claimant Company and its Officials

were *mala fide*, as the same were filed after an inordinate delay of more than a year. It was further observed that even the first complaint to the Inspector General of Police was made after a delay of three and a half months. With these observations, acquittal decision of the Courts below in favour of Claimant Company and its officials, including above named Senior Executives, were affirmed.

36. Even in the evidence, in present proceedings, the onus of these Issues were on the Objectors, which they have failed to discharge and consequently, their assertions / pleadings in this regard have been disproved. Accordingly, Issue No. 'D' is answered in negative and against the Objectors, that is to say, that the documents impugned by these Objectors, viz. Iqrarnama, Undertaking and Declaration were not signed under any threat or coercion but basically were admission of guilt by these Objectors No.1 and 2. Similarly, other articles, moveable and jewelries were not snatched allegedly by Claimant Company and its officials, who were impleaded as defendants No.1 to 6 in Suit No.358 of 1985, but were recovered from the Objectors during the investigation.

ISSUE NO. 'E':

37. In view of the above discussion, appraisal of evidence and nature of pleadings of the Objectors, lead to the conclusion that no loss of reputation was caused to the Objectors for their illegal acts as fraud against them has been proved. It is also noteworthy to mention that Objector No.2 (Tasneem Zaki) not even contested the proceedings and the evidence led by Claimant remained unchallenged to the extent of said Objector No.2, which obviously goes against him while proving his guilt and acts of misappropriation. Therefore, Issue No. 'E' is also decided against all the Objectors (Ghazanfar Ali, Tasneem Zaki and Afsari Begum). These Objectors are not entitled for any claim of damages on any count.

ISSUE NO. 'F':

38. The upshot of the above is that subsequent Suit No.358 of 1985 filed by the Objectors No.1 and 3 against the Claimant Company and its officials is dismissed with no order as to costs, whereas Suit No.752 of 1984 filed by Claimant Company is decreed to the extent that the Objectors are liable to pay a sum of Rs.23,57,117.83 (Rupees Twenty Three Lac Fifty Seven Thousand One Hundred Seventeen and Eighty Three Paisas only) to the Claimant Company together with 10% markup from the date of institution of the suit till the realization of amount. Looking at the peculiar facts of the case and conduct of the Objectors, the Claimant Company is also granted costs of the proceeding.

JUDGE**Dated: 28.07.2017.***Riaz Ahmed / P. S.**