

Form No. J (2)

HEADING OF JUDGMENT IN ORIGINAL SUIT

District: Kamrup (M)

IN THE COURT OF CIVIL JUDGE NO.3, KAMRUP(M), GUWAHATI

Present: Rajesh Kumar Todi, AJS,

Civil Judge No.3,

Kamrup (M), Guwahati

14<sup>th</sup> day of March, 2017

Money Suit No. 124/2011

**Smti. Deba Bala Gupta** .....Plaintiff

Versus

**State of Assam and others**.....Defendants

This suit coming on for final hearing on 21-02-17 & 27-02-17 in presence of –

O.P. Bhatti, Ld. Counsel .....for the plaintiff

A.Dutta, Ld. Asstt. Govt. Pleader.....for the defendants

And having stood for consideration to this day, this Court delivers the following judgment:

**JUDGMENT****Suit for realisation of Rs.66,84,945/-.**

1. Case of the plaintiff is that she is the sole proprietor of M/s Allied Business Corporation which deals in sale and supply of hardwares, electrical goods, electronic goods, iron materials etc.
2. Defendant No.5, the BDO, Tihu Development Block, issued a supply order No.TDB/IAY/SO/07-08/02 DT.03-03-2008 to the plaintiff for purchase of GCI Sheets and GI Ridging as detailed therein, requiring the plaintiff to submit bill in triplicate duly approved by the junior engineer along with the proper receipt promising for early payment. On receipt of aforesaid order by defendant No.5 the plaintiff supplied the ordered quantity on 24-04-2008 vide challan No.7 and thereafter submitted the bill for Rs.42,99,000/- completing all necessary formalities for early payment.
3. The defendant No.5, in part payment issued a cheque No.000876 dt.19-05-2008 for Rs.40,00,000/- drawn in favour of the plaintiff on Central Bank of India, Nathkuchi, Dist.Nalbari, Assam. The said cheque on being presented for payment returned unpaid with remarks *full cover not received and drawer's signature differs with the specimen on record.*
4. The plaintiff then served notice upon the defendants U/s-138 of N I Act demanding payment within 15 days but no payment was made inspite of receipt of notice. The plaintiff also filed W.P.(C) No.2724 of 2008 before the Hon'ble Gauhati High Court which is still pending. The defendant No.4, in said writ petition filed an affidavit in opposition denying as to receipt of any materials but admitting as to signing of *challan* by the then BDO, Gopal Ranghang.

5. On failure of defendants to make payment the plaintiff through her advocate issued notice dt.25-02-10 U/s-80 of CPC on the defendants. The notice was delivered to defendant No.2 on 29.10.10 and on defendant No.4 on 28-10-10. The notice was also sent to other defendants. However, even after receiving notice no payment was made and as such the instant suit has been filed for realisation of principal sum of Rs.42,99,000/- and Rs. 23,85,945/- as interest.
6. It is stated in paragraph 7 of the plaint that the documents mentioned in the said paragraph are in the possession of Tihu Police Station or in the custody of competent Criminal Court which may be called at the time of trial.
7. Order dt.24-10-11 in the case record shows that defendant No.1,2 &3 filed petition No.3342/11 stating that they will not file their written statement but they will cross-examine the plaintiff witnesses which was allowed. The defendants No.4 &5 filed their written statement stating that the suit has no cause of action and it is not maintainable. It is alleged that the plaintiff has suppressed material facts and intentionally made false statement for which the suit is liable to be dismissed.
8. It is contended that with regard to supply order for GCI sheet and G.I. Ridging issued by Gopal Ranghang, the then BDO, Tihu Development Block from file No. TDB/IAY/SO/07-08/02 DT.03-03-2008 on enquiry it was found that there is no such file No. in the office of the Tihu Development Block and this implies that said order was issued by Gopal Ranghang, the then BDO, Tihu Development Block at his own violating all the government norms and procedures. It is stated that centrally procurement of materials required for implementation of I.A.Y. Scheme has been already

banned by the government vide W.T. Message No.COM/CM/7/2002/25 dt. 25-01-2002 of Commissioner and Secretary to the chief Minister, Assam. Moreover the office has not received any copy of the so called supply order and materials against the aforesaid supply order.

9. It is further stated that Gopal Ranghang, the then BDO, Tihu Development Block handed over charge of his office to the Project Director District Rural Development Agency, Nalbari on 09-04-2008 and thus he had no authority to sign the challan on 24-04-2008 and put his signature on any document as BDO, Tihu Block but inspite of having knowledge Gopal Ranghang collected cheque No.00876 of cheque book containing leaves from 00876 to 00900 from Central Bank of India, Nathkuchi Branch on 19-05-2008 without his own capacity. Said Gopal Ranghang collected the said cheque book without producing any requisition slip which is mandatory as per bank rules whereas the cheque book meant for IAY A/C is lying in the account of the office. Thus, said Gopal Ranghang inspite of having no authority procured cheque book illegally and with ulterior intention must have issued cheque to the plaintiff. That is why said cheque issued by unauthorised person was returned by bank with endorsement *full cover not received* and *drawer's signature differs with specimen on record*.

10. It is stated that because of aforesaid illegal activities of Gopal Ranghang an ejahar being Tihu P.S. Case No.42/2008 U/s-120(B)/420/468/471 IPC was lodged against him and M/s Allied Business Corporation as per direction of Deputy Commissioner, Nalbari. It is stated that cheque was issued by Gopal Ranghang without having any authority to issue the same and as such he is

personally liable to answer such notice. It is also stated that against writ petition of the plaintiff the defendant No.5 has filed affidavit – in-opposition stating therein about the illegal activity of Gopal Ranghang and as such allegations against the defendants in the plaint are absolutely false. It is accordingly prayed that the suit be dismissed with cost.

11. On pleadings following issues were framed by Ld. Predecessor :

- i) *Whether there is any cause of action for the suit?*
- ii) *Whether the suit is maintainable in its present form?*
- iii) *Whether the plaintiff has supplied GCI sheets and GI ridging to Tihu Development Block as per the order No. TDB/IAY/SO/07-08-02 dated 03-03-2008 being the order placed by the then Block Development Officer and raised bill of Rs.42,99,000/-?*
- iv) *Whether the defendant No.5 has issued a cheque bearing No.000876 dt.19-05-2008 for Rs.40,00,000/- and if so whether he has such authority to issue the above cheque?*
- v) *Whether the plaintiff is entitled to realise Rs.66,84,945/- from the defendant jointly and severally with pendent lite interest and future interest?*
- vi) *To what other relief(s) the parties are entitled for?*

12. During trial the plaintiff did not adduce any evidence but examined one Sagar Samrat Gupta who was cross-examined by the defendants. Defendants did not adduce any evidence. Heard arguments from the Ld. Counsel for the plaintiff and defendants.

13. My issue wise decision and reasons thereof

Issue No.I

The facts stated in the plaint and claim of the plaintiff on the basis of said facts have been disputed and denied by the defendants. This has given rise to some triable issues between the parties which needs to be adjudicated upon by the Court and as such the suit has cause of action. Accordingly the instant issue is answered in **affirmative**.

Issue No.II,III & IV

These issues are taken together as decision of Issue No.II will have direct bearing upon the Issues No.III & IV and would materially affect the same. Debabala Gupta, as proprietor of M/s Business Allied Corporation has instituted the present suit against the defendants yet she has not submitted her evidence-on-affidavit or adduced evidence in support of her pleaded case. Instead one Sagar Samrat Gupta examined himself and it is written in his evidence-on-affidavit that he was deposing in this suit *for and on behalf of plaintiff Deba Bala Gupta*. Said witness viz. Sagar Samrat Gupta in his cross-examination admitted categorically that he was not authorised by executing any power of attorney or by executing any other document by Deba Bala Gupta in his favour to appear and depose in this case for and on her behalf. It is settled law that the plaintiff must substantiate his pleaded case by tendering evidence and must enter the witness box to face cross-examination with regard to the evidence tendered. The defence must get the opportunity to test the veracity of the evidence tendered by the witness in examination-in-chief. The plaintiff can not be substituted by any

other person to depose in respect of facts which are personally known to the plaintiff. The plaintiff in the affidavit annexed with her plaint made a declaration that the statements made in most of the paragraphs of her plaint are true to her knowledge and statements made in some of the paragraphs of her plaint are true to her belief. Accordingly she should have appeared to depose as to which of the pleaded facts are within her knowledge and which of the pleaded facts are true to her belief. In the reported decision viz. **(2005) 2 SCC 217, Janki Vashdeo Bhojwani –vs- Indusind Bank Ltd** it was held that power to depose in place of principal, extends only to depositions in respect of “acts” done by power of attorney holder in exercise of power granted by the instrument. The term “acts” would not include deposing in place of and instead of the principal for acts done by principal and not by power of attorney holder. Similarly power of attorney holder cannot depose for principal in respect of matters of which only principal can have personal knowledge and in respect of which principal is liable to be cross examined. If principal is unable to appear in Court, a commission for recording his evidence may be issued. In para 17 it was held by the Hon’ble Supreme Court that *on the question of power of attorney, the High Courts have diversion views. In the case of Shambhu Dutt Shastri –vs- State of Rajasthan, it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on*

*behalf of the plaintiff in the capacity of the plaintiff.* In the instant suit the witness viz. Sagar Samrat Gupta is ***not even the power of attorney holder of the plaintiff*** as already pointed out. Therefore he has no locus standi at all to depose in the instant suit for and on behalf of plaintiff Deba Bala Gupta. Here, it is pertinent to note that the said witness in his evidence-on-affidavit made it clear that he was deposing for the plaintiff which means that whatever he deposed was not within his personal knowledge but was based upon the information which he might have gathered from the plaintiff and therefore the same has no worth at all. In another reported decision viz. ***Iswar Bhai C. Patel v. Harihar Behera, (1999) 3 SCC 457*** in para 17 the Hon'ble Supreme Court held that *adverse presumption must be drawn against defendant who does not present himself for cross-examination and refuses to enter the witness box in order to refute allegations made against him or to support his pleading in his written statement.* Perusal of para 23 of the said decision further shows that the Hon'ble Bombay High Court in ***Martand Pandharinath Chaudhury v. Radhabai Krishnarao Deshmukh***, relying upon the said decision observed: *"It is the bounden duty of a party personally knowing the facts and circumstances to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstances which will go to discredit the truth of his case."* In another reported decision viz. ***(1993) 3 SCC 573, Vidhyadhar v. Manikrao and another***, it was observed by Hon'ble Supreme Court in para 17 that *"where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a*

*presumption would arise that the case set up by him is not correct.*” Accordingly in the instant suit also there is every scope to presume that the case set up by the plaintiff is not correct otherwise she would have appeared and deposed in respect of her pleaded case. Furthermore, there is no explanation at all as to what prevented the plaintiff from appearing before the Court and to depose to withstand her pleading. That apart otherwise also it appears from the evidence-in-chief of only Pw Sagar Samrat Gupta that he exhibited number of documents which are mere photocopies without there being any explanation at all for non-production of the originals thereof. Although there is one photocopy of Seizure List in connection with Tihu P.S. Case No.42/08 U/s-120 (B)/420/468/471 OF IPC marked as Ext-7 which mentions seizure of some documents including supply order, challan No.7, etc. but the documents mentioned therein were never brought on record by the plaintiff. Although the documents submitted are not admissible and can not be read into evidence even if on perusal of Ext-1, the supply order dt. 03-03-2008 it appears that it does not bear the official seal of the Block Development Office, Tihu Development Block and as such it can not be said to be a document issued by the said development block or by its authorised officer asking the plaintiff to supply the materials as mentioned therein. Further, Ext-4, the cheque in question also does not bear the official seal of the said block and its authorised officer. Thus it is apparent without going to the other aspects of the case that Tihu Development Block or its authorised officer for that matter the defendant No.5 never issued any supply order and never received any materials under challan No.7 as claimed and further that no cheque (as shown as

Ext-4) was issued by defendant No. 5 as claimed and if at all any transaction as alleged had taken place it was between the plaintiff and Gopal Ranghang in his *personal capacity and not as BDO of Tihu Development Block* and as such the present suit is not maintainable in the present from against the present defendants. Accordingly, Issues No.II,III&IV are answered in **negative**.

Issue No.V

In view of decision of Issue No.II,III & IV above the instant Issue is also answered in **negative**

Issue No.VI

The plaintiff is not entitled to any relief rather she is liable to pay Rs.5,000/- as compensatory cost as per Section 35A of CPC to the defendants for unnecessarily dragging the defendants in the instant suit.

**ORDER**

In the result the suit is dismissed on contest with cost in addition to the compensatory cost of Rs.5,000/- to be paid to the defendants by the plaintiff . Let a decree be prepared accordingly.

Given under my hand and seal of this Court on this 14<sup>th</sup> day of March 2017  
at Kamrup (M)

(Rajesh Kumar Todi)

Civil Judge No.3

Kamrup(M), Guwahati

APPENDIX

Plaintiff's witnesses

1. Sagar Samrat Gupta

Plaintiffs documents

1. Ext-1 supply order dt.03-03-08(photocopy)
2. Ext-2 challan dt.24-04-08(photocopy)
3. Ext-3 Bill No.ABC/63 dt.25-04-2008(photocopy)
4. Ext-4 cheque No.000876(photocopy)
5. Ext-5& 8 notices
6. Ext-6 cheque return memo(photocopy)
7. Ext-7 seizure list(photocopy)

Defendants witnesses & documents-Nil

(Rajesh Kumar Todi)

Civil Judge No.3

Kamrup(M) Guwahati