HIGH COURT FORM NO. J(3)

HEADING OF JUDGMENT IN APPEAL

IN THE COURT OF THE ADDL. DISTRICT JUDGE,

KAMRUP, GUWAHATI

District : Kamrup.

Present : Sri I. Hussain.

Addl. District Judge,

Kamrup, Guwahati.

Thursday the 15th September, 2011.

Money Appeal No. 15 of 2007

[From the Judgment and decree dated 06.06.2007 passed by Sri S.K. Sarma, Ld. Civil Judge (Sr. Divn.) No. 1, Kamrup, Guwahati, in Money Suit No. 126 of 2000].

Smt. Anima Das ::: Appellant/Plaintiff

Vs

Sri Tutul Bora and others ::: Respondent/Defendants

This appeal is having been heard on 03.09.2011 in presence of Sri B.K. Sen, learned advocate for the appellant and Sri B.K. Bhagawati, Ld. Advocate for respondents and having stood for consideration to this day, 15th September, 2011, the Court delivered the following Judgment :

J U D G M E N T

1. This Money Appeal has been preferred by the appellant/plaintiff against the Judgment and decree dated 06.06.2007 passed by Sri S.K. Sarma, Ld. Civil Judge (Sr. Divn.) No. 1, Kamrup, Guwahati, in Money Suit No. 126 of 2000.

2. The fact in brief, which led to filing of the Money suit is that the IOC Ltd. floated tender for placement of a new Ambassador car for its bottling plant at New Guwahati for a period of two years. Defendant No. 1 has submitted tender and the IOC Ltd. awarded the work order to the defendant No.1 on 02.07.1997 for placement of a new ambassador car. As the defendant No.1 had no money, so, he approached the plaintiff for financial assistance. Accordingly, on various dates defendant No. 1 had obtained loan from the plaintiff by executing money receipts. The Defendant No.1 approached the State Bank of India, Panbazar Branch for providing financial accommodation for purchasing a car and the plaintiff provided the money for security deposit to the defendant No.1. Defendant No. 1 also obtained loan for repairing of the vehicle and purchase of fuel etc. and payment of salary to the Driver on various dates from the plaintiff and thus, the defendant No.1 had obtained total amount of Rs. 5,02,103/- from the plaintiff as loan out of which defendant No.1 repaid an amount of Rs. 2,78,186/- to the plaintiff and there is an outstanding balance of Rs, 2,23,917/- payable by the defendant No.1 and 5 to the

plaintiff. As the defendant No.1 and 5 have failed to pay the balance amount, the plaintiff has instituted this suit for realisation of Rs. 1,63,917/- from the defendant No.1 together with interest @ 18% per annum and also for realisation of Rs. 67,510/- from the defendant No.1 and 5 and other reliefs.

3. The answering defendants have contested the suit by filing written statement. It is contended that the plaintiff has no locus-standi to file the suit, that the suit is barred by limitation, that there is no cause of action for the suit etc. etc. The answering defendant No.5 has denied that any amount was received by him from the plaintiff as loan. The answering defendant No.1 specifically denied about the receipt of any amount as loan from the plaintiff. His plea is that he has purchased the vehicle by taking loan from SBI, Panbazar Branch. He had some monetary transactions with the husband of the plaintiff Sri Bhubaneswar Das but denied that he had any transaction with the plaintiff and prayed to dismiss the suit.

4. Upon pleadings the following issues are framed:

(a) Is there any cause of action for the suit ?

(b) Whether the defendant No.1 is liable to pay Rs. 1,63,917/- to the plaintiff ?

(c) Whether the defendant No.1 and 5 are jointly and severally liable to pay a further sum of Rs. 67,510/- ?

(d) Whether the plaintiff is entitled to get interest @ 18% per annum as claimed ?

(e) To what relief/reliefs the plaintiff is entitled ?

5. The learned trial Court after recording evidence of both sides and also hearing arguments put forward by their learned counsel has delivered the impugned Judgment and decree in favour of the defendant/respondent dismissing the suit. Being aggrieved on the said Judgment and decree, the defendant-appellant challenged by way of this appeal on the following grounds –

(a) Learned court below erred in law and in facts in passing the impugned judgment and decree dated 06.06.2007 resulted failure in justice,

(b) Learned court below misread and misinterpreted the evidence and materials in the record and thereby failed to arrive at an objective assessment of the case resulted failure in justice.

(c) Learned Court below has passed the impugned judgment and decree dated 06.06.2007 over looking the submission made by the defendants in their written statements, evidence of DW1 and the agreement dated 30.01.1999 (Ext-5) in the case record resulted failure in justice.

(d) Learned Court below ought to have hold that DW1 (Tutul Bora) in his evidence stated that he took loan from PW1 (Bhubaneswar Das) whereas PW1 (Bhubaneswar Das) in his evidence stated that the plaintiff is his wife and being an woman she is unable to attend to her business and accordingly

he was looking after the business on behalf of his wife and accordingly the learned court below ought to have decreed the suit filed by PW1 on behalf of the plaintiff.

(e) Learned court below ought to have held that DW1 (Tutul Bora) in his evidence stated that he took loan from PW1 (Bhubaneswar Das) and returned the loan amount to PW1 (Bhubaneswar Das), but failed to adduce any evidence in discharge of his burden to prove that he has returned the loan amount to PW1 (Bhubanewar Das) and accordingly the learned court below ought to have decreed the suit filed by PW1 (Bhubanesar Das) on behalf of the plaintiff.

(f) Learned court below ought to have held that Sri Sudhangshu Das (Defendant No.5) in his written statement admitted that he took loan from PW1 (Bhubaneswar Das) and there are evidence in the case record showing that PW1 (Bhubanesar Das) was working on behalf of the plaintiff and also filed the suit on behalf of the plaintiff and accordingly the learned court below ought to have decreed the suit.

(g) Findings of the learned court below after going through Exts-3(1) to 3(44) that the said documents disclose nothing that at any point of time any amount was received by the defendant as loan amount from the plaintiff and that too without taking consideration of the agreement dated 30.01.1999 (Ext-5) and the pleadings of the parties to the case are perverse and unsustainable in law.

(h) Findings of the learned court below that from the Exts-7(1) to 7(26), nothing appears to be that the said amount is paid to defendant No.5 as per direction of defendant

No.1 or that defendant No.5 has borrowed the said amount from the plaintiff without taking consideration of the admissions made by the defendant No.5 in his written statement filed in the suit are perverse and unsustainable in law.

(i) Findings of the learned court below that if any amount was received by PW1 from the defendant No.1, prior to execution of the power of attorney on 20.03.2000, it cannot be said that the same was received on behalf of the plaintiff without taking consideration of the fact that the PW1 was the husband of the plaintiff and working on behalf of the plaintiff are perverse and unsustainable in law.

(j) Findings of the learned court below that the plaintiff ought to have examined herself as a witness in the case is unsustainable in as much as there is no law which requires the plaintiff to be compulsorily examined as a witness in the case.

(k) Findings of the learned court below that no any amount was received by the defendant No.1 and 5 from the plaintiff as loan or any amount was paid by the defendant No.1 to the plaintiff towards liquidation of the loan and as such defendant no. 1 and 5 are not liable to pay any money to the plaintiff on the face of overwhelming documentary evidence in the nature of admission of the defendants in the case record are perverse and unsustainable in law.

(l) In any view of the above, the impugned judgment and decree dated 06.06.2007 passed by the learned court below are otherwise bad in law and as such these are

liable to be set aside under the facts and circumstances of the case in the interest of justice.

6. It appears from the impugned judgment and the case record that the learned lower Court framed as many as 5 (five) issues to decide the case. After going through the said issues, it is found that the issue No. 2 and 3 are vital issues which will decide the result of the suit. So, I have taken for discussion the issue No.2 and 3 first, to decide whether the learned lower court below had committed any error/mistake in deciding the Money Suit No. 126/2000.

7. Heard learned Advocate for both sides and perused the case record. Learned counsel for the respondents/defendants submitted that the plaintiff failed to appear before the court and adduce evidence, but the attorney holder deposed on her behalf, which cannot be accepted as the attorney holder cannot depose evidence on behalf of a party, though he can be examined as a witness only. In support of the said contention, learned advocate relied on *Janki Vashdeo Bhojwani & another Vs Indusind Bank & Others; AIR 2005 SC 439*.

8. I have gone through the said case law. Hon'ble Apex Court observed in Para 13 as follows:-

> *"13. Order III, Rules 1 and 2, CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in*

Order III, Rules 1 and 2, CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

9. Learned Counsel for the appellant/plaintiff submitted that there is no bar under Order III, Rule 1 and 2 C.P.C. in deposing evidence by husband as power of attorney holder of his wife if the attorney holder had his knowledge about the acts done by his wife relating to the suit. In the suit in hand PW1 the power of attorney holder knows the monetary transaction between his wife and the defendant No. 1 and 5 and as such he deposed on behalf of the plaintiff. In support of his said contention, ld. Advocate submitted the case law reported in *AIR 2007 KARNATAKA 181; Yellappa Vs Smt. Yellamma and Ors*.

10. I have gone through said vase law also. Hon'ble Karnataka High Court in paragraph 12 of the said case law observed as follows :

> *"12. In so far as the contention regarding the husband of the plaintiff – PW-1, letting in evidence is concerned, it is to be noticed that it is not as though the plaintiff is the only person who is in know of facts and that she is required to step in to the witness box. It is also to be noticed that whatever evidence let in by PW-1 is based on record. When that is the case, I am of the view that the exception which is covered by the judgment in the case of Janki Vashdeo Bhojwani v. IndusInd Bank Ltd. (AIR 2005 SC 439) is attracted, wherein it is observed that if the poer of attorney holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts. In this circumstance, this contention cannot be accepted."*

11. From the observation of the Hon'ble Apex Court in Janki Vashdeo Bhojwani Vs IndusInd Bank Ltd. (supra), it is found that the attorney holder may depose for the principal in respect of acts rendered in pursuance to power of attorney but he cannot depose for the principal for the acts done by the principal and not by the power of attorney holder in respect of which principal is entitled to be cross examined. In Yellappa Vs Smt. Yellamma and Ors. (supra) Hon'ble Karnataka High Court observed that husband as power of attorney holder of his wife can depose if the evidence let in is based on record and he has

rendered some acts in pursuance of power of attorney. In the instant case, it is found that the attorney holder is the husband of the plaintiff and he (PW1) has stated in cross examination that he wrote the receipts, which evidence is as per record. PW2 also supported the fact by stating that defendant No.1 took loan from plaintiff through PW1. So, from the evidence available in the record, it appears that PW1, the power of attorney holder has the knowledge of monetary transaction between the defendant 1 and the plaintiff and he deposed from the record. It is a common factor in our society; that any monetary transaction done by either the husband or the wife is generally known to each other and most of the husband are doing most of such acts on behalf of his wife. In such circumstances, I am of the view that in the instant case, PW1 as power of attorney holder and husband of the plaintiff has the knowledge of giving loan to the defendant No. 1 and 5 by the plaintiff and hence he can depose on her behalf on the aforesaid fact that the plaintiff gave financial assistance to the defendants.

12. Defendant No.1 in his pleading as well as in the evidence stated that he had no monetary transaction with the plaintiff but he had transactions with Bhubaneswar Das, husband of the plaintiff. He stated that during the year 1997 – 1999, he took loan from Sri Bhubaneswar Das due to his business but repaid the said loan. At that time Bhubaneswar Das took his signatures on revenue stamp, blank paper and stamp paper which were later manufactured as receipt etc. and falsely filed this case. DW2 supported this fact. Contrary to this,

PW1 in his evidence stated that defendant No.1 to execute the work order for giving Ambassador Car IOC Ltd., took loan from his wife at different times and issued receipts on that behalf. Receipts were exhibited as Ext-3 Series. On perusal of the above receipts exhibited as Ext-3 series, it appears that the amounts were taken from the plaintiff. DW1 though stated that the plaintiff manufactured the receipts by pasting the signed revenue stamps on papers, which defendant gave to PW1 at the time of taking loan from him, cannot be accepted as true and believable fact because, the aforesaid exhibits reveal that the signature of defendant No.1 is partly on the revenue stamp and partly on the receipt, where the revenue stamps were affixed. Defence contention would have got some force, if the signatures were appeared on the revenue stamp only. There might be possibility of manufacturing receipts with the help of signature appeared only on the revenue stamp as alleged by defendant No.1, but when the signature appeared partly on the revenue stamp and partly on the paper where the stamp was affixed, then it would give rise the fact that the person whose signature appeared had signed the receipts with his full knowledge and after the revenue stamp was affixed. In such circumstances, plaintiff's version is found to be weighed more than the defence version. Issuance of receipts itself gives rise the fact that the amount was received by the defendant No. 1. Said amount is whether a donation or loan, it is to be explained by the party concerned, but the fact remains that the said amount was received by defendant No.1. Plaintiff explained that the defendant received the amount as a loan.

13. On the other hand, defendant No. 1 admitted that he took loan during the period from 1997 to 1999 from the husband of the plaintiff and not from the plaintiff. At the time of repayment of the said loan he asked to return the signed stamp and other papers, but PW1 stated that those were destroyed. This fact also cannot be believed because defendant No.1 failed to submit any receipt for repayment of the loan to PW1 Bhubaneswar Das. Again when defendant No. 1 stated that PW1 allegedly took his signatures on revenue stamps and papers at the time of taking loan, then what prevents the defendant No. 1 for asking receipts from PW1 Sri Bhubaneswar Das at the time of repayment of the loan. There is no such satisfactory explanation from the side of defendant No. 1 on this circumstance. In all monetary transactions, issuance of receipt cannot be one sided. It may be without receipt from both sides when the transaction is entirely on good faith, but when one side took signature on revenue stamp at the time of taking loan then the Borrower also must have obtained receipt as a proof of repayment. So, failure to furnish receipt by the defendant No.1 gives rise the fact that he did not take loan from Bhubaneswar Das but the loan was taken from the plaintiff and hence he could not furnish any receipt of repayment to Sri Bhubaneswar Das. On the other hand, plaintiff's case reveals that defendant No.1 took loan from her during the same period when he admitted to be taken from Sri Bhubaneswar Das i.e. from 1997-1999.

14. Another fact which appears to be extended support to the plaintiff's case is repayment of Rs. 2,78,186/- to the plaintiff from the payment of bills defendant No. 1 has received from IOC Ltd. and transfer of the ambassador car to the plaintiff. Plaintiff side by adducing documentary evidence i.e. Ext-4 shows that an amount of Rs. 2,78,186/- was paid to the plaintiff from the bills submitted by defendant No.1 at the IOC Ltd. for running his ambassador car. Plaintiff deducted this amount from the total amount of loan and the suit was filed for the balance amount. This fact appears to be a consistent fact as the plaintiff deducted said amount. If the amount would not have paid by the defendant No. 1 from the payment of bills received from the IOC Ltd. then the plaintiff must have filed the suit for the entire amount of Rs. 5,02,103/-.

15. Again plaintiff has stated that the ambassador car was transferred to her name in compliance of Ext-5, the agreement. Defendant denied the said fact and stated that the Ext. 5 is a manufactured one and he had not executed and the registration of the ambassador car was done illegally. Defence version cannot be believed on the ground that the registration of a vehicle cannot be transferred to another person without furnishing the 'No objection certificate' by the original owner. Even if we believe that the registration was done illegally, then also defence version has no force, because defendant No.1 did not take any action against the said act of illegal transfer by the plaintiff or her agent. Ambassador car is not like a small thing that can be concealed in a pocket of a person. So, when the

registration of such a vehicle is transferred to the name of another person illegally without the 'No objection certificate' of the original owner and the transferor is using the vehicle, then the original owner of the vehicle must have take action to recover his car as well as for cancellation of the registration. By not taking any legal action, would give rise the fact that the defendant No. 1 in compliance of the agreement, Ext-5, has transferred the ambassador car to the plaintiff. This fact also extend support to the plaintiff's case.

16. Plaintiff claimed Rs. 67,510/- from the defendant No. 1 and 5, as this amount was paid to the defendant No.5 as salary. Plaintiff stated that defendant No.5 was the driver of the ambassador car given to IOC Ltd. and during the period from 18.10.97 to 07.11.99 when the car was with the IOC Ltd., defendant No. 5 took the said amount from the Plaintiff under the instruction of defendant No. 1. Ext-7(1) to Ext-7(26) is the receipts by which defendant No.5 received the amount from the plaintiff. This fact goes to show that the plaintiff in course of giving financial assistance to defendant No.1 paid the amount to defendant No.5. Defendant No. 1 denied the said fact and stated that at that time one Gokul Das was the driver of his said vehicle. But, he failed to examine Gakul Das as his witness, in support of said contention. So, fact remains that plaintiff paid Rs. 67,510/- to defendant No.5 from 18.10.97 to 07.11.99, which the defendant No. 1 and 5 are liable for repayment to the plaintiff.

17. In view of my above discussion and reasons stated, I have answered the Issue No. 2 & 3 as affirmative. Consequently, Issue No. 4 & 5 also answered into affirmative. Learned Civil Judge (Sr. Divn), No.1, Kamrup, Guwahati has committed error in arriving at the decision in Issue No. 2 & 3 as negative.

18. In the result, appeal is allowed. Plaintiff/appellant's suit for recovery of Rs. 2,31,427/- is decreed. Out of the said amount, defendant No.1 is individually liable for payment of Rs. 1,63,917/- and defendant No. 1 & 5 are jointly and severally liable for payment of Rs. 67,510/- to the plaintiff with interest at the rate of 18% per annum till realisation of the amount. Judgment and decree dated 06.06.07 passed by the learned Civil Judge (Sr. Divn), No.1, Kamrup, Guwahati in Money Suit No. 126/2000 is set aside and quashed.

19. Prepared the decree accordingly. Send back the LCR.

18. Judgment prepared and delivered in the open Court on this 15th day of September, 2011 under my hand and seal.

Dictated & Corrected by me.

(I. Hussain)
Addl. District Judge

(I. Hussain)
Addl. District Judge

Kamrup:Guwahati Kamrup, Guwahati.