

HIGH COURT FORM NO (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT

District : Sonitpur

IN THE COURT OF MUNSIF NO 1, TEZPUR , SONITPUR

PRESENT---- Aklima Begum, AJS

Munsiff No1, Sonitpur, Tezpur

Wednesday, the 6th day of May, 2015

Money Suit No 13 of 2012

Smt Purnima BorahPlaintiffs

Vs

Sri Gautam DasDefendant.

This suit coming on final hearing on 6/4/2015 in presence of

Sri Jatin Bora and Krishna Sarma

Advocate for the Plaintiff and

Sri T.K Moitra and N Sarma

Advocate for the Defendant

And having stood for consideration to this day, the court delivered the following judgment:-

JUDGMENT

1. This is a suit for realization of Rs. 1,00,000/- (Rupees one lakh)only from the defendant.
2. The fact leading to institution of the suit is that taking advantage of the cordial relationship between the plaintiff and defendant, the defendant on 3rd day of March, 2009 approached the plaintiff and told that he was in urgent need of money amounting to Rs 1,50,000/- to meet his business requirement. The plaintiff had money in hand by that time accordingly on 3/3/2009 the plaintiff lent and paid an amount of Rs 1,50,000/- to defendant and in respect of the said transaction the plaintiff and defendant arrived into an agreement which is reduced into writing on same day at Tezpur in presence of the witnesses. As per the terms of agreement the defendant was to refund the

said amount on or before 7th day June 2009. But defendant failed to repay the loan amount till 7th day of June 2009. It is pleaded that the plaintiff made several demand to defendant over telephone to refund the said loan but defendant paid no heed and started to avoid the plaintiff. The plaintiff also on several occasions personally went to the residence of the defendant and demanded the defendant to refund the loan amount and each time defendant promised to pay the amount but never paid the amount.

3. Having unable to recover the loan amount from the defendant, the plaintiff served a notice through his advocate on 3/11/2009 demanding to pay the amount within 7 days from the date of receipt of notice but defendant did not paid the loan. Again on 19/11/2009 the plaintiff sent another notice demanding repayment of loan amount within 7 days from date of receipt and having receipt the second notice defendant paid Rs 50,000/- and on 25/1/2010 the defendant gave a cheque for Rs. 1,00,000.00 signed by one B.Saikia drawn on Assam Co- operative Apex bank Ltd telling that he had borrowed Rs.1,00,000.00 from him to liquidate his liability towards plaintiff and said transaction was reduced into writing in the form of acknowledgment dated 25/1/2010 in which the defendant has put his signature and handed over to her a photostat copy of the said document and kept the original in his custody.
4. The aforesaid cheque was presented to plaintiff bank for clearance and The Assam Co-operative Bank returned the same with Memo No dated 16/2/2010 for insufficiency of funds . Only then the plaintiff came to know defendant has given the cheque only to deceive. In view of the above reason plaintiff filed this suit.
5. The Defendant has appeared and filed his written statement taking the usual defence that the suit is not maintainable in the present form and is bar by limitation, there is no cause of action Defendant pleaded that he does not have any long term cordial relationship with the plaintiff hence question of taking advantage of that relationship does not arise at all. The defendant has stated that he is not liable to pay Rs 1,00,000/- or whatsoever to the plaintiff as because he has already cleared whatsoever transaction they had. The

defendant has stated that fact of lending loan of Rs 1,50,000/- to the defendant by plaintiff is a matter to be proved. He denied of having entering into a written agreement on 3/3/2009 as alleged by plaintiff or on any date whatsoever and did not put signature on the said written agreement.

6. The defendant has stated that he has not entered into any agreement hence no question arises for refunding of amount on or before 7/6/2009. It has also been stated that plaintiff never visited the house of defendant and he never promised to pay so called loan amount. The defendant also stated that he never issued and handed over any cheque vide no 241303 dated 2/2/2010 for Rs 1,00,000/- drawn on Assam Co-operative Apex Bank Ltd signed by B Saikia who is a necessary party and she has not been made as party hence the suit is bad for non-joinder of necessary party. It is stated that original of the said purported acknowledgment was not in his power or possession hence prayed for dismissal of the suit.
7. On perusal of pleading, following issues have been framed by my learned predecessor in office.

Issues

1. **Whether the plaintiff paid a sum of Rs 1,50,000/- to the defendant on 3rd of March,2009 as loan , to be repaid on or before 7th day of June 2009?**
2. **Whether the defendant entered into an agreement with the plaintiff on 3rd day of March 2009 regarding repayment of said loan?**
3. **Whether the defendant paid back the plaintiff a sum of Rs 50,000/- only on 25.1.2010 and admitted on the same day , in writing his liability to repay the remaining Rs 1,00,000 and handed over a Cheque being no 241303 dated 2/2/2010 for Rs 1,00,000/- to liquidate said balance amount?**
4. **Whether the suit is barred by limitation?**
5. **Whether the plaintiff is entitled to any decree as prayed for?**

8. The plaintiff has examined two PWs including herself and exhibited some document in support of its case. The Defendant has not examined any witness nor exhibited some documents in support of his case.

I have heard the arguments advanced by the learned counsel for the plaintiff and perused the material on record. The material on record and submission made on behalf of the plaintiff have received due consideration of this court.

9. Discussion, Decision and Reason thereof

Now let me discuss the material on record to arrive at definite finding as regards to the issues in this suit

10. Issue no 1) Whether the plaintiff paid a sum of Rs 1,50,000/- to the defendant on 3rd of March,2009 as loan , to be repaid on or before 7th day of June 2009?

Issue no 2) Whether the defendant entered into an agreement with the plaintiff on 3rd day of March 2009 regarding repayment of said loan?

Both the issues are taken together for convenience.

To substantiate the claim, the plaintiff has examined him as PW 1 and deposed that taking advantage of family relationship, the defendant on 3/3/2009 approached the plaintiff for taking loan of Rs 1,50,000/- to meet his business purpose accordingly the plaintiff had lent Rs 1,50,000/- to the defendant and a written agreement was entered into between the plaintiff and the defendant on 3/3/2009 at Tezpur as per which the defendant had to refund the loan amount on or before 7th day of June 2009 and gave acknowledgment receipt. In cross examination also PW 1 deposed that she claimed loan amount on the basis of Ext 1 and 2. Hence to prove that defendant has taken loan plaintiff has to prove the agreement and acknowledgment dated 3/3/2009. The defendant in written statement has denied the taking of loan , execution of agreement and acknowledgment receipt dated 3/3/2009 and stated that signature over the Ext 1 and Ext 2 are not his signature.

Section 101 of Evidence Act provides that “ **whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those fact exists.**” Section 102 of Evidence Act also provides that , **burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**

In the present case plaintiff is asserting that defendant has taken loan of Rs 1,50,000/- by executing an **agreement and acknowledgment** in favour of plaintiff and defendant denies the claim of plaintiff. Hence if no evidence is led on either side the plaintiff would fail. Hence, to prove the taking of loan, the burden lies on plaintiff to prove due execution of agreement and acknowledgment dated 3/3/2009.

11. The contents of documents may be proved by producing the primary or secondary evidence as per section 61 of Indian Evidence Act. The plaintiff has exhibited the original agreement dated 3/3/2009 claimed to be executed by defendant in favour of the plaintiff at the time of taking loan amount of Rs 1,50,000/- as Ext. 1 . The signature of plaintiff is exhibited as Ext 1(i) and signature of defendant is exhibited as Ext 1(ii). The plaintiff also exhibited the acknowledgment receipt as Ext 2(i) to prove the contents relating to taking of loan amounting to Rs 1,50,000/-. However defendant denied of having executed the Ext 1 and 2. Hence the plaintiff has to prove its due execution by proving the signature of over Ext 1 and 2.
12. Section 47 of Indian Evidence Act provides that when the court has to form an opinion as to the person by whom any document was signed or written, opinion of any person who is acquainted with the handwriting of person by whom it is supposed to be written or signed is relevant fact. Again Section 67 of Indian Evidence Act provides if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the documents as alleged to be in that persons handwriting must be proved to be in his handwriting.

As per section 67 of Evidence Act signature can be proved by calling a person who signed or wrote, or in whose presence the document was signed or by calling a person who was acquainted with the handwriting of the person by whom it is alleged to be written. Section 68 of Evidence Act provides that due execution of a documents can be proved by examining the attesting witness.

On careful scrutiny of the evidence of PWs it appears that the PW 1 in her evidence simply exhibited the signature of defendant but has never stated that signature over the Ext 1 and Ext 2 are the signature of the defendant which is put in his presence. The PW 1 has not stated that she is acquainted with the signature of the defendant as required by section 47 of Evidence Act to prove that defendant had put his signature over Ext 1 and 2 at the time of execution and that signature was of the defendant. The plaintiff has examined PW 2 who in his evidence stated that defendant to meet his need in business has taken loan of Rs 1,50,000/- from the plaintiff and a written agreement was entered into between the party on 3/3/2009 . As per the term of the agreement defendant was required to refund the amount by 7th day of June 2009. However in cross examination the PW 2 has stated that Ext 1 agreement was not executed in his present and he was not a signatory of the Ext 1. PW 2 also admitted that there is no signature of plaintiff and defendant in the first and second page of the agreement dated 3/3/2009. The PW 2 also admitted that Ext 2 acknowledgement receipt was also not executed in presence of him. Hence PW 2 also failed to prove that defendant has executed the Ext 1 and 2 and taken loan of Rs 1,50,000/- by executing Ext 1 and 2.

13. On perusal of the exhibits exhibited by the plaintiff it transpires that Ext 1 shown to have been executed between plaintiff and defendant wherein the defendant the agrees to the terms of the agreement and defendant was paid Rs 1,50,000/- by plaintiff on 3/3/2009 before the witnesses after receipt of the acknowledgment from the defendant. The plaintiff has not examined any witnesses mentioned in the Ext 1 to prove that defendant has taken loan Of Rs 1,50,000/- from plaintiff. The Ext 1 shows the name of Sri Ganesh Das

and Jayanta Kumar Nath as attesting witnesses. Ext 2 also shows the name of Sri Jayanta Kumar Nath as attesting witness. However the plaintiff has not examined the witness in whose presence the defendant has taken loan amount of Rs 1,50,000/- to prove her case or the attesting witness to prove that defendant had put his signature over Ext 1 and 2, also to prove genuineness and due execution of the Ext 1 and 2 on the basis of which plaintiff is claiming the loan amount. The plaintiff only examined PW 2 who is not a signatory of the Ext 1 and 2 and admittedly Ext 1 and 2 were not executed in his presence. PW 2 even does not have any knowledge about execution of Ext 2.

The PW 1 and PW 2 in their evidence failed to state that the signature on the Ext 1 and 2 were the signature of the defendant which was put in their presence or that they are acquainted with the signature of defendant as required by section 47, 67, 68 of Evidence Act.

Moreover the defendant throughout the case has been taking the stand that signature in Ext 1 and 2 are not of his signature. On bare perusal of written statement and Ext 1 and 2 it is found that the signature of defendant in written statement is different from the signature of defendant as claimed by plaintiff over Ext 1(ii) and Ext 2. The plaintiff has not taken any steps for comparing the signature of defendant through expert. No attesting witness is examined to prove due execution of the Ext 1 and 2. The plaintiff has to stand on its own leg and to prove its own case irrespective of the failure of defendant.

- 14.** In the present case as discussed above it can be said that due execution of Ext 1 and Ext 2 and signature of defendant have not been proved in accordance with section 47, 67 and 68 of Indian Evidence Act as discussed above. Considering the above discussion this court is of the opinion that as the plaintiff has failed to prove the execution of Ext 1 and 2 by cogent evidence it cannot be held that defendant had taken loan of Rs 1,50,000/- from plaintiff by executing Ext. 1 and Ext 2 in favour of plaintiff. Accordingly there is no question of repayment of the said amount.

Hence the issue no 1 and 2 are decided in negative.

15. Issue no 3 :- Whether the defendant paid back the plaintiff a sum of Rs 50000/- only on 25.1.2010 and admitted on the same day , in writing his liability to repay the remaining Rs 1,00,000 and handed over a Cheque being no 241303 dated 2/2/2010 for Rs 1,00,000/- to liquidate said balance amount?

The PW 1 in his evidence deposed that the defendant failed to pay the loan by 7th June 2009 accordingly the plaintiff has sent notice to the defendant demanding payment of money on 3/1/2009 and on 19/1/2009. The plaintiff exhibited the copy of notice dated 3/11/2009 as Ext 3 and notice dated 19/11/2009 as Ext 4 and postal receipt dated 19/11/2009 as Ext 5, acknowledgment of notice as Ext 6. Ext 6 shows the signature of one Nirmali Gogoi Das who received the notice.

The PW 1 deposed that having receipt the second notice defendant paid Rs 50,000/- and on 25/1/2010 the defendant gave a cheque bearing no 241303 dated 2/2/2010 for Rs. 1,00,000.00 signed by one B. Saikia drawn on Assam Co- operative Apex bank Ltd telling that he had borrowed Rs.1,00,000.00 from B Saikia to liquidate his liability towards plaintiff and said transaction was reduced into writing in the form of acknowledgment dated 25/1/2010 in which the defendant has put his signature and handed over to her a photostat copy of the said document and kept the original in his custody. The PW 1 has exhibited the Cheque bearing No 241303 as Ext 8 and written form of acknowledgement as Ext 7.

Contents of a documents can be proved by primary or secondary evidence as per section 61 of Evidence Act. Ext 7 is a secondary evidence. The original of the acknowledgement receipt was not exhibited by plaintiff and stated that original is in custody of defendant. On perusal of record of this suit it transpires that plaintiff had filed Misc(j) case no 192/13 praying to direct the defendant to make discovery on oath of the original document of acknowledgment dated 25/1/2010 upon which the defendant had put his

signature. The Misc(j) case 192/13 was allowed but defendant has not produced the document nor taken any step for production Accordingly vide order dated **21/4/2014** this court has ordered that plaintiff is at liberty to submit the document which is in his hand hence this court has allowed the plaintiff to led secondary evidence. As defendant has not produced the original of the acknowledgement dated 25/1/2010 nor make any discovery of that document as per order of this court secondary evidence of the acknowledgement dated 25/1/2010 is admissible in evidence as per law of evidence.

The defendant has denied of having signed the Ext 7. As discussed in issue no 2 the signature can be proved as per section 47, 67 of Indian Evidence Act provides that signature can be proved by calling a person who signed or wrote, or in whose presence the document was signed or by calling a person who was acquainted with the handwriting of the person by whom it is alleged to be written and the burden is on plaintiff to prove that defendant has put his signature in Ext 7 and acknowledged his liability in his presence and he has seen the defendant putting the signature on Ext 7.

On perusal of Ext 7 it is revealed that the plaintiff is the executor of Ext 7 where she had acknowledged the receipt of Rs 50,000/- from the defendant and a receipt of a Cheque bearing no 241303 A/C 22660 for Rs 1,00,000/-.Ext 7 does not show any attesting witness in whose presence the defendant has paid Rs 50,000/- and plaintiff had received the amount. Ext 7 shows the signature of defendant in Assamese. The plaintiff exhibits the Acknowledgment as Ext 7 and signature as Ext 7(i) .The plaintiff has not stated in his evidence that she is acquainted with the signature of the defendant , she has not stated that she has seen the defendant putting his signature in Ext 7. Plaintiff has not examined any other person in whose presence the defendant had put his signature in Ext 7 and who are acquainted with the signature of defendant who could have identified the signature of defendant in Ext 7.

From the bare perusal of handwriting in Ext 7 and signature of the plaintiff and defendant it can be said that the Ext 7 has been written neither by

plaintiff nor by defendant and same is written by another person but that writer of the Ext 7 has not been examined by the plaintiff to prove that defendant has put his signature in Ext 7 in Assamese and signature in Ext 1 and 2 are in English hence plaintiff has to prove that both the signature are of same person by examining attesting witnesses or by examining person in whose presence the defendant has put his signature or by examining the person who are acquainted with the signature of the defendant . From the above discussion it can be said that plaintiff has miserably failed to prove due execution Ext 7 and signature of defendant .

Merely exhibiting the signature of defendant as Ext 7(1) will not prove the signature unless it is proved by witness that he has seen the defendant signing Ext 7 or that he is acquainted with the signature of defendant and that Ext7(i) is the signature of the defendant which is put in his presence. No evidence is given by plaintiff in this regard. No other witness is examined by plaintiff to prove due execution of Ext 7.

16. The plaintiff also deposed that defendant had handed over a Cheque bearing no 241303 A/C 22660 for Rs 1,00,000/- toward his liability which was dishonoured for insufficient fund. The plaintiff exhibited the Cheque as Ext 8. And cheque returning Memo no as Ext 9 and intimation as Ext 10 .However on perusal of the Ext 8 it is found that the Cheque was drawn by one B Saikia for Rs 1,00,000/- and not by defendant. In cross examination also PW 1 stated that cheque was given by Badan Saikia. Had the cheque been drawn by defendant it could have been presumed that defendant had acknowledged his liability. But admittedly Ext 8 is not drawn by defendant . The PW 1 stated that defendant has told her the he has borrowed Rs 100,000 from B Saikia who has directly drawn the cheque in the name of the plaintiff. No other witness is examined to prove the fact. The plaintiff has not examined B Saikia the drawer of the Cheque to prove that defendant had borrowed the amount in liquidation of his liability from B. Saikia who has drawn the cheque directly in the name of plaintiff. In absence of any evidence from B Saikia it cannot be held that defendant has given the Ext 8 toward his liability of Rs 1,00,000/- and defendant cannot be held liable on the basis of a cheque given by another

person. For the reasons above it cannot be held that defendant had acknowledged his liability . From the above discussion it is held that plaintiff has failed to prove that defendant paid Rs 50000/- to the plaintiff and **handed over a Cheque being no 241303 dated 2/2/2010 for Rs 1,00,000/- to liquidate said balance amount.**

This issue is decided in negative against the plaintiff.

17. Issue no 4 Whether the suit is barred by laws of limitation?

The plaintiff has filed this suit on the basis of Ext 1 and 2 as admitted by the plaintiff. The date of execution is shown to be 3/3/2009 and this suit for recovery of amount of Rs 1,00,000/- is filed in 7/3/2012 i.e beyond three years of limitation. The plaintiff in her cross examination had admitted that she has file date suit after three years.

In this connection I would like to refer provision of section 18 (1)of Limitation Act

According to Section 18(1) of the Limitation Act, an acknowledgement of liability made in writing in respect of any right claimed by the opposite party and signed by the party against whom such right is claimed made before the expiration of the prescribed period for a suit in respect of such right has the effect of commencing a fresh period of limitation from the date on which the acknowledgement was so signed.

18. To save the limitation the plaintiff deposed that defendant paid Rs 50,000/- and on 25/1/2010 the defendant gave a cheque bearing no 241303 dated 2/2/2010 for Rs. 1,00,000.00 signed by one B. Saikia drawn on Assam Co-operative Apex bank Ltd telling that he had borrowed Rs.1,00,000.00 from B Saikia to liquidate his liability towards plaintiff and said transaction was reduced into writing in the form of acknowledgment dated 25/1/2010 in which the defendant has put his signature. However in issue no 3 it is held that plaintiff has failed to prove that defendant paid Rs 50000/- to the plaintiff and **handed over a Cheque being no 241303 dated 2/2/2010 for Rs 1,00,000/- to liquidate said balance amount.**

As plaintiff to failed to prove Ext 7 and also failed to prove that defendant has paid Rs,50,000/- to plaintiff and that he acknowledged the liability for Rs 1,00,000/- this court is of the view Ext 7 will not create any fresh limitation and cause of action as per section 18 of Limitation Act.

As this suit is filed after three year hence this suit is barred by laws of Limitation.

This issue is decided in affirmative .

24 Issue no vi) Whether the plaintiff is entitled to any decree as prayed for?

In view of the decision in above issues this court held that plaintiff through oral and documentary evidence has failed to established that defendant has taken loan of Rs 1,50,000/- by executing Ext 1 and 2 . The plaintiff also failed to established that defendant has paid Rs 50,000/- and executed Ext 7 acknowledging his liability for Rs 1,00,000/- It is also proved that suit is barred by Limitation . In view of the above the plaintiff is not entitled to the decree as prayed for.

This issue is decided in Negative.

O r d e r

In conclusion the suit is dismissed on contest with cost. The plaintiff is not entitled to any decree as prayed for.

Prepare a Decree accordingly.

This judgment and order is delivered and operative part of this judgment is pronounced in the open court today, the 6th day of May 2015 under my hand and seal.

Munsiff No 1
Sonitpur Tezpur

APPENDIX

(A) Plaintiff's Witness

1. PW-1 Smt. Purnima Bora
2. PW 2 Sri Abani Bora

(B)Plaintiff's Exhibits

Ext. 1 Agreement dated 3/3/2009

Ext 1(i) signature of Purnima Bora

Ext 1(ii) signature of Gautam Das

Ext 2 receipt dated 3/3/2009 regarding taking loan of Rs 1,50,000/-

Ext 2(i) signature of Gautam Das.

Ext 3 demand notice dated 3/11/2009

Ext 4 demand notice dated 18/11/2009

Ext 5 postal receipt

Ext 6 Acknowledgment

Ext 7 acknowledgment dated 25/1/2010

Ext 7(i) signature of Gautam Das

Ext 8 Cheque bearing no 241303 dated 2/2/2010

Ext 9 refund memo

(C)Defendants witness

NIL

(D) Defendants Exhibit

NIL

Munsiff No 1

Sonitpur Tezpur