

Assam Schedule VII, Form No. 132.

HIGH COURT FORM NO. (J) 2

HEADING OF JUDGMENT IN ORIGINAL SUIT.

DISTRICT :- BONGAIGAON.

BEFORE THE CIVIL JUDGE ::::: BONGAIGAON

Present :- Sri R. Lal, A.J.S.

Tuesday the 12th day of June, 2018.



Money Suit No. 2/2016

Sri Mahesh Ishwary

.....Plaintiff

VERSUS

Sri Dhiraj Biswas

.....Defendant

This suit coming for final hearing on 6/6/2018.

(I) Given date or dates in the presence of

Samir Kr. Sarkar

Advocate for plaintiff

Civil Judge,
Bongaigaon

and having stood for consideration to this Court on the 12th day of June, 2018 the Court delivered the following Judgment:

M.S. 2/2016
Mahesh Ishwary -vs- Dhiraj Biswas

::: J U D G M E N T :::

1. This is a suit for recovery of money. The plaintiff has stated in the plaint that he had given a loan of Rs. 472,500/- (Rupees Four Lakh Seventy Two Thousand and Five Hundred) only in cash to the defendant on 1/7/2013. At that time, so reads the plaint, the defendant had issued a post dated cheque dated 31/1/2014 for the loan amount.
2. It is the case of the plaintiff that defendant failed to return the loan amount on due date. The plaintiff then deposited the cheque in the bank for encashment on 30/4/2014. It is the case of the plaintiff that the cheque was dishonoured on the ground "insufficiency of fund". It is in that background that the plaintiff instituted a criminal case under Section 138 N.I. Act which was registered a NICR no. 74/14 seeking punishment of the accused person.
3. The plaintiff has instituted the instant case for monetary relief based on the cheque & prayed for recovery of Rs. 472,500/- (Rupees Four Lakh Seventy Two Thousand and Five Hundred) only along with interest. On institution of the suit, summons was served upon the defendant. But he did not contest the suit and hence the case proceeded ex-parte. In that view of the matter, there are no issues but nevertheless for clarity in decision making, I hereby frame the following points for determination:
4. **Points for determination :** i) Whether the suit is maintainable? ii) Whether the defendant had taken a loan of Rs. 472,500/- (Rupees Four Lakh Seventy Two Thousand and Five Hundred) only from the plaintiff on 1/7/2013 and if so whether the defendant failed to re-pay the loan? iii) Whether the plaintiff is entitled to recover the loan amount from the defendant? iv) To what relief, if any, the plaintiff is entitled to?



Civil Judge,
Bongaigaon

5. **Decision and Reasons Therefor** : I have heard Mr. Sarkar and I propose to proceed point-wise.
6. **Point no. 1** : The plaintiff had instituted a criminal case under Section 138 N.I. Act against the accused person. There is no bar in simultaneously prosecuting a civil and criminal remedy. Hence, the suit is maintainable.



7. **Point no. 2** : The plaintiff as PW1 has averred that on request being made he had given a loan of Rs. 472,500/- (Rupees Four Lakh Seventy Two Thousand and Five Hundred) only to the defendant. At that time the defendant have issued a post-dated cheque. The post dated cheque has been exhibited as part of Ext-1. The testimony of PW1 is supported by Dharendra Ch. Sarkar (PW2) who avers that loan was taken and cheque was dishonoured. The defendant has chosen not to cross-examine any of the two witnesses. In other words, the testimonies have remained un-rebutted.

8. Having read the testimonies including the documents I hold that plaintiff had given a loan of Rs. 472,500/- (Rupees Four Lakh Seventy Two Thousand and Five Hundred) only to the defendant on 1/7/2013 and that the defendant failed to repay the loan. This point is decided accordingly.

9. **Point no. 3 & 4**: This is the crucial issue in this case. Evidence has come that the criminal case has ended in conviction and the accused (defendant) has been sentenced to imprisonment and to pay fine which is double the cheque amount. The case at hand relate to breach of contractual obligation to pay the loan amount. The principle of compensation as enshrined in Sections 73 & 74 of the Contract Act is that the loss occasioned should not become a lottery for the plaintiff. In-fact a duty is cast on the plaintiff to minimize his loss. In that view of the matter, when I look into the facts of the present case, I hold that plaintiff is entitled to recover the

M
Civil Judge,
Bongaigaon

loan advanced from the defendant along with reasonable interest. But this entitlement would be subject to one condition/rider. Any payment made in the criminal court must be adjusted by the executing court while enforcing the decree.

- 10.** In the facts, I hold that plaintiff is entitled to recover Rs 472,500/ along with 9% interest per annum on the sum assured from the date of institution of the suit. The plaintiff would also be entitled to 6 % interest on the decretal sum till realization.



ORDER

The suit is decreed. I hold that plaintiff is entitled to recover the loan advanced from the defendant. The plaintiff is also entitled to 9% interest per annum on the sum awarded from the date of institution of suit till drawl of decree. The defendant would be liable to pay 5 % interest on decretal sum till realization. This entitlement would be subject to one rider/condition. Any payment made in the criminal court towards the fine imposed would be adjusted by the executing court while enforcing the decree. This is done to ensure equity and justice between the parties.

Given under my hand and the seal of this Court on the 12th day of June, 2018.

R.Lal
Civil Judge,
Bongaigaon
Civil Judge,
Bongaigaon

Dictated & corrected by me,

R.Lal
Civil Judge,
Bongaigaon
Civil Judge,
Bongaigaon

A P P E N D I XPlaintiff's witnesses :

PW 1 - Mahesh Ishwary
PW2 - Dharendra Ch. Sarkar

Plaintiff's exhibit

Ext 1 - Record of NICR case no. 74/14

Defendant's witnesses :

Nil

Defendant's exhibit

Nil

Court's witnesses :

Nil

Court's exhibit

Nil




R.Lal
Civil Judge,
Bongaigaon
Civil Judge,
Bongaigaon