IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR,TRIPURA AND ARUNACHAL PRADESH)
ITANAGAR BENCH

RFA NO. 07 OF 2009

1. The Commissioner Cum Secretary,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

2. The Chief Engineer (Power)
   Eastern Electrical Zone, Vidyut Bhawan,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

3. The Superintendent Engineer (Power),
   A.P. Erlectrical Circle –III,
   Department of Power, Miao,
   District Changlang
   Arunachal Pradesh, Itanagar.

4. The Executive Engineer,
   Deomali electric Division,
   Department of Power, Deomali,
   District Tirap, Arunachal Pradesh.

………… Appellants.

-Vs-

M/S T.C. Syndicate,
A Proprietorship firm situated at Korayer,,
P.O. Chambang, District Kurung Kumery,
Arunachal Pradesh, represented by its Proprietor,
Shri Tapio Charu, S/o Sri Charu Talla, Permanent
Resident of village korayer, District Kurung Kumey,
Arunachal Pradesh, presently residing at Itanagar,
PO/PS Itanagar, District Papum Pare,
Arunachal Pradesh.

………… Respondent

RFA NO. 08 OF 2009

1. The Commissioner Cum Secretary,
Department of Power,
Govt. of Arunachal Pradesh, Itanagar.

2. The Chief Engineer (Power)
Eastern Electrical Zone, Vidyut Bhawan,
Department of Power,
Govt. of Arunachal Pradesh, Itanagar.

3. The Superintendent Engineer (Power),
A.P. Erlectrical Circle –III,
Department of Power, Miao,
District Changlang
Arunachal Pradesh, Itanagar.

4. The Executive Engineer,
Deomali electric Division,
Department of Power, Deomali,
District Tirap, Arunachal Pradesh.

………… Appellants.

-Vs-

M/S D.L. Enterprise,
A Proprietorship firm situated at Korayer,
P.O. Chambang, District Kurung Kumery,
Arunachal Pradesh, represented by its Proprietor,
Shri Tapio Charu, s/o Sri Charu Talla, Permanent
Resident of village korayer, District Kurung Kumey,
Arunachal Pradesh, presently residing at Itanagar,
PO/PS Itanagar, District Papum Pare,
Arunachal Pradesh.

………… Respondent

RFA NO. 09 OF 2009

1. The Commissioner Cum Secretary,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

2. The Chief Engineer (Power)
   Eastern Electrical Zone, Vidyut Bhawan,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

3. The Superintendent Engineer (Power),
   A.P. Erlectrical Circle –III,
   Department of Power, Miao,
   District Changlang
   Arunachal Pradesh, Itanagar.

4. The Executive Engineer,
   Deomali electric Division,
   Department of Power, Deomali,
   District Tirap, Arunachal Pradesh.

………… Appellants.

-Vs-

M/S Shaman Enterprise,
A Proprietorship firm situated at Kaimai,
P.O. Khonsa, Distict Tirap,
Aruanchal Pradesh, represented by its Proprietor
Shri Vincent Tongluk, s/o Late N. Tongluk,’
Resident of village Kaimai,
PO/PS Khonsa, District Tirap,
Arunachal Pradesh

………… Respondent

RFA NO. 10 OF 2009

1. The Commissioner Cum Secretary,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

2. The Chief Engineer (Power)
   Eastern Electrical Zone, Vidyut Bhawan,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

3. The Superintendent Engineer (Power),
   A.P. Erlectrical Circle –III,
   Department of Power, Miao,
   District Changlang
   Arunachal Pradesh, Itanagar.

4. The Executive Engineer,
   Deomali electric Division,
   Department of Power, Deomali,
   District Tirap, Arunachal Pradesh.

………… Appellants.

-Vs-

M/S Cho-Te Enterprise,
A Proprietorship firm situated at Khasa,
PO. Pongchau, District Tirap,
Arunachal Pradesh, represented by its Proprietor,
Smt. Ngunkhaw Ngandam, W/o Sri Hinchun Ngandam,
Resident of Itanagar,
PO/PS Itanagar, District Papum Pare,
Arunachal Pradesh.

………… Respondent

RFA NO. 11 OF 2009

1. The Commissioner Cum Secretary,
Department of Power,
Govt. of Arunachal Pradesh, Itanagar.

2. The Chief Engineer (Power)
Eastern Electrical Zone, Vidyut Bhawan,
Department of Power,
Govt. of Arunachal Pradesh, Itanagar.

3. The Superintendent Engineer (Power),
A.P. Erlectrical Circle –III,
Department of Power, Miao,
District Changlang
Arunachal Pradesh, Itanagar.

4. The Executive Engineer,
Deomali electric Division,
Department of Power, Deomali,
District -Tirap, Arunachal Pradesh.

………. Appellants.

-Vs-

M/S K.P. Popo Enterprise,
A Proprietorship firm situated at Khasa,
PO. Pongchau, District Tirap,
Arunachal Pradesh, represented by its Proprietor,
Smt. Ngunkhaw Ngandam, W/o Sri Honchun Ngandam,
Resident of Itanagar,
PO/PS Itanagar, District Papum Pare,
Arunachal Pradesh.

………. Respondent

RFA NO. 12 OF 2009

1. The Commissioner Cum Secretary,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

2. The Chief Engineer (Power)
   Eastern Electrical Zone, Vidyut Bhawan,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

3. The Superintendent Engineer (Power),
   A.P. Erlectrical Circle –III,
   Department of Power, Miao,
   District Changlang
   Arunachal Pradesh, Itanagar.

4. The Executive Engineer,
   Deomali electric Division,
   Department of Power, Deomali,
   District Tirap, Arunachal Pradesh.

………… Appellants.

-Vs-

M/S H C Agency,
A Proprietorship firm situated at Ganga Market,
Itanagar District Papum Pare, Arunachal Pradesh,
Represented by its Proprietor,
Master Hage Chada (Minor)
Represented by his Mother
Smt. Hage Yanyung,
Resident of H-Sector,
PO/PS Itanagar District Papum Pare,
Arunachal Pradesh

………… Respondent

RFA NO. 13 OF 2009

1. The Commissioner Cum Secretary,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

2. The Chief Engineer (Power)
   Eastern Electrical Zone, Vidyut Bhawan,
   Department of Power,
   Govt. of Arunachal Pradesh, Itanagar.

3. The Superintendent Engineer (Power),
   A.P. Erlectrical Circle –III,
   Department of Power, Miao,
   District Changlang
   Arunachal Pradesh, Itanagar.

4. The Executive Engineer,
   Deomali electric Division,
   Department of Power, Deomali,
   District Tirap, Arunachal Pradesh.

………. Appellants.

-Vs-

M/S J. S. Enterprise,
A Proprietorship firm situated at Thinsa,
P.O. Khonsa, District, Tirap,
Arunachal Pradesh, represented by its Proprietor,
Sri Jathang Sumnyan, S/o Sri Tangnam sumnyan,
Resident of Village Thinsa,
Circle Khonsa,
PO/PS Khonsa, District Tirap,
Arunachal Pradesh.

………. Respondent

BEFORE
THE HON'BLE JUSTICE SMTI. ANIMA HAZARIKA
THE HON'BLE MR. JUSTICE C.R. SARMA

For the appellants	: Mr. D. Mozumdar Advocate
For the respondent	: Mr. G.N. Sahewalla Sr. Advocate.
Date of Hearing	**: 07.12.2010**
Date of delivery of Judgment & Order	**: 03.03.2011**

JUDGMENT AND ORDER (CAV)

(C.R. Sarma J.)

The above mentioned seven appeals, involve similar question of law and facts and the parties are represented by the same set of Advocates. The suits, which have given rise to these appeals, have been filed by the same power of attorney holder on behalf of the plaintiffs. Therefore, for the sake of convenience and as agreed to by the learned counsel, appearing for both the parties, we prefer to dispose of these appeals by this common judgment and order.

2. The respective respondents, who instituted the Money Suit Nos. 2 of 2008, 3 of 2008, 4 of 2008, 5 of 2008, 6 of 2008, 7 of 2008 and 8 of 2008 for recovery of money from the appellants, are the sole proprietorial firms, represented by their Proprietors, as indicated below :

(i) M/S T.C. Syndicate, represented by its sole proprietor, namely, Sri Tapio Charu, which is the respondent in RFA No. 07 of 2009, instituted the Money Suit No. 02 of 2008 in the Court of the learned Deputy Commissioner cum District Judge, Khonsa, Tirap, Arunachal Pradesh, against the appellants, seeking realization of Rs. 16,59,736/- being the principal amount and interest thereon, towards supply of

electrical goods to the appellant No. 4 on the basis of the work order issued by the said appellants.

(ii) M/S D.L. Enterprise, represented by its sole proprietor, namely, Sri Tapio Charu, which is the respondent in RFA No. 08 of 2009, instituted the Money Suit No. 03 of 2008 in the Court of the learned Deputy Commissioner cum District Judge, Khonsa, Tirap, Arunachal Pradesh, against the appellants seeking realization of Rs. 24,05,109/-, being the principal amount and interest thereon, towards supply of electrical goods to the appellant No. 4 on the basis of the work order issued by the later.

iii) M/S Shaman Enterprise, represented by its sole proprietor, namely, Sri Vincent Tongluk, which is the respondent in RFA No. 09 of 2009, instituted the Money Suit No. 04 of 2008 in the Court of the learned Deputy Commissioner cum District Judge, Khonsa, Tirap, Arunachal Pradesh, against the appellants seeking realization of Rs. 17,17,961/-, being the principal amount and interest thereon, towards supply of electrical goods to the appellant No. 4 on the basis of the work order issued by the later.

(iv) M/S Cho-Te Enterprise, represented by its sole proprietor, namely, Smti Ngunkhaw Ngandam, which is the respondent in RFA No. 10 of 2009, instituted the Money Suit No. 05 of 2008 in the Court of the learned Deputy Commissioner cum District Judge, Khonsa, Tirap, Arunachal Pradesh, against the appellants seeking realization of Rs. 13,36,705/-, being the principal amount and interest thereon, towards supply of electrical goods to the appellant No. 4 on the basis of the work order issued by the later.

(v) M/S K.P. Popo Enterprise, represented by its sole proprietor, namely, Smti Ngunkhaw Ngandam, which is the respondent in RFA No. 11 of 2009, instituted the Money Suit No. 06 of 2008 in the Court of the learned Deputy Commissioner cum District Judge, Khonsa, Tirap, Arunachal Pradesh, against the appellants seeking realization of Rs. 27,22,811/-, being the principal amount and interest thereon, towards supply of electrical goods to the appellant No. 4 on the basis of the work order issued by the later.

(vi) M/S H.C.Agency , represented by its sole proprietor, namely, Sri Master Hage Chanda (Minor), which is the respondent in RFA No. 12 of 2009, instituted the Money Suit No. 07 of 2008 in the Court of the learned Deputy Commissioner cum District Judge, Khonsa, Tirap, Arunachal Pradesh, against the appellants seeking realization of Rs. 20,23,478/-, being the principal amount and interest thereon, towards supply of electrical goods to the appellant No. 4 on the basis of the work order issued by the later.

(vii) M/S J.S. Enterprise, represented by its sole proprietor, namely, Sri Jathang Sumnyan, which is the respondent in RFA No. 13 of 2009, instituted the Money Suit No. 08 of 2008 in the Court of the learned Deputy Commissioner cum District Judge, Khonsa, Tirap, Arunachal Pradesh, against the appellants seeking realization of Rs. 15,08,811/-, being the principal amount and interest thereon, towards supply of electrical goods to the appellant No. 4 on the basis of the work order issued by the later.

3. All the above mentioned sole proprietors of the plaintiff-firms aforesaid, authorized Mr. Rajesh More, by executing General Power of Attorney, to do the following works on their behalf :-

> ***"1. To look after the whole business of the firm in an around the State of Arunachal Pradesh and to promote and to expand the business of the firm.***
>
> ***2. For the purpose of the business of the firm to submit quotation, tender with any State Government/Departments/Central Government/Corporations, Defense installations, companies and any other body Corporate Associations of person, co-operative, Societies partnership firms to hand over any documents or papers or to enter into any agreements, assurance or undertaking and to arrange necessary supplies in pursuance of such contracts for and on behalf of the firm and is empowered to obtain order for drawal, transportation and distribution from the concerned office.***
>
> ***3. To deal, negotiate and correspond with all concerned regarding all business, orders, transactions and agreements for and on behalf of me and for my firm M/S D.L. Enterprise, Itanagar.***
>
> ***4. To demand, receive, accept, execute or to utilize any claim, things, privileges or any objects to which the firm be entitled and to make, give any receipt release and other discharges for money payable to the due to the firm against any such claims or demands.***
>
> 5. ***To engage employees, agents according to necessary requirement and pay salary, wages etc. and if necessary discharge them whenever***

so required or necessary by my aforesaid attorney for efficient running of the business.

6. ***To, draw, accept, endorse, negotiate, retire pay or to satisfy any bills or exchange, promissory notes, cheques, drafts, order for payments or delivery of money securities of the firms, goods or effects, bill or exchange bill of leadings or other negotiable instruments/ securities to which the firm is entitled or be due to the firm in relation to the carrying of business of the firm.***

7. ***To open and close banking account/accounts with any bank/banks of Central Government or State Government in the name of the firm/s and on my behalf in the name of my attorney and to operate the said account/accounts by my attorney freely and effectively.***

8. ***The Attorney can receive payments in the form of cheques, drafts and cash etc. and to withdraw the same freely or effectively.***

9. ***The Attorney can take loan/advances to promote the business from any Bank/Banks or any Financial Institution/Institutions on behalf of my firm.***

10. ***To protect interest of the firm in all respect and for this purpose if my attorney at his absolute description if feel necessary to file and claim for settlement before the Arbitrator, Court, to engage any Advocate to submit any applications, petitions, plaints, to sign any documents or papers or to verify any such plaint or petition and if circumstances demands to defends any case/cases that may be filed by such other person/persons against the interest of the firm.***

11. ***To engage advocate, solicitors, lawyers etc. on behalf of the firm whenever necessary with powers and dismiss any or all of them if and when my attorney deems fit and proper.***

12. ***Generally to do all lawful acts, deeds and things that may be necessary for the above-mentioned purpose and any of the aforesaid acts, deeds, and things done by my attorney shall be constructed as acts, things deeds done by myself personally."***

4. On the strength of the said power of attorney received from the respective proprietors of the plaintiff-firms, the attorney i.e. Mr. Rajesh More used to look after, control and manage the entire affairs of the plaintiff-firms on behalf of the proprietors aforesaid.

The plaintiffs' case, in brief, as revealed from the pleadings may be stated as follows :-

5. The plaintiff-firms have been carrying out the business of sale and supply electrical goods to various Departments of the Government of Arunachal Pradesh and maintenance works etc. as per requirement.

6. The Deomali Electrical Division of the Department of Power, invited the representatives of the plaintiff-firms aforesaid, for executing various works of PIE

Scheme, maintenance of assets, BADP Scheme, APDRP Scheme etc. against the specification as mentioned in the work order, to which the plaintiff-firms had also agreed.

7. The appellant No. 4, issued work order in favour of the plaintiff-firms and, accordingly, the plaintiff-firms, acting through their attorney, Sri Rajesh More, had supplied the articles to the defendants' Department as per specification of work orders, through challans, as mentioned in the respective plaints, filed in the above mentioned Money Suits.

8. In Money Suit No. 02/2008, the total value of goods supplied to the appellant No. 4, on the basis of work order, issued by the latter, came to Rs. 17,63,804/-, out of which, the plaintiff received an amount of Rs. 2,97,000/-. As the appellants failed and neglected to pay the remaining amount, despite repeated approach, the plaintiff issued a legal notice, on 21.01.2008, under Section 80 CPC to the appellants, demanding payment of the said amount within a period of sixty days, from the date of receipt of the said notice with interest thereon @ 18% per annum from the date of supply of the articles.

Due to failure of the appellants, to make the payment aforesaid, despite receipt of the said legal notice, the plaintiff, through his power of attorney holder, Sri Rajesh More, instituted the Money Suit No. 02/2008 aforesaid, seeking recovery of Rs. 19,00,902/- being the principal amount and interest thereon @ 18% per annum with future interest at the said rate.

09. In Money Suit No. 03/2008, the total value of goods supplied to the appellant No. 4, on, on the basis of the work order, issued by the latter, came to Rs. 21,67,500/-. As the appellants failed and neglected to pay the said amount in spite of repeated approach, the plaintiff issued a legal notice, on 21.01.2008, under Section 80 CPC to the appellants, demanding payment of the said amount within a period of sixty days from the date of receipt of the said notice with interest thereon @ 18% per annum from the date of supply of the articles.

Due to failure of the appellants to make the payment aforesaid, despite receipt of the said legal notice, the plaintiff, through his power of attorney holder, Sri Rajesh More, instituted the Money Suit No. 03/2008 aforesaid, seeking recovery of Rs. 27,02,121/- being the principal amount and interest thereon @ 18 % per annum with future interest at the said rate.

10. In Money Suit No. 04/2008, the total value of goods supplied to the appellant No. 4, on, on the basis of the work order, issued by the latter, came to Rs. 15,52,172/-. As the appellants failed and neglected to pay the said amount in spite of repeated approach, the plaintiff issued a legal notice, on 21.01.2008, under Section 80 CPC to the appellants, demanding payment of the said amount within a period of sixty days from the date of receipt of the said notice with interest thereon @ 18% per annum from the date of supply of the articles.

Due to failure of the appellants to make the payment aforesaid, despite receipt of the said legal notice, the plaintiff, through his power of attorney holder, Shri Rajesh More, instituted the Money Suit No. 04/2008 aforesaid, seeking recovery of Rs. 19,25,197/- being the principal amount and interest thereon @ 18 % per annum with future interest at the said rate.

11. In Money Suit No. 05/2008, the total value of goods supplied to the appellant No. 4, on, on the basis of the work order, issued by the latter, came to Rs. 11,84,672/-. As the appellants failed and neglected to pay the said amount in spite of repeated approach, the plaintiff issued a legal notice, on 21.01.2008, under Section 80 CPC to the appellants, demanding payment of the said amount within a period of sixty days from the date of receipt of the said notice with interest thereon 18% per annum from the date of supply of the articles.

Due to failure of the appellants to make the payment aforesaid, despite receipt of the said legal notice, the plaintiff, through his power of attorney holder, Shri Rajesh More, instituted the Money Suit No. 05/2008 aforesaid, seeking recovery of Rs. 15,26,747/- being the principal amount and interest thereon @ 18 % per annum with future interest at the said rate.

12. In Money Suit No. 06/2008, the total value of goods supplied to the appellant No. 4, on, on the basis of the work order, issued by the latter, came to Rs.

24,96,326/-, out of which amount, the plaintiff has received an amount of Rs. 1,09,386/-. As the appellants failed and neglected to pay the said amount in spite of repeated approach, the plaintiff issued a legal notice, on 21.01.2008, under Section 80 CPC to the appellants, demanding payment of the said amount within a period of sixty days from the date of receipt of the said notice with interest thereon 18% per annum from the date of supply of the articles.

Due to failure of the appellants to make the payment aforesaid, despite receipt of the said legal notice, the plaintiff, through his power of attorney holder, Shri Rajesh More, instituted the Money Suit No. 06/2008 aforesaid, seeking recovery of Rs. 31,42,650/- being the principal amount and interest thereon @ 18 % per annum with future interest at the said rate.

13. In Money Suit No. 07/2008, the total value of goods supplied to the appellant No. 4, on, on the basis of the work order, issued by the latter, came to Rs. 17,34,382/-. As the appellants failed and neglected to pay the said amount in spite of repeated approach, the plaintiff issued a legal notice, on 21.01.2008, under Section 80 CPC to the appellants, demanding payment of the said amount within a period of sixty days from the date of receipt of the said notice with interest thereon 18% per annum from the date of supply of the articles.

Due to failure of the appellants to make the payment aforesaid, despite receipt of the said legal notice, the plaintiff, through his power of attorney holder, Shri Rajesh More, instituted the Money Suit No. 07/2008 aforesaid, seeking recovery of Rs. 23,84,847/- being the principal amount and interest thereon @ 18 % per annum with future interest at the said rate.

14. In Money Suit No. 08/2008, the total value of goods supplied to the appellant No. 4, on, on the basis of the work order, issued by the latter, came to Rs. 12,95,217/-. As the appellants failed and neglected to pay the said amount in spite of repeated approach, the plaintiff issued a legal notice, on 21.01.2008, under Section 80 CPC to the appellants, demanding payment of the said amount within a period of sixty days from the date of receipt of the said notice with interest thereon @ 18% per annum from the date of supply of the articles.

Due to failure of the appellants to make the payment aforesaid, despite receipt of the said legal notice, the plaintiff, through his power of attorney holder, Shri Rajesh More, instituted the Money Suit No. 08/2008 aforesaid, seeking recovery of Rs. 17,75,803/- being the principal amount and interest thereon @ 18 % per annum with future interest at the said rate.

15. All the above mentioned Money Suits, filed against the appellants adding them defendant Nos. 1 to 4 were received by the learned Deputy Commissioner/ District Judge, Khonsa, Tirap, Arunachal Pradesh, on 07.08.2008. On 16.10.2008, as revealed from the Order Sheets, Mr. Jawang Sumpa, Advocate, appeared for the defendants and prayed for 15 days time for filing written statement and, accordingly, 06.11.2008, was fixed for filing or written statement by the defendants. As no steps was taken on behalf of the defendants, on the said date, the learned trial Judge fixed all the suits for ex parte hearing, on 04.12.2008, on which date Sri Rajesh More, who is the power of attorney holder of the plaintiff-firms, submitted affidavits under order 18 Rule 4 of CPC, in the respective Money Suits. On behalf of the plaintiff-firms, the said witness stated in his affidavit aforesaid that the following documents were exhibited :-

Exhibit-1	Trade license No. TL/00322/ITA issued by Deputy Commissioner, Papum Pare District, Itanagar, AP., dated 30.12.1992
Exhibit-2	General Power of Attorney, executed before the Judicial Magistrate, 1st Class, Itanagar, District Papum Pare, AP., dated 24.11.1994
Exhibit-3(i) to 3 (xix)	Works Order(s)
Exhibit-4(i) to 4 (ix)	Challans
Exhibit- 5	Legal Notice of the plaintiff sent through Advocate Mr. Bhaskar Dutt, being No. BD/Notice/2008/8, dtd. 21.01.2008
Exhibit-5(1) to 5 (4)	Acknowledgment Cards of the above.

16. The learned trial Judge, by his order, dated 04.12.2008, reserved the Judgment. On 11.06.2009, the learned trial Judge received a communication from the S.E. (Power), Miao Electrical Circle-III, Department of Power, Miao, by which the Executive Engineer (Power), Deomali Electrical Division, was directed to take up the case through Mr. Jawang Lowang, Advocate, and, accordingly, the learned trial Judge, while granting a last chance to the respondents, issued summons to the SE (Power), Miao Electrical Circle-III, Department of Power, Govt. of A.P. and EE(Power), Deomali Electrical Division, Department of Power for appearance, on 26.06.2009. On 01.07.2009, Mr. Jawang Sumpa, learned counsel, appearing for the defendants, submitted written statements in all the said Money Suits, without filing any application for vacating the order for ex parte hearing. Therefore, in absence of any such application, for vacating the ex parte order, the learned trial Judge refused to accept the written statement submitted on behalf of the defendants. However, direction was made to keep the said written statements in the records. In his order, dated 01.07.2009, the learned trial Judge recorded that the learned counsel, appearing for the defendants submitted, that the defendants admitted the claim of the plaintiffs, but due to non-availability of fund the payment could not be made and that the Executive Engineer had issued the work order without having sufficient fund. It has also been recorded, that the learned counsel, appearing for the defendants, submitted that, in the event of granting some time, the defendants would make the payments to the plaintiffs.

After hearing both the parties on the said date i.e. 01.07.2009, the learned trial Judge, fixed the case for judgment, on 31.07.2009. However, as the judgment could not be delivered on the date fixed, due to administrative reasons, the same was delivered on 03.08.2009 and, accordingly, decree was drawn up.

17. By the impugned judgment and orders, dated 03.08.2009, passed in the said money Suits, the learned trial Judge decreed the suits in favour of the plaintiffs-respondents in all the above mentioned cases, granting the claim made by the plaintiffs in their respective suits aforesaid.

Aggrieved by the impugned judgment and decrees aforesaid, the defendants-judgment debtors as appellants, have come up with this set of appeals, under Section 96 and Order XLI of the Civil Procedure Code, 1908 read with Regulation 48 of the Assam Frontier (Administration of Justice) Regulation, 1945.

18. We have heard Mr. D.K. Mozumder, learned counsel, appearing for the appellants and Mr. G.N. Sahewalla, learned senior counsel, appearing for the respondents.

19. Mr. Mozumder, learned counsel, appearing for the appellants, referring to the grounds taken in the memo of appeals, has submitted that as the learned counsel, who appeared on behalf of the appellants-defendants was neither a Government Advocate nor did he file Power/Vakalatnama on behalf of the appellants-defendants, in asmuch as the appellants-defendants did not execute any Power/Vakalatnama authorizing him to appear on their behalf and as such, the appellants did not get sufficient opportunity to defend their case. It is also submitted, that, as the State of Arunachal Pradesh has not been made party in the aforesaid suits and the claim being made against the Government and its Officers (Public Officer) as such the suits are not maintainable for non-compliance of the mandatory provisions prescribed by Section 79 and Order 27 Rule 3 and 5A of CPC. It is also contended that Sri Rajesh More, who was the power of attorney holder of the plaintiff-firms, was not competent to depose on behalf of the plaintiffs. Mr. Mozumdar, further submitted, that though the suit proceeded ex parte against the appellants-defendants, the learned trial Judge ought to have framed points for determination and decide the points by appreciating the evidence and examining the documentary evidence on record but he committed error by failing to do so. It is also submitted that, as the learned counsel, who appeared for the defendants, did not file power on behalf of the appellants-defendants and that there was no instruction from the appellants-defandants to make admission on behalf of the appellants-defendants and as such the statement made by the learned counsel can't be treated as admission made by the appellants-defendants, in the eye of law. It is also submitted that the suits being filed in the name of the

firms, which were the sole proprietorial firms, were not maintainable being hit by the provisions of Order 30 Rules 1 and 10 of CPC. In support of his above contentions, Mr. Mozumdar, learned counsel, appearing for the appellants, has relied on the following decisions :-

1. **Ramesh Chand Ardawatiya Vs. Anil Panjwani**, reported in **AIR 2003 SC 2508;**

2. **Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors, r**eported in **AIR 2005 SC 439;**

3. **Uttam Singh Dugal and Co. Ltd. Vs. Union Bank of India & Ors**, reported in **AIR 2000 SC 2740;**

4. **Karam Kapahi & Ors. Vs. Lal Chand Public Charitable Trust & Anr**, reported in **(2010) 4 SCC 753;**

5. **Jeevan Diesels and Electricals Limited Vs. Jasbir Singh Chadha (HUF) & Anr.,** reported in **(2010) 6 SCC 601;**

6. **Gandabhai Gulabchand Vs. Balkrishna Vaman,** reported in **AIR 1930 Bombay 217;**

7. **Bhagvan Manji Marwadi & Ors. Vs. Hiraji Premaji Marwadi,** reported in **AIR 1932 Bombay 516;**

20. Per contra, Mr. G.N. Sahewalla, learned senior counsel, appearing for the appellants, supporting the impugned judgment and decree, has submitted, that as the suit proceeded ex parte, the evidence rendered by the plaintiff through the attorney and the documents exhibited by them, sufficiently establish the plaintiffs case. It is also contended that the deponent, who submitted evidence under Order 18 Rule 4 of CPC, was the duly constituted attorney of the plaintiffs to manage, look after and control the business of the plaintiff-firms and he having managed the business of the plaintiffs, the transactions made by the plaintiffs were within his knowledge, and as such, he was competent to depose on behalf of the plaintiffs. Regarding institution of the suit, without showing the name of the "State of Arunachal Pradesh", the learned senior counsel, submitted that the suit being instituted against the "Commissioner cum Secretary, Department of Power, Government of Arunachal Pradesh", Itanagar and other officers of the said Department there was sufficient compliance of Section 79 CPC. The learned senior counsel further submitted, that though the suits were instituted in the name of the sole

proprietorial firms, the names of the proprietors of the said firms and their particulars having been clearly mentioned and as such, there was no difficulty in understanding that the suits were, in fact, filed by the proprietors concerned and therefore, it is mentioned that mentioning of the names of the firms aforesaid will not make suits not maintainable in their present from. In support of his contentions, the learned senior counsel, appearing for the respondents, has relied on the following decisions :-

1. **Gopesh Chandra Das Vs. The Chief Secretary to the Government of Assam & Ors**., reported in **(1989) 2 GLR 377;**

2. **Ghanshyam Das & Ors. Vs. Dominion of India & Ors., reported** in **(1984) 3 SCC 46**,

3. **Raghunath Das Vs. Union of India & Anr.,** reported in **AIR 1969 SC 674;**

4. **The New India Assurance Co. Ltd. & Anr. Vs. The Delhi Development Aurhority & Ors.,** reported in **AIR 1991 Delhi 298;**

5. **Kalyan Mal Vs. Ahmad Uddin Khan & Anr.,** reported in **AIR 1934 Privy Council 208;**

6. **Chandra Kishore Tewari & Ors., Vs. Deputy Commissioner of Lucknow in Charge Court of Wards, Sissendi Estate & Anr.,** reported in **AIR 1949 Privy Council 207;**

7. **Union of India Vs. Surjit Singh Atwal,** reported in **(1979) 1 SCC 520;**

8. **State of Punjab Vs. M/S Geeta Iron & Brass Works Ltd.,** reported in **AIR 1978 SC 1608;**

9. **Karpagathachi & Ors. Vs. Nagarathinathachi,** reported in **AIR 1965 SC 1752.**

21. Having heard the learned counsels for both the parties and carefully perusing the materials on record, we find that the questions involved in these appeals are, whether the suits are maintainable in present form and, if so, whether the plaintiffs, in the above mentioned suits, could establish their claims by adducing sufficient evidence.

22. The question of maintainability of the suits having been raised, we feel it appropriate to decide the said question of law at first.

As mentioned aforesaid, Mr. D. Mozumdar, learned counsel, appearing for the appellants submitted, that the suits were not maintainable for non-

compliance of the privisions prescribed by Sections 79, 80 and Order 27 Rule 3 and 5A of CPC. Mr. Mozumdar further contended, that as the respondents-plaintiffs claimed money from the State of Arunachal Pradesh and made the Officers of the State as parties, the 'State of Arunachal Pradesh" should have been made party, but the plaintiffs instituted the suits against (1) The Commissioner cum Secretary, Department of Power, Govt. of Arunachal Pradesh, Itanagar, (2) The Chief Engineer (Power), Eastern Electrical Zone, Vidyut Bhawan, Department of Power, Govt. of Arunachal Pradesh, Itanagar, (3) The Superintendent Engineer (Power), A.P. electrical Circle-III, Derartment of Power, Miao, District-Changlang, A.P. and (4) The Executive Engineer, Deomali Electric Division, Department of Power, Deomali, District-Tirap, A.P., claiming the money from the said defendants without making any whisper in the plaint as well as in the notice under Section 80 CPC, that the "State of Arunachal Pradesh" was liable to pay the amount, claimed by the plaintiffs. Therefore, it is submitted, that the suits are liable to be dismissed for non-compliance of the previsions prescribed by Section 79 and Order 27 Rule 3 and Rule 5A of CPC.

23. In reply to the said contention, Mr. G.N. Sahewalla, learned senior counsel, referring to the decision rendered by the Single Judge of this Court, in the case of **Gopesh Chandra Das (Supra),** has submitted that Section 79 CPC is a procedural law and that the substantial compliance with the requirements is sufficient. The learned senior counsel further argued that as "the Commissioner cum Secretary", Power Department, Govt. of Arunachal Pradesh, Itanagar, has been added as defendant No. 1, in all the said suits, there has been substantial compliance with the requirement of Section 79 CPC.

In the above referred case, a notice was issued in the name of the "Chief Secretary, Govt. of Assam, Dispur, Guwahati" and he was shown as the defendant No. 1. As the defendant Nos. 1 to 4, were the officers of the State of Assam and they were discharging their duties as public servants, the suit was dismissed by the learned trial Judge, holding that in the absence of the State of Assam, no effective decree could be passed. In appeal preferred before the High Court, on behalf of the State of Assam, it was submitted that requirement of Sections 79 and 80 CPC must be strictly

complied with and that it was obligatory on the part of the plaintiff to address notice under Section 80 CPC to the State of Assam and also to implead the "State of Assam" as defendant in the suit. The learned Single Judge, referring to the decision rendered by the Supreme Court, in the case of **Ghanshyam Dass (supra)**, observed that the provisions, prescribed by Section 79 and 80 CPC were not intended to be used as booby-traps against ignorant and illiterate persons and that the notice under Section 80 CPC should be read as a whole and given a reasonable interpretation. The object of the notice contemplated by Section 80 CPC is to give to the concerned Government and public servants opportunity to reconsider the legal position and to make amends or settle the claims, if so advised, without litigation. The learned Single Judge, while allowing the appeal, observed as follows :-

> *"7.* ***I have considered the submissions of the learned counsel for the parties. I have carefully gone through the facts of the case. It is not disputed that notice under Section 80 CPC was served, besides other defendants, on the Chief Secretary to the Government of Assam. From a reading of the notice, it appears that in the said notice, <u>it was clearly stated that the Government was liable to pay the claim</u> and in the list of defendants named in the notice "The Chief Secretary, Govt. of Assam, Dispur, Gauhati, Assam" was shown as defendant No. 1. In the plaint, in para 11, the plaintiff pleaded as follows :-***
>
> > ***"That the plaintiff is entitled to the said compensation as detailed in the said schedule. The defendants are liable to make good the said loss. <u>The defendant No. 2 to 4 acted in their official capacity at the relevant time and as such</u> the Govt. of Assam is also liable and as such, the plaintiff served a notice u/s 80 CPC on 28.11.77 on all the Defendants through the plaintiff's Advocate Shri Padma Nath Baruah, M.A., B.L., Advocate Barpeta. The said notices were duly posted and were served on all the defendants".***

In the above referred case, it was clearly stated, that the Government was liable to pay the claim. Therefore, there was not difficulty in understanding that the State of Assam was sought to be made liable for the acts of the defendant Nos. 2 to 4 and in that context the State of Assam, in fact, contested the suit by filing a written statement through its official defendant No. 2. The written statement was verified by the Sub-Divisional Officer <u>on behalf of "the State" as well as other defendants.</u>

24. In the case of **Ghanshyam Dass (supra),** the point involved, was whether the notice issued by the deceased father of the plaintiff, during his life time, was sufficient notice in the suit filed by the son after his father death. The Supreme Court, in the above referred case, observed, that the point to be considered was whether notice is sufficient information as to the nature of the claim such as would enable the recipient to avert the litigation. In the above referred case, the plaintiffs' father issued notice under Section 80 CPC and the same was received and replied by the Government. Thereafter, he died before filing of the suit and after the death of the plaintiffs' father, the plaintiffs filed a suit on the basis of the notice given by their father, without issuing fresh notice. As the earlier notice was duly reached the concerned Government Department and they dealt with the notice, it was held that the Government had opportunity to examine the nature of the claim. The trial Judge, decreed the suit in favour of the plaintiffs, but on appeal, the High court reversed the decision upon the view that the notice given by the plaintiffs' father was not sufficient and valid notice under Section 80 CPC in so far the plaintiffs' were concerned. In appeal the Supreme Court held that the notice issued by the father of the plaintiffs gave sufficient opportunity to the Government to examine the nature of the claim and decide whether it should accept or contest the claim. The Supreme Court also observed that if sufficient notice (fresh) is insisted upon in such cases, the period of limitation to file a suit may expire in the meantime and that such a situation is not intended by the Court. With the above observation, the Supreme Court allowed the appeal.

25. In the case of **Raghunath Das (supra),** the Supreme Court observes that the object of issuing notice under Section 80 CPC is to avoid unnecessary litigation and to give the concerned Government and public officers, opportunity to reconsider the legal position and to make amends or settle the claim, if so advised, without litigation. In the said case, the plaintiff Raghunath Das issued notice under Section 80 CPC in the name of M/S Raghunath Dass Mulkhraj, which was a sole proprietorial firm, but he signed the notice as the proprietor of the concerned "Raghunath Dass Mulkhraj". After service of the said notice, the plaintiff Ragunath Das, instituted the

suit. The learned trial Judge, decreed the suit. On appeal, the High Court reversed the judgment and decree of the learned trial Judge, on the ground that the notice did not comply with the requirement of Section 80 CPC. The Supreme Court, while restoring the judgment and decree of the trial court, observed that the Union of India could have been left with the impression that the notice had been issued on behalf of the partnership firm and that there was clear indications, in the notice, showing that the plaintiff was the sole proprietor of the concerned “Raghunath Dass Mulkhraj”.

26. In the case of **The New India Assurance Co. Ltd. (supra),** the learned Single Judge of the Delhi High Court, referring to the decision rendered by the Supreme Court, in the case of **Raghunath Das (supra),** observed that the public authorities must take statutory notice, issued to them, in all seriousness and the purpose is not to sit over it and force the citizens to the vagaries of litigation.

27. From the above principles of law laid down by the Supreme Court and High Courts including our High Court, it is found that the purpose/object of notice under Section 80 CPC is to give the Government and its officers sufficient notice, that a litigation was going to be instituted against it and that the Government, if it so which, could settle the claim without litigation and wasting public money.

28. Section 80 CPC, which provides the requirement of issuing statutory notice, before instituting any litigation against the Government or public officer in respect of any act purporting to be done by such public officer in his official capacity, provides that in the case of a suit instituted against any Government, a notice is writing has to be delivered or left at the office of the Secretary to that Government or the Collector of the District [80(b),(c)]. It is also provided that the notice should state the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. The plaint should contain a statement that such notice has been so delivered or left.

29. In our present cases, the suits were instituted in the name of the sole proprietorial firms, represented by its proprietors. The notices were issued to the Commissioner cum Secretary, Department of Power, Govt. of Arunachal Pradesh, Itanagar and its officers, who were added as defendants in the suit. The notices were issued by the Advocate, on being instructed by his client i.e. the proprietorial firms, represented by its Attorney Sri Rajesh More. In the notice under Section 80 CPC, nowhere it was mentioned that the claim was made against the State of Arunachal Pradesh and that the State of Arunachal Pradesh was liable to pay the amount claimed by the plaintiffs. That apart, the suits were instituted by the sole proprietorial firms, represented by the proprietors, but the notices were issued mentioning that the said sole proprietorial firms were represented by its Attorney Sri Rajesh More. There is nothing on record to show that any reply to the said notices were given on behalf of the State of Arunachal Pradesh. Though a sole proprietorial firm cannot sue in firm's name, the proprietor of the firm representing the firm can sue. Therefore, as only the proprietor of the firm is entitled to sue, the notice should have been sent by the Attorney on behalf of the proprietor of the firm and not on behalf of the firm.

30. The notice issued in the case of **Gopesh Chandra Das (supra),** clearly stated that the Government was liable to pay the claim. A reading of the notice issued in the present case, does not indicate that the claim was made against the Government of Arunachal Pradesh. Rather, the notices indicated that officers/persons to whom the notices have addressed were liable to pay the amount claimed. Therefore, it appears that the notices were issued to the said officers claiming the amounts them personally. Therefore, it can't be held that the notices were issued to "the Government of Arunachal Pradesh", claiming the amounts mentioned in the plaints of the said suits.

31. That apart, though the notice was marked as Ext.-5, the same does not bear the seal and signature of the Presiding Officer, before whom the same was exhibited. Hence it cannot be held that the issuance of notice has been lawfully proved. In the light of the above discussion we have no hesitation in holding that no notices, under

Section 80 CPC was issued to the State of Arunachal Pradesh, claiming the amount as mentioned in the plaints from the Government of Arunachal Pradesh.

32. Section 79 CPC, which reads as follows, has clearly provided the procedure, to be followed in suits, filed by or against the Government.

> ***"79. Suits by or against Government.- In a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be-***
>
> (a) ***in the case of a suit by or against the Central Government, (the Union of India) and***
> ***(b) in the case of suit by or against a State Government, the State."***

33. Rule 3 of Order 27 CPC provides that in suits by or against the Government, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the appropriate name as provided in Section 79 CPC. Section 79 CPC has provided the name in case of a State Government, as "the State".

34. Rule 5A of Order 27 CPC provides that in a suit instituted against a public officer for damages or other relief in respect of any act alleged to have been done by him in his official capacity, the Government shall be joined as a party to the suit.

35. A combined reading of the statutory provisions prescribed by Section 79 and Order 27 Rule 3 and 5A CPC, makes it abundantly clear that in suits against the State Government or its officers, for any official act or the "State" is required to be added as a party to the suit. Though Section 80 CPC has provided that issuance of notice to "the Secretary to the Government" or "the Collector of the District" in case of claim relief against the Government is sufficient compliance, the provisions prescribed by Section 79 and Order 27 as aforesaid, make it mandatory that the concerned State should be added as a defendant.

36. In the present cases before us, the plaintiffs have not added 'the State of Arunachal Pradesh' as a defendant. Though the Commissioner cum Secretary, Department of Power, Govt. of Arunachal Pradesh, Itanagar, was added as defendant No. 1, there is nothing to find that he was added as a representative of the State Government. There is no whisper in the plaints show that the claim was made against the State Government and that the State of Arunachal Pradesh was liable to pay the amount claimed in the suits. In the relief portion of the suit, it was mentioned that the defendants, who were public servants of the Government of Arunachal Pradesh, were jointly and severally liable for making the payment claimed by the plaintiffs. As provided by Rule 5A of Order 27 CPC, in a suit against a public officer, for anything done by him in his official capacity, the Government is required to be joined as a party to the suit. But in the case of **Gopesh Ch. Das (supra)** both in the notice as well as the in the plaint it was clearly stated that the Government was liable to pay the claim. In the plaint of the said case it clearly stated that the defendants entered in their official capacity and as such the State of Assam was liable. That apart, the written statement was also filed on behalf of the State. As discussed above, no such statement was made in the case indicating any liability of the Government. Therefore, the decision in **Gopesh Ch. Das (supra)** will not help the appellants. Therefore, as the Government i.e. the State of Arunachal Pradesh has not been joined as a party, the suits are apparently hit by the statutory provisions of Section 79 and Order 27 Rule 3 and 5A of CPC and as such the same are not maintainable in the eye of law.

37. The next point raised by the learned counsel, appearing for the appellants is that the suits, being instituted in the name of the sole proprietorial firms, are hit by the provisions of Order 30 Rule 1 and 10 CPC. Admittedly, the suits have been instituted in the name of the sole proprietorial firms represented by its proprietors.

Order 30 Rule 1 CPC, provides that, any two or more persons carrying on business in India may sue or be sued in the name of their firms.

Rule 10 of Order 30 CPC, provides that a sole proprietorial firm or a Hindu undivided family carrying on business, may be sued in the name of the firm or HUF.

38. A Division Bench of this Court, in the case of **M/S Auto Engineering Woks Vs. Bansal Trading Co. & Ors.,** reported in **1998 (1) GLT 181**, referring to the decision in **Bhagvan Manaji Marwadi (supra),** held that the suit filed in the name of the sole proprietorial firm is hit by Order 30 Rule 10 CPC. Their Lordships, in the said case, observed that the proprietor of the firm can file a suit representing the concerned firm.

39. In the case of **Bhagvan Manaji Marwadi & Ors. Vs. Hiraji Premaji Marwadi,** reported in **AIR 1932 Bombay 516**, a Division Bench of Bombay High Court observed that a person trading himself or as a firm or in an assumed or trading name can be sued in his trading name under Order 30 Rule 10 CPC, but he cannot sue in that name. Order 30 Rule 10, CPC reads as follows:-

> **"Ordere XXX (10). Suits against person carrying on business in name other that his own.**
>
> **Any person carrying on business in a name or style other that his own name, or a Hindu undivided family carrying on business under any name, may be sued in such name or style as if it were a firm name, and, in so far as the nature of such case permits, all rules under this Order shall apply accordingly."**

Order 30 Rule 1 of CPC, which provides the provision for filing suits in the name of firms reads as follows :-

> **"Order XXX (1). Suing of partners in name of firm.**
>
> (1) **Any two or more persons claiming or being liable as partners and carrying on business in India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing the cause of action, and any party to a suit may in such case apply to the court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the court may direct.**
>
> **(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons."**

40. A comparative study of the Rule 1 and 10 of Order 30 reveal that a person, who is the sole proprietorship of firm, can't sue in the name of the firm, in which name he carries on business. Therefore, in case of sole proprietorial firm, even if the business is run in the name of firm, the suit is required to be filed by the proprietor in his own name as the representative or proprietor of the firm, were as such business firm can be sued. In view of the above, we respectfully agree with views taken by the Division Bench of this Court and the Bombay High Court aforesaid.

41. In the case of **Bhagvan Manaji Marwadi (supra),** the Bombay High court, further observed that "………..The creditor firm of Hiraji Premaji consisted, according to the appellants, of one partner Gamnaji Jethaji, and therefore the suit could not be brought in the name of the firm under Order 30 Rule 1 CPC. The objection seems to be well founded as one man cannot constitute a firm, and a person trading himself as a firm or in an assumed or trading name may be sued in his trading name under Order 30 Rule 10, but he can not sue in that name."

42. In the case **Ramapratab Brijmohandas & Ors Vs. Gavrishankar Kashiram,** reported in **1994 Bombay 109,** the Bombay High Court observed "……….Turning now to suits against a person carrying on business in a name other that his own, the Code of Civil Procedure, Order 30, Rule 10, provides that he may be sued in that name as if it were a firm name. The words "as if it were a firm name" are used advisedly, for one man cannot constitute a firm."

43. In our present cases, the suits have been instituted in the name of the firms represented by its proprietors and not in the name of the proprietor representing the said firm. Para-1 of the plaint filed in the said suits, read as follows :-

> **"…………. that the plaintiff is a proprietorship firm, having Trade License No.-TL/2947/ITA, dated 24.08.2005, issued by the Deputy Commissioner, Papum Pare, District-Yupia, A.P., having its business place at Itanagar, District-Yupia, Arunachal Pradesh. The defendants Nos 1 to 4 are the different authorities, represented the Government of Arunachal Pradesh."**

44. A careful perusal of the said paragraph leads to find that the plaintiffs were the proprietorship firm and the suits were filed in the name of the said firms. The power of attorney holder signed the plaints and verifications thereof for on behalf of the firms and not on behalf of the proprietors of the firms. In the evidence given under Order 18 Rule 14 CPC, the power of attorney holder, in the first paragraph, stated as follows :-

> **"I being the Attorney of the Plaintiff's firm, of the instant suit fully conversant and acquainted with the facts and circumstances of this suit, am competent to swear this affidavit".**

He did not state that he had deposed as the attorney of the proprietor of the firms. So he displayed on behalf of the firms. Therefore, it can be understood that the firms were made the plaintiffs and not the proprietors of the firms.

45. That apart, notice under Section 80 CPC was issued on behalf of the proprietorship firm represented by its attorney Sri Rajesh More. Nowhere in the said notice any indication was made that the same was issued on behalf of the proprietors of the firms. As the firms were not competent to sue, the notices issued on behalf of the firms cannot be treated as notices under Section 80 C.P.C. Had the notices been issued and the suits been filed in the names of the proprietors, representing the firms, the mischief under Order 30 Rule 10 CPC would not have come in operation.

46. In the backdrop of the above, we have no hesitation in holding that the suits, being instituted in the name of the sole proprietorship firms and not in the names of their owners, were hit by the provision of Order 30 Rule 10 of CPC.

The learned trial Judge, though proceed ex-parte, should have examined the question of maintainability of the suits and by failing to do so, the learned trial Judge committed error in the eye of law.

47. Referring to the decision in the case of **Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors,** reported in **AIR 2005 SC 439,** the learned counsel,

appearing for the appellants, has submitted that the owners of the firms should have deposed instead of the power of attorney holder and that the power of attorney holder was not competent to give evidence.

48. In reply to the said contention, Mr. Sahewalla, learned senior counsel, appearing for the respondents, referring to the said decision of the Supreme Court and Order 3 Rule 1 and 2 of CPC and the power of attorney executed by the proprietors of the firms in favour of the deponent, has submitted that the power of attorney holder was authorized/empowered by the proprietors of the firms to act on behalf of the firms.

49. By the said General Power of Attorney, executed in favour of Sri Rajesh More, who deposed on behalf of the firm, the said deponent was authorized to look after the whole business of the firms, deal, negotiate regarding all business of the firm, demand, receive, accept, execute or utilize any claim, things, to which the firms would be entitled, file claim for settlement before the Arbitrator, Court engage any Advocate, submit any applications, petitions, plaints, sign any documents or papers or verify any such plaints or petitions. Therefore, it is clear that the said power of attorney holder was authorized to institute suit on behalf of the proprietors of the firms. In **Janki Vashdeo Bhojwai (supra),** the Supreme Court, observed as follows :-

> **"……. The power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal. 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."**

50. In view of the above, a power of attorney holder can depose on behalf of the principal with regard to his personal knowledge in the acts done by him. In the present case, the deponent Sri Rajesh More, managed and performed the entire business of the plaintiff-firms and the suits filed, on behalf of the firms, involve claim in respect of goods supplied by the firms. Therefore, all the transactions, involving supply of goods and the claim made thereafter were within the personal knowledge of the power of attorney holder and as such he was competent person to depose on behalf of the plaintiffs.

51. In view of the above position, we find no force in the argument, advanced by the learned counsel, appearing for the appellants, that the power of attorney holder had no authority to depose on behalf of the plaintiff-firms.

52. The learned counsel, appearing for the appellants has further submitted, that at no point of time the appellants made any admission with regard to the claim of the plaintiff and that the learned trial Judge committed error by holding that the defendants (present appellants) admitted the claim of the plaintiffs and also by granting the decrees on the basis of admission. Referring to the case of **Uttam Singh Dugal (supra), Karam Kapahi (supra) and Jeevan Diesels (supra),** the learned counsel, appearing for the appellants, has submitted that admission must be clear and unambiguous and that the appellants, nowhere admitted the claim of the plaintiffs. It is further submitted that, as the learned trial Judge refused to accept the written statement, submitted on behalf of the defendant Nos. 3 and 4, there was no question of admission on pleadings.

53. The learned senior counsel, appearing for the respondents, has fairly submitted that, even if there was no admission in the eye of law, as provided by Order 12 Rule 6 of CPC, the plaintiff could establish its case by adducing sufficient evidence, both oral and documentary and as such the learned trial Judge committed no illegality or error by deciding the suits in favour of the plaintiffs-respondents.

54. In view of the above, we propose to examine as to whether the learned trial Judge decreed the suit on the basis of admission or on the basis of the evidence adduced by the plaintiffs. Substantive part of the impugned judgments, reveals as follows :-

> **"Though the suit was proceeded ex-parte against the defendants and the case was reserved for judgment, however in the interest of natural justice, a last chance was given to the defendants to plead their case. On 01.07.2009, both the parties were present and the learned counsel for the defendants submitted written statement, but the same was not accepted, since the case has been proceeded ex-parte vide order dated 06.11.2008. The defendants did not file any application for vacating the ex-parte order and did not submit any reason for their non appearance before the Court on the earlier dates. Vide Order dated 11/6/09, Respondent No. 3 and 4 were directed to appear in person but both of them failed to do so.**
>
> **The learned counsel for the defendants submitted before the Court that the defendants have admitted the claim of the plaintiff, but due to non availability of fund, the payment could not be made. The learned counsel for the defendants also declined to adduce any evidence on behalf of the defendants. The learned counsel further submitted and admitted that the entire material had indeed been supplied to Deomali Electrical Division in good quality. But, the work order had been placed by the then in-charge of Deomali Electrical Division (i.e. Executive Engineer) in spite of no funds being available for the purpose. This was an error on the part of the concerned officer and the Department is already enquiring into it.**
>
> **Perused the evidence and exhibited documents. Heard learned counsel for the plaintiff.**
>
> **The plaintiff by way of evidence and documents has established the fact that the defendant No. 4, issued the work order in favour of the plaintiff's firm and accordingly the plaintiff's firm, acting through the Attorney Sri Rajesh More, had supplied the articles to the defendant's Department as per the specification of the work order. Admittedly, the defendant No. 4 have duly received the articles and during the period of transaction, the defendants did not dispute as regards the quantity, quality and price of the articles, thereby I find no justification for withholding the payment of the bills of the plaintiff's firm. The exhibited documents substantiated the fact that on the basis of the work order of the defendant No. 4, the plaintiff's firm supplied the articles through challan and raised the bills thereupon. I find no reason to disbelieve the claim of the plaintiff. Further, the claim has already been admitted by the defendants and the only reason cited for non-payment is non-availability of funds with the Department, for which the plaintiff should not be penalized.**
>
> **Moreover, the defendants have admitted the issuance of the work order, delivery of materials and bills. During the hearing, held on 01.07.2009, the learned counsel of the defendants have also categorically and unambiguously admitted the claims of the plaintiff, but only on the pretext of non availability of funds, the claims of the plaintiff can not be frustrated at the hands of the defendants."**

55. From the above, it appears that the learned trial Judge, while deciding the suits, came to the finding that the defendants had admitted the claims of the plaintiffs. Therefore, as the suits were also decreed on the basis of admission, made on behalf of the defendants, we are required to examine if there was any admission in the eye of law. Order 12 Rule of 6 of CPC, which reads as follows, provides the provision for passing judgment on admission.

> **"O.XII. (6). Judgment on admissions:-**
>
> **(1) Where admissions of fact have been made either in the pleading or otherwise, whether orally or in writing, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, make such order or give such judgment as it may think fit, having regard to such admissions.**
>
> **(2) Whenever a judgment is pronounced under sub-rule (1), a decree shall be drawn up in accordance with the judgment and the decree shall bear the date on which the judgment was pronounced."**

For passing a judgment on admission of facts, such admission must be either in pleadings or otherwise, whether oral or in writing.

56. In the case of **Uttam Singh Dugal (supra),** the Supreme Court observed as follows :-

> **"As to the object of the Order XII, Rule 6, we need not say anything more that what the legislature itself has said when the said provision came to be amended. In the objects and reasons set out while amending the said rule, it is stated that "where a claim is admitted, the Court has jurisdiction to enter a judgment for the plaintiff and to pass a decree on admitted claim. The object of the Rule is to enable the party to obtain a speedy judgment at least to the extent of the relief to which according to the admission of the defendant, the plaintiff is entitled." We should not unduly narrow down the meaning of this Rule as the object is to enable a party to obtain speedy judgment. Where other party has made a plain admission entitling the former to succeed, it should apply and also wherever there is a clear admission of facts in the face of which, it is impossible for the party making such admission to succeed."**

57. In the case of **Karam Kapahi (supra),** the Supreme Court observed "…….. The provision under Order 12 Rule 6 of the Code is enabling, discretionary and permissive and is neither mandatory nor is it peremptory since the word "may" has been used. Thus in a given situation, as in the instant case, the said provisions can

be applied in rendering the judgment". In the above case, the Supreme Court referred to a Division Bench judgment of the Madhya Pradesh High court in **Shikharchand Vs. Bari Bai : AIR 1974 MP 75,** wherein their Lordships observed "…….. The rule applies wherever there is a clear admission of facts in the face of which it is impossible for the parties making it to succeed."

58. In the case of **Jeevan Diesels (supra),** the Supreme Court observed "……… Whether or not there is a clear, unambiguous admission by one party of the case of the other party is essentially a question of fact and the decision of this question defends on the facts of the case. The Supreme Court further observed "…… In **Uttam Singh Duggal & Co. Ltd. Vs. United Bank of India : (2000) 7 SCC 120,** the provision of Order 12 Rule 6 came up for consideration before this Court. This Court on a detailed consideration of the provisions of order 12 Rule 6 made it clear 'wherever there is a clear admission of facts in the face of which it is impossible for the party making such admission to succeed' the principal will apply."

In the light of the above decisions rendered by the Supreme Court, it is clear that for granting a decree on the basis of admission, the admission must be "clear and unambiguous", binding the party making such admission.

59. In the present cases, the learned trial Judge observed that the learned counsel, appearing for the defendants admitted the claim of the plaintiffs. There is nothing on record to find that the learned counsel appearing for the defendants received any instruction for admitting the claim of the plaintiffs. That apart, whether the learned counsel appearing for the defendants was authorized to appear and plead on behalf of the defendants is also not free from doubt. Because, according to the learned counsel appearing for the appellants/defendants, the learned Advocate, who appeared on behalf of the defendants was neither a Government Advocate nor he was given any power or vokalatnama by the defendants to appear and plead on their behalf. The record of the trial Court does not include any vokalatnama or power executed by the defendants in favour of the said Advocate, who appeared and pleaded on behalf of the defendants. Further, the written statement was filed on behalf of the

defendant Nos. 3 and 4 and the same was not accepted by the learned trial Judge the said written statement, does not bear any signature of the learned counsel, appearing for the defendants. Hence, we find sufficient force in the contention of the learned counsel, appearing for the appellants that the learned counsel, who appeared on behalf of the defendants, was not authorized to make any admission on behalf of the defendant. Therefore, admission, if any, made by the learned counsel, on behalf of the defendants cannot be accepted as the admission of the defendants. Further, from the order, dated 16.10.2008, as revealed from the order sheet of the trial Court, it appears that Mr. Jawang Sumpa, learned Advocate appearance for the defendants and prayed for 15 days time for filing written statement and the case was fixed on 06.11.2008. There is nothing on record to show that the appellants/defendants had authorized the said Advocate to appear on their behalf.

60. The written statement, filed on behalf of the defendant Nos. 3 and 4, reads, inter alia, as follows :-

> **“(1) That the suit is not maintainable in law as well as in facts.**
>
> **(2) That the suit is not maintainable in facts as no proper bills/challan have been received by the defendants, as no valid procedure has been followed.**
>
> **(3) That the answering defendants do not admit the various claims and allegations made against the defendants in the para 6,7,8,9,11,12,13,14.”**

In the said written statement, it was also averred that the bills received from the plaintiffs were pending in the Audit Section for proper scrutiny and verification and that the work orders were issued without proper approval and sanction from the higher authority.

61. In view of the above discussion, there is no difficulty in understanding that there was no clear and unambiguous admission from the defendants/appellants. Therefore, in our considered opinion, the learned trial Judge committed error by holding that the defendants categorically and unambiguously admitted the claims of the plaintiffs.

62. The learned counsel, appearing for the appellants, referring to the decision in the case of **Ramesh Chand Ardawatiya (supra),** submitted that the learned trial Judge committed error by failing to frame the points for determination and give findings on the points so framed. In the above referred case, the Supreme Court observed as follows :-

> **"……. Even if the suit proceeds ex parte and in the absence of a written statement, unless the applicability of Order VII, Rule 10 of the CPC is attracted and the Courts acts thereunder, the necessity of proof by the plaintiff of his case to the satisfaction of the Court cannot be dispensed with. In the absence of denial of plaint averments the burden of proof on the plaintiff is not very heavy. A prima facie proof of the relevant facts constituting the cause of action would suffice and the Court would grant the plaintiff such relief as to which he may in law be found entitled. In a case which has proceeded ex parte the Court is not bound to frame issues under Order XIV and deliver the judgment in every issue as required by Order XX, Rule 5. Yet the trial court would scrutinize the available pleadings and documents, consider the evidence adduced, and would do well to frame the 'points for determination' and proceed to construct the ex parte judgment dealing with the points at issue one by one. Merely because the defendant is absent the Court shall not admit evidence the admissibility whereof is excluded by law nor permit its decision being influenced by irrelevant or inadmissible evidence."**

63. In view of the above, it is clear that in an ex parte proceeding also the Court is required to scrutinize the available pleadings and documents and consider the evidence adduced. Therefore, in a case, which proceeds ex parte, the burden to prove/establish its case, though not heavy, remains with the plaintiff. As per order, dated 06.11.2008, as revealed from the order sheet, 06.11.2008 was fixed for filing of written statement and due to non-appearance of the defendants or their legal representatives on the said date, the suit was posted for ex parte hearing. Therefore, though the defendants did not file their written statement on the date fixed, the Court did not pronounce the judgment under Order 8 Rule 10, rather posted the suit for ex parte hearing and accordingly took the evidence on behalf of the plaintiffs. Therefore, necessity of proof by the plaintiffs of their cases to satisfaction of this Court was obligatory.

64. The learned senior counsel, appearing for the respondents, referring to the decisions in the case of **Kalyan Mal (supra)** and **Chandra Kishore Tewari**

(supra), submitted that the burden lies on the appellants to show that the impugned judgment was wrong.

65. In the case of **Kalyan Mal (supra),** their Lordships, of the Privy Council, observed "…….. *the principle is well established that in an appeal the burden of proving that the judgment appealed from is wrong rests upon the appellants, and that he does not discharge that onus by merely showing that there is an equal possibility of the judgment in favour of one party or the other being correct*………"

66. In the case of **Chandra Kishore Tewari (supra),** their Lordships, of Privy Council, referring to the observation made by Lord Buckmaster in Fakrunissa Vs. Moulvi Izarus Sadik, 25 C.W.N.866 at P.875 [AIR (8) 1921 P.C. 55], quoted that "*in every appeal it is incumbent on the appellants to show some reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered to justify the alteration of the judgment that stands*".

In the light of the above, there can be no dispute that it is the burden of the appellants to show that the judgment, against which the appeals have been preferred, was wrong and liable to be interfered.

67. As discussed above, in the absence of any admission from the defendants with regard to the claim of the plaintiffs, even in a case, which proceeds ex parte, burden was with the plaintiffs to prove/establish its case by adducing evidence and it is the duty of the Court to examine and scrutinize the oral as well as the documentary evidence and to arrive at a definite finding with regard to the claim of the plaintiffs. We have already quoted the substantial portion of the impugned judgment, which includes the findings of the learned trial Judge.

68. The learned trial Judge, except stating "perused the evidence and exhibited documents", did not mention as to what evidence was considered and which of the

documents were scrutinized by him to arrive at a finding that the plaintiffs could establish its case. The learned trial Judge, simply stated that the plaintiffs by way of evidence and documents have established the fact that the defendant No. 4 issued the work order in favour of the firms and accordingly, the plaintiff-firms acting through the Attorney Sri Rajesh More, had supplied the articles to the defendants' Department as per specification of the work orders.

69. That apart, the learned trial Judge did not mention as to what documents were exhibited and which of the said documents proved/supported the plaintiffs' claim that the work orders were issued in its favour, that on the basis of the said work orders, it had supplied the articles mentioned therein and that the articles claimed to be supplied by the plaintiff-firms were received by the defendants/appellants. Therefore, we are inclined to hold that the learned trial Judge failed to weigh the evidence both oral as well as documentary and came to a definite finding that the plaintiff-firms had supplied articles mentioned in the plaint and that the said articles were received by the defendants/appellants.

70. Though the learned trial Judge held that the defendant No. 4 had duly received the articles, there is no material on record to show that the articles were received by the defendants/appellants. The alleged supply of the articles being made to a Government Department, certainly the articles, if so supplied, would have been received by some authorized person acknowledging the receipt of the same either by issuing receipt or making an entry in the appropriate Register(s). No evidence has been adduced to substantiate that the said articles were received by any authorized persons.

71. The suits having proceeded ex parte, though the burden to prove its case was not very heavy, it was the duty of the plaintiffs/respondents to adduce sufficient evidence in support of their claims that the articles supplied by the plaintiffs/respondents were received by the defendants/appellants.

72. The Attorney of the plaintiff-firms, who deposed as PW.1, in his evidence given under Order 18 Rule 4 of CPC, stated that the supply made by the plaintiff-firms was duly received and accepted by the defendants' Department with full satisfaction. The said witness nowhere stated that the defendant No. 4 had duly received the articles supplied by him. The terms "defendants' Department" does not indicate that the articles were received by the defendant/appellant No. 4 i.e. the Executive Engineer, but the learned trial Judge held "admittedly the defendant No. 4 had duly received the articles". This finding of the learned trial Judge not being based on the evidence, given by the plaintiffs, is perverse.

73. In support of his claim, though the Attorney of the plaintiff-firms exhibited certain documents, he did not state on the basis of which work orders, what articles were supplied and on the basis of which or the challans, what articles were supplied and also who had received the articles supplied by him. In order to prima facie establish its case, it was the duty of the plaintiffs/respondents to prove the supply and receipt of the articles, but they failed to do so. In the absence of any evidence regarding receipt of the said articles, it could not have been held that the articles alleged to be supplied by the plaintiffs/respondents were received by the defendants/appellants.

74. That apart, the documents stated to be exhibited, though marked as exhibits, were not signed by the Presiding Officer. The said documents were compared with the original by a Judicial Magistrate 1st Class, who was not the Presiding Officer. Therefore, as the marked documents were not signed and sealed by the Presiding Officer, those can't be treated to be duly proved/exhibited documentary evidence. Therefore, no reliance could have been placed on such documents.

75. In the light of the above discussion, we have no hesitation in holding that the plaintiffs/respondents failed to prima facie establish their claims by adducing oral as well as documentary evidence, that the article alleged to be supplied by them were

received by the defendants/appellants. Therefore, in our considered opinion the plaintiffs/respondents failed to prove their cases.

76. In view of what has been discussed above, we find sufficient merit in these appeals, requiring interference with the impugned judgments and decrees. Accordingly, these appeals are allowed on contest and the impugned judgments and decrees, as indicated above, passed in Money Suit Nos.2/2008, 3/2008, 4/2008, 5/2008, 6/2008, 7/2008 and 8/2008 are set aside and quashed. Consequently, all the Money Suits dismissed. No costs.

Send down the Lower Court Records.

JUDGE **JUDGE**