

GJVD170008202022

**Order below Exhibit 10**

1. By filing the present application the defendant has put up his defence in the matter. In his entire leave to defend he has referred to the evidence which was led in the criminal proceedings undertaken under the provisions of Negotiable Instrument Act with respect to the same cheques on which the present suit is based. He has relied upon the facts stated by the complainant in his evidence in chief and cross examination and has stated that on the basis of facts stated in the criminal proceedings, the defendant is entitled to grant of unconditional leave to defend. However, during the oral arguments, he has stated that some amount out of the claimed amount has already been paid by the defendant and evidence in that respect has also been produced vide exhibit 11. However, verifying documents produced vide exhibit 11, the court could not find any evidence with respect to the fact of payment made by the defendant. Further, the statements made by the party in another criminal proceeding cannot be the basis for granting leave to defend a civil suit, those statement are not reproduced here.
2. The plaintiff has filed reply vide exhibit 16 to the defendant's leave to defend application. The said reply is just a formal denial of the facts stated by defendant in his leave to defend the suit.
3. Now, as per the plaint, the defendant had taken hand loan from the plaintiff on various occasions totalling to Rs. 17,00,000/-(Seventeen lakh rupees). It has also been stated that, later, the defendant wanted to start a new venture of purchasing lands and building houses over it and for that he was in need of money. As it required infusement of large corpus, it was agreed between them that they would enter into a partnership by creating a firm and the plaintiff would finance the project. Although, it is not certain as to whether they had entered into any such partnership or not but as per the statement made by the plaintiff, it appears that some misfortune in the said venture occured and then it was agreed between them

that the defendant would return the money to the plaintiff as per the agreement entered on 22/09/2018. The present suit is for recovery of some amount which was agreed to be payable by defendant under the said agreement of date 22/09/2018.

It is to be noted that the hand loan was actually given before making of such agreement dated 22/09/2018, cheques for the payment under the said agreement were given in the month of August, 2020 and the suit is filed in October, 2022. It is not certain on what date the alleged hand loan was actually given by plaintiff to the defendant because there is no mention of the said fact in the entire plaint. Hence, a genuine question arises with respect to the limitation for filing the suit. Also, there is no statement in the entire plaint with respect to the suit being filed within the period of limitation. When was such alleged hand loan was granted; Whether the said agreement of 22/09/2018 was entered into before the expiry of prescribed period for recovery of said hand loan and whether it can be said to have the effect of an acknowledgement which had extended the prescribed period are the questions which are left unanswered in the plaint.

- 3.1 Further, no original document has been produced. The document which are produced are only simple zerox copy and not even a certified copy of original, if the original is lodged in some other court in some other matter, the plaintiff was supposed to produce certified copies of them. In Neebha Kapoor vs Jayantilal Khandwala & Ors on 22 January, 2008, Hon'ble Supreme Court observed: "For the purpose of obtaining a summary judgment in terms of Order 37 of the Code, ordinarily the original documents must be produced. Original documents are not available. Appellant, therefore, is obligated to prove the loss of documents. Only because a suit has been entertained as a summary suit, the same by itself may not be a ground for passing of a judgment on mere asking."
- 3.2 Furthermore, during the course of arguments, the criminal case which was pending in the criminal court got decided and the accused(defendant) of the present case got convicted. He was directed to pay Rs. 25,000/- as compensation to the complainant, i.e., the plaintiff in the present case. Section 357 (5) of the Code of Criminal Procedure provides – "At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section". Hon'ble

Apex Court in the case of *D. Purushotama Reddi & Ors. v. K. Sateesh*, observed: “Evidently, a duty has been cast upon the civil courts to take into account the sum paid or recovered as compensation in terms of Section 357 of the Code.” However, there is no further information before this court as to whether the said amount has been paid to the plaintiff or not. There is no declaration by plaintiff in this behalf.

4. Hence, at the conclusion of the above discussions, this court is of the view that there are several questions before the court which are left unanswered in the suit. There is a question with respect to limitation period for filing the present suit, proof of the claim of the plaintiff by production of primary evidence, adjustment of part payment, if any, and adjustment under section 357(5) of the Code of Criminal Procedure of any sum paid by the defendant to the plaintiff, e.t.c. As discussed above, these questions are to be answered in the suit. Therefore, this court is of the view that there are several triable issues in the suit and the defendant should be given unconditional leave to defend the suit. Consequently, following order is passed.

Order

- The present application is hereby allowed.
- The defendant is granted unconditional leave to defend the suit.
- The present suit be registered in the register of money suits and be given suit number accordingly.
- The present summary suit stands disposed of.
- No order as to costs.

Pronounced in the open court today on 27th of November, 2024.

Date: 27/11/2024

(Anubhav Pandey)
2nd Addl. Judge,
Small Causes court, Vadodara.
Code:GJ01133

Self