

2013 (0) AIJEL-HC 230034

GUJARAT HIGH COURT

Hon'ble Judges:G.B.Shah, J.

Kalapi Developers Versus Pratham Realty Private Limited

SPECIAL CIVIL APPLICATION No. 8894 of 2013 ; *J.Date :- JULY 31, 2013

- **CONSTITUTION OF INDIA Article - 227**
- **NEGOTIABLE INSTRUMENTS ACT, 1881 Section - 138**
- **CODE OF CIVIL PROCEDURE, 1908 Order - 37R.1**

Constitution of India - Art. 227 - Negotiable Instruments Act, 1881 - S. 138 - Code of Civil Procedure, 1908 - Or. 37 R. 1 - leave to defend - Summary Suit to recover money taken by defendant repayable within six months - different cheques were also issued - leave to defend - money paid to purchase land for which memorandum of understanding was signed between the parties - cheques were issued by way of security - held, as there is nexus between memorandum of understanding and transfer of money, defendant is entitled to unconditional leave to defend Summary Suit without any condition - petition allowed.

Imp.Para: [12] [17]

Cases Referred To :

1. Hindustan Apparel Industries V/s. Fair Deal Corporation, New Delhi, AIR 2000 Guj 261 : 2000 (2) GLR 1422 : 2000 (2) GLH 484 : 2000 AIR Guj 261 : 2000 (3) RCR(Cri) 448
2. Mechalec Engineers And Manufacturers, M:s. V/s. M:s. Basic Equipment Corporation, AIR 1977 SC 577
3. Narinder Kumar V/s. State Of Jammu And Kashmir, 2010 9 SCC 256
4. Oil & Natural Gas Corporation Ltd. V/s. Sbi, Overseas Branch, Bombay, 2006 6 SCC 385
5. Santosh Kumar V/s. Bhai Mool Singh, AIR 1958 SCC 321

Equivalent Citation(s):

2014 (2) GLR 992 : 2014 (140) AIC 538

JUDGMENT :-

1 Being aggrieved by and dissatisfied with the order dated 30.4.2013 passed below Exh. 16 by the learned 16th Additional Sr.Civil Judge, Vadodara in Special Summary Suit No. 76 of 2012, the petitioner has filed this petition under Article 227 of the Constitution of India.

2 Heard the learned Advocates for the respective parties. Rule. Mr Samir J Dave, learned Advocate waives service of Rule on behalf of the respondent. With the consent of the parties, this matter is heard for final disposal.

3 M/s. Kalapi Developers is the petitioner/original defendant and M/s. Pratham Reality Pvt. Ltd. is the respondent/original plaintiff. The respondent/original plaintiff has filed Special Summary Suit No. 76/2012 against the petitioner/original defendant under Order 37 of the Code of Civil Procedure, 1908 for the recovery of Rs. 6,42,25,888/- alleging inter alia that taking advantage of the relationship established between the plaintiff and the defendant, the defendant had taken an amount of Rs. 4,50,25,000/- from the plaintiff with a promise that he would repay the loan amount within six months and further five different cheques for different amount mentioned in the summary suit were given by the defendant to the plaintiff. However, when the said cheques were deposited by the plaintiff in its account, the same were returned with an endorsement 'fund insufficient'. The plaintiff filed a complaint under section 138 of the Negotiable Instrument Act against the defendants. Thus the plaintiff prayed in the said suit that a decree of Rs. 6,42,25,888/- with interest at the rate of 24% per annum from the date of filing of the suit till realization may be drawn in favour of the plaintiff with special power to recover from the properties mentioned in the plaint and from the person and any other properties of the defendant. In the said summary suit, the defendant has filed affidavit of leave to defend-Exh.16 and denied the contents of th the suit. On 30.4.2013, the learned 16 Additional Sr. Civil Judge, Vadodara partly allowed the application for leave to defend submitted by the petitioner/original defendant with a condition that the defendant has to deposit Rs. 4,50,25,000/- in the court within four weeks from the date of the said order. Against this order, the petitioner has approached this court for appropriate orders and directions with a prayer to allow the petitioner to defend his case unconditionally as the suit itself is not maintainable in view of the conditions of MOU dated 24.4.2010 and the court at Vadodara has no jurisdiction alleging that the plaintiff has suppressed material aspects related to MOU dated 24.4.2010 from the court while filing summary suit.

4 Mr V.M. Pancholi, learned Advocate for the petitioner-defendant has submitted that the trial court has not properly appreciated the fact that the plaintiff has not approached this court with clean hands and suppressed the material facts. He has submitted that the trial court has not appreciated the documentary evidence properly and failed to consider the fact that the cheques which are relied upon by the plaintiff, are given to them for security purpose and as per the transaction entered into in pursuance of MOU dated 24.4.2010. He has further submitted that the learned trial Judge has not properly considered the MOU entered into between the parties and also erred in not considering the judgments relied on by the Advocate for the defendant on the point of suppression of material facts. It is his submission that as per condition No. 16 of the MOU, if any dispute arises between the parties, the same can only be resolved through arbitration as per the Arbitration and Conciliation Act and the jurisdiction will be at Ahmedabad.

Moreover as per condition No.14 of the said MOU dated 24.4.2010 all the companies of Shri Jayant Sanghvi and Shri Dipak Goradia shall be covered within the meaning of second party and in para 20 of the impugned order the said submission was recorded by the learned trial Judge but he has chosen not to touch that issue and accordingly so far as said condition No.14 of MOU is concerned the learned trial Judge has as such ignored the same and has committed error and mistake and though the said important contention was raised, it was not properly understood and properly dealt with and thus the learned trial Judge has recorded wrong finding to the effect that "further it is now admitted facts on the record that in all the litigation filed on the basis of MOU, plaintiff company is not the party and also observed that there is no nexus in MOU and in loan amount." He, therefore, submitted that the Civil Court at Vadodara has no jurisdiction to entertain the aforesaid summary suit. He also has submitted that the defendant has filed Civil Misc. Application No. 104/2011 before the City Civil Court for interim injunction under section 9 of the Arbitration & Conciliation Act, 1996. He submitted that the trial court ought to have granted unconditional leave to defend to the defendant. It is his submission that as per instruction of the authorized person and the Director, Mr Jayant Sanghvi, the defendant has also transferred the amount to different companies and firms through RTGS. That the trial court has failed to consider the legal notice issued by the defendant to the aforesaid company/firm. That the trial court has also miserably failed to consider the document produced by the defendant vide Mark-33/1 which is a complaint filed by the plaintiff against the defendant under sections 406, 402 (420) and 120(B) of the IPC where there is no reference with regard to the loan transaction as alleged. The said complaint is filed on 10.5.2012 and the summary suit is filed on 31.7.2012. It is submitted by the learned Advocate for the petitioner that the respondent-plaintiff has directly executed the sale deed, power of attorney and agreement to sale of certain lands from the agriculturist and thereby violated specific conditions of the MOU. He has drawn attention of the court to the fact that they are entitled to 50% share of the said transaction and the defendant has filed counter claim for an amount of Rs. 11,70,72,835.26. He has then submitted that the trial court has not appreciated the fact that Mr Jayant Sanghvi is one of the Directors of the plaintiff-company and there is dispute with regard to the payment and as per the arbitration clause, the proceedings are pending before the competent court for appointment of Arbitrator. He reiterated his submission on the issue of jurisdiction of the trial court in view of the arbitration clause. He has finally submitted that the decisions relied upon by the petitioner-defendant in support of his case were not at all considered by the learned trial Judge. He, therefore, submitted that the impugned order is bad, illegal, perverse and therefore, may be set aside and allow them to defend his case unconditionally in the interest of justice.

5 Mr B.B.Naik, learned senior Advocate for the respondent/original plaintiff has submitted that as per the assurances given and representations made by the defendant a MOU was entered into with the defendant and by virtue of this MOU the defendant and Mr Rajeshkumar Parihar promised to get minimum 102 acres of land adjoining to village Ognaj for the plaintiff and its partners. It is after this, on making representations by the defendant and looking to the good relations, the plaintiff had given an amount of Rs. 4,50,25,000/- on his promise that he would repay the loan amount within six months. Over and above the promises, the defendant had given certain post dated cheques for

the repayment of the loan. On presentation of the cheques, they were dishonored with an endorsement "insufficient funds". On contacting the defendant though regretted for the same and promised to make full payment at the earliest, in spite of issuing legal notice, no payment was made. Thus the plaintiff had filed criminal complaints against the defendant which are pending for trial. Thus he submitted that the defendant has not only committed serious breach of terms of contract but also against the well settled principles of law, equity and justice and they are liable to pay the interest @ 24% per annum. Mr B B Naik, learned senior Advocate has submitted that when the payment is shown to be made on instructions of the respondent/plaintiff in a leave to defend application is as such appears to be a bald statement made by the petitioners without any cogent evidence. Moreover, the cheques in question were given for security and the statement that the respondents are required to recover more money etc. cannot be said to be a plausible defence for which trial is not at all required. Drawing attention of the court to para 11 of the order, Mr Naik has submitted that one of the defences they have taken is that he has given loan at our instance to parties. Only name of two parties are there. Thus, for the said two parties also the petitioner has not given any details of the amount. He is only stating that this much amount he has to recover. In this set of facts, if there are no details of defence in the affidavit or application of leave to defend, the question of raising this triable issue does not arise. Rest of the counter claim is based on MOU. So far as the two points harped upon by Mr Pancholi is concerned, it is stated by Mr Naik that Mr Pancholi has raised argument related to SMS but in the leave to defend application nothing is mentioned related to the said SMS and he cannot be permitted to raise a new plea in this court in a petition under Article 227 of the Constitution. He submitted that on two grounds, this petition should be dismissed - one is that there is no pleading related to SMS and secondly since the argument is not raised before the trial court related to SMS and though it may not have been raised in the reply now he cannot be not permitted to raise the same before this court because specific argument by referring to the SMS before the trial court is totally absent. There is no reference at all regarding SMS and in the leave to defend application and as such there was no such argument before the trial court and now this court cannot appreciate the said evidence in a petition under Article 227. About concoction of five documents, loan transaction documents, there is no argument before the trial court. At the hearing if this issue is not argued, though the grounds are taken in the petition, then that is the end of the matter as held by Supreme Court. The respondent's signature is on the revenue stamp and it is on his letter head and then how can one concoct the documents as alleged by the other side. He has submitted that when there is no word 'SMS' or no contention before the High Court in a writ petition, now the petitioner is prohibited under Article 227 because there is very limited scope in such a petition.

6 I have carefully perused the documents forthcoming on the record in light of the above referred submissions made by the learned Advocates for the parties and accordingly gone through the impugned order. The undisputed facts between the parties are that the respondent-plaintiff is a registered private limited company and the petitioner-defendant is a proprietary concern and they both are carrying on their land and real estate business respectively in the name of Pratham Realty Pvt. Ltd so far as respondent-plaintiff is concerned in the name of Kalapi Developers so far as petitioner-defendant is concerned.

The partners of Pratham Dosti Realty a duly registered partnership firm and its partners were desirous of constructing residential/commercial complexes on a large scale in Ahmedabad. The petitioner-defendant along with one Rajeshkumar G. Parihar, sole proprietor of M/s Sewang Real Estate Developers came to know about the above desire of the respondent-plaintiff and approached the Director of plaintiff- company i.e. Jayant Sanghvi and both have assured the plaintiff that they will handover the lands after clearing all impediments, if any, and make the title of the land marketable so far as 102 acres of land adjoining village-Ognaj for the plaintiff and its partners and accordingly on the said assurance and representations made by the petitioner-defendants and Rajeshkumar Parihar, a memorandum of understanding dated 24.4.2010 (hereinafter referred to as 'MOU') was entered into with the defendant and Rajeshkumar Parikhar on the one side and Mr Jayant Sanghvi and Mr Dipak Goardia on the other.

7 It is the case of the plaintiff in his special summary suit No. 76/2012 filed on 1.8.2012 that taking advantage of the relationship established between the parties on account of frequent meetings pursuant to the said MOU dated 24.4.2010, the petitioner-defendant represented for loan amount and given assurance to repay the same within six months and the respondent-plaintiff had given certain amount on different dates from 19.10.2010 to 26.10.2010 and thus in all an amount of Rs. 4,50,25,000/- was transferred to bank account of the petitioner-defendant i.e. Union Bank of India, Vastral Branch, Ahmedabad through Real Time Gross Settlement (RTGS). It is also the case of the respondent-plaintiff that in support of the promise given by the petitioner-defendant to repay the amount, the petitioner-defendant had also given certain cheques for repayment of the loan amount. Thereafter the cheques were dishonoured with an endorsement 'fund insufficient' and the respondent-plaintiff had also issued legal notice under section 138 of the Negotiable Instruments Act and also filed criminal complaint and ultimately respondent-plaintiff has filed Special Summary Suit No. 76/2012 to recover the amount with interest. It is also averred by the respondent- plaintiff in the said summary suit that the petitioner-defendant also failed to act as per the MOU entered into between the plaintiff and the defendant for the purchase of certain immovable properties and the plaintiff is going to take necessary legal action for breach committed by the defendant.

8 The petitioner-defendant has filed leave to defend application and contended that the respondent has suppressed the true and correct facts and it is alleged to have put incomplete and distorted facts in the plaint. The petitioner- defendant has also contended that the petitioner and Rajeshkumar Parihar an agent in real estate business and they both are on one side and Jayant Sanghvi and Dipak Goradia on the other have entered into MOU dated 24.4.2010 for 102 acres of land. Moreover the petitioner-defendant has not taken any loan from the respondent at the initial stage of their business with Mr Jayant Sanghvi and Mr Dipak Goradiya and they prepared certain documents as a security and also accepted certain blank signed post dated cheques as security. Further the defendants want to do business with the plaintiff by creating faith on the plaintiff and as per the instruction of the plaintiff, the petitioner-defendant has put signature on certain blank papers which were handed over to the plaintiff by the defendant. Moreover, for taking undue advantage on the blank signed papers by using type plaintiff fabricated the same and with malice intention misused the said documents. As per the terms of the MOU and as per the instructions of authorised

person of the respondent-plaintiff one Bikram Mishra and Director Mr Jayant Sanghvi, the defendant was making the payment to the agriculturist and as per their instructions, the petitioner-defendant had also transferred the amount to the companies and firms through RTGS and as per their instructions, the petitioner-defendant had paid the loan amount to different companies such as B.K. Shah & Co. and M/s. Bhavna Steel and from both the companies the total amount of Rupees 2,60,00,000/- is yet to recover as detailed in the leave to defend application and the respondent-plaintiff is also responsible for the same. Moreover, violating the terms of the MOU dated 24.4.2010 without informing the petitioner- defendant, the respondent-plaintiff directly executed sale deed of the land at village Ognaj, Taluka Daskroi as mentioned in the leave to defend application. Prior to the summary suit, the petitioner-defendant had filed in earlier point of time the proceedings by way of Misc. Civil Application No. 104/2011 dated 13.10.2011 before the Court of City Civil, Ahmedabad and also filed Arbitration Petition No. 74/2012 under clause 16 of the MOU dated 24.4.2010 and just to pressurise the petitioner-defendant and a counter-blast the respondent- plaintiff has filed Summary Suit with fabricated and distorted version.

9 Learned Advocate for the petitioner-defendant has mainly put much stress on the MOU dated 24.4.2010 and submitted that though the respondent has referred this MOU in the plaint and who has deliberately, knowingly and intentionally copy of the same has not been produced along with the documents with a sole idea that the respondent- plaintiff wants to prove that the alleged loan transaction has no nexus with the MOU dated 24.4.2010 but as such the said MOU dated 24.4.2010 is the root between the parties and whatever the terms and conditions stipulated in the said agreement at the time of execution of the same, both the parties as such had agreed and now by way of the summary suit, the respondent-plaintiff wants to take a 'u' turn for which as such he should not be permitted. As per the case of the defendant, the suit amount is given towards investment in lands which the respondent-plaintiff wanted to purchase as per the MOU dated 24.4.2010 and not as a loan. So the important question to be decided by this court is whether the MOU dated 24.4.2010 and the different alleged loan transaction between the period 19.10.2010 to 26.10.2010 has no nexus with the plaintiff M/s. Pratham Reality Pvt. Ltd. On this aspect, learned trial Judge has observed in paras 55 to 58 of the impugned as under:

"(55) ...On the contrary on the perusal of the MOU dated 24.4.2010 vide Mark 17/1 name of the plaintiff not mentioned but name of Directors Mr Jayant Sanghvi, Dipak Goradiaya of the plaintiff company mentioned but not plaintiff company. Further in the said MOU Partnership Firm of plaintiff company Pratham Dosti mentioned but not plaintiff company. Further is there any nexus or connection between loan amount and Mou, it is (sic) burden lies on the defendant to prove the same by submitting prima facie evidence to indicate that defendant is having defence but it appears that there is no iota of evidence submitted by the defendant regarding any connection with the loan amount and MOU. Further from the record it appears that loan transaction is separate than MOU. Further on close scrutiny and as discussed above on perusal of the MOU dated 24.4.2010 on record, vide Mark 17/1 from that it is clearly appears that the plaintiff is not a party in the said and plaintiff has not executed the MOU. Further it is also appears that MOU between defendants and Mr

Jayant Sanghvi, Mr Dipak Goradia is for the purpose of 102 Acres lands adjoining to village Ognaj Ahmedabad and there is no averments about the loan amount, therefore, it appears that MOU for other purpose and transaction it is having no connection with the loan transaction. Further while considering the defendant application on affidavit there is no averments in the application of the defendant that as per the terms of MOU defendant has issued the cheques. Further it is ostensibly transpire from the record that whatever documents executed as per the terms of MOU that executed in the year 2011 and 2012 and loan amount transferred in the bank account of defendant through RTGS in month of October, 2010. Therefore, loan transaction is much before the execution of documents about lands and both the transaction, therefore, it is difficult to clubbed both the transaction to each other. Further it is also appears from the terms of the MOU that amount of Rs. 2,50,00,000/- shown paid to defendants by other side of the said MOU, means Mr Jayant Sanghvi and Dipak Goradia, but there is no contention about RTGS transfer amount in the bank account of defendants by plaintiff toward loan amount. Therefore, from the record it is crystal clear that MOU is not applicable in the transaction of loan amount and MOU transaction is for other purpose not for loan transaction." (sic)

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58. Further it is also appears that on the bases of MOU defendant has filed certain litigation for implementing the terms and conditions stipulated in the MOU and for appointment of arbitrator defendant's filed Civil Misc. Application No. 104 of 2011 before Hon'ble District Court at Ahmedabad. A copy of the same is on record vide Mark 17/12. Further while considering the averments in the said application plaintiff is not the party, even in the entire application there is no averments regarding disputed cheques, even though no averments about how defendant have received a huge amount of Rs. 4,50,25,000/- even though loan transaction was also not referred. Further it is appears that on dated 27.2.2012 defendants has also issued notice to Mr Jayant Sanghvi, Dipak Goradiya and others to invoke arbitration. A copy of the same is on record vide Mark 29/3 and reply given by Mr Jayant Sanghvi, Dipak Goradiya and others through there Id. Advocate for invoking arbitration is on record vide Mark 29/4. Further it is also appears that on the base of MOU defendants has also filed petition. Under Arbitration Act No. 74 of 2012 in the court of Hon'ble High Court. A copy of the same is on record vide Mark 17/2. Further it is now admitted facts on the record that in all the litigation filed on the bases of MOU, plaintiff company is not the party. Therefore, considering the facts and circumstances it is very clear that there is no nexus in MOU and in loan amount and both the transaction are happen to be at different time and for different purpose." (sic.) (emphasis supplied)

10 Drawing attention of this court to the above observations/findings of the learned trial Judge, learned Advocate Mr Pancholi for the petitioner-defendants has further drawn

attention of this court to the initial three lines at para 20 of the impugned order which reads as under:

"(20) He further submitted that as per the terms and condition stipulated in the MOU as condition No.14 Mr Jayant Sanghvi and Mr Dipak Goradiya and their every company accepted the terms....."

10.1 Mr Pancholi, learned Advocate for the defendant has then submitted that from the above facts, it is very clear that before the trial court, attention of the court was drawn to the condition No.14 of the MOU dated 24.4.2010 and the trial court has as such recorded submissions of the learned Advocate for the defendant as referred above. The said MOU dated 24.4.2010 is at pages No. 316 to 328 of paper Book No.I. Condition No.14 at page 322 in vernacular reads as under:

(Local language)

English translation of the above condition No.14 reads as under:

"14. In the context of party of the second part, all the companies of Shri Jayant Sanghvi and Shri Dipak Goradiya and the companies as stated by them are included."

10.2 Learned Advocate Mr Pancholi for the petitioner- defendant has then submitted that condition No.14 as such is very important to decide whether the alleged suit transaction of the plaintiff-Pratham Reality Pvt. Ltd. i.e. the alleged loan transaction covers by this condition No. 14 referred above of the MOU dated 24.4.2010 or not. From the said condition No.14, it is required to be ascertained whether it is a separate loan transaction as argued by the respondent-plaintiff and it is not part of the MOU or considering the condition No. 14 of the MOU dated 24.4.2010, can it be said that the plaintiff i.e. Pratham Reality Pvt. Ltd. is a party to this MOU or can it be indirectly covered by condition No.14 because the said Pratham Reality Pvt. Ltd. i.e. the plaintiff company is of Mr Jayant Sanghvi and Dipak Goradiya who are also persons of the other side so far as the MOU dated 24.4.2010 is concerned. Mr Pancholi, learned Advocate for the petitioner has then submitted that by the impugned order dated 30.4.2013 passed below Exh. 16 in Special Summary Suit No. 76/2012, leave to defend is partly allowed with condition, mainly on two grounds that the respondent-plaintiff is not a party to the MOU dated 24.4.2010 and the MOU and the loan amount transaction are different and accordingly leave to defend has been partly allowed. Mr Pancholi, learned Advocate for the petitioner has then submitted that before coming to the above findings the learned trial Judge should have discussed and dealt with the points reflected to condition No.14 because from the reading of condition No.14 referred hereinabove, it is clear that the second part means every company of Mr Jayant Sanghvi and Mr Dipak Goradiya will be covered under condition No.14 and accordingly in light of this condition No.14, the plaintiff i.e. Pratham Reality Pvt. Ltd. will also be covered under this condition No.14 but the trial court has ignored this important point in the entire impugned order and the learned trial Judge has missed it and not touched and discussed at all the issue related to condition No.14 of the MOU dated 24.4.2010

which was argued by the learned Advocate for the petitioner- defendant and as such as referred above, the said argument was recorded also by the trial court but it is the fact that the learned trial Judge has ignored the said important point and thus committed mistake and it leads him the erroneous finding that on close scrutiny and perusal of the MOU dated 24.4.2010 at Mart 17/1 it clearly appears that the plaintiff i.e. Pratham Realty Pvt. Ltd. is not a party in the said MOU and the plaintiff has not executed that MOU. Because of that the learned trial Judge accordingly also came to the erroneous finding that the MOU between the defendant and Mr Jayant Sanghvi and Mr Dipak Goradiya is for the purpose of 102 acres of land adjoining to village Ognaj, Ahmedabad and there is no averments about the loan amount. Mr Pancholi, learned Advocate for the petitioner has then submitted that though the trial Judge has recorded the contention related to condition No.14 of MOU dated 24.4.2010 as referred above, the learned trial Judge has not properly understood nor had dealt with the same and as he had ignored the said relevant facts and as such he has adopted an unjudicial approach and under the circumstances, it would be certainly open for this court to interfere with the impugned order under Article 227 of the Constitution of India and leave to defend application may be allowed without putting any condition as has been given by the learned trial Judge.

11 So far as the issue related to condition No.14 of the MOU dated 24.4.2010 is concerned, Learned senior Advocate Mr B B Naik for the respondent has vehemently submitted that the suit transaction is completely outside the MOU dated 24.4.2010. There is no provisions in the MOU for which the petitioner-defendant was required to give cheque as security. The amount is to be paid by the second part of the MOU i.e. (Mr.Jayant Sanghvi and Mr Dipak Goradiya) as and when the document of the lands are executed. Not a single land is purchased in the name of the plaintiff-company under this MOU. The suit amount and the suit transaction is purely on the loan transaction between the plaintiff and the defendant and it is independent of this MOU and it has nothing to do with this MOU and therefore, there is no evidence worth the name raised by the petitioner-defendant and hence the trial court is perfectly within its power to pass order granting conditional leave on the payment of principal amount to defend the suit. Learned senior Advocate Mr B B Baik has then submitted that mainly his two-fold submissions are required to be considered by this court. First submission is that the plaintiff ie. Pratham Realty Pvt. Ltd. is not a party to this MOU and, therefore, it cannot be contended by the petitioner-defendant that this transaction is part of the MOU and alternatively the second submission is that even if by interpreting condition No.14 of the MOU in favour of the petitioner-defendant, then also the suit transaction is not covered under the MOU because the conditions of MOU does not require the petitioner-defendant to issue blank cheques as security. Moreover, party of the MOU has to make payment at the time of execution of the sale deed in their favour. Further, under the MOU the second party or any other partners of Pratham Dosti are not required to give any advance amount to the plaintiff-defendant. Therefore, there is no such provision in the MOU and thus the trial court has not committed any error in passing the impugned order.

12 Before I discuss the above point relating to condition No.14 of the MOU dated 24.4.2010, it is important to note certain glaring facts regarding the alleged suit

transactions. It is the fact that the MOU is dated 24.4.2010 and the suit transactions have occurred thereafter between 19.10.2010 and 26.10.2010. Referring the documents at Mark 4/7 to Mark 4/11, it appears that they are receipts of the payment alleged to have been written by the petitioner- defendant on different dates mentioned therein confirming/acknowledging the payment as well as undertaking how to repay the loan. It is not in dispute that the alleged post dated cheques issued towards repayment of loan is of the same amount which has been transferred by the respondent- plaintiff through RTGS; meaning thereby no interest amount was calculated or included in it and it is not in dispute that if the alleged loan amount be repaid within six months, then the petitioner-defendant were not supposed to give any interest which have not been dishonoured copy of which are at Mark 4/12, 4/15, 4/17, 4/19 and 4/21. As per the case of the respondent-plaintiff, the MOU dated 24.4.2010 was executed after frequent meetings and as the relations were established, the petitioner-defendant represented to get the loan amount which would be repaid within six months and accordingly it was given. Learned Advocate for the petitioner-defendant has submitted that this theory of the respondent-plaintiff is against the averments made in para 9 of the plaint in which it is averred that the petitioner-defendant is a highly influential person and he is having both muscle as well as money power. If this be correct, then how far the theory of the respondent- plaintiff is believable that the petitioner-defendant wanted certain loan amount for a period of six months. Mr Pancholi, learned Advocate for the petitioner-defendant has then argued that prima facie, the said theory of loan is concocted and got up one subsequently. Both are doing land and realty business. The alleged loan amount of Rs. 4,50,25,000/- is not a small amount and six months' period is also somewhat not on a small period. According to the respondent-plaintiff, for six months no interest was to be charged and given for the alleged amount of Rs. 4,50,25,000/- and it was without any interest for six months. In these days, no one will believe this theory is the submission made by he learned Advocate for the petitioner-defendant. Referring the above referred document, it is clear that different amount has been credited in the bank account of the petitioner-defendant by RTGS and on the same day it is alleged that writings given and issued post-dated cheques in favour of the respondent-plaintiff company by the petitioner defendants. As referred above, the amount of cheque for the same principal amount on the same date was issued towards repayment of the alleged loan. It is the defence of the petitioner-defendant that during the business transaction as mentioned in MOU and as mentioned in the leave to defend application, the petitioner-defendant had issued certain cheques signed by him because the petitioner was transferring huge amount to the Bank account of the petitioner-defendant with a view to execute the sale deed and if the sale deed is not transferred to the name of the plaintiff, the same be secured by taking blank cheques. Learned advocate for the petitioner-defendant also mentioned that as some dispute during April, 2011 was arisen related to MOU, the petitioner has concocted the theory of the loan amount and that too after his first legal notice dated 1.6.2011 and prior to second legal notice dated 18.8.2011. The first legal notice dated 1.6.2011 issued by learned Advocate Mr Hasit D Dave of Vadodara, copy of which is at page No.59 of Paper Book-I. Referring to the said first legal notice at page No. 59, it is clear that the theory of loan is missing and repayment of the amount within six months theory is also not there in the said notice. The said first legal notice was given under the instructions of Bikram Mishra-authorized Executive of the respondent-plaintiff. The second legal Notice

dated 18.8.2011 copy of which is at page No.64 and referring to the same, it appears that the same was also given under instructions of Bikram Mishra, the then Financial Officer of the respondent- plaintiff by Advocates S.V. Raju Associates of Ahmedabad. In the second legal notice theory of loan and repayment within six months has been noticed for the first time which was not there in the first notice as referred above. Thereafter the said theory of loan and repayment within six months' period were continued in the third legal notice dated 26.9.2011 and the fourth legal notice dated 6.10.2011 which was issued under instructions of Ninad S Pradhan for the respondent- plaintiff.

12.1 As referred above, it is the case of the respondent- plaintiff that the cheque for the same principal amount on the same date was issued towards the repayment of loan as mentioned in page 3 of the plaint and as mentioned in the document Mark 4/7 to Mark 4/11. Learned Advocate for the petitioner-defendant has drawn attention to the averments made in page No.3 of the plaint and submitted that referring to the cheque numbers mentioned therein creates doubt because the preceding cheque No. 035075 dated 11.4.2011 has been alleged to have been issued earlier than the cheque Nos. 035063 and 035070 dated 21.4.2011 and 22.4.2011 respectively. He has then submitted that considering the normal conduct of human being, such things would never happen and the said conduct of the respondent-plaintiff creates doubts and contrary, it gives support to the learned Advocate for the petitioner-defendant that the alleged writing and the cheques referred therein are not related to the loan transaction. Referring to the documents at Mark 4/7 to 4/11, it further appears that an identical mistake has been committed in all the documents which alleged to have been prepared on different dates. It is not under dispute that the amount through RTGS has been credited in the bank account of the petitioner-defendant i.e. Union Bank of India, Vastral Branch, Ahmedabad while in the above documents Mark 4/7 to 4/11 a typographical error has been committed in the second line of para 1 related to the name of the branch of the Bank. Instead of Vastral Branch it is mentioned 'Vastrapur' Branch which remains identical in all the above referred documents. It is also pertinent to note that vide Mark 33/1, the complaint filed by the respondent-plaintiff against the petitioner- defendant under sections 406, 420 and 120-B of IPC were filed on 10.5.2012 in which nothing has been mentioned regarding the case of the respondent-plaintiff related to loan transaction put up by them in the Special Summary Suit No. 76/2012.

12.2 Now coming to the point related to condition No.14 of the MOU dated 24.4.2010 is concerned, it is the fact that the attention of the learned trial Judge was drawn to it which has been recorded in initial 3 lines of para 20 of the impugned order dated 30.4.2013. It is not in dispute that Mr Jayant Sanghvi is the Director of the respondent-plaintiff company i.e. Pratham Realty Pvt. Ltd. It is also not in dispute that in the MOU dated 24.4.2010, second party is also Mr Jayant Sanghvi and Mr Dipak Goradiya. A bare reading of condition No.14 of the MOU dated 24.4.2010 referred above, it appears that as mentioned therein second party means and included every company of Mr Jayant Sanghvi and Mr Dipak Goradiya and considering the same condition No.14, in my view, the respondent-plaintiff-Pratham

Realty Pvt. Ltd. is also included in condition No. 14 of the MOU dated 24.4.2010 because Mr Jayant Sanghvi is the Director of the plaintiff-company who is also the second party in the MOU referred hereinabove. At this stage, it is too early to say that not a single piece of land is purchased in the name of the plaintiff-company by the said MOU dated 24.4.2010. For the sake of argument, as observed by the learned trial Judge, if at all not a single piece of land is purchased under the said MOU, by the respondent-plaintiff, then also when it is covered under condition No.14 of the MOU dated 24.4.2010, the said fact is sufficient to come to the conclusion that the plaintiff is the company which is as such a party to the MOU and accordingly the dispute related to the MOU will also govern the suit transaction. From the above discussed facts on the record, in my view, whether the suit amount is a loan transaction or not shall be decided after leading evidence and in my view, the important condition No. 14 of the MOU was not at all touched or referred in its finding and as such the learned trial Judge has ignored and has not discussed nor taken into consideration the point related to the said condition No.14 of the MOU for the reasons best known to him. It is true that in light of the conditions of the MOU the petitioner-defendant was not required to issue blank cheques as security but it is the fact that the plaintiff and defendant have entered into an agreement of dealing of purchase of minimum land of 102 acres adjoining to village Ognaj for the plaintiff and its partners and so the case of the petitioner- defendant that because of executing the sale deed the amount was transferred through RTGS appears quite probable and plausible and in my view, the said defence does not appear to be bogus, sham and as discussed above, in my view, by not referring condition No.14 and by omitting and ignoring the same, the learned trial Judge has committed jurisdictional error and as such in my view, the trial Judge has adopted an unjudicial approach which leads him to come to the finding that there is no nexus in MOU and the loan amount and both the transactions are happened to be at different time and for different purposes. In para 58, it is also observed by the learned trial Judge that "...Further it is now admitted facts on the record that in all the litigation filed on the bases (sic) of MOU, plaintiff company is not a party." Learned Advocate Mr Pancholi for the petitioner-defendant has submitted that the petitioner-defendant has never admitted those facts and the learned trial Judge has come to the erroneous finding. It may be the findings of the learned trial Judge that the plaintiff- company is not a party to the MOU but that fact as such is not admitted by the petitioner-defendant herein is the submission made by the learned Advocate for the petitioner-defendant and there appears force and substance in it. It is the fact that in the MOU dated 24.4.2010 the partnership firm of the plaintiff-company Pratham Dosti is mentioned and name of the plaintiff-company is not there but as discussed hereinabove, name of the plaintiff company includes in condition No.14 is the submission of the learned Advocate for the petitioner-defendant and from the above discussion, I find force and merit in it and I find myself in agreement with the same.

13 Learned senior Advocate Mr B B Naik for the respondent-plaintiff has also vehemently submitted that in the leave to defend application, there is no word with regard to the SMS and the learned advocate for the petitioner-defendant wants to canvass his argument as submitted by him that as per the instructions through SMS the transaction was done as

referred hereinabove. It is also stated by Mr Naik, senior Advocate that as referred above, so far as the leave to defend application is concerned, neither the word SMS has been mentioned nor, during the course of argument also the said question of SMS was raised before the trial court and hence now he cannot be permitted to raise a new plea in this court in a petition under Article 227 of Constitution of India. Learned senior Advocate Mr B B Naik has further submitted that in the impugned order also not a single word has been referred by the learned trial Judge and it is clear that the specific argument by referring the word SMS before the trial court is totally absent and there is no reference at all regarding SMS before the trial court. On this point the said SMSs are at page Nos. 342 to 345. Learned Advocate for the petitioner- defendant Mr Pancholi has submitted that the documents which are at page Nos. 342 to 345 in the form of SMS were already produced before the trial court vide Mark 17/8 to Mark 17/11 and in the said SMS the reference of RTGS transaction is there and the court concerned has taken the cognizance related to the said documents at Mark 17/8 to 17/11 in para 14 of the impugned order and thus it cannot be said that because the word 'SMS' is not there in the leave to defend application, the said documents at Mark 17/8 to Mark 17/11 should not be considered because with regard to the said document, nothing has been argued before the trial court by the petitioner- defendant. Against this, learned senior Advocate Mr Naik for the respondent-plaintiff has submitted that if we carefully observe the averments made in the impugned order passed by the learned trial Judge related to the document Mark 17/8 to Mark 17/11, it has been referred as copies of RTGS. But so far as SMS is concerned, in the list of documents, the word SMS has not been mentioned and the petitioner-defendant has misguided the trial court and submitting the print-out of SMS vide Mark 17/8 to 17/11 wherein the word RTGS is mentioned and this is nothing but the mischief on the part of the petitioner-defendant.

13.1 I have considered the averments made in the leave to defend application and the case put up by the petitioner- defendant and also gone through para 14 of the impugned order so far as the above discussed point on SMS is concerned. I have also carefully perused the documents at pages No. 342 to 345. Mark 17/8 to Mark 17/11 appears to have been referred as copy of the RTGS but the said print-out of SMS were there before the court which are at pages No. 342 to 345 and the court could very well have located or traced out whether any mischief has been played by the petitioner- defendant or not by producing in the print-out of SMS as copies of RTGS. Simply because in the list of documents it is mentioned that it is a copy of RTGS one should not jump to the conclusion that the petitioner-defendant has tried to misguide the court because the court has already referred the said documents referring the print-out of the said SMS at Mark 17/8 to Mark 17/11. It is clear that the reference of RTGS transaction is already there in the documents at Mark 17/8 to Mark 17/11 so when the court has not observed anything adverse against the petitioner-defendant related to the document Mark 17/8 to Mark 17/11 then I do not find any merit or substance in the submissions made by the learned senior Advocate for the respondent-plaintiff because at the most it can be said that the proper description is not there in the list of documents so far as documents at Mark 17/8 to Mark 17/11 is concerned but in my view, it cannot be said that mischief as has been canvassed by the learned senior Advocate for the petitioner has been

played because the said documents at Mark 17/8 to Mark 17/11 also speaks of RTGS transaction. It is not denied by the respondent-plaintiff in his rejoinder affidavit that the person Vikram Mishra or Bikram Mishra is not working in plaintiff company and he has never sent SMS to the petitioner-defendant. As referred above, first two notices at page Nos. 59 and 64 (paper book Part-I) respectively dated 1.6.2011 and 18.8.2011 the same were issued under instructions of Bikram Mishra. The first two SMSs at page No. 342 related to Bhavna Steel and B.K. Shah & Co. respectively dated 15.10.2010 and 13.10.2010 i.e. just before few days then the alleged loan transactions dated 19.10.2010 to 26.10.2010. Referring to the said SMS alleged to have been made by Bikram Mishra it appears that it talks about RTGS transactions. The SMSs on page No. 345 of the paper book, two of them reproduced hereunder shows the relations between the petitioner and the respondent. The SMS dated 20.3.2011 on page No.345 (paper book-I) reads as under:

"May God paint the canvas of your life with the most vibrant colours and sprinkle peace and joy at every step. HAPPY HOLI Bikra Mishra"

Another SMS dated 13.10.2010 on the same page No.345 (paper Book-I) speaks about the gravity of RTGS transaction which reads as under:

"will commit suicide at your farm house if RTGS is not made today."

14 In short, referring to the SMSs at pages No.342 to 345 which is yet to be proved after trial prima facie shows the relations between the petitioner-defendant and respondent-plaintiff. It is important to refer once again condition No.14 of MOU dated 24.10.2010 referred hereinabove. Said condition No.14 of the MOU speaks about inclusion of all the companies of Mr Jayant Sanghvi and Mr Dipak Goradiya in the context of party of second part and the companies as stated by them are included. Whether companies namely, B.K. Shah and M/s.Bhavna Steels would be included or not be decided after the trial is the submissions made by the learned Advocate for the petitioner-defendant and I find myself in agreement with the same.

15 Learned senior Advocate Mr B.B. Naik, in support of his submissions, placed reliance on the following decisions:

(i) In the case of Narinder Kumar V/s. State of Jammu and Kashmir [(2010) 9 SCC 256]. Relying on the above decision, the learned senior Advocate has submitted that it has been held by the Apex Court that in a case of dishonour of cheques, it is very much required to be examined whether defence taken in application makes out a case which, if established, would be a plausible defence in a Regular Suit because as cheques which issued normally for liquidation of admitted dues. It has also been observed that the issuance of the cheque had never been disputed on behalf of the petitioner whose case was that the same had been given on account of security and not for presentation, but the said attempt had been made to misuse the same by dishonest means.

Mr Naik, learned senior Advocate has then submitted that in the case on hand also the signature on the cheques has not been denied and hence the theory put up by the petitioner- defendant in his leave to defend application, prima facie appears against the observations above referred made by the Apex Court and hence the order which has been passed by the Court concerned should not be interfered with.

(ii) In the case of Hindustan Apparel Industries V/s. Fair Deal Corporation, New Delhi (AIR 2000 Gujarat 261). Relying on this case, the learned senior Advocate has argued that as observed by the Full Bench of this court, issuance of cheque is acknowledgment of debt or liability.

(iii) In the case of Santosh Kumar V/s. Bhai Mool Singh (AIR 1958 SCC 321). Relying on para 11 of the case, the learned Senior Advocate has argued that when the complete details of payment are given, that will be examined, rather bald statement of payment towards security. In the facts of the present case, there are no details of defence in the affidavit or application of leave to defend and so the question of raising triable issue does not arise.

(iv) In the case of Mechalec Engineers and Manufacturers, M/s. V.M/s. Basic Equipment Corporation (AIR 1977 SC 577).

The learned Advocates for the parties have placed reliance on paragraph Nos. 7 and 8 which read as under:

"7. We need not dilate on the well established We need not dilate on the well established principles repeatedly laid down by this Court which govern jurisdiction of the High Courts under section 115 C.P.C. We think that these principles were ignored by the learned Judge of the High Court in interfering with the discretionary order after a very detailed discussion of the facts of the case by the learned Judge of the High Court who had differed on a pure question of fact—whether the defences could be honest and bona fide. Any decision on such a question, even before evidence has been led by the two sides, is generally hazardous. We do not think that it is fair to pronounce a categorical opinion on such a matter before the evidence of the parties is taken so that its effects could be examined. In the case before us, the defendant had denied, inter alia, liability to pay anything to the plaintiff for an alleged supply of goods. It is only in cases where the defence is patently dishonest or so unreasonable that it could not reasonably be expected to succeed that the exercise of discretion by the Trial Court to grant leave questioned. In the judgment of the High Court we are unable to find a ground of interference covered by Section 115 C.P.C.

In Smt. Kiranmoyee Dassi & Anr. V/s. Dr. J. Chatterjee(1), Das. J., after a comprehensive review of authorities on the subject, stated the principles applicable to cases covered by order 17 C.P.C. in the form of the following propositions (at p. 253):

"(a) If the Defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the Defendant is

entitled to unconditional leave to defend.

(b) If the Defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the Defendant is entitled to unconditional leave to defend.

(c) If the Defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defence, yet, shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the Plaintiff is not entitled to judgment and the Defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security.

(d) If the Defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the Plaintiff is entitled to leave to sign judgment and the Defendant is not entitled to leave to defend.

(e) If the Defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the Plaintiff is entitled to leave to sign judgment, the Court may protect the Plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the Defendant on such condition, and thereby show mercy to the Defendant by enabling him to try to prove a defence".

According to the learned senior Advocate for the respondent-plaintiff, the trial court has passed the detailed order and after depositing the amount, the petitioner-defendant would get the chance of trial and so this court should not differ on pure question of fact. According to the learned senior Advocate for the respondent-plaintiff, the trial court has rightly relied on the proposition laid down in para 8 (e) referred above. According to the learned Advocate for the petitioner-defendant, his case is falling under the propositions laid down in para 8 (a), (b) and (c) but not (e).

(v) In the case of Oil & Natural Gas Corporation Ltd. V/s. SBI, Overseas Branch, Bombay [(2006) 6 SCC 385]. The learned senior Advocate has argued that Arbitration proceedings will not apply to this case. He has submitted that in that case, no unconditional leave was granted and the petitioner-defendant had to deposit the amount of cheque. The Apex Court has also held that the High Court plainly erred in having granted leave to defend unconditionally.

16 I have perused the case law cited by the learned senior Advocate for the respondent-plaintiff and have taken due care regarding the ratio laid down by the Apex Court while passing the above order. The above discussed aspects, more particularly the issue related to condition No.14 discussed hereinabove, were ignored by the learned trial Judge and considering the above referred discussion, in my view, the ratio laid down in the case law cited hereinabove is not applicable to the facts of the case and hence the

same are not of any help to the case of the respondent-plaintiff. In view of the discussions made hereinabove, I am of the view that the impugned order dated 30.4.2013 passed in Special Summary Suit No. 76/2012 below Exh. 16 by the learned 16th Additional Senior Civil Judge, Vadodara directing the petitioner-defendant to deposit an amount of Rs. 4,50,25,000/- is illegal because as discussed hereinabove the same had been passed ignoring the vital condition No.14 of the MOU dated 24.10.2010 and as the said approach adopted by the learned trial Judge is an unjudicial approach, in my view, it is the duty of this Court to interfere with the impugned order under Article 227 of the Constitution of India.

17 In the result, this Special Civil Application is allowed and the order dated 30.4.2013 passed in Special Summary Suit No. 76/2012 below Exh. 16 by the learned 16th Additional Senior Civil Judge, Vadodara is set aside accordingly. The petitioner-defendant is entitled to defend the said Special Summary Suit without any condition, following the due procedure for the same. Rule is made absolute accordingly.