

Sl. No	Date	Office Notes, reports, orders or proceedings or directions and Registrar's order with Signatures	COURT'S OR JUDGES'S ORDERS
			C482 No.1850 of 2023 <u>Hon'ble Sharad Kumar Sharma, J.</u> Mr. Yogesh Kumar Sharma, Advocate, for the applicant. The argument as extended by the learned counsel for the applicant qua the proceedings drawn against him, with regards to the Criminal Complaint Case No.2950 of 2023, "Kamayani Mishra Vs. Ashok Panchabhai", are that the proceedings drawn under section 138 of the Act, whereby the present applicant has been summoned in Criminal Complaint Case No.2950 of 2023, "Kamayani Mishra Vs. Ashok Panchabhai" are vitiated under law. The argument of the learned counsel for the applicant is that once the terms of the agreement, which was said to be allegedly executed between them on 05.05.2023, itself was alleged to be shown to have been seized, there couldn't have been any proceedings which could be drawn under section 138 of the Act, with regards to the cheque, which was given in advance, after the cessation of the agreement. In relation to that, the learned counsel for the applicant to support his contention has relied upon the judgment as reported in 2014 (12) SCC 539, "Indus Airways Private Limited Vs. Magnum Aviation Private Limited and another". The facts of the said case though it related to the proceedings under section 138 of the NI Act, but it was entirely based upon a different context altogether. There was based on a contract executed between the parties with regards to the purchase of the spare parts of an air craft. The entire genesis of the controversy therein with regards to the fixation of the liability, as to whether it is enforceable under section 138 of the NI Act, for the discharge of the debt or the liability or not, it was rather based upon the appreciation of the fact and in context thereto, the reasons, which has been assigned in paragraph 15

			of the said judgment, which has been relied by the learned counsel for the applicant that where the purchaser has to pay an amount in advance and if there is a breach of contract, the loss might have been occasioned, but that will not amount to be a breach for security or the advances, which could be made liable to be paid under the provisions contained under section 138 of the NI Act. The relevant paragraph 15 is extracted hereunder:- “15. The above reasoning of the Delhi High Court is clearly flawed inasmuch as it failed to keep in mind the fine distinction between civil liability and criminal liability under Section 138 of the N.I. Act. If at the time of entering into a contract, it is one of the conditions of the contract that the purchaser has to pay the amount in advance and there is breach of such condition then purchaser may have to make good the loss that might have occasioned to the seller but that does not create a criminal liability under Section 138. For a criminal liability to be made out under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. We are unable to accept the view of the Delhi High Court that the issuance of cheque towards advance payment at the time of signing such contract has to be considered as subsisting liability and dishonour of such cheque amounts to an offence under Section 138 of the N.I. Act. The Delhi High Court has traveled beyond the scope of Section 138 of the N.I. Act by holding that the purpose of enacting Section 138 of the N.I. Act would stand defeated if after placing orders and giving advance payments, the instructions for stop payments are
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			issued and orders are cancelled. In what we have discussed above, if a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise and material or goods for which purchase order was placed is not supplied by the supplier, in our considered view, the cheque cannot be said to have been drawn for an existing debt or liability.” This Court is not able to agree with the argument extended by the learned counsel for the applicant, in relation to the paragraph 15 of the judgment, because there in that case it was a concluded contract where the dispute arose with regards to the breach of conditions of concluded contract and where the provisions contained under section 138 of the NI Act, was attracted for the purposes of attracting the criminal liability with regards to the amount which was sought to be paid under the terms of the contract. The reference of the contract, therein, the judgment of the “Indus Airways Private Limited Vs. Magnum Aviation Private Limited and another” would relate to a concluded contract executed between the parties, the terms of which was enforceable under law, as it was deciphered by the Hon’ble Apex Court. But here since the controversy is arising out of an unregistered agreement, the factum of which and the terms contained in it is required to
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			be determined by the learned trial court where the proceedings under section 138 of the Act, has been drawn, and all the defences qua the implications flowing from the unregistered agreement dated 05.05.2023, is to be determined by the Court which has summoned the present applicant by the impugned order, which is under challenge before this Court i.e. order dated 01.08.2023. Leaving all contentions open to be argued by the learned counsel for the applicant before trial court, since being the proceedings under section 138 of the Act, which do not satisfy the test of the parameters prescribed under the “Indus Airways Private Limited Vs. Magnum Aviation Private Limited and another”, being factually distinct to one another. The applicant is relegated to response to the notices issued under section 138 of the Act, and take all his defences before the court of ACJM, Haldwani, District Nainital, to substantiate his case with regards to the effect of the proceedings drawn under section 138 of the Act, against him, based on an unregistered agreement. I do not see any merits in the matter requiring an interference under section 482 of CrPC. The C482 application is accordingly dismissed. (Sharad Kumar Sharma, J.) 18.09.2023 NR
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