

Court No. - 27

Case :- APPLICATION U/S 482 No. - 3407 of 2024

Applicant :- Gyaneshwar Katiyar And Another

Opposite Party :- State Of U.P. Thru. Secy. Home Lko. And Another

Counsel for Applicant :- Amit Kumar Singh, Lalit Kishore Pandey

Counsel for Opposite Party :- G.A.

Hon'ble Shamim Ahmed, J.

1. Vakalatnama filed today in the Court by Shri Lalit Kishore Pandey, Advocate on behalf of opposite party No.2 is taken on record.

2. Heard Shri Amit Kumar Singh, learned Counsel for the applicants, Shri Lalit Kishore Pandey, learned Counsel for the opposite party No.2, Shri S.P. Tiwari, learned A.G.A. for the State-opposite party No.1 and perused the material placed on record.

3. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicants seeking quashing/setting aside of the summoning order dated 12.10.2023 passed by learned Presiding Officer, Additional Court No.5, Lucknow in Complaint Case No.87478/2023 vide filing No.105312/2023 instituted against the applicants under Section 138 and 141 of Negotiable Instruments Act, 1881 as well as entire proceedings of the aforesaid case so far it relates to the present applicants. A further prayer has been made by the applicants to call for the records of Complaint Case No.87478/2023 vide filing No.105312/2023 under Sections 138 and 141 of Negotiable Instruments Act, 1881.

4. Learned Counsel for the applicants submits that the applicants are innocent persons and have been falsely implicated in the present case due to enmity. He further submits that the applicants are into the business of trading of Indian-made foreign liquor and beer in the State of Uttar Pradesh and to effectively manage the business and operations they had formed an Association of Persons (hereinafter referred as "AOP") in the name and style of BKS Associates and the applicants are the Member of the AOP. He further submits that the opposite party No.2's mother, namely-Poonam Jaiswal was the licensee of a retail shop of country liquor situated at Mohamadpur, Sariya, Bankey Nagar Chauraha(A), District-Lucknow since the opposite party No.2 and his mother did not have any prior experience of operation of retail shop of country liquor, they joined AOP formed by the applicants on 17.07.2020 in which opposite party No.2 was given share of 5% only. He

further submits that after joining the AOP, the opposite party No.2 borrowed/withdrew various sums from the AOP from time to time with a promise that he would return the same very soon but when the amounts were not returned the applicants issued a legal notice dated 03.07.2023 to opposite party No.2 demanding therein the return of capital withdrawn/borrowed by him from the AOP. Thereafter, the opposite party No.2 on 05.07.2023 issued a legal notice to the applicants intimating them about the dishonoured cheques, which were issued by the applicants being the Founder Members of the AOP against the liabilities towards the opposite party No.2 i.e. cheque bearing No.1364 dated 29.05.2023 of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) and bearing No.1365 dated 19.06.2023 of Rs.35,00,000/- (Rupees Thirty Five Lakh Only), Bank-ICICI Bank, Branch-Vikas Nagar, Lucknow and also alleging therein that the said cheques were given by the applicants to the opposite party No.2 for capital inducted by opposite party No.2 and profit accrued thereof, which were dishonoured on presentation.

5. Learned Counsel for the applicant further submits that since the applicants were demanding the amount, which was borrowed by the opposite party No.2 from the AOP through legal notice dated 03.07.2023, therefore, the opposite party No.2, who was also the In-charge of day to day activities of AOP, stole the said two cheques as he had the access of signed cheques and other security documents of AOP and misused them by putting them in the bank for encashment in order to implicate the present applicants in false complaint case under the provisions of Negotiable Instruments Act, 1881.

6. The overall contention of the learned counsel for the applicants is that no offence against the applicants is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment, thus, he submits that the present case is nothing but an abuse of process of law, therefore, the present application may be allowed and the proceedings of the present case may be quashed.

7. Per contra, learned Counsel for the opposite party No.2 vehemently opposes the contentions made by learned Counsel for the applicants and submits that the opposite party No.2 was running his business in the name of his mother and the business was giving him profits but the applicants persuaded the opposite party No.2 to join their AOP only with the intention to commit forgery and misappropriation of funds. The opposite party No.2 in order to gain profits by joining the AOP of which the applicants are founder Members, started putting more and more money with the hope and trust given by the existing members of the AOP and made an investment of about

Rs.50,00,000/- (Rupees Fifty Lakh Only) and they also promised after all these investments, the business will flourish all over the State of U.P. and then we will calculate all the profits gained together and will split it as per the share of each of the members but when the same did not happen, then the opposite party No.2 asked the applicants to return his money, which was earlier denied and later on, the applicants issued two cheques bearing No.1364 dated 29.05.2023 of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) and bearing No.1365 dated 19.06.2023 of Rs.35,00,000/- (Rupees Thirty Five Lakh Only), drawn on Bank-ICICI Bank, Branch-Vikas Nagar, Lucknow in the name of opposite party No.2 but when the cheque bearing No.1365 dated 19.06.2023 amounting to Rs.35,00,000/- (Rupees Thirty Five Lakh Only) was presented before the Bank of Baroda, Branch Aliganj, Lucknow for withdrawal /encashment of the said amount, the same was dishonored with remark '*Funds Insufficient*' on 26.06.2023.

8. Learned Counsel for the opposite party No.2 further submits that thereafter, the opposite party No.2 issued legal notice to the applicants on 05.07.2023 stating therein all the facts and circumstances of the case. He further submits that in reply to the legal notice dated 05.07.2023, the applicants on 15.07.2023 sent a reply of the aforesaid notice to the opposite party No.2, wherein they have not denied the signatures which were done on the two cheques. He further submits that in their reply to the legal notice, they did not mention anything about them making any complaint to any authority regarding the lost two cheques, which itself weaken their case, thus, he submits that the impugned summoning order dated 12.10.2023 has been rightly passed by the learned trial court in accordance with law, therefore, the same is not liable to be quashed and the instant application is liable to be rejected.

9. Learned A.G.A. for the State-opposite party No.1 contends that from the allegations made in the complaint filed by the opposite party No.2, prima facie offence is made out against the applicants. The innocence of the applicants cannot be adjudged at the pre trial stage. Therefore, the applicants do not deserve any indulgence.

10. After hearing learned Counsel for the parties and after perusal of records, this Court finds that towards the discharge of above mentioned financial liabilities, the accused-applicants provided the opposite party No.2 with two post dated cheques worth Rs.60,00,000/- (Rupees Sixty Lakhs Only) of different values payable on different dates. Out of those two cheques, one cheque bearing No.1365 dated 19.06.2023 of Rs.35,00,000/- (Rupees Thirty Five Lakh Only) was deposited

by the opposite party No.2 with its banker for encashment but the said cheque was unpaid with the remark 'funds insufficient'. The opposite party No.2 informed the applicants regarding the dishonour of the cheque and asked them to pay the amount. However, the applicants did not pay any heed to the request of the opposite party No.2. Thereafter, a legal notice was sent and despite that applicants failed to make payment against the cheques in question. It is further alleged in the complaint that the applicants were at the time of commission of the offence were Founder Members of the BKS Associates and were solely responsible for the conduct of the business of the AOP, therefore, the applicants are liable for offence committed under Section 138 and 141 of the Negotiable Instruments Act, 1881, thus, the opposite party No.2 has initiated the proceedings against the applicants under the provisions of the Negotiable Instruments Act, 1881.

11. It would relevant here to go through Sections 138 and 141 of the Negotiable Instruments Act, 1881. Section 138 and 141 of the Negotiable Instruments Act, 1881 would read as under:-

"Section 138 in The Negotiable Instruments Act, 1881

138. Dishonour of cheque for insufficiency, etc., of funds in the account.—

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the

holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Section 141 in The Negotiable Instruments Act, 1881

141. Offences by companies. —

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

11. It is further observed here that according to the reply sent by the applicants, execution of the cheques in question has nowhere been disputed and as per the reply of the applicants, the cheques in question were stolen from their possession but in this regard they did not file any complaint with the authorities concerned. This question as to whether the cheques in question were only stolen or not, is a matter of evidence to be decided later on during the course of the trial. Moreover, the applicants have nowhere taken up this plea in their reply that they were neither In-charge of or responsible to the AOP for the conduct of business of the AOP.

12. It is further observed here that in their reply of the legal notice, the applicants did not dispute the signatures made on the aforesaid two cheques, thus, it can be transpired that the cheques in question were duly signed and issued by the applicants against their liabilities towards the opposite party No.2.

13. Further, in the case in hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that the cheques which were dishonoured were issued by the Founder Members of the AOP i.e. the applicants and the applicants were In-charge of the affairs of the AOP. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegation as a whole is not sufficient to show that at the relevant point of time the applicants are not alleged to be persons In-charge of the affairs of the AOP. Obviously, the complaint refers to the point of time, when the two cheques were issued, their presentation, dishonour and failure to pay in spite of notice of dishonour. Reading the complaint as a whole, this Court is satisfied that it is a case where the contentions raised by the applicants can only be dealt after the conclusion of the trial.

14. Further, the Hon'ble Supreme Court in the case of ***Mohd. Allauddin Khan vs. State of Bihar and Others*** reported in **(2019) 6 SCC 107** has been pleased to observe paragraph Nos.9 and 12, which are reproduced hereinunder:-

"9. First error is that the High Court did not examine the case with a view to find out as to whether the allegations made in the complaint prima facie make out the offences falling under Sections 323 and 379 read with Section 34 IPC or not. Instead the High Court in para 6 gave importance to the fact that since there was a dispute pending between the parties in the civil court in relation to a shop as being landlord and tenant, it is essentially a civil dispute between the parties. It is on this ground, the High Court proceeded to quash the complaint. This approach of the High Court, in our view, is faulty.

12 The High Court should have seen that when a specific grievance of the appellant in his complaint was that Respondents 2 and 3 have committed the offences punishable under Sections 323 and 379 read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizance is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order [Prem Prakash Gupta v. State of Bihar, 2017 SCC OnLine Pat 3618] is legally unsustainable."

15. Thus, from the perusal of the materials on record and looking into the facts of the case and after considering the arguments made at the bar and the judgment referred above, it does not appear that no offence has been made out against the applicant.

16. At the stage of issuing process the trial court is not expected

to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-(i) **R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866**, (ii) **State of Haryana Vs. Bhajanlal, 1992 SCC (Cri.)426**, (iii) **State of Bihar Vs. P.P. Sharma, 1992 SCC (Cri.)192** and (iv) **Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.)283** and (v) **Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918**.

17. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue.

18. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

19. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. The interference at the threshold of quashing of the complaint case, summoning order and the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. In the result, the prayer made for quashing is refused. The applicant has ample opportunity to raise all the objections at the appropriate stage.

20. In view thereof, the present application lacks merit and substance and is hereby **rejected.**

Order Date :- 16.4.2024
Piyush/-