

Court No. - 75

Case :- APPLICATION U/S 528 BNSS No. - 4825 of 2025

Applicant :- Sakshi Yadav

Opposite Party :- State of U.P. and Another

**Counsel for Applicant :- Arunendra Kumar Singh, Kumar
Kartikeya**

Counsel for Opposite Party :- G.A.

Hon'ble Vikas Budhwar, J.there

1. Heard Sri K. Kartikeya, learned counsel for the applicant as well as Sri S.K. Singh, learned AGA for the State.

2. This application u/s 528 of BNSS has been preferred to quash the entire proceedings of Complaint Case No. 7354 of 2023 (Keshav Singh V/s Sakshi Yadav), under Section 138 Negotiable Instruments Act, 1881 as well as summoning order dated 17.01.2024 passed by the Ld. Chief Judicial Magistrate-Ist, Gautam Budha Nagar, in Complaint Case No. 7354 of 2023, under Section 138 Negotiable Instruments Act, 1881, Police Station-Sector 24, District - Gautam Budha Nagar.

3. The case of the applicant that on 10.10.2023, a complaint came to be lodged by the opposite party no. 2 against the applicant under Section 138 of the NI Act with an allegation that the opposite party no. 2 runs a medical store and so far as the applicant herein, she runs a sweet shop and a restaurant and at times, on necessity, the husband of the applicant takes financial assistance. Allegation is that a flat bearing no. 104, Tower-D, Exotica Fresco, Sector 137, NOIDA, District Gautam Budhnagar is owned by the applicant and his wife who are the co-owners. The further allegation is that the applicants approached the opposite party no. 2 with a proposal to sell the said flat and the amounts stood transferred by the opposite party no. 2 to applicant on 15.09.2019, Rs. 20,00,000/-, on 10.10.2019, Rs. 20,00,000/-, on 15.11.2019, Rs. 20,00,000/-, on 08.12.2019, Rs. 20,00,000/- and on a stamp paper/agreement to sell came to be signed acknowledging the receipt of the said amount. It is also alleged that on 10.12.2020, the opposite party no. 2 paid an amount of Rs. 21,00,000/- totalling to Rs. 1,01,00,000/- and an agreement to sale stood signed on a Rs. 100/- non-judicial stamp paper though in the said agreement, the

signature of the applicant herein was not there as she was somewhere outside but there was an agreement to the extent that when a sale deed is to be executed then they would honor the said agreement. It is also the allegation that when the opposite party no. 2 approached the applicant and her husband for getting the registry done then reluctance was shown on the premise that the value of the flat had swelled up to Rs. 1,20,00,000/- and the total amount paid to Rs. 1,01,00,000/- and the residue amount of Rs. 19,00,000/- was there which is to be paid. Since, agreement would not be entered into between the parties regarding execution of the sale deed so with respect to the discharge of the liability, the applicant herein had drawn a cheque bearing no. 065425 of 50,00,000/- on 08.08.2023 which on presentation in the bank on 09.08.2023 was returned with the remark "kindly contact drawer, drawee bank and please present again". It is also recited in the complaint that on the assurance of the applicant again the said cheque was re-presented on 21.08.2023 and the same came to be returned with the remark "kindly contact drawer, drawee bank and please present again" on 22.08.2023. Thereafter, a statutory demand notice came to be issued on 09.09.2023 which as per the recitals contained in para 13 of the application, the applicant herein got the service manipulated while returning in back with the remark "on hold addressee cannot be located. Thereafter, the present complaint has been preferred on 10.10.2023. Thereafter, the applicant came to be summoned on 17.01.2024 under Section 138 of the NI Act by the court of ACJM-I, Gautam Budhnagar.

4. Questioning the summoning order, the applicant has filed the present applicant.

5. Learned counsel for the applicant has submitted that the summoning order cannot be sustained even for single moment. Elaborating the said submission, it is contended that firstly, there is no legal debt or liability so as to attract the provisions of Section 138 of the NI Act particularly in view of the fact that as per own case of the applicant, the entire payments to the tune of Rs. 1,01,00,000/- had been made in cash and in view of the provisions contained under Section 269(SS) of the Income Tax Act, 1961, a clear prohibition and bar has been provided that no person shall take or accept from any other person any loan or deposit or any specified sum otherwise by way of account payee cheque or the account payee bank draft or the use of electronic clearing system, in case, the total amount does exceed Rs. 20,000/- Secondly, the agreement so said to be entered into between the parties which is at page 62 of the paper book is not a registered agreement under

the provisions of Registration Act & Transfer of Property Act, 1882 and further in the said agreement as per the own saying of the opposite party no. 2, there happens to be no signature of the applicant and further in the said document there are two witnesses but it does not bear the signature of Sunil Kumar who is one of the witnesses and the said document is inadmissible in law. Thirdly, the value of the flat at the time of purchase by the applicant in the year 2015 was to the tune of Rs. 95,00,000/- and odd, however, it is highly unbelievable and implorable for a person even to imagine that in a place like Gautam Budhnagar in the year 2022 after a period of 7 years, the appreciation would be of only 1,00,00,000/- and odd. Fourthly, the statutory demand notice which is stated to have been issued on 09.09.2023 which contains a remark "on hold addressee could not be located" itself shows that it had not been served, thus, there has been a clear infraction of provisions of Section 138 read with Section 142 of the NI Act, thus, the applicant herein was denuded of their right to make good the payment within a period of 15 days from service. Fifthly, the reasons for returning of the cheque "kindly contact drawer, drawee bank and please present again" does not answer the description of dishonor of a cheque under Section 138 of the NI Act. Sixthly, the court below has summoned the applicant without application of mind.

6. Learned AGA, on the other hand, submits that once the cheque stood drawn and the same came to be dishonored then the presumption under Section 139 of the NI Act would be there and whatever arguments are being sought to be raised they are the matter of defences consideration whereof would not be required at this stage particularly when, in case, the payment has been made in violation of the provisions of Section 269(SS) of the Income Tax Act then it is for the Revenue Authorities to proceed in accordance with law and the applicant cannot escape the obligations and the consequences of dishonor of cheque under the provisions of NI Act.

7. I have heard the submissions so made across the bar and perused the record carefully.

8. Apparently, as per the complaint under Section 138 of the NI Act lodged by the opposite party no. 2 on 10.10.2023, the allegation is that with respect to discharge of the liability, the applicant herein had drawn a cheque bearing no. 65425 of Rs. 50,00,000/- on 08.08.2023 which was not honored and returned by the bank on 09.08.2023 and 22.08.2023 with the remarks "kindly contact drawer, drawee bank and please present again". Post

lodging of the complaint, the applicant came to be summoned under Section 138 of the NI Act on 17.01.2024.

9. As regards the first contention of the learned counsel for the applicant that no legal debt or liability stands attracted so as to invoke the provisions of Section 138 of the NI Act with regard to the fact that here the payments are stated to have been made to the tune of Rs. 1,01,00,000/- only in cash and not by cheque, draft or electronic mode, RTGS or NEFT, thus, the provisions of Section 269(SS) of the Income Tax Act would come into play, while relying upon the judgment of the High Court of Kerala in **Criminal Revision Petition No. 408 of 2024** decided on 22.07.2025 that any payment made in contravention of the provisions of Section 269(SS) of the Income Tax Act would not create any right or liability so as to encompass debt or liability under Section 138 of the NI Act, as a matter of fact, the argument so sought to be raised by the learned counsel for the applicant, at one blush, looks to be attractive but, it is not liable to be accepted at this stage particularly when the Court is confronted with an order challenging the summoning order. It may be a ground to demolish the case of the complainant but consideration whereof would be required if raised at the time when the trial commences.

10. In any view of the matter, the judgment of the Kerala High Court is a case wherein post conviction and sentence under Section 138 of the NI Act, an appeal came to be preferred before the Session Court and the conviction was confirmed against which a revision came to be preferred. Here, in the present case, summoning order is being subject matter of challenge and it would not be appropriate for this Court at this stage in the present proceedings to delve into the said issue as they are the issues which need consideration after leading of evidence and tendering their explanation when the trial commences. Moreover, a Division Bench of the Bombay High Court, Nagpur Bench, Nagpur in **Criminal Appeal No. 795 of 2018 (Prakash Madhukarrao Desai Vs. Dattatraya Sheshrao Desai)** decided on 19.08.2023 in para 18, the following was observed.-

"18. In view of the aforesaid discussion, it is held that a transaction not reflected in the books of accounts and/or Income Tax returns of the holder of the cheque in due course can be permitted to be enforced by instituting proceedings under Section 138 of the Act of 1881 in view of the presumption under Section 139 of the Act of 1881 that such cheque was issued by the drawer for the discharge of any debt or other liability, execution of the cheque being admitted. Violation of Section 269-SS and/or Section 271-AAD of the Act of 1961 would not render the transaction unenforceable under Section 138 of the Act of 1881. The decisions in Krishna P. Morajkar, Bipin

Mathurdas Thakkar and Pushpa Sanchalal Kothari (supra) lay down the correct position and are thus affirmed. The decision in Sanjay Mishra (supra) with utmost respect stands overruled."

11. However, this Court is not, at this stage, is not required to record a conclusive finding as the said issue is to be considered on the basis of the contention so set forth by the parties in the trial. With respect to the argument so raised by the learned counsel for the applicant that the agreement so relied upon by the opposite party no. 2 which is alleged to be pressed into service to show transactions of money is concerned, is inadmissible in law, this Court, at this stage in the proceedings under Section 138 of the NI Act, is not required to delve into the said issue particularly when the issue of admissibility of the said document and the impact and effect of the existence of the said document is not a factor which is to be dealt in the present proceedings at this stage. Even otherwise for the sake of illustration in **A.V. Murthy Vs. B.S. Nagabasavanna: (2002) 2 SCC 642**, the Hon'ble Apex Court had the occasion to consider the issue relatable to quashing of the proceedings on the ground that the debt or liability was barred by limitation and there is no legally enforceable debt or liability against the drawer and in para 5, it was observed as under.-

"5. As the complaint has been rejected at the threshold, we do not propose to express any opinion on this question as the matter is yet to be agitated by the parties. But, we are of the view that the learned Sessions Judge and the learned Single Judge of the High Court were clearly in error in quashing the complaint proceedings. Under Section 118 of the Act, there is a presumption that until the contrary is proved, every negotiable instrument was drawn for consideration. Even under Section 139 of the Act, it is specifically stated that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for discharge, in whole or in part, of any debt or other liability. It is also pertinent to note that under sub-section (3) of Section 25 of the Indian Contract Act, 1872, a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits, is a valid contract. Moreover, in the instant, the appellant has submitted before us that the respondent, in his balance sheet prepared for every year subsequent to the loan advanced by the appellant, had shown the amount as deposits from friends. A copy of the balance sheet as on 31st March 1997 is also produced before us. If the amount borrowed by the respondent is shown in the balance sheet, it may amount to acknowledgement and the creditor might have a fresh period of limitation from the date on which the acknowledgement was made. However, we do not express any final opinion on all these aspects, as these are matters to be agitated before the Magistrate by way of defence of the respondent."

12. The said judgment came to be considered in a recent judgment

of the Hon'ble Apex Court in **Criminal Appeal No. 2743 of 2023 (K. Hymavathi Vs. State of Andhra Pradesh & Anr.)** decided on 06.09.2023.

13. Next, the issue which would arise is whether the statutory demand notice came to be served or not particularly in view of the recital contained in para 13 of the complaint that the statutory demand notice came to be issued on 09.09.2023 and the applicant herein in connivance with the postman got the endorsement made "on hold addressee cannot be located". The issue with regard to the fact that as to whether service was actually made or not had been held to be a subject matter of trial as in a given case, the recital that the statutory demand notice had been issued would suffice. Even with regard to the service of notice, there happens to be an illustrious judgment of Hon'ble Apex Court in **C.C. Alavi Haji vs Palapetty Muhammed & Anr : 2007 (6) SCC 555**. Moreover, the said judgment came to be followed in **Ajeet Seeds Ltd. vs. K. Gopala Krishnaiah 2014 (12) SCC 685**, wherein para 10 & 11, the following was observed as under.-

"10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in C.C. Alavi Haji, this Court did not deviate from the view taken in Vinod Shivappa, but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from Vinod Shivappa where this Court has held that service of notice is a matter of evidence and proof and it would be premature at the stage of issuance of process to move the High Court for quashing of the proceeding under Section 482 of the Cr.P.C. These observations are squarely attracted to the present case. The High Courts reliance on an order passed by a two-Judge Bench in Shakti Travel & Tours is misplaced. The order in Shakti Travel & Tours does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in C.C. Alavi Haji, to which we have made a reference, the three- Judge Bench has conclusively decided the issue. In our

opinion, the judgment of the two-Judge Bench in Shakti Travel & Tours does not hold the field any more."

14. Furthermore in **Kishore Sharma Vs. Sachin Dubey: Criminal Appeal No. 1325 of 2019** decided on 03.09.2019 while following the judgment in Laxmi Diasom Vs. State of Gujarat and others 2012 (13) SCC 375 and Ajeet Seeds Ltd. the Hon'ble Apex Court had flagged a note of caution that the notice was duly served or not is a triable issue and it was evidence.

15. With respect to the argument so raised by the learned counsel for the applicant that the cheque stood returned by the bank that "kindly contact drawer, drawee bank and please present again" does not answer the definition of a cheque stood dishonored so as to invoke the provisions of Section 138 of the NI Act is concerned, suffice it to say that Hon'ble Apex Court in M/s. **Laxmi Dyechem Vs. State of Gujarat and others** : 2012 (13) SCC 375, in para 16 has observed as under:-

"16. In the case at hand, the High Court relied upon a decision of this Court in Vinod Tanna's case (supra) in support of its view. We have carefully gone through the said decision which relies upon the decision of this Court in Electronics Trade & Technology Development Corporation Ltd. (supra). The view expressed by this Court in Electronics Trade & Technology Development Corporation Ltd. (supra) that a dishonour of the cheque by the drawer after issue of a notice to the holder asking him not to present a cheque would not attract Section 138 has been specifically overruled in Modi Cements Ltd. case (supra). The net effect is that dishonour on the ground that the payment has been stopped, regardless whether such stoppage is with or without notice to the drawer, and regardless whether the stoppage of payment is on the ground that the amount lying in the account was not sufficient to meet the requirement of the cheque, would attract the provisions of Section 138."

16. Lastly, the contention that the summoning order has been passed in a cryptic manner is concerned, the Court finds that due consideration has been made what was required.

17. Accordingly, interference is declined, the application stands **disposed of** leaving it open for the applicant to raise all legal and factual issues before the court below which are advisable and permissible under law and this Court has no reasons to disbelieve that the same shall be considered in correct perspective in accordance with law.

18. At this stage, learned counsel for the applicant submits that a non-bailable warrants have been issued and the applicant be granted limited protection to apply for bail and till the bail application is decided, no coercive action be taken.

19. Considering the same, the liberty is accorded to the applicant to prefer bail application seeking bail by 28.08.2025 and the court below shall decide the bail application in the light of judgment **Satender Kumar Antil Vs. Central Bureau of Investigation and another; decided on 07.10.2021 in S.L.P. No.5191 of 2021.**

20. Till the bail application is decided, no coercive action shall be taken against the applicant with respect to Complaint Case No. 7354 of 2023 (Keshav Singh V/s Sakshi Yadav), under Section 138 Negotiable Instruments Act, 1881 as well as summoning order dated 17.01.2024 passed by the Ld. Chief Judicial Magistrate-Ist, Gautam Budha Nagar, in Complaint Case No. 7354 of 2023, under Section 138 Negotiable Instruments Act, 1881, Police Station-Sector 24, District -Gautam Budha Nagar.

21. The protection accorded to the applicant is only available subject to compliance of the terms and conditions and timeline as provided herein and in case of default, the order shall stand vacated without reference to the Bench.

Order Date :- 8.8.2025

Rajesh