

Court No. - 75

Case :- APPLICATION U/S 528 BNSS No. - 21632 of 2025

Applicant :- M/S Rainbow International Through Its Proprietor
Mrs. Aneeta Sharma And Another

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

Counsel for Applicant :- Rahul Pandey

Counsel for Opposite Party :- G.A.

Hon'ble Vikas Budhwar,J.

1. Supplementary affidavit, filed today, is taken on record.
2. Heard Shri Rahul Pandey, learned counsel for the applicants and Sri Indrajeet Singh Yadav, learned AGA for the State.
3. This application under Section 528 BNSS has been filed by the applicant to quash the Complaint Case No. 1986 of 2025 M/s Shifa Handicraft Vs. Rainbow International; under section 138 Negotiable Instrument Act-1881; Police Station-Bhawanpur, District- Meerut, pending in the court of Judicial Magistrate, Court No.-2, Meerut as well as Summoning Order Dated 11.04.2025 passed by Judicial Magistrate, Court No.-2, Meerut.
4. Learned counsel for the applicant submits that a complaint was lodged by the opposite party No. 2 on 07.03.2025 under Section 138 of the N.I. Act with an allegation that with respect to discharge of a liability, the applicants herein had drawn a cheque bearing No.320912 of Rs. 2,53,820/- which on presentation in the bank on 15.01.2025 came to be dishonored on 20.01.2025, payments stopped by the drawer, a statutory demand notice was issued on 29.01.2025 which is stated to be served upon the applicants on 31.01.2025 and thereafter the complaint stood preferred under Section 138 of the N.I. Act on 07.03.2025, the applicants came to

be summoned on 11.04.2025 under Section 138 of N.I. Act by Judicial Magistrate, Court No.2, Meerut.

5. Questioning the said order, the applicant has been filed the present application.

6. Learned counsel for the applicant has submitted that through the summoning order cannot be sustained on several grounds but the main and important ground which goes to the root of the matter is that in view of the enforcement of BNSS w.e.f. 01.07.2024 now first proviso to Section 223 BNSS mandates the Magistrate to put to notice the accused before at pre-cognizance stage. He submits that relevant assertions have been made in paragraph No. 5 of the supplementary affidavit. He seeks to rely upon the judgment in in ***Application U/S 482 No. 10390 of 2024; Prateek Agarwal v. State of U.P. and another.***

7. Learned AGA on the other hand submits that though once the cheque is to drawn and the same was dishonored, the presumption under Section 139 of N.I. Act would be there, however, he could not dispute the fact that the mandatory requirement of issuing notice and according opportunity to the applicants- accused at pre-cognizance stage had not been done. However, he submits that the summoning order be set aside and the matter be remitted back to Court below to pass fresh orders.

8. I have heard learned counsel for the parties and gone through the records carefully.

9. Section 223 of B.N.S.S. reads as under :-

"223. Examination of complainant. - (1) A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such

examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses -

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:

Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them:

(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless -

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."

10. The summoning order dated 11.04.2025 also reads as under:

"दिनांक 11.04.2025

पत्रावली आदेशार्थ पेश हुई। परिवादी उपस्थित। परिवादी (अधिवक्ता) को तलबी पर सुना जा चुका है एवं पत्रावली का अवलोकन किया गया।

परिवादी के परिवाद पत्र के अनुसार संक्षेप में कथन है कि विपक्षी ने परिवादी को विधिक देनदारी की बाबत चेक सं० 320912 दिनांक 28.10.2024, अंकन 2,53,820/- रु० (दो लाख तरेहपन हजार आठ सौ बीस), कैनरा बैंक शाखा सैक्टर-63, नोएडा उ०प्र० का दिया तथा यह विश्वास दिलाया कि उक्त चेक बैंक में प्रस्तुत करने पर चेक की धनराशि परिवादी को प्राप्त हो जायेगी। जब परिवादी ने अपने बैंक, यूनियन बैंक ऑफ इण्डिया, शाखा पचपेडा, मेरठ में भुगतान हेतु प्रस्तुत किया तो उक्त चेक "पेमेन्ट स्टोपड बाए ड्रॉवर" की टिप्पणी के साथ अनादरित होकर वापस प्राप्त हो गया। इस संबंध में परिवादी ने अपने अधिवक्ता के माध्यम से एक नोटिस दिनांकित 29.01.2025 पंजीकृत डाक से विपक्षी को भेजा जो विपक्षी को दिनांक 31.01. 2025 को प्राप्त हुआ। नोटिस भेजे जाने के बाद भी विपक्षी ने परिवादी को उसका पैसा नहीं लौटाया। तब यह परिवाद दाखिल किया गया।

सुना तथा पत्रावली एवं पत्रावली पर दाखिल समस्त प्रपत्रों का गहनता से अवलोकन किया।

परिवादी द्वारा परिवाद पत्र के समर्थन में स्वयं का बयान अन्तर्गत धारा 223 BNS में साक्ष्य शपथ पत्र प्रस्तुत किया गया है, जिसमें उसने परिवाद पत्र में वर्णित तथ्यों का समर्थन किया है तथा दस्तावेजी साक्ष्य के रूप में असल चेक, मीमो, सूचना पत्र, डाक रसीद व नोटिस की

प्रति आदि दाखिल किये गये।

उपरोक्त तथ्यों व परिस्थितियों को दृष्टिगत रखते हुए विपक्षी / अभियुक्ता अमीता शर्मा प्रोपराईटर- रैनबो इन्टरनेशनल ए०एल०, सी०-60, सैक्टर-4, नोएडा 201301, के विरुद्ध धारा 138 एन०आई०एक्ट के अपराध के गठन के सभी आवश्यक विधिक तत्व विद्यमान हैं एवं प्रथम दृष्टया अभियुक्ता के विरुद्ध अपराध का बनना पाया जाता है, जिसके विचारण हेतु अभियुक्त न्यायालय में तलब किये जाने योग्य है।

आदेश

विपक्ष / अभियुक्ता अमीता शर्मा प्रोपराईटर- रैनबो इन्टरनेशनल ए०एल०, सी०-60, सैक्टर-4, नोएडा 201301 को धारा 138 एन०आई०एक्ट के अन्तर्गत विचारण हेतु जरिये समन तलब किया जाता है। परिवादी आवश्यक पैरवी अन्दर समाह करें तथा सूची गवाहान दाखिल करें। पत्रावली वास्ते हाजिरी अभियुक्त दिनांक 13.05.2025 को पेश हो।"

11. A perusal of the summoning order dated 11.04.2025 would reveal that the applicants have not been put to notice and was not accorded opportunity of hearing at the pre-cognizance stage which is mandatory in view of the first proviso to Section 223 of the BNSS in **Prateek Kumar Agarwal (supra)**, this court held asunder:

"8. Proviso of Sub Section (1) of Section 223 of the B.N.S.S. mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine upon oath, the complainant and the witnesses present, if any, and reduce it into writing. The Proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227 of the B.N.S.S. deals with the issuance of process which is akin to Section 204 of the Cr.P.C.

9. Relevant part of the order dated 27.9.2024 passed in Criminal Petition No.7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil) passed by High Court of Karnataka is as under:-

"8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.

10. Therefore, the procedural drill would be this way:

A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate / concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.

11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023.

12. Swinging back to the facts of the case the concerned Court has passed the following order:

"This complaint is filed against the Accused alleging the offence P/U/Sec.356(2) of BNS, 2023.

Issue notice to the Accused as per proviso to section 223 of BNSS, 2023.

For hearing.

Call on 13.08.2024."

The moment complaint is filed, notice is issued to the accused. This procedure is erroneous. Therefore, the petition deserves to succeed on this short ground of procedural aberration and the matter is to be remitted back to the hands of the concerned Court to redo the exercise from the beginning, bearing in mind the observations made in the course of the order.

13. For the aforesaid reasons the following:

ORDER

(i) Criminal Petition is allowed.

(ii) Impugned order dated 16-07-2024 passed by the XLII Additional Chief Judicial Magistrate, Bengaluru in PCR No.9136 of 2024 stands quashed.

(iii) Matter is remitted back to the learned Magistrate to redo the exercise afresh, from the stage of entertainment of the complaint, bearing in mind the observations made in the course of the order.

(iv) The said exercise shall be undertaken within 4 weeks from the date of receipt of the copy of this order.

Consequently, I.A.No.2 of 2024 stands disposed."

10. In view of the above facts and discussions, present application is allowed. The impugned order dated 15.10.2024 is in violation of the provision of Section 223 of B.N.S.S., and therefore, the same is hereby set aside."

12. Since the applicant has not been put to notice at the pre-cognizance stage and there has been infraction of the provisions contained under first proviso to Section 223 of the BNSS, thus this Court has no option to set aside the summoning order, accordingly, the application decided in the following manner:

(a) The summoning order dated 11.04.2025 is set aside.

(b). The matter stands remitted back to pass fresh order strictly in accordance with law.

13. For facilitating early disposal, the party shall furnish the certified copy of the order before the court below by 18.07.2025 and the court below shall proceed to decide the said proceeding with most expedition.

14. Needless to point out that the Court has not adjudicated upon the merits of the case.

15. Accordingly, the application stands **disposed of**.

Order Date :- 8.7.2025

A. Prajapati