

Court No. - 75

Case :- APPLICATION U/S 528 BNSS No. - 22848 of 2025

Applicant :- Smt Ankita

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

Counsel for Applicant :- Navin Kumar Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Vikas Budhwar,J.

1. Heard Sri Naveen Kumar Srivastava, learned counsel for the applicant as well as Sri Motilal, learned AGA for the State.
2. In view of the order which is being proposed to be passed, notice is not being issued to the respondent no. 2.
3. This application u/s 528 of BNSS has been preferred to quash the impugned order dated 07.01.25 passed by the Judicial Magistrate Court no. 2 Agra in Complaint Case no. 14961 of 2024 Under section 138 N.I. Act P.S. Lalkurti District Meerut (Shamshad Ahmad Vs. Smt. Ankita pending in the court of Judicial Magistrate/Additional Civil Judge, (JD) Court no. 1 Meerut.
4. Learned counsel for the applicant has submitted that on 28.08.2024 a complaint came to be filed by the opposite party no. 2 under Section 138 of the NI Act with respect to discharge of a liability, a cheque bearing no. 708156 dated 15.07.2024 for Rs. 5,00,000/- was drawn which came to be dishonored on 17.07.2024 followed by a statutory complaint on 01.08.2024 which came to be received upon the opposite party no. 2 on 05.08.2024 thereafter, the applicant came to be summoned under Section 138 of the NI Act on 07.01.2025.
5. Questioning the summoning order, the applicant has filed the present application.
6. Learned counsel for the applicant has submitted that the summoning order cannot be sustained for the simple reason that the complaint was filed on 28.07.2024 post enforcement of the BNSS, 2023 and in view of the provisions contained under proviso

(i) to Section 223 at a pre-cognizance stage notice ought to have been issued to the applicant-accused, however, since the same has not been done, the summoning cannot be sustained. He seeks to rely upon the decision in **Prateek Agarwal Vs. State of U.P. : APPLICATION U/S 482 No. - 10390 of 2024**, reference has also been made to paragraph 14 and 18 of the paper book.

7. Learned AGA, on the other hand, could not dispute the said fact that the complaint stood preferred on 28.07.2024 post enforcement of the BNSS and in view of the judgment of this Court in **Prateek Agarwal (supra)** notice was mandatory at pre-cognizance stage. He submits that the summoning order be set aside, matter be remitted back to the court below to pass a fresh order.

8. I have heard the submission so made across the bar and perused the record carefully.

9. Summoning order dated 07.01.2025 reads as under.-

"दिनांक:-07.01.2025

पत्रावली पेश हुई। पत्रावली आज तलबी आदेश हेतु नियत है। परिवादी के विद्वान अधिवक्ता को तलबी बहस पर पूर्व में सुना जा चुका है।

संक्षेप में प्रकरण के तथ्य इस प्रकार हैं कि परिवादी शमशाद अहमद को पंजाब नैशनल बैंक, शाखो जुबली रोड, जिला गोरखपुर का विपक्षी द्वारा चैक सं० 708156 धनराशि अंकन 5,00,000/-रुपये दिनांकित 15.07.2024 का दिया गया था, जो बैंक में आहरण हेतु प्रस्तुत करने पर अनादरित होकर दिनांक 17.07.2024 को वापस प्राप्त हुआ है, जिसकी बाबत परिवादी ने दिनांक 01.08.2024 को विपक्षी को कोटिस भी दिया, जो विपक्षी को प्राप्त हो गया परन्तु विपक्षी द्वारा - नोटिस पर भी भुगतान नहीं किया गया। तब यह परिवाद प्रस्तुत किया गया है।

प्रार्थी/परिवादी के द्वारा लेखीय साक्ष्य में मूल चैक, मीमो, रजिस्टरी की रसीद नोटिस की छायाप्रति दाखिल की गई है साथ ही मौखिक साक्ष्य की धारा 200 दं०प्र०सं० की शपथ एन दाखिल किया गया है।

सुना एवं पत्रावली का अवलोकन किया गया।

प्रस्तुत परिवाद के तथ्यों व प्रपत्रों को दृष्टिगत रखते हुए विपक्षी के विरुद्ध चारी 138 एन.आई. एक्ट के गठन के साथ आवश्यक विधिक तत्व विद्यमान हैं व प्रथम दृष्ट्या मामला बनता हुआ पाया जाता है . जिसके विचारण के लिए विपक्षी/अनियुक्त न्यायालय में आहूत किये जाने योग्य है।

आदेश

अभियुक्त प्रेस प्रताप चेलिलेवल ट्रस्ट जरिये श्रीमती अंकिता को धारा 138 एन०आई० एक्ट में विचारण हेतु आहूत किया जारी है। परिवादी आवश्यक पैरवी करें व सूची गवाहन दाखिल करें। पत्रावली बांस्ते हाजरी अभियुत दिनांक 20.02.2002 को पेश हो।"

10. A perusal of the summoning order dated 07.01.2025 would

reveal that the same does not recite the date on which at pre-cognizance stage, notice was issued and served upon the opposite party no. 2. In **Prateek Agarwal (supra)**, the following was observed.-

"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."

*11. Accordingly, the application is **disposed of** in the following terms:-*

*(a) the order dated 07.01.25 passed by the Judicial Magistrate Court no. 2 Agra in Complaint Case no. 14961 of 2024 is set aside; (b) the matter stands remitted back to the court below to pass a fresh order; (c) for facilitation of early disposal, a copy of the order be submitted before the court below by **22.07.2025**.*

Order Date :- 8.7.2025

Rajesh