

Court No. - 73

Case :- APPLICATION U/S 482 No. - 37130 of 2024 (Leading Application)

Applicant :- Mayank Tiwari

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

Counsel for Applicant :- Sanjay Srivastava

Counsel for Opposite Party :- G.A.

with

Case :- APPLICATION U/S 482 No. - 9374 of 2024 (Connected Application)

Applicant :- Bhanu Tiwari

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

Counsel for Applicant :- Sanjay Srivastava

Counsel for Opposite Party :- G.A.

Hon'ble Vikas Budhwar,J.

1. Heard Shri Sanjay Srivastava, learned counsel for the applicant in leading as well as connected applications and Sri S.K. Singh, learned AGA for the State.

2. The facts of the leading application are that the complaint was lodged by the opposite party no. 2 on 18.05.2022 against applicant in the present application, Mayank Tiwari and the applicant in the connected application, Bhanu Tiwari with respect to drawing of a cheque of Rs. 5,00,000/- bearing No. 283969 in favour of the opposite party No. 2 which came to be dishonoured on 20.04.2022, a statutory notice was issued on 25.04.2022 followed by a complaint lodged on 18.05.2022, a summoning order came to be passed by the Court of ACMM-VII, Kanpur Nagar on 20.02.2023 summoning the applicant in the present application and the applicant in the connected application.

3. In the present application, on 05.12.2024, the following orders were passed:

"1. Heard Sri Sanjay Srivastava, learned counsel for the applicant and Sri Sunil Kr. Srivastava, learned A.G.A. for the State.

2. The instant application has been filed seeking quashing of the entire

proceeding including summoning order dated 20.2.2023 in complaint case No. 91138 of 2022 (Vikram Tripathi vs. Bhanu Tiwari and another), under Section 138 N.I. Act, P.S. Kalyanpur, District Kanpur Nagar.

3. Contention of learned counsel for the applicant is that the cheque in question was issued on behalf of Tiwari Enterprises which is a firm but while filing the impugned complaint the firm was not impleaded as party and the applicants were impleaded in the capacity of proprietors of the firm. In support of his contention, learned counsel for the applicant has relied upon the order of this Court passed in Application u/s 482 No. 9374 of 2024, filed by the co-accused Bhanu Tiwari in which interim protection was granted.

4. However, there is nothing on record to show whether the Tiwari Enterprises is proprietorship firm or partnership firm, therefore, counsel for the applicant is directed to bring on record either the deed of partnership or registration certificate of the partnership firm on the next date fixed.

5. Put up this case as fresh on 16.12.2024 along with Application u/s 482 No. 9374 of 2024.

6. Till the next date of listing, no coercive action shall be taken against the applicant in the aforesaid case."

As regards, the connected application is concerned, the same has been preferred by the Bhanu Tiwari, he is also the accused in the complaint which has been noticed and referred in the leading application, however, the applicant in the connected application along with the applicant in the leading application was summoned.

4. Questioning the summoning order, the connected application has been preferred in which on 02.05.2024, the following orders were passed:

"Heard Sri Sanjay Srivastava, learned counsel for the applicant and Sri Sunil Kumar Kushwaha, learned AGA for the State.

Present application under Section 482 Cr.P.C. has been filed for quashing the entire proceeding including summoning order dated 20.02.2023 in complaint case no. 91138 of 2022 and case no. 145996 of 2022, u/s 138 Negotiable Instrument Act, P.S. Kalyanpur, District Kanpur Nagar (Vikram Tripathi Vs. Bhanu Tiwari and another), pending in the court of A.C.M.M.- VIIth, Kanpur Nagar.

Contention of the counsel for the applicant is that the cheque in question was issued on behalf of the firm, Tiwari Enterprises but same was not impleaded as accused respondent in the impugned complaint therefore, the complaint is barred u/s 141(A) N.I. Act.

Matter requires consideration.

Issue notice to the opposite party no. 2.

List in the week commencing 08.07.2024.

Till next date of listing, the proceedings of complaint case no. 91138 of 2022 and case no. 145996 of 2022, u/s 138 Negotiable Instrument Act, P.S. Kalyanpur, District Kanpur Nagar (Vikram Tripathi Vs. Bhanu Tiwari and another), shall remain stayed against the applicant.

Court below is free to proceed against the accused if there is no legal impediment."

5. There is an office report dated 13.12.2024 that the notice has been served upon the opposite party no. 2 personally as per the report of CMM, Kanpur Nagar. However, nobody has put in appearance and there is neither any Vakalatnama nor counter affidavit available on record. Till the dictation of the order, nobody has put in appearance.

6. Learned counsel for the applicant with relation to the leading application has submitted that the cheque was drawn on behalf of the Tiwari Enterprises and applicant- Mayank Tiwari is the sole proprietor, however, in the complaint, the sole proprietorship firm Tiwari Enterprises has not been arraigned as an accused and it has not been summoned. He seeks to rely upon the provisions contained under Section 141 of the N.I. Act so as to contend that the company includes a firm and the director includes a partner. Submission is that on account of the non-arraigning of the firm, the complaint is bound to fail. Further submission is that para 6 of the complaint itself recites that a statutory notice was issued on 25.04.2022 but there is no recital of the date on which, the said notice was served upon the applicant that was a mandatory requirement as per Section 138 read with Section 142 of the N.I. Act.

7. As regards, the connected application, the submission is that the applicant Bhanu Tiwari is not either the sole proprietor or even otherwise a partner of Tiwari Enterprises and he being the brother of Mayank Tiwari has been unnecessarily arraigned as an accused. Reference has been made to para 10 of the connected application so as to buttress the said submission which reads as under:

"10. That the applicant was neither given any cheque to the Opposite Party No.2 and this cheque was given to Opposite Party No.2 Mayank Tiwari and Mayank Tiwari is proprietor of the Tiwari Enterprises. The photo copy of cheque COU and G.S.T. Registration Certificate of Tiwari Enterprises are being filed herewith and marked as Annexure Nos. 4 & 5 to this affidavit."

8. Reliance has also been placed upon the judgment in the case of

Aparna A. Shah v. Sheth Developers Pvt. Ltd. and another; AIR 2013 Supreme Court 3210 that a non-signatory of a cheque cannot be liable under Section 138 of the N.I. Act.

9. Learned AGA on the other hand submits that with respect to Mayank Tiwari, he happens to be the signatory of the cheque which is being dishonored, thus, the provisions of Section 138 of the N.I. Act would squarely apply and come with full force.

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

11. Apparently, on a specific question being raised to the learned counsel for the applicant as to whether Tiwari Enterprises is a partnership firm or a sole proprietorship firm. He submits that firm Tiwari Enterprises is the sole proprietorship firm. Once the firm is a sole proprietorship then the principles which stand applied to the company and the partnership firm would not arise as obviously partnership firm in the association of two or more persons. However, sole proprietorship firm, comprises of a single person and, thus, arraigning the sole proprietor would be sufficient and there would be no need to separately arraigned the sole proprietorship firm.

12. Abhishek Jain vs. State of U.P. & others, (2023) 0 Supreme (All.)1581 in para 16 has observed as under:-

"16. From the aforesaid observations made by the Apex Court, it is crystal clear that if the cheque is issued in the name of a firm, whether proprietorship or partnership firm, the proprietor or the partner as the case may be, becomes the holder in due course and he can sue in his own name and it is not necessary for him to sue in a trading name, though others can sue such firm in the trading name. Therefore, the instant complaint filed by the opposite party no.2, claiming himself to be a proprietor of the said firm in whose name the said cheque is issued by the applicant herein, in the considered opinion of this Court, complaint is maintainable. Even if the contention of applicant be accepted that the said Raj Rajeshwari Enterprises is a partnership and not a proprietorship firm, it will not help the applicant herein as even the partnership firm does not have a different legal identity and is not a juristic person. Therefore, a partner of the firm also becomes the holder in due course of the cheque within the meaning of Section 142 (1) of the N.I. Act. Thus, the complaint even on behalf of the partner of a firm in his own name is maintainable. Otherwise, also in the instant case, the applicant does not dispute that the cheque was issued in the name of the said Raj Rajeshwari Enterprises and the said cheque was dishonoured and demand notice was issued by the opposite party no.2, he has failed to comply with the said notice. Therefore, in view of the presumption under Section 139 of the N.I. Act and as per the law laid down by the Apex Court, this Court does not find any good ground to interfere in the instant case in exercise of jurisdiction

under Section 482 Cr.P.C."

13. As regards, the submissions so sought to be raised by the learned counsel for the applicant that there is no date of service of the statutory notice dated 25.04.2022 is concerned, the same would be of no assistance as what would be relevant and suffice would be a recital of the fact that a statutory notice was issued. The question as to whether, the same was served or not is a question of trial.

14. The Hon'ble Apex Court in the case of **Ajeet Seeds Ltd. Vs. K. Gopala Krishnaiah, (2014) 12 SCC 685**, in paragraph-10 and 11 has held 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 Court's 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."

15. Since Mayank Tiwari who is the applicant in the leading application was the signatory of the cheque and he being the sole proprietor itself and the cheque stood dishonored, thus, the summoning order insofar as it pertains to the applicant-Mayank Tiwari needs no interference.

16. Accordingly, the leading application stands **dismissed**.

17. With respect to the connected application, even a copy of the cheque has also been annexed which shows that Mayank Tiwari had drawn the said cheque and just over and over, Tiwari Enterprises, the signature of Mayank Tiwari has been made. Since the cheque itself has been drawn by Mayank Tiwari and not by Bhanu Tiwari, thus, a non-signatory to this cheque is not liable to be prosecuted. Further as already noticed in the order itself, the firm in question is the sole proprietorship firm and Mayank Tiwari is the sole proprietor, thus, the question of issuance of a cheque by Bhanu Tiwari would not arise, particularly, on the face of the photocopy of the cheque which is at page 35.

18. Aparna A. Shah Vs. Seth Developers Pvt. Ltd. and Another (supra) wherein the Apex Court observed as under:-

"23) We also hold that under Section 138 of the N.I. Act, in case of issuance of cheque from joint accounts, a joint account holder cannot be prosecuted unless the cheque has been signed by each and every person who is a joint account holder. The said principle is an exception to Section 141 of the N.I. Act which would have no application in the case on hand. The proceedings filed under Section 138 cannot be used as an arm twisting tactics to recover the amount allegedly due from the appellant. It cannot be said that the complainant has no remedy against the appellant but certainly not under Section 138. The culpability attached to dishonour of a cheque can, in no case ?except in case of Section 141 of the N.I. Act? be extended to those on whose behalf the cheque is issued. This Court reiterates that it is only the drawer of the cheque who can be made an accused in any proceeding under Section 138 of the Act. Even the High Court has specifically recorded the stand of the appellant that she was not the signatory of the cheque but rejected the contention that the amount was not due and payable by her solely

on the ground that the trial is in progress. It is to be noted that only after issuance of process, a person can approach the High Court seeking quashing of the same on various grounds available to him. Accordingly, the High Court was clearly wrong in holding that the prayer of the appellant cannot even be considered. Further, the High Court itself has directed the Magistrate to carry out the process of admission/denial of documents. In such circumstances, it cannot be concluded that the trial is in advanced stage."

19. Accordingly, the summoning order dated 20.02.2023 in complaint case no. 91138 of 2022 (Vikram Tripathi v. Bhanu Tiwari and another) and case no. 145996 of 2022, insofar as it pertains to summoning the applicant- Bhanu Tiwari is set aside.

20. It is clarified that the proceedings against Mayank Tiwari shall go on and be given a logical conclusion as it was sub-section (3) of Section 143 of the N.I. Act.

21. Connected application, accordingly, **allowed**

Order Date :- 13.5.2025

A. Prajapati