* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 15.02.2024

\+ **CRL.M.C. 7536/2023, CRL.M.A. 28069/2023 & CRL.M.A.28070/2023**

IN THE MATTER OF:

SAMARTH SHARMA ..... Petitioner

Through: Mr. Chandan Bhatia, Advocate (M:7065970666).

versus

STATE & ANR ..... Respondents

Through: Mr. Nawal Kishore Jha, APP for State

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 482 Cr.PC, petitioner seeks quashing/setting aside of the summoning order dated 21.03.2022 passed by the learned MM vide which he has been summoned to face trial in complaint case No.1287/2022 titled as 'ICICI Bank v. Samarth Sharma' arising out of proceedings initiated under Section 138 of the NI Act.

2. The facts in a nutshell are that in its complaint, the complainant alleged that the accused/petitioner had approached the complainant Bank to avail a housing loan/finance facility of Rs.69,55,347/- for purchase of flat bearing No.H.No-602, Block-A, Golf View Apartment, Sushant Golf City,

Sultanpur Road, Lucknow, UP-200015. In furtherance of the loan agreement, the petitioner had issued a cheque bearing No.246427 dated 12.11.2021 for the outstanding amount of Rs.24,00,000/- in favour of the complainant bank. The subject cheque when presented for encashment, was retuned back unpaid with the remarks *'insufficient funds'* vide a return memo dated 16.11.2021. Consequently, demand notice dated 23.11.2021 was issued and upon failure to make the payment, the subject complaint case came to be filed.

3. The present petition is premised on the ground that the subject cheque was issued by the petitioner as a security, which has been misused by the complainant. The petitioner further claims that at the time of disbursement of loan, a tripartite agreement was executed between the petitioner, the builder and the complainant. The petitioner further sent a letter to the builder for withdrawal/cancellation from allotment on 02.01.2018 stating therein that it is the builder who is responsible for the payment of the outstanding amounts. There is no other document which has been brought to the notice of the Court on the aforesaid aspect.

4. The issue that arises for consideration is whether while adjudicating a petition under Section 482 Cr.P.C., the Court can go into the question whether the cheque is given towards security or towards discharge of any debt or liability and whether it has been misused. Both are purely questions of fact and require evidence to be adduced by the parties. In the considered opinion of this Court, such a disputed question of fact cannot be gone into in a petition filed under Section 482 Cr.P.C.

5. Considering that the loan had been advanced for purchase of a flat, there existed a debt/liability under the loan agreement. The petitioner's

reliance on the decision in Indus Airways Pvt. Ltd. & Ors. *v.* Magnum Aviation Pvt. Ltd. & Anr.[1] is entirely misplaced in as much as the said case related to a purchase order that was cancelled and the cheque issued towards advance payment for the purchase order was dishonoured. The court came to the conclusion that the cheque was not issued for discharge of any debt/liability but as advance for the purchase order that was cancelled. The distinction between a cancelled purchase order and a loan transaction was highlighted by Apex Court in Sampelly Satyanarayana Rao *v.* Indian Renewable Energy Development Agency Limited.[2] The relevant extract reads as under:-

> *"xxx*
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> *11. The judgment in Indus Airways (supra) is clearly distinguishable. As already noted, it was held therein that liability arising out of claim for breach of contract under Section 138, which arises on account of dishonour of cheque issued was not by itself on a par with criminal liability towards discharge of acknowledged and admitted debt under a loan transaction. Dishonour of cheque issued for discharge of later liability is clearly covered by the statute in question. Admittedly, on the date of the cheque there was a debt/liability in presenti in terms of the loan agreement, as against the case of Indus Airways (supra) where the purchase order had been cancelled and cheque issued towards advance payment for the purchase order was dishonoured. In that case, it was found that the cheque had not been issued for discharge of liability but as advance for the purchase order which was cancelled. Keeping in mind this fine but real distinction, the said judgment cannot be applied to a case of present nature where the cheque was for repayment of loan installment which had fallen due though such*

[1] (2014) 12 SCC 539
[2] (2016) 10 SCC 458

deposit of cheques towards repayment of installments was also described as "security" in the loan agreement. In applying the judgment in Indus Airways (supra), one cannot lose sight of the difference between a transaction of purchase order which is cancelled and that of a loan transaction where loan has actually been advanced and its repayment is due on the date of the cheque.

xxx"

6. The issue raised before this Court was also considered in Sunil Todi & Ors. *v.* State of Gujarat & Anr.[3], wherein the Supreme Court while relying on its earlier decision in HMT Watches Ltd. *v.* M.A. Abida & Anr.[4] observed that whether a cheque is given towards security or otherwise or whether there existed an outstanding liability is a question of fact which has to be determined in trial on the basis of evidence. The Court further emphasised that the above being a disputed question of fact cannot be resolved in the proceedings under Section 482 Cr.P.C. More recently, in Rathish Babu Unnikrishnan *v.* State (Govt. of NCT of Delhi) & Anr.[5], the Court once again highlighted that such a determination could only be carried out in a trial.

7. In view of the foregoing discussion, it can be seen that the petitioner has not brought on record any material of sterling quality or of incontrovertible nature which would establish that on a prima-facie reading of the complaint, the offence under Section 138 NI Act is not made out. The issue raised being a triable one, the petition is devoid of merit and is accordingly dismissed alongwith the pending applications.

[3] 2021 SCC OnLine SC 1174
[4] (2015) 11 SCC 776
[5] 2022 SCC OnLine SC 513

8. Copy of this order be communicated to the concerned trial court.

MANOJ KUMAR OHRI
(JUDGE)

FEBRUARY 15, 2024/*rd*