

HIGH COURT OF JUDICATURE AT ALLAHABAD

APPLICATION U/S 482 NO. 4834 OF 2022

Gaurav Sharma ...Applicant(s)

v/s

State of U.P. and another ...Opposite Party(s)

With

APPLICATION U/S 482 NO. 6746 OF 2022

Gaurav Sharma ...Applicant

v/s

State of U.P. and another ...Opposite Party

JUDGMENT

HON’BLE SANJAY KUMAR PACHORI, J.

1. As in both the cases, common questions of fact and law arises between the same parties with regard to same subject matter, therefore, above noted cases are being decided by a common judgment.

Brief facts of Application U/S 482 No. 4834 of 2022

2. The Application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred as “Cr.P.C.”) has been filed to quash the entire proceedings of Complaint Case No. 114 of 2020 (Gaurav Sharma Vs. Ankit Agarwal) under Section 138 of Negotiable Instruments Act, (hereinafter referred as “N.I. Act”), Police Station- Tajganj, District Agra, as

well as cognizance/summoning order dated 22.02.2021 pending in the court of Additional Chief Judicial Magistrate, Agra.

2(i) Complaint Case No. 114 of 2020 has been filed alleging that the applicant and opposite party no. 2 had been running a partnership business by the name of Bankey Bihari Vidhya Mandir and the opposite party no. 2 decided to end the partnership and withdraw his share, in pursuance thereof, it was decided that a sum of Rs. 38,95,193/- would be paid by the applicant. It is further alleged that a cheque bearing no. 105359 dated 25.9.2020 had been issued by the applicant in favour of the opposite party no. 2 and when the same was placed before the Bank on 05.10.2020, the same was dishonoured on 5.10.2020 due to insufficient funds as well as stop payment by applicant.

2(ii). The opposite party no. 2 informed the applicant regarding the said dishonour of cheque and thereafter one legal notice dated 14.10.2020 had been sent to the applicant by his counsel through registered post and was duly served to the applicant on 17.10.2020, since then no payment was made. Hence, impugned complaint dated 17.11.2020 has been filed against the applicant.

Brief facts of Application U/S 482 No. 6746 of 2022

3. The Application under Section 482 of Cr.P.C. has been filed to quash the entire proceedings of Complaint Case No. 113 of 2020 (Ashish Agarwal Vs. Gaurav Sharma) under Section 138 of N.I. Act, Police Station- Tajganj, District Agra, as well as cognizance/summoning order dated 22.02.2021 pending in the court of Additional Chief Judicial Magistrate, Agra.

3(i). Complaint Case No. 113 of 2020 has been filed alleging that the applicant and opposite party no. 2 had been running a partnership business by the name of Bankey Bihari Vidhya Mandir and the opposite party no. 2 decided to end the partnership and withdraw his share, in pursuance thereof, it was decided that a sum of Rs.

58,00,000/- would be paid by the applicant. It is further alleged that a cheque bearing no. 105358 dated 25.9.2020 of Rs. 58,00,000/- had been issued by the applicant in favour of the opposite party no. 2 and when the same was placed before the Bank on 30.09.2020, it was dishonoured on 30.9.2020 due to insufficient funds as well as stop payment by applicant.

3(ii). The opposite party no. 2 informed the applicant regarding the said dishonour of cheque and thereafter one legal notice dated 14.10.2020 has been sent to the applicant by his counsel through registered post, which has been duly served to the applicant on 17.10.2020, since then no payment was made. Hence, impugned complaint dated 17.11.2020 has been filed against the applicant.

Arguments on behalf of the applicant

4. Learned senior counsel for the applicant submits that the impugned complaints have been filed on the basis of false and frivolous allegations with an ulterior motive and only to harass the present applicant. The impugned cognizance orders have also been passed without considering the facts and circumstances of the case as well as the position of law.

4 (i). It is further submitted that there was no legal debt or other liability existing against the applicant on the date when the cheques in question were drawn. As there was no legal enforceable debt on the date when the cheques in question were drawn, the proceedings under Section 138 N.I. Act against the applicant would not be maintainable and are liable to be quashed.

4(ii). It is further submitted that a Memorandum of Understanding (hereinafter referred as “MOU”) had been entered into between the parties on 04.01.2020. A bare perusal of the MOU, the applicant was liable to pay amount of Rs. 58,00,000/- and Rs. 38,95,193/- to the opposite Party No. 2 and the other leaving partners of the firm respectively, sums of money payable on or before 31.12.2021 in this

regard, the applicant had delivered signed security cheques of aforesaid amount to the opposite party no. 2.

4(iii). It is further submitted that as per the MOU, the security cheques cannot be drawn prior to the maturing of the debt or liability as on or before 31.12.2021, but the opposite party no. 2 has presented the cheques on 05.10.2020/30.9.2020, much prior to the due date.

4(iv). It is next submitted that as some place of the MOU due date for payment of the aforesaid amount is mentioned as 31.12.2020, in both cases, the presenting of the security cheques for payment on 05.10.2020/30.9.2020 before the bank were premature and no legally enforceable debt or liability existed against the applicant on the date of presentation of cheques in question.

4(v). It is next submitted that the complaints were filed through power of attorney holder namely Onkar Nath Agarwal, who has no knowledge with regard to the transaction and the issuance of cheques in question. Therefore, the prosecution case suffers from a grave defect and deserves to be quashed.

5. In support of his submission, learned Senior Counsel for the applicant placed reliance upon the following judgments:

1. Indus Airways Private Limited and others Vs. Magnum Aviation Private Limited and Another (2014) 12 SCC 539;

2. Sampelley Satyanarayan Rao Vs. Indian Renewable Energy Development Agency Limited (2016) 10 SCC 458;

3. Anil Kumar Sawhney Vs. Gulshan Rai (1993) 4 SCC 424;

4. Sudhir Kumar Bhalla Vs. Jagdish Chand and Others (2008) 7 SCC 137;

5. Expeditious Trial of Cases under Section 138 of N.I. Act, 1938 In Re (2021) 16 SCC 116;

6. Bansilal S. Kabra Vs. Global Trade Finance Limited & Another (2024) SCC Online Bom 416;

6. Sri V. P. Srivastava, learned Senior Counsel for the opposite party no. 2 has not denied the existence of MOU dated 04.01.2020 and argued that the learned Magistrate, on the basis of the material available on record, after due application of mind, has taken cognizance for offence under Section 138 of the N.I. Act against the petitioners. Since, the applicant failed to pay the amount of the cheques in question within the stipulated time then proceedings under the N.I. Act have been initiated against him. It is further contended that when the cheques were issued and the signatures thereon were admitted, the presumption of a legally enforceable debt would arise in favour of the holder of the cheques.

6(i) It is next submitted that the private opposite party no. 2, his brother Ankit Agarwal, sister Sapna Garg and Saroj Sharma were jointly running a business of Coaching Classes in partnership in the name of Bankey Bihari Vidya Mandir, and in this regard they invested a huge amount as per partnership deed dated 16.11.2015. Subsequently, Smt. Saroj Sharma and the applicant dissolved the said partnership and for returning the invested amount of the opposite party no. 2, a MOU was written on 04.01.2020.

7. Heard Sri Manish Tiwary, learned Senior Advocate assisted by Ms. Shriyanshi Upadhyay, Advocate holding brief of Sri Aushim Luthra, Sri V.P. Srivastava, learned Senior Advocate assisted by Sri Indra Deo Mishra, Ms. Anju Agarwal, learned counsle for the opposite party no. 2 and Sri Karunakar Singh, learned A.G.A. for the State.

8. There is no dispute with regard to issuance of the cheques in question under the signatures of the applicant to the opposite party no. 2. as well as other material facts to filing of the complaints under section 138 of N.I. Act. The core argument, upon which, learned counsel for the petitioner is trying to set up his case is that since there was no legally enforceable debt or other liability at the time of drawal/issuance of the cheques on 5.10.2020 and 30.9.2020, the

provisions of Section 138 of the N.I. Act would not attract. After having gone through the material available on record as well as respective submission of both the parties the following question arose for consideration.

“Whether there existed a legally enforceable debt or liability against the applicant on 5.10.2020 and 30.9.2020?”

9. Before considering the real controversy between the parties, it is apposite to mention the MOU reproduced hereinbelow:-

*"This MOU is made and concluded at Agra on this 4th day of January 2020 between **Mr. Gaurav Sharma** and **Mrs. Saroj Sharma** R/O C-174, Sector 49, Noida hereinafter called The First Party (which expression shall be deemed include legal heirs, successors and executors and administrators of the present constituents) of the Part First.*

AND

***Mr. Ashish Agarwal, Mr. Ankit Agarwal and Ms Sapna Garg** R/o 2/14, Vibhav Nagar, Agra hereinafter called The Second Party (which expression shall be deemed include legal heirs, successors and executors and administrators of the present constituents) of the Second Part.*

Whereas both the parties have been doing business as partners in a partnership firm under name & style of "Bankey Bihari Vidya Mandir" at Agra since 16.11.2015. Now the Second party has decided to retire as partners in the firm with effect from 31.12.2019 and in order to secure interest/right in the firm and to freeze their liabilities both the parties have agreed to execute this MOU.

Now therefore, it is agreed between all the parties as follows:

- 1. Second party shall retire as partners from the firm Bankey Bihari Vidya Mandir from the date as may be mutually amongst the parties which shall not be more than one month from the date of this MOU.*
- 2. The first party shall be liable to pay the total partners' capital contribution of second party in the firm before set off or losses of the firm before 31.12.2020. The detail amount as agreed by both the parties is as follows:*

- a. Ashish Agarwal: Rs 13,70,000/-*
- b. Ankit Agarwal: Rs. 13,20,000/-*
- c. Sapna Garg: Rs. 11,45,000/-*
- d. Misc. Working capital Amount: Rs. 19,65,000/-*

Total : Rs 58,00,000/-

3. The first party shall be liable to pay balance of unsecured loan of Second Party or their family members or associate concern outstanding as at 31.12.2019 before 31.12.2020. the detail amount as agreed by both the parties is as follows:

- a. Balaji Overseas: Rs. 7,19,240+ Rs. 4,65,000 totals: Rs. 11,84,240/-*
- b. Bihariji Handloom: Rs. 5,50,000/-*
- c. Ashish Agarwal HUF: Rs. 5,80,000/-*
- d. Ankit Agarwal HUF: Rs. 5,80,953/-*
- e. Lalita Rajpal: Rs. 10,00,000/-*

Total Rs. 38,95,193/-

4. In case the first party fails to pay the due amount as mentioned in Point No. 1 and 2 on or before the due date i.e. 31.12.2021 to the second party then the first party shall be liable to pay interest @ 12% p.a. on the outstanding amount as at 31.12.2021.

5. In order to secure the rights of Second party, the first party shall deposit the signed cheques of the outstanding amount to the security with the second party, as per the payments schedule agreed mutually, addendum to that is attached to this MOU.

6. The first party shall be fully liable/ responsible for any liability/ responsibility for the funning of the firm Bankey Bihari Vidya Mandir and its franchisor Vidya Mandir Classes w.e.f. 01.01.2020 and onwards. The second party shall in no way be responsible or held accountable for any actions/deed of the continuing partners from the appointed date i.e. 01.01.2020.

7. The first party should also clear all the dues and outstanding of suppliers and concern persons who supplied material or render services on good will of the second party from time to time.

8. The amount mentioned in clause no. 2, 3 & 7 due to be paid by the first party to second party will also be subject to audit of accounts by auditor of the firm.

9. The second party shall not be entitled to any right/share in the assets of the firm on or after 01.01.2020.

10. That under any circumstances, even if the franchisee centre fails to operate or not able to carry on business operations or dissolution of firm or discontinuation of first party as partners under the ownership of first party then also the amount due to Second party shall remain due to the First party in individual capacity and the liability to pay the amount shall shift to the First party as it was to the firm.

11. It is mutually agreed between the parties, that in the event of any dispute or differences in the matter of interpretation, execution or carrying out the objects and functions under this Agreement, the same shall be referred to a sole arbitrator within two months from the date of any dispute who shall be appointed with joint consent of the parties herein. In the event of the parties failing to agree to a sole arbitrator, each party shall nominate an arbitrator and then arbitrators shall appoint a third arbitrator. The provisions of the Arbitration and Conciliation Act of 1996 shall apply to the proceedings which shall be conducted in English and Hindi and the suits of such proceedings shall be at Agra."

10. Clause 1 and 2 of the MOU are related to fixing the liability against the applicant, wherein the applicant agreed to pay the amount in accordance with the terms of clause no. 1 and 2 as mentioned Rs 58,00,000/- and Rs. 38,95,193/- to the private opposite party no. 2 "before 31.12.2020". There is a clear and specific agreement between the parties with regard to liability of the applicant. The dates of presentation of cheques in question are 5.10.2020 and 30.9.2020 respectively and which are before 31.12.2020.

11. Clause no. 3 of the MOU is related only to fixing interest upon the due amount as payable as per clause no. 1 and 2, wherein the due date of amount payable is "before 31.12.2020", if not paid.

12. The word "on or before 31.12.2021" as mentioned in clause no. 3 having no interpretation that the due amount is payable on or before 31.12.2021. The aforesaid date is fixing liability only for 12% p.a. interest upon the due amount. The tems of Clause No. 3 of the MOU has no overriding effect ove the terms of Clause No. 1 and 2 of the MOU.

13. I have also carefully gone through the judgment cited by learned Senior Counsel for the applicant. In my considered opinion, the facts and circumstances of the **Indus Airways Pvt. Ltd.** (supra) is totally different to the facts and circumstances of the present case. The cheques were issued by way of advance payment for the purchase orders as per terms and conditions of the contract therein was that the entire payment would be given to the supplier in advance as it had to procure the parts from abroad, the purchaser cancelled the purchase order and requested to supplier to return both the cheques.

14. In **Dashrathbhai Trikambhai Patel v. Hitesh Mahendrabhai Patel & Anr. 2022 LiveLaw (SC) 830**, after taking into consideration, view passed in the case of Indus Airways (supra) the Supreme Court has held that for the commission of any offence under Section 138 of N.I. Act, the cheque that is dishonoured must represent a legally enforceable debt on the date of maturity or presentation. The relevant observations are reproduced as under:

"14. The judgments from Indus Airways (supra) to Sunil Todi (supra) indicate that much of the analysis on whether post dated cheques issued as security would fall within the purview of Section 138 of the Act hinges on the relevance of time. In Indus Airways (supra), this Court held that for the commission of the offence under Section 138, there must have been a debt on the date of issuance of the cheque. However, later judgments adopt a more nuanced position while discussing the validity of proceedings under Section 138 on the dishonour of post-dated cheques. This Court since

Sampelly Satyanarayana Rao (supra) has consistently held that there must be a legally enforceable debt on the date mentioned in the cheque, which is the date of maturity.

16. The judgments of this Court on post-dated cheques when read with the purpose of Section 138 indicate that an offence under the provision arises if the cheque represents a legally enforceable debt on the date of maturity. The offence under Section 138 is tipped by the dishonour of the cheque when it is sought to be encashed. Though a post-dated cheque might be drawn to represent a legally enforceable debt at the time of its drawing, for the offence to be attracted, the cheque must represent a legally enforceable debt at the time of encashment. If there has been a material change in the circumstance such that the sum in the cheque does not represent a legally enforceable debt at the time of maturity or encashment, then the offence under Section 138 is not made out.

15. In **Sampelly Satyanarayana Rao v. Indian Renewable Energy Development Agency Limited, (2016) 10 SCC 458**, it was held that the test for the application of Section 138 is whether there was a legally enforceable debt on the date mentioned in the cheque. If the answer is in the affirmative, then the provisions of Section 138 would be attracted.

16. Section 138 of the NI Act provides that if the cheque is returned unpaid by the bank for the lack of funds, then the drawee shall be deemed to have committed an offence when the conditions in the provisos have been fulfilled. Proviso (b) to Section 138 further provides that a notice demanding the payment of the 'said amount of money' shall be made by the drawee of the cheque.

17. The facts and circumstances of the judgments cited by Senior Counsel for the applicant are totally different to the facts and

circumstances of the present case. The present case is related to interpretation of clause no. 1 and 2 only.

18. After having gone through the entire material on record, following facts emerged:

(i) MOU dated 04.01.2020 has been written between the parties after dissolving the earlier partnership deed dated 16.11.2015 and cheques in question have been issued to the opposite party no. 2 in terms of aforesaid MOU.

(ii) Cheque nos. 105359 and 105358 dated 25.9.2020 each, of Rs. 38,95,193/- and Rs. 58,00,000/-, respectively, were drawn on 5.10.2020 and 30.9.2020 and dishonoured on the same days.

(iii) Legal notices dated 14.10.2020 have been served to the petitioners on 17.10.2020.

(iv) The Complaints have been filed under Section 138 of the N.I. Act on 17.11.2020 against the petitioner.

19. The argument on behalf of the applicant is that the due amount is payable on 31.12.2021 and there was no legally enforceable debt or other liability at the time of drawal/issuance of the cheques on 5.10.2020 and 30.9.2020 against the applicant and that the provisions of Section 138 of the N.I. Act would not attract, is misconceived and not sustainable.

20. After having consideration of the facts, circumstances of the case and keeping in mind the position of law, I am of the considered view that as per terms of clause 1 and 2 of the MOU, the applicant agreed to pay the amount as mentioned Rs 58,00,000/- and Rs. 38,95,193/- to the private opposite party no. 2 "before 31.12.2020". If the applicant fails to pay aforesaid amount to the private opposite party no. 2 till 31.12.2020, the applicant is liable to pay 12% p.a. interest upon the amount as due on 31.12.2020. There was a legally

enforceable debt against the applicant on 5.10.2020 and 30.9.2020 respectively. The Applications U/S 482 No. 4834 of 2022 and 6776 of 2022 having no merit, is liable to be dismissed. Accordingly, the Application U/S 482 No. 4834 of 2022 and Application U/S 482 No. 6746 of 2022, are dismissed.

21. Office is directed to keep a certified copy of this order in file of connected case.

22. Interim order, if any, is hereby vacated in both the Applications.

(Sanjay Kumar Pachori, J.)

Dated: 25.8.2025
Ishan/A.P. Pandey