

A. F. R.

**Court No. - 53**

**Case :-** APPLICATION U/S 482 No. - 28748 of 2022

**Applicant :-** Pawan Garg

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

**Counsel for Applicant :-** Shyam Shankar Mishra, Vijay Kumar Mishra

**Counsel for Opposite Party :-** G.A.

**Hon'ble Umesh Chandra Sharma, J.**

1. Heard Sri Shyam Shankar Mishra, learned counsel for the applicant, Sri Pankaj Tripathi, learned A.G.A for the State and perused the record.
2. This application has been filed by the application to quash the entire criminal proceedings in Criminal Complaint Case No. 12120 of 2020 - R & S Air Conditioning Vs. M/s Aircon Gallery, under Section 138 N.I Act, pending in the Court of Civil Judge (Junior Division), F.T.C. / Judicial Magistrate, Ghaziabad.
3. In brief, facts of the case are that opposite party no. 2 instituted a complaint under Section 138 of the N.I. Act, against the applicant and his wife Smt. Kajal Garg and M/s Aircon Galary through it's Proprietor Smt. Kajal Garg (wife of the applicant), stating that opposite party no. 3 Smt. Kajal Garg is the proprietor of partnership firm of opposite party no. 1, and opposite party no. 2 is Manager / recognized person, main officer. Opposite Party Nos. 2 and 3 are regulating the firm together, which is involved in installation, fitting of ducting and fabrication work. There have been business relations between Sachin Sharma, the proprietor of the complainant firm and opposite party no. 2 Sri Pawan Garg. There has been mutual faith between both of them. Opposite party had

given an oral work order in the month of August, 2019 to the complainant for the ducting site fabrication and A.C. Installation work along-with the ductable A.C. Machine for an amount of Rs. 10,03,189.00/- out of which Rs. 5,45,189.00- was an arrears upon the opposite party.

4. The complainant used to make regular demand of arrears amount/money, for which no attention was paid by the opposite party, but lastly they provided a Cheque No. 088797 dated 31.08.2020, for an amount of Rs.3,00,000/- getting its signed by opposite party no. 3, but when it was produced on 01.09.2020 in his P.N.B Branch Govind Puram, Ghaziabad, the same was dishonoured with the endorsement exceed arrangement. The opposite party had provided the cheque of an account from which no payment was possible, they had given the cheque intentionally to deceit the complainant.

5. On 16.09.2020 a notice dated 16.09.2020 was sent to the opposite party on 17.09.2020, which was received by them on 26.09.2020, but they did not pay the amount. Even after 15 days upto 10.10.2020, hence the act of the opposite party attracts Section 420 I.P.C and Section 138 of the N.I. Act. Hence, the opposite parties be summoned for the trial in aforesaid sections.

6. On 12.08.2021, the applicant Pawan Garg and Smt. Kajal Garg were summoned by the concerned court as proprietor under Section 138 of the N.I.Act.

7. In brief, the grounds of this application are that the cheque was issued by the firm namely M/s Aircon Gallery

through its' proprietor Smt. Kajal Garg. In the Tax Invoice e-way Bill GST documents produced by the opposite party no. 2 shows that there is no whisper of the name of the applicant as a Proprietor, Director, Owner or otherwise of the firm Aircon - Gallery.

8. In fact, the applicant has no concern with the aforesaid firm. It is a proprietorship firm run by single proprietor Smt. Kajal Garg, which is evident from Annexure No. 5, the photocopy of the registration certificate issued by the Government of India. The applicant has no concern with the aforesaid firm and he has been arrayed in the complaint with *mala-fide* intention to mount pressure for recovery of money being husband of Smt. Kajal Garg, proprietor of the aforesaid firm. The applicant has no business concern with the aforesaid firm and works separately as Sales Agent in grain market.

9. The learned courts below was totally failed in considering material available on record and has mechanically summoned the applicant under Section 138 of the N.I. Act along with Smt. Kajal Garg.

10. The impugned order is arbitrarily, unjust, illegal and is not sustainable in the eye of law. The applicant has no concern with the aforesaid firm by legal and practical aspects. The courts below could not examine the material available on record and on the basis of relation no person can be prosecuted, hence the present application be allowed and the impugned order be quashed.

11. The opposite party no. 2 has been sufficiently served, but none appeared and no counter affidavit has been filed against this application.

12. The papers available on record established that only Smt. Kajal Garg, is the sole proprietor of M/s Aircon Gallery and the applicant - Pawan Garg is neither the Proprietor, Co-proprietor or the Authorised Officer or Signatory Owner or the principal officer of the aforesaid firm.

13. The impugned cheque had been issued by Kajal Garg, opposite party no. 3, the sole proprietor of opposite party no. 1 of the complaint. There is no paper to establish that the applicant is authorized signatory, agent or co-proprietor of the Firm. In the eye of law, wife and husband have separate entity. It is also not a case that the wife, sole proprietor of the Firm had provided the cheque signed by or on behalf of the applicant.

14. In ***M. Seethalakshmi v. Suresh Bafna, 2005 SCC OnLine Mad 26***: it was held by the Madras High Court that for the cheque issued by the husband for the loan obtained by him just for the reason that in the borrowing of the loan a guarantee has been given by the wife the accused which could only be enforced in a civil forum for the liability and since the wife is not party to the issuance of the cheque, she can not be made a party or an accused for the prosecution of the bounced cheque under Section 138 of the Act.

15. The similar position is in this case where the sole proprietor Kajal Garg wife of the applicant has issued the

cheque and the applicant is neither the guarantor nor has acted in the capacity of authorized signatory or the agent of his wife.

16. The Apex Court in ***State of Haryana Vs. Ch. Bhajan Lal AIR 1992 SC 604***: has laid down guide-lines where High Court can exercise inherent powers under **Section 482 Cr.P.C** to prevent the abuse of process of law. However, this should be done sparingly and in rarest to rare cases. The guidelines are as under:

*“1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*

*2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R do not disclose a cognizable offence, justifying an investigation by police officers under S. 156(1) of the Code except under an order of a Magistrate within the purview of S. 155(2) of the Code.*

*3) Where the uncontroverted allegations made in the FIR on complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*

*4) Where the allegations in the F.I.R do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S. 155(2) of the Code.*

*5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

*6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific*

*provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.”*

17. In ***S.B. Shankar v. Amman Steel Corpn., 2001 SCC OnLine Mad 825***: it was held that if the accused did not function as Chairman and Director of the accused company during the period when cheques were drawn, no liability u/s 138 NI Act would arise.

18. In ***P. Dhamodharan v. Palani Andavar Mills Ltd., 2001 SCC OnLine Mad 944*** : it was held that when the accused was neither signatory to the cheques nor was in charge of day-to-day affairs of the firm, he would not be liable u/s 138 NI Act.

19. In ***Gangadhar v. Shrenikmal, 2002 SCC OnLine MP 674***: it was held that the accused was neither running a partnership firm nor was a partner nor signed the cheque hence, he would not be liable u/s 138 of the NI Act.

20. In ***G. Hubert Fenelon v. D. Sridharan, 2002 SCC OnLine Mad 547***: the accused was not Director of the company on the date of the commission of the offence hence, he was not held liable under section 138 NI Act.

21 All the above citations are in support of the defence taken by the applicant. Hence, the applicant cannot be summoned as accused under Section 138 of the NI Act and the summoning order in respect of the applicant is bad in law in light of the above facts and circumstances of the case.

## **ORDER**

This application under section 482 Cr.P.C is **allowed** and the impugned order dated 12.08.2021, so far as it relates to the applicant, is hereby **quashed**.

**Order Date :-** 18.4.2023

*Vinod.*