

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

**CRIMINAL MISCELLANEOUS APPLICATION No. 477/2008**

(Under Section 482 of the CrPC)

ATCALL

.....Applicant

*Versus*

M/s Soham Infosys

.....Respondent

Mr. R.P. Nautiyal, Advocate, for the applicant.

Mr. Pankaj Miglani, Advocate, for the respondent.

31<sup>st</sup> October, 2011

**Hon'ble Servesh Kumar Gupta, J.**

By way of this petition, moved under Section 482 CrPC, prayer has been made to quash the order of cognizance dated 15.3.2008, passed by the Ist Additional Chief Judicial Magistrate, Haridwar as well as the proceedings of Criminal Case No. 317/2008, titled as *M/s Soham Infosys v. ATCALL*. The said order of cognizance was passed by the learned Magistrate thereby summoning the applicant to stand trial for the offence punishable under Section 138 of the Negotiable Instruments Act (for short, the NI Act).

2. Having considered the pros and cons of the controversy, it reveals that an agreement dated 20.9.2007 was executed between the parties, viz., Atcall Marwah & Company through its proprietor based at Dehradun and M/s Soham Infosys through its proprietor Smt. Neha Jain based at Kankhal, Haridwar. Under this agreement, M/s Soham Infosys had to do some data processing work (computer job) supplied by M/s Marwah & Company, and in this job there had to be 100 per cent accuracy as per the specifications asked by M/s Marwah & Company. It was also agreed that client (M/s Marwah & Company) must acknowledge accuracy and completeness of the processed document files received by it within a period of 15 international working days. In case of

lack of accuracy, then the client must inform its business associate within 15 working days, otherwise the data furnished will be treated to be 100 per cent accurate according to the specifications provided by M/s Marwah & Company. The agreement also entailed that in case of any dispute between the parties, the matter will be referred to an arbitrator as per the Indian Arbitration and Conciliation Act, 1996.

3. The business transactions commenced between the two on the basis of the aforesaid agreement. M/s Soham Infosys did a considerable work as asked by M/s Marwah & Company, and in consideration thereof ₹ 3,95,733/- became due from the applicant-petitioner to M/s Soham Infosys. In order to pay the said amount, a post-dated cheque amounting to ₹ 2,50,000/- was issued by M/s Marwah & Company on 20.9.2007. This cheque bore the date 16.11.2007. It was presented by M/s Sopham Infosys for encashment on 14.12.2007 through its banker at Haridwar. The amount was to be collected from Punjab & Sindh Bank based at Dehradun, which returned the said cheque unpaid with a memo dated 18.12.2007 with the endorsement "insufficient fund". This memo was received by M/s Soham Infosys on 2.1.2008 through its bank based at Haridwar. Thereafter the drawee of the cheque issued a notice under Section 138(b) of the NI Act on 11.1.2008 asking for the payment. This notice was received by the drawer of the cheque on 16.1.2008, but it did not yield the desired result to the respondent M/s Soham Infosys. So, a complaint no. 317/2008 was filed on 26.2.2008 by M/s Soham Infosys stating therein the entire facts about dishonouring of the cheque and the liability of the payment by drawer of the cheque to M/s Soham Infosys.

4. The learned Magistrate after recording the statement of the complainant Smt. Neha Jain and after going

through the other documents filed in support of the complaint, passed the impugned order of cognizance dated 15.3.2008.

5. The learned Counsel for the applicant-petitioner has drawn the attention of this Court towards an agreement entered into between the parties on 16.11.2007 (date of the cheque). This agreement discloses that the said cheque, drawn on Punjab & Sindh Bank, Dalanwala Branch, Dehradun, amounting to ₹ 2,50,000/- was issued against data processed with 100 per cent accuracy. In case, accuracy comes below 100 per cent, the cheque mentioned above will not be presented by the first party (M/s Soham Infosys), and the same will be returned to the second party (M/s Marwah & Company).

6. Learned Counsel for the applicant-petitioner has contended that the accuracy of the work done by M/s Soham Infosys was found to be only 77.79 per cent, as is revealed by the second page of Annexure No. 3 filed along with the affidavit of the petitioner. On the other hand, learned Counsel for the respondent has argued that this paper, manifesting the accuracy as 77.79 per cent, has been wrongly claimed to be issued by M/s Soham Infosys. In fact, it was never issued or sent by the respondent to the applicant. Rather, M/s Soham Infosys issued a letter dated 3.12.2007 (Annexure 3 to the affidavit of the petitioner), wherein the request has been made to M/s Marwah & Company to arrange for some data for ten days as their workers were sitting idle and they had to bear their expenses. They also manifested their plight that being a new firm, they were in financial crisis. They have further asked for the payment of their particular bill dated 12.11.2007 keeping in view its financial crisis. It has been contended by the learned Counsel for the applicant-petitioner that M/s Marwah & Company made them known as to what percentage of inaccuracy was found in the work which was made available

to the applicant-petitioner after its execution. But not even a single paper has been brought on record by the applicant in support of their version. However, whatever a little bit deficiency in the quality was found, the respondent redressed the same by supplying the reworked and reloaded CDs enclosed with the letter dated 3.12.2007. This letter itself has been filed as Annexure 3 along with the affidavit of the petitioner. The said fact has also been averred in the counter affidavit dated 12.6.2009 filed by the respondent before this Court, which has not been rebutted by filing any rejoinder affidavit.

8. As far as the arbitration clause is concerned, learned Counsel for the respondent has relied upon a precedent of the Hon'ble Apex Court rendered in the case of *Sri Krishna Agencies v. State of Andhra Pradesh & Another*, reported in **(2009) 1 SCC (Cri) 241**, wherein the Apex Court, in a similar case, has held that on taking recourse to the arbitration proceedings, which is obviously of a civil nature, there cannot be bar to the simultaneous continuance of a criminal proceeding under Section 138 of the NI Act, if the two arises from separate causes of action. Therefore, in view of the arbitration clause in the original agreement dated 20.9.2007, the present proceedings under Section 138 of the NI Act are not barred.

9. Learned Counsel for the applicant has also contended that the cheque, in question, issued by M/s Marwah & Company was in the nature of a security, and not in the form of debt or liability. This Court is unable to agree with the said contention of the learned Counsel because the said cheque was certainly in the nature of a liability to be discharged by M/s Marwah & Company in lieu of the consideration of the computer data processing work done by the M/s Soham Infosys.

10. For the reasons recorded above, the petition is devoid of merit and is liable to be dismissed. Petition is dismissed accordingly. Stay order dated 25.7.2008 is hereby vacated. All the pending applications also stand disposed of accordingly.

11. However, it is made clear that the trial against the accused applicant shall not be prejudiced by any of the observations made by this Court hereinabove, and the learned Magistrate is directed to decide the controversy on merits as early as possible, preferably within a period of six months, as envisaged under Section 143(3) of the Act.

12. Registry is directed to inform the court concerned accordingly.

**(Servesesh Kumar Gupta, J.)**

**31.10.2011**  
Prabodh