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

Judgment reserved on: 08.04.2015

% **Judgment delivered on: 30.06.2015**

+ **CRL.L.P. 233/2014**

INDIAN MICRO ELECTRONICS (P) LTD Petitioner

Through: Mr. Amit Anand, Mr. Rohit Kumar &
Mr. Brijesh Kumar, Advocates.

versus

CHANDRA INDUSTRIES & ORS Respondents

Through: Mr. Himanshu Anand Gupta,
Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

J U D G M E N T

VIPIN SANGHI, J.

1. After hearing learned counsel, leave granted.
2. Let the appeal be registered and numbered.

Crl.A. No. /2015 (to be registered and numbered)

3. With the consent of learned counsels, I heard learned counsel finally at the admission stage and reserved judgment. Accordingly, I now proceed to dispose of the appeal.

4. This appeal is directed against the judgment and order dated 04.01.2014 passed by Sh. Apoorv Sarvaria, Civil Judge-I, New Delhi in CC No. 332/11 under Section 138 of Negotiable Instruments Act (NI Act). The complaint preferred by the appellant has been dismissed by the impugned judgment, and the respondent/accused were acquitted.

5. The case of the complainant was that – the complainant company is a Private Limited Company incorporated under the Companies Act, 1956 having its office at Okhla Industrial Area, New Delhi. It is dealing in manufacture of different kinds of goods and allied products. The respondent/accused No. 1, M/s Chander Industries, represented itself to be a partnership firm. It approached the complainant and placed orders between the period of September, 2007 to February, 2008 for supply of goods. The accused No.1 firm was supplied the goods/materials as per the purchase orders through one Sh. Parveen Aggarwal (accused no. 2) and Sh. GK Mishra (accused no. 3); the goods were lastly supplied on 25.02.2008; Form-C were issued by the accused on 26.02.2008; the partner of the accused signed the accounts statement; the accused made payment of Rs.10,55,788/- only, leaving an outstanding balance of Rs.7,18,432/-. To discharge the remaining liability, the accused issued two cheques of Rs 2 Lakhs each.

6. The first cheque was cleared, but the second cheque bearing no. 013983 dated 25.06.2008 (hereinafter referred to as “the cheque”) drawn on State Bank of India, SSI Branch, Baddi, Solan, Himachal Pradesh was dishonoured for reason of “payment stopped by drawer”. The cheque was issued by accused no. 2, disclosing himself to be a partner of the accused

firm. The complainant sent a legal notice dated 05.07.2008 through registered post to the accused. The accused firm replied to the legal notice and raised a dispute with regard to the quality of the goods supplied. The accused firm failed to pay the amount of the cheque within the statutory period, and accordingly, the complaint under Section 138 of NI Act was preferred by the complainant/appellant.

7. Upon being summoned, the accused entered appearance. The accused was served with the notice, under Section 251 Cr PC for the offence under Section 138 NI Act on 27.10.2009, to which the accused pleaded not guilty, and claimed trial. The parties led their respective evidence.

8. The complainant in support of its case produced 3 witnesses. CW-1 Tapas Kumar Nandy; CW-2 Raj Pal- Assistant Clerk in SBI, Baddi, HP; and CW-3 DC Sharma- Senior Manager, Punjab National Bank, Greater Kailash-I. Statements under Section 313 Cr PC of the Authoritative Representative (AR) Rajat Aggarwal of the accused firm, accused no.2 Praveen Aggarwal and accused no. 3 G.K. Mishra were recorded. Further, accused firm produced accused no. 2, Parveen Aggarwal as DW-1 and AR of the accused firm, Rajat Aggarwal as DW-2.

9. The defence of the accused, firstly, was that the accused firm had issued two post dated cheques of Rs.2 Lakhs each, which were to be encashed on the condition that the quality and quantity of the material supplied by the complainant was confirmed/ approved by the accused firm. Secondly, it was urged that since the quality of the material supplied by the complainant was not of the requisite standard, and was found to be defective

after inspection; the goods were rejected by the accused firm. Consequently, the payment was stopped by the accused firm. Accused claimed that when cheque is dishonoured for the reason “payment stopped” and the reason for stopping the payment is valid, it does not amount to dishonour of cheque under Section 138 NI Act.

10. The Trial Court accepted the defence of the accused. It held that the accused had managed to rebut the presumption raised under Section 139 NI Act. The Trial Court invoked the decision in *MMTC Ltd vs. Medchl Chemicals and Pharma (P) Ltd*, (2002) 1 SCC 234, wherein the Supreme Court held that if the accused proves that there were sufficient funds in the account of the accused to discharge its liability and the stop payment is for valid reasons, then the presumption raised under Section 139 would stand rebutted by the accused, and the accused would not be held accountable under Section 138 NI Act. The Trial Court observed that the accused managed to rebut the presumption by proving that there were sufficient funds in its bank account to discharge the said liability, and that the “stop payment” was for a valid reason.

11. While not disputing the above stated legal proposition, Id. Counsel for the appellant submits that the respondent’s defence that the material supplied was of inferior quality is not substantiated, and was merely an afterthought. The complainant company supplied materials to the accused firm from September, 2007 to February, 2008 – the last supply being made on 25.02.2008. The accused firm did not reject the materials on the ground that the quality is inferior, or the materials supplied are defective in nature. The cheque in question was issued much later, bearing the date 25.06.2008.

The stand that the goods were defective/inferior was communicated, for the first time, in reply to the legal notice under Section 138 of the NI Act. He further submits that CW-1 Sh. Tapash Kumar Nandy in his cross-examination by the counsel for the accused dated 03.03.2012 deposed that the materials were not defective. He also deposed that the accused firm did not intimate or remind the complainant company about the alleged inferior quality of the materials supplied.

12. Ld. Counsel submits that the accused firm claimed that it had, repeatedly, sent reminders to the complainant company regarding the inferior quality of the materials supplied (PCBs), but no evidence was brought on record by them to establish this defence. Rajat Aggarwal (DW-2) in his examination-in-chief dated 06.04.2013 deposed that after repeated reminders, one Sanjay Sharma (Technical Expert) came to the accused firm on 26.03.2008 to check the quality of the material, and he admitted the goods to be of inferior quality. Ld. Counsel submits that the accused firm has not proved that Sanjay Sharma had visited the accused firm's premises in relation to issues of alleged inferior quality, or that he had acknowledged the quality of the goods supplied to be inferior. The accused firm has only produced an entry in the visitor's register vide Mark DW2/A on record to prove that the said Sanjay Sharma visited the accused firm on 26.03.2008, but no evidence has been brought to prove the purpose of the visit, or that he had admitted the quality of the goods supplied to be inferior.

13. He further submits that the accused firm claims to have sent an e-mail dated 07.06.2008 (Mark DW2/B) to the complainant company informing/reminding them about the sub-standard quality of PCBs/material

supplied. The accused had led in evidence a copy of the said e-mail, however, without complying with Section 65 B of the Indian Evidence Act, 1872. He submits that as the copy of the e-mail was not proved according to law, it could not have been relied upon by the accused as it was not admissible evidence.

14. Further, ld. counsel submits that though the accused firm claimed that the material supplied was found to be of inferior quality after an inspection, i.e. it had dry soldering, the accused failed to lead in evidence any test report or evidence of inspection conducted by anyone to establish that the material provided was of inferior quality. Thus, this claim of the accused is also not substantiated.

15. Ld. Counsel submits that the fact that the accused firm had balance in its account throughout the period will not act as a safeguard when the stop payment instruction was not issued for any valid reason.

16. On the other hand, learned counsel for the respondent/accused firstly submits that the accused no. 2 has been wrongly made an accused in the present case, as he has no connection to the accused firm, nor has he ever been an employee of the accused firm. The accused no. 2 has never been involved in the working of the accused firm either. Ld. counsel submits that the accused no. 2 is not vicariously liable, as he was not a partner of the firm, nor was he the signatory of the cheque, and he was not responsible to the firm for the conduct of the business of the firm, or to the firm.

17. Ld. Counsel further submits with regard to accused no. 3, G.K. Mishra, that he was the purchase manager of the accused firm and he was

not in-charge of the day to day affairs of the accused firm. Accused no. 3 was an employee in the purchase department and placed orders on behalf of the accused firm between the period September, 2007 to February, 2008. He never made payments on behalf of the accused firm, nor was he aware that the cheque (Ex. C-30) had been issued to the complainant company. The accused no. 3 received the legal notice dated 05.07.2008 (Ex. CW-31), which he forwarded to the Administration Department of the accused firm. He submits that since the accused no. 3 is only an employee in the Purchase Department of the firm, and not in the Accounts Department, nor is he a partner in the firm, he cannot be held vicariously liable under Section 141 of the NI Act.

18. Ld. Counsel for the respondents further submits that the accused firm had repeatedly intimated the complainant company about the defective material supplied by them. There were multiple communications to this effect by the accused, but none were replied to by the complainant company. He submits that on 26.03.2008 Sanjay Sharma (Technical Expert) of the appellant visited the accused firm and acknowledged to the inferior quality of the material supplied and he agreed to inform his senior regarding the said problem. He further submits as no action was taken regarding the defective goods even after the said visit. Thus, an intimation vide an e-mail dated 07.06.2008 (Mark DW2/B) was sent to the complainant company, which again was not replied to by the complainant company.

19. I have heard the rival submission of the counsel for both the parties, and perused the evidence brought on record and the impugned judgment.

20. It is admitted by the accused firm that the aforesaid cheque bearing no. 013983 dated 25.06.2008 had been issued by them, thus, raising the presumption under Section 139 of NI Act. It is settled law that the burden to rebut the presumption under Section 139 NI Act is on the accused. The defence of the accused, to rebut the presumption, has to be tested on the touchstone of “preponderance of possibilities”, whereas the complainant has to prove its case beyond reasonable doubt. It has also repeatedly been held that the accused can rely on the evidence brought on record by the complainant to rebut the presumption, and it is not always necessary that the accused has to lead its own evidence to substantiate its defence.

21. The first and primary issue that needs consideration is whether the accused were justified in giving stop payment instructions in relation to the cheque in question. For this, the justification offered by the accused needs examination. The accused had to establish – as probable, its defence that the materials supplied were of inferior quality.

22. It is not in dispute that the parties had business transactions, and that the complainant company had been supplying material/PCBs since 2007, nor had the accused firm claimed that the materials supplied earlier were ever found to be of inferior quality. It is only when the cheque dated 25.06.2008 was dishonoured, that the accused firm took the plea – for the first time, in its reply to the legal notice, that the goods supplied were of inferior quality and therefore, the payment was stopped.

23. DW-2 in his examination-in-chief dated 06.04.2003 deposed as follows:

“That some of the lots of the material received by the complainant was not of good quality and was rejected for the reasons of problem of dry soldering in the said PCB models. That thereafter repeated reminders and request for made to the complainant regarding the same but to no avail.”

In his cross-examination dated 05.09.2013, he deposed to the effect:

“I do not remember the date when the fault in the PCB was detected by the accused firm. The same was detected when the components were used in the PCB’s of other companies. I do not know the exact date when my firm informed the complainant company about the defective PCBs”.

Further, he deposed that:

“It is correct that no document has been placed on record showing that the good were of defective nature.”

24. From the above extracted testimony, it is evident that the AR of the accused firm has claimed that the materials supplied were of inferior quality. He, upon being cross-examined, stated that no documents to this effect had been placed on record by him, nor has he provided a date when the fault in the materials was detected by the accused firm. In order to prove that the materials were defective, and the accused was justified in stopping payment of the cheque in question, the accused was obliged to lead evidence in this regard. However, DW-2 himself admitted that no documents in this regard have been put on record.

25. The DW-2, further, on 06.04.2013 stated as follows:

“That owing to the faulty PCB’s the accused firm suffered severe losses as the various components were attached to the PCB’s and because of the faulty PCB’s all these products became useless rendering the entire product as useless.”

26. Thus, the accused firm claimed that it suffered losses due the inferior quality of the materials supplied. However, the accused did not produce any statements of accounts or other evidence to show the losses allegedly incurred by the firm on account of supply of defective or inferior goods. The accused have neither preferred a counter-claim in the suit of the complainant, nor preferred any other civil suit to claim the alleged losses from the complainant. The defence of the accused firm, that it suffered losses due to the inferior quality of materials is its mere *ipse dixit*. In absence of any credible evidence to prove the same, it cannot be accepted.

27. Further, DW-2 Sh. Rajat Aggarwal in the testimony dated 06.04.2013 has stated that after repeated reminders, one Sanjay Sharma a technical expert of the complainant company visited the accused firm on 26.03.2008, and confirmed "*the problem and faulty nature of the said PCB'S*". DW-2 has brought an extract from the visitor's entry register (Mark DW2/A) to prove that the said Sanjay Sharma had visited the premises of the accused firm on 26.03.2008. While, the said document shows that Sanjay Sharma had visited the premises of the accused firm, there is nothing on record to establish that Sanjay Sharma visited the accused firm in relation to any issue of inferior quality or defect in the goods, much less to establish that he agreed that the supplied goods were defective or inferior. Mere entry in the visitor's register does not establish – even as a probable case, that the visit was for the aforesaid reason, or that the goods were found to be, or acknowledged to be defective/ inferior. Since the accused firm has brought no evidence on record to prove that Sanjay Sharma visited the accused firm to assess the quality of the material supplied, or that he acknowledged that

the quality of the goods supplied was defective or inferior, the entry of visit of Sanjay Sharma relied upon is of no avail.

28. Further, the accused firm has claimed that it sent repeated reminders to the complainant company regarding the inferior quality of the materials supplied. The accused contended that after the visit of Sanjay Sharma an e-mail dated 07.06.2008 was sent to the complainant company informing them of the defective nature of the materials supplied. DW-2, Rajat Aggarwal, in his examination-in-chief dated 06.04.2003 deposed *“That thereafter in the month of June, 2008, the complainant was informed by the way of e-mail dated 07. 06.2008 and also by a registered post informing thereby the faulty nature of the PCB’s and raising a debit note amount to approximately Rs.11 lacs and further directed them not to present the two cheques amount to Rs. 2 lacs each and also credit note amount to approximately Rs. 11 lacs to the accused firm.”* The accused produced a copy of the e-mail dated 07.06.2008 vide Mark DW 2/B and a copy of the debit note vide Mark DW2/C.

29. The copy of the e-mail (Mark DW2/B) dated 07.06.2008 is a print-out copy of the e-mail allegedly sent by the accused. Being an electronic record which is printed out on paper, it is required to have a certificate under Section 65 B of the Evidence Act, which the e-mail (Mark DW2/B) does not have. Section 65 B is as follows:

“65B. Admissibility of electronic records.—

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the

conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2)

(3)

(4) *In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—*

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.”

Thus, for an electronic evidence to be admissible as evidence, it is required to have a certificate in accordance to the abovementioned section. The certificate under Section 65B assures its authenticity. Since, the copy of the e-mail (Mark DW2/B) dated 07.06.2008 is not certified in terms of Section 65 B, it is not admissible evidence and cannot be relied upon by the accused. Consequently, as the only evidence provided by the accused to

prove that it intimated the complainant company regarding the inferior quality of the supplied materials is inadmissible; its defence is not substantiated.

30. There is no explanation as to why, in respect of goods supplied lastly on 25.02.2008, no recorded or acknowledged communication was issued, recording the factum of the goods being defective/ inferior in quality. There is no explanation as to why the cheque in question was issued, if the goods were allegedly defective/inferior in quality. The accused have not established on record that the cheque in question was issued even prior to the delivery of the allegedly defective goods.

31. The presumption under Section 139 NI Act arose in the facts of the present case. For the said presumption to be rebutted, the defence had to meet the standard of being probable upon preponderance of probabilities – as observed by the Supreme Court in various judgments. In my view, the accused has not managed to rebut the said presumption. The defence taken by the accused was that the materials supplied were of inferior quality. From the abovementioned discussion, it is established that the accused has not managed to show, even as probable, its defence that the complainant company supplied materials of inferior quality. Thus, the presumption under Section 139 NI Act is also not rebutted.

32. The accused firm has not been able to establish that it had a ‘valid reason’ for stopping the payment of the cheque. The Trial Court’s conclusion with regard to the facts is palpably wrong and the impugned judgment is likely to result in grave miscarriage of justice. The entire

approach of the Trial Court in dealing with the case is patently illegal and Trial Court judgment is manifestly unjust and unreasonable. The Trial Court has ignored the evidence and misread the material evidence while coming to its conclusion that the accused had raised a probable defence by offering good justification for stopping payment of cheque in question. In my view, the present is, therefore, a fit case for interference by this Court in the light of the judgment of the Supreme Court in *Ghurey Lal Vs. State of Uttar Pradesh*, (2008) 10 SCC 450. The finding of the learned MM that no offence under Section 138 NI Act is made out in the facts of the present case is made out in the facts of the present case is, therefore, set aside. The appellant complainant has been able to establish the commission of the offence under section 138 of the NI Act beyond all reasonable doubt.

33. The accused have brought on record a copy of the Partnership Deed dated 22.11.2006 vide Ex. DW1/2 and a copy of supplementary Partnership Deed dated 23.10.2009 vide Ex. DW1/1. The complainant has claimed that accused no. 2 Praveen Aggarwal was the signatory of the cheque. Whereas, the AR of the accused firm Mr. Rajat Aggarwal DW-2, in his cross-examination dated 24.10.2013 deposed that “*My father Sh. Rajinder Kumar Aggarwal has also signed the cheque in question Ex.C30 at point A.*” On perusal of the aforesaid mentioned partnership deeds it is noted that accused no.2, namely Sh. Parveen Aggarwal, does not appear to be a partner of the accused firm. The Partnership Deeds mention names of one Sh. R.K. Aggarwal, party no. 1, and S.K. Mittal, party no. 2, as partners of the accused firm. There is no mention of the accused no. 2 in the said partnership deeds as a partner or even a manager. Thus, it is concluded that

he was not a partner of the accused firm. The appellant has not established on record that accused no. 2 is the signatory to the cheque. Since the complainant company has also not produced any evidence to establish that accused No.2 was in charge of, or responsible to the accused firm for the conduct of the business of the firm, as well as to the firm, accused no. 2 stands acquitted.

34. The accused no. 3 was the purchase manager of the accused firm and, he had placed orders on behalf of the accused firm. His vicarious liability has to be tested on the touchstone of Section 141 NI Act. The said Section reads as follows:

“Section 141: Offences by companies -

1. If the person committing an offence under Section 138 is a company, every person who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

Provided....

2.

Explanation – For the purposes of this section-,

(a) “company” means any body corporate and includes a firm or other association of individuals; and

(b) "director" in relation to a firm, means a partner in the firm"

35. The Supreme Court in *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla*, 2005 (8) SCC 89 observed as follows:

"9. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed by a company. The key words which occur in the Section are "every person". These are general words and take every person connected with a company within their sweep. Therefore, these words have been rightly qualified by use of the words " who, at the time the offence was committed, was in charge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence etc." What is required is that the persons who are sought to be made criminally liable under Section 141 should be at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It follows from this that if a director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section

would have said so. Instead of "every person" the section would have said "every Director, Manager or Secretary in a Company is liable"....etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. **Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action.**

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10. The conclusion is inevitable that the liability arises on account of conduct, act or omission on the part of a person and not merely on account of holding an office or a position in a company. Therefore, in order to bring a case within Section 141 of the Act the complaint must disclose the necessary facts which make a person liable

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16. In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section 141 cannot be said to be satisfied."

(Emphasis Supplied)

36. The Supreme Court in **S.M.S. Pharmaceuticals** (supra) observed that only the persons who are responsible for the conduct of the business of the firm at the time the offence was committed will be vicariously liable, and not all the persons in the firm. It is an admitted position that accused no. 3

placed the orders on behalf of the accused firm between September, 2007 and February, 2008. The cheque dated 25.06.2008 was dishonoured, and a legal notice dated 05.07.2008 regarding the same was sent to the accused no. 3, as well as the accused firm. He left the accused firm only in January, 2009. Therefore, the accused no. 3 was a part of the accused firm when the offence was committed, upon dishonour of the cheque. Since the accused no. 3 was purchase manager, who placed the orders on behalf of the accused and was working in accused firm when the cheque was dishonoured, he was responsible for conduct of business of the accused firm at the time of commission of the offence. Being the purchase manager, he would have been aware of the execution of the purchase transactions/ orders with the vendors of the accused firm. As a purchase manager, his responsibility would not be limited to just place orders for purchases, but to ensure fulfilment of all obligations qua the purchase orders by both – the seller and the purchaser. Accused No.3 cannot be heard to say that he was not concerned with the payment aspect, and was only concerned with placement of purchase orders. To an outsider, like the complainant, Accused No.3 was the face of the accused firm. Since he displayed his authority and responsibility to place binding purchase orders, he cannot avoid his liability of being held responsible for payment of the amount due by the firm, regarding the supplies made, as there is nothing to show that he had put the complainant to notice, that he is not responsible for the payment being released by the accused firm, on whose behalf he had placed the purchase orders. In the light of *S.M.S. Pharmaceuticals* (supra), it is established that accused no. 3 would be vicariously liable as he was responsible for conduct of the business of the accused firm at the relevant time.

37. In view of the aforesaid discussion, the impugned judgment of acquittal qua the accused firm and accused No.3 is, accordingly, set aside. The accused no. 2 stands acquitted. The accused no. 1 and accused no. 3 are found guilty of commission of the offence under Section 138 NI Act.

38. The appeal is, accordingly, partially allowed.

VIPIN SANGHI, J

JUNE 30, 2015