

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 300 of 2001

**S.P. Bhattacharya
-Vs-**

M/s Sourit Sen & Association (P) Ltd. & Anr.

For the Appellant : Mr. Santanu Talukdar
(*Amicus Curiae*)

For the Opposite Party No. 1 : Mr. Ramasish Mukherjee
(*Amicus Curiae*)

Heard on : 06.12.2023

Judgment on : 07.03.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the impugned judgment and order dated 31st January, 2001 passed by the Learned 6th Judicial Magistrate, Sealdah South 24-Parganas in Case No. C-588 of 1996 (T.R.No. 85 of 1996) whereby the opposite parties no. 1 and 2 have been found not guilty of the offences under Section 138/141 of the Negotiable Instrument Act and have been acquitted accordingly from the case and have been discharged from the respective bail bonds.
2. The petitioner filed a petition of complaint under Section 138/141 of the Negotiable Instrument Act against the respondents herein in the Court of the Learned Additional Chief Judicial Magistrate at Sealdah. Said petition of

complaint was filed by the petitioner in view of dishonor of 4 cheques issued on behalf of the respondent no. 1 by the respondent nos. 3 and one Sourit Sen in favour of the petitioner for insufficient fund and despite demand notice the respondents failed to make payment of the amount of the cheques so dishonoured within the time stipulated under Section 138 of the Negotiable Instrument Act which was received on behalf of the company on 26.10.1996. The facts of the case was inter alia that the petitioner purchased some shares of various companies with the intention to sell it later on in the market. Thereafter at the instance of a common friend the petitioner was introduced with the respondent no. 2 and said Sourit Sen who agreed to sell those shares in lieu commission on behalf of the petitioner which was worth Rs. 5,47,555/- and such handling over of shares by the petitioner to the respondent was made between October, 1995 to November, 1996. Out of the total amount of Rs. 5,47,880/- and for the balance amount of Rs. 1,97,675/- the respondents issued four cheques in favour of the petitioner being Cheque No. 182539 dated 27.7.96 amounting to Rs. 50,000/- Cheque No. 178441 dated 30.9.1996 for Rs. 1,45,000/- cheque No. 002007 for Rs. 1500/- and 002006 for Rs. 1500/-. After receiving the information of the dishonor of cheques due to insufficient fund the petitioner served demand notice upon the respondent no. 1, on 26.10.1996 but no payment whatsoever was made by the respondents against the said cheques. The respondent no. 2 and said Sourit Sen were the Directors of the Respondent no. 1 at the material point of time and they are the persons liable for the day to day affairs of the said company being the respondent no. 1 and as such the petitioner filed the

aforesaid petition of complaint against the respondents for commission of offence punishable under Section 138/141 of the Negotiable Instrument Act, 1881.

3. The said complaint was filed before the Learned Additional Chief Judicial Magistrate, Sealdah on 3.12.1996 and Learned Magistrate was pleased to take cognizance of offences punishable under Section 138/141 of the Negotiable Instrument Act against the respondents and also against said Sourit Sen, and thereafter the same was transferred to the Court of the Learned 6th Judicial Magistrate, Sealdah and accordingly summons were issued against the respondents.
4. Thereafter the respondent no. 2 appeared before the Learned 6th Judicial Magistrate, Sealdah on 3.7.1997 and was granted bail by the said Learned Magistrate.
5. The said respondent no. 2 filed an application under Section 482 of the Code of Criminal Procedure, 1973 before the Hon'ble High Court, Calcutta for quashing of the said proceeding being complaint Case No. C-588 of 1996 (T.R. No. 85 of 1996) on various grounds including that the respondent no. 2 was not a Director at the material time of the said company M/s. Sourit Sen & Associates (P) Ltd., as he resigned from the Directorship of the said company on November 3, 1995 and the same was also communicated to the Registrar of Companies by Form No. 32 by the company. As such, no proceeding under Section 138/141 of the Negotiable Instrument Act was maintainable against the said Respondent. The said criminal revisional application was registered as CRR No. 193 of 1998. The said application

under Section 482 of the Code of Criminal Procedure was dismissed on 22.7.1999 by the Hon'ble Single Bench of this Court after going to the merits and by passing a detailed judgment considering all points raised by the said respondents no. 2 in the said revisional application and holding that the prima facie case for commission of offences under Section 138/141 of Negotiable Instrument Act has been made out against the accused persons. By the said judgment the Hon'ble Court was further pleased to direct the Learned Magistrate to conclude the trial of the case with utmost expedition preferably within a period of 3 months from the date of receipt of the Lower Court records. The petitioner crave leave to refer the copy of the said Judgment and order dated 22.7.99 at the time of hearing if necessary.

6. During the pendency of the proceeding by an order dated 14.10.1999 the proceeding against said Sourit Sen was dropped and the same continued against the respondent nos. 1 and 3 and the trial started against the said remaining accused persons. After being pleaded not guilty the trial was started against the respondent nos. 1 and 2 and the petitioner examined three witnesses and exhibited documents in support of his case and to prove that the respondent nos. 1 and 2 are guilty of offences under Sections 138 and 141 of the Negotiable Instrument Act and on the other hand the respondent no. 2 examined two witnesses and also exhibited documentary evidence. Ultimately the Learned 6th Judicial Magistrate, Sealdah by judgment and order dated 31.1.2001 has been pleased to found that the petitioner failed to establish his case beyond all reasonable doubts and the respondent no. 3 found not guilty and accordingly acquitted the respondent

no.2 under Section 255(1) of the Code of Criminal Procedure and discharged the said respondent no. 2 from bail bond.

7. The Learned Advocate for the appellant submitted that :-

- i. A case of complaint during the trial having been stated and/or supported and/or corroborated by all the material witnesses for the complainant and the said case could not be retracted by the accused the Learned Court below erred in law in discarding the case of complainant on the basis of imaginary incuna and as such the impugned order of acquittal is liable to be quashed and/or set aside.
- ii. The verdict given by the Trial Court is palpably wrong both factually and legally as such the same should be set aside an/or quashed.
- iii. The Learned Magistrate failed to take into consideration that the respondent no.2 was the person in-charge and was responsible to the company being the respondent no. 1 for the conduct of business of the Company and in view of Sub-Sections 1 and 2 of Section 141 the opposite party no. 2 was liable for prosecution for commission of offences punishable under Section 141 of the Negotiable Instrument Act but the Learned Magistrate totally overlooked the said aspect and the Learned Magistrate also overlooked that the cognizance of offences punishable both under Section 138 and 141 of the Negotiable Instrument Act and not limited to the offence punishable under Section 138 of the Negotiable Instrument Act which results in passing an illegal order of acquittal of the respondent no. 2 as such the impugned judgment is liable to be set aside and/or quashed.

- iv. The Learned Magistrate failed to consider that Form - 32 submitted by the company to the Registrar of companies indicating the change in the Board of the Company is not a conclusive prove to come to a finding that a Director was not in-charge of and was not responsible to the company for the conduct of the business of the company at the time when the cheques were issued to the complainant which results in passing of an illegal order of acquittal to the gross prejudice of the complainant as such the said order of acquittal is liable to be set aside.
- v. The Learned Magistrate failed to consider that Form-32 can at best can given a presumption but when it has been reburted it was burden on the part of the accused persons to prove the fact in question conclusively by producing the other evidence and in the absence of such other evidences the Learned Magistrate can not proceed only on the basis of the said presumption which has been done in the present case as such the impugned order of acquittal is absolutely bad, illegal and liable to be set aside.
- vi. The Learned Magistrate in accepting the Form-32 overlooked the provision of Sub-Section 2 of Section 303 of the Companies Act which gives a mandate that the Company shall within a period of 30 days from the happening thereof send a return to the Registrar of companies notifying change in the Directorship and the default to that effect is punishable offences under Sub-Section 3 of Section 303 of the Companies Act and in view of the fact that despite it is

apparent from the Form-32 as produced before the Learned Magistrate that the change has been notified to the Registrar of Companies by the company long after the said stipulated period of 30 days and even after the cheques have been issued and the same were dishonoured as such there was no question of taking any presumption on the basis of the said Form-32 come to a conclusion that the respondent no. 2 was not a Director of the Company at material point of time and he was not a person who was responsible to and was in-charge of the company being the respondent no. 1 and/or such act of the company was not in pursuance of any neglect on the part of the respondent no. 2 which results in passing of an illegal order of acquittal as such the impugned judgment and order dated 31.1.2001 is liable to be reversed and/or set aside.

8. The Learned Amicus Curiae representing the opposite party no. 1 & 2 submitted that there is no concept of vicarious liability and the Trial Court was justified in passing an order of acquittal.
9. A circumspection of the prosecution witnesses revealed as follows:-
 - i. PW-1/complainant in his deposition stated that he had filed the case against Sourit Sen and Santipriya Sen. They were directors of M/S Sourit Sen & Associates (Sic) (P) Ltd. They were brokers of share certificate. He had some shares. He wanted to sell the said share certificates. He wanted to sell the shares through the company of the accused persons. The office of M/S Sourit Sen & Associates was at C475 Salt Lake City. Cal. – 91. PW – 1 was given an information by

them that they had sold his certain shares. They had sold shares with Rs. 5,45,555/- belong (torn). They refunded him Rs. 349,880/- which included some cash money, some other shares and cheques of some amount. That was adjusted against Rs. 547,555/-. The balance adjustment amount was to be given to PW – 1 vide four cheques. Those were the said 4 cheques Viz, one (ille) 182539 dated 22-7-96 of Rs. 50000/- drawn on union Bank of India, Salt Lake, another number 182539 dt. 30-9-96 drawn on Union Bank of India, Salt Lake Branch amounting to Rs. 145000/-, 3rd cheque No. 002007 dt. 22-7-96 of Rs. 1500/- and that was the 4thcheque 002006 dt. 22-6-96 of Rs. 1500/- both drawn on Union Bank of India, Salt Lake. PW-1 had presented the cheques in first week of October, 1996 to his bank being SBI India Dalhousie square. PW-1 identified accused Santipriya Sen in Court.

- ii. PW-1 in his examination-in-chief further stated those were the said 4 cheques containing the signature of accused person Sourit Sen on behalf of the accused Company. Those were marked Exhibits 1 1(1), 1(2) and 1(3). The cheques were dishonoured due to insufficient funds. Those were the memorandums (sic) of the bank stating about insufficient funds. Those were marked X, X (1); X(2) and X(3) for identification. PW-1 had met the accused persons personally and told them about the dishonor in 1st week of October. They had not given me money in spite of his oral requests. He had sent a demand notice to the accd. Company personally and as well as under registered post

with AD. That was the copy of the notice showing receipt by them in the office by the office staff by putting his signature and seal in it his presence. The copy of notice is marked Exhibit 2 and the receiving signature and seal were marked Exhibit 2/1. The notice was prepared in his office personally by PW-1. The notice was received by them on 26-10-96. They had not made any payment to him over after getting the notice. They had not given any reply to PW-1 as well. Accd No. 3 was one of the directors of the Company. The office of the accused Company situated at CG – 75 Salt Lake City Cal – 91. They were the owners of the said premises. PW-1 never got any letter from accused No. 3 after the notice was served stating that he was no longer the director of the Company.

- iii. PW-1 in his cross-examination stated that accused No. 3 had not received the notice personally.
- iv. PW-1 in his further cross-examination stated that he had not filed papers/documents regarding sending of notice by post in the Court. There was not written agreement between the accused company and PW-1. He had no documents to show that accused Santipriya Sen was attached with accused company in any way from the very beginning. He had no documents to show that accused Santipriya Sen was in any way attached to accused company from the date of issuance of cheque till the receipt of notice. Not a fact that his statement that PW-1 went to the company's office and that he delivered the notice personally to a staff and obtained an acknowledgment of receipt was a false one. Not a

fact that He had stated so in the interest of the case. Not a fact that since he had not sent notice as per law, so PW-1 manufactured the above facts for the interest of the case. Not a fact that accused Santipriya Sen had no connection with the Company after 3-11-95. Not a fact that to malign & harass the accused, PW-1 has filed the case against him.

- v. PW-2 stated that at the time of deposition he was posted at Union Bank of India, S.S. B. Salt Lake Branch as Branch Manager. That was the cheque No. 002006 of Rs. 1500/- dt. 22.6.96 drawn on S.B.I. Dalhousie Branch. That cheque was issued under the S/B Account No. 3355 of Nabanita Chowdhury and Sourit Sen. That was (ille.) another cheque No. 002007 of Rs. 1500/- Dt. 22.6.96 drawn on S.B.I Dalhousie Branch. That cheque also was issued under the same S/B Account No. 3355. Those two cheques were presented before his bank. But the cheques were dishonoured due to insufficient fund. Thereafter they sent the dishonoured cheques to the presenting Bank i.e. S.B.I. Dalhousie Branch with memorandums. Those were two memorandums containing the signatures of Mr. P. K. Biswas the then office of his bank. PW-2 knew his signatures. The memorandums are marked (Ext. -3) and (Ext. – 3/1). PW-2 was not the maker of those two memos. Those were not prepared in his presence. Mr. P. K. Biswas not the Accountant of their Branch of the relevant point of time. There was no seal or rubber stamp under the signatures of the signatory, Mr. P. K. Biswas. PW-2 had no personal knowledge about the incident.

- vi. PW-3 stated that at the time of deposition he was the Branch Manager of Union Bank of India, Salt Lake City Branch. That was the Cheque No. 182539 Dt. 22.7.96 of Rs. 50,000/- C.D. A/C No. 28066 stands in the name of Sourit Sen and Associates Pvt. Ltd. Presenting Bank was S.B.I. Dalhousie Square Branch. That was another cheque No. 17841 Dt/ 30.9.96 of Rs. 1,45,000/- C.D. A/C No. 28066 stands in the name of Sourit Sen and Associates Pvt. Ltd. Presenting Bank was S.B.I. Dalhousie Square Branch. Above two cheques were presented before his bank for encashment. Those were dishonoured on the ground of insufficient fund. Thereafter they sent memorandums to their presenting bank. Those were two memorandums containing the signature of A. Bara, officer of our Branch. PW-2 knew his signatures. Two memorandums were marked (Exbt – 4) and (Exbt.-4/1). He could not say who signed on the cheques without the consulting the papers. PW-2 could not say which account strands in whose particulars names. He had no personal knowledge over the incident.
- vii. DW-1 in his deposition stated that Registrar of companies M.S. Karmakar had authorized him to appear before the Court on strength of summons issued. He had brought form No. 32 dt. 3/11/95 in respect of Mr. Santi Priya Sen, the then director of Messrs. Sourit Sen and Associates (P) Ltd. The true copy form was duly attested by section officer of their co. PW-3 knew his signature & it bore the seal of his office marked Ext. A. At the time of deposition he was posted as senior clerk in Record Section of Registrar of Companies at their office at

Nizam Palace. Form 32 related to resignation of director of a Company that was registered with them. Resignation tendered by S.P. Sen was accepted by him on 3/11/95.

- viii. DW-1 in his cross-examination stated that he had not brought authorization letter of Registrar of Co. and He had not received summons in the case save and except his oral submission. He could not produce any documents to show when his office received Form No. 32 on behalf of S. P. Sen. The filing date of form No. 32 is 15/10/96. He did not know within how many days the director who was resigning had to intimate the Registrar. DW-1 could not say whether there was any provision which allowed a director to resign before filing form No. 32.
- ix. DW-2 in his deposition stated that he came to depose on the case as per instruction of Registrar of companies. He had authorized letter of Registrar of Co. The said letter signed by S.P. charge, the Asst. Registrar of Co. was marked Ext.-B. That was Form No. 32 of his office. That was the prescribed form and bore the signature of Asst. Registrar of Co. Name of the appointment of Santipriya Sen of CG Salt Lake City, Cal – 91. Form 32 was proof of resignation. The name of Co. was M/S Sourit Sen & associates Pvt. Ltd. Santi Priya resigned on 3/11/95 as per the form. From date of resignation the resignation was to be accepted u/S 303(ii) of Co's Act.
- x. DW-2 in his cross-examination stated that on 15/10/96 the said Form 32 was submitted. There were provisions by which resignations which

were already been effected to can be accepted by his company. Usually, thirty days there was given for filing of the form but even after that period on tendering additional fees the form 32 could be accepted. Form columns it could be seen that on 3/11/95 resignation was accepted.

10. The opposite party no. 2 had resigned prior to the date of institution of the complaint and could not be held vicariously liable. The Learned Trial Court after assessment of evidence had reasonably acquitted the opposite party no. 1 and 3.
11. In view of the above discussions, the appeal is dismissed.
12. There is no order as to cost.
13. I record my appreciation for the able assistance rendered by Mr. Santanu Talukdar, Learned Advocate, as *Amicus Curiae* and I also record my appreciation for the able assistance rendered by Mr. Mr. Ramasish Mukherjee, Learned Advocate, as *Amicus Curiae* in disposing of the appeal.
14. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
15. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)