IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRA (SB) 96 of 2022

Amzad Hossain
Vs.
Kishan Bouri & Anr.

For the Appellant	:	Mr. Apurba Kumar Dutta Mrs. Sreemoyee Mukherjee
Heard on	:	30.01.2025
Judgment on	:	11.02.2025

Dr. Ajoy Kumar Mukherjee , J.:

1. The instant appeal has been preferred against the judgment and order dated 27th march, 2018 passed by the court below in criminal appeal no. 03/2016 whereby ld. Court below allowed the criminal appeal and set aside the judgment of conviction passed against the opposite party/accused dated 29th December, 2015 in a proceeding under section 138 of the Negotiable Instrument Act, 1881 (in short N.I. Act.)

2. The brief background of the present case is that the accused persons firm Kishan Construction used to deal with civil contractor and general order supplier. On 10th February, 2014 the complainant/appellant entered into an agreement with the aforesaid firm and in terms of agreement the opposite party firm directed the petitioner to do the work of 'snowcem painting' at Raghunathpur Thermal Power plant DPSCL Project and the rate was fixed at Rs. 41/- per square meter and it was agreed that the payment will be made within 30 days after submission of bill. Thereafter, the complainant/appellant completed the said work and he submitted a final bill of Rs. 2,67,444/- on 2nd May, 2014 to the accused/respondent no.1 with a request to make the payment at the earliest. The opposite party no.1 failed to pay the bill amount to the petitioner. However, accused/respondent no.1 accepted the bill amount and assured that the payment will be made. Thereafter the accused/opposite party no.1, after repeated request received part payment in cash for an amount of Rs. 71,444/- in two installments and also received a cheque dated 31.03.2015 to the tune of Rs. 1,96,000/- drawn on SBI Raghunathpur Branch. It is further submitted that the said cheque was signed by the respondent Kishan Bouri as well as one Ganesh Mahato and the petitioner duly deposited the cheque to his banker for encashment, but the said cheque was dishonored on the ground of "insufficient fund". After getting the said information from his banker on 10.04.2014, the complainant sent a demand notice to the respondent for making payment of cheque amount, but inspite of receipt of legal notice, the respondent herein failed and neglected to pay the amount and finding no other alternative the complainant/appellant initiated proceeding under section 138 of the N.I. Act.

3. Learned Trial court by its judgment dated 29.12.2015 came to a finding that the presumption is in favour of complainant, which has not been rebutted by the accused person and as such the respondent/accused was convicted under section 138 of N.I. Act. The relevant portion of the finding of the Trial court may be reproduced below:-

> *"on thing is very clear from the evidence on record that the accused asked the complainant to do the work of painting at Raghgunathpur Thermal Power plant, DPSCL project. It is also admitted that he did not make payment to the complainant as the complainant did not complete the work to the satisfaction of DPSCL. But no evidence was brought by the accused to show that the work was to be done to the satisfaction of DPSCL. The agreement marked as Exhibit-A also does not have such stipulation that it has to be approved by DPSCL. Not only that the agreement is between the complainant and another person and not with the accused. Therefore, it is absurd on the part of the accused to say that the payment was not made to the complainant as his work was not satisfactory in the estimation of DPSCL. This point is imaginary one. It has no place in the realm of law. The accused said that he had a joint business but brought no evidence to that effect. He also said that he had no knowledge of the cheque issued to the complainant and he only came to know about the same two months after 02.01.2015. Even thereafter he did not lodge any complaint anywhere as to how the complainant got the cheque signed by him till the date of his deposition in the court as DW1. All these imaginary points have been raised only at this stage. Had this been the case, the accused would have given the reply to the complainant at the initial stage.*
>
> *Thus, if the entire evidence on record is tested on the touchstone of law as adumbrated above, it appears to be pellucid that the accused person has not been able to rebut the presumptive evidence against her in sync with the law as laid down in Rangappa V Mohan (supra) by the Hon'ble Supreme Court. Thus, in view of the analysis of facts, evidence and law made above, it stands to reason that the accused person has failed to rebut the presumption and is therefore liable to be convicted.*

4. Being aggrieved by the said judgment of conviction passed by the Trial court, the accused/respondent preferred appeal before the court below and the court below set aside the judgment of conviction mainly on the ground that the accused during his examination in chief stated unequivocally that the work done by the complainant was below quality and was not approved by the engineer of DPSCL and such statement has also been corroborated by DW2 and the complainant was asked to do the work again to satisfy the condition mentioned in exhibit-A (i.e. agreement of work), but the complainant failed to carry out the same and furthermore, court below held that the dispute is civil in nature and the complainant skipped to discharge his liability that the impugned cheque was issued in connection with any legally enforceable debt.

5. Being aggrieved by that judgment passed by the court below the appellant/complainant argued that though the opposite party accused had taken the specific plea that the amount involved in the cheque is not legally enforceable debt since under the terms and conditions mentioned in the deed of agreement marked as exhibit-A, the payment was subject to approval of the work by the engineer DPSCL and the engineer DPSCL did not approve the work, but the respondent herein could not produce any document that the work done by the appellant was not approved by the engineer. It has been further argued that the agreement marked exhibit-A was not made in between the appellant and the respondent but said agreement was entered into in between appellant and one Tapas Kumar Mondal, and as such the conditions imposed therein is not binding in nature, so far as present accused is concerned. He further argued that though the impugned cheque was signed by the present respondent and one Ganesh Mahato from their joint bank Account, but issuance of cheque by joint signatories cannot be a proof of a joint business, in absence of other relevant documents. Ld. court below has wrongly came to a finding that there was an agreement between the appellant and respondent and as appellant failed to fulfill the terms of the agreement, so there was no legally enforceable debt. Such observation is erroneous observation in view of the fact that there was no agreement in between appellant and the respondent.

6. He further contended that though DW1 in his deposition stated that the cheque was given to the complainant towards security for completing the work but the respondent herein never taken such plea earlier and during examination under section 313 of Cr.P.C., for the first time he disclosed that his partner Ganesh Mahato gave the cheque to the complainant towards security for completing the work. Such statement was not substantiated during evidence adduced by the defence witnesses. He contended that the cheque was issued for legally recoverable debt and liability. He also argued, when the appellate court believed exhibit-A, he ought to have believed the entire contents of exhibit A, where there is no mention that the cheque was issued for security purpose. The appellate Court has wrongly came to the conclusion that the cheque was given which infact a post dated cheque as an advance payment but DW1 in his examination under section 313 of the Cr.P.C., and in examination in chief stated that the cheque was given as security for completing the work. He therefore, submitted that the order impugned is not sustainable in the eye of law and liable to be set aside.

Decision

7. It appears that the complainant appellant/did not disclose about the existence of exhibit A in his complaint, which is an agreement in respect of his work. However, when the agreement was shown to him during cross examination, he admitted his signature therein and the agreement has been marked as exhibit A. Now on perusal of the said agreement, it appears that the said agreement for the instant work was executed in between the complainant and Kishan Construction, represented by one Tapas Kumar

Mondal, who has also deposed in the case as DW2. In fact the agreement marked exhibit A was admittedly signed by the complainant/appellant in one part and said DW2 on behalf of the Kishan construction for other part. It also appears from the impugned cheque that the cheque was signed by the present respondent Kishan Bouri with seal as partner, Kishan Construction and Ganesh Mahato as partner of Kishan Construction. The complainant /appellant as PW1 also admitted that he applied for a work to Kishan Construction and an agreement was reached in between him and the Kishan Construction and the said agreement is marked as exhibit-A. The respondent as DW1 stated during cross examination that there is written partnership deed in respect of their partnership business which was not denied by the complainant by putting any suggestion. The said respondent/DW1 also specifically denied that it is not a fact that he gave the assignment to the complainant or handed over impugned cheque after completion of the said assignment.

8. During cross examination of aforesaid Tapas Kumar Mondal who signed the agreement on behalf of the Kishan Construction has specifically stated while answering question put to him by the complainant during cross examination that he does not know from which date Ganesh and Kishan started working in partnership. During the entire evidence no suggestion was put to the witnesses that there does not exist any partnership namely Kishan construction of which petitioner herein is a partner or there exists no such partnership deed.

9. In view of above facts and circumstances, it clearly reveals that the offence, if any committed in the present context has been committed by the partnership firm "Kishan Construction". Now Kishan Construction or the other partner of Kishan Construction namely Ganesh has not been made accused in the instant proceeding.

10. Section 141 of the N.I. Act runs as follows:-

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 further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.*
>
> *(2)Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*
>
> *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."*

11. In the present case though the respondent has taken a specific plea that the other partner of Kishan Construction namely Ganesh had handed over the cheque to the complainant but in the complaint neither Ganesh has been made an accused nor any specific role has been attributed against the present respondent Kishan Bouri.

12. Accordingly it is apparent that the company who have committed offence under section 138 of N.I. Act, if any, has not been made a party and the respondent/partner only has been made as an accused. *In* ***Sarad***

Kumar Sanghi Vs. Sangita Raney reported in **(2015) 12 SCC 781** the supreme Court has specifically held relying upon ***Aneeta Hada Vs. Godfather Travels and Tours (p) Ltd,*** reported in **(2012) 5 SCC 661** that, when a company has not been arraigned as a party, no proceeding can be initiated against it, even where vicarious liability is fastened under certain statute.

13. In ***Aneeta Hada's Case (Supra)*** the Court held that the words ' as well as the company' appearing in the section make it absolutely un mistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof.

14. In para 59 of the judgment court held:-

> ***59.*** *In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh [(1970) 3 SCC 491 : 1971 SCC (Cri) 97] which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal [(1984) 4 SCC 352 : 1984 SCC (Cri) 620] does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada [(2000) 1 SCC 1 : 2001 SCC (Cri) 174] is overruled with the qualifier as stated in para 51. The decision in Modi Distillery [(1987) 3 SCC 684 : 1987 SCC (Cri) 632] has to be treated to be restricted to its own facts as has been explained by us hereinabove.*

15. In ***Sunil Bharti Mittal Vs. CBI*** reported in **(2015) 4 SCC 609** it was held as follows:-

> ***42.*** *No doubt, a corporate entity is an artificial person which acts through its officers, Directors, Managing Director, Chairman, etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.*
> ***43.*** *Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made an accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory*

> *regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.*
> ***44.*** *When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada [Aneeta Hada v. Godfather Travels & Tours (P) Ltd., (2012) 5 SCC 661 : (2012) 3 SCC (Civ) 350 : (2012) 3 SCC (Cri) 241] , the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction, namely, where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.*

16. Needles to say that in terms of explanation to section 141, "company" means any body corporate and includes a firm or other association of individuals and "director" in relation to a firm means a partner of a firm and as such the present case clearly attracts the rigour of section 141 of the N.I. Act

17. The question of remanding the case back to the trial court giving opportunity to the complainant to amend the complaint and to continue the proceeding after adding the partnership firm as an accused, also does not arise in the present context as the defect made in the complaint is an incurable defect, in view of the fact that no notice under section 138 of N.I. Act was served upon the partnership firm within the statutory period of 30 days.

18. Considering all the above-mentioned circumstances , I find that the ultimate finding of the court below in acquitting the respondent/accused person does not call for interference by this Court.

19. In such view of the matter **CRA (SB) 96 of 2022** stands dismissed.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Dr. AJOY KUMAR MUKHERJEE, J.)