

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

PRESENT:

THE HON'BLE DR.JUSTICE AJOY KUMAR MUKHERJEE

CRA (SB) 91 of 2024

**Sidhant Udyog Private Limited
Vs.
Modern Infra Projects India Limited & Anr.**

For the Appellant : Mr. Sudipto Moitra, Sr. Adv.
Mr. Ratanlal Joshi
Mr. Vijay Verma
Mr. Dwiapayan Biswas

For the Respondent No.2 : Mr. Anindya Halder
Mr. Sumanta Chakraborty

For the State : Mr. Bidyut Kumar Roy

Heard on : 07.05.2025

Judgment on : 10.06.2025

Dr. Ajoy Kumar Mukherjee, J.

1. This appeal has been preferred against the judgment and order of acquittal dated 22.02.2024 passed by learned Metropolitan Magistrate 14th Court, Calcutta in case no. C/9514/2014. By the impugned judgment the court below acquitted the accused in a proceeding under section 138 read with section 141 of Negotiable Instrument Act (in short N.I. Act).

2. The appellant herein lodged aforesaid complaint case stating that accused no.1 is the company and accused no.2 is the managing director, accused no.3, 4 are the directors of the said company. It is further stated that accused no.3 and 4 being the director of the said accused No.1/ Company are in charge and responsible for looking after the day to day business affairs of the accused no.1/limited company at the relevant time, when the offence of this case under section 138 of N.I. Act was committed. The Respondent herein is the aforesaid accused no.4 who has been acquitted by the impugned judgement.

3. The case of the complainant is that on or about January 5, 2012 the accused persons namely accused no. 2 to 4 approached the complainant for an accommodation loan of Rs. 50,00,000/- for a very short period. The complainant being a business firm trusted the accused persons and their company as a reputed company of solvent persons and thereby agreed to give the said loan amount at its office by issuing a cheque bearing no. 490277 dated January 5th, 2012 for Rs. 50,00,000/- and the accused persons accepted the said amount by encashing the cheque and promise to return the said amount at the earliest. Such receipt of amount by the accused persons including the respondent is reflected and confirmed in the statement of accounts prepared and furnished by the accused persons for the period April 1, 2011 to 31st March 2012 and from April 1, 2012 to March 31st, 2013.

4. Complainant's further case is that in discharge of its legal debts and liabilities arising out of the business loan and for repayment of the same at an agreed terms and conditions, the accused no.2 Babulal Jhawar, since

deceased, issued one cheque in favour of the complainant being cheque no. 473035 dated 28.10.2013 amounting to Rs. 50,00,000/-. The complainant duly presented the said cheque for encashment through its banker within its validity periods on 30.12.2013 but it was returned to the complainant being dishonoured, vide return memo dated 31.12.2013 with remarks 'account blocked'. Thereafter the complainant through its advocate sent a demand notice on 16.01.2014 upon the accused persons under registered post demanding the payment of amount mentioned in the abovementioned dishonoured cheque, within 15 days from the date of receipt of said notice, but insptie of service of the abovementioned notice to the accused persons, they have failed and neglected to make the payment and for which the instant complaint case was initiated against all the accused persons for committing offence punishable under section 138 read with section 141 of the N.I. Act.

5. Learned Counsel for the appellant submitted that accused no. 2 Babulal Jhawar in his petition dated 27.02.2020 stated that the accused no.1/ company went into liquidation on 29.07.2013 and the cheque was issued thereafter on 28.10.2013, but the said event of liquidation was never communicated to the complainant till 27.02.2020. Suppressing the same, the cheque was issued in favour of the complainant by the accused persons though it was well within their knowledge that the company had gone on liquidation on 29th July, 2013 and they have done so with intent to deceive the complainant. It is further stated that the accused no. 2,3 and 5 died in the meantime but the accused no. 4/appellant herein, had also not communicated their death information before the court till 27.02.2021.

6. In this context referring the judgment of ***Aneeta Hada Vs. M/S. God father Travels and Tour Pvt. Ltd.*** reported in **AIR 2012 SC 2795** appellants argued that all the accused persons, including the present respondent are responsible for payment of the cheque amount to be paid to the drawee. Referring the judgment of Civil Appeal no. 2888 of 2020 in ***Tourism Finance Corporation Indian ltd Vs. Rainbow papers Ltd. and others*** learned counsel for the Appellant contended that a three Judges Bench of the Apex Court held even in case of bankruptcy of the company, punishment under section 138 of N.I. Act is applicable and the shield and protection under the Code is not available to the directors of the insolvent firm, who had been involved in the day to day business functioning of the said insolvent firm.

7. Appellant's further case is that the present respondent namely Amit Jhawar, who has been arrayed as accused no.4 in the complaint case, was made director of accused no.1 in 2005 and remained so till 2014 and was looking after day to day business affairs of the said company.

8. Learned Trial Court while recorded the judgment of acquittal held, when the company was winding up in 2013 it had resulted discharge of all the employee and the officers from the service of the company including Board of Directors and control of such a company is taken over by the official liquidator and the official liquidator has to disburse the payment in accordance with the Company Act. Court below further held that in the instant case, the account was blocked by the official liquidator which was the reason for dishonour of cheque. Accordingly after the winding up order and taking over affairs of the company by the official liquidator, erstwhile

directors seized to be the directors as on the date of the presentation of the cheque and they are not in charge of day to day affairs of the company. The creditors therefore, are to be paid under the provisions of Company Act and the liability on the ex-directors cannot be fixed.

9. The court below accordingly decided the said issue in favour of accused holding, when the company went into liquidation and the cheque is presented thereafter, it cannot be said that the company had committed the offence because of legal bar and once dishonour of the cheque by the bank and failure to make payment of amount by the company is beyond its control the ex-directors cannot be held liable and this is also because in a proceeding under section 138 of N.I Act, the cause of action does not arise on the date on which the cheque was handed over but when the payment has not been made within 15 days of receipt of the demand notice. Since accused no.4 was not in charge of the day to day affairs and conduct of the business of the company on the abovementioned date, and as the control of the company was shifted to official liquidator, the said accused no.4/appellant herein cannot have any vicarious liability for committing the alleged offence.

10. While discussing the other part of the judgment regarding ingredients to constitute offence as required under section 138 (b) of N.I. Act, the trial court held that exhibited documents go to show that the impugned cheque is marked as exhibit 3/2 and the cheque return memo dated 31.12.2013 is marked exhibit 3 series. The complaint stated that he sent lawyers notice on 16.01.2014 demanding the cheque amount under speed post asking the accused persons to pay the cheque amount within 15 days from the date of

receipt of notice. The accused persons including the respondent herein /accused no.4 denied the receiving of demand notice. Going through the exhibited documents, no demand notice dated 16.01.2014 was found to have been proved in evidence by the complainant. Instead one letter to the accused company dated 13.08.2015 with postal receipt and track report has been marked as exhibit 5 and the said notice is the notice under section 434 of the Company Act and therefore the court below held that the requirement of sending demand notice under section 138 of N.I. Act has not been complied in the present case. Accordingly he acquitted the accused no.4/ respondent herein. Be it specifically noted that the case has already been filed against the other accused persons.

11. Being aggrieved by the impugned judgment and order of acquittal learned Counsel for the complainant/appellant Mr. Maitra submits that the order of acquittal is wholly unwarranted and is product of non-application of judicial mind on the part of the learned trial Judge and as such the same is liable to be set aside. The evidence on record does not justify the order of acquittal and learned Magistrate proceeded on wrong premises in as much as and on the ground that impugned cheque was issued by the director of the accused/company, when the said company was facing liquidation proceeding under the Company Act. The court below failed to appreciate that the initiation of the liquidation proceeding will not absolve the company and its directors from the offence which has been committed under section 138 read with section 141 of the N.I. Act. The court below also miserably failed to consider the fact that the accused persons could not adduce any

cogent and unimpeachable evidence to rebut the presumption of the unenforceability of the loan, during the course of trial.

12. Therefore, learned Magistrate totally misdirected himself to appreciate basic ingredients to constitute offence punishable under section 138 read with section 141 of the N.I. Act. In fact pendency of the liquidation proceeding cannot be the impediment to prosecute the defaulting accused for commission of the offence punishable under section 138/141 of the N.I. Act. The complainant has proved it's case beyond doubts and as such the court below ought to have convicted the respondent and the other accused persons.

Decision

13. At the very outset it is to be mentioned that the impugned cheque which is marked exhibit 3/1 was not signed by the present respondent/accused no. 4 Amit Jhawar. It was signed by one accused No. 2 Babulal Jhawar who died during pendency of the proceeding. The present respondent Amit Jhawar adduced evidence as DW-1 and he had clearly stated in his evidence that the accused no.1 company had gone under liquidation vide order dated 29.07.2013 passed by the Hon'ble High Court Calcutta and he has no knowledge regarding the issuing of cheque in question. He has also categorially stated in his examination in chief that till 29.07.2013 he was one of the directors of the company. Exhibit 3/1 disclosed that the impugned cheque is dated 28.10.2013. The aforesaid contention of the appellant in examination-in-chief that the company had gone into liquidation on 29.07.2013 and that he ceased to be the director of

the accused no.1 company on and from 30.07.2013, has not been denied or disputed during cross-examination.

14. As indicated above in the petition of complaint, the present appellant has been impleaded as accused no.4 and in paragraph 4 it has only been averred that accused no.4 is the director of accused no.1/company and are/were also the persons in charge of and responsible for and looking after the day to day affairs of the said company at the relevant time when the offence alleged in this case was committed.

15. I have already quoted that present appellant/accused no.4 has made an unchallenged testimony before the court that the company had gone into liquidation vide High Court's order dated 29.07.2013 and he ceased to be a director from the said company on and from said date. Accordingly the complainant prima facie was under an obligation to substantiate in his evidence the aforesaid statements made in the complaint that the present appellant/accused no.4 was the person in charge of and responsible for and looking after the day to day business affairs of the said accused no.1/company at the relevant time, when the offence was committed. On perusal of evidence of PW-1 and PW-2 it does not appear that the complainant/appellant has substantiated the said claim that at the time of commission of the offence the appellant herein was anyway responsible for the day to day business of the company or he was anyway responsible for the issuance of the impugned cheque. On the contrary PW-1 clearly admitted in his cross examination that he knows that accused no. 1/ company had gone into liquidation vide Hon'ble High Court's order dated 29.07.2013 in connection with the CP No. 63 of 2013. PW-2 also admitted

that it is a fact that vide order dated 29.07.2013 passed by the Hon'ble High Court, the accused no.1/company went into liquidation though it was not within his knowledge that the official liquidator, appointed by the Hon'ble High Court took control or charge of all assets of the accused no.1/company.

16. In view of aforesaid factual position as admitted by both PW1 and PW2 that the accused/company had gone into liquidation since 29.07.2013 and when it is the specific case of the accused persons, including the respondent herein that he ceased to be a director of the company from 29.07.2013 and when PW-2 has not denied that from 29.07.2013, the official liquidator appointed by the Hon'ble High Court took control or charge of all assets of the accused no.1, the burden was heavily upon the complainant to plead and prove as to what role specifically played by the respondent herein in executing the impugned cheque dated 28.10.2013.

17. The words '*every person who at the time of the offence was committed*' occurring in section 141 of the N.I. Act is significant which indicates that criminal liability of a director must be determined on the date, the offence is alleged to have been committed. In the present case when the accused company had admittedly gone into liquidation on 29.07.2013 and it is the specific case of the respondent that he ceased to be a director on and from that date, he cannot be made accountable and fastened with liability for issuance of any cheque, issued after liquidation unless his specific role has been pleaded and proved. Neither in the complaint nor in the evidence the role of the respondent herein in issuance of the impugned cheque has been canvassed or proved.

18. Needless to say that vicarious liability would be attracted only when the ingredients of section 141(1) of the N.I. Act are satisfied. Merely because the respondent herein was a director prior to 29.07.2013, he would not become in charge of the conduct of the business of the accused company or the person responsible to the company for the conduct of the business of the company, which had admittedly gone into liquidation on 29.07.2013 and when the impugned cheque was issued on 28.10.2013. Only such 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 alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

19. It is true that in view of **SP Mani's Case** reported in **(2023) 10 SCC 685** the primary responsibility of the complainant is to make specific averment in the complaint so as to make the accused vicariously liable and the complainant at that stage is supposed to know only generally as to who in charge of the affairs of the company or firm but in the present case said ratio is not applicable in view of the fact that the complainant was supposed to know that the accused company had gone into liquidation long before the filing of the complaint and secondly even though it is not averred in the complaint as to how the complainant is responsible but still the complainant could have substantiate the role of the appellant in issuing the cheque during evidence adduced by PW-1 and 2.

20. Needless to say that like the present case, there may be number of directors in a company but in the absence of evidence that the particular director is vicariously liable for commission of the offence of the company,

both in charge of and was responsible for the conduction of the business of the company, the ingredients of section 141 of the N.I. Act cannot be said to be satisfied. When the company had gone into liquidation on 29.07.2013 and the official liquidator appointed by the High Court had taken over charge of the asset of the company, a bald statement that the respondent herein being accused no.4 was one of the directors and were in charge of and responsible to the company for the conduct of its business, cannot held him liable unless it has been proved as to how he was in charge and responsible for the day to day business of company, when the offence was allegedly committed. This is also because when the present Respondent was examined under section 313 of Cr.P.C. he has made specific statement that the account of company was “blocked” by order of Hon’ble High Court at Calcutta by Hon’ble Judge, Justice Harish Tandon vide order dated 29th July, 2013 passed in case no. C.P 63 of 2013 in the original side jurisdiction in a proceeding for liquidation of accused company.

21. The other aspect of the matter is that the learned court below had noticed that no demand notice or proof of service of demand notice have been exhibited during trial. Present Respondent has stated, while he was examined under section 313 Cr.P.C that no ntice was served upon him. Clause (b) of the proviso to section 138 cast on the payee or the holder in due course of the cheque, as the case may be, a duty to make a demand for payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. Therefore service of demand notice is an essential ingredient to constitute offence

under section 138 of the N.I Act. I have gone through the trial court record. In this case it is not known whether any demand notice was at all sent to the Respondent nor it is known, whether any demand notice was at all delivered to the accused, in the absence of any reasonable proof of service of demand notice. Needless to say that in a criminal trial, benefit of every reasonable doubt is to be given to the accused and complainant is to prove all the ingredients of the offence laid down in section 138(b) beyond doubt. This legal aspect also cannot be ignored in any prosecution.

22. It is trite law in view of judgement of ***Mallappa & others Vs. State of Karnataka***, reported in **(2024) 3 SCC 544** that there always remains a presumption in favour of the accused unless proved guilty and this presumption continues at all stages of the trial and finally culminates into a fact, when the case ends in acquittal and the presumption of innocence gets concretized when the case ends in acquittal and therefore, when the accused is not found guilty by the trial court, the presumption gets strengthened and a higher threshold is expected to rebut the same in appeal, which the appellant/complainant has miserably failed to do in the present context.

23. The court below is therefore, justified in holding that the ingredients to constitute offence under section 138 read with section 141 of N.I Act. against present respondent remains not proved and therefore the respondent/accused was rightly acquitted. There is no force in this appeal and the same is liable to be dismissed.

24. CRR (SB) 91 of 2024 thus stands dismissed. Send the trial court record at once to the court, wherefrom it was called for.

25. 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.)