IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 520 of 2001

Anil Kr. Kanodia
-Vs-
M/S. Bureau Consultants Pvt. Ltd.

For the Appellants	: Mr. Debabrata Roy Mr. Sajal Kanti Bhattacharyya Mr. R. K. Khandelwal Mr. Vivek Paswan
For the Opposite Party Nos.2, 4 & 5	: Mr. Apalak Basu Mr. Abhishek Jain
For the Opposite Party Nos. 3	: Mr. Nazir Ahmed
Judgment on	: 05.05.2026

AnanyaBandyopadhyay, J.:-

1. This appeal is directed against an order of acquittal and judgment dated 18.08.2001 passed by the Learned Metropolitan Magistrate, 3rd Court, Calcutta in Case No.C-930/1996, acquitted the appellant under Sections 138/141 of the Negotiable Instrument Act.

2. The case precisely stated that the opposite party no.1 was a private limited company and the opposite parties nos.2 to 5 were the Directors and/or Principal Officers and/or Persons-in-Charge and responsible for the acts and deeds of the said company. The opposite party no.3 issued two cheques bearing no.078143 dated March 31, 1996 of Rs.15,00,000/- and cheque bearing no.078140 dated March 31, 1996 of Rs.1,19,835.62/- drawn on

U.C.O Bank, New Market Branch, Calcutta for and on behalf of opposite party no.1 to discharge the liabilities of the said company respectively. The said cheques were duly deposited with Bharat Overseas Bank Ltd., Dalhousie Square Branch. The said cheques were eventually returned with a remark 'Insufficient Fund" to the petitioner on April 3, 1996. On or about April 15, 1996, notice under Sections 138/141 of the Negotiable Instrument Act was issued in the names of the opposite parties at their correct address with acknowledgement due by speed-post but returned with a postal remark "Out of Calcutta", to the sender dated April 16, 1996. The opposite parties deliberately avoided to receive the said notice. Moreover, the opposite party no.1 was a private limited company and the said company could not be "Out of Calcutta" and accordingly, the notice was duly served upon the opposite parties. Inspite of issuance of such notice, the opposite parties failed to pay the said cheque amount to the petitioner. Hence, the opposite parties had committed an offence punishable under Sections 138/141 of the Negotiable Instrument Act.

3. In order to prove its case, the prosecution examined as many as 3 witnesses and examined certain documents while the defence examined one witness.

4. The Learned Advocate for the appellant submitted as follows:-

   i. *"The complainant case that the accused no. 1 is private limited company and accused no. 2 to 5 are the Directors of the Company and conducting the day to day business of the company where the accused company for discharging its liability issued two cheques to the complainant appellant herein being cheque no. 078143 for*

Rs.15,00000/- and another cheque no. 078140 for Rs.1,19,835.62. both the cheques were issued on 31.03.1996 signed by accused no. 3, drawn on U.C.O Bank, New Market Branch, Calcutta within the jurisdiction of the Ld. Court.

ii. *During valid period of the cheque the complainant presented the cheque on 03.04.1996 in its Banker at Bharat Overseas Bank Ltd. Dalhousie Branch Calcutta 700001 but the said cheques were dishonoured with the remarks "INSUFFICIENT OF FUNDS" as per intimation from the Bank received by the complainant on 03.04.1996.*

iii. *As per provision of law the complainant issued demand notice to the accused persons through "speed post" with A/D on 15.04.1996 within the limitation and the said notice returned unserved with the remark "Out of Calcutta" hence returned to the sender on 16.04.1996.*

iv. *The complainant finding no alternative filed one complainant case U/s 138 read with Section 141, of the Negotiable Instrument Act. 1988 before the Learned Chief Judicial Magistrate, Purba Medinipur at Tamluk by complying all the provision U/s 200 of the Code of Criminal Procedure 1973. And a Case being complaint case no. C-930 of 1996 was started on May 24,1996.The Learned Chief Metropolitan Magistrate, Kolkata after taking cognizance transferred the same to the court of Learned Metropolitan Magistrate, Third Court.*

v. *The complainant was examined on solemn affirmation on 27.05.1996 and summons were issued under section 204 of the code of Criminal Procedure and were served upon the opposite parties/accused*

/respondents/The accused upon receipt of the summons entered appearance on 31.01.1997 before the Learned Magistrate, Third Court, Calcutta and filed application under Section 205 of the code of Criminal Procedure.

vi. *Thereafter plea was recorded and explained to the accused and they have pleaded not guilty and claimed to be tried. The Trial commenced under Section 138 read with Section 141 of the Negotiable Instruments Act against the accused.*

vii. *In order to prove the case against the accused persons, the complainant has examined three witnesses whereas defence examined one witness and were also examined under Section 313 of the code of Criminal Procedure.*

viii. *On 18.08.2001 the Learned Metropolitan Magistrate, Third Court, Calcutta by His Judgement and order passed in Case No.C-930/96 was pleased to acquit the accused as they were found not guilty under Sections 138 and 141 of the Negotiable Instruments Act and were discharged from bail bonds.*

ix. *The Learned Trial Judge in His Judgement and order categorically observed that the accused persons have appeared in the case after service of summon from court in the address of complainant. And it would be evident from order dated 31st January 1997 passed by the Learned Trial Court that all the accused person entired appearance in the matter before the Leaned Trial Court. It is settled law that any drawer of cheque who claims that he did not receive the notice sent by* *post, can within 15 days of the receipt of summon from the court in respect of the complaint under Section 138 of N.I. Act, make payment of cheque amount and submit to the court that he has made payment within 15 days of receiving of summon and therefore the complainant is liable to be rejected .A person who does not pay within 15 days of the receipt of the summon from the court along with the copy as the complaint u/s 138 of N.I. Act cannot obviously contend that there was no proper service of notice as required u/s 138 of the N.I Act, by ignoring statutory presumption to the contrary u/s 27 of General Clause Act and Section 114 of Evidence Act.*

x. *Reliance can be placed in "CC.Alavi Haji-vs-Palapetty Muhammad & Anr" reported in 2007 volume -VI, Supreme Court Case, Page 555 particularly paragraph 17 and 18.*

xi. *In the instant case notice were sent in the address mentioned in the complaint on 15.04.1996 but those were returned with the postal remarks' out of Calcutta hence returned to sender'. The summon issued by the court in the address mention in the complaint were duly received by the accused person and they entered appearance to contest the case and obtained order under Section 205 of the code of Criminal Procedure.*

xii. *The Ld. Trial Judge erred in holding that the demand notice as per requirement of law has not been served upon the accused person before filing of the case in court as such the case is not legally* *maintainable. The conclusion arrived at by the Learned Trial Court is perverse and contrary to the law.*

xiii. *The Ld. Trial Judge in the judgement categorically held that "the accused company and the accused no.3 are liable for disputed agreement and cheque. But as the complaint has not been proved and as demand notice has not been served upon them before filing of the case, they cannot be convicted in this case"*

xiv. *The appellant in the examination in chief categorically deposed as follows:*

"I issued demand notice dated 15.04.1996 to the accused persons through my Advocate by Sped Post with A/D. Those notices were properly addressed and properly stamped".

The appellant was not cross examined in His regard.

Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post /speed post. The Hon'ble Supreme Court has already held that when a notice is sent by registered post/speed post and is retuned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station" due service has to be presumed. Reliance can be place on vide Jagadish Singh-vs-Natthu Singh reported in (1992)1 SCC647.

xv. *It is settled law that the complaint is a judicial document and upon which cognigence has been taken and the complainant was examine u/s 200 on solemnly affirmation so the same is not required to be* *exhibited And it is also settled by judgement law that non-service of notice before filing of the complaint will not make the complaint infractus when the accused person appeared before the court after service of summon from the court in the address mentioned ion the complaint. Moreover, Section 27 by Registered of the General Clauses Act gives rise to a presumption that post speed service of notice has been effected when it is sent to the correct address post even the same returned unserved with postal remark out of Calcutta/addressee not in station.*

The directors of the company as the case may be who have the special knowledge about their role they had played in the company is required to show before the court that at the relevant point of time they had not in charge of the affairs of the company. It is a burden on the directors to substitute their claim by adducing evidence failing which presumption will go against them and they should be held guilty.

In the instant case the accused's failed and/or neglected to adduce any evidence to controvert the contention of the complaint as such are not entitled to get order of acquittal. Reliance can be placed on a Supreme Court judgement being Criminal appeal number 1586 of 2022 (S.P Mani and Mohan Dairy-vs-Dr. Snehalatha Elangovan /AIR 2022 SC 4883, 2022(9) SCR 634.

xvi. *It was well settled principles of law that when the company is liable for any offence in that event its directors and/or persons-in-charges of the* *said company are also responsible and liable for the said offences committed by the said company.*

xvii. *The entire findings of the Learned Magistrate have vitiated the true meaning of the petition of complaint as well as evidence on record.*

xviii. *It is manifest that to constitute an offence under Section 138 of the Act, the following ingredients are required to be fulfilled:*

a) *a person must have drawn a cheque on an account6 maintained by him in a bank for payment of a certain amount of money to another person from out of that account;*

b) *the cheque should have bene issued for the discharge, in whole or in part, of any debt or other liability;*

c) *that cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier;*

d) *that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;*

e) *the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;*

f) *the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence under Section 138 of the Act.*

xix. *Non exhibition of complaint cannot or should not be a ground for granting order of acquittal in favour of the accused when the complaint itself is part of record and complainant was examined on S/A which also formed part of the Record.*

It is needless to mention here that in a G.R Case. First Information Report is not substantive evidence and to judge the credibility of the informant, during his examination before the Information Report is required to be exhibited but since in a complaint case Magistrate take cognizance on the complaint and transpired into evidence for it exhibition is not necessary as the same is part of record.

xx. *The answering respondents formulated three points in order to justify the order of acquittal but while making submission be added one more ground in the name of part payment but during trial no such plea was taken by the defence that does not form part of the argument during trial and there is no reflection in the judgement itself, that such a ground was taken by the accused during trial. In order to justify the argument the answering respondents referred page-13 at the line*

No.16 which runs as follows "I have filed notice (SIC)". In written argument answering respondents relied on a division of 2023 (1) SCC 578, which came long after the subject matter of transaction and decision of the Learned Trial Court. Moreover during 313 Cr.P.C., accused Jayanta Chakraborty in question No.7 at page 22 which runs as follows "Q(7) Did you given any money to the petitioner except the two cheque?" wherein the answer was "No". Therefore the written argument which refers part negated payment was categorically neglected by the accused during trial and that ground is not available at his stage.

Swapan Choudhury who represented the company namely "M/s director Bureau of Business Consultant Pvt. Ltd." and also other director Jitendra Agarwal who faced the trial categorically answered during Section 313 Cr.P.C., against Q7 "appearing in page 20 and 18 respectively". (I have not given any money and "No" respectively).

In view of Section 106 of the Evidence Act the plea of part payment now raised by the accused cannot be taken into consideration to justify the order of acquittal when acquittal was granted only on the ground of failure on the part of appellant to serve noticed and for not proving the complaint.

xxi. *The judgement and order passed by the Learned Magistrate is otherwise bad in law and the same is liable to set aside and the opposite parties/respondents should be convicted and be adequately* *punished and the cheque amount along with interest to be paid to the appellant."*

5. The Learned Advocate for the respondent no.2, 4 and 5 submitted as follows:-

   i. *"Prosecution Case:- The prosecution case is that the complainant allegedly advanced loan of Rs.15,00,000/- to accused at 48% interest. For repayment 2 cheques were issued but the same were dishonoured for insufficiency of funds. Subsequently notices were issued but the same were not delivered.*

   Details of the cheques were allegedly issued -

   a) Rs.15 lakhs dated 31.03.1996.

   b) Rs.1,19,835.62/- dated 31.03.1996.

   Accused/respondent no.1 is Private Limited Company.

   Accused/respondent no.2-5 are Directors/Principal Officers.

   Accused/respondent no.3 was the signatory of the cheques.

   Grounds on which the learned Magistrate has given acquittal -

   a) Accused no.2 (Director), 4, 5 acquitted as their involvement in the affairs of the company (accused no.1) not proved.

   b) Complaint not exhibited.

   c) Demand notice was not served address mentioned in the agreement is different from that of complaint.

   "Out of Calcutta" cannot lead to presumption of service.

ii. *Non exhibition of the complaint:- In order to attract penal liability under Section 138 of the Negotiable Instruments Act it is imperative for the prosecution to prove that -*

a) A cheque was given in discharge of a legally enforceable debt.

b) The cheque was presented within the validity period.

c) The cheque was subsequently dishonoured.

d) A demand notice was sent to the accused within 15 days of the return memo.

e) Complaint was filed within 30 days thereof.

The above legal position is too well settled and in a case of this nature when the same is guided by a special law, it was beyond the capacity of the Learned Magistrate to take cognizance of the offence unless he was satisfied of the pre requisites having been established. In a case involving offences under the Negotiable Instruments Act, the complaint forms to be an extremely important piece of document which persuades the Learned Magistrate to take Cognizance of the offence within the stipulated time period. Such stipulated timeframe has been fixed by legislature for a definite purpose and in case the complaint cannot be looked into or in other words is not exhibited in accordance with law, the very genesis of the litigation or the very bastion of the prosecution falls flat on its face as the order taking cognizance becomes a nullity. Since the order taking cognizance becomes bad in law, the entire prosecution case which depends on it cannot survive without all requisites being fulfilled in accordance with law. It is therefore *submitted that the Learned Trial Magistrate has rightly observed that since the complaint was not exhibited, he could not have looked into the same and as such the prosecution case could not be established under such circumstances.*

iii. Address in which the demand notice was sent was different from the complaint:- The notices/receipts were not marked as exhibits in accordance with law and no effort was made to show that the address at which the notice was sent belonged to the accused.

In this case the demand notice was returned with the remark Out of Calcutta". It is a settled principle of law that a notice must be sent to a proper address. It is equally well settled that the service of notice can be through either of the two ways express service of notice and implied service of notice. When the notice actually reaches the addressee and the addressee accepts the same it is said that there is an express service of notice. On the other hand when the addressee has the knowledge of the notice and yet deliberately avoids its service on him the Court has the liberty to consider the same as being served and such service is known as implied service of notice. In this premises it must be noted that such implied service is presumed only in cases when the complainant had acted bonafide and has sent the notice in the correct address and despite that the accused deliberately avoids the service upon himself. Such implied service of notice cannot be presumed in cases where the complainant has acted mala fide and had intentionally tendered incorrect address in the notice. In other *words when the complainant has tendered wrong address in the notice and as a result of which the notice did not actually reach the accused no presumption of implied knowledge can be imposed on the accused and as such section 27 of the General Clauses Act will not be attracted.*

In this particular case the complainant while serving the demand notice did not give the correct address of the accused. It is due to this reason the demand notice never really reached the accused and as such the provisions of Section 138 of Negotiable Instruments Act was not complied with. Section 138 of Negotiable Instruments Act inter alia requires that a demand notice must be served upon the accused within 30 days of default of the cheque. It is pertinent to mention in this context that the liability under Section 138 of Negotiable Instruments Act does not arise right after the cheque was dishonored. It arises only when after the dishonor of cheque a demand notice is duly served upon the accused and despite such service the accused person fails to pay the amount within 15 days of such service and there after the complainant files a complaint within 30 days. Thus unless the complainant sends the demand notice to the proper address no liability arises under Section 138 of N.I. Act.

The postal returns/ AD Cards were marked as X for identification (Page 13) and the complainant took no steps to prove the same in accordance with law. Such document was never marked as an exhibit *and as such could not have been considered by the Learned Court while coming to the just and fair conclusion.*

The Learned Trial judge has rightly recorded in his order that the agreement exhibited by the complainant itself suggested the address of the accused no. 1 to be at the premises which is different to the address to which the purported notice was supposedly sent. The complainant has exhibited no other documents to suggest the address of the accused no. 1 company to be at such premises. The complainant at the appellate stage cannot now backtrack and deny a document or contents thereof which were exhibited from his side.

iv. *Legal Liability:- In the chief of PW-1, he admitted that the shares which were pledged against the purported loan were already in his custody on such date of examination which was years after the agreement and alleged dishonour. As such there could not have been legal liability to pay unless the pledges were invoked and there was a deficit. The legal liability as against the company was nonexistent on the date of presentation of the cheque.*

v. *Part Payment:- The PW-1 alleged and admitted part payment (page 13) in his evidence but fails to reflect the same or deduct the amount in the cheque in violation of Section 56 of the Negotiable Instruments Act. Reliance is placed on Dashrathbhai Trikabhai Patel vs Hitesh Mahendra Patel and another, (2023) 1 SCC 578*

vi. *Involvement of Accused 2, 4 & 5 not proved:- It was a trite law that the complainant has to specifically mention in the complaint about the* *manner in which the persons named in the complaint was involved in the commission of the offense under section 138 of Negotiable Instruments Act. It is obligatory on the part of the complainant to state the manner in which a person is responsible for the acts of the juristic person. It is a settled position of law that when the principal accused is a body corporate then in order to make its employees/ directors liable under section 138 of the Negotiable Instruments Act it is absolutely necessary for the complainant to state the manner in which the other accused was involved in the commission of the said offense. A person cannot be made liable merely because of being an employee of the said principal accused. The role that has been played by each of the accused towards the commission of the offense must be specifically mentioned. The complainant cannot make the other accuseds liable by merely using the words used in the provisions of the Negotiable Instruments Act like "Involved in day to day affairs of the company". In order to lift the corporate veil of a company and make its employees liable, the complainant must state the specific role that each of the accused played and how the accused were involved in the commission of the offense. In this particular case as is correctly observed by the Learned Magistrate that the involvement of accused 2,4,& 5 were not proved and thus are acquitted.*

Reliance may be placed on the following judgements-

S.M.S. Pharmaceuticles Ltd. v Neeta Bhalla & anr., (2005) 8 SCC 89.

Ashok Shewakramani & ors. Vs. State of Andhra Pradesh & anr., (2023) 8 SCC 473.

vii. *Once acquitted should not be reversed except on exceptional circumstances:- According to the settled principles of law, a person once acquitted, the judgment should not be reversed except on exceptional circumstances.*

viii. *Reply to the judgments relied upon the appellant:-*

The crux of the submission of the appellant was that since the accused had appeared then the notice even if not served prior to filing the complaint loses its significance given notice was for the purpose of intimating the accused regarding the liability. The accused upon appearance could have shown its desire to pay. In order to buttress the contentions the appellant had sought to rely on C.C. Alavi Haji Vs. Palapetty Muhammed & Anr., (2007) 6 SCC 555.

Such contention was fallacious and lacks merit given, there was no reason for the accused to pay unless there was anything due. Similar view was expressed by the Hon'ble Supreme Court in Meters and Instruments Private Limited and anr. Vs Kancan Mehta, (2018) 1 SCC 560 which relied on C.C. Alavi Haji us Palapetty Muhammed & Anr., (2007) 6 SCC 555. Subsequently Hon'ble Consitution Bench of the Hon'ble Supreme Court of India in the case of Expeditious Trial Of Cases Under Section 138 Of N.I. ACT 1881. Reported in (2021) 16 SCC 116, had overruled such observations and held that

"……….. 24.7. Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in Meters and Instruments (supra) do not lay down correct law……………."

Further the contention of the appellant that the appearance of the accused upon service of summons is also not legally tenable given it is age old settled law that when the law requires a thing to be done in a particular manner it has to be done in that manner and in no other manner. Lack of proper service of notice under Section 138(b) of the N.I. Act or even belated service cannot be regularised by taking aid of learned trial court proceedings. Moreover, no summons or ROC document was exhibited here and further the Exhibit-10 exhibited by the complainant reflects a different address of the accused no.1 when compared to the postal envelope or the cause title of the complaint.

Hence, it was most humbly submitted that taking the entire circumstances into account when juxtaposed with the evidences available there was nothing to suggest that the Order under challenge was perverse and passed in derogation of the settled law. As such, the appellant might be dismissed for the ends of justice."

6. A circumspection of evidence of the prosecution witnesses revealed as follows:-

   i) PW-1 deposed he was an officer of Bharat Overseas Bank Ltd., 3 B, Lalbazar Street, Cal-700001. He had been deputed by the Manager of our Branch i.e. Dalhousie Square Branch to attend Court with the called for documents and to give evidence in that case. There was accounts of Anil Kumar Kanodia i.e. the appellant with the bank. His cash/credit A/C number was 6/95. Mr. Anil Kumar Kanodia i.e. the appellant deposited these two cheques bearing no.078143 dated 31.03.96 for Rs.15,00,000/- drawn on UCO Bank, New Market Branch Calcutta by Bureau of Business Consultants Pvt. Ltd., favored Mr. Anil Kumar Kanodia and no.078140 dated 31.03.96 for Rs.1,19,835.62/- drawn on same bank by the same party.

On 03.04.1996 those cheques were deposited at their bank by Mr. Anil Kumar Kanodia i.e. the appellant for collection in clearing. Those were duly stamped with the seal of their bank. Those were done in the usual course of the official business of their bank. The bank presented the said two cheques before the UCO Bank, New Market branch for collection but the cheques were returned unpaid. Thereafter Debit advice dated 03.04.96 was issued in favour of Mr. Anil Kumar Kanodia by their bank informing that the aforesaid cheques returned unpaid due to insufficient fund. Mr. Partha Sarathi Basu an officer of their bank issued that Debit advice under his signature, which was marked as exhibit-11. Their bank also returned the two cheques along with Debit advice to Mr. Anil Kanodia. The said two cheques in original, were marked as Exhibits-2 and 2/11.

On deposit of the cheques necessary entries were made in the book of accounts of their bank first. On return of those cheques also necessary entries had been done in their book of accounts. He had brought the certified copies of relevant entries of the books of accounts of their bank related to those two cheques as called for Branch Manager of their bank has duly certified the true copies of the original entries of the book of accounts of their bank. The High value clearing Register duly certified was marked as Exhibit-3.

The statement of cash/credit account of Mr. Anil Kumar Kanodia duly certified by the Branch Manager of their bank, was marked as exhibit-4.

ii) PW-2 deposed he was the complainant of the case against the Bureau of Business Consultants Pvt. Ltd. having its office at 2, Ganesh Chandra Avenue, Commerce House, Calcutta and Mr. Muralilal Agarwall, Mr. Sanjay Agarwall, Mr. Sanwarmal Agarwal and Mr. Jitendra Agarwal the Directors and Officers of the accused company i.e. accused no.1 who was responsible for discharging day to day business of the accused company.

On 10.1.96 he entered into an agreement with accused no.1 for advanced of Rs.15,000/- to the accused no.1. The original agreement dated 10.01.1996 executed by him and accused no.1. He executed it by putting his signature. Accused no.4 on behalf of accused no.1 signed it as executant. By that agreement, he agreed to advance a loan of Rs.15,00,000/- to the accused no.1 at a rate of interest of 48% per annum and the accused no.1 agreed to receive that loan from him. He lent Rs.15,00,000/- to accused no.1 on the strength of that agreement, which was marked “X” for further identification.

The document was kept with the record be marked exhibit in future after hearing on the point whether it was admissible in evidence on the question of competence of the parties and whether the document was forbidden by any law as embodied in the Indian Contract Act.

Further examination-in-chief resumed on 30.06.98 and PW-2 stated on the basis of agreement dated 10.01.1996 an amount of Rs.15,00,000/- was advanced to the accused no.1 as loan by complainant. He made payment of that amount by cheque dated 10.01.96 drawn on Bharat Overseas Bank Ltd., Dalhousie Square Branch in favour of accused no.1. Said cheque was encashed by accused no.1. He had been informed by his banker about such encashment by letter dated 18.09.97.

The letter dated 18.09.97 signed by Mr. K.V.S.R. Shenoy, Accountant of their banker, was marked as exhibit-5. He was a service-holder. At the request of accused no.3 he granted the aforesaid loan.

Accused persons issued two post-dated cheques in his favour for the purpose of repayment of the loan with interest. Cheque no.078143 for Rs.15,00,000/- was issued on 31.03.96 drawn on UCO Bank, New Market Branch Calcutta for repayment of principal loan in his favour and the cheque signed by accused no.3 Sanjay Agarwal on behalf of accused no.1, which was marked as exhibit -2/1. The cheque bearing no.078140 for Rs.1,19,835.60/- was issued in discharge of accused's liability for payment of interest in part in his favour, was marked as exhibit-2.

On 03.04.96 he deposited both the cheques with his banker Bharat Overseas Bank Ltd. for encashment but both the cheques were dishonoured on ground of insufficient fund and referred to him unpaid. He came to know that fact on 03.04.96 by that return memo dated 03.04.96, identified exhibit-1. He issued demand notice dated 15.04.96 to the accused persons through his Ld. advocate by speed post with A/D. Those notices were properly addressed and properly stamped. There were the postal registration receipts in two sheets marked exhibit-6 collectively.

Said notices were returned unserved to his Ld. Advocate with remark "Out of Calcutta". Notice of accused no.1 was also returned with same remark. The said five notices closed inside the envelopes. The five closed envelopes with postal A/D cards are marked "Y" collectively for further identification.

He further deposed that he sent notice to accuseds through his Ld. Advocate. That letter was sent through speed post to accused no.1. The letter was properly addressed and prepaid. It was sent to 2, Ganesh Ch. Avenue Calcutta 13. It was registration office of the accused no.1 company. Notice was not released by the company on 16.04.96. Notice was returned. They deliberately to receive the notice. Notice was returned with note "out of Calcutta". Hence return to the sender.

Accused no.1 was a private limited Company. It has registration office at Commerce house No.2, Ganesh Avenue, Calcutta-13. Till date said company had been running business from there. There was "endorsement" each notice "Out of Calcutta". Return to sender mark "X" for identification. The accuseds did not pay the entire cheque within time.

iii) During his cross-examination PW-2 stated that that agreement was a loan agreement-cum-letter or pledge-cum-guarantee. He knew the agreement. Shares of company were pledged against the loan of Rs.15,00,000/-. Those shares were laying in his custody.

iv) PW-3 deposed he was attached to UCO Bank, New Market Branch, Calcutta. Ms. Bureau of Business Consultants Pvt. Ltd., had its bank accounts in their bank. Those two cheques bearing no.078140 dated 31.03.1996 for Rs.1,19,835.62/- and cheque no.078143 dated 31.03.1996 for Rs.15,00,000/- were drawn on their bank by the accused company. Those two cheques were deposited in their bank for clearance. Those cheques were returned unpaid for insufficient fund. That C.C. or statement of accounts of M/s Bureau of Business Consultants Pvt. Ltd., was certified by A, Manager and M.L. Bansal, Chief Manager & Signed by both under seal of bank which was marked as Exbt.-11. The C.C. or cheque return register of the bank certified by 'A' and M.L. Bansal, was marked as Exbt.-12.

v) During his cross-examination PW-3 stated that he had no personal knowledge about the case. At the relevant time, he was not in the bank.

vi) DW-1 deposed he worked in Bureau of Business Consultants Pvt. Ltd. He knew about the transaction in between Radiant Financial Services Ltd., and Bureau of Business Consultants Pvt. Ltd., on behalf of Radiant Financial Services Ltd., Amitava Sarkar negotiated with them. Amitava Sarkar arranged for loan to the complainant.

For the purpose, many deeds and agreements were executed. The loan amount was Rs.15,00,000/-. For that, they saw shares of those Rs.15,00,000/- to the complainant. Therefore, the agreement was executed. They gave one posted dated cheques of Rs.15,00,000/- to the complainant. During presentation of said cheques, the complainant did not inform them. The complainant did not serve any demand notices upon them for the cheque or not. They did not said the bank share of Rs.15,00,000/- from the complainant. The reputation with the Radiant Financial Services Ltd., was continuing.

vii) During his cross-examination DW-1 deposed he did not knows whether the disputed cheque was honoured or dishonoured. He did not get any demand notice from the complainant.

7. The appeal is directed against the judgment and order dated 18.08.2001 passed by the learned Metropolitan Magistrate, 3rd Court, Calcutta in Case No. C-930 of 1996 whereby the accused persons were acquitted of the charge under Sections 138/141 of the Negotiable Instruments Act. The appellant

has questioned the legality of the acquittal principally on the ground that issuance of the cheques, its dishonour and the statutory presumptions under Sections 118 and 139 of the Act had been sufficiently established and that the learned Trial Court failed to assign due consideration to such presumptions.

8. There can be hardly any dispute with the settled legal proposition that once execution of the cheque is admitted or proved, the statutory presumptions under Sections 118 and 139 of the Negotiable Instruments Act immediately come into operation and the Court had been obliged to presume, unless the contrary was shown, that the cheque had been issued for consideration and in discharge of a legally enforceable debt or liability. The presumption is one of law and not merely of fact. Yet, equally settled is the principle that such presumption remains rebuttable and the accused is not required to disprove the prosecution case beyond reasonable doubt. A probable defence capable of creating doubt regarding the existence of the enforceable liability would suffice to rebut the statutory presumption.

9. The law relating to interference in an appeal against acquittal is also too firmly entrenched to admit any ambiguity. An acquittal strengthens the presumption of innocence already available to the accused. Unless the findings returned by the Trial Court are wholly unreasonable, manifestly perverse or impossible on the evidence on record, the appellate court ordinarily refrains from substituting another possible view merely because an alternative interpretation may also be available. Where two views are reasonably possible upon appreciation of the evidence, the one favouring the

accused must prevail. The appellate court does not function as though the trial was being conducted afresh detached from the restraint governing an appeal against acquittal.

10. In the present case, the learned Trial Court appears to have approached the evidence not merely from the standpoint of issuance and dishonour of the cheques but from the wider perspective as to whether the complainant had satisfactorily established the precise legal character of the liability sought to be enforced. Such approach, in the opinion of this Court, cannot be said to be alien to the statutory framework of Section 138 of the Act which expressly postulates the existence of a "legally enforceable debt or other liability".

11. The evidence of PW-2 itself introduces substantial complexity into the nature of the transaction. During cross-examination he admitted that the arrangement between the parties was not confined to a simple loan transaction but was embodied in a "loan agreement-cum-letter of pledge-cum-guarantee". He further admitted that shares of the company had been pledged against the alleged advance of Rs.15,00,000/-. The defence evidence also disclosed continuing business transactions and commercial arrangements between the parties involving Radiant Financial Services Ltd. and Bureau of Business Consultants Pvt. Ltd. DW-1 specifically deposed that shares corresponding to the value of Rs.15,00,000/- remained with the complainant and had not been returned.

12. The Learned Trial Court, upon appreciation of such evidence, appears to have entertained doubt as to whether the cheques in question represented crystallised and immediately enforceable liability on the date of presentation

or whether they formed part of a larger commercial arrangement secured by pledged shares and interconnected agreements. Such conclusion cannot be described as wholly implausible or unsupported by the record.

13. The statutory presumption under Section 139 undoubtedly operates in favour of the complainant. Yet the law does not contemplate that the presumption is irrebuttable or that the Court must mechanically record conviction upon proof of dishonour alone. The accused may rebut the presumption even through the materials elicited in the cross-examination of the complainant and need not necessarily enter into elaborate defence evidence. The surrounding circumstances, inconsistencies in the prosecution case and the probabilities emerging from the record are all matters legitimately available for consideration while assessing whether the burden has been discharged by the accused on a preponderance of probabilities.

14. Equally significant is the issue concerning statutory notice under Section 138(b) of the Act. The complainant relied upon notices sent through speed post which were returned with the endorsement “Out of Calcutta”. Although the complainant asserted deliberate avoidance, the learned Trial Court did not find the materials sufficient to conclusively infer deemed service. Whether the endorsement reflected evasion or actual non-availability was essentially a question of factual appreciation. The Trial Court, having had the advantage of observing the demeanour of witnesses and assessing the evidence firsthand, adopted a view favourable to the accused. Such appreciation cannot be said to be so irrational or perverse as to warrant appellate displacement.

15. The requirement of service of notice under Section 138 is not an empty procedural formality. The notice constitutes the statutory opportunity afforded to the drawer to make payment and avoid criminal prosecution. Deficiencies or ambiguities relating to service therefore assume significance while evaluating the maintainability of the prosecution itself.

16. The prosecution also sought to invoke Section 141 of the Negotiable Instruments Act against the Directors and officers of the company. While the complaint contains averments that accused nos.2 to 5 were in charge of and responsible for the conduct of the business of accused no.1 company, the learned Trial Court appears to have found the evidence inadequate to sustain vicarious criminal liability beyond reasonable doubt against all the accused persons. Vicarious liability under criminal law cannot be inferred merely by virtue of designation. The Court must be satisfied from the materials on record that the statutory ingredients attracting Section 141 stood fulfilled in substance and not merely in form. Moreover the complaint was not proved in totality being marked as Exhibit.

17. In ***Shailendra Swarup Vs. The Deputy Director, Enforcement Directorate***[1], the Hon'ble Supreme Court held the following:-

> *30. This Court held that the criminal liability arises from being in charge of and responsible for the conduct of the Company at the relevant time. Elaborating the requirement for a person to be made liable under Section 141 this Court laid down following in paragraphs 10 and 12:*
>
> > *"10. While analysing Section 141 of the Act, it will be seen that it operates in cases where an offence under Section 138 is committed*

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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. 12. 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. "*

31. The ratio of the above judgment has been reiterated by this Court in N.K. Wahi vs. Shekhar Singh and others, (2007) 9 SCC 481, National Small Industries Corporation Limited vs. Harmeet Singh Paintal and another, (2010) 3 SCC 330 and Pooja Ravinder Devidasani vs. State of Maharashtra and another, (2014) 16 SCC 1.

32. Learned Additional Solicitor General placed reliance on the judgment of this Court reported in N. Rangachari vs. Bharat Sanchar Nigam Ltd., (2007) 5 SCC 108. This Court in Rangachari was again considering the provisions of Section 141 of the Negotiable Instruments Act, 1881. Learned Additional Solicitor General relied on paragraphs 17 to 22. In N. Rangachari this Court has noticed the earlier three-Judge judgment in S.M.S. Pharmaceuticals Ltd.(supra) and clearly held that the said judgment is binding. In paragraph 20 of N. Rangachari, this Court laid down following:

> *"20. In other words, the law laid down by this Court is that for making a Director of a Company liable for the offences committed by the Company Under Section 141 of the N.I. Act, there must be specific averments against the Director showing as to how and in what manner the Director was responsible for the conduct of the business of the Company."*

33. Thus, what was held in S.M.S. Pharmaceuticals Ltd.(supra) has been reiterated by N. Rangachari. We may also refer to paragraph 23 of the N. Rangachari judgment where following has been laid down:

"23. In the light of the ratio in S.M.S. Pharmaceuticals Ltd. (2005) 8 SCC 89, what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the Directors of the company, it is further alleged that they are in charge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in Saroj Kumar Poddar case (2007) 3 SCC 693, this Court had found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheque that was dishonoured, the persons named in the complaint were in charge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in S.M.S. Pharmaceuticals Ltd. and in view of the position of the Directors in a company as explained above."

34. In the facts of the above case this Court held that allegations were clearly made out in the complaint. Judgment of this Court in N. Rangachari, thus, does not help the respondent nor it, in any manner, dilute the ratio of three-Bench judgment in S.M.S. Pharmaceuticals Ltd.(supra).

35. We may notice one more judgment of this Court, National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Another, (2010) 3 SCC 330, interpreting Section 141 of the Negotiable Instruments Act, 1881. After extracting Section 141 of the Negotiable Instruments Act dealing with offences by companies, this Court in paragraph 12 and 13 laid down:-

"12. It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, at the time the offence was committed, was incharge of, and was 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. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. It follows from the fact 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 for a criminal offence under the provisions. The liability arises from being incharge of and responsible for the conduct of the 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. 13. Section 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent No. 1 was in-charge of or was responsible to the accused company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability."

18. The evidence in the present case, when viewed cumulatively, does not persuade this Court to hold that the conclusions reached by the learned Magistrate were either impossible or manifestly contrary to the record. The learned Trial Court considered the nature of the transaction, the pledge of shares, the surrounding commercial arrangements, the issue of service of notice and the extent of responsibility of the individual accused persons before extending the benefit of doubt. The view so taken remains a reasonably possible view arising from the evidence.

19. The jurisdiction of the appellate court in an appeal against acquittal is undoubtedly wide, but such width does not eclipse judicial restraint. Reversal of acquittal cannot rest upon a mere preference for another possible interpretation of the evidence. Unless the findings are demonstrably perverse or wholly unsustainable, interference would not be justified.
20. This Court, therefore, finds no compelling ground to unsettle the judgment of acquittal rendered by the learned Trial Court. The appreciation of evidence by the learned Magistrate does not suffer from such patent illegality or perversity as would warrant appellate intervention.
21. Accordingly, the appeal stands dismissed. The judgment and order dated 18.08.2001 passed by the learned Metropolitan Magistrate, 3rd Court, Calcutta in Case No. C-930 of 1996 acquitting the accused persons under Sections 138/141 of the Negotiable Instruments Act are hereby affirmed.
22. In view of the above discussions, the instant criminal appeal being CRA 520 of 2001 is dismissed.
23. There is no order as to costs.
24. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
25. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)