Present:
Mr. Justice Zafar Ahmed

Criminal Appeal No. 10468 of 2017

Mahmudul Hasan
..... Appellant
-VERSUS-
The State and another
……. Respondents

None appears
…… for the appellant
Mr. Md. Enamul Haque Molla, DAG with
Ms.Marufa Akhter, AAG
… for the respondent No. 1 (State)
Mr. Ehata Samul Karim, Advocate.
…… for the respondent no. 2

Heard on: 26.08.2020 and 02.09.2020
Judgment on: 06.09.2020.

In the instant appeal, the convict-appellant has challenged the legality of the judgment and order of conviction and sentence dated 03.05.2017 passed by the Additional Metropolitan Sessions Judge, 3rd Court, Chattogram in Sessions Case No. 570 of 2015 arising out of C.R. Case No. 347 of 2014 (Panchlaish Zone) convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer imprisonment for a period of 06(six) months and also pay a fine of Tk. 52,00,000/-.

Hazi Md. Bakhtiar Uddin is the complainant-respondent no. 2.

None appeared for the convict-appellant when the appeal was taken up for hearing.

It has been stated in the petition of complaint that as a result of business transaction between the parties, the complainant would get Tk. 52,00,000/- from the accused. The accused gave 3 separate cheques to the complainant to pay the said money. The first cheque was dated 15.05.2014, value being Tk. 20,00,000/-. The second cheque was dated 20.05.2014, value being Tk. 17,00,000/-, and the third cheque was dated 25.05.2014, value being Tk. 15,00,000/-, total amount being Tk. 52,00,000/-. The complainant presented those cheques in the bank for encashment, but on 18.05.2014, 21.05.2014 and 27.05.2014 respectively those cheques were returned unpaid due to insufficiency of fund. On 15.06.2014 the complainant sent a legal notice to the convict-appellant for payment of the value of those three dishonoured cheques. The accused received the notice on 22.06.2014, but the value of the cheques was not paid to the complainant. The case was filed on 07.08.2014.

Charge was framed against the accused-appellant under Section 138 of the Act, 1881. The appellant was absent on the date of framing the charge, but he faced the trial and was examined under Section 342 of the Code of Criminal Procedure.

The prosecution examined the complainant as sole witness. The defence examined 2 witnesses including the accused as DW1. The witnesses of both sides were cross-examined. The prosecution produced and proved 3 cheques (exhibit-1 series), dishonor slip (exhibit-2), legal notice (exhibit-3), postal receipt (exhibit-4) and petition of complaint (exhibit-5). Apart from theses, no other documentary evidences were produced in the Court.

The trial Court found the accused guilty of the offence and imposed a fine of Tk. 52,00,000/- upon the accused which is equivalent of the value of the dishonoured cheques along with sentence of imprisonment.

None appeared for the accused-appellant when the appeal was taken up for hearing.

The learned Advocate for the complainant-respondent submits that the case was filed after due compliance of the procedure laid down in Section 138 of the Negotiable

Instruments Act, 1881 and within one month of the date on which the cause of action had arisen under clause (c) of the proviso to Section 138. The learned Advocate further submits that that the complainant proved the case by adducing evidences, both oral and documentary. The complainant also proved consideration against which the cheques were drawn and that the complainant is the holder of the cheques in due course. The learned Advocate further submits that the trial Court rightly found that the evidences given by DW1 and DW2 are discrepant in material particulars and therefore, those cannot be believed. The learned Advocate prays for dismissal of the appeal.

Now, let us examine the evidences on record.

In examination-in-chief, PW1 (complainant) gave deposition supporting the case narrated in the petition of complaint. In cross-examination, PW1 deposed that in the course of business, the accused gave him 3 cheques total value being Tk. 52,00,000/-. The complainant further deposed that he gave Tk. 20,00,000/- in cash to the accused on three consecutive dates. The rest Tk. 32,00,000/- was given to the accused by a cheque. PW1 denied the suggestion that he filed the case using security cheques.

DW1 (accused) deposed that in the course of business the compliant gave him Tk. 80,00,000/-. Later on he paid Tk. 48,00,000/- to the complainant and he is willing to pay the rest balance amount of Tk. 32,00,000/- to the complainant. DW1 not deny his signatures contained in the cheques.

DW2 is Md. Sumon. He is involved in motor vehicle business. He knows the parties personally. He worked for the accused for about 10 years as an employee. DW2 deposed that the complainant gave Tk. 52,00,000/- to the accused in his presence. Later on, the accused returned Tk. 20,00,000/- to the complainant. The complainant would get the rest amount of Tk. 32,00,000/- from the accused. In cross-examination, DW2 stated that the accused gave 3 cheques to the complainant, value being Tk. 52,00,000/- in his presence.

It transpires from the evidences on record that the complainant and the accused started a partnership business for importing motor vehicles and sale of those in Bangladesh. It is admitted that financial transactions took place between the parties during the course of business, but there is a dispute in respect of quantum of money.

The trial Court disbelieved the defence case. In so doing, the Court below observed,

“ আসামী মাহমুদুল হাসান ডি/ডব্লিউ-১ হিসাবে সাক্ষ্য প্রদান কালে জেরায় স্বীকার করেন যে, বাদী যে তিনটা চেক মুলে এই মামলায় ৫২,০০,০০০/- (বায়ান্ন লক্ষ) টাকা দাবী করেছে ঐ তিনটা চেকেই তার স্বাক্ষর আছে। আসামী ডি/ডব্লিউ-১ হিসেবে সাক্ষ্য দান কালে বাদীর সাথে পার্টনারশীপ পার্টনারশীপ ব্যবসা করার কথা এবং ৮০,০০,০০০/- (আশি লক্ষ) টাকা বাদী পুঁজি দেয়ার কথা জবানবন্দিতে উল্লেখ করেছেন। তিনি জবানবন্দিতে কোথাও বলেননি যে, তিনি সিকিউরিটি হিসেবে এই মামলার তিনটি চেক অলিখিত অবস্থায় বাদীকে দিয়ে ছিলেন। ডি/ডব্লিউ-২ মোঃ সুমন জেরায় স্বীকার করেন আসামী তার ও ডি/ডব্লিউ-২ সামনেই বাদীকে ৫২,০০,০০০/- (বায়ান্ন লক্ষ) টাকার তিনটা চেক দেয়। তিনি সাক্ষী। সুতরাং দেখা যায় আসামী পক্ষের সাক্ষ্য দ্বারাও আসামী বাদীকে ৫২,০০,০০০/- (বায়ান্ন লক্ষ) টাকার তিনটা চেক দেয়ার ঘটনা স্বীকৃত হয়েছে। কাজেই আসামী সিকিউরিটি হিসেবে বাদীকে অত্র মামলার তিনটা চেক দিয়েছিল মর্মে আসামী পক্ষ হতে পি/ডব্লিউ-১ কে প্রদত্ত সাজেশান এর কোন ভিত্তি বা গ্রহনযোগ্যতা পরিলক্ষিত হয় না। ডি/ডব্লিউ-১ জবানবন্দিতে বলেন তিনি বাদীকে ৮০,০০,০০০/- (আশি লক্ষ) টাকা পাওনা থেকে ৪৮,০০,০০০/- (আট চল্লিশ লক্ষ) টাকা দিয়েছেন এবং বাদী ৩২,০০,০০০/- (বত্রিশ লক্ষ) টাকা পাওনা আছেন। অন্য দিকে ডি/ডব্লিউ-২ জবানবন্দীতে বলেন বাদীর নিকট থেকে নেয়া ৫২,০০,০০০/- (বায়ান্ন লক্ষ) টাকার মধ্যে আসামী ২০,০০,০০০/- (বিশ লক্ষ) টাকা পরিশোধ করেছে। বাদী আর ৩২,০০,০০০/-

(বত্রিশ লক্ষ) টাকা পাওনা আছেন। লেনদেন সর্ম্পকিত বিষয়ে ডি/ডব্লিউ-১ ও ডি/ডব্লিউ-২ এর উক্ত সাক্ষ্য পরস্পর সমর্থনসূচক না হওয়ায় তা বিশ্বাস যোগ্য বলে অত্র আদালতের নিকট প্রতীয়মান হয় না। উভয় পক্ষের উপস্থাপিত সাক্ষ্য প্রমানের উল্লেখিত আলোচনা ও বিচার বিবেচনায় এটা স্পষ্টভাবে প্রমানিত হয় যে, আসামী মোঃ মাহমুদুল হাসান বাদীর পাওনা পরিশোধের নিমিত্ত ৫২,০০,০০০/- (বায়ান্ন লক্ষ) টাকার তিনটা চেক বাদীকে প্রদান করেছিলেন। বর্নিত চেকগুলো যথাসময়ে নগদায়নের জন্যে উপস্থাপন করা হলে আসামীর ব্যাংক হিসাবে পর্যাপ্ত টাকা না থাকায় চেকগুলো ডিজঅনার হয় এবং টাকা পরিশোধের নিমিত্ত বাদীর লিগ্যাল নোটিশ পেয়েও আসামী চেকের টাকা পরিশোধ করেন নি। কাজেই নথিস্থ সাক্ষ্য প্রমান দ্বারা আসামীর বিরুদ্বে দি নেগোসিয়েবল ইনুস্ট্রুমেন্টস এ্যাক্ট, ১৮৮১ এ ১৩৮ ধারায় শাস্তিযোগ্য অপরাধ সন্দেহাতীতভাবে প্রমানিত হয়েছে মর্মে অত্র আদালত অভিমত পোষন করেন''

The defence does not deny the prosecution case as a whole, rather the accused admits that he signed the cheques, but those were security cheques against the money given to him by the complainant which he had adjusted partially and that Tk.32,00,000/- is still due to the complainant and he is willing to repay the same.

Section 118(a) of the Act, 1881 directs that it shall be presumed, until the contrary is proved, that every negotiable instrument was made or drawn for consideration. However, the presumption under the section is rebuttable. In ***Alamgir Kabir vs The State and another*** 2019 (1) 15 ALR (HCD), in which I was a party, a Division Bench of this Court held,

> "A Court should not be unmindful of the fundamental principle of criminal administration of justice that in a criminal proceeding the initial burden of proof lies upon the prosecution. Thus, in a proceeding under Section 138 of the N.I. Act, the prosecution has to prove beyond reasonable doubt as to facts regarding dishonour of cheque, issuing legal notice etc. which are mandatory requirements to initiate the criminal proceeding under the section. However, the N.I. Act being a special law providing rebuttable presumption against the accused under section 118 by using the word 'shall' that the cheque was drawn for consideration, the prosecution has to state facts, purpose being to assist the Court, from which it shall make presumption as to consideration

inasmuch as a presumption is not in itself evidence, but only makes a *prima facie* case for a party for whose benefit it exists. In such an eventuality, the question of calling upon the prosecution to formally prove the statement does not arise. If the fact is of such type that no presumption can be made as to consideration, the defence has to disprove nothing. For example, if the complainant states that the cheque was issued to him as a gift, there is no scope to hold any presumption under Section 118(a) since admittedly the cheque was drawn without consideration. On the other hand, when the Court presumes existence of consideration from facts narrated by the prosecution, then the burden of disproving the same shifts on the accused, the standard being the balance of probability. For the purpose of rebutting the presumption under Section 118(a), the evidence adduced on behalf of the complainant can also be relied upon (***Kamala S. Vs. Vidyadhran M.J.,*** (2007) 5 SCC 264)".

In the case of ***Md. Abul Kaher Shahin vs. Emran Rashid and another*** (Criminal Appeal Nos. 63-66 of 2017, date of judgment: 18.02.2020 (unreported)), the Appellate Division held,

> "When a presumption is rebuttable, it only points out that the party on whom lies duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the cheque in question was not supported by consideration. However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the

> passing of consideration apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. The burden of proof of the accused to disprove the presumption under sections 118 and 138 of the Act is not so heavy. The preponderance of probability through direct or substantial evidence is sufficient enough to shift the onus to the complainant. Inference of preponderance of probabilities can be drawn from the materials on record and also by reference to the circumstances upon which the party relies."*(emphasis supplied)*

In the instant case, no documentary evidence was produced either in respect of the partnership business in which the parties were partners or the financial transactions between the complainant and the accused. The oral evidence given by the DW1 and DW2 that the complainant would still get Tk. 32,00,000/- from the accused could not be disproved by the prosecution. It is true that there are some discrepancies in the evidences of DW1 and DW2 in respect of the amount of financial transactions between the accused and the complainant,

but both DW1 and DW2 categorically stated that the outstanding amount due to the complainant is Tk. 32,00,000/-. DW2 gave evidences on facts which he had direct knowledge. Therefore, the discrepancies which the trial Court pointed out do not destroy the defence case inasmuch as the complainant, in his turn, could not disprove the defence case on the specific point that the complainant will get Tk. 32,00,000/- from the accused as outstanding dues which the accused is willing to pay whereas the value of the dishonoured cheques are Tk. 52,00,000/-. The trial Court failed to appreciate the evidences in the perspective of burden of proof and disproof, the onus of proof and the standard of proof.

The instant case being a case of partial absence or partial failure of money consideration, Section 44 of the Act, 1881 would apply to the case. Section 44 provides for a *pro tanto* reduction of the amount where there is a partial absence or partial failure of consideration. To ensure a proportionate reduction in liability against the instrument, partial absence or partial failure of consideration must be capable of being ascertained or calculated with a fair degree of certainty. This is not a problem in the instant case. Hence, the fine of Tk. 52,00,000/- is reduced to Tk. 32,00,000/-.

Now, I turn to the sentence of imprisonment. Sub-section (2) of Section 138 provides, *"Where any fine is realised under sub-section (1), any amount up to the face value of the cheque as far as is covered by the fine realised shall be paid to the holder"*. Thus, the criminal proceeding under Section 138 serves two purposes: firstly, to punish the offender and secondly, to recover the value of the cheque. The object of adding sub-section (2) to Section 138 is to alleviate the grievance of the complainant. There can be no dispute insofar as the sentence of imprisonment is concerned that it should commensurate with the gravity of the crime. Court has to deal with the offenders by imposing proper sentence by taking into consideration of facts and circumstances of each case. It is not only the rights of the offenders which are required to be looked into at the time of the imposition of sentence, but also of the victims of the crime and society at large, also by considering the object sought to be achieved by the particular legislation. Considering facts and circumstances of the case in hand and the object of the law, this Court is of the view that the sentence of imprisonment would be a harsh sentence having no penal objective to be achieved. Hence, the sentence of imprisonment is set aside.

It is noted that the trial court did not pass any default order *i.e.* imprisonment in default of payment of the fine. When an offender is sentenced to fine only, the Court has the power to make a default order under Section 388 of the Code of Criminal Procedure (in short the 'Cr.P.C.'). Section 423(1)(d) of the Cr.P.C. empowers the Appellate Court to pass any consequential or incidental order that may be 'just and proper'. Since, this Court has already set aside the sentence of imprisonment and reduced the sentence of fine, it would be just and proper to pass a default order.

In view of the foregoing discussions, the order of the Court is as follows:

The conviction of the appellant under Section 138 of the Act, 1881 is upheld, but the sentence is modified. The sentence of 06(six) months imprisonment is set aside. The sentence of fine of Tk. 52,00,000/- is reduced to Tk. 32,00,000/-. The convict-appellant has already deposited Tk. 26,00,000/- in the Court below before filing the appeal. The Court concerned is directed to pay the said deposit to the complainant-respondent No.2 forthwith. The convict-appellant is directed to pay the remaining portion of the fine *i.e.* Tk. 6,00,000/- to the complainant-respondent No.2 within 3(three) months from the

date of receipt of this order, in default he will suffer simple imprisonment for 3 (three) months. If the convict-appellant does not pay the remaining portion of the fine as ordered or opts to serve out the period of imprisonment in lieu of payment of fine, he is not exempted from paying the same. In that event, the Court concerned shall realise the fine under the provisions of Section 386 of the Cr.P.C.

In the result, the appeal is dismissed with modification as to sentence and with directions made above. The convict-appellant is released from the bail bond.

Send down the lower Court's records (LCR) at once. Communicate the judgment and order to the Court concerned forthwith.