

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:

Mr. Justice Syed Mahmud Hossain, *Chief Justice*
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique
Mr. Justice Abu Bakar Siddiquee
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan

CRIMINAL PETITIONS FOR LEAVE TO APPEAL NO.1768-1769 OF 2019

(From the judgment and order dated 29.03.2018 passed by the High Court Division in Criminal Miscellaneous Case Nos.11076-11077 of 2017)

Phoenix Finance and Investment :**Petitioner**
Limited (PFIL), Principal Branch, (In both the cases)
Eunoos Centre (Level-11), 52-53,
Dilkusha Commercial Area,
Motijheel, Dhaka.

-Versus-

Yeasmin Ahmed and another :**Respondents**
(In both the cases)

For the petitioner : Mr. Ruhul Quddus, Advocate,
(In both the cases) instructed by Mr. Md. Abdul Hye
Bhuiyan, Advocate-on-Record.

For the respondents : Mr. Sayyed Ahmed Raja, Advocate,
(In both the cases) instructed by Mr. Md. Tawfique
Hossain, Advocate-on-Record.

Date of hearing and judgment : **The 2nd day of June, 2021.**

JUDGMENT

Obaidul Hassan, J. Delay in the filing of both the petitions is condoned hereby.

Both the Criminal Petitions for Leave to Appeal are directed against the judgment and order dated 29.03 2018 passed by a Division Bench of the High Court Division in Criminal Miscellaneous Case Nos.11076-11077 of 2017 making the Rule of absolute and quashing the

proceedings of Metro. Sessions Case No.4685 of 2016 and Special Case No.253 of 2015 arising out of C.R. Case No.1373 of 2014 and C.R. Case No.1260 of 2014 respectively, under sections 138 and 140 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act), now pending in the Court of Joint Metropolitan Sessions Judge, 7th Court, Dhaka and Special Sessions Judge, 5th Court, Dhaka respectively so far as it relates to the respondent No.1.

The complainant-opposite party No.2, herein the petitioner, as complainant filed the instant C.R. Case No.1373 of 2014 and 1260 of 2014 in the Court of the Chief Metropolitan Magistrate, Dhaka under sections 138 and 140 of the Negotiable Instruments Act, 1881 alleging *inter-alia* that the accused No.1 company availed lease facilities from the complainant company, Phoenix Finance and Investment Limited and in connection of the loan the accused, herein the respondent, issued a cheque being No.0312319 and 0312268 of Hongkong and Shanghai Banking Company Limited (HSBC) dated 14.08.2014 and 25.12.2013 for an amount of Taka 14,44,93,935.75.00 and 1,41,78,864.00 in favour of the petitioner to be drawn from an account bearing No.001-106087-011 maintained by the accused with HSBC. The petitioner placed the aforementioned cheque No.0312268 before the Mutual Trust Bank Limited, Dhanmondi Branch, Dhaka for encashment on 25.02.2014 again on 09.06.2014 and the cheque No.0312319 was also placed by the petitioner before the same bank

and branch for encashment on 19.08.2014, but both the cheques were dishonored on 09.06.2014 and 19.08.2014 respectively with remark "Account closed". Thereafter, the petitioner issued legal notices through its lawyer on 02.07.2014 and 26.08.2014 asking to repay the money and the same was received by the respondents on 03.07.2014 and 27.08.2014, but they did not pay the money. Thereafter, the petitioner was constrained to file the present cases under sections 138 and to 140 of the Negotiable Instruments Act, 1881 upon which the learned Metropolitan Magistrate took cognizance of the offence on 25.08.2014 and 20.10.2014 and after making the case ready for hearing, sent those to the Court of Metropolitan Sessions Judge, Dhaka, who transferred the cases; one to the Court of Special Sessions Judge, 5th Court, Dhaka which was numbered as Special Case No.253 of 2015 and another to the Joint Metropolitan Sessions Judge, 7th Court, Dhaka which was numbered as Metro. Sessions Case No.4685 of 2016, for trial and disposal. Thereafter, the both Courts' below framed charge on 17.11.2015 and 02.06.2016 respectively under sections 138 and 140 of the Negotiable Instruments Act, 1881 against the respondent and her husband Jasim Ahmed.

The respondent filed the Criminal Miscellaneous Case Nos.11076-11077 of 2017 challenging the above proceedings and the High Court Division issued Rule and stayed the proceeding. Both the Rules were finally heard in presence of both the parties. Upon hearing

the parties, the High Court Division made both the Rules absolute by judgments and order both dated 29.03.2018 so far as it relates to the respondent No.1.

Feeling aggrieved by and dissatisfied with the judgment and orders of the High Court Division, the petitioner preferred these criminal petitions for granting leave before this Division.

Mr. Ruhul Quddus, the learned Advocate, appearing for the petitioner in both the petitions has taken us through the judgment and order passed by the High Court Division, the relevant provisions of law, the connected materials on record and submits that the High Court Division failed to appreciate that the instant offence of dishonoring the above cheque under sections 138 and 140 of the Negotiable Instruments Act, 1881 was committed by the company of the respondent and the said offence was committed with the consent or connivance of the respondent as she was the director of the company at that time when the offence was committed and she also executed a personal guarantee for the loan upon which the above cheque was issued by the company of the respondent to repay, therefore, the judgment and order of the High Court Division suffers from illegality and is accordingly liable to be set aside. He further submits that the High Court Division failed to appreciate that the petitioner categorically stated in the complaint petition that the respondent is the director of the accused company and she executed

personal guarantee for securing the lease finance availed by the accused No.1 company and the cheque was issued with the direct consent or connivance of the respondent, therefore, the judgment and order of the High Court Division suffers from illegality and is accordingly liable to be set aside. He also submits that the High Court Division failed to appreciate that the petitioner made specific averments in the complaint to the effect that the respondent executed the personal guarantee for securing the lease finance in which the cheque was issued by the accused No.2 for repayment of the outstanding lease finance liabilities of the accused No.1 company, and also the cheque was issued with the direct consent or connivance of the respondent, therefore, the judgment and order of the High Court Division suffers from illegality and is accordingly liable to be set aside.

He adds that the High Court Division failed to appreciate that the connivance of the respondent in the instant offence is proved under section 140(2) of the Negotiable Instruments Act, 1881, because the respondent by executing personal guarantee for repayment of the lease finance, she also guaranteed that the check for repayment of the outstanding lease finance would be honoured, therefore, the judgment and order of the High Court Division suffers from illegality and is accordingly liable to be set aside. Besides he submits that the High Court Division failed to appreciate that the offence stated in section 140 of the Act is not related to any vicarious liability but it relates to

offence under section 138 of the Act committed by a company, therefore, the judgment and order of the High Court Division suffers from illegality and is accordingly liable to be set aside. He submits that the High Court Division failed to appreciate that the respondent is not a simple director but also active director by executing a personal guarantee for securing the lease finance wherein the said check was issued for repayment of the due lease finance liability, therefore, the judgment and order of the High Court Division suffers from illegality and is accordingly liable to be set aside.

Mr. Sayyed Ahmed Raja, the learned Advocate, appearing for the respondents in both the petitions, submits supporting the judgment and order passed by the High Court Division and prays for dismissal of the petitions.

We have heard the learned advocates appearing on behalf of both the parties, perused the judgment and order of the High Court Division, the relevant provisions of law and the connected materials on record.

From the judgment and order of the High Court Division, it appears that the High Court Division quashed the proceedings of Metro. Sessions Case No.4685 of 2016 and Special Sessions Case No.253 of 2015, pending in the Court of Joint Metropolitan Sessions Judge, 7th Court, Dhaka and Special Sessions Judge, Court No.5, Dhaka respectively holding that, "Simply because a person is a

Director of a Company does not make him liable under the Negotiable Instruments Act. A Director of a Company is liable to be convicted for an offence committed by the Company if he/she was in charge of and was responsible to the Company for the conduct of its business or if it's proved that the offence was committed with the consent or connivance of, or was attributable to any negligence on the part of the Director concerned."

The term 'Director' has been defined in the Companies Act, 1994 as under:

"2(f) "director" includes any person occupying the position of director by whatever name called;

*According to explanation (b) to section 140 of the **Negotiable Instruments Act, 1881** "(b) "director" in relation to a firm, means a partner in the firm."*

The definition of 'Director' both in the Companies Act, 1994 and the Negotiable Instruments Act, 1881 implies that director is a partner of a company and he holds a vital position in the affairs of the company.

Section 140 of the Negotiable Instruments Act, 1881 provides that, "140. (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. (Underline given by us)

(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." (Underline given by us)

The essence of section sub-section 1 of section 140 is that-

- I. the offence has to be committed by a company under section 138 of the Act.
- II. every person in charge of the company or responsible for the conduct of the company at the time of committing the offence shall be liable and punished.
- III. under this sub-section a person shall not be 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.

The gist of sub-section 2 of section 140 is that-

- I. the offence has to be committed by a company under section 138 of the Act.
- II. it has to be 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.
- III. if 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, then 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.

It is true that merely a person is a director, manager, secretary or other officer of company does not make them liable for the offence under section 138 of the Negotiable Instruments Act, 1881. But in case of offence committed under section 138 of the Act by a company every person in charge of the company shall be liable until he/she can prove that the offence was committed without his knowledge or he had exercised all due diligence to prevent the commission of such offence. (Underline given by us)

From the materials on record, it appears that the disputed cheques were issued by the managing director of the company. The

High Court Division quashed the proceedings of both the cases as mentioned above on the ground that non-executive director is not involve in the day-to-day affairs of the running of its business. To fasten vicarious liability under section 140 of the Act on a person, at the material time that person shall have been at the helm of affairs of the company, one who actively looks after the day-to-day activities of the company and particularly responsible for the conduct of its business, but the stage of taking evidence has not come yet. Without taking evidence, it is not possible to ascertain that the offence of the company was committed without the knowledge of the director or that she was not involved in day-to-day affairs of the company.

As the respondent was the director of the company at the relevant time and the cheque was issued from her company and as the petitioners claimed that the respondent was an active director and executed a personal guarantee for securing the lease finance, so according to section 102 of the Evidence Act, 1872 the burden of proof is upon the respondent to prove that though she was the director of the company, the offence has been committed without her knowledge or that she was a non-executive director of the company and she was not involved in day-to-day affairs of the company etc.; as the director of a company is *prima-facie* responsible for day-to-day affairs of the company. Section 140 of the Act also requires that a person whether he is a director, manager, secretary or other officer of a company shall not

be liable for any offence committed by the company if he can prove that such offence has not been committed within his knowledge or with his consent etc. Until he can prove otherwise it cannot be said that he is entitled to get exemption from the liability of the offence committed by the company. Whether a person was in charge and was responsible for conduct of the business of the company at the relevant point of time is a question of fact and this fact cannot be entertained under section 561A of the Code of Criminal Procedure, 1898. And it is only possible on the part of the accused, at the time of trial, by adducing evidence that he/she was not responsible for issuing the cheque as he/she had no knowledge regarding issuance of the cheque in question. But in the instant case, the High Court Division without taking into consideration this important aspect quashed the entire proceedings and committed serious error of law.

It is not proper to come to a conclusion before taking evidence in trial that the allegation as contained in the petition of complaint as a whole are not sufficient to show that at the relevant time respondent No.1 was not the person to be person-in-charge of the affairs of the company as had no knowledge regarding the issuance of the cheque.

The innocence of the respondent No.1, the director, has to be proved before the Court by adducing evidence and thus, the director, respondent No.1 has to face the trial. Only after taking evidence during trial if the director, respondent No.1 herein, is found that she

was not to be a person-in-charge of the affairs of the company at the relevant time of the issuance of the cheque only then she may be exonerated from the charge.

On these above findings, both the petitions are **disposed of**.

The judgment and orders passed in Criminal Miscellaneous Case Nos.11076-11077 of 2017 by the High Court Division are hereby set aside.

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