

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 3513 of 2023

Md. Amir Hossain

...Convict-appellant-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Sk. Sharifuddin, Advocate with

Mr. S.M. Rezaul Karim, Advocate

...For the convict-appellant-petitioner

Mr. Abdus Salam Mamun, Advocate with

Mr. A.B.M. Shibly Sadekeen, Advocate

...For the complainant-opposite party No. 2

Heard on 30.01.2024, 04.02.2024, 06.02.2024,
20.02.2024, 29.04.2024, 30.04.2024, 08.05.2024
and 09.05.2024**Judgment delivered on 19.05.2024**

This Rule under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 31.07.2023 passed by Sessions Judge, Barisal in Criminal Appeal No. 705 of 2022 allowing the appeal in part and modifying the judgment and order of conviction and sentence dated 13.09.2022 passed by Joint Sessions Judge, Court No. 1, Barisal in Session Case No. 231 of 2006 arising out of C.R. Case No. 276 of 2005 (Sadar Thana) convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to pay fine of Tk. 10,72,015 should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The prosecution case, in short, is that the accused Md. Amir Hossain took a loan from the Al Arafah Islami Bank Limited, Barisal Branch. Subsequently, on the application of the accused, the loan was rescheduled on 30.09.2002 on the condition that he would pay the said loan in 84 equal instalments. On 15.01.2005, the accused issued cheque

Nos. 8389161, 8389162, 8389163, 8389164, 8389165, 8389166 and 8389167 putting the dates on 24.01.2005, 31.01.2005, 07.02.2005, 14.02.2005, 22.02.2005, 28.02.2005 and 08.03.2005 respectively on the cheques for payment of Tk. 1,53,145 each, total Tk. 10,72,015 in favour of the complainant bank. The complainant bank presented those cheques on the date mentioned in the cheques which were dishonoured with the remark 'insufficient funds'. The matter of dishonour was informed to the accused and he requested the bank to present the first cheque after 6 months, the second cheque after three weeks, the third cheque after four weeks, the fourth cheque after three weeks, the fifth cheque after two weeks, sixth cheque after one week and seventh cheque after two weeks. The complainant bank presented those cheques on 10.03.2005 and finally on 17.03.2005 which were dishonoured with the remark 'insufficient funds'. The complainant bank sent a notice under Section 138 of the Negotiable Instruments Act, 1881 on 19.03.2005 to the accused. Despite the notice served upon the accused under Section 138 of the Negotiable Instruments Act, 1881 for payment of Tk. 10,72,015, he did not pay the cheque amount. Consequently, the bank filed the case on 26.04.2005 through its Officer P.W. 1 Md. Mostafizur Rahman against the accused under Section 138 of the Negotiable Instruments Act, 1881.

After filing the complaint petition, the complainant Md. Mostafizur Rahman, an Officer of the Al-Arafah Islami Bank Limited, was examined under Section 200 of the Code of Criminal Procedure, 1898 and the learned Magistrate was pleased to take cognizance of the offence under Section 138 of the said Act against the accused. On 25.10.2005, the accused Md. Amir Hossain voluntarily surrendered before the learned Magistrate and obtained bail. After that, the case was sent to the Sessions Judge, Barisal and was registered as Session Case No. 231 of 2006 and by order dated 13.11.2006, the Sessions Judge, Barisal sent the case to the Assistant Sessions Judge, Court No. 1, Barisal for trial. On 12.02.2007 charge was framed against the accused

under Section 138 of the Negotiable Instruments Act, 1881 which was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined P.W. 1 on 03.11.2020 and on that day, the accused was not present in Court for which bail of the accused Md. Amir Hossain was cancelled.

On 08.11.2020 the accused again voluntarily surrendered and filed an application for recalling P.W. 1 for cross-examination and the learned trial Court fixed the application for re-calling P.W. 1 on 30.11.2020 for hearing. On 30.11.2020 the trial Court rejected the application for recalling P.W. 1 and by judgment and order dated 30.11.2020 convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to suffer imprisonment for 1(one) year and a fine of Tk. 10,72,015 against which the accused filed Criminal Appeal No. 527 of 2020 before the Sessions Judge, Barisal which was transferred to the Additional Sessions Judge, Court No. 1, Barisal who by judgment and order dated 15.03.2021 allowed the appeal and sent the case on remand to the trial Court allowing the accused to cross-examine P.W. 1.

Thereafter on 19.01.2022 and 09.03.2022, the defence cross-examined P.W. 1. After examination of P.W. 1, the accused Md. Amir Hossain was examined under Section 342 of the Code of Criminal Procedure, 1898 and he stated that he would adduce defence witness and the trial Court fixed the next date on 05.05.2022 for the defence witness. On 01.08.2022, the case was fixed again for examination of the defence witnesses and on that day, the learned Advocate engaged on behalf of the defence informed the Court that the accused would not examine any D.W. but would submit the documents. On 23.08.2022 he submitted documents through the firisti.

After concluding the trial, the Joint Sessions Judge, Court No. 1, Barisal by judgment and order dated 13.09.2022 convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and

sentenced him to suffer imprisonment for 1(one) year and a fine of Tk. 10,72,015 against which the convict-petitioner filed Criminal Appeal No. 705 of 2022 before the Sessions Judge, Barisal who by impugned judgment and order allowed the appeal in part and modified the judgment and order of conviction and sentence passed by the trial Court sentencing the accused to pay fine of Tk. 10,72,015 and directed him to pay the remaining 50% of the cheque amount i.e. Tk. 5,36,007 within the next ninety days failing which to suffer imprisonment for 1(one) month against which the convict-petitioner obtained the instant Rule.

P.W. 1 Md. Mostafizur Rahman is the Senior Assistant Vice-President, Al-Arafah Islami Bank Limited, Barisal Branch. He stated that he is the complainant. He deposed on behalf of the bank. The accused Md. Amir Hossain took a loan from the bank. He issued seven cheques on 15.01.2005 drawn on his account maintained in the name of his business establishment Messers Hossain Traders for payment of Tk. 1,53,145 each, total Tk. 10,72,015. The said cheques were presented to the bank on the date mentioned on the cheques and subsequently on 10.03.2005 and lastly, on 17.03.2005 the cheques were presented for encashment. The said cheques were dishonoured with the remark 'insufficient funds'. On 19.03.2005, a legal notice was sent through registered post to the accused and the notice was also personally served upon the accused. The accused did not pay the cheque amount. Consequently, he filed the case. He proved the complaint petition as exhibit 1 and his signatures on the complaint petition as exhibits 1/1 and 1/2. He proved the seven cheques as exhibits 2 series, dishonour slips (total 21) as exhibits 3 series, demand notice as exhibit 4 and the postal receipt as exhibit 5. During cross-examination, he denied the suggestion that in the complaint petition, he did not mention the date of occurrence and that the cheque dated 15.01.2005 was not produced in Court and that there is no signature of the learned Advocate on the second page of the complaint petition. He also denied the suggestion that the cheque dated 17.01.2005 was not produced before the Court.

He also denied the suggestion that page No. 2 of the complaint petition of Sessions Case No. 231 of 2006 is replaced by forgery and that due to that reason, the second page was not exhibited. He affirmed that the legal notice was served on 19.03.2005 by registered post. The accused also personally received the notice. He denied the suggestion that on 09.05.2005 the legal notice was received and that he changed the date of service of the legal notice by tempering. He denied the suggestion that he put the dates on the blank cheques and filed the false case.

The learned Advocate Mr. Sk. Sharifuddin appearing on behalf of the convict-petitioner submits that at the time of rescheduling the loan agreement on 30.09.2002 complainant-bank took the blank cheques from the accused which was mentioned in the letter dated 08.05.2004 and subsequently the bank putting the new dates on the blank cheques filed the case. Having drawn the attention of this Court to the second page of the complaint petition (exhibit 1) learned Advocate submits that no legal notice was sent on 19.03.2005 and by replacing the second page of the complaint petition, the complainant substituted a new date i.e '19.03.2005' of sending notice upon the accused in place of '09.03.2005'. On the second page of the complaint petition, there is no signature of the learned Advocate. He also submits that there is no seal and date of presentation on the cheques and the deposit slips. The bank did not present the cheques on 10.03.2005 and 17.03.2005 for encashment and subsequently issued the deposit slips and the dishonour slips without presenting the cheques to file the case. He further submits that the complainant by practicing fraud and forgery upon the trial Court obtained the impugned judgment and order. The prosecution failed to prove the charge against the accused beyond all reasonable doubt. He prayed to make the Rule absolute.

The learned Advocate Mr. Abdus Salam Mamun appearing along with learned Advocate Mr. A.B.M. Shibly Sadekeen on behalf of the complainant-opposite party No. 2, Al Arafah Islami Bank Limited, submits that the accused Md. Amir Hossain handed over seven post

dated cheques on 15.01.2005 for payment of loan and there is no illegality in issuing the post-dated cheques by the drawer in favour of the payee-bank. He further submits that the cheques were lastly dishonoured on 17.03.2005 and the legal notice was served both personally and by registered post on 19.03.2005 upon the accused. Since the accused Md. Amir Hossain did not pay the cheque amount in time the complainant filed the case on 26.04.2005 complying with the procedures under Section 138 of the Negotiable Instruments Act, 1881. He also submits that both the Courts below arrived at a concurrent finding of fact that the accused issued the cheques for payment of the loan and he did not pay the cheque amount despite the service of notice under Section 138 (b) of the Negotiable Instruments Act, 1881 and both the Courts below on proper assessment and evaluation of the evidence of the prosecution witnesses legally passed the impugned judgments and orders. Therefore, he prayed for discharging the Rule.

I have considered the submission of the learned Advocates of both parties, perused the evidence, impugned judgments and orders passed by the Courts below and the records.

In the complaint petition, it has been alleged that on the first date of occurrence, the accused Md. Amir Hossain handed over seven cheques to the bank mentioning the dates 24.01.2005, 31.01.2005, 07.02.2005, 14.02.2005, 22.02.2005, 28.02.2005 and 08.03.2005 on the cheques but in the complaint petition, no first date of occurrence has been mentioned. Nothing stated by P.W. 1 that the loan was rescheduled on 30.09.2002. He stated that the cheques were handed over on 15.01.2005. At the time of examination of the accused under Section 342 of the Code of Criminal Procedure, 1898, he stated that he would adduce a defence witness and submit the documents. On 23.08.2022 the accused submitted the photocopy of the alleged legal notice dated 19.03.2005 received by the accused on 09.05.2005 and a letter dated 08.05.2004 issued by Mohammad Nur Ali, Assistant Vice-President of Al Arafah Islami Bank Limited, Barisal Branch to the

Deputy Managing Director, Investment Division, Al Arafah Islami Bank Limited, Head Office, Dhaka.

In the letter dated 08.05.2004, it has been mentioned that

“৩। বাইম ও এইচপিএসএম বিনিয়োগের শর্তাবলী পরিপালন :

ক) মঞ্জুরী পত্র নং ইসি/বিএসএল/কম্প-লিমিট/০৪/০১/৭২৩ (এ) তাং ৩১-০৩-২০০৪ তে উল্লেখিত Schedule of Property অনুযায়ী ১৫৪৬১ (পূর্বের ৬৯.০০+প্রস্তাবিত৮৫.৬১) লক্ষ টাকা তাৎক্ষনিক মূল্যের সহায়ক জামানত নতুনভাবে রেজিঃমটগেজ নেয়া হয়েছে।

খ) মেসার্স হোসেন ট্রেডার্স এর এইচপিএসএম (রি-এ) ও বাইম এবং মেসার্স আরাফাত পেইন্ট এন্ড কেমিক্যাল ওয়াকর্স এর এইচপিএসএম (ট্রান্সপোর্ট) এর বকেয়া কিস্তি সমূহের বিপরীতে প্রয়োজনীয় অগ্রিম চেক গ্রহন করা হয়েছে।”

On perusal of the said letter dated 08.05.2004, it appears that advanced cheques had been taken from the M/S Hossain Traders against each instalment. In the said letter dated 08.05.2004 nothing has been mentioned that post dated advance cheques had been taken from the convict-petitioner. Be that as it may, the cheques against the instalments had been received by the complainant bank before 08.05.2004. The complainant did not deny that the letter dated 08.05.2004 was not issued by the bank. Therefore, the statement made by P.W. 1 that on 15.01.2005 the accused handed over seven cheques to the bank (exhibit 2 series) mentioning the dates on the cheques on 24.01.2005, 31.01.2005, 07.02.2005, 14.02.2005, 22.02.2005, 28.02.2005 and 08.03.2005 is an afterthought. In the complaint petition it has been stated that advance cheques were received by the bank at the time of rescheduling the loan on 30.9.2002. The defence case that the complainant received the blank cheques at the time of reschedule of the loan on 30.09.2002 lends support from the evidence of P.W. 1 and the letter dated 08.05.2004.

P.W. 1 stated that the complainant bank issued a legal notice on 19.03.2005. On perusal of the evidence, it appears that the postal receipt was exhibited as exhibit 5. In exhibit 5, the date has been written by hand as ‘9/3’ which corresponds ‘09.03.2005’. There is a seal of the postal department on exhibit 5 but the date is not eligible for

reading. The accused submitted a copy of the alleged legal notice dated 19.03.2005 which was received by the accused on 09.03.2005. The evidence of P.W. 1 that the accused received the legal notice personally on 19.03.2005 is disputed by the defence. In the complaint petition, no statement has been made by the complainant that the accused received the legal notice (exhibit 4) personally on 19.03.2005.

On scrutiny of the alleged legal notice dated 19.03.2005 (exhibit 4), it transpires that the copy of the notice dated 19.03.2005 was received by the accused but there is a tempering on the date. Putting a scotch tape, '19.03.2005' has been written. No postal receipt dated 19.03.2005 is proved in the case by the prosecution. In the absence of any postal receipt dated 19.03.2005, it cannot be said that the notice has been sent on 19.03.2005. Therefore, I am of the view that the legal notice was sent to the accused through registered post (exhibit 5) on 09.03.2005.

P.W. 1 stated that on 15.01.2005 seven cheques each for payment of Tk. 1,53,145 total Tk. 10,72,015, were issued. Nothing stated by P.W. 1 that post dated seven cheques were issued by the accused. On perusal of the records, it appears that deposit slip dated 08.03.2005 for Cheque No. 8389167, deposit slip dated 28.02.2005 for Cheque No. 8389166, deposit slip dated 22.02.2005 for Cheque No. 8389165, deposit slip dated 14.02.2005 for Cheque No. 8389164 and deposit slip dated 07.02.2005 for Cheque No. 8389163 are lying with the records but those deposit slips were not exhibited. Although those deposit slips were not proved by the prosecution but the accused is legally entitled to rely on the documents submitted by the prosecution. On examination of those deposit slips, it transpires that there is no seal of the bank on those deposit slips. In the absence of any seal with date on the deposit slips, it cannot be held that the payee presented those cheques on the date mentioned on the deposit slips.

P.W. 1 further stated that the complainant presented the cheques on 10.03.2005 and lastly on 17.03.2005. On examination of the

disputed seven cheques (exhibits 2 series) it reveals that there is no seal dated 10.03.2005 and 17.03.2005 on the cheques. When a cheque is presented for encashment, the bank puts a seal with the date on the cheque and if the cheque is dishonoured, the Bank issues the dishonour slip. There is no seal of the bank and date of presentation on the disputed cheque (exhibits 2 series). In the instant case, the Al Arafah Islami Bank Limited, Barisal Branch is the payee of seven cheques (2 series) and the said cheques were also allegedly presented through the Al Arafah Islami Bank Limited, Barisal Branch.

On perusal of the dishonour slips (exhibits 3-3/20) it appears that three dishonour slips (exhibits 3, 3/1 and 3/2) dated 08.03.2005, 10.03.2005 and 17.03.2005 in respect of Cheque No. 8389167 dated 08.03.2005, three dishonour slips (exhibits 3/3-3/5) dated 28.02.2005, 10.03.2005 and 17.03.2005 in respect of Cheque No. 8389166 dated 28.02.2005, three dishonour slips dated 22.02.2005, 10.03.2005 and 17.03.2005 (exhibits 3/6-3/8) for Cheque No. 8389165 dated 22.02.2005, three dishonour slips (exhibits 3/9-3/11) dated 14.02.2005, 10.03.2005 and 17.03.2005 for Cheque No. 8389164 dated 14.02.2005, three dishonour slips (exhibits 3/12-3/14) dated 07.02.2005, 10.03.2005 and 17.03.2005 for Cheque No. 8389163 dated 07.02.2005, three dishonour slips dated 24.01.2005, 10.03.2005 and 17.03.2005 (exhibits 3/15-3/17) for Cheque No. 8389161 dated 24.01.2005, three dishonour slips dated 31.01.2005, 10.03.2005 and 17.03.2005 (exhibits 3/18-3/20) for Cheque No. 8389162 dated 31.01.2005 were issued.

No explanation was given by P.W. 1 as to why there is no seal and date of presentation on the cheques (exhibits 2 series). In the absence of any seal and date of presentation on the disputed cheques (exhibit 2 series) it cannot be said that the cheques were presented for encashment on the dates mentioned in the dishonour slips (exhibits 3-3/20). There is also no seal on the deposit slips lying with the records. I am of the view that the complainant bank issued the disputed dishonour slips (exhibits 3-3/20) without presenting the cheques on 10.03.2005

and 17.03.2005 for encashment. Therefore there was no cause of action for filing the case on 26.04.2005. Compliance of the provision of the proviso to Section 138 is sine quo non. Without presenting the cheques (exhibit 2 series) for encashment the complainant filed the case on 26.04.2005.

It is found that the cheques have been allegedly presented through the complainant bank. The notice was sent to the accused by registered post on 09.03.2005 (exhibit 5). Therefore, the dishonour of cheques on 10.03.2005 and 17.03.2005 will not arise at all. No statement has been made in the complaint petition that personal notice has been served upon the accused on 19.03.2005. Therefore, the evidence of P.W. 1 that the notice has been personally served upon the accused on 19.03.2005 is an afterthought and untrue.

The above evidence depicts that the complainant bank received the cheques on 30.09.2002 at the time of reschedule of the loan and the prosecution failed to prove that post dated cheques were issued by the accused in favour of the complainant. Without presenting the cheques for encashment within six months, a legal notice was sent to the convict-petitioner on 09.03.2005 through registered post (exhibit 5) for payment of the cheques amount. The presentation of the cheques by the bank on 10.03.2005 and 17.03.2005 is an afterthought. There is no seal of the bank and date of presentation on the disputed cheques (exhibit 2 series) and deposit slips. I am of the view that without presenting the cheques for encashment, the complainant-bank subsequently created the dishonour slips (exhibits 3-3/20) to file the case.

The appellate Court found that there is a signature of the complainant and the learned Advocate along with the date on the first page of the complaint petition but there is only the signature of the complainant using different inks on the second page of the complaint petition and at the time of filing the complaint petition the second page was not available with the complaint petition which has been subsequently substituted and the complainant is not responsible. The

relevant staff of the Court will give an explanation regarding the records.

On examination of the complaint petition, it reveals that there is no signature of the learned Advocate on the second page and the name of the complainant has been written in different ink on both pages. There is no denial of the fact that the complainant signed the second page of the complaint petition. Be that as it may, only the complainant shall explain under which circumstances he signed the second page. It is the defence case that the second page of the complaint petition has been replaced subsequently. Since the signature of the complainant P.W. 1 on the substituted second page has not been denied by him, it is only P.W. 1 who malafide changed the second page of the complaint petition. P.W. 1 denied the suggestion that there is no signature of the learned Advocate for the complainant on the second page. Therefore, I am of the view that the evidence of P.W. 1 that the learned Advocate signed the second page of the complaint petition is untrue.

The above evidence of P.W. 1 depicts that the complainant malafide changed the second page of the complaint petition replacing the original page No. 2 of the complaint petition and changed the date of sending notice “19.03.2005” in place of “09.03.2005”. The findings arrived at by the appellate Court below that the staff of the concerned Court will give an explanation regarding the replacement of the second page of the complaint petition is misconceived. The signature of the complainant P.W. 1 on the second page of the complaint petition has not been denied by him. It is only the complainant P.W. 1 who shall give an explanation regarding replacement of the second page of the complaint petition. P.W. 1 failed to give any explanation regarding replacement of the second page of the complaint petition.

In Section 138 (1) (b) of the Negotiable Instruments Act, 1881, the legislature used the words “makes a demand... in writing” and in Section 138 (1) (c) of the said Act, the legislature used the words “receipt of the said notice”. The literal meaning of the words “receipt of

said notice” means that the drawer of the cheque received the notice on a specific date. No provision is made in the said Act as to how the court will determine that notice under Section 138 (1) (b) of the said Act has been received by the drawer or served upon the drawer. In the absence of any statutory provision, as regards the determination of service of notice upon the drawer, I am of the view that the actual date of service of notice upon the drawer or receipt of notice by the drawer on a particular date might have been reckoned as service of notice upon the drawer. Receipt of notice indicates that the drawer of the cheque had been notified about the dishonour of the cheque. If any drawer refused to receive the said notice, the date of refusal to receive the notice by the drawer might have been reckoned as ‘receipt of said notice’ mentioned in Section 138 (1) (c) of the said Act.

In the case of *Nizamuddin Mahmood vs Abdul Hamid Bhuiyan* and another reported in 9 BLC (AD) 177 judgment dated 15.6.2004 (Amirul Kabir Chowdhury J) having considered Section 138 (1) (c) of the Negotiable Instruments Act, 1981 our Apex Court affirmed the judgment and order of High Court Division in quashing the proceedings holding that;

“In view of the non-disclosure of the date as to receipt of notice by the accused and failure to mention any legal cause of action in the petition of complaint, we are of the view that the proceeding cannot be allowed to continue and, as such, it is liable to be quashed. In view of our discussion made above the ultimate order of the High Court Division in quashing the proceeding is found to be sustainable.”

Subsequently, in the case of *Nizamuddin Mahmood vs Abdul Hamid Bhuiyan* and another reported in 60 DLR (AD) 195 judgment dated 17.6.2008 our Apex Court (Md. Abdul Matin J) set aside the

order of High Court Division in quashing the proceedings under Section 138 of the Negotiable Instruments Act, 1881 holding that;

“Since the date of receipt is a question of fact to be ascertained at the time of trial non-dis-closure of such fact in the complaint petition cannot render the proceeding liable to be quashed to the great prejudice of the complainant who is entitled to prove his case on evidence.”

It is already found that notice under Section 138 (1) (b) of the Negotiable Instruments Act, 1881 has been sent on 9.3.2005 to the accused and that no statement is made in the complaint petition that personal notice has been served upon the accused. The negotiable instruments is a special law. The pre-condition of Section 138(1)(c) i.e the service of notice upon the drawer before filing the case under Section 138 of the Negotiable Instruments Act, 1881 is sine qua non. Therefore, I am of the view that before filing the complaint petition notice under Section 138 (1)(b) of the Negotiable Instruments Act, 1881 was not served upon the accused and there was no cause of action to file the case on 26.04.2005.

It transpires that the complainant subsequently created the dishonour slips (exhibits 3/1-3/20) without presenting the cheques for encashment within six months from the date on which it was drawn i.e 30.09.2002. The complainant failed to comply the provision of Section 138(1)(c) of the Negotiable Instruments Act, 1881 before filing the case. By practicing fraud and forgery upon the trial Court, P.W. 1 changed the second page of the complaint petition and fraudulently obtained the judgments and orders passed by both the Courts below. The Courts below without applying judicial mind and without proper assessment and evaluation of the evidence mechanically passed the impugned judgments and orders. The prosecution failed to prove the charge against the convict-petitioner beyond all reasonable doubt.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders passed by the Courts below are hereby set aside.

The accused Md. Amir Hossain is legally entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

The trial Court is directed to allow the accused Md. Amir Hossain to withdraw 50% of the cheque amount within 30 days from the date of receipt of the copy of the judgment and order passed by this Court.

Send down the lower Court's records at once.