

**High Court Division**

Criminal Revision No. 830 of 2013.

**Mohammad Majharul Hoque Monsur**

....Accused-Petitioner.

-Vs-

**Mir Kashim Chowdhury & another.**

.....Opposite-Parties.

Mr. A.F. Hasan Arif, Senior Advocate  
with

Mr. Zakir Hossain Munshi with

Mr. Md. Modersher Ali Khan, Advocates.

... For the Petitioner.

Mr. Md. Ashek-E-Rasul with

Ms. Farhana Islam, Advocates

..For the Opposite-Party No. 2

Mr. Md. Harun-Ar-Rashid, D.A.G

.....For the Opposite Party-State.

Heard on : 07.04.2016, 26.05.2016,  
02.06.2016,14.07.2016 &04.08.2016

Judgment on : 24.08.2016

**Present:****Mr. Justice A.K.M. Abdul Hakim****And****Mr. Justice Md. Farid Ahmed Shibli.****Section 138 of the N.I. Act:****The proceedings initiated on the petition of complaint under section 138 of the N.I. Act cannot be hindered by or shackled with any proceeding initiated on an arbitration clause. ... (Para 13)****Section 265C of the Code of Criminal Procedure, 1898****and****Section 138 of the N.I. Act:****Whether the cheque in question was drawn against any liability or not is a pure question of fact and without awarding ample opportunity to sift those facts, anyone cannot be allowed to obstruct the course of justice depriving the complainant-opposite party, who may prove his claims and allegations on trial. ... (Para 17)****Judgment****Md. Farid Ahmed Shibli, J:**

1. This Criminal Revision, at the instance of the accused Mohammad Mazharul Haque Monsur, is directed against the order dated 13.05.2013 passed by the learned Joint Metropolitan Session Judge of the 4<sup>th</sup> Court, Chittagong in Sessions Case no. 2864 of 2011 arising out of C.R. Case No. 935 of 2011.

2. The Rule has been issued calling upon the Opposite Parties to show cause as to why the impugned order rejecting an application under section 265C of the Code for discharging the accused-petitioner and framing of the charge against him under section 138 of the Negotiable

Instruments Act, 1881 (shortly “the N.I. Act) should not be set aside and/or pass such other order or orders as to this Court may deem fit and proper.

3. The facts relevant for disposal of this case are as follows: On the basis of the Memorandum of Understanding (MOU) dated 12.08.2010 some Mir Kashim Chowdhury (i.e. the complainant-opposite party) transferred his shares in “the Sonali Cotton Mills Ltd.” (shortly “the Company) to one Mohammad Majharul Hoque Monsur (i.e. the accused-petitioner), who drew the cheque having no. CAV 9752121 dated 06.02.2011 for Taka 3 (three) crores in favour of the complainant-opposite party in order to adjust estimated value of the company-shares purchased by him (the accused-petitioner) from the complainant-opposite party and his elder brother namely Solaiman Chowdhury, According to the petition of complaint, Solaiman Chowdhury, who was also a share-holder of the company, owed Taka 3 crores to his younger brother i.e. the complainant-opposite party, in whose favour the accused-petitioner issued the said cheque as the security of payment of the shares’ value. Although the cheque was drawn against an account of the accused-petitioner maintained with the Basic Bank, Agrabad Branch, Chittagong, but on presentation it was returned unpaid. Owing to that, the complainant-opposite party sending a legal notice to the accused-petitioner demanded the cheque-money, but the latter failed to make any payment. Consequently the petition of complaint dated 23.06.2011 was filed within the prescribed time-limit observing all legal formalities.

4. On receipt of the petition of complaint, the learned Judicial Magistrate took cognizance of the offence under section 138 of the N.I Act against the accused-petitioner and sent the record to the Court of learned Metropolitan Session Judge of Chittagong, who in his term again transferred the record to the 4<sup>th</sup> Joint Metropolitan Session Judge, Chittagong for hearing and disposal. On the date fixed for charge hearing, the learned Joint Metropolitan Session Judge after giving both sides a reasonable opportunity of being heard decided the petition filed by the accused-petitioner under section 265C of the Code refusing to discharge the accused-petitioner and framed the charge against him under section 138 of the N.I Act passing the impugned order dated 13.05.2013. Being aggrieved by and dissatisfied with that order, the accused-petitioner has filed the instant application for criminal revision stating inter alia that the complainant-opposite party ought to file the complaint under section 138 of the N.I Act after exhausting the provision of arbitration clause stated in the MOU, but he did not do that and thereby made the proceedings including the impugned order liable to be set aside; and that as the provision of section 7 of the Arbitration Act, 2001 over-rides all other recourses available under any other law, the Trial Court ought to consider the said legal aspect of the matter and allow the prayer for discharging the accused-petitioner. It is claimed that now it is inevitable for this Court to set the impugned order at naught discharging the accused-petitioner therefrom.

5. Learned Senior Advocate Mr. A.F. Hasan Arif appearing with learned Advocates Mr. Zakir Hossain Munshi and Mr. Md. Modersher Ali Khan for the accused-petitioner and learned Advocate Mr. Md. Ashek-E-Rasul appearing with Ms. Farhana Islam for the Opposite-Party have entered appearance on behalf of the parties and participated in the hearing.

6. Mr. Zakir Hossain Munshi, learned Advocate for the accused-petitioner has made submission centering upon the following points:- *firstly*- as the Arbitration Case filed by the accused-petitioner under the arbitration-clause of the MOU is still pending before the Court of learned District Judge, the proceedings of the Sessions Case including framing of the

charge under section 138 of the N.I Act are not maintainable; and *secondly*- as the cheque in question was drawn without any consideration, it would create no obligation of payment upon the accused-petitioner in view of section-43 of the N.I. Act and the alleged bouncing of the cheque would therefore not constitute any offence under section 138 of the N.I. Act.

7. Referring to the MOU dated 12.08.2010 Mr. Munshi amplifies whole gamut of facts contending inter alia that both parties including the complainant-opposite party had agreed to settle all the disputes, that may arise between them, through mutual negotiation appointing an arbitrator, but in spite of being a party to the said document the complainant-opposite party in lieu of pursuing the arbitration-clause of the MOU has straightaway lodged the petition of complaint under section 138 of the N.I. Act in defiance of the legal bar laid down in section-7 of the Arbitration Act, 2001. Mr. Munshi contends that as the accused-petitioner has already filed the Arbitration Miscellaneous Case no. 165 of 2014, which is still pending in the Court of learned District Judge, the proceedings of the Sessions Case including the impugned charge-framing order under section 138 of the N.I Act are completely illegal and not tenable in the eye of law.

8. In reply Mr. Ashek-E-Rasul has drawn our attention to clause-11 of the MOU dated 12.08.2010, which runs as follows:- “The validity of this MOU is for 6 (six) months from the date of signing. The time of MOU will be extended on mutual negotiation of both the parties.”

9. It appears that validity of the MOU, as referred to above, already expired on 12.02.2011 and its time was not further extended. The cheque in question was bounced on 12.04.2011 and the notice demanding cheque-money was received by the accused-petitioner on 26.04.2011, on which the cause of action under section 138 of the N.I. Act arose, but at that time the MOU had no legal force or validity. So, for obvious reasons the complainant-petitioner did not pursue for negotiation invoking the arbitration clause of the MOU. We therefore do not find any substance in the allegations so far as made by the accused-petitioner on the point above.

10. Citing the Case of Parveen and another-Vs.-the State Reported in 51 DLR(1999)473 Mr. Munshi contends that section 7 of the Arbitration Act 2001 being a special law containing the non-obstante clause should prevail over any proceeding under the N.I, which does not have any such overriding provision. The entire proceedings including the impugned charge-framing order under section 138 of the N.I. Act, as contended by Mr. Munshi, suffer from serious legal infirmity and are liable to be set aside.

11. The Arbitration Miscellaneous Case No. 165 of 2014, as it reveals, was filed by the accused-petitioner on 13.08.2014, whereas the petition of complainant under section 138 of the N.I. Act had been filed on 23.06.2011 that was around 3½ years prior to filing of the Arbitration Miscellaneous Case. On the basis of a supplementary affidavit, the accused petitioner is now trying to castigate the impugned order, which was passed on 31.05.2013, showing a plea of the Arbitration Case, which has recently been filed and that is around one year after passing of the impugned order. Since 6 months' validity of the MOU dated 12.08.2010 expired about 3½ years' back, in such predicaments we do not find any earthly reason for the accused-petitioner to indulge in pursuing the arbitration clause or of late filing of a case to that effect.

12. Mr. Ashek-E-Rosul refers to the case of Shahnewaz Akhan-Vs- The State and another reported in 19 BLT(HCD) (2011) 349, where their Lordships decided a similar legal discourse holding the followings:-

“... there is no legal bar in filing a criminal case for criminal liability before the Court having jurisdiction notwithstanding the fact that a civil suit is pending over a self-same matter. An aggrieved person cannot be precluded from filing a criminal case if criminal offence is committed in spite of the fact that there is an arbitration clause in an agreement made, between the parties.”

13. In view of the above decision of the apex Court coupled with the attending facts of this case, *it transpires that the proceedings initiated on the petition of complaint under section 138 of the N.I. Act cannot be hindered by or shackled with any proceeding initiated on an arbitration clause.*

14. Regarding the second point, learned Senior Advocate Mr. A.F. Hasan Arif appearing for the accused-petitioner contends that since no consideration was passed or transacted before issuance of the cheque in question, it cannot therefore create any legal obligation upon the drawer of the cheque i.e. the accused-petitioner and for that reason any failure of payment as alleged on the part of the accused-petitioner would not constitute any offence under section 138 of the N.I. Act. Mr. Arif further contends that all legal ingredients of section-138 and their ramifications need to be considered without prejudice to any other provisions of the N.I. Act and that is why the cheque in question cannot be used as a sheet-anchor of the proceedings in view of section 43 of the Act.

15. In response to the above contention, Mr. Ashek-E-Rasul draws out attention to the very contents and construction of section 138(1) focusing their changes occurred before and after the amendment by Act XVII of 2000. Before the said amendment, a cheque was drawn “for the discharge in whole or in part, of any debt or other liability” but the said phrase of the section, as it reveals, has been omitted by Negotiable Instruments (Amendment) Act, 2000 (Act XVII of 2000). Presently, no such pre-condition is applicable for any cheque issued against the bank account of the drawer.

16. Mr. Ashek-E-Rasul has emphatically referred to the case of SM Emdadul Hossain (Bulbul)-Vs-Jinnur Hossain and another reported in 15 BLC(AD)(2010)146, where their Lordships observed-

“Whether any debt or liability at all exists or not is a question of facts to be determined in a proceeding under section 138 of the Negotiable Instruments Act. One of the ingredients for initiating a proceeding under section 138 of the Negotiable Instruments Act is refusal to honour a cheque and when there is such prima-facie case, the proceedings cannot be quashed...”

17. Regarding the above decision of the apex Court, Mr. Arif hardly finds anything to controvert or say anything more in this context. In the instant case, *whether the cheque in question was drawn against any liability or not is a pure question of fact and without awarding ample opportunity to sift those facts, we cannot allow anyone to obstruct the course of justice depriving the complainant-opposite party, who may prove his claims and allegations on trial.* It is thus abundantly clear that by refusing the petition under section 265C of the Code and framing the charge under section 138 of the N.I. Act the Court of Session has not committed any error of law or fact and that is why this criminal revision does not warrant any interference of this Court.

18. Be that as it may, as there are serious disputes and discourses between the parties on their business ethos and accounts of shares transferred between them, we must keep the way open to resolve those disputes on trial. At the time of charge hearing, the Court of Joint Metropolitan Session in true sense had no legal scope to consider or decide those facts and it was therefore well justified to refuse the prayer filed under section 265C of the Code.

19. Regard being had to what we have discussed above on both questions of law and relevant facts of the case, we are of the view that the learned Joint Metropolitan Session Judge has committed no error or mistake in passing the impugned order, so the instant petition for criminal revision must fail.

20. In the result, the Rule is discharged and the order of stay granted earlier by this Court stands vacated. The office is directed to transmit copy of this judgment to all concerned.