

**High Court Division**

Criminal Miscellaneous Case No. 42518  
of 2014.

Mr. Moinuddin, Advocate.  
... For the Petitioner.

**Md. Golam Faruque**  
....Accused-Petitioner.

Mr. Muntasir Uddin Ahmed with  
Mr. Ajit Sil, Advocates  
.....For the Opposite-Party No. 1

-Vs-

**Md. Salim Reza & another.**  
.....Complainant-Opposite-Party.

Mr. Md. Harun-Ar-Rashid, D.A.G  
.....For the Opposite Party-State.

Heard on : 14.07.2016, 21.07.2016 &  
04.08.2016

Judgment on : 11.08.2016

**Present:**

**Mr. Justice A.K.M. Abdul Hakim**

**And**

**Mr. Justice Md. Farid Ahmed Shibli.**

**Mere non-disclosure of facts in the petition of complaint cannot be a valid cause to make the entire proceedings liable to be quashed:**

**All particulars relating to the date of receipt or the manner of service of the legal notice including other relevant parenthetical information are bundle of facts and any discourse on those facts or their unerring decision requires in-depth scrutiny and threshing of the evidence to be produced in trial. So, mere non-disclosure of those facts in the petition of complaint cannot be a valid cause to make the entire proceedings liable to be quashed, which in true sense will deprive the complainant to prove his case on evidence.**

**...(Para 12)**

**Judgment****Md. Farid Ahmed Shibli, J:**

1. On an application filed under section 561A of the Code of Criminal Procedure, this Rule has been issued calling upon the Opposite-Party to show cause as to why the proceedings of Sessions Case No. 765 of 2014 under section 138 of the Negotiable Instrument Act, 1881 (shortly "the Act") arising out of C.R Case 104 of 2014 now pending in the Court of Additional Session Judge of the 1<sup>st</sup> Court, Gazipur should not be quashed and/or pass such other order or orders as to this Court may seem fit and proper.

2. The facts relevant for disposal of this case run as follows:- Some Md. Salim Reza figuring himself as a complainant filed the petition of complaint against one Md. Golam Faruque (i.e. the accused-petitioner) under section 138 of the Act alleging inter alia that the accused-petitioner after receiving Taka 48 lacs as loan from him (Md. Salim Reza i.e. the

complainant-Opposite Party) drew a cheque bearing no. <sup>CAF/M</sup> 2143184 on 05.03.2014 for that amount against his account maintained with Uttara Bank Limited, Gulshan Branch, Dhaka and on 11.03.2014 it was presented to the BRAC Bank of Motijheel Branch, Dhaka for encashment. On 12.03.2014 the concerned bank authority returned the cheque unpaid showing the reason of insufficient fund. The complainant-opposite party issued a legal notice on 24.03.2014 upon the accused-petitioner demanding the cheque-money, but the latter failed to make any payment owing to which the petition of complainant was filed within the statutory period before the Court of learned Senior Judicial Magistrate, Gazipur, who after complying with all legal requirements took cognizance of the offence under section 138 of the Act against the accused-petitioner.

3. Learned Session Judge of Gazipur after receiving the record transferred the same to the Court of learned Additional Session Judge of the 1<sup>st</sup> Court, Gazipur, who framed charge against the accused-petitioner under section 138 of the Act refusing the prayer filed for discharging the accused-petitioner under section 265C of the Code of Criminal Procedure, 1898 (shortly “the Code”).

4. Being aggrieved by and dissatisfied with the proceedings of Sessions Case no. 765 of 2014 arising out of C.R. case 140 of 2014 and framing of the charge under section 138 of the Act, the accused-petitioner has filed the instant application under section 561A of the Code and obtained a Rule in terms as stated hereinbefore.

5. Learned Advocate Mr. Moinuddin for the accused-petitioner and learned Advocate Mr. Muntasir Uddin Ahmed appearing with learned Advocate Mr. Ajit Sil for the complainant-opposite party have participated in the hearing of the Case.

6. On the threshold amplifying entire gamut facts and different aspects of the disputes as cropped-up between the parties, learned Advocate for the accused-petitioner Mr. Moinuddin makes the submission focusing mainly the following 3 (three) points:

*firstly*- the complainant-opposite party has made Md. Golam Faruque an accused on his personal capacity without making the company or its Managing Director a party thereto; *secondly*- complainant-opposite party's failure to file the original cheque in question has made the complaint disqualified to be accepted by the Court and *thirdly*- non-mentioning of the manner of service or the date of receipt of legal notice as envisaged in section 138(1A) of the Act has made the entire proceedings liable to be quashed.

7. In response to the *first-point* Mr. Muntasir Uddin Ahmed, learned Advocate for the complainant-opposite Party has referred to an unreported decision of the Appellate Division given in Criminal Petition for Leave to Appeal no. 485 of 2010 and contended that the person issued the cheque whether on his own behalf or on behalf of a company of which he is the Managing Director or otherwise responsible cannot escape his alleged criminal liability, which is nothing but a matter of fact to be decided upon the trial and that cannot be the basis for quashing the proceedings in its entirety under the Act. In response to the above contention, Mr. Moinuddin has failed to give any satisfactory reply and that is why this point so far as raised by him does not deserve any consideration.

8. In reply to the *second-point* Mr. Ahmed has drawn our attention to order 07 dated 12.11.2014 passed in Sessions Case no. 765 of 2014, which clearly unfolds the fact that on the date of charge hearing the complainant-opposite party produced the original copy of the

cheque and that was seen by the learned Additional Judge himself. Mr. Ahmed submits that the allegation made by the accused-petitioner on this point was nothing but an abortive attempt to frustrate a genuine claim of the complainant. In the sequel of the facts, as pointed out, it becomes difficult for Mr. Moinuddin to controvert or say anything more in that score. We, therefore, do not find any substance or truth in the allegation of non-filing the original cheque in the Court below.

9. In support of the *third-point* Mr. Moinuddin contends that the manner of service of the legal notice demanding the cheque money has not been mentioned specifically in the complaint and due to non-mentioning of that fact no Court can take cognizance of the offence on the basis of such a complaint. He further contends that non-disclosure of exact date of service of the notice in the complaint has also made the entire proceeding initiated on that complaint liable to be quashed in its entirety. In this context Mr. Moinuddin relies upon the decision in the case of Nizam Uddin Mahmood-Vs-Abdul Hamid reported in 9BLC(AD)2004 177, where their Lordships observed the following:

“In the instant case, 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, the proceeding cannot be allowed to continue and as such it is liable to be quashed”.

10. In reply, making reference to the latest decision on the said case reported in 60DLR(AD)(2008) 195, Mr. Muntasir Uddin Ahmed informs us that the earlier decision of Nizam Uddin Mahmood-Vs- Abdul Hamid, 9BLC(AD)2004 177, as cited by Mr. Moinuddin, has subsequently been reviewed and overruled by their Lordships in the Appellate Division in Criminal Appeal No. 04 of 2007 and that has been decided in following terms:

“Since the date of receipt is a question of fact to be ascertained at the time of the trial, non-disclosure 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.”

11. Due to the subsequent decision given on a Review Petition by the apex Court, the learned Advocate for the accused-petitioner has vitually lost all force of his contention, which is based on the decision of 9BLC(AD)(2004)177. On the other hand referring to another case of Iddris Sheikh (Md.)-Vs- State, 13BLC 423 the learned Advocate for the complainant-opposite party Mr. Ahmed asserts his view that on a plea of non-mentioning the date of receipt or the manner of service of the legal notice, the normal course of justice should not be intervened in any way, because those are nothing but some questions of facts to be determined in trial. Obviously we find a strong bearing and legal force in the view above as expressed by Mr. Ahmed.

12. It is stated that on 24.03.2014 the legal notice was given (*cd/vb*) to the accused, but on which date that notice was received by the accused that has not been exactly mentioned in the complaint. In most of the cases, it becomes impossible to know the exact date of receipt of the notice and generally the fact of receipt of the notice is denied by the accused on one side and asserted by the complainant on other side and that is why such questions of facts can be neither resolved not decided before concluding the trial. *All particulars relating to the date of receipt or the manner of service of the legal notice including other relevant parenthetical information are bundle of facts and any discourse on those facts or their unerring decision requires in-depth scrutiny and threshing of the evidence to be produced in trial. So, mere non-disclosure of those facts in the petition of complaint cannot be a valid cause to make the*

*entire proceedings liable to be quashed, which in true sense will deprive the complainant to prove his case on evidence.*

13. At the fag-end of the hearing Mr. Moinuddin has alleged inter alia that the cheque in question was not at all signed by the accused-petitioner and it was fraudulently created by the complainant hatching a conspiracy with an ulterior motive. He appraises this Court that the accused-petitioner stating those allegations filed a Criminal Petition Case (having no. 372/2014) on 31.03.2014 under section 98 of the Code against the complainant-opposite party, who subsequently filed this complaint under section 138 of the Act abusing the process of law narrating some concocted facts and for those reasons the instant criminal miscellaneous case is liable to be quashed under section 561A of the Code.

14. In reply Mr. Ahmed retorts amplifying chronological saga of the events including institution of several criminal litigations between the parties. He has clarified the facts that the legal notice under section 138 of the Act had been sent on 24.03.2014 to the accused-petitioner, who after receiving the said notice on 31.03.2014 filed the Petition Case under section 98 of the Code and also filed a complaint before the Anticorruption Commission, Dhaka under section 406/419/467/468/471/511 of the Panel Code against the complainant-opposite party narrating some got-up cases just to avoid his responsibility of paying the cheque money.

15. It is noted that both the parties are fighting against each other making allegations and counter-allegations, which are pure factual disputes to be looked into by the Court of Session during the trial. In as much as both the parties would get sufficient opportunity to prove their allegations and claims in the trial court and as this Court has no legal scope to examine or verify them at this trice, so any decision of quashing the proceeding as prayed for would frustrate the complainant's right to establish his claim and prove the allegations against the accused. Ergo, it seems expedient for us to refrain from giving any decision on the allegations and facts stated hereinbefore.

16. Having regard to what we have discussed above and attending facts and circumstances to the case, we are, therefore, inclined to hold that no satisfactory ground or legal substance is found in this case to quash the proceedings in question presently pending in the Court of learned Additional Session Judge of the 1<sup>st</sup> Court, Gazipur. Accordingly, the application under section 561A of the Code is decided in negative. Consequently, the Rule is discharged and the order of stay granted earlier by this Court stands vacated.

17. Communicate this judgment to all concerned.