

20 SCOB [2025] HCD**HIGH COURT DIVISION
(CRIMINAL REVISIONAL JURISDICTION)****Present:****Mr. Justice Md. Shohrowardi****Criminal Revision No. 5019 of 2023****Md. Moslem****.....Convict Petitioner****-Versus-****The State and another****.....Opposite Parties**

.... For the convict petitioner

Mr. Md. Monzur Alam Khan, Advocate

.....For the opposite party No. 2

Mr. Md. Akhtaruzzaman, DAG with

Mr. Sultan Mahmood Banna, AAG with

Mr. Mir Moniruzzaman, AAG with

Mr. Md. Kaium, AAG

....For the State

No one appears

Date of Hearing: 23-01-2025, 29-01-2025, 05-02-2025, 12-02-2025 & 20-02-2025

Date of Judgment: 25-02-2025

Editors' Note:

This criminal revision arose out of a conviction under section 138 of the Negotiable Instruments Act, 1881. The petitioner, Md. Moslem, proprietor of M/S Nasir Enterprise, had been prosecuted on the basis of a complaint lodged by NCC Bank Ltd., Nawabganj Branch, alleging dishonour of a cheque dated 22.06.2016 for Tk. 84,31,510.32, purportedly returned unpaid on 18.08.2016. The trial court, upon conclusion of proceedings, found the petitioner guilty and sentenced him to six months' simple imprisonment together with a fine equivalent to the cheque amount. The appellate court, by affirming the judgment and order of conviction, sustained the sentence.

In revision, the High Court Division scrutinized whether the essential pre-conditions stipulated in section 138 had been duly complied with. On perusal of the record, it appeared that the cheque in question bore no signature or date of any bank official, nor was there an authenticated bank seal evidencing due presentation. No deposit slip was exhibited in proof of presentment, notwithstanding that a "dishonour slip" was issued. Moreover, although a legal notice dated 01.09.2016 was claimed to have been sent by registered post, it was not dispatched with acknowledgment due; there was no material before the Court to establish actual service upon the drawer or the date of receipt. Consequently, the prosecution failed to demonstrate when the cause of action contemplated under proviso (c) accrued.

The Court held that the complainant had not fulfilled the mandatory requirements prescribed under provisos (a)–(c) to section 138, read conjointly with section 138(1A) providing for special statutory modes of service. It was further observed that recourse to section 27 of the General Clauses Act could not remedy such defects nor substitute proof of the date of receipt. In consequence, the High Court Division set aside the concurrent findings of the courts below, made the Rule absolute, and directed that the

petitioner-convict be at liberty to withdraw fifty per cent of the cheque amount earlier deposited, upon application, within seven days.

Keywords:

Section 138, N.I. Act; Cheque dishonour; Section 138 (1A), N.I. Act, 1881; Dishonour slip; Proof of service of notice with Acknowledgement Due (AD)

At the time of insertion of section 138 in the Negotiable Instruments Act, 1881 by Act No. XIX of 1994 the legislature made provision in clause b to section 138 of the said Act, regarding the demand for payment of cheque amount but no provision was made at that time in the said Act as to the mode of making demand or service of notice upon the accused. As per section 27 of the General Clauses Act, 1958 if the notice or a letter is sent by registered post addressing the correct address of the addressee, it is to be presumed that the notice was served upon the accused. Nothing is stated in section 27 of the said Act as to the determination of the date of receipt of notice by the accused or service of notice upon the accused. ... (Para 13)

Despite the provision made in section 27 of the General Clauses Act, 1958, the Legislature inserted sub-section (1A) in Section 138(1) of the Negotiable Instruments Act, 1881 by Act No. III of 2006 regarding the mode of sending notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881. Under Section 138(1)(1A) of the said Act the notice is required to be served upon the drawer of the cheque, a. by delivering it to the person on whom it is to be served; or b. by sending it by registered post with acknowledgement due to that person at his usual or last known place of abode or business in Bangladesh; or c. by publication in a daily Bangla national newspaper having wide circulation. The Negotiable Instruments Act, 1881 is a special law. Service of notice upon the accused in compliance with the provision made in Section 138(1) (1A) of the said Act at least by one mode as stated above is sine qua non. ... (Para 14)

JUDGMENT

Md. Shohrowardi J:

1. On an application under sections 439 and 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order of conviction and sentence dated 16.10.2023 passed by Sessions Judge, Dhaka in Criminal Appeal No. 277 of 2021 affirming the judgment and order dated 28.08.2018 passed by Joint Sessions Judge, Court No. 1, Dhaka in Sessions Case No. 38 of 2017 arising out of C.R. No. 110 of 2016 (Nawabganj) convicting the petitioner under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 06 (six) months and fine of Tk. 84,31,510.32 should not be set aside and/or pass such other or further orders or orders as to this court may seem fit and proper.

2. The prosecution case, in short, is that the accused Md. Moslem is the Proprietor of MS Nasir Enterprise. He took a loan from NCC Bank Ltd, Nawabganj Branch, Dhaka. As Proprietor of MS Nasir Enterprise he issued Cheque No. 4028105 on 22.06.2016 drawn on his Account No. 0400210009213 maintained with NCC Bank, Nawabganj Branch, Dhaka for payment of Tk. 84,31,510.32 in favour of the NCC Bank, Nawabganj Branch, Dhaka. The complainant presented the said cheque and after the presentation of the cheque, it was dishonoured on 18.08.2016. Thereafter, the complainant made a demand in writing on

01.09.2016 to the accused by the engaged learned Advocate through registered post to pay the cheque amount within 30 days from the date of receipt of the demand. Despite the service of notice upon the accused, he did not pay the cheque amount. Consequently, he filed the case on 27.10.2016.

3. After filing the complaint-petition, Md. Zahirul Islam, Officer of the NCC Bank Ltd, Nawabgonj Branch, Dhaka was examined on behalf of the complainant Bank under section 200 Code of Criminal Procedure, 1898 and the learned Magistrate was pleased to take cognizance of the offence against the accused under section 138 of the Negotiable Instruments Act, 1881. On 04.12.2017 the accused Md. Moslem voluntarily surrendered and obtained bail. Thereafter, the case was transferred to the Sessions Judge, Dhaka who transferred the case to the Joint Sessions Judge, Court No. 1, Dhaka for trial. On 04.04.017 charge was framed against the accused under Section 138 of the Negotiable Instruments Act, 1881 which was read over and explained to him and he pleaded not guilty to the charge and claimed to be tried following the law.

4. The prosecution examined 01 witness to prove the charge against the accused and the defence cross-examined P.W.1. After examination of the prosecution witness, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and the defence declined to adduce any DW. After concluding the trial, the Joint Sessions Judge, Court No. 1, Dhaka by judgment and order dated 28.08.2018 convicted the accused under section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 06(six) months and fine of Tk. 84,31,510.32 against which the accused filed Criminal Appeal No. 277 of 2021 before the Sessions Judge, Dhaka who after hearing the appeal by impugned judgment and order affirmed the judgment and order of conviction and sentence passed by the trial court against which the convict petitioner obtained the Rule.

5. P.W. 1 Md. Zahirul Islam is an Officer of NCC Bank Ltd, Nawabganj Branch, Dhaka. He stated that the accused issued a cheque on 22.06.2016 for payment of Tk. 84,31,510.32 which was dishonoured on 18.08.2016. The complainant sent legal notice on 01.09.2016 but he did not pay the cheque amount. Consequently, he filed the case on 02.10.2016. He proved the complaint petition as exhibit-1 and his signature on the complaint petition as exhibit-1/1, disputed cheque, the dishonoured slip, the legal notice and the postal receipt as exhibit-2 series. He denied the suggestion that the complainant filled up the cheque after "pay to". He admitted that the cheque was drawn on the account maintained with NCC Bank and it was also presented through NCC Bank. He denied the suggestion that despite the payment of the loan, he did not return the cheque and filed a false case.

6. None appears on behalf of the convict petitioner.

7. The learned Advocate Mr. Md. Monjurul Alam Khan appearing along with the learned Advocate Mr. Antas Samiul Alim on behalf of the complainant opposite party No. 2 submits that the accused issued a cheque on 22.06.2016 for payment of Tk. 84,31,810.32 in favour of the complainant NCC Bank Ltd, Nawabgonj, Dhaka and the complainant bank presented the cheque on 18.08.2016 but the cheque was dishonoured on 18.08.2016, and the complainant Bank sent legal notice on 01.09.2016 to the accused through register post making a demand for payment of the cheque amount within 30 days from the date of receipt of the notice. After the service of notice, the accused did not pay the cheque amount. Consequently, the complainant filed the case on 27.10.2016 complying with the procedures under section 138 of the Negotiable Instruments Act, 1881. He further submits that the defence did not deny that

the notice sent on 01.09.2016 was not served upon the accused before filing the complaint petition. P.W. 1 proved the charge against the accused beyond all reasonable doubt and both the courts below on correct assessment and evaluation of the evidence legally passed the impugned judgment and order. He prayed for discharging the Rule.

8. I have considered the submission of the learned Advocate Mr. Md. Monjur Alam Khan who appeared on behalf of the complainant opposite party No. 2, perused the evidence, impugned judgments and orders passed by the courts below and the records.

9. On perusal of the evidence, it appears that the accused Md. Moslem is the Proprietor of MS Nasir Enterprise and on behalf of the MS Nasir Enterprise the accused Md. Moslem issued Cheque No. 4028105 on 22.06.2016 in favour of the NCC Bank Ltd, Nowabganj Branch, Dhaka for payment of Tk. 84,31,810.32. P.W. 1 proved the said cheque as exhibit 2. He stated that the said cheque was dishonoured on 18.08.2016. No statement is made by P.W. 1 as to the presentation of the cheque. On perusal of the cheque dated 22.06.2016 (exhibit-2), it appears that there is a seal of NCC Bank Ltd, Nawabganj Branch, Dhaka. There is no signature of any officer of the bank with date as regards the presentation of the cheque for encashment. There is a date '10/4' on the said cheque. It is alleged that the said cheque was dishonoured on 18.08.2016. No explanation has been given by the prosecution as to why the date '10/4' is written on the cheque.

10. A payee or bearer of a cheque presents the cheque through a deposit slip. At the time of presentation of the cheque for encashment, an officer of the bank sign the cheque with date and put seal of the bank. Since the payee-complainant NCC Bank presented the cheque through its branch, the deposit slip is required to prove by the prosecution. In the absence of any seal of the bank and signature of any officer of the bank with the date on the cheque, it cannot be said that the cheque was presented on 18.08.2016.

11. During cross-examination, P.W. 1 stated that the cheque was drawn on the account maintained with the NCC Bank and it was also dishonoured through the NCC Bank. P.W. 1 proved the dishonoured slip (exhibit-2/1) issued by the bank on 18.08.2016. There is no seal of the bank and signature of any officer of the bank with the date on the cheque. The deposit slip is not proved in the instant case. I am of the view that the cheque was not presented on 18.08.2016 for encashment and without presenting the cheque, the complainant bank issued the dishonoured slip on 18.08.2016(exhibit-2/1).

12. It appears that the complainant sent a legal notice on 01.09.2016(exhibit-2(2)) to the accused Md. Moslem through registered post (exhibit-2(3)) making demand for payment of Tk. 84,31,510.32. The learned Advocate engaged on behalf of the complainant opposite party No. 2 submits that since the legal notice was sent through register post in view of the provision made in section 27 of the General Clauses Act, 1958 it is to be presumed that the notice was served upon the accused. The learned Advocate Md. Manjur Alam Khan relied on a decision made in the case of Nurul Islam vs. Md. Ali Hossain Mia reported in 50 DLR(AD) 114.

13. At the time of insertion of section 138 in the Negotiable Instruments Act, 1881 by Act No. XIX of 1994 the legislature made provision in clause b to section 138 of the said Act, regarding the demand for payment of cheque amount but no provision was made at that time in the said Act as to the mode of making demand or service of notice upon the accused. As per section 27 of the General Clauses Act, 1958 if the notice or a letter is sent by registered

post addressing the correct address of the addressee, it is to be presumed that the notice was served upon the accused. Nothing is stated in section 27 of the said Act as to the determination of the date of receipt of notice by the accused or service of notice upon the accused.

14. Despite the provision made in section 27 of the General Clauses Act, 1958, the Legislature inserted sub-section (1A) in Section 138(1) of the Negotiable Instruments Act, 1881 by Act No.III of 2006 regarding the mode of sending notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881. Under Section 138(1)(1A) of the said Act the notice is required to be served upon the drawer of the cheque, a. by delivering it to the person on whom it is to be served; or b. by sending it by registered post with acknowledgement due to that person at his usual or last known place of abode or business in Bangladesh; or c. by publication in a daily Bangla national newspaper having wide circulation. The Negotiable Instruments Act, 1881 is a special law. Service of notice upon the accused in compliance with the provision made in Section 138(1) (1A) of the said Act at least by one mode as stated above is sine qua non.

15. In the case of Nurul Islam (supra) the plaintiff filed the SCC Suit No. 2 of 1986 praying for decree of ejection of monthly tenant from the suit shop room. Therefore, the fact of the present case is clearly distinguishable from the fact of the said case. In the instant case, the legal notice (exhibit-2) was sent through the registered post without AD. Therefore, I am of the view that the demand under clause 'b' of the proviso to section 138 of the Negotiable Instruments Act, 1881 was not made in compliance with the provision made in section 138(1A) of the Negotiable Instruments Act, 1881.

16. In the case of Md. Amir Hossain Vs. the State and another passed in Criminal Revision No. 3513 of 2023 judgment dated 19.05.2024 this bench (Mr Md. Shohrowardi, J) held that;

“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. The 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.”

17. Nothing has been stated in the complaint petition as to the date of service of notice upon the accused. P.W. 1 also did not make any statement as to the date of service of notice upon the accused. From the registered post, the date of service of notice upon the accused could not be ascertained. The prosecution has to prove the charge against the accused beyond all reasonable doubt following the law. The defence will only deny the relevant statement made by the prosecution witness during the examination in chief. Nothing has been stated by P.W 1 regarding the service of notice upon the accused. No' AD is proved in the case. Under

clause c of the proviso to Section 138 of the Negotiable Instruments Act, 1881 a drawer of a cheque is legally entitled to 30 days from the date of receipt of notice sent under clause b of the proviso to Section 138 of the said Act for payment of the cheque amount and within next 30 days from the cause of action the complainant shall file the case. The legislature made clear provision in section 138(1A) of the said Act regarding the mode of service of notice upon the accused to ascertain/affirm the cause of action under clause c of the proviso to section 138 of the said Act. The prosecution failed to prove the cause of action as stated in clause c of the proviso to section 138 of the said Act for filing the complaint petition.

18. Because of the above evidence, facts and circumstances of the case, I am of the view that the complainant bank issued the dishonour slip on 18.08.2016 (exhibit-2/2) without presenting the cheque for encashment. Demand or notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881 was not served upon the accused. The prosecution failed to prove the cause of action for filing the case on 27.10.2016. The complainant filed the complaint petition without complying with the mandatory provision made in clause a to c of the proviso to sections 138, 138(1) (1A) and 141(b) of the Negotiable Instruments Act, 1881. Both the courts below failed to interpret the said provisions of the Negotiable Instruments Act, 1881 and arrived at a wrong decision as to the guilt of the accused. Therefore, the impugned judgments and orders passed by the courts below are liable to be set aside.

19. I find merit in the Rule.

20. In the result, the Rule is made absolute.

21. The impugned judgments and orders of conviction and sentence passed by the courts below against the accused Md. Moslem are hereby set aside.

22. The convict petitioner is entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

23. The trial court is directed to allow the accused Md. Moslem to withdraw 50% of the cheque amount within 7(seven) days from the date of filing the application, if any.

24. However, there will be no order as to costs.

25. Send down the lower Court's records at once.