

9 SCOB [2017] HCD 28**HIGH COURT DIVISION
Criminal Appellate Jurisdiction**

Criminal Appeal No. 6785 of 2011

Md. Komar Uddin**Vs.****The State and another**

Mr. A.T.M. Mizanur Rahman, with
Ms. Ayesha Siddiqua and
Ms. Sultana Razia, Advocates.
... For the convict-appellant.

Mr. Mohammad Ali Zinnah, Advocate
... For the respondent No. 2.

Mr. Abdullah Al Mamun, D.A.G. with
Mrs. Delwara Begum (Bela), A.A.G
...For the State.

Heard on: 13.8.2015

And

Judgment on: 01.11.2015

Present:**Mr. Justice Abu Bakar Siddiquee****Negotiable Instruments Act, 1881****Section 138:**

The learned advocate appearing on behalf of the convict-appellant took me to the postal receipt and strenuously argued that the postal seal reveal that the same has been received by the postal clerk on 23.03.2008 where as the postal clerk put his signature on the same showing receiving date as 12.03.2008. He further adds that those anomalies are sufficient to show that the postal receipt has been created for the purpose of this case. I have gone through the postal receipt and seen that the anomalies of those dates are palpable on the face of such receipt. It is the receiving clerk of the post office who made all those anomalies, is the best person who can say as to why and under what compelling circumstances he put this date under his signature and also as to why he put seal showing another date and without examining him, it is not possible to arrive at a concrete decision in this respect. In such a state of affairs the court can arrived such a decision which favoured the convict-appellant. Thus, I have no option but to hold that the convict-appellant is entitled to get benefit of the doubt regarding such service of notice. ... (Para 27)

Judgment**Abu Bakar Siddiquee, J.**

1. This Criminal appeal is directed against the judgment and order of conviction and sentence dated 29.09.2011 passed by the learned Additional Sessions Judge, 1st Court, Kishoreganj in Sessions Case No. 194 of 2008 arising out of C.R. Case No. 53(1)08 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 6(six) months and to pay a fine of Tk. 4,00,000/- (Four lac).

2. The fact, relevant for disposal of this appeal may briefly be stated as follows:

One Md. Kowser Miah lodged the petition of complaint before the judicial Magistrate, Cognizance Court No. 2, Kishoregonj as informant alleging inter-alia that he had a partnership business with the convict-appellant who used to take loan from the complainant and on 05.10.2007, accused-appellant took loan of Tk. 2,00,000/- (Two lac) from him in presence of other witnesses. It has been further alleged that with a view to secure such loan money, the convict-appellant executed a cheque on 20.11.2007 being cheque No. 03037511223 against his current account No. 441 of Agrani Bank, Patia Bazar Branch. The complainant- respondent presented the cheque in his own account on 08.01.2008 in the relevant bank for collection of the money from the relevant bank which has been bounced due to insufficient of fund and bank authority issued a dishonoured slip to that effect. Thereafter it has been alleged that the complainant-respondent asked the convict-appellant to pay such loan money whereupon he again requested him to present cheque to the bank and after presentation, the same has been further bounced. Thereafter complainant-respondent issued a legal notice on 13.02.2008 through his learned lawyer by registered post. It has been further that the convict-appellant did not repay the loan money within stipulated time in the legal notice and as such the respondent No. 2 (complainant) was constrained to file the complaint petition.

3. On receipt of such complaint, Learned Magistrate after examined the complainant (respondent No. 2) under Section 200 of the Code of Criminal Procedure and duly issued processes against the convict-appellant who subsequently appeared before the Court and obtained the bail. Thereafter, Magistrate sent the case record to the Court of Sessions Judge for the purpose of holding trial.

4. The learned Sessions Judge on receipt of the record took cognizance of the offence and transferred the case record to the Additional Sessions Judge, 1st Court, Kishoregonj for holding trial who on receipt of the same, framed a formal charged on completion of all formalities read over the same to him whereupon he pleaded not guilty of the offence and claimed to be tried.

5. During the course of trial the prosecution examined as many as 5(five) witnesses.

6. On the other hand, the defence examined none.

7. On closure of the evidence the learned Trial Court examined the convict-appellant under Section 342 of the Code of Criminal Procedure whereupon he abjured his guilt.

8. On conclusion of the trial, the learned trial court found the convict-appellant guilty of the offence and attributed the order of conviction as stated above.

9. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction, the convict-appellant preferred this appeal which has been contested by the respondent No. 2.

10. Mr. A.T.M. Mizanur Rahman, the learned Advocate appearing on behalf of the convict-appellant strenuously argued that no legal notice was ever served upon the convict-appellant and as such their arose no cause of action in this case under Section 138 of the

Negotiable Instruments Act, 1881. He further adds that the charges and evidence does not disclose about it of the notice under provision B of the Section 138 of the Negotiable Instruments Act, 1881 and as such the cognizance and the commencement of trial is violative to the provision of Section 141(b) of the Negotiable Instruments Act.

11. On the other hand, Mr. Mohammad Ali Zinnah, the learned Advocate appearing on behalf of the respondent No. 2 strenuously argued that all the prosecution witnesses have supported the case mentioning time, place and manner of the occurrence and as such the impugned judgment and order of conviction is liable to be affirmed.

12. Mr. Abdullah Al Mamun, the learned Deputy Attorney General appearing on behalf of the State supported the respondent No. 2.

13. I have heard the learned Advocates for both the parties and perused materials available on record.

14. Let me proceed to examine the evidence and other materials of the case and see therefrom as to how far the prosecution has been able to prove its case.

15. P.W. 1, Md. Kowser Miah deposed that he is the complainant in this case and he had a partnership business with the convict-appellant who used to take loan from him. He further deposed that the convict-appellant took loan of Tk. 2,00,000/- on 05.10.2007 and on being asked he issued a cheque for the purpose of securing such loan money. He further adds that the complainant-respondent presented the cheque against his account for encashment and his bank authority sent the same to the relevant bank for collection of money but the same has been bounced due insufficient fund. He further deposed that the complainant-respondent thereafter issued a legal notice asking him to pay the loan money within the stipulated period but the convict-appellant did not pay any heed to it and as such the complainant was compelled to file this case. The complainant-respondent produced petition of complaint before the Trial Court which has been marked as exhibit-1 and he further produced the impugned cheque which has been marked as exhibit-2. Thereafter he deposed that he produced dishonoured slip which has been marked as exhibit-3 by the Trial Court thereafter he prays for appropriate action against the convict-appellant.

16. In course of cross-examination it is admitted by him that the convict-appellant filed another case of cheque dishonour against him on demanding of Tk. 45,000/- He further deposed that there is no witness who can depose in his favour for taking loan from him. He further deposed that he cannot say as to whether the convict-appellant lodged a GDE before the Police Station on 22.07.2007 for purpose of loosing his cheque book. He further deposed that he presented the cheque against his current account in Agrani Bank Patia Bazar Branch the number of which is No. 81. He denied the suggestion put to him during the course of cross-examination.

17. P.W. 2, Mirja Ali deposed that both parties are known to him and the convict-appellant took loan a tune of Tk. 2,00,000/- from the complainant-respondent with a view to secure such loan the convict-appellant executed a cheque. Thereafter he deposed that the complainant-respondent presented the cheque before bank which has been subsequently dishonoured and as a result of which the complainant-respondent was compelled to file the case.

18. In course of cross-examination, he deposed that the transaction was made in his presence and he has not gone to the bank on the date of presentation of such cheque. Thereafter he deposed that he is not only a small trader but also a cultivator and has been rendering his business of insecticide materials. He also deposed that the complainant-respondent is also insecticide trader. He further deposed that the convict-appellant issue such cheque on sitting in the house of the complainant-respondent who himself brought out such cheque and at that time Anwar, Tarek and Harun was present and excepting those persons, one Mahatab Uddin was present who subsequently had died. It is admitted by him that homestead of convict-appellant is nine mile far from his house and the convict-appellant is his son and they have been living in the same mess. Thereafter he denied the suggestion put to him during the course of cross-examination.

19. P.W. 3, Anwar Jaman deposed that both the parties are known to him and the convict-appellant took loan of Tk. 2,00,000/- from the complainant-respondent on execution of a cheque of likely amount. Thereafter he deposed the complainant-respondent presented the cheque before the relevant bank for encashment which has been dishonoured for insufficient fund and as such the complainant-respondent was compelled to file this case.

20. In course of cross-examination, it is admitted by him that he is a vegetable trader and his homestead is half mile away from the house of the complainant-respondent who is an insecticide trader. Thereafter it is admitted by him that the convict-appellant is a partner of the complainant-respondent and they had a good relationship before filing this case. Thereafter it is admitted by him that the convict-appellant entered into a contract for repayment at the time of taking such loan and he executed a cheque in favour of the complainant-respondent with a view to secure such loan money. Thereafter he deposed that on the day presentation of the cheque, he had not gone to the bank concerned. He denied the fact that the convict-appellant gave any loan from the complainant-respondent. Thereafter he denied other suggestion put to him during the course of cross-examination.

21. P.W. 4, Haron-or-Rashid deposed that both the parties are known to him he identified the convict-appellant on dock. Thereafter he deposed on 05.11.2007 the convict-appellant took loan of Tk. 2,00,000/- from the complainant-respondent and that view to secure such loan he executed a cheque in favour of the complainant-respondent whow subsequently presented the cheque before the bank concern for encashment but the same has been bounced due to insufficient of fund.

22. In course of cross-examination, he deposed that after procurement of such cheque, the complainant-respondent presented the same with the relevant bank and he was not present at the time of such presentation. It is admitted by him that he is a electrician and he has a shop of electric materials and Gayanpur is one mile far from Sharapchar Bazar Committee and the president of bazar committee is Advocate Osman Gani. Thereafter he deposed that there is no relation in between him and complainant and he never took loan from the complainant. He also deposed that he cannot say as to whether the complainant-respondent made any correspondence with bazar committee. He denied the suggestion during the course of cross-examination.

23. P.W. 5, Faridul Hoque is the Bank Manager deposed that he was attached to the relevant bank at the relevant time. Thereafter he deposed that on 05.11.2007 the convict-appellant took loan for a tune of Tk. 2,00,000/- from the complainant on executing a cheque for the purpose of securing such loan money. Thereafter he deposed that complainant

presented the cheque before the relevant bank for encashment but the same has been bounced for insufficient of fund.

24. In course of cross-examination, he deposed that the complainant-respondent himself rushed to the bank for presentation of the cheque. He also deposed that he has not gone with the plaintiff at the time of going to the bank. Thereafter he deposed that he cannot say as to whether the convict-appellant issued any legal notice to the complainant-respondent. He denied the suggestion put to him during course of cross-examination.

25. The learned Advocate appearing on behalf of the convict-appellant took me to the averment No. 11 and ground No. 6 of the memo of appeal and strenuously argued that no legal notice has been ever served upon the convict-appellant and as such the proceeding and trial was violative to the provision of Section 141 (B) of the Negotiable Instruments Act. He further adds that the document regarding service of notice upon the convict-appellant was not being proved by the prosecution formally and as such there is no reason to believe that legal notice was ever served upon the convict-appellant. In this regard he took me to the copy of legal notice wherefrom it is seen copy of legal notice was kept in the lower Court Record but the same has not been produced before the trial court for admitting the same in evidence and also revealed that no exhibit seal has been put upon such copy of legal notice. It further alleged that no acknowledgement due has been filed in this case.

26. Learned Advocate appearing on behalf of the complainant-opposite-party argues that the complainant filed a postal receipt before the trial court and the same has been kept in the lower court record. He further adds the receipt itself shows that the legal notice has been issued in favour of the convict-appellant in his correct address court shall presumed that legal notice has been served properly. I have gone through postal receipt and it is seen that no exhibit mark has been endorsed on such postal receipt so asto evident that the same was at all entered into the evidence for the purpose of the adjudication of the case. Learned Advocate appearing on behalf of the complainant-opposite-party strenuously argued that the court has made a mistake for non endorsing the same as an exhibit and for that reason the complainant cannot be suffered and on the basis of postal receipt, this Appellate Court can concluded the fact that the since legal notice has been issued in the correct address of the convict-appellant and as such the same has been served properly.

27. The learned advocate appearing on behalf of the convict-appellant took me to the postal receipt and strenuously argued that the postal seal reveal that the same has been received by the postal clerk on 23.03.2008 where as the postal clerk put his signature on the same showing receiving date as 12.03.2008. He further adds that those anomalies are sufficient to show that the postal receipt has been created for the purpose of this case. I have gone through the postal receipt and seen that the anomalies of those dates are palpable on the face of such receipt. It is the receiving clerk of the post office who made all those anomalies, is the best person who can say as to why and under what compelling circumstances he put this date under his signature and also as to why he put seal showing another date and without examining him, it is not possible to arrive at a concrete decision in this respect. In such a state of affairs the court can arrived such a decision which favoured the convict-appellant. Thus, I have no option but to hold that the convict-appellant is entitled to get benefit of the doubt regarding such service of notice. For the sake of argument it I hold the court have made mistake in admitting the same as evidence in that case those anomalies lead to me to hold that the postal receipt has been created for the purposes of the case.

28. Having considered these facts and circumstances and evidence on record it appears to me that complainant-opposite-party measurably failed that the legal notice ever served upon the convict-appellant. Thus, I have no option but to opined that the cognizance and the proceeding and the trial is nothing but violative of Section 141 (B) of the Negotiable Instruments Act.

29. Mr. Abdullah Al Mamun, learned Deputy Attorney General appearing on behalf of the State strenuously argued that since trial Court have made a mistake in admitting those piece of paper in evidence the case may be sent back to the Trial Court for holding the trial afresh. But the anomalies on the face of the postal receipt creates a doubt regarding its genuineness. Thus, I am of the opinion that sending back the case to the trial court for holding fresh trial will be a futile exercise.

30. Having considered the facts, circumstances, evidence and other materials on record, I have no other alternative but interfere in the case.

31. Thus, there is merit in the appeal.

32. In the result, the appeal is allowed. The judgment and order of conviction and sentence dated 29.09.2011 passed by the learned Additional Sessions Judge, 1st Court, Kishoreganj in Sessions Case No. 194 of 2008 is hereby set aside.

33. The order of bail granted earlier by this Court is hereby vacated.

34. The convict-appellant is permitted to withdraw the amount which was deposited by him at the time of filing this appeal. The learned Judge of the Trial Court is directed to refund the said amount to the convict-appellant within 30(thirty) days from the date of receipt of this judgment.

35. Let a copy of this judgment along with L.C.Rs. be sent to the concerned court at once.