

Present

Mr. Justice Sheikh Abdul Awal

Criminal Appeal No. 12465 of 2016

Md. Mahbub Alom

.....Convict-appellant.

-Versus-

The State and another

.....Respondents.

Mr. A.Y. Moshuazzaman with

Mr. Md. Emran Hossain, Advocate

.....For the convict-appellant.

None appears

.....For the Respondent No. 2.

Ms. Shahida Khatoon, D.A.G with

Ms. Sabina Perven, A.A.G with,

Ms. Koheenoor Akter, A.A.G.

..... For the State.

Heard on 10.12.2023 and

Judgment on 07.02.2024

Sheikh Abdul Awal, J:

This Appeal at the instance of convict appellant Md. Mahbub Alam is directed against the judgment and order of conviction and sentence dated 30.12.2015 passed by the learned Special Sessions Judge and Druto Bichar Tribunal No.4, Dhaka in Special Sessions Case No. 28 of 2015 arising out of Metro. Sessions Case No.

5836 of 2015 corresponding to C.R. Case No. 107 of 2014 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for a period of 6 (six) months and to pay a fine of Tk. 3,35,000/- (Three Lakhs thirty five thousand) only.

The gist of the case is that one, Ankush Saha, Manager, S.A.M. Agro Chemical, Dhaka as complainant filed a petition of complaint being C.R Case No. 107 of 2014 before the learned Metropolitan Magistrate, Court No. 22, Dhaka against the accused-appellant under section 138 of the Negotiable Instrument Act, 1881 stating, inter-alia, that Syed Abul Monsur, proprietor, S.A.M. Agro Chemical, Dhaka used to busy for his profession and thereupon, he gave power to Ankush Saha, Manager, S.A.M. Agro Chemical, Dhaka to file the case for and on behalf of Mr. Syed Abul Monsur and in getting power Ankush Saha as complainant filed the case on the allegation that the accused-appellant in order pay the outstanding dues issued a cheque of Tk 3,35,000/-(Three Lakhs thirty five thousand) bearing cheque No. CD-50/AB 3173559 dated 25.01.2014 of A/C No. 1112, Janata Bank Ltd, Panbara branch, Rangpur in favour of Syed Abul Monsur and thereafter, the complainant presented the said cheque before the

Islami Bank Bangladesh Ltd, Rampura branch for encashment which was returned unpaid for insufficient of fund and thereafter, the complainant sent a legal notice through his Advocate to the convict-appellant on 20.02.2014 asking him to pay the cheque's amount within 30 days but the accused-appellant in spite of receiving the said notice did not turn to pay the cheque's amount and hence, the case.

On receipt of the petition of complaint, the learned Metropolitan Magistrate examined the complainant under Section 200 of the Code of Criminal Procedure and took cognizance against the accused-appellant under section 138 of the Negotiable Instruments Act, 1881 and also issued summon against him. Thereafter, the accused-appellant on 04.03.2015 voluntarily surrendered before the Court and obtained bail.

In this background, the case record was sent to the Court of the learned Metropolitan Sessions Judge, Dhaka for trial, wherein the case was registered as Metropolitan Sessions Case No. 5836 of 2015 which was subsequently transmitted to the Court of the learned Special Sessions Judge and Druto Bichar Tribunal No.4, Dhaka for disposal in which the case was renumbered as Special Sessions Case No. 28 of 2018.

Ultimately, the accused-appellant was put on trial before the learned Special Sessions Judge and Druto Bichar Tribunal No.4, Dhaka to answer a charge under section 138 of the Negotiable Instruments Act, 1881 to which the accused-appellant pleaded not guilty and prayed to be tried.

At the trial the complainant himself was examined as PW-1 and also exhibited some documents to prove its case, while the defence examined none.

After conclusion of trial, the learned Special Sessions Judge and Druto Bichar Tribunal No.4, Dhaka by his judgment and order dated 30.12.2015 found the accused-appellant guilty under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer simple imprisonment for a period of 06 (six) months and to pay a fine of Tk. 3,35,000/- (Three Lakhs thirty five thousand).

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 30.12.2015, the convict-appellant preferred this criminal appeal.

Mr. A.Y. Moshiuzzaman, the learned Advocate appearing for the convict-appellant at the very outset referring a decision reported in 37 BLD (AD) 202

submits that where the petition of complaint is not filed by the payee or by the holder in due course, the same is not maintainable in view of the statutory requirements as provided in section 138 of the Negotiable Instrument Act, 1881 and in this case admittedly the payee did not file the complaint petition and power of attorney of the payee has not been produced before the court but the trial Court below by giving a go-by to such mandatory provisions of law relying on the incompetent complaint petition found the appellant guilty under section 138 of the Negotiable Instrument Act, 1881 and sentenced him thereunder to suffer imprisonment for a period of 06 (six) months and to pay a fine of Tk. 3,35,000/- (Three Lakhs thirty five thousand), the same is liable to be set-aside.

No one found present on behalf of the complainant-respondent No.2.

Having heard the learned counsel for the appellant and having gone through the materials on record, the only question that calls for our consideration in this appeal is whether the trial Court committed any error in finding the accused-appellant guilty of the offence under 138 of the Negotiable Instrument Act, 1881.

On scrutiny of the record, it appears that the complainant clearly stated in the petition of complaint that he as an employee of S.A.M. Agro Chemical, Dhaka filed the case on behalf of cheque holder, Syed Abul Monsur in getting power by him to file the case. It further appears that the complainant filed the case on the allegation that to pay outstanding dues the appellant issued a cheque of Tk 3,35,000/-(three Lakhs thirty five thousand) in favour of Syed Abul Monsur and thereafter, the complainant presented the said cheque before Bank for encashment which was returned unpaid for insufficient of fund and thereafter, the complainant sent a legal notice through his Advocate to the convict-appellant asking him to pay the cheque's amount within 30 days but the convict-appellant in spite of receiving the said notice did not pay any heed to it.

It further appears that at the trial the complainant himself was examined as PW-1, who in his deposition categorically stated the complaint case in details. This witness was not cross-examined as the convict-appellant became absconding after being enlarged on bail.

To constitute an offence under Section 138 of the NI Act, the following elements need to be fulfilled:

1. A cheque should have been issued by the payer for the discharge of a debt or other liability.

2. The cheque should have been presented or deposited by the payee within a period of six months from the date of drawing of the cheque or within the period of validity of the cheque, whichever is earlier.

3. The payee should have issued a notice in writing to the payer within 30 days of receipt of information regarding the return of the cheque as unpaid from the bank.

4. The payer/drawer of the cheque should have paid the cheque amount within 30 days of receipt of the said notice from the payee.

5. If the payer is failed to pay in time the cheque amount, the payee should have filed a complaint within one month.

On an overall consideration of the facts, circumstances and the materials on record, it can be easily suggested that all the above quoted key elements are exist in the present case.

To meet the sole argument of Mr. Moshiuzzaman, I have carefully gone through the cited case. It appears that in this case the complainant Ankush Shaha as Manager of S.A.M. Agro Chemical clearly stated in

paragraph No.1 of the petition of complaint that-
 “উপরোক্ত মামলার বাদী জনাব সৈয়দ আবুল মনসুর বাংলাদেশের অন্যতম স্বনামধন্য ব্যবসা প্রতিষ্ঠান এস,এ,এম এথো কেমিক্যাল এর প্রোপ্রাইটর। তিনি ব্যবসায়িক কাজে বিশেষ ব্যস্ত থকার কারণে স্বীয় অফিসের পদাধীকারী কর্মকর্তা (যিনি দীর্ঘ দিন যাবৎ ব্যবস্থাপক হিসাবে কর্মরত) জনাব অংকুশ সাহাকে অত্র মামলা পরিচালনা করিবার ক্ষমতাপত্র অর্পন করিলে তিনি ক্ষমতাপত্র অর্পন করিলে তিনি ক্ষমতাপ্রাপ্ত হইয়া বাদী হিসাবে অত্র মামলা পরিচালনা করিতেছেন।” Besides, in this case no one raised any question to PW-1, complainant that he is not empowered to file this case. Therefore, in the attending facts and circumstances of the case, I am unable to see eye to eye to such submission of the learned Advocate Mr. Moshiuzzaman that the complaint case is incompetent and misconceived as the cheque holder /payee himself did not file the case.

Here it may be mentioned that the cases relied upon by the convict appellant have also no manner of application in the facts and circumstance of the case inasmuch as the facts of the instant case are quite distinguishable from the facts of the cited case

On an analyses of impugned judgment and order of conviction and sentence dated 30.12.2015 passed by the learned Special Sessions Judge and Druto Bichar Tribunal No.4, Dhaka in Special Sessions Case No. 28 of 2015, I find no flaw in the reasonings of the trial Court

or any ground to assail the same inasmuch as all the key elements of Section 138 of Negotiable Instruments Act are exist in the case.

The learned Judge of the trial Court below appears to have considered all the material aspects of the case and justly convicted the accused appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer rigorous imprisonment for a period of 6 (six) months and to pay a fine of Tk. 3,35,000/- (Three Lakhs thirty five thousand).

In view of my discussions made in the forgoing paragraphs, it is by now clear that the instant appeal must fail.

In the result the appeal is dismissed. The impugned judgment and order of conviction and sentence dated 30.12.2015 passed by the learned Special Sessions Judge and Druto Bichar Tribunal No.4, Dhaka in Special Sessions Case No. 28 of 2015 arising out of Metro. Sessions Case No. 5836 of 2015 corresponding to C.R. Case No. 107 of 2014 is affirmed.

Since the appeal is dismissed, the convict appellant is directed to surrender his bail bond within 3 (three) months from today to suffer his rest of sentence,

failing which the Trial Court shall take necessary steps to secure arrest against him.

The complainant-respondent No.2 is permitted to withdraw half of the cheque's amount as deposited in the Trial Court by the convict-appellant for the purpose of preferring this Criminal Appeal.

Send down the lower Court records at once.