Present:
Mr. Justice Mamnoon Rahman

Criminal Appeal No. 12575 of 2017

Md. Habibur Rahman (Habib)
.....Convict-appellant
-VERSUS-
The State and another
……... Respondents

No one appears.
…… for the appellant
Mr. Mohammad Taifoor Kabir, DAG with
Mr. Md. Lokman Hossain, AAG
Mr. Md. Hatem Ali, AAG
…… For the Respondent No. 1
Mr. Jahirul Haque Kislu, Advocate
…… For the respondent No. 2

Heard & Judgment on: 26.07.2023

In the instant appeal, the convict-appellant has challenged the legality of the judgment and order of conviction and sentence dated 16.07.2017 passed by the learned Additional Sessions Judge, 2nd Court, Sirajganj in Sessions Case No. 905 of 2016 arising out of C.R. Case No.229 of 2016 conviction the appellant under section 138 of the Negotiable Instrument Act 1881 and sentencing him to suffer rigorous imprisonment for 6 (six) month and also to pay fine of Tk.2,00,000/- (Two Lac) which is equivalent to the value of the dishonoured cheque.

None appears on behalf of the appellant when the matter is taken up for hearing.

The learned Advocate appearing for the complainant-respondent No. 2 submits that the charge brought against the

convict-appellant under Section 138 of the Negotiable Instruments Act, 1881 (in short, 'the Act, 1881') has been proved beyond reasonable doubt and therefore, the appeal is liable to be dismissed.

I have heard the learned Advocate for the complainant-respondent No. 2 and perused the materials on record.

It appears from the petition of complaint, the deposition of PW1 (complainant) and the documentary evidences that the convict-appellant issued cheque in question in favour of the complainant-respondent on 08.05.2016 for repayment of outstanding amount of Tk. 2,00,000/- which he took from the complainant. The value of the cheque is Tk. 2,00,000/-. The cheque was dishonoured by the bank concerned on 08.05.2016. The complainant sent the statutory legal notice to the convict-appellant on 08.05.2016. The value of the cheque was not paid to the complainant. The case was filed on 14.06.2016. P.W.1 proved the prosecution case.

I have no hesitation to hold that the complainant-respondent has proved compliance of the procedure laid down in Section 138 of the Act, 1881 in filing the case. The case was filed within one month of the date on which the cause of action had arisen under clause (c) of the proviso to Section 138. The complainant also proved consideration against which the cheque was drawn and that he is the holder of the cheque in due course. Hence, in my view, the impugned judgment and

order of conviction does not suffer from any illegality or infirmity. The trial Court correctly found the appellants guilty of the charge.

Section 138 of the Act, 1881 provides that the offence of dishonour of cheque is punishable with imprisonment for a term which may extend to 1 (one) year, or with fine which may extend to thrice the amount of the cheque, or with both. Sub-section (2) of Section 138 provides, *"Where any fine is realised under sub-section (1), any amount up to the face value of the cheque as far as is covered by the fine realised shall be paid to the holder"*. Thus, the criminal proceeding under Section 138 serves two purposes: firstly, to punish the offender and secondly, to recover the value of the cheque. The object of adding sub-section (2) to Section 138 is to alleviate the grievance of the complainant. In the instant case, the value of the dishonoured cheque is Tk. 2,00,000/-. The convict-appellant was fined Tk. 2,00,000/- which does not require any interference.

Now, I turn to the sentence of imprisonment. There can be no dispute in so far as the sentence of imprisonment is concerned that it should commensurate with the gravity of the crime. Court has to deal with the offenders by imposing proper sentence by taking into consideration the facts and circumstances of each case. It is not only the rights of the offenders which are required to be looked into at the time of

the imposition of sentence, but also of the victims of the crime and society at large, also by considering the object sought to be achieved by the particular legislation. Considering the facts and circumstances of the case and the object of the law, I am of the view that the sentence of imprisonment would be a harsh sentence having no penal objective to be achieved. Hence, the sentence of imprisonment is set aside.

I note that the trial court has not passed any default order *i.e.* imprisonment in default of payment of the fine. When an offender is sentenced to fine only, the Court has the power to make a default order under Section 388 of the Code of Criminal Procedure (in short the 'Cr.P.C.'). Section 423(1)(d) of the Cr.P.C. empowers the Appellate Court to pass any consequential or incidental order that may be 'just and proper'. Since, this Court has already set aside the sentence of imprisonment, it would be just and proper to pass a default order.

In view of the foregoing discussions, the order of the Court is as follows:

The conviction of the appellants under Section 138 of the Act, 1881 is upheld, but the sentence is modified. The sentence of 6(six) months rigorous imprisonment is set aside. The sentence of fine of Tk. 2,00,000/-, which is equivalent to the value of the dishonoured cheques, is upheld. The convict-appellant has already deposited Tk. 1,00,000/- in the court

below before filing the appeal. The Court concerned is directed to give the said deposit to the complainant-respondent No.2 forthwith. The convict-appellant is directed to pay the remaining portion of the value of the dishonoured cheque *i.e.* Tk. 1,00,000/- to the complainant-respondent No. 2 within 3(three) months from the date of receipt of this order, in default they will suffer simple imprisonment for 02(two) months. If the convict-appellant do not pay the remaining portion of the fine as ordered or opts to serve out the period of imprisonment in lieu of payment of fine, he is not exempted from paying the same. In that event, the Court concerned shall realise the fine under the provisions of Section 386 of the Cr.P.C.

In the result, the appeal is dismissed with modification of sentence and with directions made above. The convict-appellant is released from the bail bond.

Send down the lower Court's records (LCR)(if any) at once. Communicate the judgment and order to the Court concerned forthwith.

(Mamnoon Rahman, J:)