

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 218 of 2019

Dipayan Mondal

...Appellant

-Versus-

The State and another

...Respondents

No one appears.

...For the Appellant

Mr. Hasan Tareq, Advocate

...For the Complainant-respondent No. 2

Heard on 07.11.2024

Judgment delivered on 01.12.2024

This criminal appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order dated 14.11.2018 passed by Additional Sessions Judge, Court No. 2, Bagerhat in Sessions Case No. 131 of 2017 arising out of C.R. Case No. 275 of 2016 (Bagerhat) convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 3(three) months and fine of Tk. 1,53,906.

The prosecution case, in short, is that the accused Dipayan Mondal was the Area Manager of Resource Development Foundation, Bagerhat Area. He issued Cheque No. 6648145 on 06.06.2016 drawn on his Account No. 049134001132 maintained with Social Islami Bank Limited, Mollahat S.M.E/Agriculture Branch for payment of Tk. 1,53,906. The cheque was presented on 10.07.2016 for encashment through Account No. 4155 maintained in the name of Resource Development Foundation with the Sonali Bank Limited, Mollahat Branch. The cheque was dishonoured on 17.07.2016 and the legal notice was sent on 21.07.2016 through the registered post. The accused did not pay the cheque amount and the complaint filed the case on 24.08.2016.

After filing the complaint petition, cognizance was taken against the accused under Section 138 of the Negotiable Instruments Act, 1881. Subsequently, the case record was sent to the Sessions Judge, Bagerhat who took cognizance offence against the accused and sent the case to the

Additional Sessions Judge, Court No. 2, Bagerhat. During the trial, charge was framed against the accused under Section 138 of the Negotiable Instruments Act, 1881 which was read over to the accused and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined two witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he adduced two D.Ws. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which he filed the instant appeal.

P.W. 1 Suman Halder is the Manager of the Resource Development Foundation of Bagerhat. He stated that he obtained the power of attorney. The accused recovered Tk. 1,53,906 from the field and he did not deposit said amount. He issued a cheque on 06.06.2016. The complainant presented the cheque on 19.06.2016, 30.06.2016 and 10.07.2016. On 17.07.2016 the cheque was dishonoured. A legal notice was sent on 21.07.2016. He did not pay the cheque amount. Subsequently, Imran Hossain filed the case on behalf of the Resource Development Foundation. The signature of Imran Hossain is known to him. He proved the complaint petition as exhibit 1 and the signature of Imran Hossain as exhibit 1/1. He proved the cheque as exhibit 2, the dishonour slip dated 17.07.2016 as exhibit 3, the legal notice and the postal receipt as exhibit 4 and the power of attorney as exhibit 5. During cross-examination, he stated that he was not aware whether the accused handed over any blank cheque following the terms and conditions of his appointment. The accused discharged his duty from 10.07.2012 to 06.09.2015. The disputed cheque was issued on 06.06.2016. He is not aware whether after 10 months of dismissal, the accused issued the cheque. A legal notice was sent to the accused. The accused issued the cheque of Account No. 049134001132. He denied the suggestion that after dismissal, the amount was written on the blank cheque to deprive him from provident fund or he deposed falsely. He is not aware whether during the service period, the foundation took a blank cheque. He affirmed that the cheque was issued

for payment of the dues. There is a provident fund in the foundation. There was also a provision for taking a loan to purchase a motorcycle.

P.W. 2 Md. Hasan Ali is the Manager of Sonali Bank, Mollahat Branch. He stated that after presenting the said cheque through his bank, it was sent for clearing to the Bagerhat Branch which was dishonoured on 17.07.2016 by the Sonali Bank, Bagerhat Branch. He proved the dishonour slip as exhibit 3. He denied the suggestion that he deposited falsely.

D.W. 1 Dipayan Mondal is the accused. He stated that he was serving in the Resource Development Foundation. He proved the letter of appointment as exhibit Ka. He proved the order of dismissal as exhibit Kha. His father lodged a GD on 25.10.2015 with Dacope Thana. He proved the GD as exhibit Ga. Following the condition of his service, the complainant took three signed blank cheques from him. Subsequently, the complainant also received a cheque and dismissed him and filed the case. He denied the suggestion that the complainant did not receive any cheque from him or he was dismissed from service due to his failure to comply with the rules or failed to deposit Tk. 1,53,906 for which he issued the cheque on 06.06.2016 or despite the service of legal notice he did not pay the money.

D.W. 2 Achinta Mondal is the father of the accused Dipayan Mondal. He stated that his son Dipayan Mondal was the Manager of the Resource Development Foundation. The complainant took three cheques from his son. Subsequently, he was dismissed from service. He lodged a GD which was proved as exhibit Ga. He denied the suggestion that the complainant did not receive any security cheque from the accused or his son issued the cheque for payment of the dues of the complainant.

No one appears on behalf of the appellant.

Learned Advocate Mr. Hasan Tareq appearing on behalf of the complainant-respondent No. 2 submits that the accused was the Manager of the complainant Resource Development Foundation, Bagerhat Area and he received Tk. 1,53,906 from the field but he did not deposit said amount for which he issued a cheque on 06.06.2016 for payment of Tk. 1,53,906.

After the presentation of the said cheque within the period of its validity, it was dishonoured and the complainant sent a legal notice under Section 138(b) of the Negotiable Instruments Act, 1881 but he did not pay the cheque amount. Thereby he committed offence under Section 138 of the Negotiable Instruments Act, 1881 and the prosecution proved the charge against the accused beyond all reasonable doubt. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Hasan Tareq who appeared on behalf of the complainant-respondent No. 2, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the evidence, it appears that the accused Dipayan Mondal served as Area Manager of Resource Development Foundation, Bagerhat Area, Bagerhat from 10.07.2012 to 06.09.2015 and he was dismissed from service by letter dated 06.09.2015 (exhibit Kha). After that, a GD was lodged on 25.10.2015 (exhibit Ga) stating that at the time of joining of the accused Dipayan Mondal on 10.07.2012 in his service, the Resource Development Foundation received a blank cheque signed by him.

In the complaint petition, it has been alleged that the accused issued the cheque for payment of the dues. During cross-examination, P.W. 1 stated that he is not aware whether at the time of joining, the complainant-bank received any blank cheque from the accused. The defence case is that at the time of joining the service, the complainant received a blank cheque from the accused. P.W. 1 did not deny that a blank cheque was received by the complainant at the time of joining the accused in his service. The accused is an officer of the complainant. No statement is made in the complaint petition about what kind of money was due to the accused. A suggestion was given to P.W. 1 that for non-payment of the money of the provident fund of the accused, a false case was filed using the blank cheque received by the complainant at the time of joining the service of the accused. P.W. 1 stated that the accused recovered Tk. 1,53,906 from the field and he did not deposit the said

amount in the office. In the complaint petition, nothing has been stated that the accused received said amount from the field. No evidence has been adduced by the prosecution as to the dues of the accused.

At the time of enactment of the Negotiable Instruments Act, 1881 no provision was made as to the mode of service of notice upon the drawer of the cheque. The legislature inserted Sub-Section 1A in Section 138 of the said Act by Act No. III of 2006 making provision regarding the mode of the service of notice under clause b to Section 138 of the said Act. Under Section 138(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 of the provision made in Section 138(1A) of the said Act at least by one mode as stated above is sine qua non.

Mere dishonour of cheque within the specified time mentioned in clause (a) to Section 138 of the Negotiable Instruments Act, 1881 and making demand by the payee in writing within thirty days from the date of receipt of information by him from the bank regarding the return of the cheque as unpaid does not constitute an offence under Section 138 of the Negotiable Instruments Act, 1881 unless the said notice is served upon the drawer of the cheque and he failed to pay the cheque amount within thirty days from the date of receipt of said notice and the complainant is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138 of the said Act.

In the complaint petition, no statement is made as to the service of notice sent under clause b to Section 138 of the said Act upon the accused. In the instant case, no AD is proved by the prosecution. During the trial, the complainant failed to prove that before filing the complaint petition, the notice sent under clause (b) to Section 138 of the Negotiable Instruments Act, 1881 was served upon the accused. Therefore, no cause

of action has arisen in the case for filing the complaint on 24.08.2016 and the learned Magistrate took cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 in violation of the provision made in Section 138(c) and 141(b) of the Negotiable Instruments Act, 1881. The case could be buried at the initial stage of taking cognizance of the case.

Nothing has been stated in the order of dismissal of the accused (exhibit Kha) that the accused received Tk. 1,53,906 from the field. On perusal of the order of dismissal dated 06.09.2015 (exhibit Kha), it appears that the accused failed to recover money from the field. Therefore, the statement made by P.W. 1 that the accused recovered Tk. 1,53,906 from the field and did not deposit the said amount in the office is an afterthought and the complaint petition was filed using the blank cheque received from the accused at the time of his appointment in the service. I am of the view that the defence by cross-examining prosecution witnesses and adducing evidence rebutted the presumption under Section 118(a) of the said Act. There was no consideration of the blank cheque issued in favour of the complainant Resource Development Foundation.

On perusal of the impugned judgment and order passed by the trial Court, it reveals that the order of dismissal dated 06.09.2015 (exhibit Kha) of the accused and the GD No. 32 dated 25.10.2015 (exhibit Ga) were not considered by the trial Court. The trial Court failed to apply its judicial mind in appreciation of the evidence of both parties and arrived at a wrong decision as to the guilt of the accused. I am of the further view that the trial Court also failed to interpret clause (c) of Section 138 and 141(b) of the said Act. The prosecution failed to prove the charge against the accused beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order passed by the trial Court is hereby set aside.

Send down the lower Court's records at once.