

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)**

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 2247 of 2019

Farid Ahmed

...Appellant

-Versus-

The State and another

...Respondents

Mr. Md. Iqbal Hussain Chowdhury,
Advocate

...For the appellant

Mr. Mohammad Samsuzzaman,
AdvocateFor the respondent
No. 2

Mr. Sultan Mahmood Banna, AAG with
Ms. Sharmin Hamid, AAG with

.....For the State.

Heard on 23.01.2025, 29.01.2025

Judgment delivered on 04.02.2025

This appeal under Section 417 of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order dated 19.12.2018 passed by Druto Bichar Tribunal No. 4 and Special Sessions Judge, Dhaka in Special Sessions Case No. 482 of 2016 arising out of Metro Sessions Case No. 6990 of 2016 (CR No. 642 of 2015) acquitting the respondent No. 2 Manowara Manju from the charge framed against her under section 138 of the Negotiable Instruments Act, 1881.

The prosecution case, in short, is that the accused Manowara Manju was previously known to the complainant Farid Ahmed. She took loan of Tk. 13,00,000 from the complainant in 2013. She undertook to pay the loan within the next year but she did not pay the loan on time. He requested the accused to pay the loan amount. On

09.06.2015, she issued cheque No. 3403006 drawn on her account No. 20502670100065802 maintained with Islami Bank Bangladesh, Muhammadpur Krishimarket Branch, Dhaka in favour of the complainant for payment of Tk. 13,00,000. He presented the said cheque on the same date for encashment through First Security Bank Ltd, Azampur Branch which was dishonoured on 11.06.2015 with a remark, “insufficient funds”, and the bank also issued the dishonoured slip. He issued a legal notice on 16.06.2015 to the accused but she did not receive the said notice to avoid the payment of the cheque amount. After the expiry of the 30 days from the date of sending said notice, she did not pay the cheque amount. Consequently, the complainant filed the case on 10.08.2015.

At the time of filing the complaint petition, the complainant was examined under section 200 of the 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. After that, the Chief Metropolitan Magistrate, Dhaka, sent the case to the Metropolitan Sessions Judge, Dhaka who transferred the case to the Special Sessions Judge and Druto Bichar Tribunal No. 4, Dhaka for trial. During trial, charge was framed against the accused under section 138 of the Negotiable Instruments Act, 1881 which was read over and explained to the accused who pleaded not guilty to the charge and claimed to be tried following the law.

The prosecution examined 01(one) 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. At the time of examination of the accused under section 342 of the Code of Criminal Procedure, 1898 the accused stated that she would submit the documents and would examine the defence witness. After that, the

accused submitted the documents and examined 02 (two) DWs in support of her defence. After concluding the trial, the trial court by impugned judgment and order acquitted the accused from the charge framed against her under section 138 of the Negotiable Instruments Act, 1881 against which the complainant Farid Ahmed filed the instant appeal.

P.W. 1 Farid Ahmed is the complainant. He stated that the accused Manowara Manju was previously known to him and he was a tenant under the accused. He paid Tk. 13,00,000 as a loan to the accused. In June 2013, he paid the money for one week. After that, he requested the accused to pay the loan. On 09.06.2015, the accused issued a cheque for payment of Tk. 1300,000. He presented the cheque for encashment which was dishonoured and he sent a legal notice on 11.06.2015. He issued the legal notice but the accused did not pay the cheque amount. He proved the complaint petition as exhibit-1, the cheque, the dishonoured slip, the legal notice and the postal receipt as exhibits-2 to 5. During cross-examination, he stated that he is not the tenant of the accused. He is a tenant of House No.10, Nabinagar Housing. In the legal notice number of the house is not mentioned. He denied the suggestion that the legal notice was not properly sent to the correct address of the accused. The accused did not obtain the notice and he did not receive the notice. The disputed cheque No. 3403006 and the legal notice was sent for the subsequent cheque No. 3403007. A separate case is filed regarding that cheque. On the envelope, “not known is written”. The name of the husband of the accused is ‘Majnu’. In the legal notice, the name of the husband of the accused is written as ‘Manju’. He set up “পির সবুজ মাল্টিপারপাস সোসাইটি”, now it has no existence. He admitted that he distributed the loan. The accused submitted two sanction letters from his establishment. He is not aware whether Md. Manju Sheikh, the husband of the accused, took loan from his establishment. He

admitted that the passbook submitted by the accused in the name of 'Majnu Sheikh' was issued from his establishment. There is no document regarding the loan of Tk. 13,00,000 taken by the accused. Her husband Majnu took loan of Tk. 10,00,000 from his establishment. He denied the suggestion that there was no account in the name of her husband. She issued 4 security cheques, and subsequently, the accused filed the case using one of the said cheques. Probably he paid Tk. 10,00,000 by two cheques and paid Tk. 300,000 in cash. Probably the cheque of DBBL was issued. He filed the case on 10.08.2015. He denied the suggestion that the accused did not take any loan from him or the cheque was issued as security for the loan taken by her husband or subsequently, the false case was filed against her. He admitted that he was the President of the “চির সবুজ মাল্টিপারপাস সোসাইটি” till 2012/2013. He denied the suggestion that while he was the president of the said society, he signed the sanction letter. He paid the loan in cash. He paid Tk. 10,00,000 by two cheques each of Tk. 500,000 and paid Tk. 300,000 in cash.

D.W.1 Manowara Manju is the accused. She stated that the complainant was known to her through the “চির সবুজ মাল্টিপারপাস সোসাইটি”. She is a housewife and the complainant is the owner of the society. She is not a member of the said society; her husband, Majnu, is a member of the society. His membership No. is 9065. She did not take any loan from the society. Her husband took the loan of Tk. 100,000. After payment of the said loan, he again took loan of Tk. 10,00,000. Subsequently, he paid the entire loan. She submitted the passbook, cash account and the agreement for house rent. No bank account is maintained in the name of her husband. She issued 4 security cheques for the loan. The complainant returned the two cheques after payment of the loan. At the time of exchanging the house, the complainant lost two cheques for which he could not return the cheques. Subsequently, using one cheque filed this false case.

During cross-examination, the defence affirmed that he submitted the documents regarding the loan taken by her husband. She admitted that she signed the cheque. She denied the suggestion that the disputed cheque is not the security cheque or the cheque issued by her was a personal cheque or she issued the cheque for payment of the loan or he deposed falsely without paying the loan of the complainant.

D.W. 2 Majnu Miah is the husband of the accused Manowara Manju. He stated that he is the husband of the accused. The complaint was known to him through the NGO “চির সবুজ মান্টিপারপাস সোসাইটি”. Initially, he took loan of Tk. 100,000 from the samity. After payment of the said loan, he again took a loan of Tk. 10,00,000. His membership number was 9065. He paid the entire loan taken from the complainant. The complainant submitted his passbook for the loan. At the time of taking the loan, there was no bank account in his name, for which his wife issued 4 security cheques. The complainant returned 2 cheques but he did not return the other 2 cheques. Subsequently, he filed the instant case using one of the said cheques. During cross-examination, he stated that there is no document regarding the deposit of 4 security cheques. He denied the suggestion that the complainant issued a personal cheque or that no security cheque was issued. He denied the suggestion that to save his wife, he deposed falsely.

The learned Advocate Mr. Md. Iqbal Hossain Chowdhury appearing on behalf of the complainant-appellant submits that on 09.06.2015, the accused Manowara Manju issued the cheque No. 3403006 drawn on her account maintained with Islami Bank Bangladesh Ltd in favour of the complainant for payment of Tk. 13,00,000 and he presented the said cheque on the same date but the cheque was dishonoured on 11.06.2015 with the remark “insufficient fund” and he sent the legal notice on 16.06.2015 for payment of the cheque amount. But the accused intentionally refused to receive the notice to avoid the payment and the complainant filed the complaint

petition on 10.08.2015 complying with procedures under section 138 of the Negotiable Instruments Act, 1881 and the complainant proved the charge against the accused beyond all reasonable doubt. But the trial court illegally acquitted the accused of the charge framed against her under section 138 of the Negotiable Instruments Act, 1881.

The learned Advocate Mr. Mohammad Samsuzzaman, appearing on behalf of respondent No. 2, submits that the husband of the accused obtained loan of Tk. 10,00,000 from the “ঢির সবুজ মাল্টিপারপাস সোসাইটি” and the complainant Farid Ahmed was the President of the said society and the accused issued 4 security cheques for the loan taken from the said society and the husband of the accused also paid the entire loan and after payment of the loan, the complainant did not return 2 cheque issued by the accused and using one of the cheque filed the instant case falsely implicating the accused in the case. He further submits that the house number of the accused was not mentioned in the notice and the notice sent to the accused was not served upon her and no legal notice was sent regarding the disputed cheque No. 3403006 and no offence was proved under section 138 of the Negotiable Instruments Act, 1881 and using the security cheque for the loan taken by her husband, the accused was falsely implicated in the case and the trial court on consideration of evidence of both the parties legally passed by the impugned judgment and order. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocates of both parties, perused the evidence, the impugned judgment and order passed by the trial court and the records.

On perusal of the evidence, it appears that accused Manowara Manju issued a cheque on 09.06.2015 in favour of the complainant Farid Ahmed for payment of Tk. 13,00,000. The said cheque was proved as exhibit-2. On perusal of the cheque return memo dated 11.06.2015 (exhibit-3), it appears that there is no seal of the bank and

signature of any officer of the bank on the cheque return memo. On examination of the legal notice (exhibit-4), it reveals that the name of the husband of accused is mentioned as 'Manju' (land businessman). No house number is mentioned in the said notice. Road No. 2(near the Mobile Tower), 1st floor, Mohammadpur is only mentioned in the notice. Therefore, it appears that the cheque return memo (exhibit-3) was not issued by the bank and the legal notice (exhibit-4) was not sent to the correct address of the accused Manowara Manju. No AD is proved in the case.

On perusal of the records, it appears that at the time of examination of the accused under section 342 of the Code of Criminal Procedure, 1898, the accused Manowara Manju stated that she will submit the documents in support of her defence and accordingly she submitted the pass book of the loan taken by her husband 'Md. Majnu Sheikh' from "চির সবুজ মাল্টিপারপাস সোসাইটি" and the contract regarding the house rent executed between the accused and the Sheikh Farid Ahmed, President of "চির সবুজ মাল্টিপারপাস সোসাইটি". On perusal of the said pass book issued in favour of the Majnu Sheikh, Member No. 9065 of "চির সবুজ মাল্টিপারপাস সোসাইটি", it appears that the said society had given the loan of Tk. 10,00,000 to Md. Majnu Sheikh and on 05.08.2013, in passbook the balance was shown as nil. It transpires that the loan taken by Md. Majnu Sheikh, the husband of the accused Manowara Manju, was fully paid to the "চির সবুজ মাল্টিপারপাস সোসাইটি".

On perusal of the judgment and order passed by the trial court, it appears that the trial court acquitted the accused holding that the complainant admitted that the husband of the accused took loan from the "চির সবুজ মাল্টিপারপাস সোসাইটি" and the complainant was the president of the said society but in the complaint petition, he did not mention that the husband of the accused took loan from the said society and that from the documents submitted by the accused it

appears that the husband of the accused paid loan taken from the society and no explanation was given as to why the accused Manowara Manju, wife of a member of the said society, took loan of Tk. 13,00,000 without any document, and the complainant failed to prove that the accused took loan of Tk. 13,00,000 from him. The accused Manowara Monju issued the security cheque for the loan taken by her husband from the said society.

P.W. 1 stated that he sent notice on 16.06.2015 to the accused, but no statement is made by P.W. 1 as to the receipt of the notice by the accused Manowara Manju. It is found that the house number of the accused was not mentioned in the notice. Therefore, the notice was not sent to the correct address of the accused. Furthermore, no dishonour slip was issued by the bank. During cross-examination, P.W. 1 admitted that in the AD it has been written that 'not known'. Admittedly, the name of the husband of the accused is 'Majnu' but in the legal notice, the name of the husband of the accused is mentioned as 'Manju'. Therefore, I am of the view that the complainant did not mention the name of the husband of the accused in the legal notice correctly and the accused malafide suppressed the house number of the accused and written the wrong name of her husband on the legal notice to avoid service of the notice upon her and fraudulently filed the case showing the false service of notice upon the accused.

During cross-examination, P.W. 1 admitted that the disputed cheque No. is 3403006 and he issued the legal notice for the subsequent cheque No. 3403007. Therefore, there is a contradiction in the evidence of P.W. 1 and the legal notice (exhibit-4) regarding the cheque number. No demand under clause b to section 138 of the Negotiable Instruments Act, 1881 was made by the complainant for the payment of the cheque amount of the cheque No. 3403006.

In the complaint petition, it has been stated that the accused took loan of Tk. 13,00,000 from the complainant Farid Ahmed. The

accused Manowara Manju is neither a relation of the P.W.1 nor she has any business transaction with the complainant. No document is proved regarding alleged loan taken from the complainant. It is found that the husband of the accused took loan of Tk. 10,00,000 from “চির সবুজ মাল্টিপারপাস সোসাইটি” which has been paid by her husband. The passbook issued by the “চির সবুজ মাল্টিপারপাস সোসাইটি” in favour of the husband of the accused was submitted by the accused at the time of examination of the accused under section 342 of the Code of Criminal Procedure, 1898. I am of the view that the said passbook is not required to be exhibited and the court is legally empowered to see any statement or document submitted by the accused at the time of examination under section 342 of the Code of Criminal Procedure, 1898 in his defence.

There is a presumption under section 118(a) of the Negotiable Instruments Act, 1881 that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration. The presumption under Section 118 (a) is rebuttable. In the instant case, the accused, by cross-examining P.W. 1 and adducing DWs rebutted the presumption under section 118 of the Negotiable Instruments Act, 1881 that the accused issued the cheque for consideration. There is no denial of the fact that Md. Majnu Sheikh, husband of the accused Manowara Manju, obtained loan of Tk. 10,00,000 from “চির সবুজ মাল্টিপারপাস সোসাইটি” and the complainant Farid Ahmed was the President of the said society. There is no denial of the facts that the husband of the accused paid the entire loan of Tk. 10,00,000 taken from the said society.

Mere presentation of a cheque within the specified time mentioned in clause (a) to Section 138 of the Negotiable Instruments

Act, 1881 and sending notice in writing to the drawer of the cheque by the payee making demand for payment of the cheque amount 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 complaint is made within one month of the date on which the cause of action arises under clause (c) of Section 138 of the said Act. In the instant case, no legal notice was sent regarding the disputed cheque No. 3403006.

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 through registered post with AD in compliance with the provision made in Section 138(1A) of the said Act at least by one mode as stated above is sine qua non. It is found that notice was not sent in compliance with the provision made in Section 138(1A) of the said Act.

It is found that disputed cheque number is 3403006. The notice under clause b to section 138 of the Negotiable Instruments Act, 1881 was sent for cheque No. 3403007. But the said notice was

also not sent to the correct address of the accused Manowara Manju and not served upon the accused. Therefore, the complainant failed to comply with the provisions made in clauses ‘b’ and ‘c’ of section 138 and section 141(b) of the Negotiable Instruments Act, 1881. The trial court on correct assessment and evaluation of the evidence of both the parties arrived at a correct decision that the disputed cheque was issued by the accused for security of the loan taken by her husband from the “চির সবুজ মাল্টিপারপাস সোসাইটি” belonged to the complainant Farid Ahmed and the said loan was fully paid and there was no consideration of the cheque issued by the accused Manowara Manju.

I do not find any merit in the appeal.

The finding arrived at by the trial court that the accused Monowara Manju was falsely implicated in the case is affirmed by this court.

Accordingly, the appeal is dismissed.

The trial court is directed to do the needful.

Send down the lower Court’s records at once.