

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Criminal Appeal No. 6140 of 2019.

IN THE MATTER OF:

An appeal under Section 410 of the Code of Criminal Procedure.

-AND-

IN THE MATTER OF :

Mohammad Abdul Kader alias Karim.

...Convict-appellant.

-Versus-

The State

. Opposite party.

Mr. Sk. Zulfiqur Bulbul Chowdhury,
Advocate

...for the convict-appellant.

Mr. Md. Atiqul Hoque (Salim), A.A.G

...For the State.

The 13th June, 2019.

Present:

Mr. Justice Md. Badruzzaman.

This appeal under section 410 of the Code of Criminal Procedure, at the instance of convict appellant, is directed against judgment and order of conviction and sentence dated 25.11.2018 passed by the learned Additional Sessions Judge, 3rd Court, Chattagram in Sessions Case No. 1691 of 2018 arising out of C.R Case No. 84 of 2018 (Rangunia) convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him there under to suffer rigorous imprisonment for 04(four) months with a fine of Tk. 15,00,000/-.

Short facts are that respondent No. 2 as complainant filed petition of complaint before the concerned Magistrate against the convict-appellant under section 138 of the Negotiable Instruments Act, 1881 stating that the convict issued a cheque dated 12.11.2017 in favour of the complainant for an amount of Tk. 12,00,000/- against loan which was

dishonored for insufficiency of fund when the same was placed for encashment on 23.1.2018. Thereafter, the complainant published a notice in the “Dainik Shangram” on 14.2.2018 asking the appellant for payment of the said amount but he failed to do so and hence the case.

The learned Magistrate initially took cognizance against the appellant under the aforesaid section of law and issued summons against the appellant. The appellant voluntarily surrendered before the learned Magistrate and obtained bail. Thereafter, the case was transferred to the learned Sessions Judge who also took cognizance. Eventually, trial was held in absentia and the trial Court convicted and sentenced the appellant as stated above. Then the appellant was arrested and taken into custody on 27.3.2019.

It is stated in the petition of appeal that after his arrest, the dispute between the appellant and respondent No, 2 has been settled out of Court and as per the settlement, the appellant paid all dues to the complainant and the complainant filed an application on 16.5.2019 before the trial Court stating that the complainant would have no objection if the appellant is released on bail. Accordingly, the appellant filed an application for bail on the same date on 16.5.2019 which was rejected by the trial Court on the ground that the appellant did not deposit 50% of the cheque amount for preferring an appeal.

Thereafter, this appeal has been preferred without depositing 50% of the cheque amount and with a delay of 123 days. However, on the prayer of the learned Advocate for the appellant this Bench vide order dated 27.5.2019 permitted to file the appeal provisionally and vide order dated 12.6.19 condoned the said delay with a direction to the office to register the appeal and accordingly, the same has been registered. Now this matter has been placed before this Court for admission hearing.

Mr. Sk. Zulfiqur Bulbul Chowdhury, learned Advocate appearing for the convict-appellant in support of Admission of appeal submits that

after pronouncement of the impugned judgment and the arrest of the convict appellant the dispute between the complainant and the appellant has been settled out of Court and as per said settlement the appellant has paid entire dues of the complainant who also received the same followed by an application to the Court below and accordingly, requirement of depositing 50% of the cheque amount for filing appeal under section 138A of the Negotiable Instruments Act, 1881 has been fulfilled and as such, this appeal should be admitted without depositing 50% of the cheque amount. In support of his contention learned Advocate has placed a decision of the case of Abdus Sattar and others vs. The State and another reported in 38 DLR (AD) 38 and submits that in the said case the Appellate Division allowed compromise before it and considering the said view this Court should allow the compromise in the instant case.

I have heard the learned Advocate and perused the records.

Before going into the facts of the case it would be beneficial to look into the relevant provisions of law regarding this matter. Section 138A of the Negotiable Instruments Act has imposed a restriction in respect of appeal against any order of sentence passed under sub-section (1) of section 138 of the said Act which stipulates as follows:

“138A. Notwithstanding anything contained in the Code of Criminal Procedure 1918, no appeal against any order of sentence under sub-section (1) of section 138 shall lie, unless an amount of not less than fifty per cent of the amount of the dishonored cheque is deposited before filing the appeal in the Court which awarded the sentence.”

Section ‘138A’ has been inserted in Negotiable Instruments Act, 1881 by section 3 of the Negotiable Instruments (Amendment) Act, 2006 (Act No. III of 2006). The provision of section 138A is clear and unambiguous. By inserting section 138A in the original NI Act, 1881 the parliament has intentionally made a bar in preferring an appeal against

any order of sentence under sub-section (1) of section 138. By using the words “*notwithstanding anything contained in the Code of Criminal Procedure, 1898*” and the words “*unless an amount of not less than fifty per cent of the amount of the dishonored cheque is deposited before filing the appeal in the Court which awarded the sentence*” clearly suggest that the provisions of the code of criminal procedure in respect of preferring appeal under NI Act will not be applicable and before filing the appeal 50% of the amount of the dishonored cheque is to be deposited in the Court which awarded the sentence (underlined to give emphases). **The Court which awarded the sentence** specifically indicates that said amount must be deposited in the Court who awarded the sentence, nothing more nothing less inasmuch as that after awarding sentence under sub-section (1) of section 138, receipt of even total dues by the complainant from the convict will not fulfill the requirement of section 138A of the NI Act.

Since, Negotiable Instruments Act, 1881 is a special law the provision of the said Act will prevail over the general law like the Code of Criminal Procedure and since section 138A of the NI Act, 1881 imposed a precondition of depositing 50% of the cheque amount of the dishonored cheque in the court which awarded the sentence before filing an appeal against sentence under sub-section (1) of section 138 of the said Act with a consequence that without such deposition no appeal **shall** lie this Court is of the view that no appellate court have got jurisdiction to waive such pre-condition or entertain any such appeal and /or accept any compromise which has been held before filing of the appeal.

I have carefully perused the judgment of the Appellate Division reported in 38 DLR (AD) 38. In the said case initially conviction under section 379 of the Penal Code was passed by the trial Court against the appellant. The appeal was dismissed by the Appellate Court. The

accused moved revision under section 439A Cr.P.C before the Sessions Judge which was dismissed whereupon the accused filed an application under section 561A Cr.P.C for quashing the proceeding which was dismissed by the High Court Division. Thereafter, the accused filed Criminal Petition for Special Leave to Appeal with a petition under section 345 of Cr.P.C for compounding the offence before the Appellate Division and the Appellate Division granted leave and appeal was registered. The Appellate Division in the said case relied its earlier decision of the case of Md. Joynal and others Vs. Md. Rustam Ali Mia and others reported in Bangladesh Case Reports 1984 AD 29 wherein it was held that “*our criminal administration of justice encourages compromise of certain disputes and some of the cases can be compounded as provided by section 345 Cr.P.C*”. By endorsing the same view the appellate Division allowed compromise by acquitting the accused holding as follows:

“Section 379, Penal Code is compoundable by the owner of the property stolen. Mrs. Jobeda Khatun is the complainant and is the owner of the property in question. She has now filed an affidavit praying for composition of the offence as the parties are inter-related. As we have noticed that the law encourages the compromise of the offence and since this matter is pending by way of special leave before this Court, we have no hesitation in allowing the composition and as a result this composition shall have the effect of acquittal of the accused.”

It appears that the said case was initiated under the Penal Code and there was no requirement of depositing any amount for filing appeal before the appellate Court. More so, the compromise was allowed in that case considering the provision of section 345 Cr.P.C which empowers the Court to allow compromise of certain disputes. But in Negotiable Instruments Act, 1881 no such provision has been inserted for

compromise of any dispute. Since Negotiable Instruments Act is a special law providing special procedure for filing appeal in section 138A of the said Act by overriding the provisions of the Cr.P.C in this regard, this Court is of the view that the decision of the case of 38 DLR (AD)38 is not applicable in the instant case.

In the instant case this appeal has been preferred without depositing 50% of the amount of the dishonored cheque in the trial Court who awarded the sentence as per provision under section 138A of the Negotiable Instruments Act, 1881. In view of the legal position as discussed above this appeal is not maintainable for admission and as such, the same should be dismissed.

Accordingly, the appeal is dismissed summarily.

(Md. Badruzzaman J)