Present:

Mr. Justice Md. Khasruzzaman

Criminal Appeal No. 6402 of 2019

Khandaker Md. Omor Faruk Kamal
…………Convict-appellant
-Versus-
The State and another
…………..Respondent
Mr. Gopal Chanda, Advocate, with
Mr. Mohammad Iqbal Hossain, Advocate
……………For convict-appellant
Mr. Mohammad Abdul Karim, D.A.G. with
Mr. Md. Azgarul Islam, A.A.G. and
Ms. Mahfuza Akhter, A.A.G.
.....For the State.
Mr. Md. Motahar Hossain (Sazu), Advocate
……..For the complainant-respondent No. 2.

Judgment on 13.03.2025

01. The convict appellant, Khandaker Md. Omor Faruk Kamal, has preferred the above numbered appeal against the judgment and order of conviction and sentence dated 29.11.2017 passed by the learned Special Judge, Special Judge Court No. 6, Dhaka in Special Sessions Case No. 07 of 2017, arising out of C.R Case No. 240 of 2017, convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him there under to

suffer simple imprisonment for 01(one) year and also to pay a fine of Taka 30,00,000.00 (Thirty Lac).

02. The prosecution case, in short, is that one M.S.I. Azad, proprietor of Adib Chemical Company, as a complainant filed a petition of complaint under section 138 of the Negotiable Instruments Act, 1881 in the Court of Chief Metropolitan Magistrate, Dhaka alleging *inter alia* that the complaint is a businessman and the accused is the owner of Sadi International. When the complainant asked the accused for the money he was owed, the accused drew a cheque bearing No. C.A. $\frac{100}{F}$ 8041752 dated 05.01.2017 in account No. 1762901011604 maintained by him with Pubali Bank Ltd., Peelkhana Branch, Dhaka amounting to Tk. 30,00,000.00 (Thirty Lac) to the complainant. The complainant presented the cheque in his account of Standard Bank Limited, New Eskaton Branch, Dhaka for encashment on 11.01.2017 and it was sent to the Pubali Bank Ltd., Peelkhana Branch, for collection but it was dishonoured and returned to the complainant with the remark insufficient fund

on 11.01.2017. The complainant informed the matter to the accused but he did not response. Thereafter, on 15.01.2017 the complainant sent a legal notice through his learned Advocate to the accused by registered post with acknowledgement due requesting him for making arrangement of the money so that the cheque can be honoured and the accused received the legal notice but he did not pay the same. Thus, on 20.02.2017 the complainant under the compelling circumstances filed the petition of complaint against the accused under section 138 of the Negotiable Instruments Act, 1881 in the Court of Chief Metropolitan Magistrate, Dhaka.

03. On the basis of the said petition of complaint filed by the complainant, the case was registered as C.R Case No. 240 of 2017. The learned Magistrate examined the complainant under section 200 of the Code of Criminal Procedure and issued process against the accused. Pursuant to the process, on 21.03.2017 the accused appeared before the Court of Magistrate and sought bail and accordingly, he was granted bail on the same day. Thereafter, the case was

transmitted to the Court of Metropolitan Sessions Judge, Dhaka for trial and it was registered as Metro Sessions Case No. 7410 of 2017. The Metropolitan Sessions Judge, Dhaka took cognizance of the offence under section 138 of the Negotiable Instruments Act, 1881 against the accused and thereafter, the case record was transferred to the learned Special Judge, Special Judge Court No. 6, Dhaka for trial and disposal where the case was again registered and re-numbered as Special Sessions Case No. 07 of 2017.

04. On 22.06.2017 the charge was framed under section 138 of the Negotiable Instruments Act, 1881 against the accused in his presence and it was read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

05. In order to substantiate the charge against the accused, the prosecution examined 01 (one) witness and on completion of the recording of evidence from the side of the prosecution, the accused was examined under section 342 of the Code of Criminal Procedure when he repeated his

innocence and expressed his desire for examination of the defence witnesses and accordingly, the defence examined 01 (one) witness in this case. On 25.09.2017 two defence witnesses filed Hazira but the Court was busy in Special Case No. 13 of 2017 and as such, these two defence witnesses were not examined whereas these two witnesses were examined in Special Sessions Case No. 06 of 2017.

06. The defence case, as projected through cross examination of PW- 1 and by adducing defence witness, is one of innocence and false implication. The further defence case is that the accused did not draw the cheque to clear his liabilities as claimed by the complainant. One Monir Hossain Mithu, cousin of the complainant, and Hanif Miah were very much close to the accused, and the accused had some monetary problem and he took shelter of said Monir Hossain Mithu and Hanif Miah in order to solve his monetary problem; and Monir Hossain Mithu and Hanif Miah assured the accused that they would manage loan through the complainant. Accordingly, Monir Hossain Mithu and Hanif Miah along with the accused had gone to the complainant

with an hope that they would manage some bank loan for the accused. After some discussions, the accused gave the complainant two cheques signed by him along with some papers to get a loan from the bank. But for insufficient of papers, the complainant could not manage any loan from the bank. Then the complainant gave a loan of Tk. 25,00,000.00 (Twenty Five Lac) to the accused and at the time of disbursement of the money, the complainant took Tk. 1,00,000.00 (One Lac) in cash from the said Tk. 25,00,000.00 (Twenty Five Lac) and the complainant kept two cheques signed by the accused, which had been previously given to him for a loan from the bank. When the accused asked the complainant to return the two cheques, the complainant said that if the complainant returned the Tk. 25,00,000.00 (Twenty Five Lac) to the complainant within a month, the complainant would return the two cheques to the accused. But the complainant using the said 02 cheques filed 02 (two) cases. In this case, one cheque of Tk. 30,00,000.00 (Thirty Lac) has been used and another case has been filed using the another cheque which was also continuing side by side. The accused did not draw any cheque to clear his liabilities to the complainant. The complainant in order to harass the accused and also for illegal gain filed both the cases but the accused was innocent.

07. After consideration of the evidence and other materials on record, on 29.11.2017 the Trial Court convicted the accused under section 138 of the Negotiable Instruments Act, 1881 and sentenced him there under to suffer simple imprisonment for 01(one) year and also to pay a fine of Taka 30,00,000.00 (Thirty Lac), and the complainant would get Tk. 30,00,000.00 (Thirty Lac).

08. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence dated 29.11.2017, the accused depositing the 50% of the amount of the dinhonoured cheque surrendered before the Trial Court on 25.02.2019 and also sought bail for preferring appeal in this Court, and he was granted bail and the convict-appellant preferred this appeal. The appeal is resisted by the complainant-respondent.

09. During pendency of the appeal the complainant-respondent No. 2 filed an application under section 428 of the Code of Criminal Procedure before the High Court Division, on 12.06.2022 PW 1, complainant, was re-examined and some documents relating to the sale of the chemical to the accused have been taken as additional evidence.

10. Mr. Gopal Chanda, the learned Advocate for the convict-appellant assailing the judgment of the Trial Court and supporting the appeal submits that the complainant using the security cheque of the accused filed the present case along with another case for some illegal gain. The accused never purchased any chemical from the complainant and the complainant was not a businessman of chemical items at all. So, the purchase of any chemical from the complainant was a redundant fact.

11. He further submits that the Trial Court did not consider the defence case and he applied his one sided eye

and view and thereby found the appellant guilty under section 138 of the Negotiable Instruments Act, 1881.

12. He also submits that on 27.11.2016 the accused requested a loan of TK. 30,00,000.00 (Thirty Lac) from the complainant for business needs through the complainant's cousin Monir Hossain Mithu and Hanif Miah; and the accused had no previous acquaintance with the complainant, and the accused gave two cheques alongwith other papers to the complainant for granting loan from the bank but his papers were not sufficient for granting loan. Then on 29.11.2016 the complainant gave a loan of Tk. 25,00,000.00 (Twenty Five Lac) to the accused out of which the complainant took Taka 1,00,000.00 (One Lac) instantly as service charge when the accused told the complainant about his two cheques, the complainant said that if the accused returned Tk. 25,00,000.00 (Twenty Five Lac) within a month, he would return the two cheques to the accused but the complainant by dishonouring these two cheques filed two cases. These facts were categorically deposed by D.W-1, and supported by D.Ws- 2, 3 and 4 in Special Sessions Case No.

06 of 2017 but the Trial Court without considering the defence case as a whole passed the judgment and order of conviction and sentence.

13. He contents that C. R. Case No. 240 of 2017, renumbered as Special Sessions Case No. 07 of 2017, was filed for dishonouring the cheque No. C.A. $\frac{100}{F}$ 8041752 drawn by the convict appellant. Accordingly, the charge was framed and the appellant was examined under section 342 of the Code of Criminal Procedure. But when the complainant testified in this case, he mentioned cheque No. 8041753 instead of cheque No. 8041752 and accordingly, the dishonoured cheque No. 8041753 and its dishonoured slip, legal notice, postal receipt and acknowledgement due were exhibited by the prosecution in the present case. Thus, the prosecution failed to prove the charge against the appellant. Since the prosecution failed to prove the charge, the appellant will be acquitted.

14. He further contents that the accused paid the complainant Tk. 10,00,000.00 (Ten Lac) through a pay order

and Tk. 6,50,000.00 (Six Lac and Fifty Thousand) in cash. But the complainant denied this fact, then one of the officers of Bank Asia was examined as C.W-1 in Special Sessions Case No. 06 of 2017 and he deposed that Tk. 10, 00,000.00 (Ten Lac) was paid by Sadi International, the accused, to Adib Chemical Company, the complainant, through a pay order and he exhibited the confirmation of payment order, exhibit No. I. Thus, the complainant made false statement before the Court after taking oath and as such, both the cases of the complainant creat a doubt.

15. He further contents that during pendency of the appeal, the prosecution re-examined the complainant to fulfill the lacuna of the case and the complainant exhibited the cash memo and challan bill but there was no signature of the accused in the cash memo as well as challan receipt. Moreover, these cash memo and challan receipts were created because bill and challan were prepared on 29.10.2016 but the complainant in cross-examination stated that the accused was introduced with the complainant on 29.11.2016. Thus, before introducing each other, huge

quantity of chemicals were sold on credit which was totally absurd; and moreover, bill No. 2251 dated 16.03.2016, bill No. 2252 dated 29-10-2016, bill No. 2253 dated 02.11.2012, bill No. 2254 dated 08.12.2016 and onwards of cash memo book No. 46, which are on the records, are very relevant to understand the real facts of the case.

16. He also contents that had the case of the defence been considered in a proper manner by the Trial Court, the Trial Court would find that the accused did not take any money more than Tk. 24,00,000.00 (Twenty Four Lac) from the complainant and also found that the accused at the time of taking said loan executed 02 (two) cheques and the complainant for some illegal gain as against Tk. 24,00,000.00 (Twenty Lac) was trying to get Tk. 60,00000.00 (Sixty Lac) from the accused under the garb of the present case along with another case.

17. The learned Advocate in his concluding submissions submits that this is not a money suit and as such, the Trial Court can not deduct some money from the cheque

amount and passed a partial decree like a civil Court. So, the judgment of the Trial Court has been suffering from gross illegality which may kindly be set aside and acquitted the accused of the charge.

18. The appellant in support of his submissions refers the following cases: (1) Abul Kaher Shahim (Md.) Vs. Emran Rashid and another, 25 BLC (AD) (2020) 115; (2) Md. Shah Alam @Shah Ali and others Vs. the State and another, 1986 BLD (AD) (Vol. VI) 88; and (3) Amir Chand Vs,. Krishna Chandra Bhoumik, AIR 1936 Calcutta 315.

19. On the other hand, Mr. Motahar Hossain (Sazu), the learned Advocate appearing for the complainant-respondent submits that the Trial Court have considered the all evidence adduced by the parties very meticulously and did not leave any evidence adduced either by the complainant or by the appellant from consideration, and as such, there is no scope to say that the Trial Court without considering the evidence on record and facts of the case came to a wrong conclusion.

20. He further submits that the complainant is a businessman of chemicals and the accused is also a supplier and businessman of chemicals. The appellant purchased Sodium Bentonite chemical from the complainant without payment of money in cash but at the time of taking said chemical, the appellant drew 02 cheques for making payment of the value of the chemical but both the cheques were dishonoured by the bank for insufficient of fund, and out of the above two cheques, the complainant filed this case for dishonouring cheque No. 8041752 and filed another case for dishonouring cheque No. 8041753.

21. He also submits that the complainant by adducing additional evidence proved that he was a chemical businessman and the convict-appellant purchased the Sodium Bentonite chemical from the complainant and he also proved the cash memo and challan receipt of the chemical.

22. The learned Advocate in his concluding submissions submits that the prosecution has proved the case leaving no stone untouched and the Trial Court was also very

much justified in finding the appellant guilty under section 138 of the Negotiable Instruments Act, 1881. So, the judgment of the Trial Court does not call for any interference by this Court.

23. The respondent in support of his submissions refers the following cases: (1) Abul Kaher Shahim (Md.) Vs. Emran Rashid and another, 25 BLC (AD) (2020) 115; and (2) Mohammad Ali Fatik Vs. The State and another, 22 BLT (HCD) (2014) 243.

24. I have considered the above submissions of the learned Advocates of both the parties with profound attention and gone through the materials on record particularly the petition of complaint, the evidence adduced by the parties, the judgment of the Trial Court.

25. Now, in order to appreciate the above arguments of the learned Advocates of both the parties, it is necessary to examine the evidence on record.

26. P.W- 1, M. S. I. Azad, the complainant, in his examination-in-chief stated that the accused Omar Faruk

Kamal purchased chemical item from him and in order to make payment of the said chemicals, he drew a cheque bearing No. 8041753 dated 05.01.2017, he exhibited the cheque and marked it as exhibit No. 1, he presented the cheque in his bank on 11.01.2017 but it was dishonoured for insufficient of fund, he exhibited the dishonorur slip and marked it as exhibit No. 2, and thereafter, he sent a legal notice by registered post with acknowledgement due on 15.01.2017, he exhibited a copy of the legal notice and the postal receipt along with the acknowledgment due and marked these as exhibit No. 3 series. But the accused did not turn up for making payment of the cheque amount and thus, he filed C.R Case No. 241 of 2017, he exhibited the petition of complaint and his signature and marked it as exhibit Nos. 4 and 4/1 respectively.

In cross examination of the defence, P.W-1 denied the defence suggestions that the accused gave him a security cheque; and the complainant filed this case with a security cheque; and another case with another security cheque. He stated that the accused drew him two cheques dated the same day. He denied the further defence suggestions that the accused did not take chemicals worth Tk. 30,00,000.00 (Thirty Lac) from him; and the accused would not have issued two cheques if he had taken chemicals worth Tk. 6,00,000.00 (Six Lac); and he paid Tk. 24,00,000.00 (Twenty Four Lac) to the accused; and Hanif Miah drew a cheque to him for the money in this case; and the accused paid him Tk. 10,00,000.00 (Ten Lac) through a pay order; and he would not get Tk. 30,00,000.00 (Thirty Lac) from the accused; and the accused merely signed the cheque; and he wrote the amount on the cheque; and he gave false testimony in the case to gain benefits.

On 17.10.2017, P.W-1 was recalled by the defence and on recall, he stated that he was in the chemical business, trading in various types of industrial raw materials and water treatment chemicals, including sodium potassium, magnesium, sodium nitrate, sand.

He further stated that he had a trade licence to conduct that business and imported the chemicals from China. He also stated that he imported 250 tons of Sodium Bentonite in that shipment, selling 200 metric tons of it to the accused.

He denied the defence suggestions that the accused Mr. Kamal did not accept the chemicals; and he did not supply any chemical to the accused; and the representative of the accused did not accept the 8 trucks of goods; and Azgar Ali was not the employee of the accused; and the accused did not personally go and introduce himself to anyone to receive the chemical; and he did not have the documents for importing the chemical given to the accused; and he deposed false testimony in the Court.

27. During pendency of the appeal, on 12.06.2022 P.W-1 was re-examined by the prosecution. At the time of re-examination, P.W-1 deposed that he was the owner of Adib Chemical Company, he proved his trade licences of 2009 and marked a photocopy of the same as exhibit Nos. 5 and 5/1. He has been doing this business for the last 22 years. The accused purchased 200 tons or 8000 bags Sodium Bentonite on 29.10.2016. A bag contained 25 kg. The

accused took the delivery of the goods through 08 trucks, the complainant exhibited the cash memo of the sold chemicals and marked a photocopy of the same as exhibit No. 6 and challan was required for the transport and delivery of goods, he exhibited the challan of the goods dated 29.10.2016 and marked a photocopy as exhibit No. 6/1.

In cross examination of the defence, P.W-1 stated that he was the complainant and it was imported. He purchased the chemicals from Himel Company of chattogram and their address was Khatungonj. He could not give the detailed address. He denied the suggestion that the complainant fabricated the story to win the case, and he knew the name and address of the company when it bought and sold goods. The name of the company was Himel Shaheb. He denied the further defence suggestion that he gave a loan of Taka 25,00,000.00 (Twenty Five Lac) to the accused and out of which he took Taka 1,00,000.00 (One Lac) instantly and at that time he took 02 (two) security cheques from the accused and by the said cheque he filed the present case. He denied the further defence suggestion that the accused gave Tk. 10,00,000.00 (Ten Lac) to the complainant.

28. DW 1, Khandker Md. Omar Faruk Kamal, in his examination-in-chief stated that on 27.11.2016 he asked the complainant for a loan of TK. 30,00,000.00 (Thirty Lac) through one Monir Hossain Mithu, a cousin of the complainant, and Hanif Miah, and before that he had no connection with the complainant. On 28.11.2016 the complainant informed him that he would be able to get a loan against the papers of the accused and accordingly, on 29.11.2016 at 11.00 a.m. he had gone in front of Standard Bank, Eskaton Branch, along with Monir Hossain Mithu and Hanif Miah; and after some times, the complainant came into the spot and asked the accused and others to stay in a nearest restaurant, and they were waiting in the said restaurant, the complainant left the restaurant with some papers of the accused and along with 2 cheques executed by the accused. After 02 hours the complainant came back to the said restaurant and informed the accused that his papers were not sufficient for a loan of Tk. 30,00,000.00 (Thirty Lac) and the

complainant also told him that he had taken Taka 25,00,000.00 (Twenty Five Lac) from the bank against his own FDR to meet the urgency of the accused but at the same time the complainant took back Tk. 1,00,000.00 (One Lac) out of the said Tk. 25,00,000.00 (Twenty Five Lac) as charge and cost of the loan. The accused demanded the 02 cheques to the complainant which he executed earlier for the bank loan but the complainant did not return back the said cheques rather he told that if the loan money was refunded to him within 01 (one) month, he would return back the cheques and the accused trusting upon the said words of the complainant came back from the restaurant. Since it was not possible on the part of the accused to return back the said money within 29.12.2016, the accused had gone in the house of the complainant on 20.12.2016 and he asked for more 01 (one) month time but the complainant denied to give any more time. Thereafter, on 21.12.2016 Hanif Miah also drew cheque to the complainant. At that time, he could not return the cheque of the complainant because he did not have the cheque. The complainant did not return the cheques given by the accused. The complainant filed the case with the said cheque. He also stated that by this time, he had paid Taka 10,00,000.00 (Ten Lac) through a pay order and Tk. 6,50,000.00 (Six Lac and Fifty Thousand) in cash to the complainant.

In cross examination of the prosecution, DW 1 stated that he drew the cheques in favour of the complainant signing the same. He categorically denied the prosecution suggestion that he purchased Sodium Bantonite from the complainant. He stated that he paid Tk. 10,00,000.00 (Ten Lac) through a pay order and Tk. 6,50,000.00 (Six Lac and Fifty Thousand) in cash to the complainant and Tk. 5,00,000.00 (Five Lac) to Mithu on the request of the complainant.

29. C.W-1, Md. Ziauddin, First Assistant Vice President, Bank Asia, Satmosjid Road, Dhanmondi was examined in Special Sessions Case No. 06 of 2017. In his examination-in-chief, he deposed that a letter vide memo No. B.A/Satmosjid/GB/2017/847 dated 01.11.2017 was issued

from their office. He identified the letter. He further deposed that the money of the pay order dated 04.05.2017 disbursed from Sadi International to Adib Chemicals Company. The amount of money was Tk. 10,00,000.00 (Ten Lac). He proved the conformation of the payment order and marked it as exhibit No. I.

He was not cross examined by the prosecution. Thus, the statements of this witness remained unchallenged and intact.

30. These are the evidence those have been given by the prosecution and the defence in the case. From the evidence discussed above it appears that the prosecution examined 1 (one) witness to prove the prosecution case; and on the other hand, the defence examined 1 (one) witness to prove the defence case. In Special Sessions Case No. 06 of 2017, D.Ws-1 to 4 were examined, and D.Ws-1, 2 and 4 were cross-examined and D.W-3 was not cross-examined ; and on the basis of the application of the accused, C.W-1

was examined in Special Sessions Case No. 06 of 2017 and he was not cross-examined by the prosecution.

31. It is noticed here that from the very beginning of the case when the case was in trial, the defence made out a case that he neither purchased any chemical from the complainant nor drew the said 02 cheques in order to make payment of price of any chemical; rather the accused took loan of Taka 25,00,000.00 (Twenty Five Lac) from the complainant on 29.11.2016 and the complainant took Tk. 1,00,000.00 (One Lac) in cash from the said money and before taking the said money, the accused executed 02 cheques for taking loan from the bank through the complainant and the complainant after handing over the Taka 24,00,000.00 (Twenty Four Lac) did not return the said 02 cheques to the appellant and instead, filed the present case along with another one on the basis of those two cheques.

32. It appears from the records of Criminal Appeal No. 6401 of 2017, arising out of Special Sessions Case No. 06 of 2017, that P.W-1, in cross-examination, deposed that

২৭.১১.২০১৬ ইং তারিখ এ আমার ভাই মিঠুর মাধ্যমে আসামী ৩০ লক্ষ টাকা ধার চায়। আমি তাহাকে চিনিতাম না। D.W.-1 in his examination-in-chief deposed that আমি অত্র মামলার আসামী। বাদী ২৭-১১-২০১৬ ইং তারিখে বাদীর চাচাত ভাই মনির হোসেন মিঠু ও হানিফ মিয়ার মাধ্যমে বাদীর নিকট ব্যবসায়ীক প্রয়োজনে ৩০ লক্ষ টাকা ধার চায়। ইতোপূর্বে বাদীর সহিত আমার কোন পরিচয় ছিল না।" Thus, it is admitted that they did not know each other before the 27th November 2016. But at the time of re-examination, P.W-1 deposed that সে সোডিয়াম বেনটোনাইট নেয় ২৯.১০.২০১৬ তারিখে। যার পরিমাণ ২০০ টন বা ৮০০০ ব্যাগ। এক ব্যাগে ২৫ কেজি থাকে। সে ৮টি ট্রাকে এই মাল নেয়। এই সেই মেমো, প্র-৬। এই মাল পরিবহনের জন্য চালান লাগে। এই সেই চালান তাং ২৯.১০.২০১৬ প্র-৬/১। It appears from Bill No. 2252 dated 29.10.2016, exhibit No. 6, and Challan No. 2302 dated 29.10.2016, exhibit No. 6/1, that 200 tons or 8000 bags or 8 trucks Sodium Bentonite (China) valued at Tk. 60,00,000.00 (Sixty Lac) were allegedly sold and handed over to the accused whereas P.W. 1 in cross examination stated that he was not introduced with the accused before 27.11.2016. Thus, it is inconceivable how the complainant sold such a huge quantity of chemicals to the accused one month and two days before they were introduced. Thus, it is very much relevant for deciding the case that Bill No. 2253 dated 02.11.2016 and Challan No. 2303 dated 02.11.2016 contained in cash memo book No. 46 and challan book No. 47, respectively, were submitted by the complainant and are on the record. Some may argue that the date 29.10.2016 was erroneously recorded and should have been 29.11.2016. However, such an interpretation creates further inconsistencies. This is because the chemical had already been sold under Bill No. 2253 dated 02.11.2016 to one Md. Hanif Miah of Joy Fabrics. Since a different chemical had already been sold to another person on 02.11.2016, as evidenced by Cash Memo Bill No. 2253 dated 02.11.2016, the alleged sale on 29.11.2016 could not subsequently have been recorded in the same cash memo. Accordingly, it appears that, prior to the sale of the chemical on 02.11.2016, Bill No. 2252 dated 29.10.2016 and Challan No. 2302 dated

29.10.2016 (exhibits 6 and 6/1, respectively) were created by the complainant in support of the alleged sale of the chemicals. This situation is aptly described by the saying, "the cart went before the horse." In other words, the chemical was purportedly sold before the accused had even been introduced to the complainant.

33. It further appears from the records that D.W.-1 in his examination-in-chief deposed that আমি বাদীকে পে-অর্ডার এর মাধ্যমে ১০ লক্ষ ও ৬ লক্ষ ৫০ হাজার টাকা ক্যাশ প্রদান করি। D.W. 3 in his examination-in-chief deposed that বাদীকে আসামী ১০ লক্ষ টাকার Pay order ও নগদ ৬ লক্ষ টাকা প্রদান করে। On the other hand, in cross examination, P.W-1 deposed that ইহা সত্য নহে যে, সাদী ইন্টারপ্রাইজ আমাকে ১০ লক্ষ টাকার পে-অর্ডার পাঠায়। But C.W-1, Md. Ziauddin, First Assistant Vice-President of Bank Asia Limited, in his examination-in-chief deposed that এই সেই চিঠি যাহাতে pay order করা হয়। ০৪.০৫.২০১৭ ইং তারিখে উক্ত pay order এর টাকা Sadi International থেকে Adip Chamical Company এর নামে যায়।

টাকার পরিমান ১০ লক্ষ টাকা (প্রদর্শনী-I). But the Trial Court without any admission of the complainant observed that বাদী অবশ্য উক্ত দশ লক্ষ টাকা পেয়েছেন মর্মে আদালতে উল্লেখ করেন। The complainant nowhere stated in his deposition that he had received Tk. 10,00,000.00 (Ten Lac) from the accused through a pay order. Rather, P.W.1, in his cross-examination, categorically denied having received Tk. 10,00,000.00 (Ten Lac) from the accused through a pay order. Had the complainant admitted to receiving the said amount through a pay order, there would have been no necessity for the accused to file an application for summoning the concerned bank official as a witness. Nevertheless, the Trial Court erroneously observed that the complainant had admitted to receiving Tk. 10,00,000.00 (Ten Lac). Such an observation is not borne out by the evidence on record and amounts to a misappreciation of the evidence. It is true that, as evident from Exhibit-I and the testimony of C.W.1, the complainant had in fact received Tk. 10,00,000.00 (Ten Lac). However, he falsely denied such receipt on oath before the Court.

Therefore, the Trial Court was correct as to the fact of receipt but incorrect in observing that the complainant had admitted the receipt in his testimony. Consequently, the complainant's false denial under oath adversely affects his credibility as a witness.

34. It appears from the records that D.W. 1 deposed that he took loan of Tk. 25,00,000.00 (Twenty Five Lac) from the complainant and the complainant charged Tk. 1,00,000.00 (One Lac) on 29.11.2016 and the complainant took 2 (two) cheques from the accused as security. These facts were supported by D.W-2, D.W-3 and D.W.4 in Special Sessions Case No. 06 of 2017. The prosecution could not find anything contrary from the defence case by cross-examining D.Ws-1, 2 and 4. Here, it is mentioned that D.W-3 was not cross-examined by the prosecution and as such, the depositions of D.W 3 remained unchallenged and intact. Thus, the unchallenged depositions of D.W-3 and C.W-1 including the depositions of D.Ws- 1, 2 and 4 are sufficient to believe the defence case.

35. According to the petition of complaint, the deposition, and the cross-examination of P.W.1, the complainant did not know the accused prior to 27.11.2016. Therefore, the allegation that the complainant sold chemicals worth Tk. 60,00,000.00 (Sixty Lac) to the accused on 29.10.2016 in exchange for only two cheques is not credible. I find this allegation to be wholly implausible and inherently improbable. It is difficult to believe that, in present-day Bangladesh, any individual or company would hand over chemicals worth Tk. 60,00,000.00 (Sixty Lac) in exchange for only two cheques without any other written documentation. A businessman may sell a large quantity of goods to another businessman on credit, but such transactions ordinarily depend upon a pre-existing business relationship and mutual goodwill. In the present case, however, it is not credible that the complainant, without any prior acquaintance with the accused, would sell chemicals worth Tk. 60,00,000.00 (Sixty Lac) based solely on two cheques.

36. It is stated in the petition of complaint that বাদী আসামীর নিকট পাওনা টাকা দাবী করিলে আসামী তাহার নিজ নামীয় পূবালী ব্যাংক লিমিটেড, পিলখানা শাখা, ঢাকার হিসাব নং ১৭৬২৯০১০১১৬০৪ এর অনুকুলে =৩০,০০,০০০/- (ত্রিশ লক্ষ) টাকা মূল্যমানের একটি চেক প্রদান করেন। যাহার চেক নং C.A. $\frac{100}{F}$ 8041752, তারিখ ০৫.০১.২০১৭ ইং। It appears that the complainant, while giving deposition in the Court, deposed cheque number 8041753 instead of cheque No. 8041752 and he exhibited cheque No. 8041753 as exhibit No. 1 and its dishonoured slip as exhibit No. 2, legal notice, registered postal receipt and acknowledgement due as exhibit No. 3 series. Whereas, C.R. Case No. 240 of 2017, renumbered as Special Sessions Case No. 07 of 2017, was filed for dishonouring the cheque bearing No. 8041752. Thus, the prosecution side totally failed to prove the charge orally and documentary. But the Trial Count passed the judgment and order of conviction and sentence of the case without taking these points into consideration.

37. It appears from the records that P.W.-1 was recalled on 17.10.2017. Upon being recalled, he deposed that আমি উক্ত chemical চায়না থেকে import করে আনি। আমি উক্ত চালানে ২৫০ টন সোডিয়াম বেন্টোনাইট আনিয়া ছিলাম। He further deposed that আসামীর কাছে ২ শত মেট্রিক টন সোডিয়াম বেন্টোনাইট বিক্রি করি।

In the meantime, the accused obtained information from government authorities indicating that the complainant was not an importer of the said chemical. On the basis of such information, the defence put a suggestion to the complainant that he was not an importer of the said chemical.

Subsequently, upon an application filed by the complainant-respondent under section 428 of the Code of Criminal Procedure, the High Court Division recorded the additional evidence of P.W.-1 on 12.06.2022. During cross-examination, P.W.-1 deposed that এটি আমদানী করি। আমি

চট্টগ্রামের হিমেল কোম্পানীর নিকট থেকে ক্রয় করি। তাদের ঠিকানা খাতুনগঞ্জ তবে বিস্তারিত ঠিকানা বলতে পারব না।

Therefore, it may be concluded that P.W.-1 initially categorically deposed that he had imported 250 metric tons of Sodium Bentonite from China and had sold 200 metric tons thereof to the accused. Subsequently, however, during cross-examination, P.W.-1 deposed that he had not imported the chemical himself; rather, he had purchased it from a company in Chattogram.

It is now an admitted fact that the complainant did not import the chemical. Consequently, the accused was no longer required to prove independently whether the complainant had imported the chemical, as P.W.-1 himself admitted during cross-examination that he had not imported it but had purchased it from a company in Chattogram.

Accordingly, although the complainant initially categorically stated that he had imported the chemical and had sold 200 metric tons of Sodium Bentonite to the accused, he subsequently admitted during cross-examination that he had not imported it. In view of such subsequent admission, it may reasonably be concluded that the complainant resorted to various devices in an attempt to establish his case but ultimately failed, with the result that his testimony lost its credibility.

38. It appears that D.W-1 deposed that he paid the complainant Tk. 10,00,000.00 (Ten Lac) through a pay order and Tk. 6,50,000.00 (Six Lac and Fifty Thousand) in cash; and D.W-3 deposed that the accused paid Tk. 10,00,000.00 (Ten Lac) through a pay order and Tk. 6,00,000.00 (Six Lac) in cash to the complainant, and D.W-3 was not cross examined by the prosecution, and as such, the depositions of D.W-3 remained unchallenged and intact. C.W-1 proved that the complainant received Tk. 10,00,000.00 (Ten Lac) through a pay order, exhibit-I. Now it is decided that the complainant received Tk. 10,00,000.00 (Ten Lac) from the accused through the pay order. But the complainant dishonoured the two cheques of Tk. 60,00,000.00 (Sixty Lac) and filed both the cases for punishment and recovery of Tk. 60,00,000.00 (Sixty Lac) from the accused, which was not

correct decision of the complainant under any circumstances as section 138 of the Negotiable Instruments Act deals with for committing of an offence and there is a provision for punishment with imprisonment, or with fine, or with both. Section 138 of the Negotiable Instruments Act will never be used to recover partial money or partial cheque amount of the dishonoured cheque. A cheque is a bill of exchange and a bill of exchange is an instrument. A bill of exchange shall contain an order to pay to its holder and this order will not be used partially, and if it is used partially then the document will not be treated as a bill of exchange. In the present case, as claimed by the complainant and the accused, two different transactions were involved. The complainant claimed that he sold Sodium Bentonite valued at Tk. 60,00,000.00 (Sixty Lac) to the accused. On the other hand, the accused claimed that he took a loan of Tk. 24,00,000.00 (Twenty Four Lac) from the complainant. The complainant as a plaintiff did not file the present case for recovery of the money rather he filed the case against the accused for committing an offence. In the case of two different transactions, the Court should have either believed the complainant's case or disbelieved it. Therefore, the judgment of the Trial Court to reduce the amount by Tk. 10,00,000.00 (Ten Lac) was not a correct decision.

39. Considering all the aspect of the case it shows that no offence has been constituted by dishonouring the cheques of the appellant punishable under section 138 of the Negotiable Instruments Act, 1881.

40. In view of the forgoing discussions, I find merit in the appeal.

41. In the result, the appeal is allowed.

42. Thus, the judgment and order of conviction and sentence dated 29.11.2017 passed by the learned Special Judge, Special Judge Court No. 6, Dhaka in Special Sessions Case No. 07 of 2017, arising out of C.R Case No. 240 of 2017, convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him there under to suffer simple imprisonment for 01(one) year and also to pay a fine of Taka 30,00,000.00 (Thirty Lac) is set aside.

43. Accordingly, the convict-appellant is acquitted of the charge levelled against him, and he is permitted to withdraw the amount deposited by him in the Trial Court for the purpose of filing the appeal.

44. The Trial Court is directed to do needful.

45. Send down the records.

46. Communicate the judgment.

(Md. Khasruzzaman, J:)