

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

Criminal Appeal No. 10601 of 2019

Md. Moazzem Hossain Howlader

...Appellant.

-VERSUS-

The state and another.

... Respondents.

Present

Mr. Justice Mamnoon Rahman

Mr. Md. Zahirul Alam, Adv.

... For the appellant.

Mr. Md. Khalilur Rahman, Adv.

...For the complainant-respondent.

Heard on: 21.11.2021, 13.03.2024 & 01.08.2024

And

Judgment on: The 21st January, 2025

This appeal is directed against the judgment and order of conviction and sentence dated 08.08.2019 passed by the learned Special Judge Court No. 1, Dhaka acquitted the accused-respondent No. 2, Saleha Begum from the charge in Sessions Case No. 05 of 2018 arising out of C.R. Case No. 557 of 2017 dated 22.08.2017 under section 138 of the Negotiable Instrument Act, 1881.

The short facts relevant for the disposal of the appeal, is that, the appellant as complainant filed C.R. Case No. 557 of 2017 implicating the respondent as accused-opposite party under section 138 of the Negotiable Instrument Act, 1881 alleging *inter-alia* that the complainant and the accused entered into an agreement for sale of flat and resulting which the complainant paid an amount of Tk. 80,00,000/- to the accused on different occasions. However, since there was dispute

and other aspects the accused person agreed to refund the money and for that purpose issued a cheque in favour of the accused person being cheque No. 4077033 dated 20.04.2017 of Basic Bank Limited for an amount of Tk. 80,00,000/-. Subsequently, the complainant placed the cheque for encashment wherein the cheque was dishonoured for insufficient fund. Consequently, the present appellant issued legal notice as required by the provisions of the Negotiable Instrument Act requesting the accused to adjust the money within thirty days which was duly received by the accused respondent but since the accused respondent failed to adjust the money within that period the complainant was constrained to file C.R. Case No. 557 of 2017. Subsequently, the case was transferred as Special Sessions Case No. 5 of 2018 before the Special Sessions Judge, Court No. 1 Dhaka wherein the court below proceeded with the case. During trial both the parties adduced evidences both oral and documentary. The trial court, thereafter, proceeded and vide the impugned judgment and order acquitted the accused respondent from the charge leveled against him. Being aggrieved, by and dissatisfied with the aforesaid judgment and order passed by the trial court, the appellant moved before this court by way of an appeal.

The respondent No. 2 contested the appeal by filing affidavit-in-opposition.

The learned Advocate Mr. Md. Zahirul Alam, appearing on behalf of the appellant submits that admittedly the accused respondent and the complainant entered into an agreement for sale of a flat and out of that transaction the complainant paid a substantial amount to the accused respondent in different mode by bank as well as cash which was duly admitted by the accused respondent in different occasions. He submits that in the present case in hand there is no denial regarding the issuance of cheque, its validity and other requirement fulfilled by the complainant but the trial court without applying its judicial mind acquitted the accused appellant with certain vague presumption and findings which is not at all tenable in the eye of law. He further submits that as per the regular requirement the complainant proved the cheque, dishonoured for insufficient fund, issuance of legal notice within statutory period as well as failure on the part of the accused respondent to adjust the amount and as such the court below ought to have found the accused respondent guilty of the offence as alleged and ought to have convicted and sentenced him accordingly. He also submits that the complainant tried his level best to prove the transaction in the trial court but because of the development of the new aspects regarding the proof of payment and other issues the complainant failed to prove the same in an appropriate manner.

The learned Advocate Mr. Md. Khalilur Rahman, appearing on behalf of the respondent vehemently opposes the appeal. He submits

that the trial court on proper appreciation of the facts and circumstances, materials on record, evidences both oral and documentary has rightly acquitted the accused-respondent thus the trial court committed no error which does not requires interference by this court. He submits that the accused respondent never denied the transaction in question but admittedly he received an amount of Tk. 17,50,000/- and not a single payment more than that and being a simple person on good faith handed over a blank cheque but the complainant with ulterior motive put a exaggerate amount and filed the case just to harass and humiliate the accused respondent. He further submits that in the trial court the complainant miserably failed to prove the transaction in question in every manner and as such the decisions arrived at by the trial court cannot be interfered in any circumstances.

I have heard the learned Advocates for the appellant as well as respondent. I have perused the impugned judgment and order of conviction and sentence passed by the court below, Memorandum of appeal, affidavit-in-opposition, application for stay filed by the petitioner as well as LC Records.

On perusal of the same, it transpires that admittedly out of a transaction the accused respondent issued a cheque in favour of the complainant. It further transpires that the said cheque was dishonoured for insufficient fund resulting which the complainant issued a legal notice requesting the accused respondent to adjust the amount as

required by law. It further transpires that the accused respondent received the said notice but failed to adjust the same within the period as stipulated in law and after expiry of the period the complainant filed the case under section 138 of the Negotiable Instrument Act, 1881. It further transpires that ultimately the case record was transmitted to the trial court wherein the trial court proceeded with the case. During trial the complainant adduced one witness while the accused respondent adduced one. Both the parties also adduced documentary evidence. However, the trial court passed the impugned judgment and order acquitting the accused respondent.

As per the provisions of Negotiable Instrument Act a court of law is to see the validity of the cheque, whether the cheque was dishonoured after presentation for insufficient fund, whether the holder or payee issued legal notice enabling the drawer to adjust the amount within the period as stipulated in law as well as whether the drawer failed to adjust the money after receiving any legal notice within the period mentioned thereof.

This practice has been evolved since long and if the above conditions are being fulfilled the same was enough to find a person convict under section 138 of the Negotiable Instrument Act, 1881 and to sentence him accordingly. But the same jurisprudence has been developed wherein our apex court in numerous decisions came to a conclusion that the trial court must see the financial capacity and proof

the transaction in question fully. The recent view of our apex court as well as this court is that the complainant who filed the case has to prove the source of payment and the actual transaction made by the parties as well as the purpose of such transaction by sufficient credible evidence. In the instant appeal the impugned judgment was passed in the year 2019. So, it further transpires that though the trial court did not find any deviation regarding the initial conditions stipulated in a case under section 138 of the Negotiable Instrument Act, 1881 but also dealt with the transaction and came to a conclusion that the complainant failed to prove the transaction.

On meticulous perusal of the papers and documents, it transpires that the appellant who is the complainant tried to place some documents regarding the payment which was not duly disposed of by the trial court. Hence, I am of the view that justice would be done if the case be sent back on remand to the trial court to hear and dispose of the case afresh only considering the question of transaction and payment made by the accused respondent. During fresh trial the trial court shall only allow the complainant to prove that he has the source of making a payment of Tk. 80,00,000/- as well as the method of payment in a lawful manner. Consequently, I find substance in the instant appeal.

Accordingly, the instant appeal is allowed and the case is sent back on remand. The judgment and order passed by the court below is hereby set aside. The trial court is directed to hear and dispose of the

case afresh within 90(Ninety) days as per the observations made by this court.

Send down the L.C. Records to the concerned court below with a copy of the judgment at once.

(Mamnoon Rahman,J:)

Emdad.B.O.