

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

Present:

Mr. Justice Md. Shohrwardi

**Criminal Appeal No. 1784 of 2020
**Shah Md. Ruhul Amin Patowary
(Jewel)****

...Convict-Petitioner

-Versus-

The State and another

...Opposite parties

Mr.Md. Shameem Khaled, Advocate

...For the appellant

Mr. Md. Rashidul Islam, Advocate

.....For the respondent No. 2

Mr. S.M Golam Mostofa Tara, DAG with

Mr A. Mannan, AAG with

.....for the State.

Heard on 12.10.2023, 15.10.2023 and
05.03.2024

Judgment delivered on 11.03.2024

This appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against judgment and order dated 24.10.2019 passed by Sessions Judge, Chandpur in Session Case No. 226 of 2019 arising out of C.R Case No. 171 of 2018 (Hajigonj) convicting the appellant under Section 138(1) of the Negotiable Instrument Act, 1881 and sentencing him thereunder to suffer rigorous imprisonment for 01 (one) year and fine of Tk. 13,90,000/- (Thirteen lakhs ninety thousand) only.

The prosecution case, in short, is that the accused Shah Md. Ruhul Amin Patowary issued cheque No. 7031626 on 26.12.2017 drawn on Al-Arafa Islami Bank Limited, Hajigonj Branch, Chandpur for payment of Tk.13,99,000 in favour of the complainant. On 17.04.2018 the complainant presented the cheque for encashment, but the same was dishonoured on 17.04.2018 with a remark “insufficient funds”. Thereafter, the complainant served a legal notice on 18.04.2018 to the

accused but he did not pay the cheque amount within time and thereby committed offence under section 138 of the Negotiable Instrument Act, 1881.

After taking cognizance, the accused voluntarily surrendered before the Court below and obtained bail and thereafter the case record was sent to the Sessions Judge, Chandpur and the case was registered as Session Case No. 226 of 2029. The Sessions Judge, Chandpur framed charge under section 138(1) of the Negotiable Instruments Act, 1881 against the accused which was read over and explained to him and he pleaded not guilty to the charge.

The prosecution examined one witness to prove the charge. At the time of examination of the prosecution witness, the accused was absconding. After concluding the trial, the trial court by impugned judgment and order dated 24.10.2019 convicted the accused under section 138(1) of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer rigorous imprisonment for 01(one) year and to pay a fine of Tk. 13,90,000.

P.W. 1 Most. Nazma Begum stated that he deposed on behalf of the complainant Md. Millad Hossain who reside out of country and the complainant authorized her to depose in court. The accused took loan of Tk. 13,99,000 from the complainant. He issued a cheque on 26.12.2017 drawn on his account for payment of the said amount. The complainant presented the said cheque for encashment which was dishonored on 17.04.2018. After that a legal notice was served upon the accused on 18.04.2018 through registered post but he did not pay the cheque amount. She proved the complaint petition as exhibit-1 and signature of the complainant as exhibit-1/1. She proved the power of attorney as exhibit-2, the cheque as exhibit-3, the dishonored slip as exhibit-4, the legal notice with AD as exhibit- 5 series.

The learned Advocate Mr. Md. Shameem Khaled appearing on behalf of the convict petitioner submits that both the parties settled the

dispute out of court and accused paid the cheque amount to the complainant. Therefore, he prayed for allowing the appeal.

The learned Advocate Mr. Md. Rashidul Islam appearing on behalf of the complainant respondent No. 2 submits that both the parties settled the dispute out of court and he received the entire cheque amount from the accused.

I have considered the submission of the learned Advocates of both parties, evidence of prosecution witness, the impugned judgments and orders passed by the courts below and the records.

On perusal of the records, it appears that The accused issued a cheque on 26.12.2017 drawn on his account in favour of the complainant and he presented the said cheque for encashment which was dishonored on 17.04.2018. After that a legal notice was served upon the accused on 18.04.2018 through registered post with AD but he did not pay the cheque amount. P.W. 1 proved the complaint petition as exhibit-1 and the signature of the complainant as exhibit-1/1. P.W. 1 proved the power of attorney as exhibit-2, the cheque as exhibit-3, dishonored slip as exhibit-4, legal notice with AD as exhibit- 5 series. The convict petitioner did not pay the cheque amount within time.

The Negotiable Instruments Act, 1881 is a special law and the offence under section 138 of the said Act is not compoundable. Therefore, the parties are not entitled to compromise the dispute out of court.

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. The accused neither adduced evidence nor cross-examined P.W. 1 to rebut the presumption under Section 118(a) of the said Act. Therefore, I am of the view that the accused issued the cheque in favour of the payee-complainant for

consideration. After service of notice in writing the accused failed to pay the cheque amount. Thereby the accused committed an offence under Section 138 of the Negotiable Instruments Act, 1881 and the complainant filed the case following procedures provided in Section 138 of the Negotiable Instruments Act, 1881. The prosecution proved the charge against the accused beyond all reasonable doubt and the trial Court on correct assessment and evaluation of evidence legally passed the impugned judgment and order.

Considering the gravity of the offence and facts and circumstances of the case, I am of the view that ends of justice would be best served, if the sentence passed by the trial court is modified as under:

The accused Shah Md. Ruhul Amin Patowary(Juwel) is found guilty of the offence under section 138 of the Negotiable Instruments Act, 1881 and he is sentenced to pay a fine of Tk. 13,90,000. The complainant is entitled to get the fine amount.

Since the accused appellant already paid the entire cheque amount to the complainant respondent No.2, he is not required to deposit the fine amount again.

In view of the above observation, findings and reasoning the appeal is disposed of with modification of the sentence.

Send down the lower Court's records at once.