Present
Madam Justice Kashefa Hussain

Criminal Appeal No. 4749 of 2020

Dream Touch Real Estate Ltd.
..... Convict -Appellant
-Versus-
The State and others
------- Respondents
Mr. Md. Akmal Hossain, Advocate
.... for the Appellant
Mr. Samsuddin Babu, Senior Advocate
.... for the respondent No. 2
Mr. Md. Mohiuddin Dewan, D.A.G with
Ms. Syeda Sabina Ahmed Molly, A.A.G
------- For the State.
Heard on: 29.11.2023, 30.11.2023, 06.12.2023 and
Judgment on 07.12.2023

This appeal is directed against the judgment and order dated 03.10.2019 passed by the learned Additional Session Judge, 4th Court, Dhaka in Metro Session Case No. 3893 of 2017 arising out of C.R Case No. 1387 of 2016 under Section 138 of the Negotiable Instruments Act, 1881, finding the appellant guilty and convicted for the offence under Section 138 of the Negotiable Instrument Act, 1881 sentencing him to suffer simple imprisonment for 1(one) month with a fine of Tk. 15,00,000/- (fifteen lac) and/or pass such other or further order orders as to this court may seem fit and proper.

The complainant's case, in short is that the complainant and the convict petitioner were acquainted before and consequently the petitioner took a loan of Tk. 15,00,000/- (fifteen lac) from the complainant upon a promise that he would return the money within due time. Subsequently, in order to return the money, the convict-petitioner issued a cheque amounting to Tk. 15,00,000/- (fifteen lac) only. That the complainant submitted the cheque for encashment on 26.05.2016 at Basic Bank main branch (motijheel) C/A Dhaka. That the said cheque was dishonored due to insufficiency of fund on the same day. That thereafter the complainant sent a legal notice to the convict-petitioner demanding the said amount on 06.06.2016. That nonetheless, the convict-petitioner did not pay the money to the complainant. Hence the complainant filed a C.R. Case in the court of learned Chief Metropolitan Magistrate Court, Dhaka being C.R. Case No. 1387 of 2016.

After going through the due process trial was held before the court of Additional Session Judge, 4th Court, Dhaka. One prosecution was examined while the convict-petitioner here produced two defense witnesses and was inter alia examined under Section 342 of the Code of Criminal Procedure.

Learned Advocate Mr. Md. Akmal Hossain appeared for the appellant while learned Senior advocate Mr. Samsuddin Babu represented the respondent No. 2 while learned Deputy Attorney General Mr. Mohiuddin Dewan along with Ms. Syeda Sabina Ahmed Molly represented the respondent No. 1.

Learned Advocate for the appellant submits that the court below upon misapplication of mind arrived upon wrong finding and the judgment be set aside and the appeal be allowed. He particularly argues on the issue of the convict appellant's claims of the dishonored cheque being security cheque and not a regular cheque. He submits that although the accused convict appellant pleaded before the trial court and proved upon evidences that the cheque was a security cheque however the court below over looked the particular issue of cheque given as a security cheque only and came upon wrong finding. There was a query from this bench regarding a settled principle of our Apex Court to the effect that in the event of dishonor of a cheque given as a security cheque, if the cheque is dishonored it shall come within the mischief of the Section 138 of the Negotiable Instrument Act, 1881. Learned advocate for the appellant controverts and points out to a decision of our Apex Court in the Criminal Petition For Leave To Appeal Nos. 533

of 2017, 600 of 2016, 493-502 of 2016, 538-39 of 2016, 480-83 of 2016, 320, 336, 422-5 of 2016, 1027 of 2016, 342 of 2017, Civil Petition For Leave To Appeal No. 1330 of 2016 reported in 16 ALR (AD) page-113. He points out to the decision and draws upon para-14 and para-16 of the decision for purpose of his arguments. He points out that in para-14 and para-16 of the argument our Appellate Division in substance held that:

> "In view of the aforesaid facts and circumstances our considered opinion is that the disputed question of fact as to the issuance of the cheque as 'security' or 'advance' or 'postdated' can only be decided upon recording evidence. Accordingly, we do not find any substance in the appeals and petitions."

Relying on this observation of our Apex Court he argues that since the instant matter is a criminal appeal and not a proceeding under Section 561A of the Code of Criminal Procedure therefore the question of issue of security cheque also falling within the mischief of Section 138 of the Negotiable Instrument Act, 1881 is not applicable here. He

points out to the several decisions relied upon by the learned advocate for the opposite party and submits that these decisions all arose out of a proceeding under Section 561A of the Code of Criminal Procedure where the factual issues could not be adjudicated upon. He submits that since the instant matter is a criminal appeal and not a quashment proceeding under Section 561A of the Code of Criminal Procedure therefore in an appeal it can be evaluated upon facts and evidences whether the cheque was security cheque or not and therefore the cheque dishonor also ought not to come within the mischief of Section 138 of the Negotiable Instrument Act's 1881.

Learned Advocate for the appellant concedes and admits that the signatures of the cheque are genuine and not forged whatsoever. However he persuades that he gave a blank cheque and further claiming that he did not insert or write any amount in the cheque. He submits that therefore the amounts (number written in the cheque) were all subsequently written after the issuance of the cheque as security. Upon another query from this bench he submits that generally a security cheque is given as blank cheque along with the signature only of the drawer. He submits that however the courts below did not take this factor into consideration and did not sift through the evidences and

therefore caused grave injustice to the interest of the appellant. He concludes his submissions upon assertion that therefore the judgment of the court below be set aside and the appeal be allowed.

On the other hand learned Advocate for the respondent vehemently opposes the appeal. Against the appellant's contention on the cheque being drawn as a security cheque he argues that even if the cheque is dishonored it will fall within the mischief of the provisions of Section 138 of the Negotiable Instrument Act, 1881. In support of his argument he draws upon inter alia a decision reported in 16 ALR (AD) 2019 (2) page- 113. For purposes of his submissions he points out to para-14 and submits that in para-14 of the decision our Apex Court has clearly interpreted the terms of Section 138 of the Negotiable Instrument Act, 1881. He particularly refers to the Apex Court's observation upon the terms of any cheque. Relying on the observation, he submits that therefore it is settled by our Apex Court that to come within the mischief of Section 138 of the Negotiable Instrument Act, 1881 it would include any cheque and does not distinguish between Security cheque or any other cheque.

Next he controverts the argument of the learned advocate for the appellant regarding the instant matter being an appeal and not a proceeding under Section 561A of the Code of Criminal Procedure. He vehemently argues that although those decisions may have arose out of a proceeding under Section 561A of the Code of Criminal Procedure but however it cannot be presumed by the contents and ingredients of those judgments that the principle held by our Apex Court did not include a criminal appeal. He submits that in those decisions our Apex Court did not anywhere state or distinguish the principle between a quashment proceeding under section 561A with that of a criminal appeal under Section 410 of the Code of Criminal Procedure. He submits that it is a settled principle and given that our Apex Court nowhere distinguished the applicability of the settled principles on the status of security cheque between the kind of proceeding it would applicable to. He continues that therefore is to be presumed that the principle held by our Apex Court will cover the ambits of an appeal. He argues that it would be absurd to hold that a different principle regarding security cheques may be intended in the event of an appeal and different from that of a proceeding under Section 561 A of the Code of Criminal Procedure.

He next submits that although the appellant claims that he gave a blank cheque but however he could not prove by any cogent evidences that he gave a blank cheque to the complainant and nor could he prove that the amount in the cheque was inserted and written subsequently upon committing forgery and fraudulently. He submits that since it is the appellant's claim that he gave a blank cheque therefore it was his duty to prove that he actually gave a blank cheque. He next points out to the evidence of the DW-1 wherefrom he presses that from the oral evidence of the DW-1 and DW-2 it shows that there is marked inconsistency in the oral evidences between DW-1 and DW-2 and their depositions are not corroborative. Relying on his arguments he concludes upon assertion that the appeal bears no merits and ought to be dismissed for ends of justice.

I have heard the learned advocate from both sides and perused the application and materials. That the appellant gave the cheque and the signature is his is admitted and not denied.

The contention of the appellant is a two fold contention. It is the appellant's claim that the cheque is a security cheque and therefore does not fall within the mischief of Section 138 of

the Negotiable Instrument Act, 1881. In support of his arguments he relied on a decision reported in 16 ALR (AD) 2019 (2) page-113 in the Criminal Petition For Leave To Appeal Nos. 533 of 2017, 600 of 2016, 493-502 of 2016, 538-39 of 2016, 480-83 of 2016, 320, 336, 422-5 of 2016, 1027 of 2016, 342 of 2017, Civil Petition For Leave To Appeal No. 1330 of 2016 by our Apex Court. He particularly drew attention to para-14 and para-16 of this decision. Para-14 is reproduced below:

> "Another important issue is issuance of a blank cheque without mentioning the date and amount will come within the definition on cheque or not. If the cheque is not drawn for a specified amount it would not fall within the definition of bail of exchange. Filling up amount portion and date are material. Any alteration without the consent of the party who issued the cheque rendered the same invalid. However, question of issuance of blank cheque and fraudulent insertion of larger amount than actual liabilities is a question of fact.

> Insertion of larger amount in blank cheque than actual liability is an ingredient of fraud which cannot be approved since fraud goes to the root of the transaction. Where there is an intention to deceive and means of the deceit to obtain an advantage there is fraud."

Para-16 is also reproduced below:

> "In view of the aforesaid facts and circumstances our considered opinion is that the disputed question of fact as to the issuance of the cheque as 'security' or 'advance' or 'postdated' can only be decided upon recording evidence. Accordingly, we do not find any substances in the appeals and petitions."

Learned advocate for the appellant attempted to argue that by this decision our Apex Court distinguished between question of facts decided in an appeal and which he argued may be distinguished from a proceeding under section 561A of the Code of Criminal Procedure. Learned Advocate for the appellant argues that the question of fraud are all disputed

matters of fact to be decided in appeal and also whether it is a security cheque or not can also be decided on point of facts in an appeal. The learned advocate for the appellant argued that the decision relied upon by the learned advocate for the complainant respondent including in the decision 16 ALR (AD) 2019 page-113 those decisions arose out of a quashment proceeding under Section 561A of the Code of Criminal Procedure and not a Criminal appeal like in the instant case. It is his argument that since the instant matter is before this division by way of criminal appeal therefore factual evidences can be evaluated here inter alia that whether it is a security cheque or not.

The substance of the learned advocate for the appellant's contention appears to be that our Apex Court held that even if in the event of a security cheque being dishonored, it shall come with the mischief of Section 138 of the Negotiable Instrument Act, 1881 only if the proceeding is under Section 561 A of the CrPC since in a proceeding under Section 561A of the Code factual evidence cannot be evaluated and cannot be examined. It is also his argument that since the factual matters and evidences can be sifted and examined in a criminal appeal,

therefore those decisions of our Apex Court shall not be applicable in a criminal appeal.

I am constrained to hold that the argument of the appellant is not correct. In agreement with the learned counsel of the respondent it is my considered view that when our Apex Court expounded the principle that a security cheque falls within the mischief of Section 138 of the Negotiable Instrument Act, it did not distinguish as to forum the matter is brought up in this Division. I have also perused the two decisions including other decisions and I do not find anything from those decisions which may indicate that the principle expounded by our Apex Court shall not be applicable in a Criminal Appeal. Therefore I am of the considered view that whatsoever be the forum, be it a proceeding under 561A of the Code of Criminal Procedure or a criminal appeal under Section 410 of the CrPC or a Criminal Revision under Section 435 and 439 of the Code of CrPC the principle held by our Apex Court as to security cheque falling within the mischief of Section 138 of the Negotiable Instrument Act, shall be applicable as a uniform principle irrespective of the forum resorted to.

Learned Advocate for the appellant also argued that he gave a blank cheque and the amount was subsequently inserted upon. After going through the records and the oral evidences it appears that the appellant could not prove anywhere by any cogent evidences that the amount in the security cheque is a subsequently insertion. Since it is the appellant's admission that the signature in the cheque belongs to him and he did not deny that he gave the cheque, therefore it was the appellant's duty to prove the amount of subsequent insertion upon resorting to 'fraud' and 'forgery'. However I do not find anything from the evidences which may be relied upon to indicate that the appellant gave a blank cheque only.

Furthermore I have also found marked inconsistency between the oral evidences of the DW-1 and DW-2. In cross examination the DW-2 even admits that he has never seen the complainant. Such admission reveals that the DW-2 is not aware of the facts at all and therefore his oral evidences cannot be relied upon.

For discussion's sake, after perusing the materials it is revealed that the appellant could not even prove that the cheque was a security cheque only and not a regular cheque. Although

in the oral evidences the DW-1 and DW-2 claim that the security cheque was given only as security but needless to state that the oral evidences of the DW-2 is contradictory since he was not even acquainted with the complainant. Therefore it is absurd to presume that he would be aware as to the purpose of giving the cheque to the convict appellant.

Under the facts and circumstances and forgoing discussions, I am of the considered view that the court correctly gave its order which needs no interference with. I do not find any merit in the appeal.

In the result, the appeal is dismissed.

The impugned judgment and order dated 03.10.2019 passed by the learned Additional Session Judge, 4th Court, Dhaka in Metro Session Case No. 3893 of 2017 arising out of C.R Case No. 1387 of 2016 under Section 138 of the Negotiable Instruments Act, 1881, finding the appellant guilty and convicted for the offence under Section 138 of the Negotiable Instrument Act, 1881 sentencing him to suffer simple imprisonment for 1(one) month with a fine of Tk. 15,00,000/- (fifteen lac).

The convict-appellant is directed to deposit the balance amount of cheque to the trial court within 45 days from the date of received of this judgment along with lower court records to be paid to the respondent in accordance with law.

The convict-appellant is further directed to surrender before the trial court within 60 days from the same date for serving out the remaining sentence of imprisonment.

The respondent is allowed to withdraw the 50% of the cheque amount which has been deposited by the convict-appellant in the trial court through Chalan within 1(one) month from the date of receipt of this judgment.

Communicate the judgment at once.

Shokat (B.O.)