

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

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 5456 of 2020

Mohammed Humayun Kabir

...Convict-appellant

-Versus-

The State and another

...Opposite parties

M/S. Bahesti Marjan, Advocate

...For the appellant

None appears

.....For the respondent No. 2

Heard on 29.08.2024

Judgment delivered on 02.09.2024

This appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the judgment and order of conviction and sentence dated 24.08.2009 passed by Additional Sessions Judge, Munshiganj in Sessions Case No. 66 of 2007 arising out of C.R Case No. 167 of 2001 convicting the appellant under section 138 of the Negotiable Instruments Act. 1881 and sentencing him thereunder to suffer simple imprisonment for 01 (one) year and to pay a fine of Tk. 5,00,000, in default, to suffer simple imprisonment for 03 (three) months.

The prosecution case, in short, is that the complainant Mohammed Shadullah and the accused Mohammed Humayun Kabir are relatives. The accused took loan of Tk. 350,000 from the complainant to sell 50% share of his ship i.e. MB Amanat renamed Himu Mishu. Subsequently, the accused took Tk. 91,500 from the complainant to send him to Saudi Arabia. The complainant demanded the money from the accused and he

issued cheque No. 3833616 dated 20.6.2001 drawn on his account maintained with Pubali Bank Ltd, Munshiganj for payment of Tk. 2,50,00 in favour of the wife of the complainant. The complainant presented the said cheque on 02.07.2001, 05.07.2001 and 09.07.2001 through his Savings Account No. 2620 maintained with Pubali Bank Ltd. which was dishonoured on the same dates with a remark, “insufficient funds”. After that, he sent a legal notice on 24.7.2001 to the accused but he did not pay the money. After that, the complainant filed the case on 29.7.2001.

After filing the complaint petition the learned Magistrate, First Class, Cognizance Court No.1, Munshiganj examined the complainant under section 200 of the Code of Criminal Procedure, 1898 who was pleased to take cognizance of the offence against the accused under section 138 of the said Act. On 17.8.2001 the accused voluntarily surrendered before the learned Magistrate and obtained bail. After that, the accused appeared before the learned Magistrate till 20.4.2002. On 10.11.2002 charge was framed against the accused under section 138 of the said Act and at the time of framing the charge the accused was absconding.

On 2.04.2003 the prosecution examined 3 witnesses and the defence did not cross-examine them. Since the accused was absconding, he was not examined under section 342 of the Code of Criminal Procedure, 1898. After concluding the trial, the trial court by judgment and order dated 11.11.2003 convicted the accused under Section 138 of the said Act and sentenced him thereunder to suffer rigorous imprisonment for 01(one) year and a fine of Tk.500,000, in default, to suffer rigorous imprisonment for 01(one) month against which the accused filed the Criminal

Appeal No. 42 of 2004 before the Sessions Judge, Munshiganj who by judgment and order dated 27.7.2004 send the case on remand for fresh trial. After that the learned Magistrate, First Class, Munshiganj by order dated 04.9.2004 enlarged the accused on bail. On 22.11.2004 again charge was framed under section 138 of the said Act against the accused and he pleaded not guilty to the charge and claimed to be tried following the law.

During fresh trial, the prosecution examined 4 witnesses to prove the charge against the accused. At the time of examination of prosecution witnesses, the accused again absconded. After that the learned Chief Judicial Magistrate by order dated 11.12.2007 sent the case to the Sessions Judge, Munshiganj holding that the case is triable by the Court of Sessions. The case record was received by the Sessions Judge, Munshiganj on 26.12.2007 and re-numbered as Session Case No. 66 of 2007. The Sessions Judge, Munshiganj by order dated 16.3.2008 sent the case to the Additional Sessions Judge, Munshiganj who by order dated 5.7.2009 again framed charge against the accused under Section 138 of the said Act and the accused was absconding for which the charge framed against the accused could not be read over to him.

During the trial, the prosecution again examined 4 witnesses on 12.8.2009 to prove the charge against the accused. After concluding the trial, the Additional Sessions Judge, Munshiganj by judgment and order dated 24.8.2009 convicted the accused under section 138 of the said Act and sentenced him thereunder to suffer imprisonment for 1(one) year and a fine of Tk. 500,000 against which the appellant filed the instant appeal.

P.W. I. Shahidullah is the complainant. He stated that accused Humayun Kabir received Tk. 350,000 from him to sell the 50% share of his ship i.e. MB Amanat now Himu Mishu. The registration number of the ship is 4063. Subsequently, he also received Tk. 91,500 to send him to Saudi Arabia. He received a total Tk. 4,41,500 but he did not sell the share of his ship and repay the money. When he demanded money, the accused issued cheque No.3833616 on 20.06.2001 in favour of his wife Jebunnessa drawn on his Saving Account No. 2620 maintained with Pubali Bank Ltd, Gazaria Bazar Branch for payment of Tk. 2,50,000. He proved the cheque as exhibit 1. He presented the cheque on 02.07.2001, 05.07.2001 and 09.07.2001 for encashment but the same was dishonoured with a remark, "insufficient funds". He proved the dishonour slips as exhibit-2 series. He sent a legal notice through registered post on 24.7.2001 to the accused for payment of the cheque amount. He stated that the original postal receipt was handed over to his learned Advocate but subsequently, the receipt was lost. He proved the photocopy of the receipt as exhibit 3. He proved the legal notice as exhibit 4. After receipt of the legal notice, the accused did not pay the cheque amount. He proved the complaint petition as exhibit-5 and his signature on the complaint petition as exhibit-5/1.

P.W. 2 Jebunnessa stated that the complainant is her husband. The accused Humayun Kabir received Tk. 3,50,000 to sell 50% share of his ship and also received Tk.91,500 to send her husband abroad. But he did not transfer 50% share of his ship and he also did not send her husband abroad. When her husband demanded money, the accused issued a cheque drawn on his Savings Account No. 2620 for payment of Tk. 250,000 in her

favour. She presented the cheque on 02.7.2001 and 05.07.2001 but the same was dishonoured with a remark, “insufficient funds”. She sent the legal notice on 24.7.2001 but he did not pay the cheque amount.

P.W. 3 Shafiqul Islam Bhuiyan is a clerk of Pubali Bank Limited. He stated that on 02.7.2001 he was posted at Pubali Bank Ltd., Gazaria Branch, Munshiganj. At that time Jebunnessa presented the cheque through Account No. 2620 maintained with the name of Humayun Kabir on 02.07.2001, 05.07.2001 and 09.07.2001 but there were no sufficient funds in the account of the drawer to honour the cheque. Accordingly, the cheque was dishonoured.

P.W. 4 Md. Noor Hussain is the Manager of Pubali Bank Ltd, Charshindur, Munshiganj. He stated that on 02.07.2001 he was posted at Pubali Bank Ltd, Gazaria Branch, Munshiganj. On 02.7.2001, 05.07.2001 and 9.7.2001 cheque No. 23833616 dated 20.06.2001 was presented for encashment but the cheque was dishonoured due to “insufficient funds” and he issued the dishonour ships which has been proved as exhibit-2 series.

None appears on behalf of the appellant.

The learned Advocate M/s. Bahesti Marjan appearing on behalf of respondent No. 2 submits that the accused received Tk. 350,000 from the complainant to sell 50% share of his ship namely, MB Amanat now Himu-Mishu and he also received Tk. 91,500 to send the complainant to Saudi Arabia but the accused neither transferred the share of his ship nor sent the complainant to Saudi Arabia. When the complainant requested the accused to pay the money, the accused issued a cheque on 20.6.2001 for payment of Tk. 250,000 in the name of Jebunnessa, wife of the complainant. He presented the cheque on 02.7.2001, 05.7.2001

and 09.07.2001 for encashment but the same was dishonoured due to insufficient funds. The complainant issued the legal notice on 24.7.2001 to the accused for payment of the cheque amount, but he did not pay the cheque amount. Consequently, the complainant filed the case complying with all the procedures as provided in section 138 of the said Act. The trial court after assessment of the evidence passed the impugned judgment and order. Therefore, he prayed for the dismissal of the appeal. The learned Advocate also cited decisions made in the case of Md. Arif Uz-Zaman vs. The State and another reported in 21 BLT (AD) 234 and Farhana Akhter Liza vs. the Islamic University and others reported in 10 SCOB 2018 HCD 92.

I have considered the submission of the learned Advocate M/S. Bahesti Marjan who appeared on behalf of respondent No. 2, evidence of prosecution witnesses, the impugned judgment and order passed by the court below and the records.

The Negotiable Installments Act, 1881 is a special law and before filing the complaint petition under section 138 of the said Act, the complainant is bound to strictly follow the procedure provided in the proviso to section 138 of the said Act. In the complaint petition, it has been stated that the disputed cheque was issued on 20.6.2001 in favour of Jebunessa, wife of the complainant, and the said cheque was presented on 02.07.2001, 05.07.2001 and 09.07.2001 for encashment, but the said cheque was dishonoured on those dates with the remark, "insufficient funds". After that, the complainant sent a legal notice on 24.07.2001 and filed the complaint petition on 29.07.2001.

Compliance with the procedures provided in the proviso to section 138 of the Negotiable Instruments Act, 1881 is sine

qua non. Under section 141(b) of the said Act no court shall take cognizance of the offence under section 138 of the said Act unless the complaint is made within 01(one) month of the date on which the cause of action arises under clause(c) of the proviso to section 138 of the said Act. The drawer of the cheque is entitled to 30 days for payment of the cheque amount from the date of receipt of the notice sent under clause (b) of the proviso to section 138 of the said Act.

No statement is made by the complainant P.W. 1 as to the date of service of notice upon the accused sent under clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881. The cheque was lastly dishonoured on 09.07.2001 and the legal notice was sent on 24.07.2001 and the complaint petition was filed on 29.07.2001. No statement is made in the complaint petition as to the service of the notice upon the accused. Therefore, I am of the view that before service of the notice upon the accused, the complainant filed the case on 29.07.2001. The complainant failed to comply with the provision made in clause (c) of the proviso to section 138 of the said Act. No cause of action arose on 29.07.2001 under clause (c) of the proviso to section 138 of the said Act to file the case.

The above view of this court lends support from the decision made in the case of Nizam Uddin Mahmood vs. Abdul Hamid Bhuiyan and another reported in 9 BLC(AD) 177 judgment dated 15.06.2004 (Mr. Amirul Kabir Chowdhury, J) wherein our Apex Court after elaborate discussion quashed the proceedings of the case holding that;

“In view of the non-disclosure of the date as to receipt of notice by the accused and failure to mention any legal cause of action

in the petition of complaint, we are of the view that the proceeding cannot be allowed to continue and, as such, it is liable to be quashed. In view of our discussion made above the ultimate order of the High Court Division in quashing the proceeding is found to be sustainable”.

In the case of Nizamuddin Mahmood vs. Abdul Hamid Bhuiyan and another reported in 60 DLR(AD) 195 judgment dated 17.06.2008 (Mr. Md. Abdul Matin,J) our Apex Court has held that;

“Since the date of receipt is a question of fact to be ascertained at the time of trial non-disclosure of such fact in the complaint petition cannot render the proceeding liable to be quashed to the great prejudice of the complainant who is entitled to prove his case on evidence.”

In the case of Md. Arif Uz-Zaman vs. The State and another reported in 21 BLT (AD) 234 judgment dated 09.11.2011 our Apex Court (Mr Md. Abdul Wahab Mia) has held as under:

“So far as the last question is concerned, we are of the view that the operation of section 138 of the Act, 1881 cannot be obstructed or, in any way, circumvented by the mere fact of filing of a suit by the drawer of the dishonoured cheque in civil Court whatever allegations may be in the plaint about the same and the relief prayed for therein because such a device shall totally make the section itself nugatory. However, if a holder or the

payee gets hold of a dishonoured cheque by fraudulent means or forgery, the drawer of the cheque shall have the liberty to take such defence during the trial.”

The facts and law involved in the cases cited by the learned Advocate for the respondent are distinguishable from the facts and law involved in the instant case. Therefore, I am of the view that the decisions made in those cases do not apply to the facts and circumstances of the instant case.

In the case of Md. Amir Hossain vs. the State and another, passed in Criminal Revision No. 3513 of 2023 judgment dated 19.05.2024 this bench (Mr. Justice Md. Shohrowardi) held as under;

“In Section 138 (1) (b) of the Negotiable Instruments Act, 1881, the legislature used the words "makes a demand... in writing" and in Section 138 (1) (c) of the said Act, the legislature used the words "receipt of the said notice". The literal meaning of the words "receipt of said notice" means that the drawer of the cheque received the notice on a specific date. No provision is made in the said Act as to how the court will determine that notice under Section 138 (1) (b) of the said Act has been received by the drawer or served upon the drawer. In the absence of any statutory provision, as regards the determination of service of notice upon the drawer, I am of the view that the actual date of service of notice upon the drawer or receipt of notice by the drawer on a particular date might have been reckoned as service of notice upon the drawer. The receipt of the notice indicates that the drawer of the cheque had been notified about the dishonour of the cheque. If any drawer refused to receive the said notice, the date of refusal to receive the notice by the drawer might have been reckoned as 'receipt of said notice' mentioned in Section 138 (1) (c) of the said Act.”

The facts and law involved in the instant case are similar to the facts and law settled by our Apex Court in the case of Nizamuddin Mahmud(supra). The complainant failed to comply with the procedure as provided in clause (c) of the proviso to section 138 of the Negotiable Instruments Act, 1881. The prosecution failed to prove the charge against the accused beyond all reasonable doubt. The trial court failed to interpret clause (c) of the proviso to section 138 and 141(b)of the said Act and illegally passed the impugned judgment and order of conviction and sentence against the accused.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial court against the accused Mohammad Humayun Kabir is hereby set aside.

However, there will be no order as to costs.

Send down the lower Court's records at once.