

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 5596 of 2020

Sorower Molla

...Convict-appellant

-Versus-

The State and another

...Opposite parties

Mr. Rusho Mostafa, Advocate

...For the convict-appellant

Mr. Md. Jahangir Alam, Advocate

...For the complainant-respondent No. 2

Heard on 04.12.2024

Judgment delivered on 04.12.2024

This appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed challenging the legality and propriety of the impugned judgment and order of conviction and sentence dated 10.09.2020 passed by Additional Sessions Judge, Court No. 1, Faridpur in Sessions Case No. 628 of 2019 convicting the appellant under Section 138 of the Negotiable Instrument Act, 1881 and sentencing him to suffer simple imprisonment for 6(six) months and to pay a fine of Tk. 11,00,000.

The prosecution case, in short, is that the accused Sorower Molla, Proprietor of M/S SH Board and Packaging, was previously known to complainant P.W. 1 Bijoy Saha. The accused received Tk. 11,00,000 from the complainant for business purposes on condition to repay the said amount. On 14.01.2019 the accused issued Cheque No. 1083012 drawn on Account No. 1022101000002430 maintained in the name of M/S SH Board and Packaging with United Commercial Bank Ltd, Faridpur Branch. The payee presented the cheque on 21.01.2019 through his account maintained with United Commercial Bank Ltd, Satoir Bazar Branch, Faridpur which was returned unpaid with a remark "insufficient funds". On 03.02.2019 he sent a notice through the learned Advocate for payment of the

cheque amount within 30 days and the accused received the notice on 08.02.2019. After receipt of the notice, the accused did not pay the cheque amount within 30 days and committed an offence under Section 138 of the Negotiable Instruments Act, 1881 and the complainant filed the case on 20.03.2019.

The complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and the learned Senior Judicial Magistrate, Faridpur was pleased to take cognizance of the offence against the accused under Section 138 of the Negotiable Instruments Act, 1881. After that, the case was sent to the Sessions Judge, Faridpur who took cognizance of the offence against the accused and transferred the case to the Additional Sessions Judge, Court No. 1, Faridpur.

On 17.11.2019 the charge was framed against the accused under Section 138 of the Negotiable Instruments Act, 1881 which was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried following law. The prosecution examined 1(one) P.W. to prove the charge against the accused. During trial, the accused was absconding for which he was not examined under Section 342 of the Code of Criminal Procedure, 1898. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which he filed the instant appeal.

P.W. 1 complainant Bijoy Saha stated that the accused Sorowar Molla received Tk. 11(eleven) lakh from him for business but he did not repay the said amount for which on 14.01.2019, he issued a cheque for payment of Tk. 11(eleven) lakh. On 21.01.2019 he presented the cheque which was dishonoured with the remark 'insufficient funds'. He issued a legal notice on 03.02.2019 and the accused received the same. After that, he filed the case. He proved the complaint petition as exhibit 1 and his signature on the complaint petition as exhibit 1/1. He proved the cheque as exhibit 2,

the dishonoured slip as exhibit 3, and the registered postal receipt with AD as exhibit 4 series.

Learned Advocate Mr. Rusho Mostafa appearing on behalf of the appellant submits that due to financial hardship, the appellant could not pay the cheque amount to the complainant-respondent No. 2 Bijoy Saha and during the pendency of the appeal, the appellant settled the dispute with the complainant-respondent No. 2. He paid Tk. 5,50,000 to the complainant-respondent No. 2 on 28.11.2024 and deposited 50% of the cheque amount to the trial Court before filing an appeal. He prayed for acceptance of the compromise made between the complainant-respondent No. 2 and the appellant.

Learned Advocate Mr. Md. Jahangir Alam appearing on behalf of the complainant-respondent No. 2 submits that the accused issued a cheque on 14.01.2019 and he presented the said cheque on 21.01.2019 but the same was dishonoured with a remark 'insufficient funds' and the notice sent by the complainant on 03.02.2019 to the accused which was received by the accused on 08.02.2019 but he did not pay the cheque amount. Consequently, after complying with all the procedures provided in Section 138 of the Negotiable Instruments Act, 1881, the complainant filed the case and P.W. 1 proved the charge against the accused beyond all reasonable doubt. However, the learned Advocate submits that the complainant-respondent No. 2 and the appellant settled the dispute between them and the complainant-respondent No. 2 received Tk. 5,50,000 from the appellant and he is willing to withdraw the remaining 50% of the cheque amount of Tk. 5,50,000 deposited by the accused in the trial Court. He also prayed for acceptance of the compromise between the complainant-respondent No. 2 and the appellant.

I have considered the submission of the learned Advocate Mr. Md. Jahangir Alam who appeared on behalf of the complainant-respondent No. 2 and the learned Advocate Mr. Rusho Mostafa

engaged on behalf of the appellant, perused the evidence, the impugned judgment and order passed by the trial Court and the records.

On perusal of the joint application of compromise sworn on 03.12.2024 by the appellant Sorower Molla and the complainant-respondent No. 2 Bijoy Saha, it appears that the accused paid Tk. 5,50,000 in cash on 28.11.2024 to the complainant and he also accepted the said amount.

The Negotiable Instruments Act, 1881 is a special law and the offence under Section 138 of the Negotiable Instruments Act, 1881 is not compoundable. Therefore, the case filed under Section 138 of the Negotiable Instruments Act, 1881 cannot be disposed of considering the compromise made between the complainant and the accused. After filing a case under Section 138 of the Negotiable Instruments Act, 1881, the Court shall dispose of the case considering the evidence adduced by the parties.

On perusal of the evidence, it appears that the accused issued a cheque on 21.01.2019 in favour of the complainant P.W. 1 Bijoy Saha for payment of Tk. 11,00,000 (exhibit 2). The cheque was presented on 21.01.2019 which was dishonoured on the same date with the remark 'insufficient funds'. After that, a notice was sent on 03.02.2019 through registered post with AD. The postal receipt was proved as exhibit 4, AD as exhibit 4/1 and the legal notice as exhibit 4/2. On perusal of the acknowledgement due, it appears that the accused Sorower Molla received the notice on 08.02.2019 but he did not pay the cheque amount and consequently, the complainant filed the case on 20.03.2019 after complying with all the procedures provided in Section 138 of the Negotiable Instruments Act, 1881. During the trial, the accused did not cross-examine P.W. 1. Therefore, the evidence of P.W. 1 that the accused issued the cheque on 21.01.2019 for payment of the cheque amount is admitted by the defence.

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) of the said Act 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. The prosecution proved the charge against the accused beyond all reasonable doubt and the trial Court on proper assessment and evaluation of the evidence legally passed the impugned judgment and order of conviction.

Considering the gravity of the offence, I am of the view that the ends of justice would be best served if the sentence passed by the trial Court is modified as under;

The accused Sorower Molla is found guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and he is sentenced thereunder to pay a fine of Tk. 11,00,000.

The complainant-respondent No. 2 is entitled to get the fine amount.

The complainant-respondent No. 2 admitted that he received Tk. 5,50,000 from the appellant. Therefore, he is entitled to withdraw the remaining fine amount of Tk. 5,50,000 deposited by the appellant in the trial Court before filing appeal.

With the above findings, observation, direction and proposition, the appeal is disposed of with a modification of the sentence.

However, there will be no order as to costs.

Send down the lower Court's records at once.