

Present

Mr. Justice Sheikh Abdul Awal

Criminal Appeal No. 6091 of 2020

Md. Makhon Miah

.....Convict-appellant.

-Versus-

The State and another

.....Respondents.

Mr. Uzzal Bhowmick with

Mr. Ashish Karmokar, Advocate

.....For the convict-appellant.

Mr. Mohammed Ismail Hossain, Advocate

.....For the Respondent No. 2.

Ms. Shahida Khatoon, D.A.G with

Ms. Sabina Perven, A.A.G with,

Ms. Koheenoor Akter, A.A.G.

..... For the State.

Heard on 09.07.2024, 11.07.2024 and

Judgment on 15.07.2024

Sheikh Abdul Awal, J:

This Appeal at the instance of convict appellant, Md. Makhon Miah is directed against the judgment and order of conviction and sentence dated 05.09.2019 passed by the learned Additional Metropolitan Sessions Judge (Metropolitan Sessions Judge in Charge), Sylhet in Special Sessions Case No. 2805 of 2013 arising out of

C.R. Case No. 1260 of 2012 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for a period of 1 (one) year and to pay a fine of Tk. 25,00,000/- (Twenty five Lakhs) only.

The gist of the case is that one, Riaz Khan, Assistant Manager, M/S. Monayem Khan Babul as complainant filed a petition of complaint being C.R Case No. 1260 of 2012 before the learned Chief Judicial Magistrate, Sylhet against the accused-appellant under section 138 of the Negotiable Instrument Act, 1881 stating, inter-alia, that the accused-appellant in order pay the outstanding dues of business transaction issued a cheque of Tk. 25,00,000/- (Twenty five) bearing cheque No. 0027885 dated 30.05.2012 of A/C No. 34045272, Janata Bank Ltd., Sylhet Corporate Branch, Sylhet in favour of complainant and thereafter, the complainant presented the said cheque before the Bank for encashment which was returned unpaid for insufficient of fund on 29.08.2012 and thereafter, the complainant sent a legal notice through his Advocate to the convict-appellant on 24.09.2012 asking him to pay the cheque's amount within 30 days but the accused-appellant in spite of receiving the said notice did not turn to pay the cheque's amount and hence, the case.

On receipt of the petition of complaint, the learned Chief Judicial Magistrate examined the complainant under Section 200 of the Code of Criminal Procedure and took cognizance against the accused-appellant under section 138 of the Negotiable Instruments Act, 1881 and also issued summon against him fixing next date 24.01.2013. Thereafter, the accused-appellant on 24.01.2013 voluntarily surrendered before the Court and obtained bail.

In this background, the case record was sent to the Court of the learned Sessions Judge, Sylhet for trial, wherein the case was registered as Sessions Case No. 477 of 2013 which was subsequently transmitted to the Court of the learned Additional Metropolitan Sessions Judge, Sylhet for disposal wherein the case was renumbered as Sessions Case No. 2805 of 2013.

Ultimately, the accused-appellant was put on trial before the learned Additional Metropolitan Sessions Judge, Sylhet to answer a charge under section 138 of the Negotiable Instruments Act, 1881 to which the accused-appellant pleaded not guilty and prayed to be tried.

At the trial the complainant himself was examined as PW-1 and also exhibited some documents to prove its

case while the defence examined 2 witnesses namely DW-1 and DW-2.

On conclusion of trial, the learned Additional Metropolitan Sessions Judge (Metropolitan Sessions Judge in charge), Sylhet by his judgment and order dated 05.09.2019 found the accused-appellant guilty under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer simple imprisonment for a period of 01 (one) year and to pay a fine of Tk. 25,00,000/- (Twenty five Lakhs).

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 05.09.2019, the convict-appellant preferred this criminal appeal.

Mr. Ashish Karmokar, the learned Advocate appearing for the convict-appellant submits that the appellant never took any cash amount from the complainant, he issued the cheque as security of land transfer but after transferring the land the complainant deliberately did not return the cheque in question and the appellant side as DW-1 and DW-2 categorically stated the same before the trial Court but the trial Judge without considering the same from a correct angle mechanically held that the accused-appellant guilty of

the offence under section 138 of the Negotiable Instrument Act, 1881 and sentenced him thereunder to suffer imprisonment for a period of 1 (one) year and to pay a fine of Tk. 25,00,000/- (Twenty five Lakhs), which is liable to be set-aside. Finally, the learned Advocate submits that the provision of section 9 and 43 of the Negotiable Instruments Act was not complied in this case, which occasioned a failure of justice.

Mr. Mohammed Ismail Hossain, the learned Advocate appearing for the complainant-respondent No.2, on the other hand, supports the impugned judgment and order of conviction and sentence, which was according to him just, correct and proper. He submits that the defence plea is false, baseless and the defence by adducing evidence could not establish its case that he issued the cheque as security of land transfer. Besides, the accused-appellant after receiving legal notice did not give any reply to the complainant, which suggests that the subsequent plea of the accused-appellant is devoid of substance.

Having heard the learned Advocate for the accused-appellant and the learned Advocate for the complainant-respondent No.2 and having gone through the materials on record, the only question that calls for my consideration in this appeal is whether the trial Court

committed any error in finding the accused-appellant guilty of the offence under 138 of the Negotiable Instrument Act, 1881.

On scrutiny of the record, it appears that the appellant to pay outstanding dues issued a cheque of Tk. 25,00,000/-(Twenty five Lakhs) in favour of complainant-respondent No.2 and thereafter, the complainant presented the cheque before Bank for encashment which was returned unpaid for insufficient of fund on 29.08.2012 and thereafter, the complainant sent a legal notice through his Advocate to the convict-appellant on 24.09.2012 asking him to pay the cheque's amount within 30 days but the convict-appellant in spite of receiving the said notice did not pay any heed to it. It further appears that at the trial the complainant himself was examined as PW-1, who in his deposition categorically stated the complaint case in details. This witness in his cross-examination stated that- “সত্য নয় যে, জমি রেজিস্ট্রি করে দেয়ার পর নালিশী চেকটি ফেরত দেয়ার কথা ছিল। সত্য নয় যে, তিনি চেক ফেরৎ না দিয়ে তা দিয়ে আসামীর বিরুদ্ধে মামলা করেছেন।” It further appears that the accused-appellant as DW-1 stated in his deposition that he used to do land purchase and sale business and accordingly he transferred land to Monayem Khan. This witness also stated that- “পরবর্তীতে ৪৫ শতক ভূমি ৩০ লক্ষ টাকা সাব্যস্তে ২৫

লক্ষ টাকা আমাকে দিলে আমি রেজিস্ট্রি করে দিতে না পারায় সিকিউরিটি হিসাবে ২৫ লক্ষ টাকার নালিশী চেক প্রদান করি। কথা ছিলো রেজিস্ট্রি হওয়া সাথে চেকটি ফেরৎ দিবেন এবং বাকী ৫ লক্ষ টাকা প্রদান করবেন। ০৫/০৬/২০১২ খ্রিঃ তারিখে ৯৯৭৪/১২ নং দলিল মূলে ৪৫ শতক ভূমি বাদী বরাবরে রেজিস্ট্রি করে দেই। কিন্তু বাদী চেকটি ঐদিন ফেরত দেননি।” This witness in his cross-examination stated that- “সত্য নয় যে, আমি রড সিমেন্টের ব্যবসা করি। সত্য নয় যে, আমি ব্যবসা প্রতিষ্ঠান থেকে ২৫ লক্ষ টাকার মালামাল নেই। সত্য নয় যে, উক্ত টাকা পরিশোধ বাবদ বাদীকে ২৫ লক্ষ টাকার চেক দেই। চেক দিয়েছি সত্য তবে সেটা পাওনা বাবদ নয়। সত্য নয় যে, বাদীর প্রেরিত লিগ্যাল নোটিশ পেয়েছি। সত্য নয় যে, উক্ত নোটিশ পেয়েও অস্বীকার করছি। সত্য নয় যে, বাদীর পাওনা না দেয়ার জন্য প্রতারণা করছি। সত্য নয় যে, মিথ্যা সাক্ষ্য দিলাম। সত্য নয় যে, আমার দালিখী দলিলগুলো নালিশী চেকের সাথে সম্পর্কিত নয়।” DW-2 gave similar type of evidence as like as DW-1.

On an analysis of the petition of complaint together with the evidence of PW-1 and DW-1 and DW-2 it appears that the complainant after exhausting all the legal formalities filed the case. PW-1 in his evidence categorically stated that the complaint case in details and he denied the suggestion given by the defence that the cheque in question was given to him as security of the land transfer for time being. It further appears that in spite of receiving legal notice the accused appellant did not give any reply to it. The plea as taken by the

accused-appellant appears to be baseless and the defence could not prove the same in accordance with law.

To constitute an offence under Section 138 of the NI Act, the following elements need to be fulfilled:

1. A cheque should have been issued by the payer for the discharge of a debt or other liability.

2. The cheque should have been presented or deposited by the payee within a period of six months from the date of drawing of the cheque or within the period of validity of the cheque, whichever is earlier.

3. The payee should have issued a notice in writing to the payer within 30 days of receipt of information regarding the return of the cheque as unpaid from the bank.

4. The payer/drawer of the cheque should have paid the cheque amount within 30 days of receipt of the said notice from the payee.

5. If the payer is failed to pay in time the cheque amount, the payee should have filed a complaint within one month.

On an overall consideration of the facts, circumstances and the materials on record, it can be

easily suggested that all the above quoted key elements are exist in the present case.

On an analyses of impugned judgment and order of conviction and sentence dated 05.09.2019 passed by the learned Additional Metropolitan Sessions Judge (Metropolitan Sessions Judge in charge), Sylhet in Sessions Case No. 2805 of 2013, I find no flaw in the reasonings of the trial Court or any ground to assail the same inasmuch as all the key elements of Section 138 of Negotiable Instruments Act are exist in the case.

The learned Judge of the trial Court below appears to have considered all the material aspects of the case and justly found the accused appellant guilty under Section 138 of the Negotiable Instruments Act, 1881 and sentenced her thereunder to suffer simple imprisonment for a period of 1 (one) year and to pay a fine of Tk. 25,00,000/- (Twenty lakhs). No interference is, therefore, called for.

In the result the appeal is dismissed. The impugned judgment and order of conviction and sentence dated 05.09.2019 passed by the learned Additional Metropolitan Sessions Judge (Metropolitan Sessions Judge in charge), Sylhet in Sessions Case No. 2805 of

2013 arising out of C.R. Case No. 1260 of 2012 against the accused appellant is hereby affirmed.

Since the appeal is dismissed the convict appellant is directed to surrender his bail bond within 3 (three) months from today to suffer his sentence, failing which the Trial Court shall take necessary steps to secure arrest against him.

The complainant-respondent No.2 is permitted to withdraw half of the cheque's amount as deposited in the Trial Court by the convict-appellant for the purpose of preferring this Criminal Appeal.

Send down the lower Court records at once.