IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CRIMINAL APPELLATE JURISDICTION)

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 627 of 2021

Md. Nurul Amin Bhuiyan

…….Appellant

-versus-

The State and another

…….Respondent

Mr. Md. Billal Hossain, Advocate

……………For the appellant

Mr. Abul basher Tutul, Advocate

…. For the respondent No. 2

Mr. Md. Anichur Rahman Khan, DAG with

Mr. Sultan Mahmood Banna, AAG with

Mr. Mir Moniruzzaman, AAG

….For the State

Heard on 08.05.2025 and 07.08.2025

Judgment delivered on 14.08.2025

This appeal is directed against the impugned judgment and order dated 08.03.2020 passed by the Metropolitan

Additional Sessions Judge, Court No. 3, Dhaka in Metropolitan Sessions Case No. 11504 of 2019 arising out of C R Case No. 2085 of 2015(Motijheel) convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 01(one) year and fine of Tk. 2,56,934.

The prosecution's case, in short, is that the accused Md. Nurul Amin Bhuiyan issued cheque No. 5715524 on 23.07.2015 drawn on his Account No. 00220214002518 maintained with Trust Bank Ltd, Millennium Corporate Branch, Dhaka in favour of the Bangladesh Development Bank Ltd for payment of the loan amount. The complainant bank presented the said cheque on 27.07.2015 for encashment, but it was dishonoured on the same date with the remark "insufficient funds". After that, the complainant bank sent a legal notice on 17.08.2015 through registered post with AD to the accused, which was duly served upon the accused, but he did not pay the cheque amount in time. Consequently, the complainant filed the case on 12.10.2015.

During the trial, charge was framed against the accused under Section 138 of the Negotiable Instruments Act, 1881, and at the time of framing charge, the accused was absconding. The prosecution examined 1 witness to prove the charge against the accused. Since the accused was absconding, the trial court could not examine him 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 Md. Nurul Islam stated that the complainant bank authorized him to depose in the case. He proved the power of attorney as Exhibit 1. The accused Md. Nurul Islam issued a cheque on 23.07.2015 for payment of Tk. 2,56,394 in favour of the complainant bank for payment of the loan. He proved the said cheque as Exhibit 2. The complainant bank presented the said cheque on 27.07.2015 for encashment, but it was dishonoured on the same date. He proved the dishonoured slip as Exhibit 3. The legal notice was sent on 17.08.2018. He proved the legal notice and postal receipt as Exhibit 4 series. The accused did not pay the cheque amount. Consequently, the bank filed the case on 12.10.2015. He proved the complaint petition and the signature of the officer who was earlier authorized to file the case as exhibits 5 and 5/1, respectively. Defence did not cross-examine P.W.1.

The learned Advocate Mr. Md. Billal Hossain, appearing on behalf of the appellant Md. Nurul Amin Bhuiyan submits that at the time of disbursement of the loan, the accused issued a blank cheque in favour of the complainant bank but subsequently filling up the blank cheque, the complainant presented the same and the demand under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881 was not sent to the accused through registered post with AD as provided in Sub-section 1(A) of section 138 of the said Act and the notice dated 17.08.2015 was not served upon the accused before filing the case and there is no cause of action to file the case on 12.10.2015. The prosecution failed to prove the charge under section 138 of the Negotiable Instruments Act, 1881, and the trial court failed to consider the provision made in sections 138,138 (1)(A), and 141(b) of the Negotiable Instruments Act, 1881, and arrived at a wrong decision as to the guilt of the accused. He prayed for setting aside the impugned judgment and order passed by the trial court.

The learned Advocate Mr. Abul Basher Tutul, appearing on behalf of respondent No. 2, submits that the accused Md. Nurul Amin Bhuiyan issued cheque No. 5715524 on 23.07.2015 for payment of Tk. 2,56,394 in favour of the complainant bank for payment of the loan. The complainant presented the cheque on 27.07.2015, but the same was dishonoured on the same date with the remark “insufficient funds”. After that, the complainant sent a legal notice on 17.08.2018 through registered post with AD to the accused for payment of the cheque amount within 30 days. After the expiry of the said period, the accused did not pay the cheque amount. Therefore, the accused committed an offence under section

138 of the Negotiable Instruments Act, 1881, and P.W. 1 proved the charge against the accused beyond all reasonable doubt. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocates of both parties, perused the evidence, impugned judgment and order passed by the trial court, and the records.

On perusal of the evidence, it appears that the accused Md. Nurul Islam Bhuiyan issued cheque No. 5715524 on 23.07.2015 drawn on his Account No. 00220214002518 maintained with Trust Bank Ltd, Millennium Corporate Branch, Dhaka, in favour of the Bangladesh Development Bank Ltd for payment of Tk. 2,56,934. P.W. 1 proved the said cheque as Exhibit 2. The cheque was presented on 27.07.2015 for encashment, but it was dishonoured with the remark "insufficient funds". P.W. 1 proved the dishonoured slip as Exhibit 3. Therefore, it appears that the cheque was presented for encashment following the provision made in clause a of the proviso to section 138 of the Negotiable Instruments Act, 1881.

P.W. 1 stated that the complainant bank sent the legal notice on 17.08.2015 and proved the legal notice and postal receipt as Exhibit 4 series. In the complaint petition, it has been stated that the legal notice was sent through registered post with AD, but no AD has been proved in the case.

The mere presentation of a cheque within the specified time mentioned in clause (a) of the proviso to section 138 of the Negotiable Instruments Act, 1881 and sending the notice in writing to the drawer of the cheque making a demand for the payment of the cheque amount by the payee within thirty days from the date of receipt of information by him from the bank regarding the return of the cheque as unpaid does not constitute an offence under Section 138 of the Negotiable Instruments Act, 1881 unless the cheque is issued for consideration and the said notice is served upon the drawer of the cheque and he/she failed to pay the cheque amount within thirty days from the date of receipt of said notice and the complaint is made within 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.

At the time of enactment of the Negotiable Instruments Act, 1881 no provision was made as to the mode of service of notice upon the drawer of the cheque. The legislature inserted Sub-Section (1A) in Section 138(1) of the said Act by Act No. III of 2006, making provision regarding the mode of the service of notice under clause b of the proviso to Section 138 of the said Act. Under Section 138(1)(1A) of the said Act the notice under Section 138(b) of the said Act is required to be served upon the drawer of the cheque, a. by delivering it to the person on whom it is to be served; or b. by sending it by registered post with acknowledgment due to that person at his usual or last known place of abode or business in Bangladesh; or c. by publication in a daily Bangla national newspaper having wide circulation. The Negotiable Instruments

Act, 1881 is a special law. Service of notice upon the accused in compliance with the provision made in section 138(1)(1A) of the said Act, at least by one mode as stated above, is sine qua non.

The evidence discussed hereinabove depicts that the demand under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881 was not made following the provision made in sub-section 1(A) of section 138 of the said Act, and no evidence was adduced regarding service of notice upon the accused before filing the case. The prosecution could not prove the cause of action for filing the case on 12.10.2015 under Section 138 of the Negotiable Instruments Act, 1881.

The complainant failed to comply with the cumulative provisions made in clauses b and c of the proviso to section 138, and sections 138(1)(A) and 141(b) of the Negotiable Instruments Act, 1881. The trial court did not consider the provision made in clauses b and c of the proviso to section 138, Sub-section 1(A) of section 138, and 141(b) of the Negotiable Instruments Act, 1881.

The prosecution failed to prove the charge against the accused beyond all reasonable doubt, and the trial court illegally passed the impugned judgment and order of conviction and sentence.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order passed by the trial court against the accused Md. Nurul Amin Bhuiyan is hereby set aside.

The trial court is directed to allow the accused to withdraw 50% of the cheque amount, i.e., Tk. 1,28,467 deposited by him in the trial court before filing appeal.

However, there will be no order as to cost.

Send down the lower Court’s record at once.

ABO
Hasan