

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 1492 of 2021

Fatema Jahangir

...Appellant

-Versus-

The State and another

...Respondents

Mr. Neoaz Morshed, Advocate

...For the Appellant

Mr. Md. Manir Hossain, Advocate

...For the complainant-respondent No. 2

Heard on 19.02.2024

**Judgment delivered on 28.02.2024**

This appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the judgment and order of conviction and sentence dated 25.09.2019 passed by Sessions Judge, Khulna in Session Case No. 39 of 2018 arising out of C.R. Case No. 297 of 2014 (Paikgacha) convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 1(one) year and to pay a fine of Tk. 36,00,000 (thirty-six lakh).

The prosecution case, in short, is that the accused Fatema Jahangir issued Cheque No. AWCD-4012760 on 23.04.2014 drawn on his Account No. 4313300004649 maintained with Social Islami Bank Ltd, Paikgacha Branch for payment of loan amounting to Tk. 35,70,000(thirty-five lakh and seventy thousand) in favour of the complainant. The complainant-respondent No. 2 presented the said cheque on 23.04.2014 for encashment and the same was dishonoured on the same date with a remarked 'insufficient funds'. Thereafter, the complainant issued a legal notice on 04.05.2014 upon the accused through registered post with AD for payment of the cheque amount within 30 days but he did not pay the cheque amount. Consequently, he filed the complaint petition on 26.06.2014 against the accused.

After filing the complaint petition, the complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and the learned Magistrate was pleased to take cognizance of the offence under

Section 138 of the Negotiable Instruments Act, 1881 against the accused. During the trial, the complainant examined himself as P.W. 1. After that, 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 Kamal Ahammed Parvez is the Investment Officer of Social Islami Bank Limited, Paikgacha Branch. Khulna. He stated that the accused Fatema Jahangir obtained the loan from the bank in 2012. She issued a cheque on 23.04.2014 in favour of the bank for payment of Tk. 35,40,000. He proved the cheque dated 23.04.2014 as exhibit 1. The cheque was presented on 23.04.2014 which was returned unpaid with the remark 'insufficient funds'. He proved the dishonour slip as exhibit 2. After that, the bank issued a legal notice registered with AD upon the accused through the learned Advocate to pay the cheque amount within 30 days. He proved the legal notice and the postal receipt as exhibit 3 series. He proved the AD as exhibit 4. Despite the notice served upon the accused, he did not pay the cheque amount. Consequently, the bank filed complaint petition on 26.06.2014. P.W. 1 proved the signature of the authorized officer Shomel Mahmud. He proved the complaint petition as exhibit 5 and the signature of authorized officer Shomel Mahmud as exhibit 5/1. He stated that he is authorized to depose in Court. He proved the power of attorney dated 21.01.2018 as exhibit 6. The accused was absconding and did not cross-examine P.W. 1.

Learned Advocate Mr. Neoaz Morshed appearing on behalf of the appellant submits that the bank and the appellant settled the dispute out of Court and paid total Tk. 43,03,067 in favour of the Social Islami Bank Limited and both the bank and the appellant executed an undertaking on 16.11.2023 and the Social Islami Bank Limited issued a certificate on 15.11.2023 stating that the appellant has no liability with the bank. Therefore, he prayed for allowing the appeal.

Learned Advocate Mr. Md. Manir Hossain appearing on behalf of the complainant-respondent No. 2 submits that the appellant paid the entire loan liability of the bank amounting to Tk. 43,03,067 and the bank

also executed an undertaking and issued a certificate on 15.11.2023 stating that the appellant has no liability with the bank.

I have considered the submissions of the learned Advocates who appeared on behalf of both parties, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the records, it appears that the accused issued Cheque No. AWCD-4012760 dated 20.04.2014 drawn on his Account No. 4313300004649 maintained with Social Islami Bank Ltd, Paikgacha Branch, Khulna in favour of the complainant-respondent No. 2 for payment of Tk. 35,70,000 and the said cheque was presented on 23.04.2014 for encashment which was dishonoured on the same date with a remark 'insufficient funds'. After that, the complainant sent a legal notice to the accused through registered post with AD on 04.05.2014 but he did not pay the cheque amount within time. Consequently, the payee-complainant filed the case on 26.04.2014. P.W. 1 proved the complaint petition as exhibit 5 and the signature of authorized officer Shomel Mahmud as exhibit 5/1. He also proved the cheque as exhibit 1, the dishonoured slip as exhibit 2, the legal notice and postal receipt as exhibit 3 series and AD as exhibit 4. During the trial, the accused was absconding and he did not cross-examine P.W. 1. Therefore, the evidence of P.W. 1 as regards the issuance of a cheque in favour of the said Bank by the accused remains uncontroverted.

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. After service of notice in writing under Section 138(1)(b) of the said Act, the accused failed to pay the cheque amount. Thereby the accused committed an

offence under Section 138 of the Negotiable Instruments Act, 1881 and the complainant filed the case following all procedures provided in Section 138 of the Negotiable Instruments Act, 1881. The prosecution proved the charge against the accused beyond all reasonable doubt and the trial Court after proper assessment of the evidence legally passed the impugned judgment and order of conviction.

On perusal of the records, it appears that the accused having filed a supplementary affidavit on 17.01.2024 annexed an undertaking dated 16.11.2023 as Annexure-D executed by the Manager, Social Islami Bank Ltd, Paikgacha Branch and the accused and also annexed a certificate dated 15.11.2023 and statements of account dated 16.11.2023 as Annexure-E, F, F-1 and F-2. In the undertaking dated 16.11.2023, it has been stated that the accused paid total Tk. 43,03,067 in favour of the bank.

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 accused is not entitled to get an order of acquittal based on the compromise between the parties. After filing the case under Section 138 of the Negotiable Instruments Act, 1881 the Court is not empowered to dispose of the case relying on the compromise made between the parties.

Considering the gravity of the offence and the facts and circumstances of the case, 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 Fatema Jahangir is found guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and she is sentenced to pay a fine of Tk. 35,70,000.

The complainant bank admitted that the accused paid total Tk. 43,03,067. The accused paid more than the fine amount imposed by this Court in favour of the complainant bank. Therefore the accused is entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

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

The trial Court is directed to allow the accused Fatema Jahangir to withdraw 50% of the cheque amount deposited by her before filing the appeal within 1(one) month from the date of receipt of the copy of the judgment.

Send down the lower Court's records at once.