

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7421 of 2021

Md. Shah Alam Dhali

...Appellant

-Versus-

The State and another

...Respondents

No one appears.

...For the appellant

Ms. Bijoya Barua, Advocate

...For the complainant-respondent No. 2

Heard on 31.10.2024 and 06.11.2024

**Judgment delivered on 10.11.2024**

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 dated 21.11.2016 passed by Additional Sessions Judge, Chandpur in Session Case No. 132 of 2015 arising out of C.R Case No. 397 of 2014 (Chandpur) convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer rigorous imprisonment for 1(one) year and fine of Tk. 1,95,036.

The prosecution case, in short, is that the accused Md. Shah Alam Dhali took loan on 28.07.2011 from the complainant BRAC Bank Limited. He did not pay the loan in time. Thereafter on 12.07.2014 the accused issued Cheque No. 5669057 drawn on his Account No. 0902202117788001 maintained with BRAC Bank Limited, Chandpur Branch for payment of loan. The complainant-bank presented the said cheque on 22.07.2014 for encashment which was dishonoured with a remark 'insufficient funds'. Thereafter, the complainant-bank sent notice on 04.08.2014 to the accused for payment of the cheque amount which he received on 07.08.2014 but he did not pay the cheque amount. Thereafter, the complainant filed the complaint petition on 29.09.2014.

At the time of 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. The Chief Judicial Magistrate sent the case record to the Sessions Judge, Chandpur.

During trial, the charge was framed on 13.09.2015 under Section 138 of the Negotiable Instruments Act, 1881. At the time of framing the charge, the accused was absconding. After that, the Sessions Judge, Chandpur by order dated 04.02.2016 sent the case to the Additional Sessions Judge, Chandpur. During the trial, the complainant was examined as P.W. 1 to prove the charge against the accused. The defence did not cross-examine P.W. 1. After examination of the prosecution witness, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he declined to adduce any D.W. After concluding the trial, the trial Court by impugned judgment and order convicted the accused as stated above against which he filed the instant appeal.

P.W. 1 Md. Saifuzzaman is the Associate Manager, BRAC Bank Limited, Chandpur Branch. He stated that he got the power of attorney from the bank. He proved the power of attorney as exhibit 1. He stated that the accused Shah Alam Dhali obtained a loan from the bank and on 12.07.2014 he issued a cheque for payment of loan amounting to Tk. 1,95,036. The bank presented the cheque on 22.07.2014. Thereafter, the bank sent a notice to the accused on 04.08.2014 and he received the notice on 07.08.2014 but he did not pay the cheque amount and after complying with the procedures under Section 138 of the Negotiable Instruments Act, 1881 he filed the case. He proved the complaint petition as exhibit 2 and the signature of Md. Alamgir Hossain as exhibit 2/1. He stated that Md. Alamgir Hossain served along with him in the bank. He proved the cheque as exhibit 3, dishonour slip as exhibit 4, legal notice as

exhibit 5, postal receipt as exhibit 6 and acknowledgement due as exhibit 7. The defence did not cross-examine P.W. 1.

No one appears on behalf of the appellant.

Learned Advocate Ms. Bijoya Barua appearing on behalf of the complainant-respondent No. 2 submits that the appellant issued a cheque on 12.07.2014 drawn on his account maintained with BRAC Bank Limited, Chandpur Branch for payment of loan amounting to Tk. 1,95,036 received by the appellant from the bank. The cheque was presented on 22.07.2014 but the same was dishonoured on the ground 'insufficient funds'. Thereafter, the bank issued notice to the accused. Despite the service of notice upon the accused, he did not pay the cheque amount. Thereafter complying with all the procedures provided in Section 138 of the Negotiable Instruments Act, 1881, the complainant filed the complaint petition. The prosecution proved the charge against the accused beyond all reasonable doubt. She prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Ms. Bijoya Barua who appeared on behalf of complainant-respondent No. 2, 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 Md. Shah Alam Dhali issued a cheque on 12.07.2014 in favour of the complainant BRAC Bank Limited for payment of Tk. 1,95,036 (exhibit 3). The said cheque was presented to the BRAC Bank Limited, Chandpur Branch on 22.07.2014 but the same was dishonoured with a remark 'insufficient funds' and the bank issued the dishonour slip (exhibit 4). After that, the complainant bank sent a notice on 04.08.2014 through registered post with AD to the accused which was proved as exhibit 5. P.W. 1 proved the postal receipt and AD as exhibits 6 and 7.

On perusal of the acknowledgement due, it appears that the appellant received the notice on 07.08.2014. Despite the notice

received by the appellant on 07.08.2014, he did not pay the cheque amount. During the trial, the accused was not present and he did not cross-examine P.W. 1. Therefore, the evidence of P.W. 1 regarding the issuance of the cheque by the appellant remained uncontroverted. I am of the view that the appellant issued the cheque (exhibit 3) for payment of Tk. 1,95,036.

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 cheque was dishonoured and after service of notice in writing under Section 138(1)(b) of the said Act, the accused did not 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 on proper assessment and evaluation of the evidence legally passed the impugned judgment and order.

In view of the above evidence, findings, observation and proposition, I am of the view that 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 convicted the accused.

On perusal of the judgment passed by the trial Court, it appears that the trial Court awarded a sentence of rigorous imprisonment against the accused. No provision is made in Section 138 of the Negotiable Instruments Act, 1881 to award rigorous imprisonment. The trial Court is only empowered to award a simple sentence against the accused provided that the prosecution proved the charge against the accused beyond all reasonable doubt.

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

The accused Md. Shah Alam Dhali is found guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and he is sentenced to suffer imprisonment for 2(two) months and a fine of Tk. 1,95,036.

The accused Md. Shah Alam Dhali is directed to surrender forthwith and pay the remaining 50% of the cheque amount within 30(thirty) days from the date failing which the trial Court is directed to do the needful.

In the result, the appeal is disposed of.

Send down the lower Court's records at once.