

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 332 of 2022

A.S.M. Shamsuddoha Chowdhury Biplob

...Appellant

-Versus-

The State and another

...Respondents

Mr. Swapan Kumar Das, Advocate

...For the Appellant

Mr. Md. Golam Nabi, Advocate

...For the Complainant-respondent No. 2

Heard on 19.07.2023, 30.07.2023 and 14.08.2023

Judgment delivered on 09.10.2023

This criminal appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order of conviction and sentence dated 21.07.2019 passed by Additional Metropolitan Sessions Judge, Court No. 2, Dhaka in Metropolitan Session Case No. 16216 of 2018 arising out of C.R. Case No. 2153 of 2017 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 04(four) months and also to pay fine of Tk. 20,00,000 (twenty lakh).

The prosecution case, in a nutshell, is that the complainant Brigadier General (Rtd) Jamil Ahmed Khan purchased 5 katha land of Mouza-Digun, Mirpur, Dhaka by registered sale deed dated 19.05.2013 from accused A.S.M. Shamsuddoha Chowdhury Biplob. After registration of the deed, the complainant came to know that the accused had no possession of the land sold to him and committed fraud. Thereafter, the accused A.S.M. Shamsuddoha Chowdhury Biplob issued Cheque No. 9962903 on 26.07.2017 drawn on his account maintained with City Bank Limited for payment of Tk. 20,00,000 to pay back the consideration of said land. The complainant presented the cheque on 08.10.2017 through his account maintained with Trust Bank Limited, Gulshan Corporate Branch, Dhaka but the said cheque was returned on the same date as unpaid with a remark of insufficient funds. The complainant served a legal notice on 12.10.2017 through his learned Advocate for payment of the

cheque amount within 30 days from the date of receipt of the said notice through registered post with A/D. The said notice was duly served upon the accused but he did not pay the cheque amount within time. Consequently, the complainant filed the case against the accused.

After filing the complaint petition, the Chief Metropolitan Magistrate was pleased to take cognizance of the offence against the accused under Section 138 of the Negotiable Instruments Act, 1881. Thereafter, the case was transferred to the Metropolitan Sessions Judge, Dhaka for trial and the case was registered as Metropolitan Session Case No. 16216 of 2018. After that, the case was transferred to the Additional Metropolitan Sessions Judge, Court No. 2, Dhaka for trial. The trial Court by order dated 01.01.2019 was pleased to frame the charge under Section 138 of the Negotiable Instruments Act, 1881 against the accused. At the time of the framing charge, the accused was absconding. The complainant examined one witness to prove the charge against the accused. The trial Court after concluding the trial 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. Rashed Moishan stated that he obtained the power of attorney and that he deposed on behalf of the complainant. The accused A.S.M. Shamsuddoha Chowdhury issued a cheque on 26.07.2017 for payment of Tk. 20 lakh. The cheque was presented on 08.10.2017 for encashment but the same was dishonoured. On 12.10.2017 a legal notice was sent to the accused. Despite the service of the legal notice, the accused did not pay the cheque amount. Thereafter, he obtained the power of attorney and filed the case. He proved the complaint petition as exhibit 1 and his signature as exhibit 1/1. He proved the cheque as exhibit 2 and the dishonour slip as exhibit 3. He proved the legal notice as exhibit 4, postal receipt and A/D as exhibits 5 and 5/1. The defence did not cross-examine P.W. 1.

Learned Advocate Mr. Swapan Kumar Das appearing on behalf of the appellant submits that Cheque No. 9962903 dated 26.07.2017 was issued by the Managing Director, WAO Dressing Company Ltd drawn on

Account No. 1401891047001 in the name of said company with City Bank Limited, Gulshan Corporate Branch, Dhaka. No cheque was issued by the accused in favour of the complainant. Therefore, the offence alleged in the complaint petition does not attract Section 138 of the Negotiable Instruments Act, 1881. The trial Court most illegally passed the impugned judgment and order against the accused. Therefore, he prayed for setting aside the impugned judgment and order passed by the trial Court.

Learned Advocate Mr. Md. Golam Nabi appearing on behalf of the complainant-respondent No. 2 submits that in the complaint petition, it has been stated that the accused A.S.M. Shamsuddoha Chowdhury Biplob is the Managing Director of WAO Dressing Company Limited and on behalf of the company accused himself issued the cheque for payment of the consideration of the deed dated 19.05.2013. Therefore, the offence committed by the accused attracts Section 138 of the Negotiable Instruments Act, 1881 and the trial Court following the provision in Section 138 of the Negotiable Instruments Act, 1881 and on proper assessment of the evidence passed the impugned judgment. Learned Advocate Mr Md. Golam Nabi cited decisions made in the case of Md. Sirajul Haque Vs. The State and another reported in 19 BLT (HCD)2011 525, Arfin Akter Vs. Bangladesh and others reported in 19 BLT (HCD)2011 532, Tipu Sultan Vs. State and another reported in 21 BLC 341. He prayed for the dismissal of the appeal.

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

The issue involves in the instant appeal as to whether the accused issued Cheque No. 9962903 dated 26.07.2017 for payment of the consideration in favour of the complainant.

In the complaint petition, it has been alleged that the accused transferred 5 kathas land of Mouza-Digun, Mirpur to the complainant vide registered deed dated 19.05.2013 for consideration of Tk. 85,00,000 but he had no possession of the said land and fraudulently transferred the property in favour of the complainant and subsequently, the accused

issued the cheque No. 9962903 on 26.07.2017 for payment of Tk. 20,00,000 to partly pay back the total consideration amounting to Tk. 85,00,000. P.W. 1 stated that accused A.S.M. Shamsuddoha Chowdhury issued said cheque dated 26.07.2017 for payment of Tk. 20,00,000 in favour of his employer. P.W. 1 proved the complaint petition as exhibit 1 and his signature as exhibit 1/1. He proved the Cheque No. 9962903 dated 26.07.2017 as exhibit 2 and the dishonour slip as exhibit 3, legal notice as exhibit 4, postal receipt and A/D as exhibits 5 and 5/1. P.W. 1 also stated that on 12.10.2017 a legal notice was issued upon the accused and he also received the same but the accused did not pay the cheque amount in time.

Fact remains that exhibit 2, the disputed Cheque No. 9962903 dated 26.07.2017, was issued by WAO Dressing Company Limited in favour of Jamil Ahmed Khan for payment of Tk. 20,00,000. The disputed cheque was not drawn from the account maintained by the accused. It is specifically stated in the complaint petition that the complainant Brigadier General (Rtd) Jamil Ahmed Khan purchased 5 kathas land from the accused A.S.M. Shamsuddoha Chowdhury Biplob and the cheque was issued to partly pay back the consideration of said 5 kathas land. Therefore, it is an admitted fact that the complainant did not purchase any land from WAO Dressing Company Limited. Nothing stated in the complaint petition that there was any business transaction between the complainant and WAO Dressing Company Ltd. There was no reason to issue the disputed cheques by WAO Dressing Company Ltd in favour of the complainant.

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. Since the complainant asserted that he purchased the land from the accused A.S.M. Shamsuddoha Chowdhury Biplob, it is crystal clear that the WAO Dressing Company Limited had no debt to the complainant. Therefore, there was no reason for the WAO Dressing Company Limited to issue the cheque in favour of

the complainant Brigadier General (Rtd) Jamil Ahmed Khan. The accused A.S.M. Shamsuddoha Chowdhury Biplob is personally responsible to pay back the consideration of the 5 kathas land sold by sale deed dated 19.05.2013 to the complainant. Admittedly there was no transaction between the complainant and the WAO Dressing Company Ltd. Therefore the cheque was issued without consideration.

On perusal of the legal notice dated 12.10.2017 (exhibit 4) it appears that a notice demanding payment of the cheque amount was sent to the accused Jamil Ahmed Khan informing dishonour of the cheque and requesting the accused to pay the cheque amount within 30 days from the date of receipt of the notice. The disputed cheque was issued by “WAO Dressing Company Ltd”. No demand under Section 138(1)(b) was made upon the said company regarding dishonour of the cheque requesting to pay the cheque amount within 30(thirty) days from the date of receipt of the notice. The disputed cheque was not drawn from the account maintained by the accused. Therefore, no offence under Section 138 of the Negotiable Instruments Act, 1881 was committed.

The statement made by the complainant that the accused A.S.M. Shamsuddoha Chowdhury Biplob transferred 5 kathas land of Mouza-Digun, Mirpur without having possession and fraudulently transferred the land to the complainant is not disputed by the accused. It appears that the accused adopted a device to cheat the complainant. Therefore, the complainant is at liberty to file a criminal case under the Penal Code, 1860 before the competent Court, if so advised.

Because of the above facts and circumstances of the case, evidence, findings, observation, reasoning and the proposition, I am of the view that the complainant failed to prove the charge under Section 138 of the Negotiable Instruments Act, 1881 against the accused and the trial Court without considering Section 138 of the Negotiable Instruments Act, 1881 in its true perspective illegally passed the impugned judgment and order of conviction and sentence against the accused.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial Court is hereby set aside.

Send down the lower Court's records at once.