

**IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CRIMINAL REVISIONAL JURISDICTION)**

Present:

**Mr. Justice Md. Shohrowardi**

**Criminal Revision No. 2857 of 2019**

Hemlal Shil

-Vs-

The State and another

No one appears

.... For the convict petitioner

Mr. Syed Md. Zahangir Hossain, Advocate with

Ms. Khandaker Sharmin Sultana, Advocate

.....For the opposite party No.2

Mr. S.M. Golam Mostofa Tara, DAG with

Mr. A. Monnan, AAG

..... for the State

**Heard on 16.01.2024, 22.01.2024**

**Judgment on 23.01.2024**

The Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 06.05.2019 passed by the Sessions Judge, Patuakhali in Criminal Appeal No.146 of 2018 affirming the judgment and order of conviction and sentence dated 12.07.2018 passed by the Joint Sessions Judge, Court No. 3, Patuakhali in Session Case No. 407 of 2017 arising out of C.R. Case No.732 of 2017 convicting the petitioner under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 01(one) year and to pay a fine of Tk. 1,03,000 should not be set aside and/or pass such other order or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that the accused Hemlal Shil and his wife Sandhya Rani jointly obtained a loan of Tk. 100,000 on 27.08.2015 from the complainant Ansar VDP Unnayan Bank Ltd, Patuakhali Branch but they did not repay the loan following the terms and conditions of the loan disbursed to the accused. Thereafter, the accused issued cheque No. 9037826 on 21.05.2017 drawn on his Saving Account No. 002159996 maintained with Sonali Bank Ltd, Newtown Branch, Patuakhali for payment of Tk. 1,03,000 in favour of the complainant Ansar VDP Unnayan Bank Ltd. The complainant presented the said cheque for encashment on 23.05.2017 but the same was dishonoured with a remark “insufficient funds”. After that, the complainant issued a legal notice on 21.06.2017 under section 138 (b) of the said Act upon the convict petitioner through registered post with AD for payment of the cheque amount within 30 days but he did not pay the cheque amount. Consequently, the complainant filed the complaint petition on 20.08.2017.

After filing the complaint petition, the Senior Judicial Magistrate, Court No. 1, Patuakhali examined the complainant under section 200 of the Code of Criminal Procedure, 1898 and the cognizance of the offence was taken against the accused under section 138 of the Negotiable Instruments Act, 1881 and the case was registered as C.R. No. 732 of 2017. The learned Magistrate transmitted the records of the case to the Sessions Judge, Patuakhali and the case was registered as Session Case No. 407 of 2018. Thereafter, the learned Sessions Judge, Patuakhali transferred the case to the Joint Sessions Judge, Court No. 3, Patuakhali for disposal.

During the trial, the charge was framed on 14.02.2018 against the accused under section 138 of the Negotiable Instruments Act, 1881 which was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried following law. During the trial, the prosecution examined 2(two) witnesses to prove the charge against the accused and the defence cross-examined the prosecution witnesses. After examination of the

prosecution witnesses, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and he declined to adduce any DW.

The trial court after concluding the trial by judgment and order dated 12.07.2018 convicted the accused under section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 01(one) year and a fine of Tk. 103,000. Being aggrieved by and dissatisfied with the said judgment and order dated 12.07.2018 the accused filed Criminal Appeal No. 146 of 2018 before the Sessions Judge, Patuakhali. After hearing, the Sessions Judge, Patuakhali by impugned judgment and order dated 06.05.2019 affirmed the judgment and order passed by the trial court against which the convict-petitioner obtained the instant Rule.

P.W. 1 Md. Abdus Salam Talukder is the Manager of the Ansar VDP Unnayan Bank, Patuakhali Branch. He stated that the accused and his wife jointly obtained a loan on 27.08.2015 amounting to Tk. 100,000 from Ansar VDP Unnayan Bank, Patuakhali Branch but he did not pay the said loan. Subsequently, the accused issued cheque No. 9037826 on 21.05.2017 drawn on his Saving Account No. 002159996 maintained with Sonali Bank Ltd, Newtown Branch, Patuakhali for payment of Tk. 103,000. He presented the said cheque on 23.05.2017 and on the same date, the cheque was dishonoured with the remark "insufficient funds". After that, he issued a legal notice on 21.06.2017 upon the accused but he did not pay the cheque amount. Consequently, he filed the case. He proved the complaint petition as exhibit-1 and his signatures on the complaint petition as exhibits-1/1, 1/2 and 1/3. He proved the dishonoured cheque as exhibit-2, the dishonor slip as exhibit-3, the postal receipt as exhibit-4 and the legal notice as exhibit-5. He denied the suggestion that at the time of disbursement of the loan, the bank took a blank cheque from the accused. The accused maintained an account in the Ansar VDP Unnayan Bank. He denied the suggestion that his wife maintained a DPS account with the Ansar VDP Unnayan Bank. He affirmed that a legal notice was served upon the accused. He denied the suggestion that the accused did

not filled up the cheque. He also denied the suggestion that the accused was falsely implicated in the case due to enmity.

P.W. 2 Md. Fazlur Rahman is the Second Officer of the Ansar VDP Unnayan Bank, Patuakhali. He stated that accused Hemlal Shil and his wife jointly obtained a loan of Tk. 100,000 from the bank on 27.08.2015 but he did not pay the loan. Subsequently, he issued a cheque on 21.05.2017 for payment of Tk. 103,000 from his account maintained with Sonali Bank Limited, Newtown Branch, Patuakhali. On 23.05.2017, the cheque was dishonoured with the remark “insufficient funds”. The bank served a legal notice on 21.06.2017 upon the accused but he did not pay the cheque amount. During cross-examination, he stated that on 21.05.2017 there was a total balance of Tk. 103,000 in the loan account of the accused. He denied the suggestion that the accused did not issue the cheque and that a blank cheque was issued. He affirmed that the wife of the accused maintains a DPS account of monthly Tk. 300. He denied the suggestion that since there was a dispute regarding the DPS of his wife, he was falsely implicated in this case.

No one appears on behalf of the accused.

The learned Advocate Mr. Syed Md. Zahangir Hossain appearing along with learned Advocate Ms. Khondaker Sharmin Sultana appearing on behalf of the opposite party No. 2 submits that the accused issued the cheque(exhibit-2) on 21.05.2017 for payment of the loan and installment amounting to Tk. 103,000 but the cheque was dishonored due to “insufficient funds”. Thereafter, a legal notice was issued upon the accused but he did not pay the cheque amount. After complying with all the legal procedures provided in section 138 of the Negotiable Instruments Act, 1881 filed the complaint petition and both the courts below after proper assessment of evidence legally passed the impugned judgment and order finding him guilty of the offence under section 138 of the Negotiable Instruments Act, 1881. Therefore, he prayed for discharging the rule.

On perusal of the records, it appears that the accused Hemlal Shil issued cheque No. 9037826 dated 21.05.2017 drawn on his account maintained with Sonali Bank Limited, Newtown Branch, Patuakhali in favour of the Ansar VDP Unnayan Bank, Patuakhali for payment of Tk. 103,000. P.W. 1 proved the cheque as exhibit-2. The complainant presented the said cheque on 23.05.2017 which was returned unpaid with the remark “insufficient funds”. P.W. 1 proved the dishonored slip dated 23.05.2017 as exhibit-3. The complainant issued a legal notice on 21.06.2017 through registered post with AD upon the accused. P.W. 1 proved the registered post with AD as exhibit-4 and the legal notice as exhibit-5. P.W.1 also proved the complaint petition as exhibit-1. The accused cross-examined the P.Ws. 1 and 2. On scrutiny of the evidence, it reveals that the suggestion made by the defence during cross-examination that a blank cheque was received by the bank at the time of disbursement of the loan was denied by PWs 1 and 2.

In a case under section 138 of the Negotiable Instruments Act, 1881 the accused is not bound to prove the defence case by adducing evidence. He is legally entitled to make out a defence case by cross-examining the prosecution witnesses. The defence case is that the accused issued a blank cheque which has been denied by the prosecution witnesses. The accused by cross-examining P.Ws. 1 and 2 failed to make out a case that he issued a blank cheque. Therefore, I am of the view that the accused issued the cheque (exhibit-2) for payment of the loan amounting to Tk. 103,000.

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) is rebuttable. By cross-examining P.Ws. the defence failed 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 the accused did not pay the cheque amount. Thereby the accused committed an offence under Section 138 of the Negotiable Instruments Act, 1881.

It is found that the trial court convicted the accused and sentenced him to suffer imprisonment for 01(one) year and a fine of Tk. 103,000 for the dishonour of a cheque amounting to Tk. 103,000. It is a settled proposition that the court shall award a sentence considering the gravity of the offence. In the instant case, the cheque amount is only for Tk. 103,000 but the trial court without applying the judicial mind awarded the maximum sentence provided in section 138 of the Negotiable Instruments Act, 1881 and the appellate court below mechanically affirmed the sentence passed by the trial court. It is observed with caution that a court of law is not a machinery of awarding sentence against the accused. The Court shall pass the sentence considering the gravity of the offence. Therefore, I am of the view that both the courts below committed serious illegality in awarding the sentence against the accused.

Considering the facts and circumstances of the case, evidence and the gravity of the offence, I am of the view that ends of justice would be best served, if the sentence passed by the trial court is modified as under:

The accused is found guilty of the offence under section 138 of the Negotiable Instruments Act, 1881 and he is sentenced to pay a fine of Tk. 103,000 only.

In the result, the Rule is disposed of with a modification of the sentence.

Send down the lower Court's record at once.

