

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

Present:

Mr. Justice Md. Bashir Ullah

Criminal Appeal No. 11234 of 2018

In the matter of:

An Appeal under Section 410 of the Code
of Criminal Procedure

-And-

In the matter of:

Md. Nazrul Islam

... **Convict-Appellant**

-Versus-

S. M. Alamgir and another

... **Complainant-Respondents**

Mr. Palash Mallik, Advocate

... For the Appellant

Mr. Md. Mozammel Hoque, Advocate with
Ms. Helena Pervin, Advocate

... For the Respondent No. 1

Mr. Md. Shafiquil Islam, D.A.G with

Ms. Farhana Abedin, A.A.G with

Mr. Hedayath Uddin, A.A.G and

Mr. K. M. Saiful Islam, A.A.G

... For the State

**Heard on: 02.02.2026, 07.05.2026 and
10.05.2026**

Judgment on: 18.05.2026

This appeal, preferred under Section 410 of the Code of
Criminal Procedure, 1898 is directed against the judgment
and order dated 16.07.2018 passed by the learned Additional

Metropolitan Sessions Judge, 5th Court, Dhaka in Metropolitan Sessions Case No. 3094 of 2016 arising out of C.R Case No. 158 of 2015 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for a period of 01(one) year and to pay a fine of Taka 21,00,000/- (Twenty one lac).

The prosecution's case, in short, is that accused No. 1, in his capacity as the Managing Director of accused No. 2 (a developer company), entered into a Joint Venture Agreement (Construction Agreement) with the complainant for the construction of a building on the complainant's demised property. Upon the accused's failure to achieve substantial completion within the contractually stipulated period, a breach of contract occurred, precipitating the present dispute. Following the breach, an informal mediation (*Salish*) was convened by local dignitaries. During the *Salish*, the accused made a formal offer to purchase the subject land for a total consideration of Taka 1,65,00,000/- (One crore sixty-five lac). In furtherance of said offer, the accused-appellant

issued cheque No. 7265357 dated 03.08.2015 for an amount of Taka 21,00,000/- (Twenty one lac) drawn on Standard Bank Limited, as earnest money towards the sale consideration. The complainant presented the said cheque to the concerned bank on 30.08.2015, but the same was dishonoured with the endorsement “Insufficient Funds”. Thereafter, the complainant served a statutory legal notice on 03.09.2015; however, the appellant failed to make payment within the stipulated period.

Consequently, the complainant instituted Shahbag C.R. Case No. 158 of 2015 before the learned Chief Metropolitan Magistrate, Dhaka, on 18.10.2015. The learned Magistrate took cognizance of the offence and transmitted the case to the Court of Metropolitan Sessions Judge, Dhaka, and it was registered as Metro Sessions Case No. 3094 of 2016. The learned Metropolitan Sessions Judge, Dhaka, transferred the case to the learned Additional Metropolitan Sessions Judge, 5th Court, Dhaka. The charge was framed under Section 138 of the Negotiable Instruments Act, 1881, against the accused-appellant on 31.07.2016, to which the accused pleaded not guilty and claimed to be tried.

In the course of the trial, the prosecution examined 01(one) witness and the defence examined 02(two) witnesses.

Upon conclusion of the trial and hearing the parties, the learned Additional Metropolitan Sessions Judge, 5th Court, Dhaka convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 (the Act, 1881) and sentenced him to suffer simple imprisonment for a period of 01(one) year and to pay a fine of Taka 21,00,000/- (Twenty one lac) by judgment and order dated 16.07.2018.

Being aggrieved by and dissatisfied with the judgment and order dated 16.07.2018, the convict-appellant preferred this instant Criminal Appeal before this Court, whereupon this Court enlarged the appellant on bail till disposal of the appeal.

Mr. Palash Mallik, the learned Advocate appearing on behalf of the appellant submits that admittedly the convict-appellant is the Managing Director of the Unison Development Limited. The complainant had entered into a registered Contract and Power of Attorney for the construction of a multistoried building on a joint venture basis

with the convict-appellant. The convict-appellant failed to complete the construction within the stipulated time and could not deliver possession to the complainant-respondent. The parties are obliged to refer their disputes arising from such an agreement to arbitration under Section 36 of the Real Estate Development and Management Act, 2010, and as such, the conviction and sentence under Section 138 of the Negotiable Instruments Act are not legally sustainable.

He further submits that the title of the cheque is defective under Section 58 of the Negotiable Instruments Act, 1881, and the complainant is not 'holder in due course' of the cheque as defined under Section 9 of the Negotiable Instruments Act, 1881.

He next submits that the cheque was issued by a company, yet the trial Court neither took cognizance nor framed any charge against the company. The trial Court also failed to convict the company, which is impermissible and vitiates the proceedings, particularly in light of Section 140 of the Negotiable Instruments Act, 1881. He finally prays for the appeal to be allowed.

Per contra, Mr. Md. Mozammel Haque, Advocate, along with Ms. Helena Pervin, appearing on behalf of respondent No. 1, submits that the agreement between the accused and complainant culminated in a decision whereby the accused agreed to purchase 5.76 decimals of land for Taka 1,65,00,000/- (One crore sixty five lac). As earnest money, the accused issued 3 cheques totaling Taka 65,00,000/- (Sixty-five lac), including the cheque in question in favour of the complainant. The cheques were dishonored. Thereafter, the complaint duly served with legal notice on 03.09.2015, the case was filed on 18.10.2015, and a charge was framed on 31.07.2016 and PW1 proved the prosecution's case beyond a reasonable doubt.

He further submits that the complainant-respondent No. 1 has already delivered possession of the land to the appellant, who has already constructed a multistoried building thereon. The complainant has also applied for mutation of the land and after having the mutation, he will take action to execute the sale deed and registration after receiving the remaining amount from the appellant. The construction phase is concluded and Section 36 of the Real Estate Development

and Management Act, 2010, is not attracted. No bar exists to proceeding under Section 138 of the Act.

He next submits that the complainant has fully complied with all procedural requirements under the proviso to Section 138 of the Negotiable Instruments Act, established consideration, and is the lawful holder of the cheque. The trial Court rightly convicted the appellant and as such, the appeal is liable to be dismissed.

I have heard the respective parties, perused the judgment and order and the evidence on record.

The record shows that the complainant has successfully proved compliance with the procedure laid down in Section 138 of the Act of 1881 in filing the case. The case was filed within one month of the date on which the cause of action had arisen under clause (c) of the proviso to Section 138. The complainant also proved consideration against which the cheque was drawn and that it is the holder of the cheque in due course. The trial court, upon proper assessment of evidence, rightly found the accused guilty of the charge. Hence, the impugned judgment and order of conviction do not suffer from any illegality or infirmity.

It appears from the evidence of DW1, Md. Nazrul Islam that he admitted that he issued the cheque and signed the same. DW2, Md. Selim Khan, director of accused No. 2, testified in his examination-in-chief that DW1 issued 3 cheques in favour of the complainant.

The aforesaid admissions unequivocally establish that the cheque was issued by the appellant and that it was supported by lawful consideration. The cheque having been returned unpaid by the drawee bank, the ingredients of dishonour contemplated under Section 138 stood fully satisfied.

It appears that the appellant had agreed with the complainant for the development of a building on the complainant's demised property. Upon the accused's failure to achieve substantial completion within the contractually stipulated period, a dispute arose between the parties. Subsequently, a *salish* was convened by local dignitaries. The dispute was resolved by converting the transaction into an agreement for the sale of land. The original joint venture arrangement subsequently culminated in a separate settlement

whereby the accused agreed to purchase the land for a total consideration of Taka 1,65,00,000/- (One crore sixty-five lac). Pursuant thereto, the accused issued several cheques, including the cheque in question as earnest money. Therefore, the cheque did not arise directly out of any dispute relating to construction obligations under the development agreement; rather, it represented an independent monetary obligation arising from a subsequent settlement between the parties. Consequently, the arbitration provision embodied in Section 36 of the Real Estate Development and Management Act, 2010, does not operate as a bar to prosecution under Section 138 of the Negotiable Instruments Act, 1881.

The learned Advocate appearing on behalf of the appellant contends that the complainant failed to establish lawful entitlement to enforce the cheque under Section 58 of the Act, and the complainant is not a holder in due course under Section 9 of the Negotiable Instruments Act, 1881. However, I find no substance in the said submissions because it appears that the complainant proved the consideration for

which the cheque was issued, and the appellant himself admitted the issuance of the cheque and his signature. The complainant received the cheque as the named payee in good faith and for consideration. Accordingly, he is a lawful 'holder' within the meaning of Section 8 of the Act. The accused issued the cheque against the purchase of land as earnest money, and it was admitted by the accused that he issued the cheque and signed the same; the statutory presumption under Sections 118 and 139 of the Act operates in favour of the complainant.

Mr. Mallik further argues that the cheque in question was issued by a company, but the trial Court neither took cognizance of the company, nor framed a charge, nor convicted it, and as such, the entire prosecution was vitiated.

Perusal of the record confirms that the complainant impleaded the company as an accused and issued a legal notice. However, the trial Court omitted to record a conviction against the company. Such omission, in the facts and circumstances of the present case, constitutes a curable

irregularity and does not vitiate the proceeding, particularly where the appellant admittedly signed and issued the cheque in his capacity as Managing Director and remained in control of the affairs of the company at the relevant time. The settled principle of law is that the vicarious liability of responsible officers does not automatically fail merely because of non-conviction or non-prosecution of the company, provided no failure of justice has been occasioned thereby.

The apex Court has authoritatively settled this issue. In *Islami Bank Bangladesh Ltd vs. Ferdous Khan@ Alamgir and another*, reported in 22BLC(AD) 209, the it was held:

“The liability under section 138 of the Act can be termed as a strict liability where a cheque has been returned to the payee having been dishonoured by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid

from that account then the person, issuing the cheque is strictly liable.”

It was further held in the above-mentioned case:

“The person who issued the cheque, whether on his own behalf or on behalf of a company of which he is in charge or for which he is responsible, cannot escape liability under the Act.”

In *Eusof Babu and others vs. State and another*, reported in 68 DLR(AD) 298, the Apex Court held:

“If a company is not prosecuted due to any legal snag or otherwise, the other prosecuted persons cannot, on that score alone, escape from criminal liability created through legal fiction envisaged in section 141 of the Act.”

Earlier in *Joynul Karim and others Vs. State and another*, reported in 21 BLC (AD) 1, the Appellate Division held:

“The alleged omission of impleading the company in the proceeding is an irregularity and the same is not fatal and that though the company is not made party in the proceeding but the persons concerned representing the company, who are party in the issuance of the dishonoured cheque in reference, having been made party in the proceeding, the proceeding cannot be said to be bad for defect of party in as much as the punishment if any on proof is to be inflicted upon the natural persons involved in the offence committed.”

Applying the above principles, the failure of the trial Court to prosecute and convict the company does not ipso facto exonerate the appellant. The signatory and the persons responsible for the conduct of the company’s business at the relevant time may incur vicarious criminal liability under Section 138 of the Negotiable Instrument Act. The omission to convict the company is merely an irregularity which does

not go to the root of the jurisdiction or the merits of the case against the appellant and did not occasion failure of justice.

Concerning the sentence, reference may be placed to the decision passed in *Aman Ullah Vs. State*, reported in 73 DLR (2021) 541, wherein this Court observed that in cases instituted under Section 138 of the Negotiable Instruments Act, imposition of a sentence of imprisonment would be harsh, having no penal objective to be achieved.

The record shows that the accused-appellant has already deposited Taka 10,50,000/- (Ten lac fifty thousand) with the trial Court before filing this appeal.

Considering the compensatory nature of proceedings under Section 138 of the Negotiable Instruments Act, the partial deposit already made by the appellant, and the facts and circumstances of the case, I am of the view that the ends of justice would be sufficiently met by maintaining the sentence of fine equivalent to the cheque amount while setting aside the substantive sentence of imprisonment.

The learned Advocate for the appellant submits that the complainant has not yet executed and registered the sale deed,

so he is unable to realize money from the purchasers of the flats constructed in the demised property of the complainant. For this reason, the appellant is in financial hardship, and due to financial hardship, it is not possible to pay the balance amount within a short period and as such, he prays for 03(three) months to pay the balance amount. The learned Advocate for the complainant agreed to the proposal made by the learned Advocate for the appellant. So, the ends of justice would be best served if this Court allows the appellant to pay the remaining amount within 03(three) months.

In view of the foregoing discussions, together with the decision and the *ratio* laid down in the above-mentioned reported case, the appeal is dismissed with the following order:

The conviction of the appellant under Section 138 of the Act, 1881 is upheld; however, the sentence of 01(one) year simple imprisonment is set aside. The sentence of fine of Taka 21,00,000/- (Twenty-one lac) is upheld. It appears that the convict-appellant has already deposited Taka 10,50,000/- (Ten lac fifty thousand) before the trial Court before filing the appeal. So, the trial Court is directed to disburse the deposited

money to the complainant-respondent No. 1 forthwith upon proper identification. The convict-appellant is directed to pay the remaining balance of the dishonoured cheque amounting to Taka 10,50,000/- (Ten lac fifty thousand) to the complainant-respondent No. 1 through the trial Court within 03(three) months from the date of receipt of this judgment, in default, he shall suffer simple imprisonment for 01(one) month. If the convict-appellant does not pay the remaining portion of the fine as ordered or opts to serve out the period of imprisonment instead of payment of fine, he is not exempted from paying the same. In that event, the Court concerned shall impose the fine under the provisions of Section 386 of the Code of Criminal Procedure.

In the result, the Appeal is dismissed with modification of the sentence of imprisonment and with directions as made above. The convict-appellant is released from his bail bond.

Let a copy of this judgment, along with the lower Court's records (LCR), be communicated to the Court concerned forthwith.

(Md. Bashir Ullah, J)