

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 2009 of 2022

Md. Faruque Azam Shobhan

...Appellant

-Versus-

The State and another

...Respondents

Mr. Khandoker Anisur Rahman, Advocate

...For the appellant

Mr. Jamil Ahammad, Advocate

...For the complainant-respondent No. 2

Heard on 03.01.2024 and 04.03.2024

Judgment delivered on 19.03.2024

This appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the judgment and order of conviction and sentence dated 18.10.2018 passed by Additional Metropolitan Sessions Judge, Court No. 5, Dhaka in Metropolitan Session Case No. 12223 of 2016 arising out of C.R. Case No. 786 of 2015 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 1(one) month and a fine of Tk. 7,00,000 (seven lakh).

The prosecution case, in short, is that the accused Md. Faruque Azam Shobhan issued Cheque No. IBQ-3159562 on 15.08.2015 for payment of Tk. 25,00,000 (twenty-five lakh) drawn on his Account No. 20502090100313308 maintained with Islami Bank Ltd, Shyamoli Branch, Dhaka in favour of the complainant Abu Ahammad Asadullah. The complainant presented the cheque on 16.08.2015 for encashment which was dishonoured on the same date with the remark 'insufficient funds'. The complainant issued a legal notice on 26.08.2015 through registered post with AD upon the accused for payment of the cheque amount. He received the notice on 04.09.2015 but he did not pay the cheque amount. Consequently, he filed the case on 28.10.2015.

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. After that the case was sent to the Additional Metropolitan Sessions Judge, Court No. 5, Dhaka for trial and the case was renumbered as Metro Sessions Case No. 12223 of 2016.

During the trial, charge was framed on 08.03.2017 against the accused under Section 138 of the Negotiable Instruments Act, 1881. The prosecution examined 1(one) witness to prove the charge against the accused. The defence did not cross-examine P.W. 1. 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 Abu Ahammad Asadullah is the complainant. He stated that the accused Md. Faruque Azam Shobhan took loan of Tk. 25,00,000(twenty five lakh) from him. He issued Cheque No. 3159562 drawn on Islami Bank Bangladesh Limited, Shyamoli Branch, Dhaka on 15.08.2015 for payment of Tk. 25,00,000(twenty five lakh) in his favour. He presented the cheque on 16.08.2015 but the cheque was dishonoured on the same date. He issued the legal notice on 26.08.2015 through registered post. The accused received the said notice on 04.09.2015 but the accused did not pay the cheque amount. Consequently, he filed the case on 28.10.2015. P.W. 1 proved the disputed cheque as exhibit 1, the dishonour slip as exhibit 2, the postal receipt as exhibit 3, legal notice as exhibit 4 and the acknowledgement as exhibit 5. During cross-examination, he admitted that the accused was known to him for the last one and a half/two years. He had no business transaction with the accused. He could not say the exact date of taking the loan. However, he stated that from May, 2014-February 2015, he received the money. The accused wrote the cheque. On recall, P.W. 1 stated that after filing the case, the accused paid total Tk. 18,00,000 and Tk. 7,00,000 is now due.

During the trial, charge was framed on 08.03.2017 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 the law. The prosecution examined 1(one) witness to prove the charge against the accused. After examination of the prosecution witness, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he pleaded not guilty to the charge and declined to adduce any D.W.

Learned Advocate Mr. Khandoker Anisur Rahman appearing on behalf of the appellant submits that both the appellant and the complainant-respondent No. 2 settled the dispute out of Court and the appellant paid the entire cheque amount to the complainant. He prayed for allowing the appeal.

Learned Advocate Mr. Jamil Ahammad appearing on behalf of the complainant-respondent No. 2 submits that the accused issued the cheque for payment of Tk. 25,00,000(twenty-five lakh) on 15.08.2015 and the same was dishonoured due to insufficient funds and after complying with all the procedures provided in Section 138 of the Negotiable Instruments Act, 1881, the complainant filed the complaint petition and P.W. 1 proved the charge against the accused beyond all reasonable doubt. He admitted that he received the entire cheque amount total Tk. 25,00,000(twenty five lakh) from the appellant.

I have considered the submission of the learned Advocate Mr. Khandoker Anisur Rahman who appeared on behalf of the appellant and the learned Advocate Mr. Jamil Ahammad who appeared on behalf of 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 both the complainant-respondent and the appellant filed an affidavit of compromise on 18.03.2024 stating that the complainant received the entire cheque amount. The Negotiable Instruments Act, 1881 is a special law and the

offence under Section 138 of the Negotiable Instruments Act, 1881 is not compoundable. After filing a complaint petition under Section 138 of the Negotiable Instruments Act, 1881 the Court shall dispose of the case on merit. There is no scope to settle the dispute out of Court and this Court is not legally empowered to accept the compromise made between the parties.

On perusal of the records, it appears that the accused issued cheque No. IBQ-3159562 dated 15.08.2015 (exhibit-1) in favour of the complainant for payment of Tk. 25,00,000 (twenty five lakh). During the trial, the accused was absconding and he did not cross-examine the prosecution witness. The evidence of P.W. 1 as regards the issuance of the cheque (exhibit 1) remained uncontroverted by the defence. By filing the joint application for compromise the accused also admitted that he paid the entire cheque amount.

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.

Considering the gravity of the offence, 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 Md. Faruque Azam Shobhan is found guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and he is sentenced thereunder to pay a fine of Tk. 25,00,000(twenty five lakh).

Since the complainant by filing an affidavit admitted that he received the entire cheque amount from the accused, the fine imposed by this Court is not required to be deposited by the appellant again before the trial Court.

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

Send down the lower Court's records at once.