

**Present:**

Mr. Justice Md. Shohrowardi

**Criminal Revision No. 1958 of 2022**

Abdul Jabber Miah

...Complainant-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Md. Motaher Hossain (Sazu), Advocate with

Mr. Syed Md. Zahangir Hossain, Advocate

...For the Complainant-petitioner

Mr. Md. Ekramul Hoque Tutul, Advocate with

Mr. Sk. Sharif Uddin, Advocate

...For the opposite party No. 2

Heard on 26.07.2023, 27.07.2023, 01.08.2023 and  
02.08.2023**Judgment delivered on 17.08.2023**

This Rule under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 was issued calling upon the opposite parties to show cause as to why the judgment and order of conviction and sentence dated 29.05.2022 passed by the Sessions Judge, Barishal in Criminal Appeal No. 5 of 2020 reversing those dated 28.10.2019 passed by the Joint Sessions Judge, Court No. 4, Barishal in Sessions. Case No. 97 of 2018 arising out of C.R. Case No. 882 of 2017 convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 1(one) year and fine of Tk. 46, 50,000 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution cases, in short, are that the petitioner Abdul Jabbar and opposite party No. 2 Md. Shafiqur Rahman are cousin and businessman. On 25.01.2017 the accused took loan of Tk. 46,55,000 from the complainant to pay the same within the next 3 months. After that, on 20.04.2017 the accused issued Cheque No. IBI-1333301 dated 24.04.2017 for payment of Tk. 12,80,000 and Cheque No. IBI-1334042 dated 15.06.2017 for payment of Tk. 33,75,000 drawn on Islami Bank Bangladesh Limited, Hatkhola Chawkbazar Branch, Barishal in favour of

the complainant-opposite party and requested him to deposit the cheques after 5 months. On 20.09.2017, the complainant presented those cheques to One Bank Limited, Barishal Branch for encashment and the said bank sent those cheques for clearing to Islami Bank Bangladesh Limited, Hatkhola Chawkbazar Branch, Barishal but the said cheques were dishonoured on 24.09.2017 with a remark “payment stopped by drawer” which has been reported to the complainant on 24.09.2017. On the same date i.e 24.09.2017 while the complainant was returning from Islami Bank Bangladesh Limited, Hatkhola Branch at 5.45 pm by order of the accused, his son Arifur Rahman along with unknown 2/3 persons attacked the complainant and by beating, said Arifur Rahman snatched away said cheques and the dishonour slip. Although the envelope was torn, the token of those cheques remained in the hand of the complainant. On the same date, the complainant lodged a GD entry with Kotwali Model Thana which was registered as GD No. 1515 dated 24.09.2017. On the next, the complainant informed the matter in writing to the Manager, One Bank Limited, Barishal Branch and the manager of the said branch requested the Islami Bank Limited, Hatkhola Chawkbazar Branch, Barishal to issue a duplicate copy of the dishonour slip and subsequently, the said branch issued the duplicate dishonour slip and informed the matter to the Manager, One Bank Limited, Barishal Branch. Thereafter, the complainant issued a legal notice on 27.09.2017 through registered post with A/D to pay the cheque amount within 30 days and the notice was also received on 28.09.2017 but he did not pay the cheque amount.

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 against the accused under Section 138 of the Negotiable Instruments Act, 1881. Thereafter, the accused surrendered before the Court and obtained bail. After that, the case was sent to the Sessions Judge, Barishal and the learned Sessions Judge, Barishal was pleased to send the case to the Joint Sessions Judge, Court No. 4, Barishal for trial. During the trial, charge was framed against the accused on 05.04.2018 under Section 138 of the

Negotiable Instruments Act, 1881. During the trial, the complainant examined 3 witnesses. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and the defence also examined 3 D.Ws. P.W. 1 is the complainant and the accused was examined as D.W. 3.

After concluding the trial, the learned trial Court by judgment and order dated 28.10.2019 convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 1(one) year and a fine of Tk. 46,50,000 against which the accused preferred Criminal Appeal No. 5 of 2020 to the Sessions Judge, Barishal and on transfer, the appeal was heard by the Joint Sessions Judge, Court No. 4, Barishal and the appellate Court below by impugned judgment and order allowed the appeal by setting aside the judgment and order of conviction passed by the trial Court against which the complainant obtained the instant |Rule.

P.W. 1 Abdul Jabbar is the complainant. He stated that the accused Md. Safiqur Rahman obtained loan of Tk. 46,55,000 for business purposes from him. The accused Safiqur Rahman is his paternal cousin. On-demand by the complainant, the accused issued two cheques on 24.04.2017 and 15.06.2017 for payment of Tk. 12,80,000 and Tk. 33,75,000 respectively drawn on Islami Bank Limited, Chawkbazar Branch. He presented the cheque to One Bank Limited, Barishal Branch for encashment which was dishonoured with a remark “payment stopped by drawer.” Keeping those cheques in the envelope on 24.09.2017 at 5.45 pm while the informant came out from the bank, Arifur Rahman, son of the accused along with 2/3 other unknown persons, snatched away the dishonour slip and somehow he rescued himself but the counterpart of the two cheques remained in his hand for which he lodged a GD entry on 24.09.2017 with Kotwali Police Station being GD No. 1515. Thereafter, Islami Bank Limited issued a duplicate dishonoured slip and informed the matter to One Bank Limited. On 27.09.2017, the informant issued legal notice but the accused did not pay the cheque amount. Consequently, he filed the case on 01.11.2017. He proved the complaint petition as exhibit 1 and his signature as exhibit 1/1.

He proved the dishonour slip as exhibit 2. The counterpart of the torn cheque as exhibit 3, duplicate dishonour slips as exhibit 4 series, legal notice as exhibit 5, the letter of acknowledgement as exhibit 6, postal receipt as exhibit 7 and a copy of the GD as exhibit 8. During cross-examination, he stated that both the cheques were bearer cheques, not account payees and the deposit slips were produced in Court. It took 15 minutes to go to One Bank, Sadar Road from Islami Bank, Chawkbazar Branch and the cheques were snatched away out of the collapsible gate. He denied the suggestion that during the inquiry, the police did not find the truth of the allegation made in the GD entry and there is no original of the cheque with him and the torn part of the cheques had been produced and no case has been filed against the son of the accused. He also denied the suggestion that the accused did not issue any cheque in his favour. He denied the suggestion that he filed the case to harass the accused.

P.W. 2 Md. Zahirul Islam is the Senior Officer of One Bank Limited, Barishal Branch, Barishal. He stated that he deposed on behalf of the Manager, One Bank Barishal. The complainant presented two cheques on 20.9.2017 for payment of Tk. 46,55,000. By forwarding, the cheques were sent to the Islami Bank, Hatkhola Branch and those cheques were handed over to the complainant who informed that those cheques had been lost. Thereafter, the Islami Bank communicated the One Bank and the informant showed the copy of the GD entry. Subsequently, the Islami Bank issued two duplicate dishonour slips on 24.09.2017. During cross-examination, he stated that the informant signed the register and took the cheques to deposit those cheques to Islami Bank and he is responsible for the cheques. The manner of losing the cheques has been mentioned in the GD entry. He denied the suggestion that the complainant did not present the cheques to One Bank Limited.

P.W. 3 Abu Zafar Khan is the Manager of Islami Bank Limited, Hatkhola Branch, Barishal. He stated that on 24.09.2017 One Bank Limited, Barishal Branch sent two cheques for collection to Islami Bank Limited, Hatkhola Branch which was deposited in his branch. On 24.09.2017, the said cheques were dishonoured with a remark “stopped

payment by the drawer.” On 25.09.2017 One Bank informed that the dishonour slip had been lost and wanted to know the confirmation regarding the dishonour slip and requested to issue the duplicate dishonour slip. On that day, the bank issued a duplicate dishonour slip. During cross-examination, he stated that One Bank by issuing a letter informed the Islami bank that the complainant lost the dishonour slip. Two cheques were dishonoured for ‘stop payment’. The Islami Bank Limited is situated in a crowded area. He denied the suggestion that the bank has no authority to issue the duplicate dishonour slip. He denied the suggestion that the complainant did not deposit the cheque.

D.W. 1 Md. Mushfiqur Rahman is the Manager (Operation) of Islami Bank Limited, Hatkhola Chawkbazar Branch. He stated that the accused Shafiqur Rahman is a businessman. He was posted at Islami Bank Bangladesh Limited, Hatkhola Chawkbazar Branch and the accused maintained an account at that branch. The accused lodged a GD entry stating that four cheques had been lost for which payment of four cheques was cancelled and stopped the payment. On 24.09.2017, none stated that the cheques were lost or torn. The dishonour slip submitted by the complainant was issued by the Islami Bank Bangladesh Limited, Hatkhola Chawkbazar Branch, Barishal. The dishonour slips have been issued on the grounds of ‘payment stopped by drawer’. On the next day, One Bank issued a letter stating that cheques had been lost. Since the request was sent for issuance of the duplicate dishonour slip, the dishonoured slip was issued to One Bank. He heard that the son of the accused snatched away cheques keeping the torn part of the cheque. The complainant has shown a copy of the GD entry.

D.W. 2 Md. Nasir Uddin is the Security Guard of Islami Bank Bangladesh Limited, Hatkhola Chawkbazar Branch. He stated that on 15.06.2017 he was posted at Islami Bank Limited, Hatkhola Branch, Barishal. He saw nothing. During cross-examination, he stated that he discharged duty standing inside the gate. On 24.09.2017, the complainant came and again he went out of the bank. He could not see anything which

has been stated to the officer of the bank. He heard that the cheques had been lost.

D.W. 3 Md. Safiqur Rahman (Sufian) is the accused and paternal cousin of the complainant. He stated that he is a businessman. He maintained the Current Account No. 59 with Islami Bank Bangladesh Limited, Chawkbazar Branch, Barishal. On 10.09.2017 while he examined the statement of his account along with the accounts of his business, he saw that the four cheques had been lost along with the counterpart. Thereafter, he went to the bank and after inquiry, it was found that those cheques were not used. Thereafter, on 19.09.2017 at 5.00 pm, he lodged a GD entry with Kotwali Model Thana regarding the four cheques and after lodging the GD entry, the original copy was deposited to the bank for stopped payment. He proved the attested copy of the GD entry as exhibit Ka. He proved the attested copy of the information dated 11.09.2017 as regards the two cheques issued by the drawer as exhibit Kha series. He produced a copy of the Cheque Referred & Returned Register dated 24.09.2017, Islami Bank Bangladesh Limited, Hatkhola Chawkbazar Branch, Barishal. He proved the statement of account from 31.12.2014 to 28.12.2015 as exhibit Ga. He proved the legal notice dated 27.09.2017 issued by the complainant as exhibit Gha. After receipt of the legal notice, he had given a reply to the show cause notice. He proved the show cause notice as exhibit Uma. He claimed that he had no business transaction with the complainant and he also did not take loan from the complainant. He did not issue any cheque in favour of the complainant. As a paternal cousin, he used to come to his shop and sit. He also claimed that for business purposes, he used to go outside the Barishal after signing the cheques. He stated that using the tokens of the lost cheques, the complainant filed the case.

The learned Advocate Mr. Md. Motaher Hossain (Sazu) appearing along with learned Advocate Mr. Syed Md. Zahangir Hossain on behalf of the complainant-petitioner submits that the accused issued two cheques No. IBI-1333301 dated 24.04.2017 and Cheque No. IBI-1334042 dated 15.06.2017 for payment of Tk. 12,80,000 and 33,75,000 respectively in

favour of the complainant and the complainant presented those cheques on 20.09.2017 for encashment through the One Bank Limited, Hatkhola Branch, Barishal which were dishonoured on 24.09.2017 by the Islami Bank Bangladesh Limited, Hatkhola Chawkbazar Branch, Barishal with a remark 'payment stopped by drawer' and the said bank informed the matter in writing on 24.09.2017 to the complainant. Thereafter, he issued a legal notice on 27.09.2017 to the accused for payment of the cheque amount but he did not pay the cheque amount. He further submits that on 24.09.2017 at 5.45 pm while the complainant was returning along with the dishonour slip, the son of the accused, Arifur Rahman, along with 2/3 other unknown persons snatched away the cheque from outside the gate of the bank and he lodged a GD entry on the same day as regards the incident. The prosecution witnesses proved the charge against the accused beyond all reasonable doubt by adducing documentary evidence but the appellate Court below illegally set aside the judgment and order passed by the trial Court.

The learned Advocate Mr. Md. Ekramul Hoque Tutul appearing along with learned Advocate Mr. Sk. Sharif Uddin on behalf of the opposite party No. 2 submits that the accused is a businessman and the complainant failed to prove that the accused took a loan amounting to Tk. 46,55,000 from the complainant and before presenting the cheques on 20.09.2017, the accused lodged a GD entry on 19.09.2017 stating that the four cheques along with the counterpart of the disputed cheques had been lost and the accused did not issue any cheque in favour of the complainant and the case has been filed without producing the original of the disputed cheques. He further submits that after the alleged incident of snatching away the two cheques by the son of the accused, the complainant did not inform the matter to Manager, Islami Bank Ltd, Chawkbazar Hatkhola Branch, Barishal, although those cheques were allegedly snatched away from outside the collapsible gate of the Islami Bank Limited, Chawkbazar Hatkhola Branch, Barishal. The complainant failed to prove the charge under Section 138 of the Negotiable Instruments Act, 1881 against the accused and the appellate Court below on proper assessment and

evaluation of the evidence legally set aside the judgment and order of conviction and sentence illegally passed by the trial Court. Therefore, he prayed for discharging the Rule.

I have considered the submission of the learned Advocates of both parties, perused evidence, the impugned judgments and orders passed by the Courts below and the records.

On perusal of the records, it appears that the P.W. 1 stated that the accused issued cheque No. IBI-1333301 dated 24.04.2017 for payment of Tk. 12,80,000 and cheque No. IBI 1334042 dated 15.06.2017 for payment of Tk. 33,75,000, total Tk. 46,55,000. In the complaint petition, it has been alleged that the accused sitting in his shop at Hazi Traders on 20.04.2017 issued said Cheques and requested the complainant to deposit those cheques after 5 months. P.W. 1 stated that the accused issued the said cheques on 24.04.2017 and 15.06.2017. There is a discrepancy in the statement made in the complaint petition and the evidence of P.W. 1 as regards the date of first delivery of two cheques.

In the complaint petition, it has been alleged that while Md. Arifur Rahman, son of the accused, snatched away two cheques kept in the envelope, the complainant somehow kept one part of the torn cheques. The complaint did not prove the counterpart of the torn envelope. No explanation has been given by the complaint as to how the torn counterpart of the two cheques came into his hand without the torn part of the envelope. There is no scope to keep the torn part of the counterpart of the disputed cheques unless the torn part of the envelope is kept in the hand of the complainant. None of the bank officials of the Islami Bank Limited, Hatkhola Chawkbazar Branch, Barishal was examined to prove the snatching away of the cheques by the son of the accused. No statement has been made in the complaint petition that immediately after the occurrence of snatching away the cheques, he informed the matter to manager or any bank officials of the Islami Bank Limited, Hatkhola Chawkbazar Branch, Barishal from where the cheques allegedly snatched away by the son of the accused. Furthermore, D.W. 2 Md. Nasir Uddin, the security guard of the Islami Bank Bangladesh Limited, Hatkhola



Chawkbazar Branch, Barishal stated that on 24.09.2017 he was on duty, he did not see anything. D.W. 2 is the competent witness to prove the alleged snatching away of the cheque by the son of the accused. D.W. 1 Md. Musfiqur Rahman, Manager (Operation), Islami Bank Limited, Hatkhola Chawkbazar Branch stated that on 24.09.2017 none stated that the cheques had been lost or torn. The cheques were snatched away from the outside of the Islami Bank Ltd, Hatkhola Chawkbazar Branch, Barishal. No explanation has been given by complainant P.W. 1 as to why he did not inform the matter to manager or any officers of said Branch. Neither any officer of the Islami Bank Ltd nor any guard of the said Branch was examined by the prosecution. In view of the above evidence, I am of the view that the complainant failed to prove that on 24.09.2017 at 5.45 pm Arifur Rahman, son of the accused, snatched away the disputed cheques from the complainant from out side the Islami bank, Hatkhola Chawkbazar Branch, Barishal.

It is found that the alleged cheques were dishonoured on 24.09.2017 and before the dishonour of cheque on the ground “payment stopped by drawer”, the accused lodged a GD entry on 19.09.2017 (as exhibit Ka) stating that on 10.09.2017 while he examined the statement of account maintained in the name of his business establishment namely Hazi Traders, he found that there is no information about the use of Cheque Nos. 9362880, 9945567, 1333301, 1334042 and the counterpart of those cheques are also not available with the counterpart of the chequebook. On perusal of the statement of account No. 20503180100005913 maintained in the name of M/S Hazi Traders (exhibit Ga, four pages) it reveals that by Cheque No. I IBL-1333302 Tk. 15,000 was withdrawn on 02.07.2015 and by Cheque No. IBL-1334043 Tk. 25,000 was withdrawn on 13.10.2015 in cash and the disputed cheques Nos. IBI-1333301 and IBI-1334042 are previous cheques of cheque Nos. IBL-1333302 and IBL-1334043 which were issued on 02.07.2015 and 13.10.2015 for withdrawal of money in cash. There was no reason for keeping the disputed cheques unused for a long time by the accused. Therefore, the accused rightly stated in the GD

entry (exhibit Ka) that the alleged two cheques including two other cheques had been lost.

In the case of A.H. Ershadul Haque, Advocate Vs. The State and another made in Criminal Appeal No. 1144 of 2021, judgment dated 06.02.2023 (Md. Shohrwardi J) it has been held that

“The presumption under Section 118(a) of the Negotiable Instruments Act, 1881 is always rebuttable and the standard of proof of doing so is that of the preponderance of probabilities. The accused either adducing evidence or by cross-examining the PWs are entitled to rebut the said presumption. The accused is not bound to prove his innocence by adducing evidence. A negative fact cannot be proved by adducing positive evidence. The issue as to whether the presumption stood rebutted or not must be determined based on the evidence adduced by the parties. In a case under Section 138, the false implication cannot be ruled out. Therefore, the Court shall not put on a blind eye to the ground realities. In that case, the background of the case and the conduct of the parties are required to be taken into consideration. No explanation has been given by the complainant as to why no instrument was executed between the parties although handsome money was claimed to have been paid to the appellant.”

There is a presumption under Section 118(a) of the Negotiable Instruments Act, 1881 that the drawer of the cheque issued the cheque for payment of the consideration but the presumption under Section 118(a) of the said Act is not the conclusive proof of the fact that the accused issued the cheque for consideration. The Court cannot ignore the ground reality. In the instant case, the accused himself was examined as D.W. 3 and deposed that he did not issue any cheque in favour of the complainant and on 19.09.2017 he also lodged a GD entry before alleged dishonour of cheque dated 20.09.2017 stating that the alleged cheques along with two other cheques had been lost along with the counterpart of the cheques. In a

case under Section 138 of the Negotiable Instruments Act, 1881 the accused is not bound to prove the defence case by adducing legal evidence but he is bound to prove the fact under which circumstances, the disputed cheques came into possession of the accused. In the instant case, the accused has given a reasonable explanation as regards the missing of the disputed cheques and rebutted the presumption under Section 118(a) of the Negotiable Instruments Act, 1881. On the other hand, the complainant failed to prove that Arifur Rahman, the son of the accused snatched away the disputed cheques on 24.09.2017 at 5.45 pm when he came out from the Islami Bank Limited, Hatkhola Chawkbazar Branch, Barishal after dishonour of the cheques.

The proposition 'proved' has been defined in Section 3 of the Evidence Act, 1872. Section 3 of the Evidence Act, 1872 states that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

The appellate Court below set aside the judgment and order of conviction and sentence passed by the trial Court on the findings that the complainant failed to produce the original cheques and no criminal case was filed under Section 386 of the Penal Code, 1860 against the son of the accused regarding the snatching away of the cheques and that no document was produced as regards taking loan by the accused from the complainant and the complainant also did not prove the return to show that he paid money to the accused and that Tk. 15,000 was withdrawn by cheque No. IBL-1333302 on 02.07.2015 and Tk. 25,000 by cheque No. IBL-1334043 on 13.10.2015 and disputed cheques Nos. 1333301 and 134042 were issued on 24.04.2017 and 15.06.2017 respectively. The disputed cheques ought to have been issued in 2015.

In the complaint petition, it has been stated that the accused obtained loan of Tk. 46,55,000 on 25.01.2017 for the business of the accused. During the trial, no evidence was adduced by the complaint to prove the disbursement of a handsome loan amounting to Tk. 46,55,000 to

the accused. In the complaint petition, it has been stated that the accused issued the disputed cheques sitting at his shop at Hazi Traders on 20.04.2017 but while he was examined as P.W. 1, he did not say that the cheques were issued on 20.04.2017. Rather, he stated that two cheques were issued on 24.04.2017 and 15.06.2017. Therefore, the statement made in the complaint petition to the effect that the accused issued two cheques on 20.04.2017 sitting in his shop at Hazi Traders was not proved beyond all reasonable doubt.

The accused Md. Shafiqur Rahman is examined as D.W. 3 in the case. He stated that on 10.09.2017 he found that four cheques were missing along with the counterpart of the cheque and informed the bank that the four cheques were not used and on 19.09.2017 at 5.00 pm he also lodged a GD entry No. 557. The GD entry was proved as exhibit Ka. There is no transaction between the accused and the complainant and he also did not issue any cheque in favour of the complainant. As a cousin, the complainant used to come to his house and due to business purposes, he used to go outside Barishal after signing the cheques and using the counterpart of the lost cheques, the complainant filed the case against him. During the trial, the complainant did not cross-examine D.W. 3 as regards the above statement made regarding the missing of the four cheques. Therefore, the evidence of D.W. 3 remains uncontroverted by the complainant.

Considering the facts and circumstances of the case and the evidence of both parties in juxtaposition, I am of the view that the complainant failed to prove that the accused issued the disputed cheques Nos. IBI-1333301 dated 24.04.2017 for payment of Tk. 12,80,000 and the Cheque No. IBI-1334042 dated 15.06.2017 for payment of Tk. 33,75,000 in favour of the complainant. The trial Court failed to consider, assess, and evaluate the evidence of the parties in its true perspective.

In view of the above evidence, observations, findings, reasoning and the proposition, I find no merit in the Rule.

In the result, the Rule is discharged.

However, there will be no order as to costs.

The accused is entitled to get back the 50% of the cheque amount deposited by him before filing the appeal.

Send down the lower Court's records at once.