

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

**Present:**

**Mr. Justice Md. Shohrowardi**

**Criminal Revision No. 1349 of 2022**

**Md. Mojibul Hoque**

**.....Convict Petitioner**

**-versus-**

**The State**

**.....Opposite Party**

Mr. Md. Shah Alam, Advocate

.... For the convict petitioner

Mr.Md. Shahidul Islam, AAG with

Mrs. Sharmin Hamid, AAG

....For the State

Mr. Md. Firoj Kabir, Advocate

.....For the Opposite party No.2

**Heard on 25.11.2024, 28.11.2024**

**Judgment delivered on 02.12.2024.**

On an application under section 439 read with section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order of conviction and sentence date 6.02.2022 passed by Sessions Judge, Chandpur in Criminal Appeal No. 123 of 2019 affirming the judgment and order of conviction and sentence dated 16.4.2019 passed by Senior Judicial Magistrate, Court No. 3, Chandpur in CR Case No. 2 of 2014 (Hajigonj) convicting the petitioner under section 406 of the Penal Code, 1860 and sentencing him to suffer rigorous imprisonment for 06 (six) months and fine of Tk. 2,000, in default, to suffer

imprisonment for 01(one) month 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 case, in short, is that the complainant Md. Jahangir Alam and accused Md. Mojibul Hoque is a resident of the same locality. The accused had given a proposal to the complainant to supply the sand, stones and bricks for the construction of his house. The complainant bonafide agreed to purchase those materials from the accused who demanded advance payment. The complainant believed that the accused would supply those materials and he paid Tk. 1,50,00 by Cheque No. 30 dated 24.07.2012, Tk. 1,00,000 by Cheque No. 65 dated 07.01.2013, Tk. 50,000 by Cheque No. 95 dated 05.02.2013, Tk. 15,000 by Cheque No. 101 dated 07.02.2013 and Tk. 50,000 by Cheque No. 103 dated 11.02.2013 drawn on Bank Asia, Hajigonj Bazar Branch. The complainant also paid Tk. 70,000 in cash on 10.02.2013 to the accused and the accused had given an undertaking to supply the materials within one month. After the expiry of the said period, he did not supply the materials. When the complainant demanded to supply the materials on the different pretext, he cheated the complainant. The accused issued 04 cheques, on 01.08.2013 for Tk. 100,000, on 07.08.2013 for Tk. 100,000, on 13.08.2013 for Tk. 125,000 and on 20.08.2013 for Tk. 110,000 drawn on his Account No. 1349 maintained with Islami Bank Bangladesh Ltd, Hajigonj Branch. The complainant bonafide accepted those cheques and presented those cheques thrice for encashment but those cheques were returned unpaid. After that, he sent a legal notice through the learned Advocate for payment of the said amount but without paying the said amount, he committed the cheating. On 28.11.2013 at 10.00 am a shalish took place in the biti hut of the accused and in that shalish, the accused and the witnesses were present. In that shalish, he refused to repay the Tk. 435,000 received by him to supply the bricks, sand and stones and thereby he committed criminal breach of trust.

At the time of filing the complaint petition on 02.01.2014, the Senior Judicial Magistrate, Hajigonj, Chandpur was pleased to take cognizance of the offence against the accused under sections 406/420 of the Penal Code, 1860.

After that, the case was sent to the Senior Judicial Magistrate, Court No. 3, Chandpur for trial and disposal of the case. During the trial, charge was framed against the accused under section 406 of the Penal Code, 1860 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 03 witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and the defence examined one DW. After concluding the trial, the Senior Judicial Magistrate, Court No. 3, Chandpur by impugned judgment and order dated 16.04.2019 was pleased to convict the accused under section 406 of the Penal Code, 1860 and sentenced him thereunder to suffer rigorous imprisonment for 6(six) months and fine of Tk. 2000, in default, to suffer imprisonment for one month against which the convict petitioner filed Criminal Appeal No. 123 of 2019 before the Sessions Judge, Chandpur who by impugned judgment and order affirmed the judgment and order of conviction and sentence passed by the trial court against which the convict petitioner obtained the Rule.

P.W. 1 Md. Jahangir Alam is the complainant. He stated that the accused had given a proposal to supply the bricks, sand and stone for the construction of his house and he paid total Tk. 435,000 by 05 cheques on different dates from 24.07.2012 to 11.02.2013 and in cash. He did not supply the materials as stated by him. After that, the accused issued 04 cheques drawn on his account maintained with Islami Bank Bangladesh Ltd for payment of Tk. 435,000 and the complainant bonafide received those cheques. When he presented said cheques, those were dishonoured. He served legal notice to the accused. Thereafter, a shalish took place on 28.11.2013 at 10.00 am and the accused refused to pay the money and committed cheating. P.W. 1 proved the complaint petition as exhibit-1 and his signature as exhibit-1/1, 4 cheques being Nos. 7552802-05 as exhibit-2 series, dishonoured slips as exhibit-3 series. He also produced a copy of the legal notice. He denied the suggestion that he and accused are the business partners. He denied the suggestion that he

took money for business purposes. He deals with the mobile and shoe business. He denied the suggestion that he and the accused deal with the sand business. He denied the suggestion that he paid money to the accused to bring a dredger machine or he did not pay the money to supply the brick, sand and stone. He affirmed that on 24.09.2012 he issued cheques for Tk. 150,000, on 07.01.2013 for Tk. 100,000, on 05.02.2013 for Tk. 50,000, on 07.02.2013 for Tk. 15,000 and on 10.02.2013 Tk. 70,000. He paid Tk. 70,000 in cash. On 11.02.2013 the accused received two cheques for Tk. 50,000 sitting in his shop. He denied the suggestion that he did not pay any money in cash to the accused or he paid Tk. 70,000 to supply the dredger machine. He denied the suggestion that a decision was taken for payment of Tk. 200,000. He denied the suggestion that Tk. 50,000 was paid to the accused through the learned Advocate Mr Ahsan or he agreed to pay the remaining amount in instalments. He affirmed that the accused issued total 04 cheques in his favour. In the legal notice, it might have been written that the money was paid for sand business with the accused. He denied the suggestion that he deal with the sand business with the accused.

P.W. 2 Lutfor Rahman stated that the accused and the complainant were known to him. The accused received total Tk. 4,35,000 in cash and by cheque from the complainant from 24.07.2012 to 11.02.2013 to supply the brick, sand and stone but he did not supply those materials. Subsequently, he issued a cheque for payment of the said amount which was dishonoured for insufficient funds and a legal notice was sent to the accused. He did not pay the money. On 28.11.2013 a shalish took place and the accused refused to pay the money. He committed cheating and misappropriated the amount received from the complainant. During cross-examination, he stated that he deals with the land business. He denied the suggestion that the complainant also deals with the land business with him. The complainant deals with the shoe business. At the time of payment of money, he was present in his shop. On 24.07.2012 Tk. 150,000 was paid by cheque. He heard that other cheques were also issued by the complainant in favour of the accused. He is not aware whether a shalish took place on 28.11.2013 in the house of the complainant and the many

respective locals were present there. The accused undertook to pay the money through cheque but he did not pay the cheque amount. Subsequently, a shalish took place. He is not aware whether the accused paid Tk. 50,000 through the learned Advocate. He denied the suggestion that the accused received the money from the complainant for business purposes.

P.W. 3 Md. Mostafa Miazi stated that the complainant Md. Jahangir Alam and accused Md. Mujibul Haque are resident of the same locality. The accused used to deal with the business of bricks, sand and cement. The accused received Tk. 430,000 from the complainant to supply the materials for the construction of the building. A shalish took place on 08.01.2013 and subsequently on 01.08.2013. At that time, the accused issued 4 cheques drawn on Islami Bank Ltd but those cheques were dishonoured for insufficient funds. After waiting many days, he filed the case. During cross-examination, he stated that the accused received money through the Bank Asia. Initially, he received Tk. 150,000, the second time he received Tk. 100,000, the third time he received Tk. 50,000 and 4<sup>th</sup> time he received Tk. 100,000. He could not remember the date of the transaction. The money was not paid in his presence but the first cheque for Tk. 150,000 was handed over in his presence. The complainant deals with the mobile business and he also deals with the land business. He denied the suggestion that the accused and the complainant used to deal with the sand business. He affirmed that he is the Secretary of the bazaar committee. Father of the accused was the President of the Bazaar Committee. He deals with the electronic business. He denied the suggestion that the accused did not receive any money to supply the bricks, sand and stone or that the accused received the money to supply a dredger machine.

D.W. 1 Anowar Hossen stated that the complainant and the accused are known to him. The accused received money for the sand business. The owner of the dredger machine did not supply the machine for which excavation was stopped. He knows that the complainant issued the legal notice to the accused. At the time of handing over the money, he was not present. He is not aware whether the accused supplies rods and cement to the accused.

The learned Advocate Mr. Md. Shah Alam appearing on behalf of the convict petitioner submits that the complainant and the convict petitioner are residents of the same locality and both of them deal with the supply business of the sand. The accused received money from the complainant to supply a dredger machine for the excavation of the sands. However, the owner of the dredger machine did not supply the dredger machine for which he suffered a loss and the dispute between the accused and complainant is a civil dispute and no offence under section 406 was proved. He further submits that the complainant could have filed the money suit before the civil court for the realization of money taken from him for business purposes and both the courts below failed to understand that the transactions were made for the business purpose and no offence was committed. He prayed to make the rule absolute.

The learned Advocate Mr. Md. Feroj Kabir appearing on behalf of the complainant opposite party submits that admittedly the accused received total Tk. 435,000 by 5 cheques and in cash to supply the sand, bricks and stone for the construction of his house but he did not supply those materials. Subsequently, the accused issued the 4 cheques for payment of the said amount but there was no sufficient amount in the account to honour the cheques. He further submits that the accused malafide cheated the complainant and without supplying the materials misappropriated the amount and committed cheating and both the courts below on correct assessment and evaluation of the evidence arrived at a correct decision as to the guilt of the accused. He prayed for discharging the rule.

I have considered the submission of the learned Advocate of both the parties who appeared on behalf of the accused and the complainant, perused the evidence, the impugned judgments and orders passed by the courts below and the records.

On perusal of the evidence and impugned judgment and order passed by the trial court, it reveals that the accused received money from the complainant to supply the construction materials but he did not supply those

materials. The appellate court below affirmed the judgment and order of conviction and sentence passed by the trial court holding that the evidence of prosecution witnesses that the accused received Tk. 435,000 to supply the bricks, sand and stone for the construction of the house of the complainant could not be assailed by the defence during the trial of the case. Furthermore, by adducing D.W 1, the defence affirmed the prosecution case.

On perusal of the evidence of P.W. 1, it appears that the accused received Tk. 70,000 in cash on 10.02.2013 and on different dates from 24.07.2012 to 11.02.2013 he also received Tk. 150,000 by cheque No. 30 dated 24.07.2012, Tk. 100,000 by cheque No. 65 dated 07.01.2013, Tk. 50,000 by cheque No. 95 dated 05.02.2013, Tk. 15000 by cheque No. 101 dated 07.02.2013 and Tk. 50,000 by cheque No. 13 dated 11.02.2013 drawn on the account maintained in the name of the complainant with the Bank Asia, Hajigonj Branch, Chandpur. The accused received total Tk. 435,000. By giving suggestions to the prosecution witnesses, the defence admitted that the accused received Tk. 435,000 from the complainant. D.W. 1 also admitted that the accused received the money from the complainant for the sand business. The prosecution case is that the accused received the money to supply the bricks, sand and stone. The suggestion given by the defence to the prosecution witnesses that the accused received Tk. 435,000 for business purposes is denied by them. No agreement was executed between the parties regarding the sand business.

D.W. 1 was not present at the time of the transaction between the accused and the complainant. It is found that the complainant paid total Tk. 435,000 by 05 cheques and in cash to supply bricks, sand and stone and the accused issued 04 cheques to repay the said amount to the accused. There was no reason to issue the 4 cheques by the accused in favour of the complainant unless he received Tk. 435,000 to supply the bricks, sand and stone. The accused could not prove the defence case that he received the money for business purposes.

As regards the submission made on behalf of the convict petitioner that since the cheques were dishonoured for insufficient funds, the complainant could file the case under section 138 of the Negotiable Instruments Act, 1881, I hold the view that the failure of the complainant to file the case under section 138 of the Negotiable Instruments Act, 1881 is not a bar to file a case under the Penal Code, 1860 if the offence under section 420 of the Penal Code, 1860 is proved otherwise. The dishonoured of the cheque issued by the accused in favour of the complainant is evidence of cheating. The issuance of the cheques by the accused for payment of Tk. 435,000 has not been denied by the defence. I do not find any business transaction between the accused and the complainant.

There was a single transaction between the accused and the complainant regarding the supply of bricks, sand and stone. The accused received Tk. 435,000 to supply the bricks, sand and stone and he did not supply those materials. Subsequently he issued 04 cheques to repay the said amount and intentionally deceived the complainant without keeping sufficient money in his account to honour the cheques issued by him. Therefore, I am of the view that the offence committed by the accused attracts section 420 of the Penal Code, 1860.

Considering the evidence, the facts and circumstances of the case and 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 courts below is modified as under;

The accused Md. Mojibul Hoque is found guilty of the offence under section 420 of the Penal Code, 1860 and he is sentenced to suffer simple imprisonment for 03(three) months and a fine of Tk. 2000, in default, to suffer imprisonment for 01(one) month.

Therefore, the Rule is disposed of with a modification of the sentence.

However, there will be no order as to costs.

Send down the lower Court's record at once.



