

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 1831 of 2021

Md. Iqbal Hossain Mojumder (Ex-Chairman)

...Convict-petitioner

-Versus-

Md. Shamsar Alam and another

...Opposite parties

Mr. Md. Omar Faruk, Advocate

...For the convict-petitioner

Mr. Alamgir Hossain, Advocate

...For the complainant-opposite party

Heard on 04.12.2023 and 05.02.2024

Judgment delivered on 15.02.2024

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 impugned judgment and order dated 28.08.2019 passed by Sessions Judge, Cumilla in Criminal Appeal No. 11 of 2019 affirming the judgment and order of conviction and sentence dated 30.05.2017 passed by Joint Sessions Judge, Court No. 1, Cumilla in Session Case No. 1836 of 2016 arising out of Dabiddar Thana C.R. No. 411 of 2015 convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 01(one) year and fine of Tk. 10,00,000, in default, to suffer imprisonment for 03(three) months more should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

The prosecution case, in short, is that on 30.08.2015 the accused Md. Iqbal Hossain Majumder issued Cheque No. 1391633 drawn on his Account No. 021001053 maintained with Bangladesh Commerce Bank Ltd, Cumilla Zilla School Branch, Cumilla in favour of the complainant. The complainant presented the cheque on 10.09.2015 for encashment but the same was dishonoured for 'insufficient funds'. After that, he issued a legal notice on 15.09.2015 upon the accused for

payment of the cheque amount. Although the notice was served upon the accused, he did not pay the cheque amount. Consequently, on 27.10.2015 the complainant filed the case.

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. The case record was sent to the Sessions Judge, Cumilla for trial and the case was registered as Sessions Case No. 1836 of 2016. The Sessions Judge, Cumilla by order dated 21.08.2016 sent the case to the Joint Sessions Judge, Court No. 1, Cumilla for disposal.

On 26.10.2016, the charge was framed against the accused under Section 138 of the Negotiable Instruments Act, 1881 which was read over to the accused and he pleaded not guilty to the charge and claimed to be tried following law. The complainant examined 1(one) witness to prove the charge. During the trial, the accused was absconding and did not cross-examine the P.W. 1.

After concluding the trial, the trial Court by judgment and order dated 30.05.2017 convicted the accused Md. Iqbal Hossain Mojumder under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 1(one) year and fine of Tk. 10,00,000, in default, to suffer imprisonment for 3(three) months more. Against the said order passed by the trial Court, the accused filed Criminal Appeal No. 11 of 2019 before the Sessions Judge, Cumilla. After hearing the appeal, the Sessions Judge, Cumilla by impugned judgment and order dated 28.08.2019 affirmed the judgment and order of conviction and sentence passed by the trial Court against which the convict-petitioner obtained the instant Rule.

P.W. 1 Md. Shamser Alam stated that the accused issued a cheque on 30.08.2015 for payment of Tk. 10,00,000 drawn on Bangladesh Commerce Bank Ltd. The cheque was presented on 10.09.2015 for encashment but the same was dishonoured for

'insufficient funds'. After that, the complainant issued a legal notice on 15.09.2015 for payment of the cheque amount but the accused did not pay the cheque amount. He stated that the complainant lived in Italy and authorised him by executing a power of attorney to file the case. He proved the complaint petition as exhibit 1 and his signature as exhibit 1/1. He proved the cheque as exhibit 2, dishonour slip as exhibit 3, legal notice as exhibit 4, postal receipt as exhibit 5 and power of attorney as exhibit 6. The defence declined to cross-examine P.W. 1.

Learned Advocate Mr. Md. Omar Faruk appearing on behalf of the convict-petitioner submits that both the convict-petitioner and the complainant-opposite party settled the dispute out of Court and he paid the entire cheque amount to the complainant. He prayed to make the Rule absolute.

Learned Advocate Mr. Alamgir Hossain appearing on behalf of the complainant-opposite party submits that the accused issued the cheque for payment of Tk. 10,00,000 on 30.08.2015 and after complying with all the legal procedures provided in Section 138 of the Negotiable Instruments Act, 1881 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 and settled the dispute out of Court.

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 P.W. 1 was examined on 23.11.2016 and on that day, the defence prayed for an adjournment to cross-examine P.W. 1 and the next date was fixed on 02.02.2017. On 02.02.2017, the complainant applied for adjournment. On 22.03.2017, P.W. 1 filed hajira and the accused remained absconding on 21.03.2017 and his bail was cancelled by order dated 21.03.2017. The defence did not cross-examine P.W. 1. Therefore, the evidence of P.W. 1 as regards the issuance of the cheque in favour of the complainant remains

uncontroverted. Learned Advocate Mr. Md. Omar Faruk appearing on behalf of the convict-petitioner did not dispute that the accused issued the cheque in favour of the complainant.

The Negotiable Instruments Act, 1881 is a special law and the offence under Section 138 of the Negotiable Instruments Act, 1881 is not compoundable.

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 convict-petitioner 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 convict-petitioner Md. Iqbal Hossain Mojumder (Ex-Chairman) issued the cheque in favour of the payee-complainant for consideration. After service of notice in writing under Section 138(1)(b) of the said Act, he did not pay the cheque amount. Thereby he 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 convict-petitioner beyond all reasonable doubt and the Courts below on proper assessment and evaluation of evidence legally passed the impugned judgments and orders.

Considering the facts and circumstances of the case, 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 convict-petitioner 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. 10,00,000(ten lakh).

The complainant is entitled to get the fine amount.

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

Since the complainant-opposite party admitted that he received the entire cheque amount from the convict-petitioner, he is not required to deposit the fine amount again.

Send down the lower Court's records at once.