

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 11320 of 2022

Md. Sumon Ahmed

...Appellant

-Versus-

The State and another

...Respondents

No one appears.

...For the appellant

Mr. Md. Faridul Islam, Advocate

...For the complainant-respondent No. 2

Heard on 13.01.2026

Judgment delivered on 20.01.2026

This criminal appeal under section 410 of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order of conviction and sentence dated 22.07.2018 passed by Sessions Judge, Sirajgonj in Sessions Case No. 730 of 2017 arising out of C.R. Case No. 101 of 2016 (Ulla:) convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 1(one) year and fine of Tk. 11,72,685.

The prosecution's case, in short, is that the accused Md. Sumon Ahmed is previously known to the complainant Md. Ainul Haque. The accused issued Cheque No. 0815627 on 18.07.2016 drawn on his Account No. 0312050004775 maintained with One Bank, Sirajgonj Branch for payment of Tk. 11,72,685. The complainant presented the cheque on 01.08.2016 for encashment, but it was dishonoured with the remark "insufficient funds". On 08.08.2016, he sent a legal notice through registered post to the accused for payment of the said amount, but he did not pay the cheque amount. Consequently, the complainant filed the case on 20.09.2016.

During trial, charge was framed against the accused under Section 138 of the Negotiable Instruments Act, 1881. At the time of

framing charge, the accused was absconding. Prosecution examined 1(one) P.W. to prove the charge against the accused. Since the accused was absconding, it was not possible to examine him under section 342 of the Code of Criminal Procedure, 1898. After concluding the trial, the trial Court by impugned judgment and order 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. 11,72,685 against which the accused filed the instant appeal.

P.W. 1 Md. Ainul Hoque stated that the accused Sumon Ahmed issued a cheque on 18.07.2016 in his favour for payment of Tk. 11,72,685. He presented the said cheque on 01.08.2016, but it was dishonoured with the remark “insufficient funds”. He sent a legal notice on 08.08.2016. The accused did not pay the cheque amount. Consequently, he filed the case. He proved the complaint petition as Exhibit 1 and his signature on the complaint petition as Exhibits 1/1 and 1/2. He proved the cheque as exhibit 2, dishonour slip as exhibit 3, legal notice as exhibit 4, and the postal receipt as exhibit 5.

No one appears on behalf of the appellant.

Learned Advocate Mr. Md. Faridul Islam, appearing on behalf of the complainant-respondent No. 2, submits that the accused issued a cheque on 18.07.2016 (exhibit 2) in favour of the complainant Md. Ainul Hoque and he presented the said cheque on 01.08.2016, but it was dishonoured with the remark “insufficient funds”. He sent a legal notice on 08.08.2016, but the accused did not pay the cheque amount. Consequently, the complainant, complying with the procedure laid down in section 138 of the Negotiable Instruments Act, 1881 filed the case. He relied on the decision made in the case of Nizamuddin Mahmood vs Abdul Hamid Bhuiyan, and another reported in 60 DLR (AD) 195. During the trial, the prosecution proved the charge against the accused beyond all reasonable doubt, and the trial Court, on

correct assessment and evaluation of the evidence, legally passed the impugned judgment and order. He prayed for dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Md. Faridul Islam, who appeared on behalf of the complainant-respondent No. 2, perused the evidence, the impugned judgment and order passed by the trial Court and the records.

On perusal of the evidence, it reveals that the accused Md. Sumon Ahmed issued Cheque No. 0815627 on 18.07.2016 drawn on his Account No. 0312050004775 maintained with One Bank, Sirajgonj Branch. P.W. 1 proved the complaint petition as exhibit 1 and the cheque as exhibit 2. He presented the said cheque on 01.08.2016, but it was dishonoured due to “insufficient funds”. He proved the dishonour slip as Exhibit 3. He sent a legal notice on 08.08.2016. He proved the legal notice as Exhibit 4 and the postal receipt as Exhibit 5.

The mere presentation of a cheque within the specified time mentioned in clause (a) of the proviso to section 138 of the Negotiable Instruments Act, 1881 and sending a notice, in writing, to the drawer of the cheque making a demand for the payment of the cheque amount by the payee within thirty days from the date of receipt of information by him from the bank regarding the return of the cheque as unpaid does not constitute an offense under section 138 of the Negotiable Instruments Act, 1881 unless the said notice is served upon the drawer of the cheque and he/she failed to pay the cheque amount within thirty days from the date of receipt of said notice and the complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138 of the said Act.

At the time of enactment of the Negotiable Instruments Act, 1881 no provision was made as to the mode of service of notice upon the drawer of the cheque. The legislature inserted sub-section (1A) in section 138(1) of the said Act by Act No. III of 2006, making

provision regarding the mode of the service of notice under clause b of the proviso to section 138 of the said Act. Under section 138(1)(1A) of the said Act, the notice under section 138(b) of the said Act is required to be served upon the drawer of the cheque, a. by delivering it to the person on whom it is to be served; or b. by sending it by registered post with acknowledgment due to that person at his usual or last known place of abode or business in Bangladesh; or c. by publication in a daily Bangla national newspaper having wide circulation. After receipt of the notice by the accused or service of notice upon the accused, the accused is entitled to thirty days to pay the cheque amount.

The Negotiable Instruments Act, 1881 is a special law, and compliance with the procedure provided in section 138(1)(1A) of the said Act is sine qua non. The prosecution shall prove that before filing the case under section 138 of the Negotiable Instruments Act, 1881, the demand under clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881 has been served upon the accused, and he failed to pay the cheque amount within thirty days from the date of receipt of said notice. In the instant case, no statement is made in the complaint petition or by P.W. 1 as to the date of service of notice upon the accused. Nothing has been stated by P.W. 1 that the notice or the demand has been sent by the complainant following the procedure as stated in section 138(1)(1A) of the Negotiable Instruments Act, 1881. No evidence is adduced by the prosecution to prove that the notice under section 138(1)(b) of the said Act has been served upon the accused. In the absence of any evidence as to the date of service of notice upon the accused, it cannot be said that the prosecution proved the cause of action as stated in clause (c) of the proviso to section 138 of the Negotiable Instruments Act, 1881. From the evidence adduced by the prosecution the cause of action for filing the case under section 138 of the said Act could not be ascertained.

The above view of this Court lends support from the decision made in the case of Nizamuddin Mahmood vs Abdul Hamid Bhuiyan and another reported in 60 DLR (AD) 195, in which it has been held that;

“Since the date of receipt is a question of fact to be ascertained at the time of trial, non-disclosure of such fact in the complaint petition cannot render the proceeding liable to be quashed to the great prejudice of the complainant who is entitled to prove his case on evidence.”

On perusal of the judgment and order passed by the trial Court, reveals that the trial Court passed the impugned judgment without arriving at any finding as to the cause of action as stated in clause (c) of the proviso to section 138 of the said Act. I am of the view that the prosecution failed to prove the charge under section 138 of the Negotiable Instruments Act, 1881 against the accused following law beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial Court against the convict-petitioner Md. Sumon Ahmed is hereby set aside.

The convict-petitioner Md. Sumon Ahmed is entitled to get 50% of the cheque amount deposited by him before filing the appeal.

The trial Court is directed to refund 50% of the cheque amount deposited by the convict-petitioner within seven days from the date of filing the application, if any.

However, the complainant is at liberty to file a money suit in the civil Court for recovery of the cheque amount, if so advised.

Send down the lower Court's records at once.