

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 12539 of 2022

Md. Anisur Rahman Bhuiyan (Mahbub)

...Appellant

-Versus-

The State and another

...Respondents

Mr. Md. Akramul Haque Baki, Advocate

...For the appellant

Mr. Md. Yousuf Alam, Advocate

...For the complainant-respondent No. 2

Heard on 16.01.2024

**Judgment delivered on 28.01.2024**

This appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed against the judgment and order dated 30.07.2015 passed by Sessions Judge, Cumilla in Session Case No. 148 of 2014 convicting the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 1(one) year and fine of Tk. 69,60,000 (sixty-nine lac sixty thousand) i.e. thrice of the cheque amount Tk. 23,20,000.

The prosecution case, in short, is that the complainant Ali Hossain and the accused Md. Anisur Rahman Bhuiyan (Mahbub) are residents of the neighbouring villages and are known to each other. The accused is the owner of the S.R. Brick Field set up at the adjacent village and he received advance money to supply the bricks. The accused used to receive the advance to supply the bricks. On 30.09.2013 the accused received Tk. 23,20,000 in advance to supply the bricks to the complainant but he did not supply the bricks after production. He issued Cheque No. 5911610 on 30.09.2013 for payment of Tk. 13,20,000 drawn on his Account No. 0281330004928 maintained with Social Islami Bank Limited, Eliatganj Branch and requested him to present the cheque after one month. On 30.10.2013 the accused also issued Cheque No. 5911611 for payment of Tk. 10,00,000 drawn on his Account No. 0281330004928 maintained with Social Islami Bank Limited, Elliatganj Branch for payment of Tk. 10,00,000. The accused issued two cheques for payment of total Tk.

23,20,000, Thereafter, on 03.03.2014 the accused presented cheques for encashment which were dishonoured on the same date with the remark 'insufficient funds' and the bank issued dishonour slips. The complainant issued a legal notice on 20.03.2014 upon the accused for payment of the cheque amount within the next 30 days but he did not pay the cheque amount within time. Consequently, he filed the case on 05.05.2014 under Section 138 of the Negotiable Instruments Act, 1881.

After filing the complaint petition, the complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and the Additional Chief Judicial Magistrate, Cumilla was pleased to take cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 against the accused and sent the case to the Sessions Judge, Cumilla. During the trial, charge was framed on 24.09.2014 under Section 138 of the Negotiable Instruments Act, 1881 against the accused which was read over and explained to him and he pleaded not guilty to the charge and claimed to be tried following law. During the trial, the prosecution examined 3(three) witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused absconded. 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 Ali Hossain is the complainant. He stated that accused Md. Anisur Rahman Bhuiyan (Mahbub) is the owner of a Brick Field. The accused took Tk. 23,20,000 in advance to supply the bricks to the complainant but he did not supply the bricks after production. The accused issued 2 cheques for paying back the advance money and the complainant presented the cheques for encashment but it was dishonoured due to 'insufficient funds'. The complainant informed the matter to the accused. Despite that, he did not pay the cheque amount in time. Subsequently, the complainant also issued a legal notice through the learned Advocate and thereafter, filed the case. He proved the disputed cheques as exhibits 1 and 1/1, the dishonour slip as exhibit 2, legal notice as exhibit 3, postal receipt as exhibit 4 and the acknowledgement as exhibit 5, the complaint petition

as exhibit 6 and the signature of the complainant on the complaint petition as exhibit 6/1-6/4. The accused was absconding and did not cross-examine P.W. 1.

P.W. 2 Hazi Md. Sahaj Uddin Sarkar stated that the accused took loan of Tk. 23,20,000 from the complainant to supply the bricks but he did not supply the bricks after production. He issued 2 cheques which were dishonoured by the bank. Subsequently, the complainant issued the legal notice and lodged the complaint petition. He claimed that he was present at the time of the transaction. The defence did not cross-examine P.W. 2.

P.W. 3 Uttam Saha stated that the accused and the complainant are known to him. The complainant paid Tk. 23,20,000 by 2 installments to supply the bricks. Subsequently, he issued 2 cheques. After the presentation of the cheques, those were dishonoured. The complainant issued the legal notice and filed the case. The defence did not cross-examine P.W. 3.

Learned Advocate Mr. Md. Akramul Haque Baki appearing on behalf of the appellant submits that the accused deposited 50% of the cheque amount before filing appeal to the trial Court and during the pendency of the appeal paid the remaining 50% of the cheque amount to the complainant and settled the dispute out of Court and he prayed for acquittal on the ground of compromise between the parties.

Learned Advocate Mr. Md. Yousuf Alam appearing on behalf of complainant-respondent No. 2 submits that the complainant and the accused reached a settlement regarding the cheques issued in favour of the complainant and he received 50% of the cheque amount in cash. He concedes that both the parties arrived at a settlement out of Court regarding the cheques issued by the accused.

I have considered the submission of the learned Advocate Mr. Md. Akramul Haque Baki who appeared on behalf of the appellant and the learned Advocate Mr. Md. Yousuf Alam who appeared on behalf of respondent No. 2, perused the evidence, impugned judgment and order passed by the trial Court and the records.

At the very outset, it is noted that a joint application for compromise sworn on 19.07.2023 has been filed by the parties and both the complainant Md. Ali Hossain and accused Md. Anisur Rahman Bhuiyan (Mahbub) signed the affidavit and the learned Advocate engaged on behalf of the complainant and the respondent identified them.

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 during the pendency of the appeal.

On perusal of the records, it appears that the accused issued cheques Nos. 5911610 dated 30.09.2013 and 5911611 dated 30.10.2013 in favour of the complainant for payment of Tk. 13,20,000 and Tk. 10,000 respectively. During the trial, the accused was absconding and he did not cross-examine the prosecution witnesses. The evidence of P.W. 1 to 3 as regards the issuance of the two cheques (exhibits 1 and 1/2) remained uncontroverted by the defence. By filing the joint application for compromise the accused also admitted that he issued the two cheques mentioned hereinabove.

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 3 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. 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 after proper assessment of the evidence legally passed the impugned judgment and order.

It is found that the two cheques were issued for payment of Tk. 23,20,000 by the accused in favour of the complainant but the trial Court convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 awarding maximum sentence.

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. Anisur Rahman Bhuiyan (Mahbub) 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. 23,20,000.

It is admitted by the complainant that he received Tk. 50% of the cheque amount during the pendency of the appeal. Therefore, he is only entitled to get the remaining 50% of the cheque amount deposited by the accused before the trial Court after passing the impugned judgment and order. No further deposit is required by the accused.

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

In the result, the appeal is disposed of with modification of the sentence.

Send down the lower Court's records at once.