Present
Madam Justice Kashefa Hussain

Criminal Revision No. 360 of 2023

Md. Masudur Rahman
..... Convict-petitioner
-Versus-
The State and another
------- Opposite parties
Mr. Md. Ahsan with
Mr. Balayet Hossain, Advocates
.... for the convict-petitioner
Mr. Mizanul Hoque Chowdhury with
Mr. A.M. Jamiul Hoque Faysal, Advocate
.... for the opposite parties
Mr. Md. Abdul Aziz Miah, D.A.G with
Ms. Syeda Sabina Ahmed Molly, A.A.G
------- For the State.
Heard on: 14.06.2023, 18.07.2023, 26.07.2023 and
Judgment on 02.08.2023

Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 20.11.2022 passed by the learned Additional Sessions Judge, 7th Court, Dhaka in Metro. Criminal Appeal No. 537 of 2022 dismissing the appeal and affirming the judgment and order of conviction and sentence dated 04.04.2022 passed by the learned Metropolitan Joint Sessions Judge, 5th Court, Dhaka in Metro. Sessions Case No. 4237 of 2014 arising out of C.R. Case No. 2268 of 2013 convicting the petitioner under Section 138 of the

Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 6(six) months and also to pay a fine of Tk. 25,00,000/- 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 instant complainant as opposite party No. 2 Actual Homes Ltd. Filed Metro Sessions Case No. 4237 of 2014 arising out of C.R. Case No. 2268 of 2013 in the court of Metropolitan Joint Sessions Judge, 5th Court, Dhaka with allegation under Section 138 of the Negotiable Instrument Act, 1881 against the instant accused convict instant petitioner here inter alia with allegation of cheque dishonor. The trial court upon hearing the parties convicted the petitioner sentencing him to suffer simple imprisonment for 6(six) months and to pay a fine of Tk. 25,00,000/- (twenty five lacs) by its judgment and order of conviction and sentence dated 04.04.2022. Being aggrieved by the judgment and order of conviction and sentence passed by the trial court the accused convict petitioner filed Criminal Appeal No. 537 of 2022 which was heard by the Additional Sessions Judge, 7th Court, Dhaka. The Appellate Court upon hearing the parties dismissed the appeal by its judgment dated 20.11.2022 and thereby affirmed the judgment

of sentence and conviction passed by the trial court earlier. Being aggrieved by the judgment dated 20.11.2022 the convict petitioner filed Criminal Revision which is presently before this court for disposal.

The complainant's case inter alia is that the convict petitioner issued one cheque against on amount of Tk. 25,00,000/- (twenty five lacs) in the name of complainant opposite parties No. 2 being account No. 1525101410800001, Cheque No. SSD 1559278 of BRTAC Bank Ltd. Mentioning 25,00,000/- (twenty five lacs) taka dated 23.09.2013. That alleged cheque was deposited for encashment but returned as dishonored on ground of insufficient fund. That thereafter, the complainant sent a legal notice on 08.10.2013 for depositing the said amount within 30 days but convict petitioner did not pay back the sum and hence the case was filed.

Learned Advocate Mr. Md. Ahsan along with Mr. Balayet Hossain appeared for the convict petitioner while learned advocate Mr. Mizanul Hoque Chowdhury along with Mr. A.M. Jamiul Hoque Faysal represented the respondent-opposite party No. 2.

Learned Advocate for the accused petitioner submits that both courts below upon misappraisal of facts and evidences on

record and upon misinterpretation of the law came upon wrong finding and those are not sustainable and ought to be set aside. He submits that both courts, wrongly found that the accused was absconding during trial. To controvert the findings of the courts he points out to several orders from the lower court records. He agitates that these orders clearly manifest that the accused convict petitioner was not absconding since these orders clearly show that he was present on all occasions except on the day of judgment before the court. He particularly points out to Order No. 32 dated 18.07.2019, Order No. 33 dated 06.08.2019, Order No. 34 dated 20.10.2019, Order No. 35 dated 25.11.2019, Order No. 36 dated 02.03.2020, Order No. 38 dated 30.09.2020, Order No. 40 dated 12.10.2021, Order No. 42 dated 01.12.2021 and Order No. 43 dated 02.02.2022. Upon a query from this bench on the fact that he was absconding on the day of judgment he points out that was the only day that is on 04.04.2022 that the petitioner was not present. He submits that however it is evident from the records that he was present all through trial and did not try to evade the process of the law. He argues that although the courts below made observation that the court could not examine the accused under section 342 of the Code of Criminal Procedure since he was absconding but however it is clear that there was no absconsion on the

petitioner's part during trial. He next argues that it is evident from the lower court records that the accused convict petitioner made an application for hand writing expert to verify the signature of the petitioner. He submits that the petitioner does not admit to his signature in the cheque and whatsoever and he made an application for hand writing expert signature under Section 73 read with Section 45 of the Evidence Act, 1872. He submits that it is also evident from the records that the application for hand writing expert was allowed. He next points out that against this application the complainant filed a Criminal Revision before the concerned court but however the criminal revision was discharged. He argues that in the absence of resorting to the higher forum the order of discharge of criminal revision by the concerned court upholding the order allowing examination of signature by hand writing expert stands valid. He submits that pursuantly the signature was also examined by the hand writing expert who gave his report accordingly. He points out that however none of the courts below made any observation on the report of the hand writing expert. He assails that the court himself allowed the order of hand writing expert but however totally skipped and was silent on the issue of hand writing and which is a serious error in the eye of the relevant laws. He submits that in the absence of any

observation on the issue of hand writing expert by either court such judgments remains incomplete and therefore those judgments are not sustainable.

He next draws this bench's attention to Section 114 (G) of the Evidence Act, 1872. Relying on Section 114(G) of the Evidence Act, 1872 he contends that the provision clearly contemplate that evidence which could be and is not produced could if produced be unfavorable to be a person. He submits that therefore not examining the hand writing expert as a witness is a serious deviation on the part of the courts below. Learned advocate for the petitioner cited a decision in the case of Saheb Ali Fakir vs. State reported in 27 BLC (AD) 2022 page-81 in support of his argument. Summing up his submissions he concludes that therefore both courts committed serious error in law and the judgment of the courts below be set aside and the Rule bears merit and ought to be made absolute.

On the other hand learned Advocate Mr. Mizanul Hoque Chowdhury vehemently opposes the Rule. At the onset there was a query from this bench upon the learned advocate for the opposite parties on the issue of the petitioner's contention against the finding of absconsion and reason for no examination under section 342 including the issue of hand writing expert not

being examined and also the provisions of Section 114 (G) of the Evidence Act, 1872. To address these issues, the learned Advocate for the opposite party in reply takes the bench to the certified copy of an application made by the accused convict petitioner before the trial court during the proceedings being application dated 20.05.2014. He points out to the subject matter of the application wherein it is stated "বিষয়ঃ আপোষ মিমাংশা মূলে স্বাক্ষীর জন্য সময়ের আবেদন।" He submits that such application dated 25.11.2014 and the subject matter of the application being আপোষ মিমংশা (compromise) a is clear admission that the petitioner committed the offence under Section 138 of the Negotiable Instrument Act, 1881. He submits that the term আপোষ মিমাংশা is only contemplated in a situation where the allegation for a cheque given by the accused has actually be dishonored. He argues that if the cheque was not given by the accused petitioner then the question আপোষ মিমাংশা would not arise. He reiterates that the subject matter of the application is আপোষ মিমাংশা which is a clear admission of the offence and leave no space for any doubt. He argues that on the face of such clear admission any procedural lacuna may be overlooked since the offence is admitted and the result of the case is clear as broad day light. He next draws the bench to Order No. 16 dated 23.08.2016 passed by the trial court. He submits that Order No.

16 dated 23.08.2016 clearly manifest and is also clear admission that the cheque was issued by the accused petitioner but which was dishonored. He points out that the petitioner here took the plea that the cheque was given as a জামানত (security) cheque. He agitates that it is a settled principle by our Apex Court that in case of security cheque also it cannot evade the stringent provisions of Section 138 of the Negotiable Instrument Act, 1881. He contends that therefore since these documents reflect open admission of the accused petitioner therefore the judgments were correctly given by the courts below.

He next argues that Section 58 of the Evidence Act, 1872 provide that facts admitted need not be proved. He submits that the courts did not commit any illegality since the subject matter of the application dated 25.11.2014 and the Order No. 16 dated 23.08.2016 clearly manifest the petitioner's admission to committing the offences. He submits that therefore Section 58 of the Evidence Act, 1872 shall be applicable in this case and since the facts are admitted in this case also they need not be proved by way of hand writing expert nor in any other manner. He concludes his submissions upon assertion that the courts

below correctly gave the judgment and the Rule bears no merits and ought to be discharged for ends of justice.

I have heard the learned advocate from both sides, perused the application and materials on records before me. The learned advocate for the petitioner drew attention of this bench to several orders passed on different dates by the trial court. Truly enough it appears that although the courts below found that the petitioner was absconding but however on the dates of trial the petitioner was not absconding as is manifest from these orders.

Nevertheless the petitioner was absconding on the day of judgment dated 04.04.2022. It is the petitioner's contention that although the petitioner was not absconding during trial but however the courts below incorrectly found that he was absconding. It also appears that the courts below also made observation that examination under Section 342 could not be done because of the absconsion of the accused convict petitioner. I am of the considered view that such observations of the courts below are not correct. Since I do not find that the petitioner was absconding in trial. However he was absconding on the day of judgment. I have also examined the issue of hand writing expert. The petitioner contends that the courts did not

take these facts into consideration including not examining the hand writing expert who gave his report.

To assess and examine these issues and also to determine these issues, I have examined the application dated 25.11.2014 made by the accused petitioner before the trial court. The subject matter of the application clearly reads "বিষয়- আপোষ মিমাংশা মুলে স্বাক্ষীর জন্য সময়ের আবেদন।" In agreement with the learned advocate for the opposite parties I am of the considered view that particularly in a case under Section 138 of the Negotiable Instruments Act, 1881 the issue or the question of আপোষ মীমাংষা (compromise) may arise only if the cheque has been dishonored. The application made by the accused convict petitioner praying for আপোষ মীমাংষা before the trial court therefore it is an admission that he gave the cheque. In all reasonableness it may be held that if the petitioner did not sign the cheque which was dishonored the question of আপোষ মীমাংষা would not arise. Therefore it is clear that the petitioner admits to his signature on the cheque which was dishonored.

Next I have examined Order No. 16 dated 23.08.2016. From Order No. 16 it also clearly shows that the accused petitioner stated that the cheque was given by him as a জামানত (security) cheque. Such being the petitioner's admission, I am

of the considered view that by this order also it clearly manifests that the petitioner gave the cheque himself and signed the cheque in favour of the complainant opposite party No. 2. Therefore from the application dated 25.11.2014 and from the trial court's Order No. 16 dated 23.08.2016 I am inclined to draw upon the principles of res ipsa loquitor (the thing speaks for itself).

I have also drawn upon the principles of Section 58 of the Evidence Act, 1872 which is reproduced below:

> "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings."

Therefore in this case since the application dated 25.11.2014 and the Order No. 16 dated 23.08.2016 speaks of the facts and prove the facts thereof, hence Section 58 shall be applicable in this case also.

I am of the considered view that although there may be some lacunas in the judgment by the courts below but however in the instant case from the application dated 25.01.2014 and the Order No. 16 dated 23.08.2016 it clearly appears that the petitioner signed the cheque and committed the offence. It may be reiterated that the application dated 25.01.2014 and the trial courts Order No. 16 dated 2308.2016 are clear admission which suffice to prove the allegation against the petitioner of committing the offence. Therefore I do not find much reason to interfere with the judgments of the courts below.

Under the facts and circumstances I am of the considered view that the courts correctly gave the judgments and needs no interference with. I do not find any merit in the case.

In the result, the Rule is discharged.

The judgment and order dated 20.11.2022 passed by the learned Additional Sessions Judge, 7th Court, Dhaka in Metro. Criminal Appeal No. 537 of 2022 dismissing the appeal and affirming the judgment and order of conviction and sentence dated 04.04.2022 passed by the learned Metropolitan Joint Sessions Judge, 5th Court, Dhaka in Metro. Sessions Case No. 4237 of 2014 arising out of C.R. Case No. 2268 of 2013 convicting the petitioner under Section 138 of the Negotiable

Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 6(six) months and also to pay a fine of Tk. 25,00,000/-.

The accused-petitioner is directed to deposit the balance amount of cheque to the trial court within 45 days from the date of received of this judgment along with lower court records to be paid to the complainant opposite party in accordance with law.

The accused-petitioner is further directed to surrender before the trial court within 60 days from the same date for serving out the remaining sentence of imprisonment.

The complainant-opposite party is allowed to withdraw the 50% of the cheque amount which has been deposited by the accused-petitioner in the trial court through Chalan within 1(one) month from the date of receipt of this judgment.

Send down the Lower Court Records at once.

Communicate the judgment at once.

Shokat (B.O.)