

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 4327 of 2023

Md. Shahlal

...Appellant

-Versus-

The State and another

...Respondents

No one appears.

...For the appellant

Mr. Md. Shofiul Aziz, Advocate

...For the complainant-respondent No. 2

Heard on 14.08.2025

**Judgment delivered on 21.08.2025**

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 19.05.2019 passed by Additional Sessions Judge, Chapai Nawabganj in Sessions Case No. 582 of 2018 arising out of C.R. Case No. 59 of 2018 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. 50,00,000(fifty lakh).

The prosecution's case, in short, is that the accused Md. Shahlal, Proprietor of Shahlal Traders, obtained loan from the Islami Bank Bangladesh Ltd, Chapai Nawabganj Branch. He issued Cheque No. 3238727 on 06.12.2017 drawn on his Current Account No. 3931 maintained with Islami Bank Bangladesh Ltd, Chapai Nawabganj Branch for payment of Tk. 49,71,110(forty nine lakh seventy one thousand one hundred and ten) in favour of the complainant Islami Bank Bangladesh Ltd, Chapai Nawabganj Branch. The complainant presented the said cheque on 07.12.2017 for encashment, which was dishonoured on the same date with the remark "insufficient funds". After that, the complainant bank sent a legal notice on 12.12.2017 to the accused through registered post for payment of the cheque amount within 30(thirty) days. The accused received the notice on

14.12.2017, but he did not pay the cheque amount within the 30(thirty) days from the date of receipt of the notice. Thereby, he committed offence under section 138 of the Negotiable Instruments Act, 1881. Consequently, the complainant filed the case on 22.01.2018.

After filing the complaint petition, the cognizance was taken against the accused Md. Shahlal under section 138 of the Negotiable Instruments Act, 1881. The case was sent to the Sessions Judge, Chapai Nawabganj, who sent the case to the Joint Sessions Judge, Court No. 1, Chapai Nawabganj for trial. 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. After framing charge, the Sessions Judge, Chapai Nawabganj, by order dated 07.10.2018, sent the case to the Additional Sessions Judge, Chapai Nawabganj, for trial. During the trial, the prosecution examined 1(one) witness to prove the charge against the accused. After concluding the trial, the trial Court by impugned judgment and order dated 19.05.2019 convicted the accused under section 138 of the Negotiable Instruments Act, 1881, and sentenced him thereunder to suffer imprisonment for 1(one) year and fine of Tk. 50,00,000(fifty lakh) against which he filed the instant appeal.

P.W. 1 Md. Sohel Mahmud Al Murad stated that he is the Senior Officer of Islami Bank Limited, Chapai Nawabganj Branch, Chapai Nawabganj. The accused Md. Shahlal issued a cheque on 06.12.2017 for payment of the loan amounting to Tk. 49,71,110(forty nine lakh seventy one thousand one hundred and ten) in favour of the complainant-bank. The cheque was presented on 07.12.2017, but it was dishonoured. On 12.12.2017, a legal notice was sent to the accused. The accused received the legal notice on 14.12.2017, but he did not pay the cheque amount. Consequently, on 22.01.2018, the complainant filed the case. P.W. 1 proved the complaint petition and

his signature on the complaint petition as exhibit 1 series, cheque, dishonour slip, legal notice, P.C.R as exhibit 2 series. The defence did not cross-examine P.W. 1.

No one appears on behalf of the appellant.

Learned Advocate Mr. Md. Shofiul Aziz, appearing on behalf of the complainant-respondent No. 2, submits that the accused issued the cheque on 06.12.2017 for payment of the loan amounting to Tk. 49,71,110 and complainant-bank presented the said cheque on 07.12.2017 following the provision made in clause (a) of the proviso to section 138 of the Negotiable Instruments Act, 1881 but it was dishonoured on the same date and the complainant-bank made a demand on 12.12.2017 following the provision made in clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881 for payment of the cheque amount and the accused received the said demand on 14.12.2017 but the accused did not pay the cheque amount despite the notice received on 14.12.2017 by him and the complainant-bank complying with the provisions made in clause (a) to (c) of the proviso to sections 138 and 141(b) of the Negotiable Instruments Act, 1881 filed the case. He further submits that since the notice was sent to the accused on 12.12.2017 through registered post, it is to be deemed valid service upon the accused in view of the provision made in section 27 of the General Clauses Act. He also relied on the decision made in the case of Nizamuddin Mahmood vs Abdul Hamid Bhuiyan and another reported in 60 DLR (AD) 195. The prosecution proved the charge against the accused beyond all reasonable doubt, and the trial Court, on correct assessment and evaluation of the evidence, passed the impugned judgment and order following the law. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Md. Shofiul Aziz, who appeared on behalf of the complainant-

respondent No. 2, perused the evidence, impugned judgment and order passed by the trial Court, and the records.

On perusal of the evidence, it reveals that on 06.12.2017, the accused signed Cheque No. 3238727 drawn on his Al Wadiah Current Account No. 3931 maintained with the Islami Bank Bangladesh Ltd but the handwriting on the cheque is not identical to the signature of the accused. The name of the payee, cheque amount, and the date on the cheque was written by different handwriting.

In the complaint petition, it has been stated that on 12.12.2017, a notice was sent through registered post, and the accused received the notice on 14.12.2017. P.W. 1 stated that the cheque was dishonoured on 07.12.2017, and a legal notice was sent on 12.12.2017 and the accused received the legal notice on 14.12.2017, but the accused did not pay the cheque amount, and the complainant filed the case on 22.01.2018. Nothing has been stated in the complaint petition and by P.W. 1 that the notice or demand was sent through registered post with AD. No AD has been proved in the case.

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.

Despite the provision made in section 27 of the General Clauses Act, 1958, the Legislature inserted sub-section (1A) in section 138(1) of the Negotiable Instruments Act, 1881 by Act No.III of 2006 regarding the mode of sending notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881. The Negotiable Instruments Act, 1881 is a special law. Service of notice upon the accused in compliance with the provision made in section 138(1)(1A) of the said Act, at least by one mode as stated above is sine qua non.

P.W. 1 stated that the accused did not pay the cheque amount despite the receipt of the notice on 14.12.2017. No documentary evidence was adduced by the complainant to prove that the accused received the notice on 14.12.2017. From the evidence adduced by the prosecution, it could not be ascertained that the accused received the notice on 14.12.2017.

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 para 20, 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.”

In respect of the submission made by the learned Advocate engaged on behalf of the complainant-respondent No. 2, that the accused was absconding and did not deny that notice was not served upon him before filing the case, I am of the view that it is the duty of the prosecution to prove the charge against the accused beyond all reasonable doubt by adducing legal evidence following law. Section 138 (1)(1A)(b) of the Negotiable Instruments Act, 1881 states that the notice under clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881 is required to be sent to the accused through registered post with AD. Before filing the case, the complainant shall make a demand following the provision made in Section 138(1)(1A) of the Negotiable Instruments Act, 1881. In the instant case, the notice was not sent following the provision made in Sub-section (1A) of section 138 of the Negotiable Instruments Act, 1881. No AD has been proved in the case.

From the evidence discussed hereinabove, it is found that the prosecution failed to prove that before filing the case on 22.01.2018, the notice sent under clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881 was served upon the accused and the prosecution failed to prove the cause of action as stated in clause (c) of the proviso to section 138 of the Negotiable Instruments Act, 1881. The provisions made in clauses (a) to (c) of section 138,

sections 138(1A) and 141(b) of the Negotiable Instruments Act, 1881 are cumulative. In the instant case, the prosecution failed to comply with the mandatory provisions made in clause (c) of the proviso to sections 138, sections 138(1A), and 141(b) of the said Act, and the trial Court failed to correctly interpret the said provisions and arrived at a wrong decision as to the guilt of the accused.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order passed by the trial Court against the accused Md. Shahlal is hereby set aside.

The accused Md. Shahlal is entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

The trial Court is directed to allow the accused Md. Shahlal to withdraw 50% of the cheque amount deposited by him in the trial Court before filing the appeal.

However, there will be no order as to costs.

Send down the lower Court's records at once.