

**Present:**

Mr. Justice Mamnoon Rahman

**Criminal Appeal No. 7011 of 2023**

Sohag Ahmed

....Convict-appellant

**-VERSUS-**

The State and another

... Respondents

Ms. Ayasha Akter, Adv. with

Ms. Lipika Saha, Adv.

..... For the appellant

Mr. Md. Lokman Hossain, AAG

..... For the respondent No. 1

Mr. Md. Shahriar Iqbal Khan, Advocate

..... For the respondent No. 2

**Heard on: 22.02.2024 and 13.03.2024**

**And**

**Judgment on: 21.05.2024**

In the instant appeal, the convict-appellant has challenged the legality of the judgment and order of conviction and sentence dated 19.10.2020 passed by the learned Additional Metropolitan Sessions Judge, 5<sup>th</sup> Court, Dhaka in Metro: Sessions Case No.9423 of 2019 arising out of C.R. Case No.18 of 2017 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 01(one) year and to pay a fine of Taka 32,000.00/- only which is equivalent to the value of the dishonored cheque.

Md. Mominul Hoque, is the complainant-respondent No. 2.

In the instant case the complainant-respondent filed the case against the appellant alleging *inter-alia* that out of business transaction the appellant issued a cheque on 28.04.2016 in favour of the complainant for

an amount of Tk. 32,00,000/-. The complainant paid the cheque for withdrawal of the money but the same was dishonored on 23.10.2016 for insufficient fund. Finding no other alternative the complainant sent a Legal Notice on 21.11.2016 to the appellant. The appellant despite receiving of the said notice failed to adjust the money for which the complainant filed the case against the appellant under section 138 of the Negotiable Instruments Act, 1881 before the Chief Metropolitan Magistrate, Dhaka. The Chief Metropolitan Magistrate, Dhaka after completing all the formalities sent the case for trial before the Metropolitan Sessions Judge, Dhaka and ultimately the same was heard and disposed of by Additional Sessions Judge, 5<sup>th</sup> Court, Dhaka in Metropolitan Sessions case No. 9423 of 2019. During trial the complainant adduced one evidence as well as documentary evidence. The trial court after hearing the parties and considering the facts and circumstances, vide the impugned judgment and order convicted and sentenced the appellant. Being aggrieved, the appellant moved before this court by way of appeal.

At the time of hearing of the appeal the appellant filed supplementary affidavit as well as the complainant-respondent filed counter affidavit.

Ms. Lipika Saha, the learned Advocate for the petitioner-appellant submits that there is no denial regarding the issuance of cheque in question by the appellant and as per the supplementary affidavit during pendency of the case as well as filing of the case the appellant paid an

amount of Tk. 12,70,000/- in different occasions through bank account and as such the amount is liable to be deducted from the claim of the complainant. She also submits that at the time of filing of the appeal the appellant also deposited Tk. 16,00,000/- by Challan No. 1046 dated 06.06.2023 through Bangladesh Bank. The learned counsel further submits that the appellant is ready to repay the remaining amount as and when directed by this court.

Mr. Md. Shahriar Iqbal Khan, the learned Advocate appearing on behalf of the complainant-respondent No. 2 vehemently opposes the appeal. He submits that admittedly the court below on proper appreciation of the facts and circumstances, evidence both oral and documentary passed the impugned judgment and order of conviction and sentence which requires no interference by this court. He further submits that admittedly the cheque was issued and the same was dishonored and the complainant-respondent No. 2 by following all the procedures passed the impugned judgment and order of conviction and sentence by the trial court which is liable to be sustained for ends of justice. By filing counter-affidavit he submits that admittedly the appellant deposited the amount as mentioned in the supplementary affidavit but the same is relates to another transaction that means the complainant also gave the appellant extra loan of Tk. 12,70,000/- apart from Tk. 32,00,000/- and the amount paid by the appellant as shown in the supplementary affidavit is relates to the said amount not the amount of the cheque as such the petitioner-appellant is bound to repay the remaining money.

I have heard the learned Advocates for the appellant-petitioner as well as the complainant-respondent No. 2. I have perused the impugned judgment and order of conviction and sentence, supplementary affidavit, counter-affidavit as well as L.C. Records.

On meticulous perusal from the petition of complaint the deposition of P.W. 1 and the documentary evidence that the convict appellant issued a cheque in favour of the complainant on 28.04.2016 for an amount of Tk. 32,00,000/-. The said cheque was dishonored by the bank concern on 23.10.2016 and the complainant sent statutory legal notice to the convict-appellant on 21.11.2016. Since the value of the cheque was not paid to the complainant the complainant filed the case on 08.1.2017. It further transpires that the trial court while following the procedures as well as while taking the deposition of P.W. 1 and on consideration of the documentary evidence, namely cheque, dishonored slip, legal notice and other aspects came to a conclusion that the appellant committed an offence under section 138 of the Negotiable Instruments Act, 1881 and as such handed over the sentence.

I have no hesitation to hold that the complainant-respondent has proved compliance of the procedure laid down in Section 138 of the Act, 1881 in filing the case. The case was filed within one month of the date on which the cause of action had arisen under clause (c) of the proviso to Section 138. The complainant also proved consideration against which the cheque was drawn and that he is the holder of the cheque in due course. Hence, in my view, the impugned judgment and order of conviction does

not suffer from any illegality or infirmity. The trial Court correctly found the appellants guilty of the charge.

Section 138 of the Act, 1881 provides that the offence of dishonour of cheque is punishable with imprisonment for a term which may extend to 1 (one) year, or with fine which may extend to thrice the amount of the cheque, or with both. Sub-section (2) of Section 138 provides, “*Where any fine is realised under sub-section (1), any amount up to the face value of the cheque as far as is covered by the fine realised shall be paid to the holder*”. Thus, the criminal proceeding under Section 138 serves two purposes: firstly, to punish the offender and secondly, to recover the value of the cheque. The object of adding sub-section (2) to Section 138 is to alleviate the grievance of the complainant. In the instant case, the value of the dishonored cheque is Tk. 32,00,000/-. The convict-appellant was fined Tk. 32,00,000/- which does not require any interference.

Now, I turn to the sentence of imprisonment. There can be no dispute in so far as the sentence of imprisonment is concerned that it should commensurate with the gravity of the crime. Court has to deal with the offenders by imposing proper sentence by taking into consideration the facts and circumstances of each case. It is not only the rights of the offenders which are required to be looked into at the time of the imposition of sentence, but also of the victims of the crime and society at large, also by considering the object sought to be achieved by the particular legislation. Considering the facts and circumstances of the case and the object of the law, I am of the view that the sentence of imprisonment would be a harsh sentence having no penal objective to be achieved. Hence, the sentence of imprisonment is set aside.

I note that the trial court has not passed any default order *i.e.* imprisonment in default of payment of the fine. When an offender is sentenced to fine only, the Court has the power to make a default order under Section 388 of the Code of Criminal Procedure (in short the 'Cr.P.C.'). Section 423(1)(d) of the Cr.P.C. empowers the Appellate Court to pass any consequential or incidental order that may be 'just and proper'. Since, this Court has already set aside the sentence of imprisonment, it would be just and proper to pass a default order.

In view of the foregoing discussions, the order of the Court is as follows:

The conviction of the appellant under Section 138 of the Act, 1881 is upheld, but the sentence is modified. The sentence of 1 (one) year simple imprisonment is set aside. The sentence of fine of Tk. 32,00,000/-, which is equivalent to the value of the dishonoured cheque, is upheld. The convict-appellant has already deposited Tk. 16,00,000/- in the Court below before filing the appeal. The Court concerned is directed to give the said deposit to the complainant-respondent No.2 forthwith.

In the instant case, it further appears that the cheque was issued on 28.04.2016 and the case was filed on 08.01.2017. On meticulous perusal of the supplementary-affidavit, it appears that at this period the appellant paid an amount of Tk. 12,70,000/- to the complainant which has not been denied by the complainant though it has been stated by the complainant that this amount relates to different transactions. To substantiate the argument the learned counsel for the complainant filed a counter affidavit annexing a bank statement to justify that the amount was a personal loan

to the appellant. But on meticulous perusal of the said counter-affidavit and the statement that the entire amount was cash withdrawal which does not reflect any payment to the appellant nor there is any evidence to show that apart from the cheque of Tk. 32,00,000/- the complainant made another loan of Tk. 12,70,000/-. So the contention as raised by the appellant has substance. As such, the convict-appellant is directed to pay the remaining portion of Tk. 3,30,000/- within 1(one) month from the date of receipt of the instant judgment and order, in default, to suffer simple imprisonment for 15(fifteen) days.

In the result, the instant appeal is dismissed with modification of sentence and with direction made above. The convict-appellant is released from the bail bond.

Send down the L.C. Records to the concerned court below with a copy of the judgment at once.

(Mamnoon Rahman, J.)

*Emdad.B.O.*