

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 1102 of 2023

Md. Nizamuddin

...Convict-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Md. Sayed Alom (Tipu), Advocate

...For the convict-petitioner

Mr. Mohammad Shahin Howlader, Advocate

...For the complainant-opposite party No. 2

Heard on 06.12.2023 and 02.01.2024

Judgment delivered on 23.01.2024

This Rule under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 was issued calling upon the opposite parties to show cause as to why the judgment and order dated 26.02.2023 passed by the Sessions Judge, Narayanganj in Criminal Appeal No. 207 of 2022 affirming the judgment and order of conviction and sentence dated 29.05.2022 passed by the Joint Sessions Judge, Court No. 2, Narayanganj in Session Case No. 790 of 2020 arising out of C. R. Case No.235 of 2016 convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 7(seven) months and also to pay a fine of Tk. 6,00,000 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 prosecution case, in short, is that the complainant Saidur Rahman @ Liton and the accused Md. Nizamuddin is the inhabitant of the same locality and the accused obtained a loan of Tk. 6,00,000 from the complainant. The accused issued Cheque No. 1358995 on 05.07.2015 drawn on his Account No. 00111100000306 maintained in the name of Nilima Cotton Processing with the South East Bank Limited, Narayanganj Branch in favour of the Runa Enterprise. The accused is the Proprietor of Nilima Cotton Processing and the complainant is the Proprietor of Runa Enterprise. The complainant presented said cheque on 03.12.2015 for

encashment through South East Bank Limited, Narayanganj Branch but the said cheque was dishonoured with a remark 'account closed or dormant or block'. The complainant issued a legal notice on 30.12.2015 through registered post with AD but he did not pay the cheque amount within time. After that, the complainant filed the case on 01.03.2016 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 learned Magistrate was pleased to take cognizance of the offence against the accused under Section 138 of the Negotiable Instruments Act, 1881. The Chief Judicial Magistrate transmitted the record to the Sessions Judge, Narayanganj and the Sessions Judge took cognizance of the offence against the accused and transferred the case to the Joint Sessions Judge, Court No. 2, Narayanganj for disposal.

During trial, the charge was framed on 23.09.2020 against the accused under Section 138 of the Negotiable Instruments Act, 1881. The charge framed against the accused was read over and explained to him and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 1(one) witness to prove the charge against the accused and the defence cross-examined P.W. 1. After examination of the prosecution witness, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he examined three D.Ws including himself.

After concluding the trial, the trial Court by judgment and order dated 29.05.2022 convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer simple imprisonment for 7(seven) months and a fine of Tk. 6,00,000. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence dated 29.05.2022 passed by the trial Court the accused filed Criminal Appeal No. 207 of 2022. After hearing, the appellate Court below by impugned judgment and order dated 26.02.2023 affirmed the judgment and order of conviction and sentence dated

29.05.2022 passed by the Joint Sessions Judge, Court No. 2, Narayanganj against which the convict-petitioner obtained the Rule.

P.W. 1 Saidur Rahman Liton is the complainant. He stated that accused Md. Nizamuddin issued a cheque on 05.07.2015 for payment of Tk. 6,00,000 which was dishonoured on 03.12.2015 and he served a legal notice on 30.12.2015 upon the accused but he did not pay the cheque amount. He proved the complaint petition and his signatures on each page of the complaint petition as exhibit 1 series. He proved the cheque, dishonoured slip, legal notice and postal receipt with AD as exhibit 2-4. During cross-examination, he stated that the accused is his maternal uncle. He took a loan of Tk. 6,00,000 but there was no written undertaking. On 05.07.2015 at 10.00 am, he handed over the cheque at his godown. He could not say whether the handwriting of the accused and the amount mentioned in the cheque were written by the accused or not. He affirmed that the accused had written the cheque. He could not say whether the cheque was dishonoured on the ground of different signature. He denied the suggestion that the accused did not issue any cheque in his name and that he deposed falsely.

D.W. 1 Md. Nizamuddin is the accused. He stated that there was no business transaction between him and the complainant. He did not issue any cheque and denied his signature on the cheque. During cross-examination, he stated that his company is the owner of the disputed cheque and he is the account holder. He did not sign the cheque. The complainant used to come to his house. The complainant has stolen the cheque beyond his knowledge and he filed a GD against the accused. His account was dormant. He denied the suggestion that he issued the cheque in favour of the accused.

D.W. 2 Azizur Rahman is the son of accused Md. Nizamuddin. He stated that he did not hand over the cheque to the accused. During cross-examination, he stated that his father is the account holder and his father did not sign the cheque. He denied the suggestion that he deposed falsely.

D.W. 3 Md. Shakil stated that the accused and the complainant are known to him and they are inhabitants of the same locality. He is not aware of the case. The prosecution declined to cross-examine P.W. 3.

Learned Advocate Mr Md. Sayed Alom (Tipu) appearing on behalf of the accused submits that both the accused and the complainant are relatives and they settled the dispute out of Court and the accused paid the remaining 50% of the cheque amount out of Court. Therefore, he prayed for setting aside the impugned judgment and order passed by the Courts below.

Learned Advocate Mr. Mohammad Shahin Howlader appearing on behalf of the complainant-opposite party No. 2 submits that both the complainant and the accused arrived at a settlement out of Court and executed a written agreement on 18.01.2024 as regards the disputed cheque issued by the accused. He admitted that on 15.01.2024, he received 50% of the cheque amount and the complainant had withdrawn 50% of the cheque amount deposited by the accused before filing the appeal. He received the entire cheque amount.

I have considered the submission of the learned Advocates of both parties, perused evidence, the impugned judgments and orders passed by the Courts below and the records.

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 taking cognizance of the offence, there is no scope to settle the dispute out of Court and the case is required to be disposed of considering the evidence of both the parties adduced at the time of trial.

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. By cross-examining P.W. 1 and adducing evidence the defence could not rebut the presumption. Therefore I am of the view that the accused Md. Nizamuddin issued the cheque

(exhibit 2) in favour of the payee-complainant for consideration. After service of notice in writing upon the accused under Section 138(1)(b) of the said Act, he failed to pay the cheque amount. Thereby he committed an offence under Section 138 of the Negotiable Instruments Act, 1881 and the complainant filed the case following 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 Courts below on proper assessment of evidence legally passed the impugned judgments and orders of conviction.

It is found that both the accused and the complainant are close relatives. Therefore, considering the facts and circumstances of the case and 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 Courts below are modified as under;

The accused Md. Nizamuddin 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. 6,00,000.

The complainant admitted that he received the entire cheque amount. Therefore, the sentence of fine imposed/awarded by this Court against the accused is not required to be deposited again.

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

Send down the lower Court's records at once.