

**IN THE SUPREME COURT OF
BANGLADESH**

HIGH COURT DIVISION

(CRIMINAL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Shohrwardi

Criminal Revision No. 1733 of 2023

Nasir Uddin Talukder (Nahid)

.....Convict petitioner

-Vs-

The State and another

....respondents

Mr. Md. Nashiruddin, Advocate

.For the convict petitioner.

Mr. Sujit Kumar Chatterjee (Bappi),
Advocate

..For the opposite party No.2

Mr. Md. Shahidul Islam, AAG with

Mrs. Sharmin Hamid, AAG

..... For the State

**Heard on 04.11.2024, 14.11.2024,
04.12.2024**

Judgment delivered on: 09.12.2024

On an application filed under section 439 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 13.03.2023 passed by Sessions Judge, Madaripur in Criminal Appeal No. 23 of 2022 affirming the judgment and order dated 28.02.2021 passed by Joint Sessions Judge, Court No.2, Madaripur in Sessions Case No. 91 of 2020 convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 01(year) year and fine of Tk. 3,50,000

should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that the complainant Yeakub Ali Hawlader and the accused Nasir Uddin Talukder (Nahid) were known to each other and developed a friendly relationship between them. The complainant is the Proprietor of the Human Health Care shop. On 24.03.2016 at noon the accused went to the said shop situated at Pakdi new bus stand and demanded loan of Tk. 350,000. The complainant agreed to pay Tk. 150,000 in cash and Tk. 100,000 by cheque No. 3594028 and cheque No. 3594029 each drawn on his Account No. 205022170100319616 maintained with Islami Bank, Madaripur Branch. He paid total Tk. 350,000 in cash and by cheque and the accused also received the cheque amount but he did not pay the money in time. On 15.04.2019 he along with the locals went to the house of the accused and issued cheque No. JCA 0483640 for payment of Tk. 50,000 and Cheque No. JCA 0483646 for payment of Tk. 300,000 drawn on his Account No. 0440210003715 maintained with Jamuna Bank Ltd., Madaripur Branch. He presented the said cheques on 16.04.2019 for encashment but the same was dishonoured due to “insufficient funds”. On 05.09.2019 he again presented the said cheques which were dishonoured for “insufficient funds”. He sent legal notice on 30.09.2019 through the learned Advocate to the accused for payment of the cheques amount within 30 days and he received the legal notice on 01.10.2019 but he did not pay the cheque amount within time. After that, he filed the complaint petition on 13.11.2019.

After filing the complaint petition, the learned Chief Judicial Magistrate, Madaripur by order dated 13.11.2019 took cognizance of

the offence against the accused under section 138 of the Negotiable Instruments Act, 1881. The Chief Judicial Magistrate by order dated 13.02.2020 sent the case to the Sessions Judge, Madaripur for trial and disposal of the case.

During the trial, charge was framed against the accused under section 138 of the Negotiable Instruments Act, 1881 which 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 01 witness to prove the charge against the accused. After examination of the prosecution witness, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and the defence examined 01(one) DW.

After concluding the trial, the Joint Sessions Judge, Court No. 2, Madaripur by judgment and order dated 28.02.2021 convicted the accused under section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 01(one) year and fine of Tk. 3,50,000 against which the convict petitioner filed Criminal Appeal No. 23 of 2022 before the Sessions Judge, Madaripur. After hearing the appeal the Sessions Judge, Madaripur by impugned judgment and order dated 13.03.2023 affirmed the judgment and order of conviction and sentence passed by the trial court against which the convict petitioner obtained the instant Rule.

P.W. 1 Yeakub Ali Hawlader stated that the accused Nasir Uddin Talukder issued two cheques on 15.04.2019 for payment of Tk. 50,000 and 300,000 which were dishonoured on 16.04.2019. The said cheques were dishonoured again on 05.09.2019. He sent legal notice on 30.09.2019 but he did not pay the cheque amount. He proved the

complaint petition as exhibit-1 and his signature on the complaint petition as exhibit-1/1, the dishonoured slip dated 16.4.2019 and the cheques as exhibit-2 series, the cheque dated 05.09.2019 and dishonour slip as exhibit-3 series, the photocopy of the legal notice and the postal receipt as exhibit-4 series. During cross-examination, he stated that he paid Tk. 3,50,000 on 24.03.2016. He is the owner of Human Health Care and he sells medicine. He denied the suggestion that the accused was his business partner. An agreement was executed between him and the accused on the non-judicial stamp of Tk. 300. He could not remember the date of the agreement. He could not remember whether the said two cheques were received as security. He could not say whether said agreement belonged to him. He denied the suggestion that two cheques were received from the accused as security of the partnership business and subsequently, he filed the case using the said cheques. He also denied the suggestion that the accused did not issue any cheque for payment.

D.W. 1 Yeasin Hawlader is the Manager of Human Health Care. He stated that the complainant and the accused were known to him. The complainant is the Proprietor of Human Health Care and the accused was the Sales Representative of the said business establishment. The accused issued a blank cheque without a date for payment of Tk. 300,000. The accused used to take the delivery of the goods from the complainant to sale in the market. He was a witness to the agreement. There was another witness Sariful. Sariful typed the agreement. During cross-examination, he stated that he did not submit any document to prove that he was the Manager of the Union Health Care. He could not say whether in the agreement it had been mentioned that the accused would issue the cheque. He could not say

the number of the cheque given by the accused. The complainant paid money to the accused through a cheque to purchase medicine. The accused received the money but the accused did not pay the cheque amount to the complainant.

The learned Advocate Mr. Md. Nashiruddin appearing on behalf of the convict petitioner submits that the convict petitioner was the Sales Representative of Human Health Care and the complainant Yeakub Ali Hawlader was the Proprietor of Human Health Care and at the time of appointment as Sales Representative an agreement was executed between them and blank cheques were issued by the accused in favour of the complainant at the time of appointment of the accused as Sales Representative. He further submits that the complainant withheld the said agreement and there was no consideration of the undated cheques issued by the accused in favour of the complainant. He also submits that the complainant failed to prove that before filing the complaint petition the notice dated 30.09.2019 was served upon the accused and there was no cause of action to file the case and the prosecution failed to prove the charge against the convict petitioner beyond all reasonable doubt.

The learned Advocate Mr. Sujit Kumar Chatterjee appearing along with learned Advocate Mr. Md. Shahin Khan on behalf of the opposite party No. 2 submits that the accused issued 2 cheques on 15.04.2019 in favour of the complainant for payment of Tk. 50,000 and Tk. 300,000 and the cheques were presented on 16.04.2019 and 05.09.2019 within 6 months from the date of issuance of the cheques. But the cheques were dishonoured on those dates and the complainant sent a legal notice on 30.09.2019 through the learned Advocate for payment of the cheque amount within 30 days and the accused

received the notice on 01.10.2019 but he did not pay the cheques amount. He further submits that during trial the accused did not deny that notice was not served upon the accused. In support of his submission, the learned Advocate relied on the decision made in the case of Amir Hossain vs. Malek reported in 56 DLR (AD)(2004) 146, Abdul Hamid vs. the State and another reported in 21 BLC(2016) 370 and the case of Monirul Islam (Md) vs. the State reported in 22 BLC(2017) 414.

I have considered the submission of the learned Advocate Mr. Md. Nashiruddin who appeared on behalf of the convict petitioner and learned Advocate Mr. Sujit Kumar Chatterjee who appeared along with the learned Advocate Mr. Shahin Miah on behalf of the opposite party No. 2, perused the evidence, impugned judgments and orders passed by the courts below and the records.

On perusal of the evidence, it appears that cheque No. 0483640 dated 15.04.2019 for payment of Tk. 50,000 drawn on Account No. 0440210003715 and cheque No. 0483646 dated 15.04.2019 for payment of Tk. 300,000 drawn on said account were allegedly issued by the accused in favour of the complainant Md. Yeakub Ali Hawlader. During the trial, the said cheques were proved as exhibit-2/1 and 3. Dishonoured slips dated 16.04.2019 in respect of Cheque No. 0483640 was proved as exhibit-2. The dishonour slip dated 05.09.2019 in respect of cheque No. JCA 0483646 for payment of Tk. 300,000 was proved as exhibit-3/1. The dishonour slip for cheque No. JCA 0483640 dated 05.09.2019 for Tk. 50,000 was not proved in the case. The copy of the legal notice dated 30.09.2019 sent by the learned Advocate Gopal Krishna Mandal on behalf of the complainant

Yeakub Ali Hawlader was proved as Exhibit 4 and postal receipt dated 30.09.2019 was proved as exhibit-4/1.

From the above evidence, it appears that the accused Nasir Uddin Talukder issued 2 cheques in favour of the complainant and the Cheque No. JCA 0483646 was lastly presented 05.09.2019 and the complainant proved the dishonoured slip in respect of cheque No. JCA 0483646 for payment of Tk. 300,000 as exhibit-3/1 and the dishonour slip dated 05.09.2019 in respect of cheque No. JCA 0483640 for payment of Tk. 50,000 was not proved in the case. There is no seal and signature of any officer of the bank and date of presentation on the cheques (exhibits 2 and 3/1). In the absence of any seal and signature of the officer of the bank and date of presentation on the cheques, it can not be said that the said cheques were presented on 16.04.2019 and 05.09.2019 for encashment. Cheque No. 483640 was allegedly presented on 16.04.2019 and legal notice was sent on 30.9.2019 beyond the period of thirty days. Therefore, the demand for cheque amount of cheque No. 483640 was not sent following the provision made in clause b to section 138 of the Negotiable Instruments Act, 1881.

In the complaint petition, it has been mentioned that the legal notice was sent on 30.09.2019. P.W. 1 stated that he sent legal notice on 30.09.2019 to the accused but he did not pay the cheque amount. As regards the submission of the learned Advocate for the complainant opposite party No. 2 as to the denial of service of notice upon the accused I hold the view that the defence will only deny the statement made by the prosecution witness. No statement is made by P.W. 1 as to the service of the notice upon the accused. Therefore, there is no scope to give any suggestion to P.W. 1 that the notice was

not served upon the accused. The prosecution has to prove that before filing the complaint petition notice was served upon the accused. A statement in the complaint petition that notice was served on 01.10.2019 is not sufficient unless complainant P.W. 1 corroborates the statement made in the complaint petition that notice was served on 01.10.2019 and proves the AD. No evidence has been adduced by the prosecution to prove that the notice dated 30.09.2019 was sent by registered post with AD and it was served upon the accused before filing the complaint petition. The notice was not sent through registered post with AD in compliance with the provision made in Section 138(1A)(b) of the Negotiable Instruments Act, 1881.

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 of the said Act by Act No. III of 2006 making provision regarding the mode of the service of notice under clause b to Section 138 of the said Act. Under Section 138(1A) of the said Act the notice 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 acknowledgement 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. The Negotiable Instruments Act, 1881 is a special law. Service of notice upon the accused through registered post with AD in compliance with the provision made in Section 138(1A) of the said Act at least by one mode as stated above is sine qua non. It is found that notice was not sent through registered post with AD in compliance with the provision made in Section 138(1A)(b) of the said Act.

The prosecution case is that the accused took loan of Tk. 350,000 and he issued the cheques for payment of loan amount. The

defence case is that the accused was the sales representative of the Human Health Care. An agreement was executed regarding the appointment of the accused as a sales representative and the said agreement belonged to the complainant who is the proprietor of Human Health Care. He withheld the said agreement during the trial of the case. Nothing has been stated in the complaint petition that the accused Nasir Uddin Talukder was the sales representative of the complainant. Rather P.W. 1 stated that a friendly relationship developed between the complainant and the accused and he took loan of Tk. 350,000 from the complainant. During cross-examination, P.W. 1 admitted that an agreement was executed between him and the accused on the non-judicial stamp of Tk.300. But he could not say the date of execution of the agreement. In reply to a question P.W. 1 stated that he could not remember whether in the said agreement it has been mentioned that 2 cheques were issued as a security. D.W. 1 Yeasin Hawlader stated that he was the Manager of Human Health Care which is not denied by the prosecution. D.W.1 stated that the accused was the sales representative of the complainant and he issued cheque without mentioning the date for payment of Tk. 300,000. He was also the witness to the agreement executed between the accused and the complainant.

On scrutiny of the evidence of P.W. 1 and DW. 1, it reveals that the accused was the sales representative of P.W. 1 and the accused used to take money from the complainant to purchase the medicine for Human Health Care and there was a fiduciary transaction between them. The evidence of D.W. 1 that the accused issued an undated cheque in favour of the complainant for payment of Tk. 300,000 was not denied by the complainant. The defence case that

the accused was the sales representative of the complainant and he issued an undated cheque at the time of appointment in favour of the complainant as security is not denied by the prosecution.

The prosecution did not deny the evidence of D.W.1 that an agreement was executed between the accused and the complainant regarding the appointment of the accused as representative of P.W. 1. In the absence of the said agreement, it cannot be said that the accused received Tk. 350,000 from the complainant as loan. Therefore, I am of the view that an undated, blank and security cheques were issued by the accused in favour of the complainant at the time of the appointment of the accused as a sales representative of P.W. 1. There was no consideration of the cheque.

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) is rebuttable. The defence by cross-examining P.W. 1 and adducing evidence proved that there was no consideration of the cheques issued by the accused in favour of the complainant at the time of his appointment as sales representative of P.W.1 and rebutted the presumption under section 118(a) of the said Act.

During the hearing, the learned Advocate Mr. Sujit Kumar Chatterjee (Bappi) having filed an affidavit sworn on 04.12.2024 stated that the notice sent on 30.09.2019 was received by the accused on 01.10.2019 and he prayed for sending the case on remand to the trial court. Since no statement is made by P.W. 1 as to the date of

sending notice by registered post with AD and service of notice upon the accused, I am not inclined to send the case on remand.

Because of the above evidence, finding, observation and proposition, I am of the view that both the courts below failed to interpret section 118(a), clause 'c' to Section 138, Section 138 (1A)(b) and section 141 (b) of the Negotiable Instruments Act, 1881 and arrived at a wrong decision as to the guilt of the accused. Therefore, both the judgment and order of conviction and sentence passed by the courts below are liable to be set aside.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders passed by the courts below against convict petitioner Nasir Uddin Talukder (Nahid) are hereby set aside.

The accused Md. Nasir Uddin Talukder (Nahid) is entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

However, the complainant is at liberty to file a civil/money suit for recovery of the cheque amount, if so advised.

Send down the lower Court's records at once.

