

**Present:**

Mr. Justice Md. Shohrowardi

**Criminal Revision No. 3269 of 2023**

Swadin Hasan Selim

...Convict-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Md. Aktarujjaman, Advocate

...For the convict-petitioner

Mr. Mohammad Abul Kashem Bhuiyan, Advocate

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

Heard on 09.06.2024 and 02.07.2024

**Judgment delivered on 10.07.2024**

On an application filed under Section 439 read with Section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 10.07.2023 passed by the Additional Sessions Judge, Court No. 2, Tangail in Criminal Appeal No 283 of 2022 affirming the judgment and order of conviction and sentence dated 10.04.2022 passed by the Joint Sessions Judge, Court No. 2. Tangail in Session Case No.776 of 2021 arising out of Complaint Register (C.R.) Case No. 14 of 2021 (Ghatail) convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 1 (one) year and a fine of Tk. 13,00,000 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 A.K.M Masud Khan is a businessman and former Chairman of Sandhanpur Union Parishad and the accused Swadin Hasan Selim is his neighbour and also a relative. The accused is the proprietor of Messers Akash Bricks Field and Titas Bricks Field. On 12.10.2018 the accused came to the house of the complainant and received Tk.

43,00,000(forty-three lakh) in advance to supply total 716666 pieces of bricks within the first of April, 2019 but he did not supply the bricks. The accused issued Cheque No. GaChha 0635577 on 20.06.2020 for payment of Tk. 13,00,000 drawn on his Current Account No. 6028502000555 maintained with Sonali Bank Limited, Shaheed Salauddin Cantonment Branch for part payment of the said amount. The complainant presented the said cheque on 18.11.2020 for encashment which was dishonoured with a remark 'insufficient funds'. After that, he sent a legal notice on 24.11.2020 to the accused for payment of the cheque amount through registered post with AD and he received the said notice. He did not pay the cheque amount. Consequently, he filed the case on 07.01.2021.

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 case record was transferred to the Sessions Judge, Tangail and the case was registered as Session Case No. 776 of 2021. The Sessions Judge, Tangail transferred the case to the Joint Sessions Judge, Court No. 2, Tangail for trial.

During trial, the 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 complainant examined 1(one) witness to prove the charge. 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 again pleaded not guilty. Thereafter, the defence examined one witness who was cross-examined by the complainant.

After concluding the trial, the trial Court by judgment and order dated 10.04.2022 convicted the accused Swadin Hasan Selim

under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 1(one) year and a fine of Tk. 13,00,000 against which the accused filed Criminal Appeal No. 283 of 2022 before the Sessions Judge, Tangail who was pleased to transfer the case to the Additional Sessions Judge, Court No. 2, Tangail. After hearing the appeal, the Additional Sessions Judge, Court No. 2, Tangail by impugned judgment and order dated 10.07.2023 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 A.K.M Masud Khan is the complainant. He stated that on 20.06.2020 the accused Md. Swadin Hasan Selim issued a cheque in his favour for payment of Tk. 13,00,000 which was dishonoured on 18.11.2020 due to 'insufficient funds'. After that, he served a legal notice on 24.11.2020 but he did not pay the cheque amount. He proved the complaint petition as exhibit 1 and his signature as exhibit 1/1. He proved the cheque as exhibit 2, dishonour slip as exhibit 3, the postal receipt as exhibit 4 and the legal notice as exhibit 5. During cross-examination, he stated that he paid total Tk. 43 lakh for supplying 7,16,066 pieces of bricks. The accused is the owner of bricks field. He denied the suggestion that the accused supplied all the bricks. He denied the suggestion that there is no agreement/contract regarding Tk. 43 lakh.

D.W. 1 Md. Swadin Hasan Selim is the accused. He stated that he sold 3 lakh pieces of bricks in advance valued at Tk. 15,75,000. At the time of payment, the complainant received 3 security cheques from him. After starting production, he became sick. At that time, the complainant received total 1,35,000 bricks and sold those bricks which is known to all. At that time, he was sick. There was due of total 1,65,000 pieces of bricks valued at Tk. 8 lakh. No occurrence took place as stated by P.W. 1. During cross-examination, he stated that at the time of delivery of the bricks, he

was under treatment at Dhaka. He issued the cheque in the month of June, 2019. He denied the suggestion that on 12.10.2018 he received total Tk. 43 lakh to supply 7,16,066 pieces of bricks to the complainant. He denied the suggestion that he supplied the bricks is not true. He denied the suggestion that on 05.07.2020 he issued the cheque for Tk. 20 lakh. He admitted that the cheque was dishonoured on 19.11.2020 and he also received the legal notice. He denied the suggestion that no brick was supplied to the accused.

Learned Advocate Mr. Md. Aktarujjaman engaged on behalf of the convict-petitioner submits that both the complainant and the convict-petitioner filed a joint application stating that the convict-petitioner paid the entire cheque amount and the complainant received the said amount. Therefore, he prayed for making the Rule absolute considering the compromise made between parties.

Learned Advocate Mr. Mohammad Abul Kashem Bhuiyan appearing on behalf of the complainant-opposite party No. 2 submits that the convict-petitioner Swadin Hasan Selim issued a cheque on 20.06.2020 for payment of Tk. 13,00,000 and the same was dishonoured on 18.11.2020 for 'insufficient funds' and after service of notice upon the accused he did not pay the cheque amount. However, he submits that both the complainant and the accused settled the dispute out of Court and the complainant received the entire cheque amount Tk. 13,00,000.

I have considered the submission of the learned Advocate Mr. Md. Aktarujjaman who appeared on behalf of the convict-petitioner and the learned Advocate Mr. Mohammad Abul Kashem Bhuiyan who appeared on behalf of the opposite party No. 2, perused the evidence, the impugned judgments and orders passed by the Courts below and the records.

On perusal of the records, it appears that the statement made by P.W. 1, as regards the issuance of the cheque by the convict-petitioner, is admitted by the accused during the cross-examination

of D.W. 1. The defence case is that he issued a blank cheque in favour of the complainant and partly supplied the bricks. During cross-examination, D.W. 1 admitted that after dishonour of the cheque, the complainant sent a legal notice on 24.11.2020. There is no denial of the facts that the complainant did not receive the said notice. He did not pay the cheque amount. Therefore, I am of the view that the accused issued the cheque for consideration and he did not pay the cheque amount after service of the notice upon him. Therefore the convict-petitioner committed offence under Section 138 of the Negotiable Instruments Act, 1881.

The Negotiable Instruments Act, 1881 is a special law and the offence under Section 138 of the Negotiable Instruments Act, 1881 is not compoundable. Therefore, there is no scope to dispose of the Rule considering the compromise made between the parties. After filing the case under Section 138 of the said Act, the Court shall dispose of the case considering the merit of the case.

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. The convict-petitioner failed to rebut the presumption under Section 118(a) of the said Act. Therefore I am of the view that the convict-petitioner Swadin Hasan Selim issued the cheque (exhibit 2) in favour of the payee-complainant for consideration. After making a demand in writing under Section 138(1)(b) of the said Act, he did not pay the cheque amount despite the notice served upon him. In the meantime, the accused paid the entire cheque amount. Thereby he committed an offence under Section 138 of the Negotiable Instruments Act, 1881 and the complainant filed the case following all procedures provided in Section 138 of the Negotiable

Instruments Act, 1881. The prosecution proved the charge against the convict-petitioner beyond all reasonable doubt and the Courts below on proper assessment and evaluation of evidence legally passed the impugned judgments and orders.

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 trial Court is modified as under;

The convict-petitioner Swadin Hasan Selim 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. 13,00,000.

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

The complainant is entitled to get the fine amount. Since the complainant admitted that he received the fine amount from the convict-petitioner, therefore he is not required to deposit the fine amount again.

Send down the lower Court's records at once.