

**IN THE SUPREME COURT OF
BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)**

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 12666 of 2023

Md. Jafor Kibria Shujon

.....Appellant

-versus-

The State and another

.....Respondent

Mr. Muhammad Anjarul Hasan, Advocate

.... For the complainant-appellant

Mr. Sheikh Sharif Uddin, Advocate

.....For the respondent No.2

Mr. Md. Anichur Rahman Khan, DAG with

Mr. Sultan Mahmood Banna, AAG with

Mr. Mir Moniruzzaman, AAG

....For the State

Heard on 13.07.2025, 14.07.2025 and 24.07.2025

Judgment delivered on 28.07.2025

This appeal under section 417(2)(a) of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order dated 02.11.2023 passed by the Metropolitan Joint Sessions Judge, Court No. 1, Sylhet in Sessions Case No. 1113 of 2020 arising out of C.R. Case No. 1972 of 2019 (Kotwali) acquitting the accused M. Istak Ahmad

Bablu from the charge framed against him under section 138 of the Negotiable Instruments Act, 1881.

The prosecution's case, in brief, is that the accused M. Istak Ahmed Bablu purchased goods amounting to Tk. 7,15,188 on credit from M/S. Mamun Enterprise, but he could not pay the said amount in time, and on the request of the complainant, the accused issued cheque No. 8342764 on 08.09.2019 drawn on his account No. 16011020005464 maintained with Prime Bank Ltd. Subidbazar Branch, Sylhet, for payment of Tk. 7,15,188 in favour of the complainant. The complainant presented the said cheque on 09.09.2019 for encashment, which was dishonored on the same date with the remark "account closed/dormant/blocked". On 03.10.2019, the complainant sent a legal notice to the accused through registered post with AD. Although the accused himself received the notice but he did not pay the cheque amount in time. Therefore, he committed offence under section 138 of the Negotiable Instruments Act, 1881. In the complaint petition, it has been alleged that the cause of action arose on 03.10.2019, and he filed the case on 20.11.2019.

At the time of filing the complaint petition, the complainant was examined under section 200 of the Code of Criminal Procedure, 1898, and the learned Additional Chief Metropolitan Magistrate, Sylhet, by order dated 20.11.2019 took cognizance of the offence against the accused under section 138 of the Negotiable Instruments Act, 1881. The accused voluntarily surrendered on 20.03.2020 and obtained bail. The Additional Chief Metropolitan Magistrate, Cognizance Court No. 1, Sylhet sent the case to the Metropolitan Sessions Judge, Sylhet, who by order dated 18.10.2020 framed charge against the accused under section 138 of the Negotiable Instruments Act, 1881, which was read over and

explained to the accused, and he pleaded not guilty to the charge. The Metropolitan Sessions Judge, Sylhet, by order dated 22.03.2021, sent the case to the Joint Sessions Judge, Court No. 1, Sylhet for trial.

During the trial, the prosecution examined 01(one) witness to prove the charge against the accused, and at the time of the examination of P.W. 1, the accused was absconding. Subsequently, the Joint Sessions Judge, Court No. 1, by order dated 01.02.2023, recalled P.W.1 on the prayer of the defence, and the defence cross-examined P.W. 1. Thereafter, the accused was examined under section 342 of the Code of Criminal Procedure, 1898, and he examined 01(one) D.W. The defence also submitted documents through feristhi. After concluding trial, the trial court, by impugned judgment and order, acquitted the accused from the charge framed against him under section 138 of the Negotiable Instruments Act, 1881 against which the complainant filed the appeal.

P.W. 1 Sheikh Dulal Ahmed is the Assistant Manager of M/S. Mamun Enterprise, Sylhet. He stated that he deposed based on the power of attorney executed by the complainant. The accused M. Istak Ahmad Bablu issued a cheque on 08.09.2019 for payment of Tk. 7,15,188 in favour of the complainant. The said cheque was presented on 09.09.2019, but it was dishonoured. After that, he sent a legal notice on 03.10.2019, but the accused did not pay the cheque amount in time as mentioned in the notice. Thereafter, he filed the complaint petition. He proved the complaint petition, and the signature on the complaint petition, and the power of attorney as exhibit-1 series. He proved the disputed cheque, dishonored slip, legal notice, and postal receipt as exhibit-2 series. During cross-examination, he stated that the accused purchased cement from their shop, but nothing has been specifically stated in the complaint petition. He did not submit any copy of the

receipt or chalan. He could not remember the date on which the accused took the delivery of goods valued at Tk. 715,188. He could not remember whether the accused paid Tk. 300,000 by a subsequent cheque of the disputed cheque to M/S. Mamun Enterprise. He denied the suggestion that at the time of selling goods, a blank security cheque was received or that he wrote the cheque amount on the blank cheque, or that he deposed falsely to harass the accused. He admitted that Mamun is the younger brother of Md. Jafor Kibria Shujon and Mamun Kibria Sumon is also the proprietors of Kibria Still Corporation. He admitted that the cases are pending between Mamun Kibria Sumon and Jafor Kibria Shujon regarding the proprietorship of M/S. Mamun Enterprise, but he could not say the specific number of cases. He did not produce the trade license of M/S. Mamun Enterprise. He could not say whether on 06.04.2015, Tk. 300,000 was paid by another cheque to Mamun Kibria Sumon. He could not remember whether any account is maintained in the name of M/S. Mamun Enterprise with the ULCB, Amberkhana Branch, Sylhet. He could not remember whether on 06.08.2015, Tk. 200,000 was transferred from the account of the accused to the account maintained in the name of M/S. Mamun Enterprise through the UCBL, Amberkhana Branch, Sylhet. He admitted that an account is maintained with the Pubali Bank Ltd, Women's College Branch, Sylhet, in the name of M/S. Mamun Enterprise. He could not remember whether on 29.03.2018, Tk. 100,000 was transferred from the account of the accused maintained with Pubali Bank Ltd, Stadium Branch, Sylhet, to the account of M/S. Mamun Enterprise maintained with Pubali Bank Ltd, Women's College Branch, Sylhet. He denied the suggestion that the cheque amount was not due to M/S. Mamun Enterprise, or that the accused paid the debt of Mamun Enterprise, or that Jafor Kibria Shujon is not the Proprietor of M/S. Mamun Enterprise, or that the accused paid

dues of the Mamun Enterprise, or that he filed the case due to a dispute regarding the proprietorship of M/S. Mamun Enterprise or that a security blank cheque was received in 2015, or that subsequently he wrote the cheque amount.

D.W. 1 M. Istak Ahmad Bablu is the accused. He stated that he started the business in 2014 with the M/S. Mamun Enterprise and continued till 2015. At the time of starting the business, a security cheque was kept with the M/S. Mamun Enterprise. Subsequently, he paid the dues through the cheque, but a dispute arose between Mamun Kibira Sumon and Jafor Kibria Shujon regarding proprietorship of the M/S. Mamun Enterprise. He paid the money through the account maintained in the name of M/S. Mamun Enterprise. Sheikh Dulal, the Manager of the complainant, using the security cheque filed the case. The complainant wrote the cheque amount beyond his knowledge. He produced the statement of account of 3 banks as Exhibit Ka series. During cross-examination, he stated that he paid the dues of M/S. Mamun Enterprise by 3 cheques and in cash in 2016. He paid Tk. 120,000 to the Manager Main of M/S. Mamun Enterprise, but he could not remember the date. He paid the dues till 2018. He could not say whether Jafor Kibria Shujon is the account holder of the account maintained in the name of M/S. Mamun Enterprise. He affirmed that no notice was served by M/S. Mamun Enterprise upon him to pay the dues. He denied the suggestion that a notice was issued by M/S. Mamun Enterprise for payment of the dues. He is not aware of the real owner of M/S. Mamun Enterprise. He denied the suggestion that he issued the disputed cheque on 08.09.2019 for payment of dues of M/S. Mamun Enterprise. He affirmed that he could not say the date of dishonour of the cheque and the date of sending the legal notice. He denied the suggestion that the money paid by 3 cheques is not part of the cheque amount or that

the dues of the M/S. Mamun Enterprise was not paid by the accused or that the statement that the security cheque was given is false or that he deposited falsely.

The learned Advocate Mr. Muhammad Anjarul Hasan, appearing on behalf of the complainant, submits that the accused issued cheque No. 8342764 drawn on his account No. 16011020005464 maintained with Prime Bank Ltd, Subidbazar Branch, Sylhet on 08.09.2019 for payment of Tk. 7,15,188 in favour of M/S. Mamun Enterprise, and as Proprietor of M/S. Mamun Enterprise, the complainant presented the cheque on 09.09.2019, but the said cheque was dishonoured with the remark “account closed/dormant/blocked” and the complainant sent a legal notice on 03.10.2019 to the accused through registered post with AD, and despite the service of notice upon the accused, he did not pay the cheque amount to the complainant. Thereafter, he filed the case on 20.11.2019, complying with the procedure under section 138 and 141(b) of the Negotiable Instruments Act, 1881. During the trial, the prosecution proved the charge against the accused beyond all reasonable doubt, but the trial court, without assigning any good reason, illegally passed the impugned judgment and order acquitting the accused. He further submits that since the notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881 was sent through registered post to the correct address of the accused, in view of the provision made in section 27 of the General Clauses Act, it is to be presumed that the notice sent on 03.10.2019 has been served upon the accused. The prosecution proved the charge against the accused beyond all reasonable doubt, and the trial court illegally passed the impugned judgment and order. He prayed for allowing the appeal.

The learned Advocate Mr. Md. Sheikh Sharif Uddin, appearing on behalf of the accused M. Istak Ahmad Bablu submits that the disputed cheque exhibit-2 was allegedly issued in favour of M/S. Mamun Enterprise, but nothing has been stated in the complaint petition that the Md. Jafor Kibria Shujon is the Proprietor of M/S. Mamun Enterprise and the notice was sent by M/S. Mamun Enterprise. Having drawn the attention of this court to the legal notice dated 03.10.2019 (exhibit-2/2), he submits that Sheikh Dulal Ahmed issued the notice on 03.10.2019 without any authority from M/S. Mamun Enterprise. Therefore, it is to be presumed that no notice was sent by the payee of the alleged cheque (Exhibit 2) to the accused M. Istak Ahmad Bablu. He further submits that the complainant did not make any statement in the complaint petition to the effect that the notice was sent through registered post with AD. Therefore, the mandatory provision made in section 138(1A) was not complied with before filing the case. He also submits that the alleged notice issued under clause b of the proviso to section 138 of the said Act was not served upon the accused before filing the case. He lastly submits that at the time of delivery of the goods on credit, a blank security cheque was handed over to M/S. Mamun Enterprise and the Manager of Md. Jafor Kibria Shujon filed the false case without the consent of the proprietor of M/S. Mamun Enterprise and the trial court, considering the evidence of both parties, legally passed the impugned judgment and order acquitting the accused. He prayed for dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Muhammad Anjarul Hasan, who appeared on behalf of the complainant appellant, and the learned Advocate Mr. Md. Sheikh Sharif Uddin, who appeared on behalf of the accused-respondent, perused the evidence, impugned judgment and order passed by the trial court, and the records.

On perusal of the evidence, it reveals that cheque No. 8342764 was allegedly issued on 08.09.2019 by the Proprietor of M/S. Makhon Mia and sons drawn on Account No. 16011020005464 maintained with Prime Bank Ltd, Subidbazar Branch, Sylhet for payment of Tk. 715,188 in favour of the M/S. Mamun Enterprise. Nothing has been stated in the complaint petition that Md. Jafor Kibria Shujon is the Proprietor of M/S. Mamun Enterprise. On perusal of the evidence of both parties, it reveals that Mamun Kibria Sumon and Md. Jafor Kibria Shujon are full brothers, and the cases are pending regarding the proprietorship of M/S. Mamun Enterprise between them. During cross-examination, it was suggested to P.W. 1 Sheikh Dulal Ahamed that on 06.04.2015 and 29.03.2018, Tk. 300,000 and 100,000, respectively, were paid from the account of the accused to the account maintained in the name of M/S. Mamun Enterprise, which has not been denied by P.W.1. During cross-examination of P.W.1, the defence also suggested that on 06.08.2015, the accused paid Tk. 200,000 through his account maintained with UCBL Amberkhana Branch to the account of M/S. Mamun Enterprise, which has not been denied by P.W.1.

On perusal of the statement of account maintained in the name of M/S. Makhon Mia and Sons (Exhibit-Ka), it reveals that Tk. 200,000 was paid to the M/S. Mamun Enterprise by cheque No. 1004481 dated 06.08.2015. In Exhibit Ka (8), the statement of account No. 16011020005464 maintained in the name of Makhon Mia and Sons with the Pubali Bank Ltd, Subidbazar Branch, it has been mentioned that Tk. 300,000 was withdrawn by one Mamun on 06.04.2015, which proved that there were transactions between the accused and Mamun. Admittedly, the cheque was issued in favour of M/S. Mamun Enterprise. In the absence of any statement in the complaint petition as to the

proprietorship of M/S Mamun Enterprise, it cannot be said that Md. Jafor Kibria Shujon is the Proprietor of M/S. Mamun Enterprise.

Exhibit-Ka series and Ka(8) proved that Mamun Kibria Sumon withdrew total Tk. 500000 as the Proprietor of M/S. Mamun Enterprise. It is also found that the legal notice was not sent by Md. Jafor Kibria Shujon, and he was also not examined in the case. The trial court acquitted the accused, holding that the accused paid the debt of M/S. Mamun Enterprise by exhibit-Ka series, and no evidence was adduced by the prosecution regarding the transaction between the accused and the Md. Jafor Kibria Shujon. The exhibit-Ka series proved that there were transactions between the accused and Mamun Kibria Somon, Proprietor of M/S. Mamun Enterprise. I am of the view that P.W. 1 failed to prove any transaction between Md. Jafor Kibria Shujon and the accused. There is a dispute between Mamun Kibria Somon and Md. Jafor Kibria Shujon, who are the full brothers, regarding the proprietorship of M/S. Mamun Enterprise. The complainant failed to prove that Md. Jafor Kibria Shujon is the proprietor of M/S. Mamun Enterprise.

On perusal of the evidence adduced by both parties, it further reveals that before sending notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881, no power of attorney was executed by Md. Jafor Kibria Shujon in favour of P.W. 1 Sheikh Dulal Ahmed to send the legal notice (Exhibit 2) on 03.10.2019. I am of the view that P.W. 1 Sheikh Dulal Ahmed was not legally empowered to send notice on behalf of Md. Jafor Kibria Shujon to the accused for payment of the cheque amount. No notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881 was sent by Md. Jafor Kibria Shujon to the accused.

At the time of the insertion of section 138 in the Negotiable Instruments Act, 1881, by Act No. XIX of 1994, the legislature made provision in clause b of the proviso to section 138 of the said Act, regarding the demand for payment of cheque amount, but no provision was made at that time in the said Act as to the specific mode of making demand upon the accused. As per section 27 of the General Clauses Act, 1958, if the notice or a letter is sent by registered post addressing the correct address of the addressee, it is to be presumed that the notice was served upon the accused. Nothing is stated in section 27 of the said Act as to the determination of the date of receipt of notice by the accused or date of service of notice upon the accused.

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. Under Section 138(1)(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 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. Nothing has been stated in the complaint petition that the complainant sent a legal notice through registered post with AD. During the trial, the AD was not proved in the case.

The issue regarding the service of notice upon the accused before filing the case under section 138 of the Negotiable Instruments Act, 1881 had been dealt with by our Apex Court in the case of Nizamuddin Mahmood vs Abdul Hamid Bhuiyan judgment dated 15.06.2004 reported in 9 BLC(AD)177. In the said case, the High Court Division quashed the proceedings of the case on the ground of non-service of notice upon the accused before filing the case, and the Hon'ble Appellate Division affirmed the said judgment and order passed by the High Court Division. The said judgment passed by our Apex Court in the case of Nizamuddin (supra) was subsequently reviewed by the Appellate Division by judgment and order dated 17.06.2008, which has been reported in 60 DLR(AD)(2008)195, 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 the case of Md. Amir Hossain Vs. the State and another passed in Criminal Revision No. 3513 of 2023 judgment dated 19.05.2024, this bench (Mr Md. Shohrowardi, J) held that;

“In Section 138 (1) (b) of the Negotiable Instruments Act, 1881, the legislature used the words “makes a demand... in writing” and in Section 138 (1) (c) of the said Act, the legislature used the words “receipt of the said notice”. The literal meaning of the words “receipt of said notice” means that the drawer of the cheque received the notice on a specific date. No provision is made in the said Act as to

how the court will determine that notice under Section 138 (1) (b) of the said Act has been received by the drawer or served upon the drawer. In the absence of any statutory provision, as regards the determination of service of notice upon the drawer, I am of the view that the actual date of service of notice upon the drawer or receipt of notice by the drawer on a particular date might have been reckoned as service of notice upon the drawer. The receipt of notice indicates that the drawer of the cheque had been notified about the dishonour of the cheque. If any drawer refused to receive the said notice, the date of refusal to receive the notice by the drawer might have been reckoned as 'receipt of said notice' mentioned in Section 138 (1) (c) of the said Act."

The part payment made by the accused to Mamun Kabir Sumon was not denied by P.W. 1. The alleged cheque No. is 8342764. It is found that by subsequent cheque No. 8342765 Tk. 300,000 was paid on 06.04.2015 to Mamun Kabir Sumon. Therefore, there was no reason to keep the cheque No. 8342764 with the accused to issue the same on 08.09.2019. I am of the view that the disputed cheque (exhibit-2) was a blank cheque and the same was issued before the issuance of the cheque No. 8342765 dated 06.04.2015 in favour of M/S. Mamun Enterprise, which corroborates the defence case that a blank security cheque was issued by the accused in favour of M/S. Mamun Enterprise.

The complainant failed to prove that notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881 was served upon the accused before filing the case on 03.11.2019. P.W. 1 did not say that the notice was served upon the accused before filing the

case. The evidence adduced by both parties depicts that there was transactions between the accused and Mamun Kibria Sumon, proprietor of M/S. Mamun Enterprise. There was no transaction between the accused and the Md. Zafor Kibria Shujon. The complainant failed to prove any cause of action for filing the case on 03.11.2019.

Considering the evidence discussed hereinabove, I am of the view that the disputed cheque was not issued in favour of Md. Jafor Kibria Shujon and the notice under clause b of the proviso to section 138 of the Negotiable Instruments Act, 1881 was not sent by M/S. Mamun Enterprise and P.W. 1 Sheikh Dulal Ahmed, Manager of Md. Jafor Kibria Shujon, was not authorized to send any legal notice on 03.10.2019 to the accused. The cause of action under clause c of the proviso to section 138 of the Negotiable Instruments Act, 1881 could not be ascertained. The complainant falsely implicated the accused M. Istak Ahmed Bablu in the case.

I find no merit in this appeal.

In the result, the appeal is dismissed with a cost of Tk. 5,000(five thousand).

The accused M. Istak Ahmad Bablu is entitled to get the costs.

The appellant is directed to deposit the costs in the trial court within 30 days from the date.

The trial court is directed to do the needful.

Send down the lower Court's record at once.

