

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 3512 of 2023

Md. Amir Hossain

...Convict-appellant-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Sk. Sharifuddin, Advocate with

Mr. S.M. Rezaul Karim, Advocate

...For the convict-appellant-petitioner

Mr. Abdus Salam Mamun, Advocate with

Mr. A.B.M. Shibly Sadekeen, Advocate

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

Heard on 30.01.2024, 04.02.2024, 06.02.2024,
15.02.2024, 19.02.2024, 20.11.2024, 11.12.2024
and 08.01.2025

Judgment delivered on 09.01.2025

On an application 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 impugned judgment and order dated 31.07.2023 passed by Special Sessions Judge, Barishal and Jananirapatta Bighnakari Aparadh Daman Tribunal, Barishal in Criminal Appeal No. 704 of 2022 modifying the judgment and order of conviction and sentence dated 13.09.2022 passed by Joint Sessions Judge, Court No. 1, Barishal in Session Case No. 232 of 2006 arising out of C.R. Case No. 277 of 2005 (Sadar Thana) convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and to pay a fine of Tk. 14,21,042 within 90(ninety) days, in default, he is sentenced to pay a fine of Tk. 14,21,042 and imprisonment for 1(one) month 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 accused Md. Amir Hossain took loan from the Al Arafah Islami Bank Limited, Barishal Branch. The bank rescheduled the said loan on 30.09.2002 allowing the accused to pay the loan by 84 equal installments. On the first date of

occurrence, the accused issued seven cheques drawn on his Account No. 33001244 maintained with Al Arafah Islami Bank Limited, Barishal Branch. The accused issued the cheques Nos. 1144611, 1144612, 1144613, 1144614, 1144615, 1144616 and 1144617 dated 24.01.2005, 31.01.2005, 07.02.2005, 14.02.2005, 22.02.2005, 28.02.2005 and 08.03.2005 respectively for payment of Tk. 2,03,006 each, total Tk. 14,21,042. The complainant presented the said cheques for encashment which were dishonoured with the remark 'insufficient funds' and he informed the matter to the accused. After that, the accused requested the complainant to present the first cheque after 6 weeks, the second cheque after 5 weeks, the third cheque after 4 weeks, the fourth cheque after 3 weeks, the fifth cheque after 2 weeks, the sixth cheque after 1 week and the seventh cheque after 2 days. The complainant again presented the said cheques on 10.03.2005 and lastly on 17.03.2005 for encashment which were again dishonoured with the remark 'insufficient funds'. Subsequently, on 19.03.2005, the complainant sent the legal notice to the accused. Despite the service of notice, the accused did not pay the cheque amount. Consequently, the complainant filed the case on 26.04.2005.

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 under Section 138 of the Negotiable Instruments Act, 1881 against the accused. The accused voluntarily surrendered and obtained bail. After that, the learned Magistrate sent the case record to the Sessions Judge, Barishal and the case was registered as Session Case No. 232 of 2006. 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 the accused present in Court and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 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 Md. Amir Hossain was examined under Section 342 of the Code of Criminal Procedure, 1898 and the defence declined to examine D.W. but submitted documents in the trial Court in support of his defence.

After concluding the trial, the trial Court by judgment and order dated 13.09.2022 convicted the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to suffer imprisonment for 1(one) year and a fine of Tk. 14,21,042 against which he filed Criminal Appeal No. 704 of 2022 in the Court of Sessions Judge, Barishal. After hearing the appeal, the appellate Court below by impugned judgment and order affirmed the judgment and order of conviction passed by the trial Court and modified the sentence to pay fine of Tk. 14,21,042 within 90(ninety days) failing which he was sentenced to pay a fine of Tk. 14,21,042 and to suffer imprisonment for 1(one) month against which the convict-petitioner obtained the instant Rule.

P.W. 1 Md. Mostafizur Rahman is the S. A. V. P of Al-Arafah Islami Bank Limited, Barishal Branch. He deposed on behalf of the bank. He stated that the accused Md. Amir Hossain issued seven cheques on 17.01.2005 for payment of Tk. 2,03,006 each, total Tk. 14,21,042 in favour of Al-Arafah Islami Bank Limited, Barishal Branch which was dishonoured twice with the remark 'insufficient funds' on 10.03.2005 and lastly on 17.03.2005. The complainant sent a legal notice on 19.03.2005 through registered post and personally upon the accused to pay the cheque amount but he did not pay the cheque amount. Subsequently, he filed the case. He proved the complaint petition as exhibit 1 and his signatures on the complaint petition as exhibits 1/1 and 1/2. He proved the seven cheques as exhibits 2 series, dishonour slips (total 21) as exhibits 3 series, demand notice as exhibit 4 series and the postal receipt as exhibit 5. He denied the suggestion that there is no signature of the learned Advocate on the second page of the complaint petition or that the cheque dated 17.01.2005 relating to

Session Case No. 232 of 2006 is not produced in Court. He admitted that he did not produce the seven cheques dated 17.01.2005 in Court. He denied the suggestion that he changed the second page of the complaint petition. He proved the second page of the complaint petition by forgery substituting the same for which he did not exhibit the second page of the complaint petition. He denied the suggestion that on each cheque, it has been written that pay to Messers Hossain Traders. He sent the legal notice on 19.03.2005 through registered post. The accused personally received the legal notice from the branch. He denied the suggestion that the accused received the legal notice on 09.05.2005 or by tempering the writing on the cheque he wrote '1' before '9' and wrote '3' tempering the mathematical word '5' or there is no cause of action or at the time of disbursement of the loan, many cheques were taken. Seven cheques for total Tk. 14,21,042 relates to Session Case No. 232 of 2006. On 26.04.2005 he also filed another case in respect of seven cheques for total Tk. 10,72,015. He denied the suggestion that he filled up the blank cheque writing the amount on the cheque and filed the false case for his benefit.

The learned Advocate Mr. Sk. Sharifuddin appearing along with the learned Advocate Mr. S.M. Rezaul Karim on behalf of the convict-petitioner submits that at the time of rescheduling of the loan on 30.09.2002 the complainant-bank received blank cheques against each instalment and the complainant-bank failed to present the said cheques within six months from the date of issuance of the blank cheques or within the period of its validity and filed the case filling the blank cheques and no notice was served upon the accused before filing the complaint petition. Therefore, the mandatory provision of clause (a) to (c) of Section 138 of the Negotiable Instruments Act, 1881 was not complied with before filing the case and no offence was committed under Section 138 of the said Act. He further submits that the complainant-bank issued the legal notice on 19.03.2004 and after filing the complainant petition he changed the second page of the complaint

petition replacing the date of sending notice '19.03.2005' in place of '19.03.2004'. The prosecution failed to prove the charge against the accused beyond all reasonable doubt and both the Courts below failed to interpret clause (a) to (c) of Section 138 and Section 141(b) of the said Act and illegally convicted the accused. He prayed for setting aside the impugned judgments and orders passed by the Courts below.

The learned Advocate Mr. Abdus Salam Mamun appearing along with learned Advocate Mr. A.B.M. Shibly Sadekeen on behalf of the complainant-opposite party No. 2 submits that the convict-petitioner issued seven cheques mentioning the dates on the cheques i.e 24.01.2005, 31.01.2005, 07.02.2005, 14.02.2005, 22.02.2005, 28.02.2005 and 08.03.2005 and lastly, the complainant-bank presented those cheques on 17.03.2005 within six months from the date of issuance of the cheques in compliance with the provision made in clause (a) of Section 138 of the Negotiable Instruments Act, 1881 and served notice on 19.03.2005 personally upon the accused. He further submits that since the notice has been sent through the registered post the said notice would be treated as valid service under Section 27 of the General Clauses Act, 1897 upon the accused and the complainant filed the complaint petition following the procedures under Section 138 of the said Act. He also submits that the appellate Court rightly found that the concerned staff of the trial Court is/are responsible for changing the second page of the complaint petition and the prosecution proved the charge against the accused beyond all reasonable doubt. Both the Courts below following the correct principle of assessment and evaluation of the evidence legally passed the impugned judgments and orders. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Sk. Sharifuddin who appeared along with the learned Advocate Mr. S.M. Rezaul Karim on behalf of the convict-petitioner and the learned Advocate Mr. Abdus Salam Mamun who appeared along with the learned Advocate Mr. A.B.M. Shibly Sadekeen on behalf of the

complainant-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 on the first page of the complaint petition (exhibit 1). It has been mentioned that the cheques were issued on 17.01.2005. P.W. 1 stated that the accused issued seven cheques on 17.01.2005 for payment of Tk. 2,03,006 each, total Tk. 14,21,042 in favour of the complainant bank. During cross-examination, P.W. 1 admitted that he did not produce the seven cheques dated 17.01.2005. On the second page of the complainant petition, it has been stated that seven cheques Nos. 1144611, 1144612, 1144613, 1144614, 1144615, 1144616 and 1144617 dated 24.01.2005, 31.01.2005, 07.02.2005, 14.02.2005, 22.02.2005, 28.02.2005 and 08.03.2005 respectively were issued in favour of the complainant for payment of total Tk. 14,21,042. No explanation has been given by P.W. 1 where from he got seven cheques of different dates. Furthermore, seven cheques dated 17.01.2005 were also not proved in the case.

It further appears that Cheque No. 1144617 dated 08.03.2005, Cheque No. 1144616 dated 28.02.2005, Cheque No. 1144615 dated 22.02.2005, Cheque No. 1144614 dated 14.02.2005, Cheque No. 1144613 dated 07.02.2005, Cheque No. 1144612 dated 31.01.2005 and Cheque No. 1144611 dated 24.01.2005 were proved as exhibits 2 to 2/6. Nothing has been stated by P.W. 1 that the said seven cheques (exhibits 2 to 2/6) were issued by the accused in favour of the complainant bank. Therefore, there is a contradiction in the evidence of P.W. 1 and the statement made in the complaint petition as to the date of issuance of the seven cheques (exhibits 2 to 2/6) by the accused.

At the time of examination of the convict-petitioner Md. Amir Hossain on 01.08.2022 under Section 342 of the Code of Criminal Procedure, 1898 he stated that he would submit the documents and the next date was fixed on 23.08.2022 for submitting the documents and hearing the argument. The convict-petitioner submitted documents on 23.08.2022 through firisty. Amongst those documents, he submitted the

letter dated 08.05.2004 issued by Mohammad Nur Ali, Assistant Vice-President of Al-Arafah Islami Bank Ltd to the Deputy Managing Director, Investment Division, Al-Arafah Islami Bank Limited, Head Office, Dhaka. In the said letter dated 08.05.2004, it has been mentioned that

“খ)মেসার্স হোসেন ট্রেডার্স এর এইচপিএসএম (রি-এ) ও বাইম এবং মেসার্স আরাফাত পেইন্ট এন্ড কেমিক্যাল ওয়াকার্স এর এইচপিএসএম (ট্রান্সপোর্ট) এর বকেয়া কিস্তি সমূহের বিপরীতে প্রয়োজনীয় অগ্রিম চেক গ্রহন করা হয়েছে।”

The complainant bank did not deny that the said letter dated 08.05.2004 was not issued by the bank. On consideration of the statement made in the complaint petition and the letter dated 08.05.2004 in juxtaposition, it reveals that on or before 08.05.2004 the advance cheques were issued by the accused for payment of the instalments. Therefore, the statement made by P.W. 1 that the accused issued seven cheques on 24.01.2005, 31.01.2005, 07.02.2005, 14.02.2005, 22.02.2005, 28.02.2005 and 08.03.2005 for payment of Tk. 2,03,006 each, total Tk. 14,21,042 finds no substance.

In the case of Md. Amir Hossain Vs The State and another (between the same parties), Criminal Revision No. 3514 of 2023 judgment dated 19.11.2024 this bench (Md. Shohrwardi, J) regarding cheques allegedly issued by convict-petitioner Md. Amir Hossain in favour of complainant Al-Arafah Islami Bank Ltd, Barishal Branch held that

“It reveals that at the time of rescheduling the loan on 30.09.2002, the complainant bank received 84 cheques from the accused. No statement is made by the complainant that post-dated cheques were received by the bank. Therefore, I am of the view that undated or blank 6(six) cheques (exhibit 2 series) were received by the complainant bank at the time of rescheduling the loan on 30.09.2002.”

In the complaint petition, it has been mentioned that the complainant sent a legal notice on 19.03.2005. No statement is made in the complaint petition as to the receipt of said notice by the accused and receipt of personal notice by him. During cross-examination, P.W. 1 stated that the accused personally received the legal notice from the bank but no specific date has been mentioned by P.W. 1 as to the receipt of the notice personally by the accused. Therefore, it cannot be said that the accused personally received the notice on 19.03.2005.

The suggestion given to P.W. 1 that the accused personally received the notice on 09.05.2005 has been denied by him. He also denied the suggestion that by forging and tempering on the notice he wrote '1' before '9' and '3' in place of '5'. The defence made out a case that the accused by forging and tempering on the legal notice (exhibit 4) changed the date of receipt of the notice but no answer has been given by the Courts below as to the said forgery and tempering and date of receipt of the personal notice by the accused. A legal notice dated 19.03.2005 is proved as exhibit 4 and the said notice was received by the accused. On scrutiny of the legal notice (exhibit 4), it appears that below the signature of the accused, there is a mark of scotch tape. No explanation has been given by the prosecution as to why scotch tape was pasted below the signature of the accused.

On perusal of the complaint petition (exhibit 1), it reveals that the complainant wrote his name on both pages using different ink. The learned Advocate engaged on behalf of the complainant signed the first page of the complaint petition but there is no signature of the learned Advocate on the second page of the complaint petition. Although there is a seal of the learned Advocate Mr. Sarder Abul Hashem on the second page there is no signature of the learned Advocate on the second page of the complaint petition. No explanation has been given by the complainant as to why there is no signature of the learned Advocate Mr. Sarder Abul Hashem on the second page of the complaint petition.

A suggestion was given to P.W. 1 that the second page of the complaint petition was forged by substituting the second page of the complaint petition which has been denied by him. The appellate Court found that the second page of the complaint petition is not available with the records which has been subsequently substituted but the complainant is not responsible. The staffs of the Court who are the custodian of the records are competent to give explanation regarding substituted page of the complaint petition.

I have gone through the complaint petition. It appears that there is no seal of the Court and the signature of the learned Advocate and the learned Magistrate on the second page of the complaint petition. Only the complainant wrote his name on the second page with different ink. Therefore, I am of the view that the second page of the complaint petition was substituted subsequently by replacing the original page Nos. 2 of the complaint petition and complainant mala fide changed the second page of the complaint petition.

P.W. 1 stated that legal notice was sent on 19.03.2005. The complaint petition has been filed on 26.04.2005. Under clause c to Section 138 of the Negotiable Instruments Act, 1881 the accused shall pay the cheque amount within fifteen days (now thirty days) of the receipt of the notice sent under clause b to Section 138 of the said Act. The accused is entitled fifteen days (now thirty days) to pay the cheque amount from the date of receipt of the said notice. Under Section 141(b) of the said Act the complainant shall file the case within one month of the date on which the cause of action arises under clause (c) to Section 138 of the said Act. The date of receipt of notice or date of refusal to receive the notice is reckoned as cause of action mentioned in Section 141(b) of the said Act. The prosecution failed to prove that before filing the complaint petition on 26.04.2005 the notice was served upon the accused. The complainant did not file the case following the provision made in clause c to Sections 138 and 141(b) of the Negotiable Instruments Act, 1881.

The mere presentation of a cheque within the specified time mentioned in clause (a) to Section 138 of the Negotiable Instruments Act, 1881 and sending notice in writing to the drawer of the cheque by the payee within fifteen days (now thirty days) from the date of receipt of information by him from the bank regarding the return of the cheque as unpaid does not constitute an offence under Section 138 of the said Act unless the said notice is served upon the drawer of the cheque and he failed to pay the cheque amount within fifteen days (now thirty days) from the date of receipt of said notice and the complaint is made within one month of the date on which the cause of action arises under clause (c) of Section 138 of the said Act.

In the case of *K. Bhaskaran vs. Sankaran Vaidhyan Balan* and another reported in (1999) 7 SCC 510 para 18 as to the issuance of notice and receipt of the notice mentioned in clause (b) and (c) to Section 138 of the Negotiable Instruments Act, 1881 it has been held that;

“On the part of the payee he has to make a demand by “giving a notice” in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such “giving”, the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days “of the receipt” of the said notice: It is, therefore, clear that “giving notice” in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.”

“In Black’s Law Dictionary “giving of notice” is distinguished from “receiving of the notice” (vide p.621): “A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other

actually comes to know of it.” A person “receives” a notice when it is duly delivered to him or at the place of his business.”

The Negotiable Instruments Act, 1881 imposes three conditions to be fulfilled by the complainant before filing the case under Section 138 of the said Act. If the complainant fails to comply with any of the conditions of clause (a), (b) and (c) of Section 138 of the said Act, the learned Magistrate is barred under Section 141(b) of the said Act to take cognizance of the offence against the accused under Section 138 of the said Act. In the instant case, the complainant failed to present the cheques within the specified time or within the period of its validity as mentioned in clause (a) of the said Act. The notice sent on 19.03.2004 under clause (b) to Section 138 of the said Act was not served upon the accused before filing the complaint petition. The complainant also failed to comply with the provision of clause (c) to Section 138 of the said Act. There was no cause of action under clause (c) to Section 138 of the said Act to file the case on 13.04.2005. Both the Courts below failed to hold the correct view as to the mandatory provision made in clauses (a), (b) and (c) of Section 138 and Section 141(b) of the said Act and committed gross illegality in passing the impugned judgments and orders and arrived at a wrong decision as to the guilt of the convict-petitioner.

In similar facts and circumstances of the case in Criminal Revision No. 3513 of 2023 and Criminal Revision No. 3514 of 2023 filed between the same parties judgment dated 19.05.2024 and 19.11.2024 respectively this Court set aside the judgments and orders of conviction and sentence passed by both the Courts below.

In view of the above evidence, findings, observation and proposition, I am of the view that the prosecution failed to prove the charge against the convict-petitioner Md. Amir Hossain beyond all reasonable doubt.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders of conviction and sentence passed by both the Courts below against the convict-petitioner Md. Amir Hossain is hereby set aside.

The convict-petitioner Md. Amir Hossain is entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

The trial Court is directed to allow the convict-petitioner Md. Amir Hossain to withdraw 50% of the cheque amount deposited by him within 15 days from the date of filing application, if any.

However, there will be no order as to costs.

Send down the lower Court's records at once.