

Present:

Mr. Justice Md. Shohrwardi

Criminal Revision No. 3514 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,
28.05.2024, 28.07.2024, 30.07.2024, 04.09.2024
and 14.11.2024

Judgment delivered on 19.11.2024

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 Aparad Daman Tribunal, Barishal in Criminal Appeal No. 706 of 2022 allowing the appeal in part and 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. 119 of 2006 arising out of C.R. Case No. 240 of 2005 (Sadar Thana) convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to pay a fine of Tk. 9,18,870 within 90(ninety) days, in default, to suffer simple 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 obtained loan from the complainant Al Arafah Islami Bank Limited, Barisal Branch. He issued cheques Nos. 8389955, 8389956,

8389957, 8389958, 8389959, 8389960 dated 07.12.2004, 15.12.2004, 22.12.2004, 30.12.2004, 10.01.2005 and 17.01.2005 respectively for payment of Tk. 1,53,145 each, total Tk. 9,18,870. The complainant bank presented the said cheques for encashment which were dishonoured with the remark 'insufficient funds'. The complainant bank informed the matter of dishonour to the accused. After that, he instructed the complainant bank to present the first cheque after 3 months, the second cheque after 2 months and 3 weeks, the third cheque after 2 months and 2 weeks, the fourth cheque after 2 months and 1 week, the fifth cheque after 2 months and the sixth cheque after 1 month and 3 weeks. The complainant bank presented the said cheques again on 10.03.2005 and lastly on 17.03.2005 which were dishonoured with the remark 'insufficient funds'. The complainant-bank sent a notice on 19.03.2004 under Section 138(b) of the Negotiable Instruments Act, 1881 to the accused for payment of the cheque amount within 15 days. After receipt of the notice, the accused did not pay the cheque amount. Consequently, the bank filed the case on 13.04.2005.

After filing the complaint petition, the complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and the learned Magistrate, First Class, Cognizance Court No. 4, Barishal was pleased to take cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 against the accused. Thereafter, the case record was sent to the Sessions Judge, Barisal who sent the case to the Joint Sessions Judge, Court No. 1, Barisal 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 to the accused who pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined one P.W 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 adduce any D.W.

After concluding the trial, the Joint Sessions Judge, Court No. 1, Barishal by judgment and order dated 13.09.2022 convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to suffer imprisonment for 1(one) year and fine of Tk. 9,18,870 against which the convict-petitioner filed Criminal Appeal No. 706 of 2022 before the Sessions Judge, Barisal. The Sessions Judge, Barishal was pleased to allow the appeal in part and modified the judgment and order passed by the trial Court and sentenced him to pay a fine of Tk. 9,18,870 within 90(ninety days) failing which he shall be liable to suffer imprisonment for 1(one) year and pay fine of Tk. 9,18,870 against which the convict-petitioner obtained the instant Rule.

P.W. 1 Md. Mostafizur Rahman is the Senior Assistant Vice-President, Al-Arafah Islami Bank Limited, Barisal Branch. He deposed on behalf of the complainant Al-Arafah Islami Bank Limited. He stated that the accused issued six cheques on 01.12.2004 for payment of Tk. 1,53,145 each, total Tk. 9,18,870, drawn on his business establishment Messers Hossain Traders for payment of the loan taken from the complainant-bank. The complainant-bank presented the said cheques on the dates mentioned in the cheques for encashment and subsequently on 10.03.2005 and lastly on 17.03.2005 presented those cheques which were dishonoured with the remark 'insufficient funds'. The complainant-bank sent legal notice on 19.03.2005 through registered post to the accused but he did not pay the cheques amount. After that, he filed the case on 13.04.2005. 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 six cheques as exhibits 2 series, dishonour slips (total 18) as exhibits 3 series, demand notice as exhibit 4 and the postal receipt as exhibit 5. He denied the suggestion that he did not mention the date of occurrence or the cheque dated 01.12.2004 of Case No. 119 of 2006 was not produced in Court or there is no power of attorney. He

denied the suggestion that there is no signature of the learned Advocate on the second page of the complaint petition or in Session Case No. 119 of 2006, he changed the second page of the complaint petition and substituted the date '19.03.2005' in place of '19.03.2004'. He admitted that he did not produce the six cheques dated 01.12.2004. He denied the suggestion that he fraudulently changed the second page of the complaint petition of Session Case No. 119 of 2006 or in each cheque the name of Messers Hossain Traders is written as payee. He sent the legal notice on 19.03.2005 through registered post. The accused personally received the legal notice from the bank. He denied the suggestion that the legal notice was received on 09.05.2005 or by tempering he wrote '1' before '9' and replaced '5' month in place of '3' month or there is no cause of action. or at the time of disbursement of the loan, the bank received many cheques or Messers Hossain Traders will be treated as payee or holder in due course of the cheque. He affirmed that Advocate Sarder Abul Hasem signed the first page of the complaint petition (exhibit 1) and there is also signature and seal of the learned Magistrate. He denied the suggestion that there is no signature of the learned Magistrate and Advocate on the second page of the complaint petition or he filled up the blank cheque writing the amount on the cheque or he deposed falsely.

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 disbursement of the loan the complainant-bank received blank cheques against each installment and the complainant-bank failed to present the cheques within six months from the date of issuance of the blank cheques or within the period of its validity. Subsequently, 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 Negotiable Instruments Act, 1881. 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 of the Negotiable Instruments Act, 1881 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 six cheques mentioning the dates on the cheques i.e 07.12.2004, 15.12.2004, 22.12.2004, 30.12.2004, 10.01.2005 and 17.01.2005 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 to the accused personally following the provision made in clause (b) to Section 138 of the Negotiable Instruments Act, 1881. He further submits that since the notice has been sent through 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 Negotiable Instruments Act, 1881. 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.

The issue involves in the instant Rule whether the complaint petition was filed on 13.04.2005 complying with the procedure provided in clause a to c of Section 138 and Section 141 (b) of the Negotiable Instruments Act, 1881.

On perusal of the complaint petition, it appears that the accused Md. Amir Hossain is the Proprietor of Messers Hossain Traders. Hossain Traders took loan from the complainant bank but it could not pay the loan for which considering the application of the accused an opportunity was given on 30.09.2002 to the accused to pay the loan in 84 equal installments. Six cheques (exhibit 2 series) were allegedly issued by the accused on 07.12.2004, 15.12.2004, 22.12.2004, 30.12.2004, 10.01.2005 and 17.01.2005 respectively drawn on his Account No. 33001244 for payment of Tk. 1,53,145 each, total Tk. 9,18,870. P.W. 1 stated that on 01.12.2004 the accused issued six cheques for payment of Tk. 1,53,145 each, total Tk. 9,18,870, which were presented on 17.03.2005. It is also mentioned in the complaint petition that the accused issued six cheques on 01.12.2004. There is a contradiction in the complaint petition and evidence of P.W. 1 regarding the date of issuance of the cheques (exhibit 2 series).

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, the convict-petitioner 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 firstly. 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 ওয়াকর্স এর এইচপিএসএম (ট্রান্সপোর্ট) এর বকেয়া কিস্তি সমূহের বিপরীতে প্রয়োজনীয় অগ্রিম চেক গ্রহন করা হয়েছে।”

Nothing has been stated by the complainant bank denying the issuance of the said letter dated 08.05.2004. 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 six cheques on 15.12.2004, 22.12.2004, 30.12.2004, 10.01.2005 and 17.01.2005 for payment of Tk. 1,53,145 each, total Tk. 9,18,870, finds no substance.

The complainant mentioned several dates in the complaint petition as to the issuance of the cheques by the accused. P.W. 1 stated that six cheques were issued on 01.12.2004. Be that as it may, the statement made in the complaint petition and by P.W. 1 as to the date of issuance of cheques on 15.12.2004, 22.12.2004, 30.12.2004, 10.01.2005 and 17.01.2005 cannot be accepted. I am of the view that the accused issued the cheques on or before 08.05.2004 or at the time of reschedule of the loan on 30.09.2002 and the bank presented the dispute cheques (exhibits 2 series) on 17.03.2005 after expiry of six months from the date of issuance of the cheques or beyond the period of its validity. Therefore, the complainant failed to comply with the mandatory provision made in clause (a) to Section 138 of the Negotiable Instruments Act, 1881.

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/third pages of the complaint petition are 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 second 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 and third pages of the complaint petition. Only the complainant wrote his name on the second and third pages with different ink. Therefore, I am of the view that the second and third pages of the complaint petition were substituted subsequently by replacing the original pages Nos. 2 and 3 of the complaint petition and complainant malafide changed the second and third pages of the complaint petition.

P.W. 1 denied the suggestion that there is no signature of the learned Magistrate and the learned Advocate Sarder Abul Hashem on the second page of the complaint petition. Therefore, I am of the view that the complainant tells a lie regarding the signature of the learned Magistrate and the learned Advocate on the second page of the complaint petition.

On the first page of the complaint petition, it has been stated that the cheques were issued on '01.12.2004' but on the second page of the complaint petition, it has been stated that the cheques were issued on 07.12.2004, 15.12.2004, 22.12.2004, 30.12.2004, 10.01.2005 and 17.01.2005. At the time of filing the revisional application, a photocopy of the certified copy of the complaint petition was annexed as Annexure-A and the certified copy of the complaint petition was filed in Criminal Miscellaneous Case No. 13401 of 2006. In the substituted second page of the complaint petition (Annexure-A), it has been

mentioned that the complainant bank sent a legal notice on '19.03.2005'. The record of the Miscellaneous Case No. 13401 of 2006 has been called for by this Court. In the certified copy of the complaint petition of CR Case No. 240 of 2005 (Sadar Thana), annexed in Miscellaneous Case No. 13401 of 2006, it has been mentioned that the notice was sent to the convict-petitioner on 19.03.2004. Therefore, I am of the view that the date of sending notice on 19.03.2005 mentioned in the complaint petition i.e. Annexure-A to this revisional application is not the correct date of sending notice upon the convict-petitioner. In the original complaint petition, the date of sending the notice has been mentioned as '19.03.2004'. The complainant substituted the second page of the complaint petition replacing the date of service of notice on '19.03.2005' in place of '19.03.2004' to malafide make out a case under Section 138 of the Negotiable Instruments Act, 1881. The notice under Section 138(b) of the Negotiable Instruments Act, 1881 was sent by the complainant to the accused on 19.03.2004 which proved that the cheques were issued by the accused before 19.03.2004.

The Miscellaneous Case No. 13401 of 2006 was filed on 27.08.2006 and the certified copy of the complaint petition of CR Case No. 240 of 2005 (Sadar Thana) was received on 24.08.2006. No allegation has been made by P.W. 1 that the accused changed the second and third pages of the complainant. Therefore, I am of the view that the second and third pages of the complaint petition had been substituted by the complainant after 24.08.2006.

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.

Nothing has been stated in the complaint petition and by P.W. 1 in examination in chief as to the date of receipt of the notice by the

accused. During cross-examination, P.W. 1 stated that the accused also personally received the notice from the bank. No date has been mentioned by P.W. 1 regarding the date of receipt of the notice by the accused Md. Amir Hossain. Furthermore, six cheques dated 01.12.2004 were not proved in the case. I am of the view that before filing the complaint petition on 13.04.2005, the notice under clause (b) of Section 138 of the Negotiable Instruments Act, 1881 was not served upon the accused.

In the case of SM Anwar Hossain vs Md Shafiul Alam (Chand) and another reported in 51 DLR (AD) (1999) 218 judgment dated 03.02.1999 (ATM Afzal, CJ) = 4 BLC (AD) 106 the Hon'ble Appellate Division quashed the proceeding of the case holding that;

“The complainant has alleged many other things in his petition of complaint including that the accused-appellant had assured him of payment of the money on 11-4-96 over telephone and the appellant having failed to keep his word, the complaint was filed on 18-4-96. The subsequent allegations will not save the limitation because, as noticed above, the requirement under the law is that the complaint has to be filed within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138.”

In the case of Nizamuddin Mahmood vs Abdul Hamid Bhuiyan and another reported in 9 BLC (AD) 177 judgment dated 15.6.2004 (Amirul Kabir Chowdhury, J) having considered Section 138 (1) (c) of the Negotiable Instruments Act, 1981 our Apex Court affirmed the judgment and order of High Court Division quashing the proceedings holding that;

“In view of the non-disclosure of the date as to receipt of notice by the accused and failure to

mention any legal cause of action in the petition of complaint, we are of the view that the proceeding cannot be allowed to continue and, as such, it is liable to be quashed. In view of our discussion made above the ultimate order of the High Court Division in quashing the proceeding is found to be sustainable.”

The above view of our Apex Court has been reviewed by the Hon’ble Appellate Division by judgment dated 17.6.2008 which is reported in 60 DLR (AD) 195. The Hon’ble Appellate Division (Md. Abdul Matin, J) set aside the order of the High Court Division holding that;

“Since the date of receipt is a question of fact to be ascertained at the time of trial non-dis-closure 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.”

The ratio decidendi adopted in the referred cases undoubtedly speaks that during trial the complainant shall prove that before filing case under Section 138 of the Negotiable Instruments Act, 1881 the notice sent under clause (b) of Section 138 of the Negotiable Instruments Act, 1881 has been served upon the accused. Before filing the complaint petition under Section 138 of the said Act, the complainant shall strictly follow the procedure provided in clause a to c of Section 138 and 141(b) of the said Act.

In the case of Md. Arif-Uz-Zaman vs. The State and another reported in 21 BLT (AD)2013 page 234 judgment dated 09.06.2011 it has been held that;

“Whether the cheque in question was dishonoured for the “insufficiency of fund” or for the “dissimilarity of the signature of the

drawer on the cheque” as stated in the letter dated 30.08.2009 is a question of fact which can only be thrashed out during the trial. We do not see any scope of deciding such question in considering the merit of the revision application.”

“On perusal of the dishonour slips (exhibits 3-3/17) it appears that three dishonour slips (exhibits 3, 3/1 and 3/2) dated 15.12.2004, 10.03.2005 and 17.03.2005 in respect of Cheque No. 8389156, three dishonour slips (exhibits 3/3-3/5) dated 17.01.2005, 10.03.2005 and 17.03.2005 in respect of Cheque No. 8389160, three dishonour slips dated 10.01.2005, 10.03.2005 and 17.03.2005 (exhibits 3/6-3/8) for Cheque No. 8389159, three dishonour slips (exhibits 3/9-3/11) dated 30.12.2004, 10.03.2005 and 17.03.2005 for Cheque No. 8389158, three dishonour slips (exhibits 3/12-3/14) dated 07.12.2004, 10.03.2005 and 17.03.2005 for Cheque No. 8389155, three dishonour slips dated 22.12.2004, 10.03.2005 and 17.03.2005 (exhibits 3/15-3/17) for Cheque No. 8389157 were issued by Al-Arafah Islami Bank Ltd, Barishal Branch.

On perusal of the records, it appears that deposit slip dated 10.01.2005 in respect of Cheque No. 8389159, deposit slip dated 30.12.2004 in respect of Cheque No. 8389158, deposit slip dated 07.12.2004 in respect of Cheque No. 8389155, deposit slip dated 22.12.2004 in respect of Cheque No. 3839157, deposit slip dated 15.12.2004 in respect of Cheque No. 8389156 and the deposit slip dated 17.01.2005 in respect of Cheque No. 8389160 are available with the records. There is no seal of the bank and no signature of any Officer of the bank on those deposit slips.

On perusal of the disputed cheques (exhibits 2 series), it appears that there is no seal of the bank and date of presentation on those cheques. No explanation is given by P.W. 1 as to why there is no seal and date of presentation on the cheques (exhibits 2 series). In the

absence of any seal and date of presentation on the disputed cheques (exhibit 2 series) it cannot be said that those cheques were presented for encashment on the dates mentioned in the dishonour slips (exhibits 3-3/17). There is also no seal of the bank and no signature of any officer of the bank on the deposit slips lying with the records. I am of the view that the complainant bank issued the disputed dishonour slips (exhibits 3-3/17) without presenting the cheques for encashment. There was no cause of action for filing the case on 13.04.2005. Compliance of the provision made in the proviso a to c of Section 138 is sine qua non. Without presenting the cheques (exhibit 2 series) for encashment the complainant filed the case on 13.04.2005.

It is found that the cheques were allegedly presented through the complainant's bank. The notice was sent to the accused on 19.03.2004. No statement is made in the complaint petition that personal notice has been served upon the accused on 19.03.2005. No specific date has been mentioned by P.W. 1 as to the service of personal notice upon the accused. Therefore, the evidence of P.W. 1 that the notice was personally served upon the accused is an afterthought and untrue.

In the case of Md. Amir Hossain Vs. the State and another (between the same parties) 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. 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."

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 Negotiable Instruments Act, 1881 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.

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 in compliance of the provision made in Section 138(1A) of the said Act at least by one mode as stated above is sine qua non.

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 Negotiable Instruments Act, 1881. If the complainant failed to comply with any of the condition of clause (a), (b) and (c) of Section 138 of the said Act, the learned Magistrate is barred under Section

141(b) of the Negotiable Instruments Act, 1881 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 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 Negotiable Instruments Act, 1881 was not served upon the accused before filing the complaint petition. The complainant also failed to comply with the provision made in clause (c) of Section 138 of the Negotiable Instruments Act, 1881. There was no cause of action under clause (c) of Section 138 of the Negotiable Instruments Act, 1881 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 Negotiable Instruments Act, 1881 and committed a gross illegality in passing the impugned judgments and orders and arrived at a wrong decision as to the guilt of the convict-petitioner.

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 convict-petitioner Md. Amir Hossain are hereby set aside and he is acquitted from the charge framed against him.

The convict-petitioner Md. Amir Hossain is entitled to get back 50% of the cheques 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 cheques amount deposited by him within 15 days from the date of filing the application, if any.

However, there will be no order as to costs.

Send down the lower Court's records at once.