

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 2554 of 2023

Mohammad Nurul Azim

...Convict-appellant-petitioner

-Versus-

The State and another

...Opposite parties

Ms. Ainun Nur Chowdhury, Advocate

...For the convict-appellant-petitioner

Mr. Md. Abdul Malek Hawlader, Advocate with

Mr. Gazi Md. Mamunur Rashid, Advocate

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

Heard on 28.08.2024, 23.10.2024, 24.10.2024,
and 30.10.2024

Judgment delivered on 05.11.2024

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 31.10.2022 passed by the Additional Sessions Judge, Cox's Bazar in Criminal Appeal No. 322 of 2021 affirming the judgment and order dated 09.11.2021 passed by the Joint Sessions Judge. Court No. 1, Cox's Bazar in S.T. Case No. 1262 of 2016 arising out of C.R. Case No. 489 of 2016 convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer imprisonment for 10(ten) months and to pay fine of Tk. 10,00,000(ten lakh) should not be set aside and/or pass such other or further order or orders as to this Court may deem fit and proper.

The prosecution case, in short, is that the husband of the complainant Dil Zohar resides in Saudi Arabia. One Younus was her servant and he introduced the accused Mohammad Nurul Azim to the complainant. After that, the accused used to come to her house and developed a family relationship with the complainant. The accused took loan of Tk. 10,00,000 from the complainant for payment of the said amount within the next week. On 03.04.2016 the accused issued

cheque No. 3686963 drawn on his Account No. 301012100005191 maintained with Shahjalal Islami Bank, Cox's Bazar sitting in the said branch. The complainant presented the said cheque on 11.04.2016 which was dishonoured with the remark 'payment stopped by drawer'. She sent a notice on 12.04.2016 through his learned Advocate to the addresses of the accused through registered post with AD. The accused in connivance with the peon of the postal department returned the said notice on 18.04.2016 with the remark "recipient of the notice reside along with his family at Cox's Bazar" and the notice sent to the present address of the accused was also returned on 19.04.2016 with a remark "recipient of the notice is not found in his address". The accused did not pay the cheque amount within 30 days from the date of refusal to receive the notice on 18.04.2016 for which the cause of action under clause (c) of Section 138 of the Negotiable Instruments Act, 1881 arose. Consequently, she filed the case on 24.05.2016.

The complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and cognizance was taken against the accused Mohammad Nurul Azim under Section 138 of the Negotiable Instruments Act, 1881. The case was sent to the Sessions Judge, Cox's Bazar who sent the case to the Joint Sessions Judge, Court No. 1, Cox's Bazar for trial. During the trial, charge was framed against the accused. At the time of the framing charge, the accused was absconding. The prosecution examined 1(one) witness to prove the charge against the accused and the accused 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 pleaded not guilty to the charge and claimed to be tried following the law. The defence examined 1 D.W. After concluding the trial, the Joint Sessions Judge, Court No. 1, Cox's Bazar by judgment and order dated 09.11.2021 convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to suffer imprisonment for 10(ten) months and fine of Tk. 10,00,000(ten lakh)

Being aggrieved by and dissatisfied with the said judgment and order passed by the trial Court, the convict-petitioner filed Criminal Appeal No. 322 of 2021 before the Sessions Judge, Cox's Bazar. The appeal was heard by the Additional Sessions Judge, Cox's Bazar. After hearing, the appellate Court below by judgment and order dated 31.10.2022 affirmed the judgment and order passed by the trial Court against which the convict-petitioner obtained the Rule.

P.W. 1 Dil Zohar is the complainant. She stated that the accused took a loan of Tk. 10 lakh from her on condition to repay the same within the next 7 days. He issued a cheque on 03.04.2016 drawn on his account maintained with Shahjalal Islami Bank, Cox's Bazar Branch for payment of Tk. 10 lakh. The said cheque was presented on 11.04.2016 through her account maintained with Southeast Bank Ltd and the same was dishonoured on the same date. She sent legal notices on 12.04.2016. Both the notices were returned on 18.04.2016 and 19.04.2016. She filed the case on 24.05.2016. She proved the complaint petition as exhibit 1 and her signature on the complainant petition as exhibit 1/1. She proved the cheque as exhibit 2, the dishonour slip as exhibit 3, the legal notice as exhibit 4, the postal receipt as exhibit 5 and the envelope along with the AD as exhibit 6 series. During cross-examination, she stated that on 03.04.2016 at 3 pm, she paid the money to the accused. The accused is a resident of Ramu. The accused was an employee of Destiny-2000 Ltd. She denied the suggestion that she paid money on 25.07.2011 to Destiny and on the same date Destiny issued the receipt and that she received a blank cheque from the accused and that she filled up the cheque. She admitted that the accused filed a case against her in the A.D. M Court. She denied the suggestion that after the issuance of the search warrant she said that the cheque belonged to the husband of her sister. She remained silent regarding the payment of the money to the accused. She admitted that the accused is neither her relation nor she had any business transaction with the accused. One Yunus introduced him to her and for a long time, the accused used to

come to her house. She admitted that at the time of handing over the cheque to her, many persons were present there. She could not remember their name. She admitted that the accused was the head of the marketing company 'Destiny-2000 Ltd, Cox's Bazar Branch'. She denied the suggestion that she, Nuruchsofa and Younus formed a team and that she made investments through Nuruchsofa and Younus. She admitted that she signed the form 'Distribution Information for all of Destiny' but there is no date. She denied the suggestion that her group took a blank cheque from the accused. She denied the suggestion that on 03.04.2016, she snatched away the cheque, stamp and mobile phone from Tarabon House, Taraboniarchhora. She stated that she made a protest against the false news published in the Daily Himchari. She admitted that on 07.04.2016, the accused filed M.R Case No. 422 of 2016. She denied the suggestion that the accused did not issue the cheque in her favour or there was no consideration of the cheque and that the accused did not take any loan from her or S.T. Case No. 368 of 2014 was filed based on the cheque issued at the time of investment or this case was filed based on the cheque taken forcibly.

D.W. 1 Md. Nurul Azim is the accused. He stated that he was the head of the 'Destiny-2000 Ltd, Cox's Bazar Branch'. The complainant invested Tk. 10,50,000 through M. Nuruchsofa and Younus and he handed over the documents regarding investment to the complainant who signed the Distribution Information form. At that time, her group took a blank cheque from him. In 2012, the operation of 'Destiny-2000 Ltd' was closed. At that time, the complainant, M. Nuruchsofa and Younus personally demanded the money from him. Nuruchsofa filed S.T Case No. 368 of 2014. On 03.04.2016 the complainant came with a terrorist team and took his signature on a blank cheque and blank stamp which was published on 04.04.2016 in 'The Daily Himchari'. On 07.04.2016 he filed M.R Case No. 422 of 2016 and a search warrant was also issued against the complainant. He did not take a loan of Tk. 10,00,000 from the complainant and he also

did not issue the cheque for payment of the loan. He proved one money receipt issued in favour of Dil Zohar, 10 Distribution Information forms, and 10 duplicate copies of the Acknowledgment Report as exhibits Ka, Kha series and Ga series. During cross-examination, he stated that documents of Destiny-2000 Limited were submitted in the year 2011. He admitted that the disputed cheque was issued in 2016 and that in Appeal No. 173 of 2017 filed against the order passed in S.T Case No. 368 of 2014, he admitted that Tk. 2,50,000 was due to Nuruchsofa and he paid the said amount on installment. He could not remember whether there were three signatures on the disputed cheque. He affirmed that all the handwritings on the cheque were written by him but he wrote under compelling circumstances.

Learned Advocate Ms. Ainun Nur Chowdhury appearing on behalf of the convict-petitioner submits that the notice sent by the complainant under Section 138(b) of the Negotiable Instruments Act, 1881 was not served upon the accused and there was no cause of action of the case. She further submits that the trial Court held that the complainant invested Tk. 10,50,000 through the accused. The trial Court ought to have held that there was no consideration of the cheque which was taken forcibly from the accused. The accused rebutted the presumption under Section 118(a) of the Negotiable Instruments Act, 1881 and both the Courts below failed to interpret Sections 138 and 118(a) of the Negotiable Instruments Act, 1881 and illegally convicted the petitioner. She prayed to make the Rule absolute.

Learned Advocate Mr. Md. Abdul Malek Hawlader appeared along with learned Advocate Mr. Gazi Md. Mamunur Rashid on behalf of the complainant-opposite party No. 2 submits that the accused issued the cheque for consideration and after complying with all the procedures provided in Section 138 of the Negotiable Instruments Act, 1881 filed the case. The prosecution proved the charge against the accused beyond all reasonable doubt and both the Courts below on proper assessment and evaluation of the evidence of the prosecution

witnesses legally passed the impugned judgments and orders. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Ms. Ainun Nur Chowdhury who appeared on behalf of the convict-petitioner and the learned Advocate Mr. Md. Abdul Malek Hawlader who appeared along with learned Advocate Mr. Gazi Md. Mamunur Rashid 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 of P.W. 1, it reveals that the complainant is neither a relative of the accused nor she had any business transaction with the accused. It is admitted that the accused is the head of the Destiny-2000 Limited, Cox's Bazar Branch and one Younus, a servant of the complainant, introduced the accused to her. The prosecution case is that the accused used to come to the house of the complainant and he took a loan of Tk. 10,00,000 from her on 03.04.2016 on condition to pay the same within the next 7 days. It is found that before filing the case, the accused filed M.R Case No. 422 of 2016 on 07.04.2016 for recovery of the cheque from the custody of the complainant and the learned Magistrate also issued a search warrant for recovery of the cheque.

During cross-examination, P.W. 1 admitted that at the time of issuance of the cheque on 03.04.2016 many people were present at the bank but none of them was examined by the complainant. The defence case is that when the accused was serving with Destiny-2000 Limited as head of the Cox's Bazar Branch, the complainant, M. Nuruchsofa and Younus formed a group and made the investment of Tk. 10,50,000 with Destiny-2000 Limited and all business transactions of Destiny were stopped in 2012 and the group of the complainant demanded the money to him and on 03.04.2016 she along with a terror team came to his house and forcibly took his signature on the disputed cheque. D.W. 1 proved one money receipt issued in favour of P.W. 1 Dil Zohar, 10

Distribution Information Forms and 10 acknowledgment receipts as exhibits Ka, Kha series and Ga series. P.W. 1 admitted that she signed the form 'Distribution Information for all Destiny' but stated that there was no date. Considering exhibits Ka, Kha series, Ga series and evidence of P.W. 1, the trial Court held that the complainant Dil Zohar invested Tk. 10,50,000 in 2011 with the Destiny-2000 Limited. The defence case that the complainant invested Tk. 10,50,000 through the accused find support from the evidence of P.W. 1. No document was proved regarding the loan taken by the accused from the complainant. I am of the view that the complainant paid Tk. 10,50,000 to Destiny-2000 Limited through the accused who was the head of Destiny-2000 Limited, Cox's Bazar Branch.

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. It has been stated in the complaint petition that the accused took loan of Tk. 10,00,000 from the complainant which is a very big amount but she admitted that the accused is neither her relation nor she had any business transaction with the accused. Therefore, there was no reason for the complainant to pay such a big amount to the accused except the investment of Tk. 10,50,000 with the Destiny-2000 Limited through the accused. I am of the view that there was no consideration of the cheque and the accused by adducing evidence and cross-examining P.W. 1 rebutted the presumption under Section 118(a) of the Negotiable Instruments Act, 1881 that he issued the cheque in favour of complainant for consideration.

In the case of A.H. Ershadul Haque, Advocate Vs. The State and another passed in Criminal Appeal No. 1144 of 2021 judgment dated 06.02.2023 (Mr Justice Md. Shohrowardi), it has been held that;

“The presumption under Section 118(a) of the Negotiable Instruments Act, 1881 is always rebuttable and the standard of proof of doing so is that of the preponderance of probabilities. The accused either by adducing evidence or by cross-examining PWs are entitled to rebut the said presumption. The accused is not bound to prove his innocence by adducing evidence. A negative fact cannot be proved by adducing positive evidence. The issue as to whether the presumption stood rebutted or not must be determined based on the evidence adduced by the parties. In a case under Section 138, the false implication cannot be ruled out. Therefore, the Court shall not put on a blind eye to the ground realities. In that case, the background of the case and the conduct of the parties are required to be taken into consideration. No explanation has been given by the complainant as to why no instrument was executed between the parties although handsome money was claimed to have been paid to the appellant.”

P.W. 1 stated that on 12.04.2016 legal notice was sent to the accused. Two notices were returned on 18.04.2016 and 19.04.2016 as unserved and she filed the case on 24.05.2016. Nothing has been stated by P.W. 1 that before filing the case notice under Section 138(b) of the Negotiable Instruments Act, 1881 was served upon the accused. In the absence of any statement of P.W. 1 regarding the service of notice sent under clause (b) of Section 138 of the said Act, it cannot be said that the said notice was served upon the accused. There was no cause of action under clause (c) of Section 138 of the said Act to file the case on 24.05.2016.

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. Justice Md. Shohrowardi) has held as under:

“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 the 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 through registered post with AD by the payee within 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 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 the proviso to 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 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 a 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.” [quoted in para 19 of the judgment passed in K. Bhaskaran vs Sankaran Vaidhyan Balan and another]

At this stage, it is relevant here to rely on a decision made in the case of SM Anwar Hossain vs. Md. Shafiul Alam reported in 51 DLR(AD)(1999)218 judgment dated: 03.02.1999 (ATM Afzal, CJ) wherein it has been held that;

“Subsequent allegations will not save limitation for prosecution. The requirement under the law is that the

complaint against non-payment of money has to be filed within one month of the date on which the cause of action arises. The High Court Division wrongly rejected the application for quashing."

The above view of the Apex Court was reiterated in the case of Nizam Uddin Mahmood vs. Abdul Hamid Bhuiyan and another reported in 9 BLC(AD) 177 judgment dated 15.06.2004 (Mr Amirul Kabir Chowdhury, J) wherein our Apex Court after elaborate discussion quashed the proceedings of the case 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 decision of our Apex Court made in the case reported in 9 BLC (AD) 177 was subsequently reviewed by the Hon'ble Appellate Division which was reported in 60 DLR(AD) 195 judgment dated 17.06.2008 (Mr Md. Abdul Matin, J). The Hon'ble Appellate Division has 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."

The ratio decidendi adopted in the referred cases undoubtedly speaks that during trial, the complainant shall prove that before filing the case under Section 138 of the Negotiable Instruments Act, 1881 the notice sent under clause (b) of Section 138 of the said Act has been

served upon the accused. The complainant failed to prove that the said notice sent on 12.04.2016 was served upon the accused before filing the case on 24.05.2016. The Negotiable Instruments Act, 1881 is a special law and 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. No statement is made by the complainant P.W. 1 as to the date of service of notice sent under clause (b) of the proviso to Section 138 of the said Act, 1881 upon the accused. The complainant failed to comply with the mandatory provision made in clause (c) of the proviso to Section 138 and 141(b) of the said Act and there was no cause of action to file the case on 24.05.2016.

In the case of Md. Arif-Uz-Zaman vs. The State and another reported in 21 BLT(AD) 234 judgment dated 09.06.2011 our Apex Court (Mr. Md. Abdul Wahab Mia, J) has held as under:

“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.”

It is found that the appellate Court most illegally relied on a letter allegedly written by the accused to the local Member of Parliament which was not proved during the trial of the case. The appellate Court is not legally empowered to travel beyond the evidence adduced during the trial of the case to find the accused guilty of the offence. Both the Courts below failed to interpret the mandatory provision made in clause (c) of Section 138 and 141(b) of the Negotiable Instruments Act, 1881 and illegally arrived at a wrong decision as to the guilt of the accused.

Because of the above evidence, facts and circumstances of the case, findings, observation and proposition, I am of the view that the prosecution failed to prove the charge under Section 138 of the Negotiable Instruments Act, 1881 against the convict-petitioner Mohammad Nurul Azim to the hilt beyond all reasonable doubt.

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 the convict-petitioner Mohammad Nurul Azim are hereby set aside.

The convict-petitioner Mohammad Nurul Azim is legally entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

The trial Court is directed to allow the accused Mohammad Nurul Azim to withdraw 50% of the cheque amount deposited by him before filing the appeal.

However, there will be no order as to costs.

Send down the lower Court's records at once.