

**IN THE SUPREME COURT OF
BANGLADESH**

HIGH COURT DIVISION

(CRIMINAL REVISIONAL JURISDICTION)

Present:

Mr. Justice Md. Shohrwardi

Criminal Revision No. 2075 of 2021

Md. Safikul Islam

.....Convict Petitioner

-versus-

The State and another

.....Opposite Parties

None appears

.... For the convict petitioner

Mr. Abul Basher Tutul, Advocate

.....For the opposite party No. 2

Mr. Akhtaruzzaman, DAG with

Mr. Sultan Mahmood Banna, AAG with

Mr. Mir Moniruzzaman, AAG with

....For the State

Heard on 08.05.2025 and 29.05.2025

Judgment delivered on 01.06.2025

On an application under sections 439 and 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 20.02.2019 passed by Sessions Judge, Narsingdi in Criminal Appeal No. 85 of 2019 affirming the judgment and order dated 16.04.2018 passed by Joint Sessions Judge, Court No. 2, Narsingdi in Sessions Case No. 532 of 2017 arising out of Madhabdi C.R. Case No. 85 of 2017 convicting the petitioner under section 138 of the Negotiable Instruments Act, 1881 and

sentencing him thereunder to suffer imprisonment for 01 (one) year and fine of Tk. 30,00,000 should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The prosecution's case, in short, is that the accused Md. Safikul Islam is a customer of the Shahjalal Islami Bank Ltd, Madhabdi Branch, Narsingdi. The accused took loan from the Shahjalal Islami Bank Ltd, Madhabdi Branch, Narsingdi. He issued cheque No. 6834515 on 06.02.2016 drawn on his Account No. 402611100008804 maintained with Shahjalal Islami Bank Ltd, Madhabdi Branch, Narsingdi for payment of Tk. 24,84,964 in favour of the complainant Shahjalal Islami Bank Ltd. The complainant bank presented the said cheque on 06.12.2016 for encashment, but the same was dishonored on the same date with a remark “insufficient funds”. On 22.12.2016, the complainant bank sent a legal notice to the accused through registered post with AD. Despite the service of notice upon the accused, he did not pay the cheque amount. Consequently, the complainant filed the case on 03.02.2017.

After filing the complaint petition, the complainant was examined under section 200 of the Code of Criminal Procedure, 1898 and the learned Magistrate was pleased to take cognizance of the offence against the accused under section 138 of the Negotiable Instruments Act, 1881. On 04.12.2017, the accused voluntarily surrendered before the Senior Judicial Magistrate, Narsingdi and obtained bail. Thereafter, the case record was transferred to the Sessions Judge, Narsingdi and the case was registered as Sessions Case No. 532 of 2017.

During trial, charge was framed against the accused under section 138(1) of the Negotiable Instruments Act, 1881. At the time

of framing charge, the accused was absconding. The prosecution examined 1 witness to prove the charge against the accused and the defence did not cross-examine P.W.1.

After concluding trial, the trial court by judgment and order dated 16.04.2018 was pleased to convict the accused Md. Safikul Islam under section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 01(one) year and fine of Tk. 30,00,000 against which the accused filed Criminal Appeal No. 85 of 2019 before the Sessions Judge, Narsingdi who after hearing by order dated 20.02.2019 was pleased to dismiss the appeal holding that the engaged learned Advocate did not appear at the time of hearing the appeal. Against the said judgment and order passed by the appellate court below, the convict petitioner obtained the instant rule.

P.W. 1 Ataul Haque is the Officer of Shahjalal Islami Bank Ltd, Madhabdi Branch, Narsingdi. He stated that he is authorized by power of attorney to depose in favour of the bank. He proved the power of attorney as exhibit-1. On 06.12.2016, the accused issued a cheque for payment of Tk. 24,84,964 in favour of the bank. The cheque was dishonoured on 06.12.2016 and thereafter he issued the legal notice on 22.12.2016 through registered post. P.W. 1 proved the cheque as exhibit-2, dishonoured slip as exhibit-3, legal notice as exhibit-4, and postal receipt as exhibit-5. The accused did not pay the cheque amount. Consequently, the officer of the bank filed the case on 13.02.2017. He claimed that the signature of the officer is known to him. He proved the complaint petition as exhibit-6 and the signature of the officer on the complainant petition as exhibit-6/1.

No one appears on behalf of the convict petitioner.

The learned Advocate Ms. Shayema Chowdhury appearing on behalf of the complainant opposite party No. 2 submits that the accused is a customer of the Shahjalal Islami Bank Ltd, Madhabdi Branch, Narsingdi and he issued the cheque (exhibit-2) on 06.12.2016 for payment of Tk. 24,84,964 and the bank presented the said cheque on 06.12.2016, but the said cheque was dishonoured. Consequently, the complainant bank sent a legal notice on 22.12.2016 and complying with the procedures under clause a to c of the proviso to section 138 and 141(b) of the Negotiable Instruments Act, 1881 filed the case. During trial, the complainant proved the charge against the accused beyond all reasonable doubt and both the courts below considering the evidence passed the impugned judgment and order. She prayed for the discharging the rule.

I have considered the submission of the learned Advocate Ms. Shayema Chowdhury who appeared 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 accused Md. Safikul Islam as Proprietor of Ms. Bhai Bhai Textile signed the cheque No. 6834515 dated 06.12.2016. P.W. 1 proved the said cheque as exhibit-2. On examination of said cheque, it reveals that a seal of the Shahjalal Islami Bank Ltd, Madhabdi Branch, Narsingdi is available on the cheque as payee and the cheque amount has been written in English by hand writing and the name of the payee is written in Bengali. The signature of the accused Md. Safikul Islam and the amount written on the cheque is not identical and the name of the payee is not written by the payee Md. Safikul Islam. A seal of the Shahjalal Islami Bank Ltd, Madhabdi Branch, Narsingdi has

been put on cheque as payee. P.W. 1 stated that the bank presented the cheque on 06.12.2016. No deposit slip of the said cheque is proved by the complainant. At the time of presentation of the cheque, an officer of the bank put seal with the date on the cheque presented for encashment. In the instant case, there is no seal with the date of any officer of the bank on the cheque. No deposit slip is proved in the case by the complainant. Therefore, I am of the view that the cheque was not presented for encashment. The cheque return memo dated 07.12.2016 (exhibit-3) was issued without presenting the cheque.

In the complaint petition, it has been mentioned that the legal notice was sent on 22.12.2016 through registered post with AD. P.W. 1 did not say that the legal notice was sent through registered post with AD. On perusal of the legal notice (exhibit-4) and the postal receipt dated 22.12.2016(exhibit-5), it reveals that the legal notice dated 22.12.2016 (exhibit-4) was sent to the accused Md. Safikul Islam by registered post on 22.12.2016 (exhibit-5). No AD has been proved in the case. P.W. 1 failed to prove that the legal notice dated 18.12.2016 was sent through registered post with AD.

The mere presentation of a cheque within the specified time mentioned in clause (a) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 and sending the notice in writing to the drawer of the cheque making a demand for the payment of the cheque amount 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 offense under Section 138 of the Negotiable Instruments Act, 1881 unless the said notice is served upon the drawer of the cheque and he/she 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.

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(1) of the said Act by Act No. III of 2006 making provision regarding the mode of the service of notice under clause b of the proviso to Section 138 of the said Act. Under Section 138(1)(1A) of the said Act the notice under Section 138(b) of the said Act 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 acknowledgment 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. No AD has been proved in the case.

On perusal of the impugned judgment and order passed by the appellate courts below, it reveals that the appeal was filed on 20.02.2019 and it was registered on the same date. An appeal against the judgment and order of conviction passed by the trial court is a statutory right of the accused. After filing the appeal, the appellate court usually admits the appeal. If the appellate court found that there is no ground for condonation of delay, the appellate court shall

pass an order assigning good reason. It further reveals that at the time of filing the appeal, the convict petitioner also filed an application for condonation of delay, but the appellate court below rejected the appeal on the ground of non-appearance of the learned Advocate engaged on behalf of the appellant without rejecting the application for condonation of delay. The appellate court passed a non-speaking order dismissing the appeal without rejecting the application for condonation of delay. Therefore, I am of the view that the appellate court failed to discharge judicial duty following the law.

It is found that the complainant did not present the cheque following the provision made in clause a of the proviso to section 138 of the Negotiable Instruments Act, 1881 and the cause of action for filing the case under section 138 of the Negotiable Instruments Act, 1881 could not be ascertained. Therefore, I am not inclined to send the case on remand to the appellate court below.

In view of the above evidence, findings, observation, and the proposition I am of the view that the cheque was not presented for encashment on 06.12.2016 and the dishonoured slip (exhibit-3) was issued without presenting the cheque. The complainant failed to prove the cause of action for filing the case under section 138 of the Negotiable Instruments Act, 1881. The prosecution failed to prove the charge against the convict petitioner beyond all reasonable doubt and the courts below failed to hold the correct view as to the provision made in clauses a and c of the proviso to section 138, sub-section (1A) of section 138 and section 141(b) of the said Act and arrived at a wrong decision as to guilt of the convict petitioner.

I find merit in the rule.

In the result, the rule is made absolute.

The impugned judgment and order passed by the courts below against the accused Md. Safikul Islam is hereby set aside.

The convict petitioner is entitled to get the fine amount deposited by him in the trial court before filing the appeal.

However, there will be no order as to costs.

Send down the lower Court's records at once.