<u>Present</u>:

Mr. Justice Md. Salim

<u>Criminal Revision No.3790 of 2023</u>

Md. Soaif Uddin

……. Convict-Petitioner.

-Versus-

The State and another

...… Opposite parties.

Mr. S.M. Bazlur Rashid, advocate

..... For the petitioner.

Mr. Ismail Hossain, advocate

.... For the Opposite Party No.2

Mr. Monzurul Alam Sujan, DAG
Mr. Towhidul Islam, AAG
Mr. Syed Akhtarul Islam, AAG
.... For the State.

<u>Heard on 23.02.2026 and 09.06.2026</u>

<u>Judgment on 09.06.2026</u>

By this Rule, the opposite parties were called upon to show cause as to why the Judgment and order dated 03.05.2023 passed by the learned Additional Sessions Judge, 2nd Court, Naogaon in Criminal Appeal No.30 of 2021 allowing the appeal and sentencing him to suffer rigorous imprisonment for 01(one) year and to pay Tk.8,00,000/- and reversing the Judgment and order of acquittal dated 03.01.2021 passed by the learned Joint Sessions Judge, 2nd Court, Naogaon in Sessions

Case No.610 of 2017 arising out of C.R. No.389 of 2016 (Mohadebpur) acquitting the accused petitioner of the charge initiated by the opposite party under section 138 of the Negotiable Instruments Act, 1881 (Amendment 2006) 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 case in brief is that the present-opposite party No.2, as complainant, initially filed a petition of complaint under section 138 of the Negotiable Instruments Act, before the Judicial Magistrate, Naogaon, against the convict-petitioner, alleging, inter alia, that the petitioner on 24.08.2016 issued a cheque in favour of the complainant for the purpose of land purchase amount of Tk.6,00,000/-. In order to encash the said cheque, the complainant-opposite party No.2 then presented the cheque on 01.09.2016 to the Bank, but on that very date, the cheque was dishonoured with an endorsement of insufficient funds. Finding no other alternative, the opposite party No.2 then issued a legal notice on 08.09.2016, by his engaged lawyer, to the accused person, requesting him to repay the amount. As the accused petitioner failed to comply with the request made in the legal notice, the opposite party complainant was constrained to file the petition.

In view of the said petition of complaint, the learned Judicial Magistrate, Naogaon, then examined the complainant under section 200 of the Code of Criminal Procedure and took cognizance of the said case. Since the case is triable by the Sessions Judge, the learned Judicial Magistrate then transferred the case to the learned Sessions Judge, Naogaon, for trial. In the meantime, the accused petitioner surrendered before the Court below and obtained bail.

Subsequently, the learned Joint Sessions Judge, 2nd Court, Naogaon, framed the charge against the accused-petitioner under section 138 of the Negotiable Instruments Act, which was read over and explained to the accused-petitioner, who pleaded not guilty and claimed to be tried.

During the trial, the prosecution examined one witness and produced several documents. On the contrary, the defense examined two D.Ws.

After the conclusion of the taking of evidence, the accused-petitioner was examined under section 342 of the Code of Criminal Procedure.

However, after the conclusion of the trial, the learned Joint Sessions Judge, 2nd court, Naogaon, vide Judgment and order dated 03.01.2021, acquitted the accused-petitioner of the charge under section 138 of the Negotiable Instruments Act, 1881, as has been stated hereinabove.

Being aggrieved by and dissatisfied with the above Judgment and order of acquittal, the complainant as appellant, preferred the appeal, which has been registered as Criminal Appeal No.30 of 2021 before the Sessions Judge, Naogaon.

Eventually, the learned Additional Sessions Judge, 2nd Court, Naogaon, by the Judgment and order dated 03.05.2023, allowed the appeal after reversing those passed by the trial court below and thereby convicting the accused petitioner under section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer rigorous imprisonment for 01(one) year and to pay Tk.8,00,000/-

Being aggrieved by and dissatisfied with the above Judgment and order of conviction and sentence, the convict, as petitioner, then filed the instant Criminal Revision.

Mr. S.M. Bazlur Rashid, the learned advocate appearing on behalf of the convict petitioner, submits that the learned

Judge of the appellate Court has failed to considered that the instant case was file without complied of the section 138/141 of the Negotiable Instrument Act as such the impugned Judgment is not a Judgment according to the law; that the complainant failed to proved in consideration of the alleged cheque but the appellate Court with misreading of evidence and misquotation of law found this convict petitioner guilty under section 138 of the Negotiable Instrument Act, which is not tenable in the eye of law. Thus, the impugned Judgment is liable to be set aside.

Mr. Md. Ismail Hossain, the learned advocate, appearing on behalf of the complainant opposite party vehemently by the learned advocate for the petitioner and submits that appellate Court consider the evidence on record very judiciously, found the accused-petitioner guilty, and thereby convicted under section 138 of the Negotiable Instruments Act; that the learned Judge of the appellate Court very judiciously found the instant case was filed comply with the provision of section 138/141 of the Act.

We have considered the submissions of both parties and have perused the impugned Judgment, evidence, and other materials on record. It appears that the opposite party No.2

herein, as complainant, filed the instant case under section 138 of the Negotiable Instruments Act, 1881.

In order to prove the case, the prosecution examined only one witness, i.e., P.W. 1, who, in his deposition, stated that the accused petitioner issued the cheque on 24.08.2016 for payment of Tk. 6,00,000/- and that the cheque was dishonored on 04.09.2016. Legal notice was served on 08.09.2016; the accused received it on 10.09.2016, and the instant case was filed on 27.10.2016. He also produced the alleged cheque, dishonor slip, postal receipt, and AD.

During cross-examination by the defense, this witness admitted that the accused had written the contents of the cheque. The cheque's date is overwritten. There is indeed no mark on dishonor of the cheque in the dishonor slip. There is indeed no date under the manager's signature. The due date for the acknowledgment has been overwritten.

On the contrary, DW-1 Bodr-E- Alam, Manager, Rajshahi Krishi Unnoyan Bank, deposed that the dishonor slip was issued by the second officer Projjoti Sarker.

During the complainant's cross-examination, this witness stated that the AD is overwriting, that the signature and contents of the cheque are written in different inks, and that there is no signature under the second officer's signature; the account number on the cheque is shown overwriting by computer, he denied the suggestion that signature of the accused in the cheque is difference in between front side and opposite side.

DW.2 Anamul Haque, a local Chairman of the local Union Parishad, deposed that the accused lodged a complaint with the village court regarding the alleged cheque. He noticed the complainant of the instant case, but he did not appear before the village court. The accused alleged in the complaint that he gave the alleged cheque to the complainant for the grant of a CC loan, and that he received Tk.25,000/-. He sent the complaint back to the accused because he had no jurisdiction in that regard and advised the accused to approach the Court. He identified a certified copy of his order bearing his signature.

During the complainant's cross-examination, this witness admitted that he had not formed any arbitration board.

Analyzing the above evidence on record, it appears that the signature and contents of the cheque have been written in different inks. The Bank did not provide any reasons in the dishonor slip. There is no date under the second officer's signature on the dishonor slip. The dates on the cheque and the acknowledgment due are found overwritten. Moreover, though the complainant claimed that the accused petitioner issued the cheque of Tk.6,00,000/- to be paid as an advance for the sale proceeds of the land, he failed to prove the same by adducing evidence.

Considering the above evidence on record, the trial court dismissed the case with findings that the complainant failed to prove that the accused issued the cheque for payment of the debt, or that the cheque was dishonored for insufficient funds, or that the case was maintainable under section 138/141 of the Act.

On the contrary, the appellate Court found the accused guilty under section 138 of the Act, with findings that the complainant successfully proved the accused issued the cheque for payment of dues, the cheque was dishonored for insufficient funds, notice was issued and served upon the accused in accordance with the law, and the case was filed within the time.

The relevant sections of the Act for adjudication and to draw a conclusion over the dispute of the instant case are quoted as below:-

> "Section 5. "Bill of exchange", - "A "bill of exchange' is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."
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> Section 6. Cheque-A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."
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> Section. 43. Negotiable instrument made, etc., without consideration.- A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such

holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Exception 1.- No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Exception II.- No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

The Negotiable Instruments Act, 1881 is a special law, and an offense under section 138 of the Negotiable Instruments Act is a non-cognizable offense. According to section 138(1) of the Act where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account is returned by the Bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that Bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [thrice] the amount of the cheque, or with both:

Notwithstanding anything contained in sub-section (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized.]

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within [thirty days] of the receipt of information by him from the Bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within [thirty days] of the receipt of the said notice.

[(1A) The notice required to be served under clause (b) of sub-section (1) shall be served in the following manner-

(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.]

(2) Where any fine is realized under sub-section (1), any amount up to the face value of the cheque as far as is covered by the fine realized shall be paid to the holder.

(3) Notwithstanding anything contained in sub-section (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if the whole or any part of the value of the cheque remains unrealized.

"141. Cognizance of offences- Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898),-

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such 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;

[(c) no court inferior to that of a Court of Sessions shall try any offence punishable under section 138.]]"

Though section 141 of the Act begins with non-obstante clause carving out an exception to the provisions of the Code of

Criminal Procedure. Section 141(C) of the Act clearly provides that Court of Sessions shall try the offence punishable under Section 138 of the Act. That is, offence alleged to have committed under section 138 of the Act is Sessions triable.

Admittedly, a cheque is a bill of exchange drawn on a banker payable on demand. A bill of exchange is a negotiable instrument in writing containing an instruction to a third party to pay a stated sum of money at a designated future date or on demand. A cheque, on the other hand, is a bill of exchange drawn on a bank by the holder of an account payable on demand. Thus, a cheque under section 6 of the Act is also a bill of exchange, but it is drawn on a banker and is payable on demand. An instrument can be construed as a cheque only if such document satisfies the requirements under section 5 read with section 6 of the Act. So, on the facts and circumstances of each case, the Court will have to examine whether the instrument involved in the cheque is a cheque as defined under section 5 read with section 6 of the Act.

When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. To rebut the statutory presumptions, an accused is not expected to prove his defense beyond reasonable doubt, as the complainant is in a criminal trial. The accused may adduce direct evidence to prove that the cheque in question was not supported by consideration. However, the Court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of consideration apparently would not serve the purpose of the accused. Something probable has to be brought on record to shift the burden of proof to the complainant. The burden of proof of the accused to disprove the presumption under sections 118 and 138 of the Act is not so heavy. The preponderance of probability through direct or substantial evidence is sufficient enough to shift the onus to the complainant. Inference of preponderance of probabilities can be drawn from the materials on record and also by reference to the circumstances upon which the party relies.

This view gets support in the case reported in AIR 2001 Karnataka HCR 2054, it has laid that:-

"A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidence on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration. Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter, all that is meant is that the prosecution is obliged to prove the case against the accused beyond a reasonable doubt The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing

> the reasonable possibility of the non-existence of the presumed fact."

In view of the above, it appears that the presumption under Section 118(a) of the Negotiable Instruments Act, 1881, is always rebuttable, and the standard of proof for rebutting it is the preponderance of probabilities. The accused, either by adducing evidence or by cross-examining the witness, is 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 of whether the presumption stood rebutted must be determined from the evidence adduced by the parties. In a case under Section 138, the false implication cannot be ruled out.

In the instant case, we have already noticed that the signature and the contents of the cheque were written in different inks. The dates on the cheque and the acknowledgment due are found overwritten; the Bank did not provide any reasons in the dishonor slip. Moreover, although the complainant claimed that the accused petitioner issued the cheque for the payment of advance sale proceeds of the land, totalling Tk.6,00,000/-. However, he failed to prove the same by adducing evidence.

In a case where the complainant fails to discharge the initial onus of proof by showing that the cheque was dishonored for insufficient funds or for stop payment of the account, and/or for any of the other reasons, no cause of action arises for an offense punishable under section 138 of the Act.

Considering the above, it is presumed that the prosecution has failed to prove that the alleged cheque was issued by the accused for the payment of advance sale proceeds of land, so he failed to prove the consideration money for the cheque. Consequently, we are of the firm view that the accused petitioner does not commit any offense punishable under section 138 of the Act.

On the contrary, it was imperative on the part of the learned Judge of the appellate Court to find out whether each and every incriminating circumstance in respect of the implication of the accused-respondent-petitioner in the felony has been established by credible, reliable, and clinching evidence. But the learned Judge of the appellate Court, without considering oral and documentary evidence, most erroneously found that the cheque was issued and dishonored in accordance with the law. Thus, he committed a serious error in presuming the guilt of the convict-appellant first and, thereafter, trying to find another reason to justify such a conclusion without an objective, independent, and impartial analysis or assessment of the materials before recording a finding of guilt against the convict-appellant.

The doubtful and suspect nature of the evidence sought to be relied upon to substantiate the circumstances suffered from serious infirmities and lacked legal credibility. So, the findings of the learned Judge of the appellate Court do not deserve the merit of approval of this Court, having regard to the infirmities and illegalities vitiating them and the patent errors apparent on the face of the record, resulting in a serious and great miscarriage of Justice in convicting the appellant.

In view of the above facts and circumstances of the case, we find merit in the Rule.

As a result, the Rule is made absolute, without any order as to costs.

Communicate the Judgment and send down the lower court records.

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(MD. SALIM, J).

Rakib(ABO)