

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Revision No. 4360 of 2022

Montasir Billah Shahariar

...Convict-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Sakib Mabud, Advocate

...For the convict-petitioner

Mr. Md. Harun-Or-Rashid, Advocate with

Mr. Md. Mozammel Hossain, Advocate

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

Heard on 30.10.2024 and 7.11.2024

**Judgment delivered on 11.11.2024**

On an application filed 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 04.03.2018 passed by Additional Metropolitan Sessions Judge, Court No. 6, Dhaka in Criminal Appeal No. 567 of 2017 affirming those dated 12.03.2017 passed by Joint Metropolitan Sessions Judge, Court No. 6, Dhaka in Metropolitan Sessions Case No. 8321 of 2014 arising out of C. R. Case No. 283 of 2014 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer imprisonment for 1(one) year and fine of Tk. 35,00,000 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 Montasir Billah Shahariar took loan of Tk. 81,00,000 from the complainant A.K.M. Azad. He issued cheques Nos. IBE 3550428 dated 17.09.2013 for payment of Tk. 9,00,000, IBE 3550426 dated 22.09.2013 for payment of Tk. 9,00,000 and IBE 3550427 dated 25.09.2013 for payment of Tk. 9,00,000 drawn on his Account No. 20501770100372418 maintained with Islami Bank Bangladesh

Limited, Gulshan, Dhaka Branch. The complainant presented the said cheques for encashment through Sonali Bank Ltd, Naval Head Quarter Branch, Banani but the cheques were dishonoured on 23.12.2013 with the remark 'insufficient funds'. On 12.01.2014, he sent a legal notice to the accused through his learned Advocate for payment of the cheque amount. The accused received the legal notice on 14.01.2014 but he did not pay the cheques amount. Consequently, the complainant filed the case on 12.03.2014 complying with the procedure under Section 138 of the Negotiable Instruments Act, 1881.

After that, the case record was sent to the Metropolitan Sessions Judge, Dhaka who sent the case to the Joint Metropolitan Sessions Judge, Court No. 6, Dhaka for trial and disposal. 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 him and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 1(one) witness to prove the charge against the accused. During trial, the accused was absconding for which he was not examined under Section 342 of the Code of Criminal Procedure, 1898.

After concluding the trial, the trial Court by judgment and order dated 12.03.2017 convicted the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to suffer rigorous imprisonment for 1(one) year and a fine of Tk. 35,00,000 against which the accused filed Criminal Appeal No. 567 of 2017 before the Metropolitan Sessions Judge, Dhaka who transferred the appeal to the Additional Metropolitan Sessions Judge, Court No. 6, Dhaka. After hearing, the appellate Court by impugned judgment and order affirmed the judgment and order passed by the trial Court against which the convict-petitioner obtained the instant Rule.

P.W. 1 Md. Abdul Jalil stated that he obtained power of attorney from the complainant A.K.M. Azad. He proved the power

of attorney as exhibit 1. The accused Montasir Billah Shahariar issued three cheques on 17.09.2013, 22.09.2013 and 25.09.2013 for payment of total Tk. 27,00,000. The cheques were dishonoured on 23.12.2013 and the legal notice was sent on 12.01.2014 through registered post but he did not pay the cheques amount. He proved the complaint petition as exhibit 2 and his signature on the complaint petition as exhibit 2/1, the cheque as exhibit 3, the dishonour slip as exhibit 4, the postal receipt as exhibit 5 and the legal notice as exhibit 5/1. The accused was absconding.

Learned Advocate Mr. Sakib Mabud appearing on behalf of the convict-petitioner submits that the convict-petitioner Montasir Billah Shahariar issued the cheques for business purposes but due to hardship, he could not pay the cheque amount after service of notice. However, he submits that the complainant-opposite party No. 2 and the convict-petitioner settled the dispute between them regarding the cheque amount and deposited the entire amount in the trial Court. He prayed for making the Rule absolute accepting the compromise made between the parties.

Learned Advocate Mr. Md. Harun-Or-Rashid appearing along with learned Advocate Mr. Md. Mozammel Hossain on behalf of the complainant-opposite party No. 2 submits that the accused issued three cheques for payment of Tk. 27,00,000 and after complying with all the procedures under Section 138 of the Negotiable Instruments Act, 1881 filed the case and the prosecution proved the charge against the accused beyond all reasonable doubt. However, he admitted that both the complainant-opposite party No. 2 and the convict-petitioner settled the dispute between them and he withdrew 50% of the cheque amount during the pendency of the appeal and he is willing to withdraw the remaining 50% of the cheque amount deposited by the convict-petitioner. He also prayed for acceptance of the compromise made between the parties.

I have considered the submission of the learned Advocates of both parties, perused the evidence, the impugned judgments and orders passed by the Courts below and the records.

On perusal of the records, it appears that the complainant-opposite party No. 2 filed an application sworn on 06.11.2024 to withdraw Tk. 13,50,000 stating that the complainant has no objection if the Court set aside the impugned judgments and orders passed by the Courts below. The convict-petitioner also filed an application sworn on 05.11.2024 stating that after disposal of the appeal, on 23.10.2022 the convict-petitioner deposited the remaining 50% of the cheques amount Tk. 13,50,000 and 50% of the cheque amount deposited by the convict-petitioner before filing the appeal had been withdrawn by the complainant. The Negotiable Instruments Act, 1881 is a special law and the offence under Section 138 of the said Act is not compoundable. Therefore, after filing the case the parties are not legally entitled to make any compromise regarding the cheque.

On perusal of the evidence, it appears that the convict-petitioner issued cheques Nos. IBE 3550428 dated 17.09.2013 for payment of Tk. 9,00,000, IBE 3550426 dated 22.09.2013 for payment of Tk. 9,00,000 and IBE 3550427 dated 25.09.2013 for payment of Tk. 9,00,000 drawn on his Account No. 20501770100372418 maintained with Islami Bank Bangladesh Limited, Gulshan Branch. The said cheques were proved as exhibits 3, 3/1 and 3/2. The cheques were presented through Sonali Bank Limited and were dishonoured on 23.12.2013 and the bank issued the dishonour slip which was proved as exhibit 4. The complainant issued a legal notice on 12.01.2014 through registered post with AD upon the accused and the accused received the said notice on 14.01.2014. During the trial, the accused was absconding and he did not cross-examine P.W. 1. Therefore, the issuance of the cheques by

the accused in favour of the complainant for payment of total Tk. 27,00,000 is admitted by the accused.

The learned Advocate Mr. Sakib Mabud appearing on behalf of the convict-petitioner submits that after service of notice, he could not pay the cheque amount due to hardship. Therefore, I am of the view that the complainant after complying with all the procedures provided in Section 138 of the Negotiable Instruments Act, 1881 filed the complaint petition and P.W. 1 proved the charge against the accused beyond all reasonable doubt.

However, considering the gravity of the offence, I am of the view that the ends of justice would be best served if the sentence passed by the Courts below is modified as under;

The convict-petitioner Montasir Billah Shahariar is found guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and he is sentenced to pay a fine of Tk. 27,50,000.

The complainant-opposite party No. 2 is entitled to get the cheque amount Tk. 27,00,000. Since the complainant admitted that he received 50% of the cheque amount, he is now entitled to withdraw the remaining 50% of the cheque amount deposited by the convict-petitioner after passing the impugned judgment and order by the appellate Court below.

The convict-petitioner is directed to pay the remaining fine amount of Tk. 50,000 in the trial Court which will be deposited in the public exchequer.

The trial Court is directed to allow the complainant-opposite party No. 2 to withdraw the remaining 50% of the cheque amount Tk. 13,50,000.

In the result, the Rule is disposed of with a modification of the sentence.

However, there will be no order as to costs

Send down the lower Court's records at once.