

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Revision No. 3578 of 2023

Sarkar Md. Tohidul Islam alias Md. Tohidul Islam

...Convict-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Md. Ekramul Hoque Advocate with

Mr. Md. Golam Subhan Chowdhury, Advocate

...For the convict-petitioner

Mr. Mazedul Islam Patwary, Advocate

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

Heard on 27.05.2024, 28.05.2024, 15.07.2024 and

20.08.2024

**Judgment delivered on 27.08.2024**

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 25.05.2023 passed by the Sessions Judge, Lalmonirhat in Criminal Appeal No. 03 of 2022 affirming the judgment and order dated 23.09.2021 passed by the Joint Sessions Judge, Court No. 1, Lalmonirhat in Sessions Case No. 631 of 2018 arising out of C.R. No. 162 of 2018 (Lal) convicting the petitioner under Section 138(1) of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 01(one) year and fine of Tk. 3,00,000 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 Sarkar Md. Tohidul Islam alias Md. Tohidul Islam was previously known to the complainant Mosammat Biva Khatun and he took a loan of Tk. 3,00,000 from the complainant. On 04.03.2018 the accused issued Cheque No. SBLR 4213200 drawn on his Current Account No. 8366 maintained with Rupali Bank Ltd, Lalmonirhat Branch. The

complainant presented the said cheque for encashment which was dishonoured on 19.03.2018 with a remark 'insufficient funds'. On 27.03.2018 she sent a legal notice. The accused received the legal notice on 05.04.2018. He did not pay the cheque amount. After that, she filed the complaint petition.

The Joint Sessions Judge, Court No. 1, Lalmonirhat framed charge against the accused under Section 138(1) 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. The defence did not cross-examine P.W. 1. 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 23.09.2021 convicted the accused under Section 138(1) of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer imprisonment for 1(one) year and a fine of Tk. 3,00,000 against which the accused filed Criminal Appeal No. 03 of 2022 before the Sessions Judge, Lalmonirhat who by impugned judgment and order was pleased to affirm the judgment and order passed by the trial Court against which he obtained the instant Rule.

P.W. 1 Most. Biva Khatun is the complainant. She stated that the accused Sarkar Md. Tohidul Islam was known to her and he took loan of Tk. 3 lakh before 1 year of the issuance of the cheque but he did not pay the money. On 04.03.2018 he issued Cheque No. SBLR 4213200 drawn on his account maintained with Rupali Bank Ltd, Lalmonirhat Branch. On 19.03.2018 the cheque was dishonoured for 'insufficient funds'. On 27.03.2018 a legal notice was sent which was received by the accused on 05.04.2018 but he did not pay the cheque amount. Consequently, she filed the case. She proved the complaint petition as exhibit 1, his signature on the complaint

petition as exhibit 2/1, the cheque as exhibit 2, the dishonour slip as exhibit 3, legal notice as exhibit 4, postal receipt as exhibit 5 and the acknowledgement receipt as exhibit 6.

Learned Advocate Mr. Md. Ekramul Hoque appearing along with the learned Advocate Mr. Md. Golam Subhan Chowdhury on behalf of the convict-petitioner submits that both the complainant-opposite party No. 2 and the convict-petitioner settled the dispute out of Court and the convict-petitioner paid 50% of the cheque amount to the complainant. He prayed for making the Rule absolute considering the compromise dated 14.07.2024 made between the complainant-opposite party No. 2 and the convict-petitioner (Annexure-X).

Learned Advocate Mr. Mazedul Islam Patwary appearing on behalf of the complainant-opposite party No. 2 submits that the accused issued the cheque for payment of Tk. 3,00,000 on 04.03.2018 but the same was dishonoured. Consequently, the complainant sent a legal notice but the accused did not pay the cheque amount. Consequently, she filed the case following the procedure provided in Section 138 of the Negotiable Instruments Act, 1881. However, he submits that both the complainant-opposite party No. 2 and the convict-petitioner settled the dispute between them and received 50% of the cheque amount Tk. 1,50,000 from the convict-petitioner and he is willing to receive the remaining 50% of the cheque amount deposited by the convict-petitioner before filing the appeal.

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 convict-petitioner and the complainant-opposite party No. 2 filed a joint application for compromise sworn on 14.07.2024 stating that before filing the appeal, the convict-petitioner deposited 50% of the cheque

amount in the trial Court and during the pendency of the Rule, the convict-petitioner paid Tk. 1,50,000 to the complainant and settled the dispute out of Court.

The Negotiable Instruments Act, 1881 is a special law and the offence under Section 138 of the Negotiable Instruments Act, 1881 is non-compoundable. Therefore, there is no scope to dispose of the Rule considering the compromise made between the parties. After filing the case under Section 138 of the said Act, the Court shall dispose of the case considering the merit of the case.

On perusal of the evidence, it further reveals that the convict-petitioner issued Cheque No. SBLR 4213200 on 04.03.2018 (exhibit 2) drawn on his account maintained with Rupali Bank Ltd, Lalmonirhat Branch and the said cheque was dishonoured on 19.03.2018 with a remark 'insufficient funds' and accordingly, the bank issued the dishonour slip (exhibit 3). After that, the complainant sent a legal notice (exhibit 4) on 27.03.2018 to the accused which was received on 05.04.2018. Despite the notice received by the convict-petitioner regarding the dishonour of said cheque, he did not pay the cheque amount. Consequently, the complainant filed the case on 07.05.2018. The postal receipt was proved as exhibit 5 and the acknowledgement due was proved as exhibit 6. The defence did not cross-examine P.W. 1. It is found that the complainant filed the case complying with the procedure under Section 138 of the Negotiable Instruments Act, 1881.

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. The convict-petitioner neither adduced evidence nor cross-examined P.W. 1 to rebut the presumption under Section

118(a) of the said Act. Therefore I am of the view that the convict-petitioner Sarkar Md. Tohidul Islam alias Md. Tohidul Islam issued the cheque (exhibit 2) in favour of the payee-complainant for consideration. After making a demand in writing under Section 138(1)(b) of the said Act, he did not pay the cheque amount. Thereby he committed an offence under Section 138 of the Negotiable Instruments Act, 1881 and the complainant filed the case following all procedures provided in Section 138 of the Negotiable Instruments Act, 1881. The prosecution proved the charge against the convict-petitioner beyond all reasonable doubt and the Courts below on proper assessment and evaluation of evidence legally passed the impugned judgments and orders of conviction.

Considering the gravity of the offence and the facts and circumstances of the case, 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 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. 3,00,000.

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

Since the complainant admitted that she received 50% of the cheque amount in cash from the accused, he is not required to deposit the fine amount again in the trial Court.

The complainant-opposite party No. 2 is entitled to get the fine awarded by this Court. The trial Court is directed to allow the complainant-opposite party No. 2 to withdraw 50% of the cheque amount deposited by the convict-petitioner before filing the appeal.

Send down the lower Court's records at once.