

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 93 of 2023

Md. Tayajul Islam

...Convict-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Md. Zishan Mahmud, Advocate

...For the convict-petitioner

Mr. Mazedul Islam Patwary, Advocate

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

Heard on 20.11.2024

Judgment delivered on 25.11.2024

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 judgment and order dated 11.04.2022 passed by the Sessions Judge, Lalmonirhat in Criminal Appeal No. 100 of 2021 affirming the judgment and order of conviction and sentence dated 07.03.2021 passed by the Joint Sessions Judge, Court No. 1, Lalmonirhat in Sessions Case No. 194 of 2020 arising out of C. R. Case No. 162 of 2019 (Kaliganj) convicting the petitioner under Section 138(1) of the Negotiable Instruments Act, 1881 and sentencing him to suffer rigorous imprisonment for 1(one) year and to pay a fine of Tk. 2,00,000 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 Md. Tayajul Islam was previously known to the complainant Md. Ekramul Haque. On 05.10.2018 the accused took loan of Tk. 2,00,000 from the complainant for business. On 22.05.2019 the accused issued Cheque No. 3409303 drawn on his Account No. 601017277 maintained with Sonali Bank Limited, Kaliganj Branch, Lalmonirhat. The complainant presented the said cheque for encashment which was dishonoured on

07.07.2019 with a remark 'insufficient funds'. On 18.07.2019 he sent a legal notice. The accused received the legal notice on 28.07.2019. He did not pay the cheque amount. After that, he filed the complaint petition on 05.09.2019.

During the trial, 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. The accused was absconding during trial 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 07.03.2021 convicted the accused under Section 138(1) of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer rigorous imprisonment for 1(one) year and a fine of Tk. 2,00,000 against which the accused filed Criminal Appeal No. 100 of 2021 before the Sessions Judge, Lalmonirhat who by impugned judgment and order affirmed the judgment and order of conviction and sentence passed by the trial Court against which he obtained the instant Rule.

P.W. 1 Md. Ekramul Haque is the complainant. He stated that the accused Md. Tayjul Islam took loan of Tk. 2 lakh on 05.10.2018 for business. He issued Cheque No. 3409303 on 22.05.2019 drawn on Sonali Bank Limited, Kaliganj Branch. After presenting the said cheque, it was dishonoured on 07.07.2019. On 18.07.2019 the complainant sent a notice to the accused and he received the notice on 28.07.2019. He did not pay the cheque amount and filed the complaint petition on 05.09.2019. He proved the complaint petition as exhibit 1 and his signature on the complaint petition as exhibit 1/1, cheque as exhibit 2, the dishonour slip as exhibit 3, the notice as exhibit 4, the postal receipt as exhibit 5 and AD as exhibit 6. The defence did not cross-examine P.W. 1.

Learned Advocate Mr. Md. Zishan Mahmud appearing on behalf of the convict-petitioner submits that the impugned judgment and order of conviction and sentence passed by the Courts below is too harsh. Therefore, the impugned judgment and order of conviction and sentence passed by the Courts below are not sustainable in law.

Learned Advocate Mr. Mazedul Islam Patwary appearing on behalf of the complainant-opposite party No. 2 submits that the accused issued a cheque on 22.05.2019 drawn on his account maintained with Sonali Bank Limited, Kaliganj Branch and the same was dishonoured on 07.07.2019 and on 28.07.2019 the accused received the legal notice dated 18.07.2019 but he did not pay the cheque amount. Thereby he committed the offence under Section 138 of the Negotiable Instruments Act, 1881. He prayed for discharging the Rule.

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 evidence, it reveals that the convict-petitioner issued Cheque No. 3409303 on 22.05.2019 (exhibit 2) drawn on his account maintained with Sonali Bank Limited, Kaliganj Branch and the said cheque was dishonoured on 07.07.2019 with a remark 'insufficient funds' and accordingly, the complainant issued the dishonour slip (exhibit 3). After that, the complainant sent a legal notice (exhibit 4) on 18.07.2019 to the convict-petitioner which was received on 28.07.2019 by him. Despite the notice received by the convict-petitioner regarding the dishonour of said cheque, he did not pay the cheque amount. The postal receipt was proved as exhibit 5 and the AD was proved as exhibit 6. The defence did not cross-examine P.W. 1. The complainant filed the case on 05.09.2019 complying with the procedures 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 Md. Tayajul Islam issued the cheque (exhibit 2) in favour of the payee-complainant for consideration. After service of notice sent 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. The prosecution proved the charge against the convict-petitioner beyond all reasonable doubt.

On perusal of the impugned judgment and order passed by the trial Court, it appears that the trial Court awarded a sentence of rigorous imprisonment. No provision is made in the Negotiable Instruments Act, 1881 to award rigorous imprisonment. The Court is only empowered to award imprisonment. Both the Courts below committed a serious illegality in awarding rigorous imprisonment.

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 is found guilty of the offence under Section 138 of the Negotiable Instruments Act, 1881 and he is sentenced to suffer imprisonment for 2(two) months and a fine of Tk. 2,00,000.

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.