

**IN THE SUPREME COURT OF
BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)**

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 5930 of 2024

Md. Saiful Islam

.....Appellant

-versus-

The State and another

.....Respondent

Mr. Sk. Eusuf Rahman, Advocate

.... For the appellant

None appears

.....For the respondent No.2

Mr. Akhtaruzzaman, DAG with

Mr. Sultan Mahmood Banna, AAG with

Mr. Mir Moniruzzaman, AAG

....For the State

Heard on 20.02.2025 and 13.05.2025

Judgment delivered on 19.05.2025

This appeal under section 417(2) of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order dated 23.05.2024 passed by the Joint Sessions Judge, Court No. 2, Satkhira in Sessions Case No. 1835 of 2000 (Kaliganj) arising out of C.R. Case No. 315 of 2020 acquitting the respondent No. 2 from the

charge framed against him under section 138 of the Negotiable Instruments Act, 1881.

The prosecution's case, in short, is that the accused Md. Abdul Mannan and the complainant Md. Saiful Islam were previously known to each other. On 17.08.2019 the accused Md. Abdul Mannan took loan of Tk. 48,00,000 in cash for business on condition to pay the same within next 6 months. On 17.02.2020 the complainant went to the house of accused and demanded the money. At that time, the accused issued cheque No. 8245386 drawn on his Account No. 1812901026063 maintained with Pubali Bank Ltd, Satkhira Branch, Satkhira for payment of Tk. 48,00,000 in favour of the complainant. The complainant presented the said cheque on 20.02.2020 which was dishonored with the remark "insufficient funds". On 03.03.2020 the complainant sent a legal notice to the accused through registered post with AD and the accused himself received the notice on 09.03.2020 but he did not pay the cheque amount within one month from the date of receipt of the notice. Thereafter, he filed the case on 31.05.2020. In the complaint petition, it has been stated that due to covid situation, on 26.03.2020 the government declared the holly day and the court re-opened on 30.05.2020, and on 31.05.2020 he filed the case under section 138 of the Negotiable Instruments Act, 1881.

During trial, charge was framed against the accused under section 138 of the Negotiable Instruments Act, 1881 which was read over and explained to the accused present in court and he pleaded not guilty to the charge and claimed to be tried in accordance with law. The prosecution examined one witness to prove the charge against the accused. After examination of the prosecution witness, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and defence

examined one DW. After concluding trial, the trial court by impugned judgment and order acquitting the accused from the charge framed against him under section 138 of the Act against which the complainant filed the appeal.

P.W. 1 Md. Saiful Islam is the complainant. He stated that the accused took loan of Tk. 48,00,000 from him and he issued a cheque on 17.02.2020 drawn on his account maintained with Pubali Bank Ltd, Satkhira Branch. He presented the said cheque on 20.02.2020 and the same was dishonoured on the same date. On 03.03.2020, he sent a legal notice to the accused and he received the legal notice on 09.03.2020 but he did not pay the cheque amount. He proved the complaint petition as exhibit-1 and his signature on the complainant petition as exhibit-1/1, the cheque as exhibit-4, the postal receipt as exhibit-5 and the legal notice as exhibit-6. During cross-examination, he stated that the accused is known to him for about 8/10 years and there was transaction between the accused and the complainant before issuance of the cheque. He is now aged about 37 years. He handed over Tk. 48,00,000 to the accused sitting in his house. Before 3 to 5 days, he kept the money in his house. The accused signed the cheque in his presence. The house of the accused is situated at Kathakkhali. No agreement was executed regarding the payment of the money. He admitted that Tk. 40,00,000/45,00,000 were not kept regularly in his house. At the time of handing over the money one person was present there but he could not remember his name. At the time of handing the money, his manager was present. He denied the suggestion that the accused was not known to him before the occurrence or he did not see him. His father is alive and he deals with land business. He admitted that there was business transaction between his father and the accused. He denied the suggestion that after payment of the dues, his father kept the cheque signed by the accused in his custody or his father

was involved in many other cases for which he could not handed over the cheque to the accused or that he took the cheque from the custody of his father and filed the false case using the cheque kept in the custody of his father or that the accused is not known to him or he filed a false case suppressing the truth.

D.W. 1 Md. Abdul Mannan is the accused. He stated that he used to deal with brick business. Now his is retired. He cannot see with his right eye but can see lightly with his left eye. The complainant Md. Saiful Islam is not known to him. He sent the reply to the legal notice. Suddenly he issued a notice to him. He did not take any loan from the accused. One Ahmed Ali who was dealing with coal business was known to him. There was total dues of Tk. 50,000/100,000. He kept 2 signed cheques in his custody. Subsequently, he paid the loan of Ahmed Ali but he did not return his two signed cheques. He filed the case using 1 (one) of the said cheques. He retired from business about 5/7 years ago. He was involved in brick business for about 40 years. Ahmad Ali was known to him. He was involved with coal business. The complainant is known to him. He is not aware whether Md. Saiful Islam is the son of the Ahmed Ali. He did not lodged any GD for missing the cheques or he did not file any case.

The learned Advocate Mr. SK. Eusuf Rahman appearing on behalf of the complainant appellant submits that the accused Abdul Mannan took loan of Tk. 48,00,000 for brick business. He issued a cheque on 17.02.2020 for payment of Tk. 48,00,000 and the complainant presented the said cheque on 20.02.2020 following provision made in clause a of the proviso to section 138 of the Negotiable Instruments Act, 1881 which was dishonoured on the same date with a remark “insufficient funds”. On 03.03.2020 the complainant sent a legal notice

following clause b of the proviso to section 138 of the said Act and the accused received the legal notice on 09.03.2020 but he did not pay the cheque amount. Consequently, following circular dated 30.05.2020 issued regarding the covid situation he filed the case on 31.05.2020 in compliance with the procedure under clause a to c of the proviso to section 138 and 141(b) of the said Act and during trial P.W. 1 proved the charge against the accused but the trial court most illegally passed the impugned judgment and order. He further submits that under section 118(a) of the Negotiable Instruments Act, 1881 there is a presumption that the cheque was issued for consideration and the trial court failed to interpret section 118(a) of the said Act and illegally passed the impugned judgment and order. He prayed for setting aside the impugned judgment and order passed by the trial court.

No one appears on behalf of the respondent No. 2

I have considered the submission of the learned Advocate who appeared on behalf of the complainant appellant, perused the evidence, impugned judgment and order passed by the trial court and the records.

On perusal of the impugned judgment and order passed by the trial court, it reveals that the complainant Md. Saiful Islam was aged about 37 years and the accused Md. Abdul Mannan was aged about 72 years and they are not relatives. There is no documents regarding the transaction of Tk. 48,00,000 although 3/4 accounts are maintained in the name of the complainant. No explanation is given by the complainant regarding the source of such a big amount. The complainant admitted that the accused signed the cheque in his presence. On scrutiny of the cheque (exhibit-2), the trial court found that the signature of the accused and other hand writing on the cheque are not identical. Nothing has been stated by the P.W. 1 regarding other hand writing on the cheques,

although he admitted that the accused signed the cheque in his presence. Finally the trial court held that the complainant filed the case using the cheque kept in the custody of his father and no cheque was issued by the accused in favour of the complainant and there was no consideration of the cheque.

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 offence under Section 138 of the Negotiable Instruments Act, 1881 unless the cheque is issued for consideration and 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.

The defence case is that the accused is an old man of 72 years and he cannot see with his right eye and he can see lightly with his left eye. He retired from businesses about 5/7 years ago. There was a transaction between the accused and Ahmed Ali, father of the complainant, and he kept 2 signed cheques in the custody of Ahmed Ali who is the father of the complainant and after payment of the dues to the Ahmed Ali, he did not return those cheques and using one of the cheque kept in custody of Ahmed Ali, the complainant filed the case.

There is a presumption under section 118(a) of the Negotiable Instruments Act, 1881 that unless contrary is proved, 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 Negotiable Instruments Act, 1881 is rebuttable and the standard of proof of doing so is that of the preponderance of probabilities. The accused either adducing evidence or by cross-examining PW 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 as to whether the presumption stood rebutted or not must be determined based on the evidence adduced by the parties. In a case under section 138 of the said Act, the false implication of accused cannot be ruled out. Therefore, the court shall not put on a blind eye to the ground realities. No explanation has been given by P.W.1 as to why no instrument was executed between the parties although handsome amount of money was claimed to have been paid to the accused. Furthermore, no date has been mention by P.W. 1 when he paid Tk. 48,00,000 to the accused.

At the time of examination of the accused Md. Abdul Mannan as D.W. 1, he was aged about 72 years. He stated that he cannot see with his right eye but can see lightly with his left eye. He retired from business about 5/7 years ago. It is found that the accused is not relation of the complainant. No documentary evidence was adduced by the prosecution regarding payment of Tk. 48,00,000 to the accused . The statement made by D.W. 1 regarding his health condition is not denied by the prosecution. The statement made by DW. 1 that about 5/7 years ago, he retired from business is also not denied by P.W. 1. Therefore, the defence case that the accused retired from business at the time of issuance of the cheque on 17.02.2020 is admitted by the prosecution.

On scrutiny of the cheque (exhibit-2), it reveals that the accused wrote his name as drawer on the cheque (exhibit-2) and the hand writing of accused Md. Abdul Mannan on the cheque is not identical to other writing on the cheque. P.W. 1 admitted that the accused signed the cheque in his presence. No statement is made by P.W.1 to the effect that the accused filled up other columns of the cheque. No explanation has been given by P.W.1 as to why the hand writing (signature) of the accused Md. Abdul Mannan is not identical to the other hand writing on the cheque. Nothing has been stated by P.W. 1 who wrote his name on the cheque as payee. I am of the view that the accused Abdul Mannan did not issue the cheque in favour of the complainant Md. Saiful Islam.

The statement made by DW. 1 that Ahmed Ali, father of the accused, was a business man and there was transaction between Ahmed Ali and the accused was not denied by the prosecution. P.W. 1 admitted that there was business transaction between his father and accused. I am of the further view that the accused filed the case using the cheque kept in the custody of the father of the complainant. At the time of issuance of the cheque on 17.02.2020, the accused retired from his business and there was no reason for issuance of the cheque (exhibit-2) in favour of the complainant. The ground reality regarding the filing a case under section 138 of the Negotiable Instruments Act, 1881 cannot be ignored by this court. Keeping cash Tk. 48,00,000 in the house of the complainant is unusual. Admittedly, P.W.1 maintained 3/4 bank accounts in his name. No evidence was adduced that at the relevant time, he withdrew the said amount from his account. Therefore, the handing over Tk. 48,00,000 sitting in the house of the complainant to the accused who is neither relation nor business partner of the complainant is doubtful. By cross-examining P.W. 1 and examining D.W. 1, the defence rebutted the presumption under section 118(a) of the said Act. I am of

the view that there was no consideration of the cheque issued in favour of the complainant.

At this stage, it is relevant here to rely on a decision made in the case of A.H. Ershadul Haque Advocate vs. the State and another, reported in 75 DLR(2023) 447, judgment dated: 06.02.2023, (Md. Shohrowardi,J), in which, it has been held that;

“In view of provision of section 138(1)(a) of the said Act, a cheque is required to be 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. Be that as it may, there is no scope to issue an undated cheque. If the payee or holder in due course is allowed to present the undated cheque, the purpose of Section 138 (1)(a) will be frustrated. The presentation of the cheque within 06(six) months to the bank is not without any purpose. It is not practically possible for the drawer of the cheque to keep the money in the account for an indefinite period. Therefore, a cheque issued without mentioning the name of the payee or date does not come within the purview of section 138 of the said Act. Although there is no bar in issuing an antedated or post-dated cheque in view of the provision of section 21C of the said Act. Nothing has been stated in the said Act as regards issuance of undated cheque.”

In section 138 of the Negotiable Instruments Act, 1881 the legislature used the word “another person” meaning thereby that the drawer issued the cheque in favour of a ‘particular and specified person’. On a bare reading of sections 138 and 43 of the said Act in a

juxtaposition it reveals that there is no scope to issue any blank cheque without writing the name of the payee and the amount in the cheque. A person cannot be convicted for any act unless it is prohibited under any penal law. No duty has been attributed to the drawer of a blank cheque in the said Act to honour the undated and blank cheque. Therefore, a cheque issued without writing the name of payee, amount and date on the cheque is not a cheque in the eye of law and the drawer of a blank cheque has no obligation to pay the cheque amount.

In view of the above evidence, findings, observation and the proposition I am of the view that no cheque was issued by the accused in favour of the complainant and there was no consideration of the cheque (exhibit-2). The finding of the trial court that the complainant filed the case using the cheque kept in the custody of his father is hereby affirmed. The statement made by P.W. 1 in the complainant petition that the accused issued the cheque in his favour is an afterthought.

I do not find any merit in this appeal.

In the result, the appeal is dismissed with costs of Tk. 5000(five thousand).

The accused is entitled to get the costs.

The appellant is directed to deposit the costs in the trial court within 30 days from the date of receipt of a copy of this judgment and order.

The trial court is directed to do the needful.

Send down the lower Court's record at once.

