

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

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 3450 of 2023

Major Mohammad Abu Taher (Retd.)(Bir
Muktijodda)

..... petitioner

-Vs-

The State and another

....Opposite Party No. 2

Mr. Mohammad Abul Kashem Bhuiyan,
Advocate

....For the petitioner.

Mr. Md. Mahfuzur Rahman(Milon),
Advocate

.....For the opposite party No.2

Mr. Sultan Mahmood Banna, AAG with
Ms. Sharmin Hamid, AAG

..... For the State

Heard on 13.03.2025

Judgment delivered on: 18.03.2024

On an application under section 439 read with section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 02.03.2023 passed by Additional Metropolitan Sessions Judge, Court No. 6, Dhaka in Metropolitan Criminal Appeal No. 75 of 2020 affirming the judgment and order of conviction and sentence dated 04.11.2019 passed by Metropolitan Joint Sessions Judge, Court

No. 6, Dhaka in Metropolitan Sessions Case No. 1031 of 2014 arising out of C.R. No. 748 of 2013 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 04(four) months and fine of Tk. 9,12,314 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 short, is that the accused Major Mohammad Abu Taher(Retd.) issued cheque No.341826215 dated 03.04.2013 on 03.04.2013 drawn on his Account No.01234056921 maintained with Bank Asia Ltd, MCB Banani Branch, Dhaka for payment of Tk. 9,12,314 in favour of the complainant, National Housing Finance and Investment Ltd. The complainant presented the said cheque for encashment, but the same was dishonoured on 03.04.2013 with a remark “insufficient funds”. He sent a legal notice on 22.04.2013 to the accused by registered post with AD for payment of the cheque amount within 30 days from the date of receipt of the notice, but he did not pay the cheque amount. Consequently, the complainant filed the case on 11.06.2013.

After filing the complaint petition, the complainant was examined under section 200 of the Code of Criminal Procedure, 1898, and on 11.06.2023, the learned Magistrate was pleased to take cognizance of the offence against the accused under section 138 of the said Act. Thereafter, the learned Magistrate sent the case to the Metropolitan Sessions Judge, Dhaka, and the Metropolitan Sessions

Judge, Dhaka, sent the case to the Joint Metropolitan Sessions Judge, Court No. 6, Dhaka Dhaka for trial.

During the trial, charge was framed against the accused under section 138 of the said Act. During the trial, the prosecution examined 01 (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 again he pleaded not guilty to the charge. The defence examined 1 DW. After concluding the trial, the trial court by impugned judgment and order convicted the accused and sentenced him as stated above, against which the accused filed the Criminal Appeal No. 75 of 2020 before the Metropolitan Sessions Judge, Dhaka who by impugned judgment and order affirmed the judgment and order passed by the trial court against which he obtained the Rule.

P.W. 1 Abdullah Al Kafi stated that the accused Major Mohammad Abu Taher(Retd.) issued cheque No.341826215 dated 03.04.2013 drawn on his account No.01234056921 maintained with Bank Asia Ltd, MCB Banani Branch, Dhaka for payment of Tk. 9,12,314 in favour of the complainant, National Housing Finance and Investment Ltd. The complainant presented said cheque for encashment, but the same was dishonoured on 03.04.2013 with a remark “insufficient funds”. He sent a legal notice on 22.04.2013 to the accused by registered post with AD for payment of the cheque amount within 30 days from the date of receipt of the notice, but he did not pay the cheque amount. Consequently, the complainant filed the case on 11.06.2013. He proved the power of attorney as Exhibit

1, the disputed cheque, dishonour slip, legal notice, AD and postal receipt as exhibits 2, 3, and 4 series.

D.W. 1 Abu Taher is the accused in the case. He stated that he took a loan of Tk. 10,00,000(ten lakh) from the complainant Bank and the interest was fixed at the rate of 12%. Subsequently, the complainant Bank increased the interest up to 17% violating the circular of Bangladesh Bank. During the last eight years, he paid Tk. 142942. He filed writ petition No. 5753 of 2013, and the High Court Division, by judgment and order dated 11.07.2013, directed the bank to calculate the interest at the rate of 12%. At the time of payment of the installment of the loan, the complainant bank took a blank cheque. After the judgment passed by the High Court Division, the complainant bank filed the cheque, writing the amount on the cheque. He proved the certified copy of the order as exhibit Ka. During cross-examination, he admitted that he issued the cheque, but he did not write the cheque amount. He received the notice but the cheque amount is not due to him.

The learned Advocate Mr. Mohammad Abul Kashem Bhuiyan, appearing on behalf of the petitioner, submits that the accused issued the cheque on 03.04.2013 in favour of the complainant for payment of Tk. 9,12,314, but after service of notice, the accused could not pay the cheque amount due to financial hardship. He further submits that the accused settled the dispute out of court with the complainant and deposited 50% of the cheque amount before filing the appeal, and 50% of the cheque amount was paid to the complainant in cash. He prayed for the setting aside the impugned judgment and order.

The learned Advocate Mr. Md. Mahfuzur Rahman (Milon), appearing on behalf of the complainant, submits that the accused issued the cheque for payment of Tk. 9,12,314. The complainant presented the said cheque for encashment, but the same was dishonoured with a remark “insufficient funds”. The complainant sent a legal notice to the accused and, after complying with all the procedures under section 138 of the said Act, filed the complaint petition. However, he submits that both the accused and the complainant settled the dispute between them out of court, and the complainant received 50% of the cheque amount in cash, and he is willing to withdraw 50% of the remaining cheque amount deposited by the accused in the trial court. He prayed for acceptance of the compromise made between the accused and the complainant.

I have considered the submissions of the learned Advocates of both parties, perused the evidence, impugned judgment and order passed by the courts below, and the records.

On perusal of the records, it appears that a joint application for compromise sworn on 20.08.2024 has been filed by P.W.1 and the accused Major Mohammad Abu Taher (Retd.) stating that the accused paid 50% of the cheque amount to the complainant in cash and he also received the said amount. The Negotiable Instruments Act, 1881 is a special law, and the offence under section 138 of the said Act is not compoundable. Therefore, the appeal cannot be disposed of considering the compromise between the parties. After filing a case under section 138 of the said Act, the court shall dispose of the case considering the merit of the case. There is no scope to accept the compromise made between the parties.

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) is rebuttable. Furthermore, the accused admitted that he issued the cheque in favour of the complainant. The cheque was dishonoured within time for insufficient funds. The accused admitted that he received the notice, but he could not pay the cheque amount due to hardship. The complainant filed the case following the procedures of Section 138 and 141(b) of the Negotiable Instruments Act, 1881. Thereby, he committed an offence under Section 138 of the said Act. 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 trial court is modified as under;

The accused Major Mohmmad Abu Taher (Retd.) is found guilty of the offence under section 138 of the Negotiable Instruments Act, 1881, and he is sentenced thereunder to pay a fine of Tk. 9,12,314.

The complainant is entitled to get the fine amount.

The complainant bank admitted that it received 50% of the cheque amount from the accused Major Mohammad Abu Taher (Retd.) in cash. The complainant bank is entitled to withdraw the remaining 50% of the cheque amount deposited by the accused before filing the appeal. The trial court is directed to allow the complainant to withdraw 50% of the cheque amount deposited by the accused before filing the appeal.

With the above findings, observation, and direction, the Rule is disposed of with modification of the sentence.

However, there will be no order as to costs.

Send down the lower Court's records at once.

