

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7080 of 2024

Md. Shamsul Alam

...Appellant

-Versus-

The State and another

...Respondents

Mr. Mahiuddin, Advocate

...For the appellant

Mr. A.K.M. Farhan, Advocate

...For the complainant-respondent No. 2

Heard on 05.02.2025, 12.02.2025, 19.02.2025,
06.03.2025, 18.03.2025 and 19.03.2025**Judgment delivered on 07.05.2025**

This criminal appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed challenging the legality and propriety of the impugned judgment and order dated 26.09.2019 passed by Sessions Judge, Cox's Bazar in S.T Case No. 1793 of 2018 convicting the accused under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 1(one) year and fine of Tk. 4,47,42,583.54 (four crores forty-seven lakh forty-two thousand five hundred eighty-three and fifty-four paisa).

The prosecution case, in short, is that the accused Md. Shamsul Alam is the Managing Director and Chairman of Hyperion Builders Limited, Mirpur, Dhaka. He is a customer of the South East Bank Limited, Cox's Bazar Branch. On 06.08.2008 Hyperion Builders Limited took loan of Tk. 3,00,00,000(three crore) and the loan liability of the company was renewed six times till 30.09.2014 but the company did not pay the loan in time. Consequently, the total loan liability of the company stood at Tk. 4,47,42,583.54 (four crores forty-seven lakh forty-two thousand five hundred eighty-three taka and fifty-four paisa) as of 10.09.2015. As the Managing Director of Hyperion Builders Limited, the accused issued Cheque No. 01718401 on 10.09.2015 drawn on Account No. 11100010549 maintained in the name of Hyperion Builders Limited

for payment of Tk. 4,47,42,583.54 (four crores forty-seven lakh forty-two thousand five hundred eighty-three and fifty-four paisa) in favour of the complainant South East Bank Limited, Cox's Bazar Branch. The complainant presented the said cheque on 10.09.2015 but the same was dishonored on the same date with the remark "insufficient funds". After that, the complainant sent a legal notice on 21.09.2015 through registered post. On behalf of the accused, one Amina received the notice on 06.10.2015 but the accused did not pay the cheque amount within the specified time mentioned in the legal notice. On 24.11.2015 the complainant communicated to the accused but he refused all transactions with the bank. Thereafter, the complainant filed the case on 01.12.2015.

After filing the complaint petition, the complainant was examined under Section 200 of the Code of Criminal Procedure, 1898 and the Senior Judicial Magistrate, Court No. 4, Cox's Bazar took cognizance of the offence against the accused Md. Shamsul Alam under Section 138 of the Negotiable Instruments Act, 1881. The summons issued against the accused was not served upon him till 29.10.2017. The Senior Judicial Magistrate, Court No. 4, Cox's Bazar by order dated 29.10.2017 issued W/A against the accused Md. Shamsul Alam. The warrant issued against the accused was not executed and no report was submitted by the concerned Police Station regarding the execution of the W&A.

On 03.04.2018 the Senior Judicial Magistrate, Court No. 4, Cox's Bazar issued P&A against the accused and fixed the next date on 24.05.2018 but no report was sent by the concerned Police Station regarding the execution of the P&A. On 24.05.2018 the Senior Judicial Magistrate, Court No. 4, Cox's Bazar passed an order for publication of the notification in the newspaper against the accused and fixed the next date on 23.07.2018. Thereafter, the notice was published on 01.07.2017 in the daily 'আলোকিত সময়' published from Baily Road, Dhaka, and daily

‘দৈনন্দিন’ on 27.06.2017 published from Cox’s Bazar. After that, the Magistrate sent the case record to the Sessions Judge, Cox’s Bazar.

On receipt of the records, the Sessions Judge, Cox’s Bazar by order dated 29.08.2018 took cognizance of the offence against the accused under Section 138 of the Negotiable Instruments Act, 1881 and framed charge on 26.09.2018 against accused Md. Shamsul Alam in absentia under Section 138 of the Negotiable Instruments Act, 1881. The prosecution examined 1(one) witness to prove the charge against the accused. During trial, the accused was absconding and after concluding the trial, the Sessions Judge, Cox’s Bazar by impugned judgment and order convicted the accused and sentenced him as stated above against which he filed the instant appeal.

P.W. 1 Saiful Alam Chowdhury is the Officer of the complainant South East Bank Limited. He stated that the bank authorized him to depose in the case. The accused took a loan of Tk. 3 crore from the South East Bank Limited, Cox’s Bazar Branch. He issued a cheque for payment of Tk. 4,47,42,583.54 in favour of the bank. The complainant presented the cheque on 10.09.2015 but the said cheque was dishonoured. The complainant-bank sent a legal notice to the accused but he did not pay the cheque amount. Consequently, the complainant filed the case. He proved the complaint petition as Exhibit 1 and the signatures of Officer Azmal Hossain as Exhibits 2, 2/1, and 2/2, the disputed cheque as Exhibit 3, the dishonor slip as Exhibit 4, legal notice, postal receipt and the AD as Exhibits 5, 5/1 and 5/2.

Learned Advocate Mr. Mahiuddin appearing on behalf of the appellant submits that after the issuance of the cheque dated 10.09.2015, the accused paid total Tk. 3,53,60,000 from 30.09.2015 to 27.12.2021 to the complainant bank and no notice was served upon the accused following the provision made in clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 making a demand for payment of the cheque amount within next thirty days from the date of receipt of

information by the complainant and the notice was sent regarding the offence allegedly committed by the accused under Section 420 of the Penal Code, 1860 which was also not served upon the accused and the provision made in clause (b) and (c) of the proviso to Section 138 and Section 141(b) of the Negotiable Instruments Act, 1881 was not complied with. He further submits that the cheque was issued under the signature of the Managing Director of Hyperion Builders Limited but the Directors who were responsible for conducting the business of the company at the relevant time were not implicated as accused in the case. Having drawn the attention of this Court to the order sheets of the Court of Magistrate, he lastly submits that the provision made in Sections 87, 88, and 339B of the Code of Criminal Procedure, 1898 was not complied with before framing the charge for which the accused was not aware of the case. Consequently, the trial was held in absentia and the complainant-bank maliciously refrained from giving any information regarding the pendency of this case though the accused paid total Tk. 3,53,60,000 pending trial of the case and fraudulently obtained the impugned judgment and order of conviction beyond the knowledge of the accused. He prayed for setting aside the impugned judgment and order passed by the trial Court.

Learned Advocate Mr. A.K.M. Farhan appearing on behalf of the complainant-respondent No. 2, South East Bank Limited, submits that the accused issued the disputed cheque on 10.09.2015 for payment of the loan amounting to Tk. 4,47,42,583.54(four crore forty seven lakh forty two thousand five hundred eighty three and fifty four paisa) which was presented on the same date but the same was dishonored with the remark “insufficient funds” and the complainant sent a legal notice on 21.09.2015 following the provision made in clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 through registered post with AD which was received by the accused on 06.10.2015 but the accused did not pay the cheque amount despite the service of notice upon him. Thereby he committed the offence under Section 138 of the

Negotiable Instruments Act, 1881 and complying with the provisions made in clause (a) to (c) of the proviso to Sections 138 and 141(b) of the Negotiable Instruments Act, 1881 complainant-bank filed the case. The prosecution proved the charge against the accused beyond all reasonable doubt and the trial Court on correct assessment of evidence legally passed the impugned judgment and order. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Mahiuddin who appeared on behalf of the appellant Md. Shamsul Alam and the learned Advocate Mr. A.K.M. Farhan who appeared on behalf of the complainant-respondent No. 2, South East Bank Limited, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the evidence, it appears that in the complaint petition, it has been stated that the cheque was issued by the accused on 10.09.2015 and it was dishonored on 10.09.2015 due to insufficient funds and the legal notice was sent on 21.09.2015 through the registered post to the accused. P.W. 1 stated that a legal notice was sent on behalf of the bank. It appears that a legal notice dated 21.09.2015 was sent to Hyperion Builders Limited addressing the accused Md. Shamsul Alam as the Managing Director and the Chairman of the said Company. During the trial, the said notice is proved as Exhibit 5. The postal receipt dated 21.09.2015 is proved as exhibit 5/1 but the learned trial Judge did not sign the AD (exhibit 5/2).

No statement is made in the complaint petition that the notice (exhibit 5) was sent through registered post with AD. Nothing has been stated by P.W. 1 that the legal notice (exhibit 5) was sent through registered post with AD. A photocopy of the AD is lying with the records which has been marked as exhibit 5/2 but the said AD was not signed by the learned trial Judge. It reveals that there is no “round seal” of the postal department on the AD. No explanation has been given by the prosecution as to why no statement is made in the complaint petition

and by P.W. 1 as to the service of notice upon the accused through registered post with AD. No explanation has been given by the prosecution as to why the original AD is not proved in the case. If any copy is made from the original AD, definitely a “round seal” of the postal department would appear on the photocopy but no “round seal” appears on the photocopy of the AD dated 21.09.2015. Therefore, I am of the view that the notice was not sent through registered post with AD and the photocopy of the AD (exhibit 5/2) was subsequently created.

In the case of Dr. Muhammad Yunus vs Commissioner of Taxes judgment dated 23.07.2023 (Md Ashfaul Islam, J) reported in 76 DLR (AD) 25 in para 52 it has been held that.

“In the discussions as made above and keeping the principle of laws and authorities regarding the interpretation of the provisions of exemption from taxation in mind, it can safely be held that when the intention of the Legislature on the statutory language manifestly suggests no ambiguity, it is not permissible to attribute different meaning to the language employed in the text of the legislation of the Gift Tax Act, 1990 for the purpose of enlarging the scope of said legislation.”

At the time of enactment of the Negotiable Instruments Act, 1881 no provision was made as to the mode of service of notice upon the drawer of the cheque. The legislature inserted Sub-Section (1A) in Section 138(1) of the said Act by Act No. III of 2006 making provision regarding the mode of the service of notice under clause b of the proviso to Section 138 of the said Act. Under Section 138(1)(1A) of the said Act the notice under Section 138(b) of the said Act is required to be served upon the drawer of the cheque, a. by delivering it to the person on whom it is to be served; or b. by sending it by registered post with acknowledgment due to that person at his usual or last known place of abode or business in Bangladesh; or c. by publication in a daily Bangla national newspaper having wide circulation. The Negotiable Instruments Act, 1881 is a special law. Service of notice upon the accused in

compliance with the provision made in Section 138(1)(1A) of the said Act at least by one mode as stated above is sine qua non.

The legislature imposes three conditions in clauses a to c of the proviso to Section 138 of the Negotiable Instruments Act, 1881 to be fulfilled by the complainant before filing the case under Section 138 of the said Act. If the complainant fails to comply with any of the said conditions, the learned Magistrate is barred under Section 141(a) of the Negotiable Instruments Act, 1881 to take cognizance of the offence against the accused under Section 138 of the said Act.

In the case of Prem Chand Vijay Kumar Versus Yashpal Singh and another reported in (2005) 4 SCC 417 judgment dated 02.05.2005 the Supreme Court of India regarding the demand under clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 held that.

“One of the indispensable factors to form the cause of action envisaged in Section 138 of the Act is contained in clause (b) of the proviso to that section. It involves the making of a demand by giving a notice in writing to the drawer of the cheque “within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid”. If no such notice is given within the said period of 15 days, no cause of action could have been created at all.”

In Jugesh Sehgal vs Shamsher Singh Gogi reported in (2009) 14 SCC 683 the Supreme Court of India has given an interpretation of Section 138 of the Negotiable Instruments Act, 1881. The Supreme Court of India has held that;

“It is manifest that to constitute an offence Under Section 138 of the Act, the following ingredients are required to be fulfilled:

(i) a person must have drawn a cheque on an account maintained by him in a bank for payment of a certain

amount of money to another person from out of that account;

(ii) the cheque should have been issued for the discharge, in whole or in part, of any debt or other liability;

(iii) that cheque has been 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;

(iv) that cheque is returned by the bank unpaid, either because of the amount of money standing to the credit of the account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with the bank;

(v) the payee or the holder in due course of the cheque makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within 15 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid;

(vi) the drawer of such cheque fails to make payment of the said amount of money to the payee or the holder in due course of the cheque within 15 days of the receipt of the said notice.

Being cumulative, it is only when all the aforementioned ingredients are satisfied that the person who had drawn the cheque can be deemed to have committed an offence Under Section 138 of the Act.”

In the instant case, no demand following clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 was made. The notice (exhibit 5) sent for committing the alleged offense of cheating was also not sent through registered post with AD. Therefore, the mandatory provision made in clause b of the proviso to Section 138 and Sub-

Section(1A) of Section 138(1) of the Negotiable Instruments Act, 1881 was not complied with.

On perusal of the cheque dated 10.09.2015 (exhibit 3), it reveals that the said cheque was issued by the accused Md. Shamsul Alam as the Chairman and Managing Director of Hyperion Builders in favour of the South East Bank Limited drawn on the Account No. 11100010549 maintained in the name of Hyperion Builders Limited with South East Bank Limited, Cox's Bazar Branch. Under Section 140 of the Negotiable Instruments Act, 1881 if the person committing an offense under Section 138 of the Negotiable Instruments Act, 1881 is a company, every such person who, at the time of the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offense and shall be liable to be proceeded against and punished accordingly. Therefore all the directors of the company are required to be implicated as an accused in the complaint petition filed under Section 138 of the Negotiable Instruments Act, 1881. However, any such person might have taken a defence that he was not responsible for the business of the company at the relevant time or the offence was committed beyond his knowledge or he had exercised all due diligence to prevent the commission of such an offence. In the instant case, Directors of Hyperion Builders Ltd is not implicated as accused in the case.

In the case of Phoenix Finance and Investment Limited (PFIL) - VS- Yeasmin Ahmed and another reported in 10 CLR (AD) (2022) 55 it has been held that;

“It is true that merely a person is a director, manager, secretary or other officer of company does not make them liable for the offence under section 138 of the Negotiable Instruments Act, 1881. But in case of offence committed under section 138 of the Act by a company every person in charge of the company shall be liable until he/she can prove that the offence was committed without his knowledge or he had exercised all due diligence to

prevent the commission of such offence. (Underline given by us)”

In the case of U.P. Pollution Control Board Vs. Modi Distillery and ors. reported in AIR 1988 SC 1128 judgment dated 06.08.1987 it has been held that

“On a plain reading of Sub-section (1) of Section 47 of the Act, where an offence has been committed by a company, every person who at the time of the commission of the offence was in charge of and responsible to the company for the conduct, of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Proviso to Sub-section (1) however engrafts an exception in the case of any such person if he were to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. It would be noticed that Sub-section (1) of Section 47 is much wider than Sub-section (4) of Section 17 of the Prevention of Food Adulteration Act 1954 which fell for consideration in I.K. Nangia's case. Furthermore, proviso to Sub-section (1) shifts the burden on the delinquent officer or servant of the company responsible for the commission of the offence. The burden is on him to prove that he did not know of the offence or connived in it or that he had exercised all due diligence to prevent the commission of such offence. The non-obstante clause in Sub-section (2) expressly provides that notwithstanding anything contained in Sub-section (1), where an offence under the Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed

to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.”

In the case of *K. Bhaskaran vs. Sankaran Vaidhyan Balan* and another reported in (1999) 7 SCC 510 para 18 as to the giving notice and receipt of the notice mentioned in clause (b) and (c) to Section 138 of the Negotiable Instruments Act, 1881 it has been held that;

“On the part of the payee he has to make a demand by “giving a notice” in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such “giving”, the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days “of the receipt” of the said notice: It is, therefore, clear that “giving notice” in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address.”

“In Black’s Law Dictionary “giving of notice” is distinguished from “receiving of the notice” (vide p.621): “A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it.” A person “receives” a notice when it is duly delivered to him or at the place of his business.”

In Section 138 (1) (b) of the Negotiable Instruments Act, 1881, the legislature used the words “makes a demand... in writing” and in Section 138 (1) (c) of the said Act, the legislature used the words “receipt of the said notice”. The literal meaning of the words “receipt of said notice” means that the drawer of the cheque received the notice on a specific date. No provision is made in the said Act as to how the court

will determine that notice under Section 138 (1) (b) of the said Act has been received by the drawer or served upon the drawer. In the absence of any statutory provision, as regards the determination of service of notice upon the drawer, I am of the view that the actual date of service of notice upon the drawer or receipt of notice by the drawer on a particular date might have been reckoned as service of notice upon the drawer. Receipt of notice indicates that the drawer of the cheque had been notified about the dishonour of the cheque. If any drawer refused to receive the said notice, the date of refusal to receive the notice by the drawer might have been reckoned as 'receipt of said notice' mentioned in Section 138 (1) (c) of the said Act.

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 offense under Section 138 of the Negotiable Instruments Act, 1881 unless 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.

In the complaint petition, it has been mentioned that after the expiry of the time mentioned in the legal notice, the complainant communicated to the accused on 24.11.2015 but he refused the transaction with the bank. In the legal notice dated 21.09.2015 (exhibit 5), it was stated that there was no sufficient money in the account to honor the cheque for which by issuing the cheque the accused committed cheating. No statement is made in the legal notice (exhibit) making the demand to the accused to pay the cheque amount of Tk. 4,47,42,583.54. Before filing a case under Section 138 of the Negotiable Instruments

Act, 1881 the complainant shall send a demand following the provision made in clause (b) of the proviso to Section 138 and Sub-Section (1A) of Section 138 of the Negotiable Instruments Act, 1881.

The cheque was issued on 10.09.2015. In the second supplementary affidavit dated 17.03.2025 filed by the accused, it has been stated that from 30.09.2015 to 27.12.2021 the accused paid total Tk. 3,53,60,000. Although the complainant-respondent filed an affidavit on behalf of the respondent bank but did not dispute the receipt of the said amount by the bank. At the time of the hearing, the learned Advocate Mr. A, K.M. Farhan conceded that after issuance of the cheque, the complainant-bank received total Tk. 3,53,60,000. It appears that the complainant did not inform about the case filed against the accused and maliciously obtained the impugned judgment and order beyond the knowledge of the accused.

The notice sent on 21.09.2015 under clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 was not served upon the accused before filing the complaint petition. There was no cause of action under clause (c) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 to file the case on 01.12.2015. The trial Court failed to hold the correct view as to the mandatory provision made in clauses (b) and (c) of Section 138 and Sections 138(1)(1A), 140 and 141(b) of the Negotiable Instruments Act, 1881 and illegality passed the impugned judgment and order. The provisions made in clauses (a) to (c) of the proviso to Section 138, Sections 138(1)(1A), 140 and 141(b) of the Negotiable Instruments Act, 1881 are cumulative and before filing the case under Section 138 of the said Act, those provisions are required to be complied with by the complainant.

The above view of the this Court regarding service of notice upon the drawer of the cheque before filing case under Section 138 of the Negotiable Instruments Act, 1881 lend support from the decision made in the case of Nizamuddin Mahmood vs Abdul Hamid Bhuiyan and

another reported in 60 DLR (AD) 195 para 20 in which it has been held that;

“Since the date of receipt is a question of fact to be ascertained at the time of trial non-disclosure of such fact in the complaint petition cannot render the proceeding liable to be quashed to the great prejudice of the complainant who is entitled to prove his case on evidence.”

On perusal of the order sheets of the Court of Magistrate, it reveals that after the issuance of the W&A, no report was sent by the concerned police station regarding the execution of WA and PA issued against the accused. Although no report was sent by the concerned police station regarding the execution of the P/A, the Magistrate in violation of the provision made in Section 339B of the Code of Criminal Procedure, 1898 passed an order on 24.05.2018 directing to publish a notice in the newspaper against the accused to appear in the case violating the mandatory provision of Sections 87 and 88 of the Code of Criminal Procedure, 1898. Although notice under Section 339B of the Code of Criminal Procedure, 1898 were published in the daily ‘আলোকিত সময়’ on 01.07.2017 and ‘দৈনন্দিন’ on 27.06.2017 those are not widely circulated all over Bangladesh. Therefore, the mandatory provision made in Sections 87, 88, and 339B of the Code of Criminal Procedure, 1898 was not complied with. No demand was made following clause (b) of the proviso to Section 138 of the Negotiable Instruments Act, 1881 to the accused, and notice was not served upon the accused. I am of the view that no offence under Section 138 of the Negotiable Instruments Act, 1881 is committed by the accused. Therefore, no purpose would be served, if the case is sent back on remand to the trial Court for non-compliance of the mandatory provision made in Sections 87, 88, and 339B of the Code of Criminal Procedure, 1898.

Because of the above facts and circumstances of the case, evidence, findings, observation, and the proposition, I am of the view

that the complainant failed to prove the charge under Section 138 of the Negotiable Instruments Act, 1881 against the accused Md. Shamsul Alam beyond all reasonable doubt.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order passed by the trial Court against the accused Md. Shamsul Alam is hereby set aside.

The accused Md. Shamsul Alam is entitled to get back 50% of the cheque amount Tk. 2,23,71,291.77 deposited by him after pronouncement of the judgment and order by the trial Court. However, Tk. 3,53,60,000 admittedly paid by the accused Md. Shamsul Alam after issuance of the cheque may be adjusted against the loan liability of the accused Md. Shamsul Alam.

The trial Court is directed to pay 50% of the cheque amount Tk. 2,23,71,291.77 to the accused Md. Shamsul Alam within 15(fifteen) days from the date of filing the application, if any.

Send down the lower Court's records at once.