

Present:

Mr. Justice Borhanuddin
and
Mr. Justice K. M. Kamrul Kader

Criminal Miscellaneous Case No.22031 of 2010

Mr. Younusuzzaman (Badal)
.....Petitioner

-Versus-

The State and another
.....Opposite parties.

Mr. Md. Lutfor Rahman, Advocate
.....For the petitioner.

Mr. A.F.M. Mesbahuddin, Senior Adv. with
Mr. Md. Tamizuddin, Advocate
.....For the opposite party No. 2

Heard and Judgment on: 25.07.2013

K. M. Kamrul Kader, J.

This Rule was issued upon an application filed by the accused-petitioner under section 561A of the Code of Criminal Procedure calling upon the opposite parties to show cause, as to why the proceeding of Sessions Case No. 227 of 2009 arising out of C. R. Case No. 766 of 2008 under Section 138 of the Negotiable Instrument Act, 1881, now pending in the Court of 4th Assistant Sessions Judge, Narayangonj, should not be quashed.

Facts, relevant for disposal of the Rule, in brief, are that one Akhil Chandra Basak as complainant filed a petition of complaint in the Court of learned Chief Judicial Magistrate, Narayangonj on 20.10.2008 stating *interalia* that the complainant entered into an agreement on 24.05.2004 with M/S Zaman Dyeing & Fabrics Ltd., represented by its Managing Director, the accused petitioner, for marketing and selling 10/1, 16/1 & 20/1 count cotton yarn produced by the said company. According to the terms and conditions of the agreement the complainant paid an amount of Tk. 20,00,000/- (twenty lac) only to the accused petitioner on the date of signing of the said agreement as security money, if the company of the accused-petitioner fails to supply yarn to the complainant as per terms of the agreement the company of the accused would be bound to refund the entire security money to the complainant. Accordingly, the accused petitioner on behalf of the company issued a cheque being Cheque No. 6403508 dated 08.07.2008, in favour of the complainant, for an amount of Tk. 20,00,000/-(twenty lac) only, from his C/D Account

No. STD 16 maintained with Uttara Bank Ltd. Siddeswari Branch, Dhaka against the said security money. Since the accused petitioner failed to comply with the terms and conditions of the agreement, the complainant presented the said cheque on 12.08.2008 and 19.08.2008 for encashment to the Dutch Bangla bank Ltd. Narayangonj branch and on both occasion the cheque was dishonoured for insufficient fund. Finding no other alternative, the complainant issued a legal notice according to the provisions of the Negotiable Instruments Act through his learned Advocate on 30.08.2008 by registered post with A /D and the same was received by the accused petitioner on 02.09.2008. Unfortunately, the accused did not take any step to pay the said amount within the statutory period of 30 days from the receipt of this legal notice. After expiry of the statutory period of 30 days, cause of action arose and the complainant-opposite party filed the instant petition on 20.10.2008. Accordingly, the Magistrate has examined the complainant and having found *prima facie* case against the accused, took cognizance of the offence under section 138

of the Negotiable Instruments Act, 1881. The accused petitioner voluntarily surrendered in the Court of learned Chief Judicial Magistrate, Narayangonj and obtained bail on 20.10.2008.

Next the case record was transmitted to the court of learned Sessions Judge, Narayangonj and the same was numbered as Sessions Case No. 227 of 2009. Thereafter, the case was further transmitted to the court of 4th Assistant Sessions Judge, Narayangonj for trial. The accused petitioner filed an application under section 265 (C) of the Code of Criminal procedure for discharging the accused petitioner from the charge levelled against him on the ground that in the petition of complaint the Company has not been implicated as an accused and the cheque itself is not a valid one, as it has been presented after four years of its maturity, which is unlawful as such the accused petitioner should be discharged. After hearing the parties the learned Assistant Sessions Judge rejected the application for discharge and framed charge against the

accused, under section 138 of the Negotiable Instruments act, 1881, on 03.05.2010.

Having been aggrieved by and dissatisfied with the impugned proceeding, the accused-petitioner preferred this instant application under section 561A of the Code of Criminal Procedure for quashing the proceeding and obtained the present Rule and an order of stay.

Mr. Lutfor Rahman, learned advocate appearing for the petitioner at the outset submits that the instant proceeding clearly violated the provisions of sections 138 and 140 of the Negotiable Instruments Act, admittedly, the alleged business was taken place between the Complainant and Zaman Dyeing & Fabrics Ltd. but the Company has not been implicated as accused, the complainant instituted this proceeding without implicating the principal accused, the cheque in question being issued on behalf of the company, namely Zaman Dyeing & Fabrics Ltd. a private company and the accused as Managing Director simply signed the cheque on behalf of the company, as there is no allegation made in the petition of complaint against the

drawer company, this impugned proceeding is not maintainable in law as per provision of Section 140 of the Act, as such, the proceeding against this petitioner is liable to be quashed.

Finally, he submits that the cheque itself is not a valid one, as it has been presented after four years of its maturity, which is unlawful as such the accused petitioner should be discharged from the charge levelled against him. The learned Advocate argued that admittedly the cheque was supposed to be presented for encashment on 24.05.2005, just after expiring the agreement, for which the cheque was issued and as it was an undated cheque should be matured just after the incidence for which the maturity of the cheque was relying on and without following the maturity period the complainant presented the cheque four (4) years later than its maturity, without any explanation of the said delay, as such the same is not a valid cheque in the eye of law as it was submitted for encashment after 4 years of its maturity and the liability if any become a time barred civil liability and clear violation

of law and process as such, it is liable to be quashed. The complainant failed to comply the provision of sections 138 and 140 of the Negotiable Instruments Act, as such, the proceeding is an abuse of the process of the court and is liable to be quashed. In support of his submission the learned advocate for the appellant placed reliance on the decisions in the cases of *Jagarlamubi Surya Prasad vs. State of AP (1992) 1 BC 120, UP Pollution Control Board Vs. Modi Distillery (1987) 3 SCC 684, Krishan Bi vs. ARPI Press (1994) 80 Company CAs, 750 Mad, Wahidul Islam Chairman and others vs. The State and others 28 (2008) BLD (HCD) 354.*

Learned Sr. advocate Mr. A. F. M. Mesbahuddin, with Mr. Md. Tamizuddin appears on behalf of the opposite party No. 2, submits that the complaint Petition and other materials on record disclosed that all legal formalities as laid down in Section 138 of the Act have been duly complied and the materials put forward by the prosecution contain ingredients of criminal offences as contemplated by the Section 138 of the Act against the petitioner. He next

submits that since the complaint petition and other materials on record disclosed prima-facie case against the petitioner, the learned Magistrate has examined the complainant and having found *prima facie* case against the accused, rightly took cognizance of the offence against the petitioner. The learned Assistant Sessions Judge after hearing the parties rejected the application for discharge and framed charge against the accused, under section 138 of the Negotiable Instruments act, 1881, on 03.05.2010. The accused petitioner being Managing Director cannot avoid his liability to pay the amount due under this dishonor cheque as per provision of Section 140 of the Act. He further submits that whether the cheque itself is a valid one or not and whether or not it has been presented after four years of its maturity are factual matters, which required to be proved on taking evidence, this Court exercising its extra-ordinary jurisdiction under Section 561A of the Code of Criminal Procedure cannot decide the factual aspect of the case. He further submits that there is no illegality and irregularity in the proceeding. The

complainant has filed this petition of complaint after complying all procedure of the section 138 and 140 of the Negotiable Instruments Act, 1881 and as such, the instant application for quashing the proceeding should be dismissed.

We have perused the application under section 561A of the Code of Criminal Procedure and the annexure thereto.

In order to appreciate the submission made by the learned Advocates of both the parties, let us now see whether the complainant-opposite party No. 2 has filed the case after complying the provision of law as enunciated in sections 138 and 141 of the Negotiable Instruments Act and whether or not the instant proceedings is liable to be quashed. The provisions of section 138 of the Negotiable Instruments Act, 1881, which reads as follows:

“138. (1). Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account is returned by

the bank unpaid, either because of the amount of money standing to the credit of that 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 that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to (thrice) the amount of the cheque, or with both;

Provided that nothing contained in this section shall apply unless-

- (a) The 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;*
- (b) The payee or the holder in due course of the cheque, as the case may be, 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 thirty*

days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) The drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within (thirty days) of the receipt of the said notice.

(1A) The notice required to be served under clause (b) of sub-section (1) shall be served in the following manner-

(a) by delivering it to the person on whom it is to be served; or

(b) by sending it by registered post with acknowledgement 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.

(2)---

(3)---

Now let us see the provision of Section 141 of the Negotiable Instruments Act which runs as follows:

“141. Notwithstanding anything contained in the

Code of Criminal Procedure, 1898 (Act V of 1898)

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque:

(b) Such 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;

(c) no court inferior to that of a court of sessions shall try any offence punishable under section 138.”

On a careful analysis of Section 138 and 141 of the Negotiable Instruments Act, 1881, we find in the instant case that the accused petitioner issued a Cheque being No. 6403508, dated 08.07.2008, in favour of the complainant Akhil Chandra Basak, for an amount of Tk. 20,00,000/- only from his Account and the same was presented on 12.08.2008 and 19.08.2008 for encashment to the Dutch Bangla bank Ltd. Narayangonj branch and on both occasion the cheque was dishonoured for insufficient fund

and returned. We find and hold that the cheque has been presented to the bank within the statutory period of six months from the date on which it is drawn and within the period of its validity. Thereafter, the complainant sent a legal notice through his learned Advocate on 30.08.2008 according to the provision of Section 138, Clause (1A), Sub-clause (b) of the Negotiable Instruments Act. The accused petitioner received it on 02.09.2008 but he did not take any step to pay the said amount, within the statutory period of 30 days from the receipt of this legal notice. After expiry of the statutory period of 30 days, cause of action arose and the complainant-opposite party filed the instant petition on 20.10.2008. Accordingly, the Magistrate has examined the complainant and having found *prima facie* case, he took cognizance of the offence under section 138 of the Negotiable Instruments Act, 1881 against the accused petitioner.

We have perused the application and other materials on record and find that in the instant case, all legal formalities as laid down in Sections 138 and 141 of

the Act have duly been complied. There is no illegality or irregularity in this proceeding.

The learned Advocate for the petitioner raised a question to the effect that the drawer of the cheque is Zaman Dying and Fabrics Ltd. a Private company was not made party in this case. The Company has not been implicated as an accused, the complainant instituted this proceeding without implicating the principal accused, the cheque in question being issued on behalf of the company, namely Zaman Dyeing & Fabrics Ltd. a private company and the accused as Managing Director simply signed the cheque on behalf of the company, as there is no allegation made in the petition of complaint against the drawer company, this impugned proceeding is not maintainable in law as per provision of Section 140 of the Act. We have also considered the provision of Section 140 of the Negotiable Instruments Act which runs as follows:

140 (1) If the person committing an offence under section 138 is a company, every person who, at the time 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 offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence 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.

Explanation- For the purposes of this section-

(a) "company" means anybody corporate and includes a firm or other association of individuals; and

(b) "director' in relation to a firm, means a partner in the firm.

This Section contained that if a company committed an offence under section 138 of the said Act, the person who was in charge or responsible for the conduct of the business of the company, **as well as** the company, shall be deemed to be guilty of the offence, the word "**as well as**" means **and** or **in addition**, it does not negate or exclude the liability of a person who was in charge or responsible for the conduct of the business of the company.

Further, our legislature clearly expressed their intention in Sub-clause 2 of the Section 140 of the said Act, the words "**Notwithstanding anything contained in sub-section (I)**" means sub-section (II) shall prevail over the sub-section (I), which makes it an independent sub-section

of Section 140 of the said Act. it provide that if a company committed an offence under section 138 of the said Act, 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 of the company, such director shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. This sub-section imposed personal liability upon the Managing Director of a Company for his action and / or his negligence.

Admittedly, the accused petitioner as Managing Director of the Company signed the cheque on behalf the Company, as a natural person and the drawer of the cheque is a juristic person, the petitioner does everything on behalf of the company. All liability practically falls on him. A company being a juristic person, all its deeds and functions are the result of the acts of Managing Director. Therefore, a Managing Director of the company is responsible for the acts done in the name of the company. The accused petitioner was Managing Director of the

Company at the time of offence committed and all acts are committed or done within his knowledge. He is responsible for the conduct of the business of the company and in such situation when the Managing Director of the Company is made party, there is no necessity for making the Company a party as the Director represents the company.

The learned Advocate for the petitioner raised another question to the effect that the cheque itself is not a valid one, as it has been presented after four years of its maturity. The question is whether the cheque itself is a valid one or not and whether or not it has been presented after four years of its maturity are factual matters, which required to be proved on taking evidence, this Court exercising its extra-ordinary jurisdiction under Section 561A of the Code of Criminal Procedure cannot decide the factual aspect of the case. We cannot decide the factual aspect of the case, the question of facts will be decided in the trial court. We find support of the above view in the

case of *Nizamuddin Mahmood vs. Abdul Hamid Bhuiyan and another reported in 60 DLR (AD) 195.*

Having been considered the materials on record, after hearing the learned Advocates appearing for the both sides and under the facts and circumstances of the case, we find do not find merit in this Rule.

Accordingly, the Rule is discharged.

The order of stay granted at the time of issuance of the Rule is hereby vacated.

Communicate a copy of this judgment to the court concern immediately.

Borhanuddin, J.

I agree.