Present

Mr. JUSTICE MD. JAHANGIR HOSSAIN

and

MR. JUSTICE MD. BAZLUR RAHMAN

CRIMINAL MISC. CASE No.29451 of 2013

In the matter of:

Mohammad Shah Alam
---------- Petitioner
Versus
The State and another
--------- Opposite-parties.
Mr. Shafiq Ahmed, with
Mr. S.M. Shajahan, Senior Advocates with
Mr. Mahbub Shafiq with
Mr. Md. Mizanur Rahman, Advocates
--------- For the petitioner
Mr. Muhammad Rafiul Islam, Advocate
----- For the opposite party No.2.
Mrs. Yesmin Begum Bithi, D.A. G with
Mrs.Mst. Asma Khatun, A.A.G with
Mr. A.T.M. Aminur Rahman, A.A.G
------For the opposite-party-State
Heard on 28.03.2023, 29.03.2023 and 04.04.2023

Judgment on 05th April, 2023

MD. JAHANGIR HOSSAIN;J

This is an application under Section 561-A of the Code of Criminal Procedure. The Rule was issued calling upon the opposite parties to show cause as to why the judgment and order of conviction and sentence dated 10.07.2012 passed by the Joint Metropolitan Sessions Judge, Court No.7, Dhaka in Metro Sessions Case No.3932 of 2011arising out of C.R. Case No.14 of 2011 convicting the petitioner under Section

138 of the Negotiable Instrument Act sentencing him to suffer rigorous imprisonment for six months and also to pay a fine of Tk. 3,20,00,000/- which is triple of the amount of money mentioned in the cheque should not be quashed and/ or pass such other or further order or orders as to this court may seem fit and proper.

At the time of issuance of the Rule the operation of the judgment and order of conviction and sentence dated 10.07.2012 passed by the Joint Metropolitan Sessions Judge, Court No.7, Dhaka in Metro Sessions Case No.3932 of 2011arising out of C.R. Case No.14 of 2011 convicting the petitioner under Section 138 of the Negotiable Instrument Act sentencing him to suffer rigorous imprisonment for six months and also to pay a fine of Tk. 3,20,00,000/- which is triple of the amount of money mentioned in the cheque was stayed for a period of three months from date.

The relevant facts necessary for disposal of the Rule are as follows:-

The petitioner has taken loan of Tk. 50,00,000/- from the complainant through a bearer cheque No. 0360577 on 27.11.2010 and later on the petitioner had also taken loan amounting Tk. 1,10,00,000/- (one crore ten lacs) on several

times on personal grounds. The petitioner issued a blank cheque in account No. 00130400146627 of Social Islami Ban k, Principal Branch, Dhaka for an amount of Taka 1,60,00,000/- only in favour of the complainant as payment of the outstanding loan dues. Thereafter the opposite-party No. 2 presented the cheque on successive dates on 26.12.2010, 28.12.2010 and 30.12.2010 in the bank for encashment, but unfortunately the said cheque was returned on all three times stating reason of insufficient fund.

Thereafter the respondent No. 2 through his appointed legal counsel issued a legal notice with registered A/D post on 04.01.2011, under section 138 of the Negotiable Instruments Act, 1881, stating about the said dishonor of cheque and demanding the payment of Tk. 1,60,00,000/- within 30 days of the receipt of the notice, as per provision of the said law. But the accused petitioner did not make any payment within the statutory period. Thereafter the complainant filed a case being C.R. Case No. 14 of 2011 under Section 138 of the Negotiable Instrument Act. Hence the case.

The accused-petitioner in his application under section 561A contended that the case record was transmitted to the

learned court below for holding trial and disposal and the learned court below on 15.06.2011 framed charge against the petitioner but on that date due to absconsion of the accused (subsequent convict), it was not possible to explain and read over the charge to him. Thereafter the learned court below took evidences of witness. The complainant adduced his evidence before the court as witness. Due to absconsion of the petitioner he was not examined under section 342 of the Code of Criminal Procedure.

Later on the accused-petitioner appeared before the court and with the permission of the court cross-examined the P.W.1. Complainant Rakimul Al Mamun as P.W.1 deposed in his cross examination that the accused has given a cheque to meet up his dues within 7 days. He also stated that it was printing mistake and subsequently that has been written as 30 days through correction instead of 30 days has been written, but the learned court did not verify his signature with the correction. At the time of filing of the case he gave signature on it.

The accused petitioner filed supplementary affidavit where he stated that learned trial Judge did not consider the defence version as regarding unusual circumstances which the

complainant did with the alleged cheque and the misdoings of him regarding the cheque which was brought to the notice of the Court but all this matter were overlooked and not considered by the learned trial Judge and as such the accused-petitioner has been seriously prejudiced. The trial Judge did not consider that the PW No. 1 in his cross examination stated that "লিগ্যাল নোটি-শ ৭ দি-নর ম-ধ্য টাকা পরি-শা-ধর জন্য সময় দেয়া হ-য়-ছ। উহা প্রিন্টিং মি-স্টক। প-র হা-ত ৩০ লি-খ দেয়া হ-য়-ছ। ৭ দি-নর স্থ-ল ৩০ লেখা হ-য়-ছ। সেখা-ন এডভ-কট এর সাক্ষর দেয়া নেই। ফাইলিং এর সময় স্বাক্ষর দেয়া হ-য়-ছ। এই মামলায় পিটিশন ও লিগ্যাল নোটিশ এর কোথাও তকিত এর নম্বর দেয়া হয়নি।".

It was further stated in the supplementary that it also transpires from the deposition of the prosecution witnesses that "চেক এর তারিখ টাকার অঙ্ক এবং প্রাপকের নাম তাহার নিজের হাতের লেখা, আসামী-ক লিগাল নোটিশ দেওয়া হ-য়-ছ, তা-ত ৭ দিন লেখা আ-ছ, তিনি নি-জ এই লেখাগুলো লিখেছেন এবং আসামীর নামিয় ইনিশিয়ালও তিনি নিজে দিয়েছেন, তিনি ও জোবাইদা না-ম এক মহিলা আসামীর কা-ছ ও-য়স্টিন হো-ট-লর ১০,৮০০০,০০০/- (দশ কোটি আশি লক্ষ) টাকা জাল শেয়ার বিক্রয় করেছে। ঐ জাল শেয়ার এর বিপরী-ত তারা আসামীর কাছ থে-ক ক-য়কটি চেক নি-য়-ছন, ঐ রকম একটি চেক এ নিজের মনগড়া অঙ্ক বসিয়ে এই মামলা করেছে। ঐ মামলায় প্রতিবেদন এ-স-ছ যে, মামলাটি মিথ্যা, তিনি একজন মামলাবাজ লোক। তিনি জাল শেয়ার বিক্রয় করেছেন এবং মিথ্যা মামলা করে মিথ্যা সাক্ষ্য দি-য়-ছন ম-র্ম আসামিপ-ক্ষ

প্রদত্ত সাজেসন অস্বীকার করেন" and all this matters were overlooked and not considered by learned trial Judge and as such the accused-petitioner has been seriously prejudiced.

At the time of hearing learned Senior Advocate for the petitioner Mr. S.M. Shajahan and learned Advocate Mr. Mahbub Shafiq submits that on the self same matter a judgment and order of conviction and sentence of the Negotiable Instruments Act was challenged in writ jurisidiction and a larger bench of the Hon'ble High Court Division of Bangladesh Supreme Court comprising their Lrodships Madam Justice Zinat Ara, Mr. Justice Bhabani Prasad Singh and Mr. Justice A.K.M. Zahirul Hoque in its majority views affirmed Writ Petition No. 12580 of 2015 that " the petitioner is allowed to remain on the same bail as granted by this Court up to 20th January, 2017 for the purpose of filling a Criminal Miscellaneous Case filed by the accused-petitioner demands equal footings in accordance with the observations and directions given by said Hon'ble Bench. .

Where it is held in its observation made by the Hon'ble Court in Writ Petition No. 12580 of 2015 that "if there had been any fraud or quorum non-judice of the Trial Court or that the facts alleged do not constitute offence under Section 138 of the Act or that the conviction has been based on no legal evidence or otherwise for securing the ends of justice, the Petitioners could

have taken recourse of section 561A of the CrPC'' and majority views observed that "the petitioner may raise this question under Section 561A of the CrPC before an appropriate Bench of this Court.

The learned Advocates further submit that though the P.W. No. 1 was cross examined but defence version of the case was not considered by the trial Court and in this regard a Division Bench of the Hon'ble High Court Division comprising their Lordships Mr. Justice Mirza Hossain Haider and Mr. Justice Kazi Ejarul Haque Akondo (case referred to 68 DLR 2016 page 283) decided with observations that "pursuant to Sections 4,6,8,9,43,58 and 118 of the Act that the trial Court shall give the accused persons adequate opportunity to take any such defence during the course of trial'' and as such the judgment and order of conviction is liable to quashed and the accused-petitioner may kindly be allowed to adduce additional evidence by sending the case on remand for the ends of justice.

The learned Advocates further submit that in the case reported in 61 DLR 478, their Lordships of the High Court Division while deciding the vires of Section 138A of the Act observed that "due to certain embargo as laid down in Section 138A of the Act, the poor petitioner could not prefer appeal against the impugned judgment and order of conviction and sentence under section 138 A of the Act although the petitioner has every

chance of success in appeal. However, it is to be observed that a convict may invoke inherent jurisdiction of the Court Section 561A of the CrPC if he can make out of a case of corum non-judice of the trial court or that the facts alleged do not constitute any offence or that the conviction has been based on no legal evidence or otherwise for securing the ends of justice..

The learned Advocates lastly submit and referred 46 DLR AD 1994 page-67,their Lordships of the Hon'ble Appellant Division made observations that "the inherent power under Section 561A of the CrPC can be invoked at may stage of the proceeding even after conclusion of trial, if it is necessary to prevent the abuse of the process of the court or otherwise to secure ends of justice'' and as such invoking jurisdiction by the present petitioner under Section 561A of the CrPC ought to be justified by this Hon'ble Court to secure ends of justice.

On the above submission and the referred cases we have elaborately gone through the referred cases. It transpires the submission made by the learned Advocate are elaborately discussed in the reported cases. The inherent power under Section 561A of the Code of Criminal Procedure is an extra ordinary different power of the High Court Division. Though it is an extra ordinary different power of the High Court Division, it will be exercised very cautiously in the actual relevant stage of the case

which has already been decided by our Apex Court which is reported in 17 BLD, Page-44 wherein it is held that:-

> "The settled principle of law is that to bring a case within the purview of section 561A for the purpose of quashing a proceeding one of the following conditions must be fulfilled;
>
> (1) Interference even at an initial stage may be justified where the facts are so preposterous that even on admitted facts no case stands against the accused;
> (2) Where the institution and continuation of the proceeding amounts to an abuse of the process of the Court;
> (3) Where there is a legal bar against the initiation or continuation of the proceeding;
> (4) In a case where the allegations in the F.I.R. or the petition of complaint, even if taken at their face value and accepted in their entirety, do not constitute the offence alleged and
> (5) The allegations against the accused although constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge."

On the other hand, Mr. Muhammad Rafiul Islam, learned Advocate for the opposite party, submits that the grounds taken by the accused-petitioner and the submissions placed by the learned Advocates for the accused-petitioner all are unlawful. The petition filed under section 561A is not maintainable. In view of the section 138A of the Negotiable Instruments Act, 1881 relating the right to prefer appeal, 50% of the dishonored cheque has to be deposited to the court which has awarded the sentence and alternative forum is available under section 138A of the Negotiable Instruments Act, 1881 and convict petitioner had wide right to prefer appeal as laid down in the section 138A of the Negotiable Instruments Act, 1881. This sentence cannot be questioned under Section 561A of the Code of Criminal Procedure by avoiding the provision under section 138A of the Negotiable Instruments Act. Lastly he submits for discharging the Rule.

Upon such facts and circumstances we have gone through the impugned judgment and the relevant papers annexed with the record. We have also carefully examined the L.C.Rs. It transpires from the judgment and record that the accused-petitioner at the relevant time of the trial was in the police custody in another case which was also filed by the same party. It appears those matters to have been elaborately stated in the supplementary affidavit placed by the accused-petitioner. However it appears lastly the accused-petitioner appeared in the trial Court and by filing an application

made cross examination of the witness in the case. In the defence case the accused-petitioner placed the matter regarding the cheque and signature placed by him in the cross examination at the trial court but the learned trial Court in its judgment did not address the fact discovered by the accused-petitioner in the cross-examination of the prosecution witness i.e. signature upon the cheque.

Learned Advocate for the accused-petitioner further submits that the impugned cheque is really a fraud cheque and it clearly shows that in the MICR cheque the number of the cheque has been manipulated and digit '1' has been written by pen on the original cheque. Clear fraud has been vividly practised to alter cheque number or original cheque itself. No pen-writing is allowed on any MICR cheque and MICR cheque has been introduced in banking dealing to prevent any kind of fraud like the present one. This matter should be examined by an expert which was not done by the trial Court. He further submits that the alleged cheque number in question (i.e.2596764) was not mentioned both in the Legal Notice and Complaint Petition and for want of statutory compliance of the mandatory provisions of Section 138 of the Act, the present complaint is not maintainable and judgment and sentence passed by the learned Trial Court is liable to be quashed. In support of his submission he referred a case of High Court Division of Punjab and Haryana in Chhabra Fabrics Private

Limited Vs. Bhagwan Dass reported in 2015 (2)DCR 587 (Para-8) wherein it is held that-

> "Undisputedly, both the parties had business dealings with each other with regard to handlooms. It has come on record that the accused had issued cheque No. 476844 as security cheque to the complainant which he presented for encashment by filling an amount of Rs. 2,00,000/- as part payment towards Bill No. 248 dated 25/09/1995 for Rs. 3,26,565.51/- but the same was dishonoured on account of non-arrangement of funds by the drawee bank. However surprisingly, complainant served a legal notice to the accused qua cheque No. 47844 dated 26/09/1995 which apparently was not for the cheque in dispute. It may be true, that there was a typographical error in the said legal notice while typing out the cheque number but such typographical error if any, does not meet the compliance of the mandatory provisions of Section 138 of the Negotiable Instruments Act and the only course left for the complainant was to give a fresh legal notice to the accused which admittedly has not been done in the present case and hence it is safe to conclude that for want of statutory compliance of the mandatory provisions of Section 138 of the Act, the present complaint is not maintainable. The Trial Court appreciated the said aspect of

the case and rightly came to an irresistible conclusion that the complainant has miserably failed to establish the accusation against the accused and thus accordingly while dismissing the complaint filed by him, acquitted the accused."

He further referred (2012 (2) DCR1) Kishorebhai Bhudabhai Chavda Vs. State of Gujrat wherein it is held that-

"In view of the above provision, it is clear that when the cheque is returned unpaid on account of the resons mentioned in the said provision, the payee or holder in due course, as the case may be, is required to make a demand for the payment of unpaid amount of cheque by giving notice in writing to the drawer of the cheque. The prosecution produce the cheque given by the accused at Exh. 43. The prosecution also produced the bank memo at Exh. 45 and the notice given to the accused demanding the amount of unpaid cheque at Exh. 46. On perusal of cheque at Exh. 43, it appears that the cheque is drawn on behalf of M/s. Kanji Raja & Company and it is drawn in favour of the complainant. The bank memo Exh. 45 indicates the cheque Exh. 43 eas returned unpaind on account of insufficient fund. The complainant served notice to the accused demanding amount of unpaid cheque. It appears from the notice Exh. 46 that it is not addressed to the

drawer of the cheque as required under Section 138(b) of the Act. Therefore, in my view, requirement of Section 138 of the Act with regard to notice is not complied with. It is also settled position that the offence under Section 138 of the Act, notice to the accused making demand of unpaid cheque is sine qua non. As the complainant failed to serve notice, the trial Court was justified in recording acquittal."

Learned Counsel further submits that on the self-same occurrence by presenting the same cheque the Complainant Opposite Party No. 2 filed Kolabagn Police Station Case No. 7(02)11 dated 23.02.2011 and a C.R Case No. 41 of 2011 dated 20.03.2011 before the learned Chief Metropolitan Magistrate, Dhaka against the present Petitioner in connection with alleged cheque and final report was given in both cases which was brought to the notice of the learned Trial Court but all these matters were overlooked and not considered by the trial judge and as such the accused petitioner has been seriously prejudiced .

Lastly Learned Counsel submits that the recourse was suggested by the Hon'ble High Court Division under Section 561A of the Code of Criminal Procedure if any fraud or quorum non-judice of the Trial Court or that the dates alleged do not constitute offence under Section 138 of the Act or that the conviction has been based on no legal evidence or otherwise for securing the ends of justice. In Writ Petition No. 12580 of 2015, judgment and order

of conviction and sentence of the Negotiable Instruments Act was challenged without depositing 50% of the fine amount and it was affirmed for the purpose of filling a Criminal Miscellaneous Case under Section 561A of the Code of Criminal Procedure. (Writ Petition No. 12580 of 2015: Madam Justice Zinat Ara, Mr. Justice Bhabani Prasad Singh and Mr. Justice A.K.M. Zahirul Hoque).**

We have anxiously gave our thought on the submissions of the learned Advocate for the accused-petitioner and the learned Counsel of the opposite party. We have also elaborately examined the impugned judgment and exhibits attached with the L.C.Rs. It transpires from the said record that the complainant adduced only one witness and the accused-petitioner was not given any opportunity to cross examine the P.W.1 as he was in the jail custody for the another case of the self same party. However at the stage of Section 342 examination of the Code of Criminal Procedure the accused-petitioner was able to attend before the court and cross examined P.W. 1 by filing an application. It appears form the record that P.W. 1 has been cross-examined on point of notice and manipulation of cheque by the complainant. But the learned Trial Court did not take proper step to dispose of the matter or question about number of the cheque. It is well settled now that if there is a fraud it will vitiate all the matters and claims. Further it transpires from the record that the legal notice was served upon the present petitioner giving 7 days time to make

payment and subsequently ‘7 days’ was corrected by ‘30 days’ without putting initial of the learned Advocated which is admitted by the complainant in the cross examination. It is further observed from the record that the cheque number in question was not mentioned either in the legal notice or in the complaint petition. Earlier we have mentioned the referred case reported in 2015 (2) DCR 587 (Para-8).

We have given our anxious consideration that there is an extra pen number ‘1’ on the said cheque. The other materials placed by the accused-petitioner in his application and the submission of the learned Advocate of the accused-petitioner. We are of the view that there are extra-ordinary facts and grounds available in this case. In such circumstances, we may invoke inherent power of the High Court Division under section 561A of the Code Criminal Procedure. However, the facts regarding the cheque and other discussed points of this case should be examined by the Trial Court.

Upon such circumstances, we are of the view that this case should go on remand to the Trial Court to examine the said impugned cheque and the notice which was corrected by pen without initial of the learned Advocated concerned.

Learned Trial Court is directed to take necessary steps for perusing the impugned cheque and its number by process of law.

Both the parties are directed to take necessary steps before the Trial court by filing their application, if any.

Upon such observation, the impugned judgment and order is set-aside.

The Rule is disposed of accordingly.

Stay order passed in connection with the Rule stands vacated.

Send down L.C.Rs and a copy of this judgment and order to the concerned court below for necessary action.

MD. Bazlur Rahman, J:

I agree

Md. Majibur Rahman

Bench Officer