

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 973 of 2009

Ragib Ahsan

...Convict-petitioner

-Versus-

The State and another

...Opposite parties

Mr. Syed Mamun Mahbub, Advocate

...For the convict-petitioner

Mr. Md. Salahuddin Talukder, Advocate

...For the complainant-opposite party No. 2

Heard on 31.07.2024 and 01.08.2024

Judgment delivered on 21.08.2024

On an application filed under Section 439 of the Code of Criminal Procedure, 1898 the Rule was issued calling upon the opposite party to show cause as to why the judgment and dated 12.07.2009 passed by Metropolitan Sessions Judge, Dhaka in Criminal Appeal No. 400 of 2009 rejecting the application for condonation of delay of 335 days in filing appeal against the judgment and order dated 27.07.2008 passed by Metropolitan Magistrate, Dhaka in C. R. Case No. 850 of 2002 convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer rigorous imprisonment for 1(one) year and fine of Tk. 96,00,000(ninety six lakh), in default, to suffer rigorous imprisonment for 3(three) months 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 convict-petitioner Ragib Ahsan took loan from the complainant Shandhani Credit Co-Operative Society Limited and the convict-petitioner issued Cheque No. 548450 on 06.03.2002 for payment of Tk. 48,00,000(forty eight lakh) drawn on Standard Chartered Bank, Dhaka in favour of the complainant Shandhani Credit Co-Operative Society Limited. The

complainant presented the cheque on 07.03.2002 for encashment through Al-Baraka Bank Bangladesh Limited, Principle Office, Dhaka and the same was dishonoured for 'payment stopped by the drawer'. After that, the complainant issued legal notices on 17.03.2002 and 18.03.2002 to the accused through registered post but the accused did not pay the cheque amount. Consequently, the complainant filed the case on 11.04.2002.

During trial, Md. Hossain Howlader, General Manager of the complainant Shandhani Credit Co-Operative Society Limited was examined as P.W. 1. He stated that the convict-petitioner Ragib Ahsan took loan from the complainant and he issued a cheque on 06.03.2002 for payment of Tk. 48,00,000(forty eight lakh) in favour of the complainant. He proved the said cheque as exhibit 2. The complainant presented the cheque on 07.03.2002 for encashment through Al-Baraka Bank Bangladesh Limited but the same was dishonoured on the ground 'payment stopped by the drawer'. He proved the dishonoured slip as exhibit 3. On 17.03.2002 the complainant sent legal notice through postal department to the accused. He proved the legal notice as exhibit 4 and the postal receipt as exhibit 5 and the acknowledgment receipt is marked as exhibit 6. Although the convict-petitioner received the legal notice but he did not pay the cheque amount. Consequently, he filed the case.

After concluding the trial, the trial Court by judgment and order dated 27.07.2008 convicted the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer rigorous imprisonment for 1(one) year and fine of Tk. 96,00,000(ninety six lakh), in default, to suffer rigorous imprisonment for 3(three) months against which the convict-petitioner filed Criminal Appeal No. 400 of 2009 before the Metropolitan Sessions Judge, Dhaka and filed an application for condonation of delay of 335 days. The appellate Court by impugned

judgment and order dated 12.07.2009 refused to admit the appeal rejecting the application for condonation of delay of 335 days against which the convict-petitioner obtained the instant Rule.

Learned Advocate Mr. Syed Mamun Mahbub appearing on behalf of the convict-petitioner submits that the convict-petitioner filed Criminal Miscellaneous Case No. 912 of 2003 challenging the proceedings of the case and obtained Rule. The High Court Division by judgment and order dated 31.07.2006 discharged the Rule but the learned Advocate engaged on behalf of the convict-petitioner did not inform him about the said judgment and order passed by the High Court Division and after discharging the Rule issued in Criminal Miscellaneous Case No. 912 of 2003 no notice was served upon him to appear before the trial Court. Consequently in the absence of the convict-petitioner, the trial Court passed judgment and order dated 27.07.2008 convicting the petitioner for which he was not aware in time about the judgment passed by the trial Court and when he came to know about the said judgment passed by the trial Court, the convict-petitioner voluntarily surrendered on 22.06.2009 for which it was delayed by 335 days in filing the appeal which is unintentional and bonafide. He prayed for making the Rule absolute.

Learned Advocate Mr. Md. Salahuddin Talukder appearing on behalf of the complainant-opposite party No. 2 submits that the convict-petitioner was aware about the proceeding initiated against the accused and he obtained bail and during trial, he absconded and at the time of filing the appeal, the convict-petitioner failed to show any reasonable cause of delay of 335 days in filing the appeal against the judgment and order of conviction and sentence passed by the trial Court for which the appellate Court below legally passed the impugned judgment and order. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Syed Mamun Mahbub who appeared on behalf of the convict-

petitioner and the learned Advocate Mr. Md. Salahuddin Talukder who appeared on behalf of the complainant-opposite party No. 2, perused the evidence, impugned judgments and orders passed by both the Courts below and the records.

On perusal of the records, it appears that the trial was held in absentia and the accused did not cross-examine P.W. 1. It has been stated that after disposal of the Criminal Miscellaneous Case No. 912 of 2003 by judgment and order dated 31.07.2006, the learned Advocate for the convict-petitioner did not inform him about the said judgment and no notice was served by the trial Court upon the accused to appear before the Court for which he was not aware about the proceeding initiated again against him.

It is found that in the meantime, the convict-petitioner paid 50% of the cheque amount Tk. 24,25,000 to the accused by pay order dated 11.07.2024 and the complainant-bank also admitted the payment of Tk. 24,25,000 in their official pad on 11.07.2024 (Annexure D1) issued by Md. Mizanur Rahman, Deputy Manager, Sandhani Credit Co-operative Society Limited, Motijheel, Dhaka.

On examination of the Section 138 of the Negotiable Instruments Act, 1881, it reveals that the trial Court is only empowered to award the sentence of imprisonment or with fine which may extend to thrice the amount of the cheque or with both. In the instant case, the trial Court awarded a sentence to suffer rigorous imprisonment for 1(one) year and fine of Tk. 96,00,000, in default, to suffer rigorous imprisonment for 3(three) months. No provision is made in the Negotiable Instruments Act, 1881 to award any rigorous imprisonment and default sentence.

The appeal against the judgment and order of conviction and sentence is a statutory right. In the application for condonation of delay, the convict-petitioner had given a reasonable explanation that the learned Advocate for the convict-petitioner did not inform him about the judgment and order dated 31.07.2006 passed by the High Court

Division in Criminal Miscellaneous Case No. 912 of 2003 for which the trial was held in absentia. The cause of delay of 335 days in filing the appeal appears reasonable and bonafide. Therefore, I am of the view that the Rule should be made absolute.

The delay of 335 days in preferring the appeal against the judgment and order passed by the trial Court is hereby condoned. The payment of 50% of the cheque amount Tk. 24,25,000 by the convict-petitioner to the complainant is treated as deposit under Section 138A of the Negotiable Instruments Act, 1881.

In the result, the Rule is made absolute.

The impugned judgment and order dated 12.07.2009 passed by the appellate Court below is hereby set aside.

The Metropolitan Sessions Judge, Dhaka is directed to dispose of the appeal considering the merit positively within 6(six) months from the date of receipt of the copy of this judgment.

However, there will be no order as to costs.

Send down the lower Court's records at once.