

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

Criminal Miscellaneous No. 49090 of 2015.

IN THE MATTER OF:

Mr. Rajib Chowdhury and others

.....Accused-petitioners.

-V E R S U S-

The State and another

.....Opposite parties.

Mr. Ashok Kumar Banik, Advocate

..... For the petitioners

Mr. Md. Mahabubur Rahman Kishore, Adv.

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

Heard on: 10.01.2024 and

Judgment on: 15.02.2024.

Present:

Mr. Justice Zafar Ahmed

And

Mr. Justice Khandaker Diliruzzaman

Khandaker Diliruzzaman, J:

On an application under section 561A of the Code of Criminal Procedure, 1898 a Rule was issued calling upon the opposite parties to show cause as to why the proceeding of Metropolitan Sessions Case No. 1702 of 2015 arising out of C.R. Case No. 677 of 2014 (Doublemooring Police Station) under sections 138/140 of the Negotiable Instruments Act, 1881, now pending in the Court of learned Joint Metropolitan Sessions Judge, 1st Court, Chittagong should not be quashed

and/or such other or further order or orders passed as to this Court may seem fit and proper.

By the Rule issuing order dated 10.12.2015, all further proceedings of the aforesaid case was stayed for a period of 01(one) year, subsequently it was extended time to time and lastly on 02.11.2021 extended for a further period of 01(one) year.

The facts relevant for disposal of the Rule, are that, the complainant opposite party No. 2 is a banking company incorporated under the Bank Companies Act and runs its Banking business all over Bangladesh. The accused petitioners are the owner of a business institution namely, Tube Rose Clothing Limited and during the course of business they availed various credit facilities from the Bank and as per terms and conditions of the aforesaid facility, the accused petitioners issued a Cheque being No. 2194542 dated 14.11.2013 amounting to Tk. 7,38,600/- (Seven lacs thirty eight thousand and six hundred) only in favour of the complainant Bank for repayment of the aforesaid outstanding liabilities with the complainant Bank. On 27.04.2014, the complainant presented the said cheque before the concerned bank for encashment but

the same was dishonored with a remarks “Insufficient Fund” and then the complainant Bank served a Legal notice dated 06.05.2014 upon the accused petitioners by registered post requesting payment of Cheque amount but the same was not received by the accused petitioners and they did not pay heed to arrange the Cheque amount for repayment of the loan. The complainant-opposite party No.2 after observing all legal formalities filed the instant complaint under sections 138/140 of the Negotiable Instruments Act, 1881 against the accused petitioners and hence, the case.

On receipt of the petition of complaint, the learned Chief Metropolitan Magistrate by examining the complainant under section 200 of the Code of Criminal Procedure took cognizance of the offence under sections 138/140 of the Negotiable Instruments Act, 1881 against the accused-petitioners and issued summons against them. Thereafter, the accused-petitioners surrendered before the learned Court and obtained bail. The case being ready for trial, the record of the case was transmitted to the Court of Metropolitan Sessions Judge, Chattogram and the case was renumbered as Metropolitan Sessions Case No.1702 of 2015 and

subsequently the same was transferred to the Court of the learned Joint Metropolitan Sessions Judge, First Court, Chattogram for trial.

During charge hearing, the accused petitioners filed an application under section 265C of the Code of Criminal Procedure before the learned Court and after part hearing the learned Judge fixed a day i.e. 19.01.2016 for further hearing the same.

Feeling aggrieved by and dissatisfied with the impugned proceedings, the accused petitioner filed the instant application under section 561A of the Code of Criminal Procedure and obtained the instant Rule and order of stay.

Mr. Ashok Kumar Banik, the learned Advocate appearing for the accused-petitioners submits that the accused petitioners availed loan facilities by depositing security cheque to the Bank but the Bank by using this security cheque filed the instant case against the accused-petitioners which are an abuse of the process of Court and are liable to be quashed.

He also referred to a circular issued by Bangladesh Bank concerning clearance of Non-MICR (Magnetic Ink Character Reorganization) cheque and submits that by a

DCMPS Circular No. 07/2010 dated 26.07.2010 it has been instructed by Bangladesh Bank that clearance of non-MICR cheque will not be allowed after the date of 01.11.2010 but the complainant presented the aforesaid non-MICR cheque before Bank on 27.04.2014 and validity of the said non-MICR cheque already been expired after the date of 01.11.2010, therefore, non-MICR cheque is completely bar for clearing and the said cheque has no legal force at all after the date of 01.11.2010. The cheque referred to in the complaint petition is non-MICR instruments and is not valid instruments and, as such, the impugned proceedings, based on a non-MICR cheque are an abuse of process of the Court and continuation of the proceedings are liable to quashed.

By making those submissions, the learned Advocate for the accused-petitioners prays for quashing the impugned proceedings of Metropolitan Sessions Case Nos.1702 of 2015 under sections 138/140 of the Negotiable Instruments Act, 1881 and making the Rule absolute.

On the other hand, Mr. Md. Mahabubur Rahman Kishore, the learned Advocate appearing on behalf of the Opposite Party No.2 having taken us through the petition and

other materials on record, submits that the petition of complaint contained prima-facie offences against the accused-petitioners under sections 138/140 of the Negotiable Instruments Act, 1881 and the learned Judge of the Court below after considering the materials on record rightly took cognizance of the offence under sections 138/140 of the Act, 1881 against the accused-petitioners and, as such, the impugned proceedings should not be quashed and the rule issued earlier may be discharged.

He finally submits that a proceeding cannot be quashed merely on technical grounds and, as such, the Rule issued by this Court calls for no interference by this Court.

In order to appreciate the submissions advanced by the learned Advocates for both the respective parties, we have gone through the applications under section 561A of the Code of Criminal Procedure, the materials annexed thereto and given our anxious consideration to their submissions.

The offence under section 138 of the Act can be completed with the concentration of a number of facts i.e. (i) drawing of the cheque, (ii) presentation of the cheque, (iii) returning of the cheque unpaid by the drawee bank, (iv) giving

notice in writing to the drawer of the cheque demanding payment of the cheque amount and, (v) failure of the drawer to make payment within 30 days of receipt of the notice. The accused petitioners admitted about the loan, issuance of cheque by them and dishonour of cheque and that a notice under section 138(1)(b) of the Act has been given by the complainant. Thus, all the legal requirements are present to bring the offence under section 138 of the Negotiable Instruments Act.

For the convenience of understanding sections 138 and 141 of the Act, 1881, read as hereunder:

“138 Dishonour of cheque for Insufficiency, etc. of funds in the account—[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 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.*

[(A)] 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) *Where any fine is realized under sub-section (1), any amount up to the face value of the cheque as far as is covered by the fine realized shall be paid to the holder.*
- (3) *Notwithstanding anything contained in sub sections (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized.*

141. Cognizance of offences—.

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.”*

In the Case of Majed Hossain Vs the State reported in 17 BLT (AD) 177 wherein their lordships opined that;

“A reading of sub-section (1) of section 138 of the Act, 1881 shows that an offence under the section shall be deemed to have been committed, the moment a 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 on any of the grounds mentioned therein. Sub-section (1) of section 138 has not made any

qualification of the cheque so returned unpaid either post-dated given as a security for repayment of the loan availed by a loanee as alleged by the accused or any other cheque issued by the drawer for encashment currently. When the legislature has not made any difference between a post-dated cheque issued as security for the repayment of the loan availed by the loanee and a cheque issued for encashment currently, we do not see any scope of making any such difference. Facts to be taken into account to see whether an offence under sub-section (1) of section 138 of the Act, 1881 has been committed or not are (a) whether the cheque issued by the drawer was presented to the bank within a period of six months from the date on which the same was drawn or with the period of its validity whichever was earlier by the payee, or as the case may be, by the holder In due course of the cheque, (b) whether the cheque returned unpaid ie dishonoured on any of the grounds mentioned in sub section (1) (c) whether demand for the payment of the amount of money of the unpaid/dishonoured cheque was made to the drawer of

the cheque by the payee or, as the case may be by the holder of the cheque in due course of the cheque by giving a notice in writing within thirty days of the receipt of information from the bank by him regarding the return of the cheque unpaid and lastly (d) whether the drawer of the unpaid/dishonoured cheque failed to make the payment of the amount of money of such cheque within thirty days to the payee or, as the case may be, to the holder in due course of the cheque from the date of receipt of the notice demanding such payment”.

From the above cited decision, it has been consistently held that “Sub-section (1) of section 138 has not made any qualification of the cheque so returned unpaid either post dated given as a security for payment of the loan availed by the loanee as alleged by the accused or any other cheque issued by the drawer for encashment currently. When the legislature has not made any difference between a post dated cheque issued as security for the repayment of the loan availed by the loanee, we do not see any scope of making such difference”. Therefore, the grounds taken by the learned

Advocate for the accused petitioner to the effect that the cheque issued by the accused-petitioners as a security for payment of the loan has no bearing at all.

Let us now adjudicate upon the issue raised by the learned Advocate for the accused-petitioners regarding the DCMPS Circular No. 07/2010 dated 26.07.2010. We have carefully read the circular and find that this circular is concerning clearing of cheques through Dhaka clearing house. The purpose of the circular appears to be digitalizing the clearing house process by issuing MICR (Magnetic Ink Character Recognition). Moreover, this circular was issued and addressed to the schedule Banks, requiring them to comply with the instructions in this circular. The instruction to phase out the non-MICR cheques within a specified period was upon the schedule Banks. Admittedly, this circular was not issued to the 'payees' of any cheque or to any 'holder' in due course. We, therefore, hold that the fact as to whether a cheque is a non-MICR one or not will neither absolve the concerned Bank or the clearing house, their obligation in favour of the 'payee' of a cheque, to clear the same. If any schedule Bank does not comply with the Bangladesh Bank's

instruction, then it may take action against the Bank for non compliance. But, it cannot affect the proprietary or beneficial right, title ad interest of ‘payee’ or ‘holder’ of a cheque. We have already seen that no legal consequence was attached with the DCMPS circular No. 07/2010 dated 26.07.2010, therefore, the circular issued by the Bangladesh Bank is clearly directory in nature and it has no mandatory character at all, since no consequence has been provided in the circular. The accused-petitioners, therefore, cannot claim that initiation of the proceedings basing on a non-MICR cheque is an abuse of the process of the Court.

In this connection reliance may be placed on the case of S.M. Mozammel Haque Talukder Vs. State reported in 68 DLR (AD) 370 wherein it has been held that;

“It appears that the High Court Division considered the provision of section 10 of the Druta Bichar Tribunal Ain and rightly found that the provisions are directory and not mandatory. Since no consequence has been provided for in section 10(4)(5) the trial by the same tribunal even after the expiry of 135 days will not be illegal or without jurisdiction.”

Moreover, the impugned proceedings in its entirety is well founded in the facts and circumstances of the case. So the grounds taken in the petition by the accused petitioners are not the correct exposition of law. However, we have gone through it, but the same deserves for no consideration.

In the light of discussions made above and the preponderant judicial views emerging out of the authorities refer to above we are of the view that the impugned proceedings suffers from no legal infirmities which calls for no interference by this Court.

In view of foregoing narrative, the Rule is discharged. The order of stay granted earlier stands vacated.

In view of the facts, this is a case of 2014, we are inclined to direct the learned Judge of the Court below to dispose of the case as early as possible preferably within six months from the date of receipt of this order.

The office is directed to communicate the order at once.

Zafar Ahmed, J:

I agree.

Md. Mustafizur Rahman
Bench Officer