

**Present**

**Mr. Justice Sheikh Abdul Awal**

**Criminal Appeal No. 4411 of 2016**

Md. Zamal Hossain

.....Convict-appellant.

-Versus-

The State and another

.....Respondents.

Mr. Md. Lutfor Rahman, Advocate

.....For the convict-appellant.

Ms. Shahida Khatoon, D.A.G. with  
Ms. Sabina Perven, A.A.G with,  
Ms. Koheenoor Akter, A.A.G.

..... For the respondent No.1.

No one appears

.....for the respondent No.2.

**Judgment on 21.05.2024.**

**Sheikh Abdul Awal, J:**

This Appeal at the instance of convict appellant, Md. Zamal Hossain is directed against the impugned judgment and order of conviction and sentence dated 14.02.2016 passed by the learned Additional Sessions Judge, Barguna in Sessions case No. 19 of 2013 arising out of C.R. Case No. 711 of 2012 (Pathar) convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer rigorous imprisonment for a period

of 1 (one) year and to pay a fine of Tk. 3,90,000/- (three Lac and ninety thousand).

The gist of the case is that one, Md. Sagir Akon as complainant filed C.R. Case No. 711 of 2012 (Pathar) in the Court of the learned Senior Judicial Magistrate, Patharghata Barguna against the convict-appellant under section 138 of the Negotiable Instruments Act, 1881 stating, inter-alia, that the complainant used to deal with grocery business and accused out of previous relationship used to purchase goods from his grocery shop on credit and in this way the complainant owed Tk. 3,81,961/- as unrepaid till 13.08.2012 and accordingly, the accused in order to pay the said unrepaid money on 14.08.2012 issued a cheque being No. 02B-7761962 amounting to Tk. 3,80,000/-(three Lac and eighty thousand) of Agrani Bank, Patharghata Branch, Barguna in favour of the complainant and thereafter, the complainant presented the said cheque in bank on 26.08.2012 and 12.09.2012 for encashment, which was dishonoured for insufficient of fund and thereafter, the complainant sent legal notices through his Advocate to the accused appellant on 27.08.2012 and 13.09.2012 respectively asking him to pay the cheque's amount but the accused-appellant did not pay any heed to it and hence , the case.

On receipt of the petition of complaint, the learned Senior Judicial Magistrate, Patharghata Barguna examined

the complainant under Section 200 of the Code of Criminal Procedure and took cognizance against the accused-appellant under section 138 of the Negotiable Instruments Act, 1881 and also issued summon against the accused appellant fixing next date on 13.11.2012. Thereafter, the accused appellant voluntarily surrendered before the Court and obtained bail.

In usual course the case record was sent to the Court of the learned Sessions Judge, Barguna, wherein the case was registered as Sessions case No. 19 of 2013 which was subsequently, transmitted to the Court of the learned Additional Sessions Judge, Barguna for disposal before whom the accused appellant was put on trial to answer a charge under Section 138 of the Negotiable Instruments Act, 1881 to which the accused appellant pleaded not guilty and claimed to be tried stating that he has been falsely implicated in this case.

At the trial the complainant himself was examined as PW-1 and also exhibited some documents to prove its case, while the defence examined none.

On conclusion of trial, the learned Additional Sessions Judge, Barguna by the impugned judgment and order dated 14.02.2016 found the accused guilty under Section 138 of the Negotiable Instrument Act, 1881 and sentenced him thereunder to suffer rigorous imprisonment for a period of 1

(one) year and to pay a fine of Tk. 3,90,000/- (three Lac and ninety thousand).

Being aggrieved by the aforesaid impugned judgment and order of conviction and sentence dated 14.02.2016, the convict-appellant preferred this criminal appeal.

Mr. Md. Lutfor Rahman, the learned Advocate appearing for the appellant in the course of argument takes me through the petition of complaint and other materials on record and then submits that the trial Court below failed to consider that the complainant side could not prove the case under Section 138 of the Negotiable Instrument Act, 1881 against the appellant beyond all reasonable doubts and as such the impugned judgment and order of conviction and sentence is liable to be set aside. He further submits that the allegation as attributed in the petition of complaint does not come within the purview of section 138 of the Negotiable Instruments Act, 1881 as the complaint was not a holder of cheque in due course, the notice was not served properly, the alleged cheque was taken fraudulently and it was not drawn against any debt or loan, the said cheque was signed blank cheque and as such, the impugned judgment and order of conviction and sentence of the appellant is illegal and liable to be set aside.

He further submits that there was good friendship between them and the accused-appellant was a simple uneducated and lay man who was habituated to depend on

the respondent No. 2 for most of his business affairs and the accused-appellant took loan from Brac Bank with the help of the complainant-respondent No. 2, who himself was the guarantor of that loan and at the time of sanctioning of that loan, the cunning complainant took four Blank and undated cheques of Agrani Bank from the appellant after getting his signatures under the excuse of using as security cheque for the said loan but in fact the complainant gave 3 (three) cheques out of those 4(four) cheques to the Brac Bank for the purpose of loan and another one was stolen by him with an ill motive and the said loan of Brac Bank was paid duly by the accused-appellant but the appellant was given back 3(three) cheques of Agrani Bank by the Brac Bank keeping 4<sup>th</sup> cheque fraudulently by the complainant at his disposal and he subsequently arranged this false case by using the said cheque by inserting date, amount and name of the drawee and as such, the accused-appellant is entitled to be acquitted and the impugned judgment and order of conviction and sentence is liable to be set-aside.

No one appears for the complainant-respondent.

Having heard the learned Advocate and perused the memo of Appeal, deposition of witnesses and other materials on record including the impugned judgment and order of conviction and sentence, the only question that calls for consideration in this appeal is whether the trial Court committed any error in holding the accused- appellant guilty

of the offence under Section 138 of the Negotiable Instrument Act, 1881.

On scrutiny of the record, it appears that one, Md. Sagir Akon as complainant filed C.R. Case No. 711 of 2012 (Pathar) in the Court of the learned Senior Judicial Magistrate, Patharghata Barguna against the convict-appellant under section 138 of the Negotiable Instruments Act, 1881 stating, inter-alia, that the complainant used to deal with grocery business and the accused out of good relationship used to purchase goods from his grocery shop on credit and in this way the accused fallen due Tk. 3,81,961/- till 13.08.2012 and accordingly, the accused in order to pay the said outstanding money on 14.08.2012 issued a cheque being No. 02B-7761962 amounting to Tk. 3,80,000/-(three Lac and eighty thousand) of Agrani Bank, Patharghata Branch, Barguna in favour of the complainant and thereafter, the complainant presented the said cheque in bank on 26.08.2012 and 12.09.2012 for encashment which was dishonoured for insufficient of fund and thereafter, the complainant sent legal notices through his Advocate to the accused appellant on 27.08.2012 and 13.09.2012 respectively asking him to pay the cheque's amount but the accused-appellant did not pay any heed to it.

On perusal of record, it is found that the complainant-after exhausting all the legal formalities filed C.R. Case No. 711 of 2012 (Pathar) under section 138 of the Negotiable

Instruments Act, 1881 against the convict appellant and during the trial the complainant himself was examined as PW-1, who in his deposition categorically stated that “আমি মামলা করি। আসামী আমার দোকান থেকে বিভিন্ন সময়ে বাকীতে মাল নেয় এবং পাওনা ৩,৮০,০০০/- টাকা বাবদ ১৪/৮/১২ তারিখে ১ টা চেক দেয়। চেকটি ২৬/৮/১২ ও ১২/৯/১২ তারিখে ব্যাংকে জমা দিলে ডিজঅনার হয়। আসামীকে লিগ্যাল নোটিশ দেই ১৩/৯/১২ তারিখে ও ২৭/৮/১২ তারিখে। আসামী নোটিশ পায়। কিন্তু টাকা দেয় নাই। তাই মামলা করি। এইটা অভিযোগের দরখাস্ত ও আমার স্বাক্ষর প্রদর্শনী ১,১(১)। এইটা চেক, ২টি ডিজঅনার স্লিপ, ডাক রসিদ ও উকিল নোটিশ প্রদর্শনী ২,৩,৩(১), ৪, ৪(১)। আমার ডকে আছে।” This witness in his cross examination stated that “আসামী কনফেশনারি ব্যবসা করে। আমি মুদি দোকানদার। আসামীর সাথে আমার ভাল সম্পর্ক ছিল। আসামী অল্প লেখাপড়া জানে। আসামী শুধু স্বাক্ষর অল্প সম্পন্ন কিনা জানি না। সত্য নয় যে, আসামী অশিক্ষিত জন্য তার পক্ষে আমি লেনদেন করতাম। আসামীর লেখা কোন কাগজ দাখিল করতে পারব না।” In cross examination the defence side could not able to discover anything as to the credibility of the witness on the matter to which he testifies.

To constitute an offence under Section 138 of the NI Act, the following elements need to be fulfilled:-

1. A cheque should have been issued by the payer for the discharge of a debt or other liability.

2. The cheque should have been presented or deposited by the payee within a period of six months from the date of

drawing of the cheque or within the period of validity of the cheque, whichever is earlier.

3. The payee should have issued a notice in writing to the payer within 30 days of receipt of information regarding the return of the cheque as unpaid from the bank.

4. The payer/drawer of the cheque should have paid the cheque amount within 30 days of receipt of the said notice from the payee.

5. If the payer having failed to pay in time the cheque amount, the payee should have filed a complaint within one month.

On an overall consideration of the facts, circumstances and the materials on record, it can be easily suggested that all the above quoted key elements are exist in the present case.

The learned Judge of the trial Court below appears to have considered all the material aspects of the case and justly convicted the accused appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer rigorous imprisonment for a period of 1 (one) year and to pay a fine of Tk. 3,90,000/- (three Lac and ninety thousand).

However, at the end of the day the learned Advocate for the appellant submits that admittedly the complainant served two legal notice upon the accused appellant which is

not tenable in law. In this case it appears that this plea was not raised before the trial Court even not in the memo of appeal. It further appears that in this case the legal notices were sent on 13.09.2012 and 27.9.2012, that is within one month and thus, I am unable to hold that the impugned judge is liable to be struck down on that count. Therefore, I find no substance in either of the contentions as raised by the learned Advocate for the appellant.

On an analyses of impugned judgment and order of conviction and sentence dated 14.02.2016 passed by the learned Additional Sessions Judge, Barguna in Sessions case No. 19 of 2013, I find no flaw in the reasonings of the trial Court or any ground to assail the same inasmuch as the impugned judgment is well founded in the law and fact and all the key elements of Section 138 of Negotiable Instruments Act are exist in the case. No interference is therefore called for.

In the result, the appeal is dismissed. The impugned judgment and order of conviction and sentence dated 14.02.2016 passed by the learned Additional Sessions Judge, Barguna in Sessions case No. 19 of 2013 arising out of C.R. Case No. 711 of 2012 (Pathar) against the convict-appellant is hereby affirmed.

Since the appeal is dismissed the convict appellant, Md. Zamal Hossain is directed to surrender his bail bond within 3 (three) months from today to suffer his sentence,

failing which the Trial Court concerned shall take necessary steps to secure arrest against him.

The complainant respondent No. 2 is permitted to withdraw half of the cheque's amount as deposited in the Trial Court concerned by the convict-appellant for the purpose of preferring this Criminal Appeal.

Send down the lower Court records at once.