

Supreme Court of Bangladesh  
High Court Division

Criminal Appeal No. 6094 of 2016

**Lokman**

..... Appellant

**-VERSUS-**

**Ayub Ali and the State**

....Respondents

Mr. A.K.M. Shamshad, Advocate

..... for the appellant

Ms. Anwara Shahjahan, DAG

..... for the respondent no. 2  
(State)

Heard on: 05.07.2017 and 06.07.2017

Judgment on: 09.07.2017.

**Present:**

**Mr. Justice Zafar Ahmed**

**Negotiable Instruments Act, 1881**

**Section 118(a) and 138:**

**Cheque is a negotiable instrument (section 13). In the instant case, the prosecution story as narrated in the petition of complaint and the deposition of the complainant as PW1 sharply contradicts each other as to when the complainant paid the money to the accused against which the cheque was issued to repay the same. The petition of complaint is silent about the date of monetary transaction, but states that the cheque was issued by the accused subsequently. In deposition, the complainant stated that the payment of money and issuance of the cheque took place on the same date which creates a doubt as to passing off consideration to the complainant against which the cheque was issued. Therefore, the presumption under section 118(a) of the Act, 1881 as to consideration has been successfully rebutted by the defence. ... (Para 14)**

**Negotiable Instruments Act, 1881**

**Section 9:**

**In my view, the trial Court has correctly found that the complainant is not the holder of the cheque in due course. ... (Para 17)**

**Judgment**

**Zafar Ahmed, J:**

1. The complainant-appellant namely Lokman has filed the instant appeal under section 417 of the Code of Criminal Procedure challenging the judgment and order of acquittal dated 31.05.2016 passed by the Additional Sessions Judge, 4<sup>th</sup> Court, Comilla in Sessions Trial Case No. 784 of 2015 arising out of C.R. Case No. 1504 of 2014 acquitting the accused respondent no. 1 of the charge under section 138 of the Negotiable Instruments Act, 1881.

2. On 26.10.2014, the complainant-appellant filed a petition of complaint under section 138 of the Negotiable Instruments Act, 1881 (in short 'the Act, 1881') against the accused-respondent No. 1 Ayub Ali before the Court of Senior Judicial Magistrate, Comilla alleging *inter alia* that the accused owed the complainant Tk. 40,00,000/- arising out of the business transaction between them. On 17.07.2014, the accused issued a cheque of Tk. 40,00,000/- in favour of the complainant to repay the said money. On 09.09.2014, the complainant

deposited the cheque with National Bank Ltd., Barura Branch, Comilla for encashment. The cheque was returned unpaid with the remark 'signature differs'. On 22.09.2014, the complainant sent a legal notice to the accused which he received, but did not take any step to pay the complainant the value of the cheque.

3. The case was sent to the Court of Additional Sessions Judge, 4<sup>th</sup> Court, Comilla for disposal. The learned Judge framed charge against the accused-respondent under section 138 of the Act, 1881. The accused pleaded not guilty to the charge.

4. During the trial, the complainant gave evidence as PW1. He did not examine any other witness. The accused-respondent was examined under section 342 of the Code of Criminal Procedure. He again pleaded his innocence. The defence examined 3 witnesses including the accused.

5. The trial Court acquitted the accused on the ground that the prosecution case has been disproved by the defence witnesses and that the complainant is not a holder of the cheque in due course and that the cheque was not issued in favour of the complainant.

6. Mr. A.K.M. Shamshad, the learned Advocate appeared on behalf of the complainant-appellant. None appeared for the accused-respondent.

7. The learned Advocate for the complainant-appellant submits that the complainant filed the case after compliance of the procedure laid down in section 138 of the Act, 1881 and within the period of one month of the date on which the cause of action arose. The learned Advocate further submits that the accused admitted his signature on the cheque in question while he deposed as DW1. The learned Advocate further submits that the complainant has also proved that the cheque was drawn for consideration. The learned Advocate further submits that the trial Court did not at all consider the prosecution case and the evidences, both oral and documentary, adduced by the complainant, rather passed the order of acquittal considering the defence case and evidences adduced by him which is illegal and as such, is liable to be interfered with. He further submits that the complainant has successfully proved all the elements of law required to prove the guilt of the accused under section 138 and hence, the judgment and order of acquittal is illegal and liable to be set aside.

8. I have heard the learned Advocate for the complainant-appellant and perused the materials on record.

9. PW1 (complainant) in cross-examination deposed that the accused is his distant relative (আমার ভাই এর ভায়রা যার নাম সোহেল তার জেঠা হলো আসামী). He further deposed that he and the accused were involved in land business. On 17.07.2014, he gave the money to the accused at his home and on that the accused issued the cheque in his favour. PW1 was given suggestion by the defence that on 02.07.2014 Sohel forcibly obtained signature of the accused on some stamp papers and on two cheques. Sohel gave the cheque in question to the complainant. PW1 was given further suggestions by the accused that the statements relating to land business or business transaction are not true. PW1 denied the suggestion.

10. The accused gave evidence as DW1. He deposed that he did not know the complainant from before. He had seen him first time in the Court. He further deposed that he is not an educated person, but can put signature only. One of his sons lives abroad. He sends money to the accused every month. For this reason, the accused opened a bank account.



about the date of monetary transaction, but states that the cheque was issued by the accused subsequently. In deposition, the complainant stated that the payment of money and issuance of the cheque took place on the same date which creates a doubt as to passing off consideration to the complainant against which the cheque was issued. Therefore, the presumption under section 118(a) of the Act, 1881 as to consideration has been successfully rebutted by the defence. The findings and observations of the trial Court are very important to determine the issue. The trial Court observed that,

“On perusal of the above evidence on record it appears that the complainant Lokman Hossain has claimed that he has a joint business with the accused Ayub Ali. It is really noticeable that the complainant is a man of 30 years of old and the accused Ayub Ali is an old man of 85 years of old. Starting a land business jointly by the above two distinct aged persons is quite doubtful. Moreover, the accused from the very beginning has been claiming that he did not give the impugned cheque to the complainant. His further claim was that his nephew Soheli took this cheque and another cheque forcibly from him on 02.07.14 and subsequently when he filed a petition of allegation to the concerned Police Station their dispute was settled on 09.08.14. That means, the accused has a clear defence plea and his defence plea strongly supported by his witnesses DW2 and DW3 even by the documents.”

15. The trial Court further observed that,

“In the light of the aforesaid facts, circumstances and evidence on record it appears that the accused successfully disproved the case of the prosecution. Because, the complainant himself as PW1 deposed that he gave the money on 17.07.2014 and on that date the accused gave him the impugned cheque. This statement of the complainant is a clear deviation of his petition of complaint. ... Moreover, the defence plea of alibi i.e. the accused had no business transaction with the complainant and he did not issue the cheque in favour of the accused and his nephew Soheli obtained the cheque including another cheque from him on threat and thus he has submitted a petition of complaint to the concerned Police Station Barura and subsequently Soheli compromised the matter in the Police Station, Barura are established enough by the defence witnesses.

Thus, in the light of the foregoing discussion, it appears that the prosecution case is *disproved* by the defence witnesses and the accused made a *doubt* successfully that the complainant Lokman is not a holder of the cheque in due course and the cheque is not issued in favour of the complainant rather the complainant has filed the case on fraud with a disputed cheque regarding which a solenama was executed earlier in the Barura Police Station. Thus, the accused is entitled to get the benefit of above doubt. As the prosecution has failed to prove the case beyond reasonable doubt, thus, the accused is entitled to be acquitted.”

16. Section 9 of the Act, 1881 defines ‘holder in due course’. Section 9 is quoted below for ready reference:

**Section 9:** “Holder in due course” means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective. “Holder in due course”

**Explanation** - For the purposes of this section the title of a person to a promissory note, bill of exchange or cheque is defective when he is not entitled to receive the amount due thereon by reason of the provisions of section 58.

17. In my view, the trial Court has correctly found that the complainant is not the holder of the cheque in due course. This finding is in consonant with the provisions of section 9. The learned Advocate for the complainant-appellant could not show any infirmity or illegality, both on facts and laws, in the findings of and conclusion arrived at by the trial Court. The Court below upon proper scrutiny of the evidences on record and assessment of those in correct perspective of law acquitted the accused-respondent. Hence, I find no merit in the appeal.

18. In the result, the appeal is dismissed.

19. Send down the lower Court records (LCR). Communicate the judgment and order to the Court concerned at once.