Present:
Mr. Justice Zafar Ahmed

Criminal Appeal No. 1535 of 2020
with
Criminal Appeal No. 1536 of 2020

Md. Ershad Ali @ Md. Ershad Ullah
..... Appellant

-VERSUS-

The State and another
….Respondents

Mr. S.M. Rifazuddin, with
Mr. Md. Jahangir Alam, Advocates
…… for the convict-appellant in both appeals
Mr. Md. Enamul Haque Molla, DAG with
Ms. Marufa Akhter, AAG
…… for the respondent No. 1 in both appeals
Mr. S.M. Shajahan, with
Mr. Shamsul Islam,Advocates
…… for the respondent No.2 in both appeals

Heard on: 19.08.2020, 02.09.2020,
10.09.2020 and 17.09.2020
Judgment on: 22.09.2020

In both the appeals, the parties are same, the dishonoured cheques were issued in the course of same transactions and same question of facts and identical points of law are involved in deciding the appeals. Therefore, they are heard together and disposed of by this single judgment.

Md. Ershad Ali @ Md. Ershad Ullah (Chairman of M/s Ershad Brothers Corporation) is the convict-appellant and Md. Atikur Rahman, Managing Director of Hitech Steel Re-rolling Mills Ltd. is the complainant-respondent in the appeals.

In Criminal Appeal No. 1535 of 2020, the appellant has challenged the judgment and order of conviction and sentence dated 15.10.2019 passed by the learned Sessions Judge, Narayanganj in Sessions Case No. 681 of 2018 arising out of C.R. Case No. 1115 of 2017 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 01 (one) year and also to pay a fine of Tk. 44,70,000/- which is equivalent of the value of the dishonoured cheque.

In Criminal Appeal No. 1536 of 2020, the appellant has challenged the judgment and order of conviction and sentence dated 09.10.2019 passed by the learned Sessions Judge, Narayanganj in Sessions Case No. 682 of 2018 arising out of C.R. Case No. 1116 of 2017 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 01 (one) year and also to pay a fine of Tk. 89,40,000/- which is equivalent of the value of the dishonoured cheque.

Complainant's case as narrated in the petition of complaint of both cases.

The parties are known to each other beforehand and they had good business relationship. The appellant used to buy rod on credit from the complainant's company. Thus, total Tk. 1,34,10,000/-

became due to the company. In order to adjust the entire due, the appellant issued two cheques, one for Tk. 44,70,000/- dated 16.07.2017 and the other for Tk. 89,40,000/- dated 20.07.2017 to the complainant in presence of the witnesses. On 24.08.2017, both the cheques were presented to the bank for encashment. The cheque dated 16.07.2017, value being Tk. 44,70,000/- was dishonoured on ground of 'stop payment'. The cheque dated 20.07.2017, value being Tk. 89,40,000/- was dishonoured due to 'insufficiency of fund'. On 12.09.2017, the complainant issued separate statutory legal notices which were received by appellant on 18.09.2017. The appellant did not pay the complainant the value of the dishonoured cheques.

Procedural matters

Both the cases were filed on 08.11.2017 in the Court of Chief Judicial Magistrate, Narayanganj by one Md. Billal Hossain, Recovery Manager on behalf of the complainant by dint of Letter of Authorization (although frequently referred to as 'Power of Attorney'). The learned Magistrate examined the said Md. Billal Hossain under Section 200 of the Code of Criminal Procedure, 1898 (in short, the 'Cr.P.C.') and took cognizance of the offence under Section 138 of the Negotiable Instruments Act, 1881 (in short, the 'N.I. Act') against the appellant and issued summons. The appellant appeared before the learned Magistrate and obtained

bail. Both the cases were transferred to the learned Sessions Judge for disposal and were registered as Sessions Case Nos. 681 of 2018 and 682 of 2018 respectively. Charge was framed against the appellant under Section 138 of the N.I. Act in both the cases to which he pleaded not guilty. The learned Sessions Judge tried the Cases.

Change of authorised person by the complainant

On 31.10.2018, the complainant filed separate applications in both the cases to change the authorised person to conduct the cases on behalf of the complainant. This time, the authorised person was Md. Arif Hosen, Recovery Officer of the complainant's company. The learned Sessions Judge, vide separate orders, both dated 24.03.2019, allowed the applications.

Witnesses

In Sessions Case No. 681 of 2018, the prosecution examined Md. Arif Hosen as the sole witness who was cross-examined. The defence examined none.

In Sessions Case No. 682 of 2018, the prosecution examined Md. Arif Hosen as the sole witness who was cross-examined. In this case, the defence examined two witnesses. DW1 is Md. Zakir Hosen who is the manager of Ershad Group. DW2 is the appellant. Both the witnesses were cross-examined.

The appellant was examined under Section 342 of the Cr.P.C. in both the cases after recording of the evidences of the prosecution witness. He again pleaded his innocence.

Documentary evidences

In both the cases, the original cheques, dishonour slips, legal notices, postal receipts and acknowledgement receipts were produced by the PW1 as documentary evidence. These evidence have not been challenged by the defence. The defence did not produce any documentary evidence.

Defence case

The appellant does not deny the signatures contained in the cheques. His specific defence case as narrated by him as DW2 in Sessions Case No. 682 of 2018 is that the complainant asked him to do marketing for his factory. The appellant told him that he would not do business unless an agreement is entered into. The appellant then signed advanced cheques and went abroad. The appellant was not aware that the G.M. of his business enterprise was doing business with the complainant. The said G.M. gave the cheques to the complainant. The appellant filed a criminal case against the G.M. The appellant did not do business with the complainant.

Who is the payee - Md. Atikur Rahman or Hitech Steel Re-rolling Mills Ltd.?

In the cause titles of both the petitions of complaint, so far as they relate to describing the complainant, it has been stated as follows:

> Md. Atikur Rahman
> Managing Director
> Hitech Steel Re-rolling Mills Ltd.
> ……
> ……
> On his behalf
> Md. Billal Hossain
> Recovery Manager *(English translation provided)*

In both the petitions of complaint, it has been stated that the accused-appellant used to purchase rod on credit from the complainant's business institution (প্রতিষ্ঠান) and in order to pay the outstanding due, the accused gave the cheque to the complainant. The complaint petitions neither disclose the name and nature of the complainant's business institution nor the relationship between the complainant and the said business institution.

In the formal charge of the cases, it has been mentioned that the accused gave the cheque to the complainant which was dishonoured. Up to this stage, it appears that Md. Atikur Rahman, who is the Managing Director of Hitech Steel Re-rolling Mills Ltd., is the payee of the cheque.

Now, we turn to the original cheques (exhibit-1 in both cases). The payee's name, amount in figure and words, date, the drawer's name were printed in the cheques. The payee's name in both the cheques are: HITECH STEEL RE-ROLLING MILLS LTD. The name of the company's Managing Director Md. Atikur Rahman does not appear anywhere in the cheques.

The learned Advocate for the appellant refers to the case of ***Md. Nur Hussain vs Md. Alamgir Alam,*** 2017 BLD (AD) 37 202 and submits that the complainant Md. Atikur Rahman is neither the payee nor the holder of the cheques in due course within the meaning of Section 9 of the N.I. Act in that the complaint petitions do not state how the complainant became the holder of the cheques and therefore, the cognizance of the offence under Section 138 of the N.I. Act has been taken illegally violating the provisions of Section 141 of the same Act. In ***Md. Nur Hussion***, the apex Court found that the complainant was not the holder of the cheque for consideration and that the cheque was not transferred to him. The proceeding was quashed.

The learned Advocate for the complainant, on the other hand, at the outset, frankly concedes that the cause title of the complaint petitions describing the complainant's name is defective. The company itself should have been the complainant. The learned Advocate draws attention to the fact that the complaint petitions

were filed through the company's authorised person. The letter of authorisation was given in the company's printed pad and the authorised person's signature was authenticated by Md. Atikur Rahman as Managing Director of the company. The letter of authorisation was never challenged by the appellant. In the statements made by the authorised person while he was examined under Section 200 of the Cr.P.C., he stated that the accused gave the cheque to the company. The learned Advocate submits that the defect in the cause title is merely a technical one which is curable and does not render the complaint petitions and/or the proceeding illegal.

It is true that the issue regarding the payee or holder in due course or the letter of authorisation was never raised by the appellant at any stage of the proceedings in the cases. The issue has been raised for the first time in the appeal. Upon perusal of the materials on record, this Court finds force in the submission of the learned Advocate for the complainant that the company is the payee of the cheques and the defect in the cause title of the complaint petitions is a technical one which does not vitiate the proceedings.

Complaint by company through power of attorney/authorised person.

In a dispute between two corporeal persons, arising out of a proceeding under the N.I. Act, it has been held in ***Hashibul Bashar***

vs. Gulzar Rahman and another, 56 DLR (AD) 17 that taking of cognizance of the offence upon the petition of complaint filed by the attorney upon due examination under Section 200 of the Cr.P.C. is perfectly valid and appropriate. Same view was expressed in ***A.C. Narayanan and others vs. State of Maharashtra and others, MANU/SC/0934/2013=AIR 2014 SC 630,*** where the complainant was a company and the same was filed through power of attorney.

In ***Associated Cement Co. Ltd. vs. Keshavananda,*** (1998) 1 SCC 687, it has been held that when the complainant is a body corporate it is the *de jure* complainant, and it must necessarily associate a human being as *de facto* complainant to represent the former in Court proceedings. It has been further held that no Magistrate shall insist that the particular person, whose statement was taken on oath at the first instance, alone can continue to represent the company till the end of the proceedings. It is open to the *de jure* complainant company to seek permission of the Court for sending any other person to represent the company in the Court. In the instant cases, the complainant company changed the authorised person to represent it with permission of the Court.

Presumption of consideration and rebuttal

Law presumes that every cheque is drawn for consideration, until the contrary is proved (Section 118(a) of the N.I. Act). A cheque drawn without consideration creates no obligation of

payment (Section 43). It is a valid defence available to the accused that the cheque was drawn without consideration. The issue is no longer a *res integra*. Thus, the presumption under Section 118(a) is rebuttable.

The learned Advocate for the convict-appellant submits that in the instant cases, the defence has successfully rebutted the presumption. The submission has been vehemently opposed by the learned Advocate for the complainant-respondent. In the course of hearing, the learned Advocates of both sides referred to some decisions.

It has already been noted that prior to commencement of the trial, the complainant company changed the authorised person in both the cases with leave of the Court.

In Sessions Case No. 681 of 2018, Md. Arif Hosen, Recovery Officer of the company was examined by the complainant as PW1. In examination-in-chief, PW1 stated, "বাদী এবং আসামীর মধ্যে ব্যবসায়িক লেনদেন ছিল। বাদীর পাওনা হয় আসামীর নিকট ১,৩৪,১০,০০০/- টাকা। আসামী ১৬/৭/২০১৭ ইং তারিখে ৪৪,৭০,০০০/- টাকার একটি চেক দেয়। ব্যাংকে উপস্থাপন করেছি কিন্তু চেকটি ডিজঅনার হয় ২৪/৮/২০১৭ ইং তারিখে।"

In cross-examination, PW1 stated, "আসামীর সংগে আমাদের কোনোদিন ব্যবসায়িক চুক্তি নাই ইহা সত্য নয়। মালামালের কোনো রশিদ এবং ভাউচার নাই ইহা সত্য নয়। আসামীর কর্মচারী মাহামুদ হাসানের সংগে বাদীর সম্পর্ক ছিল। ইহা সত্য নয়

আমরা আসামীর নিকট কোনো টাকা পাবো না।" In Sessions Case No. 681 of 2018, defence did not examine any witness.

In Sessions Case No. 682 of 2018, PW1 Md. Arif Hosen stated in examination-in-chief, "মুল বাদী আতিকুর রহমানের সঙ্গে আসামীর ব্যবসায়িক লেনদেন ছিল। বাদী রি-রোলিং মিল থেকে আসামীর ব্যবসায়িক পরিচয়। তাতে আসামীর নিকট বাদীর এক কোটি চৌত্রিশ লক্ষ দশ হাজার টাকা পাওনা হয়। আসামী বিগত ২০/৭/২০১৭ ইং তারিখ চেক দেয়। উননব্বই লক্ষ চল্লিশ হাজার টাকার। বাদী নগদায়নের জন্য ঐ চেক ব্যাংকে উপস্থাপন করে ২৪/৮/২০১৭ ইং তারিখে চেকটি ডিজঅনার হয়।"

In cross-examination, PW1 stated, "আসামীকে চিনি না। এখন কোর্টে চিনি। আসামীর সাথে ব্যবসায়িক সম্পর্ক। আসামীর নিকট রড বিক্রি করেছি। ভাউচার বা কাগজে আসামীর স্বাক্ষর নাই। কোন তারিখে রড বিক্রি হয়েছে এবং কতো টন বিক্রি হয়েছে জানি না। কোন সময় থেকে ব্যবসা জানি না। বাদী এক সময় আসামীর কর্মচারী ছিল ইহা সত্য নয়। বাদী ঐ চেকে স্বাক্ষর আসামীর নিকট থেকে নিয়ে এই মামলা করেছে ইহা সত্য নয়। চেক জি,এম দিয়েছে ইহা সত্য নয়। ইহা সত্য নয়, অবৈধ লেনদেন করেছি।"

In Sessions Case No. 682 of 2018, the defence examined 2 witnesses. DW1 is Md. Zakir Hossen who is the Manager of the business enterprise owned by the accused. DW2 is the accused himself.

DW1 stated in examination-in-chief, "আমি এরশাদ গ্রুপের ম্যানেজার। বাদী পক্ষ আমাদের সাথে ব্যবসা করতে চায়। আমরা ব্যাংক গ্যারান্টির বাইরে ব্যবসা করবো না বলে দেই। আমাদের কোম্পানীর জি,এম মাহমুদ হাসান চেক দেয় বাদীপক্ষকে এবং নিজেই ব্যবসা করে। এই বিষয়ে আমরা জানি না। আমরা বাদীপক্ষের নিকট থেকে কোন মালামাল নিয়েছি তণ্মধ্যে কোনো ডকুমেন্ট নাই। জি,এম মাহমুদ হাসানের বিরুদ্ধে

এজন্যে মামলায় সে জেল হাজতে আছে।”. In cross-examination, DW1 stated, “বাদীপক্ষ কবে ব্যবসা করতে গিয়েছে তারিখ জানি না। জি,এম সাহেব থাকাকালে এই ঘটনা হয়েছে।”

DW2 stated in examination-in-chief, “আমি এই মামলার আসামী। বাদী তার ফ্যাক্টরীর মার্কেটিং করার জন্য বলায় আমি বলেছি এগ্রিমেন্ট না করলে ব্যবসা হবে না। আমি অগ্রিম চেকে স্বাক্ষর করে রাখি এবং বিদেশে যাই। আমার জি,এম বাদীর সংঙ্গে ব্যবসা করেছে ইহা আমি জানতাম না। জি, এম সাহেবের বিরুদ্ধে মামলা করেছি। সে জেল হাজতে আছে। জি,এম আমার নামীয় চেক দিয়েছে। আমি বাদীর সঙ্গে কোনো ব্যবসা করিনি।”. In cross-examination, DW2 stated, “সাফাই সাক্ষী নং-১, আমার প্রতিষ্ঠানের ম্যানেজার । তর্কিত চেকটি আমার ইহা সত্য। ইহা সত্য নয়, আমি এবং জি,এম স্বাক্ষর করে মালামাল রেখেছি। তর্কিত চেকটি আমার। চেকে আমার স্বাক্ষর করা আছে।”.

In ***Md. Abul Kaher Shahin vs. Emran Rashid and another,*** Criminal Appeal Nos. 63-66 of 2017, (date of judgment; 18.02.2020, published in the website of the Supreme Court of Bangladesh), the important question was while considering the charge brought under Section 138 of the N.I. Act, the Court is empowered to examine the defence case or not. In other words, whether the Court shall examine the authenticity of the cheque only or it shall examine and consider the bonafide of the claim of the complainant and the defence case as appear in materials available on record. It has been held by the Appellate Division,

> “The accused person can prove the non-existence of a consideration by raising a probable

> defence. If the accused discharges the initial onus of prove showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift to the complainant. He will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to grant of relief on the basis of negotiable instrument. Where the accused person fails to discharge the initial onus of proof by showing the non existence of the consideration, the complainant would invariably be held entitled to the benefit of presumption arising under section 118(a) of the Act in his favour. To disprove the presumption, the accused person has to bring on record such facts and circumstances upon consideration of which the Court may either believe that the consideration did not exist or its non existence was so probable that a prudent man would under the circumstances of the case, shall not act upon the plea that it did not exist". *(emphasis supplied)*

It has been further held in the above mentioned case,

> "However, the court need not insist in every case that the accused should disprove the non-existence of consideration and debt by leading direct

> evidence because the existence of negative evidence is neither possible nor contemplated. At the same time, it is clear that bare denial of the passing of consideration apparently would not serve the purpose of the accused. Something which is probable has to be brought on record for getting the burden of proof shifted to the complainant. The burden of proof of the accused to disprove the presumption under sections 118 and 138 of the Act is not so heavy. The preponderance of probability through direct or substantial evidence is sufficient enough to shift the onus to the complainant. Inference of preponderance of probabilities can be drawn from the materials on record and also by reference to the circumstances upon which the party relies". *(emphasis supplied)*

Section 118 of the N.I. Act is an example of a reverse onus clause. In ***Md. Abul Kaher Shahin vs. Emran Rashid*** (supra), the apex Court has set the principle that in order to rebut the statutory presumption, all that an accused is required is to establish 'preponderance of probability' or raising a 'probable defence' that the existence of consideration was improbable or doubtfulor or the same was illegal. In so doing, the materials on record and the circumstances can be relied upon. It is not necessary that the

accused must step into the witness box to discharge the burden of proof (***K. Prakashan vs. P.K. Surenderan***, 2008 CRIMINAL (SC) 138) or adduce evidence of his own (***Rangappa vs. Mohan***, MANU/SC/0376/2010=AIR 2010 SC 1898). If the prosecution feels that the accused has succeeded in rebutting the statutory presumption and/or that the case is slipping out of its hand, the prosecution is always at liberty to re-call its witness(es) and/or take recourse to Section 540 of the Cr.P.C., as the case may be, to prove its case, the standard of proof being beyond reasonable doubt.

Reverting back to the cases in hand, neither the prosecution nor the defence produced any documentary evidence to prove or disprove consideration and business transaction between the parties. PW1 (authorised agent of the complainant company) had seen the accused for the first time in the Court. He knows nothing about the business transactions between the parties which is the foundation of the prosecution case. PW1, in fact, does not possess any knowledge, let alone due knowledge, regarding the alleged business transactions.

The defence case, on the other hand, as narrated by DW1 and DW2 that the accused refused to do business with the complainant without agreement, that he signed advanced cheques and went abroad, that the General Manager (G.M) of his business enterprise used the said cheques and did business with the complainant of

which the accused was not aware of, that the accused filed criminal case against the said G.M. in connection of which he is in jail custody-could not be disproved by the prosecution. Applying the test of 'preponderance of probability'/'probable defence', this Court is of the view that the defence has successfully rebutted the statutory presumption of consideration. Thus, the onus to prove, standard being 'beyond reasonable doubt', that the cheques were drawn for consideration, shifted to the prosecution, but it failed to discharge the onus and the foundation of the prosecution case (business transactions and passing of consideration) has fallen apart. Hence, the inevitable conclusion is that in spite of facts that the cheques in question were signed by the accused and the complainant company was the payee, those were drawn without consideration.

At this juncture, the learned Advocate for the complainant refers to the case of ***Rangappa*** (supra) and submits that the accused received the statutory notice, but did not reply to the same which leads to the inference that there is merit in the complainant's version of the case. The argument is misconceived. Inference drawn from the non-reply to the statutory notice does not override the successful rebuttal of presumption of consideration.

The trial Court passed the impugned judgments in a slipshod manner and failed to consider that the cheques were not drawn for

consideration. The prosecution, from filing of the case till end of the trial, conducted case in a shoddy and clumsy manner. The judgment of conviction cannot be sustained for the reasons discussed above.

In the result, both the appeals are allowed. The impugned judgment and order of conviction and sentence dated 15.10.2019 passed by the learned Sessions Judge, Narayanganj in Sessions Case No. 681 of 2018 arising out of C.R. Case No. 1115 of 2017 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 and the judgment and order of conviction and sentence dated 09.10.2019 passed by the learned Sessions Judge, Narayanganj in Sessions Case No. 682 of 2018 arising out of C.R. Case No. 1116 of 2017 convicting the appellant under Section 138 of the Negotiable Instruments Act, 1881 are set aside. The appellant is acquitted of the charge. He is released from the bail bond. The Court below is directed to return the deposit to the appellant which he has made in the trial Court before filing the appeals forthwith.

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