

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

Dated- 15.01.2020

Present:

Mr. Justice Syed Md. Ziaul Karim

And

Mr. Justice Mustafa Zaman Islam.



Criminal Miscellaneous Case No. 20691 of 2014. (Arising out of Sessions Case No. 876 of 2013, arising out of C.R. Case No. 1723 of 2012 (Kotwali Zone), now pending before the Court of Metropolitan Joint Sessions Judge, 4th Court, Chittagong).

Md. Imtiaz Salim, son of late Haji Mohammad Nurul Haque Proprietor of Messers Madina Trading Corporation, of 118/5, Amir Marker, Khatungonj, Post Office-Lamar Bazar, Police Station-Kotwali, District-Chittagong. At Present Nandan Kanon. House of Idris Chairman, Police Station-Kotwali, District-Chittagong. Permanent address of Sheikh Chander Para, West Kanai Madari, Post Office-Pathandandi, Police Station-Chandanish, District-Chittagong.

.....Accused Petitioner.

=VERSUS=

1. Mohammad Shamsul Haque, son of late Haji Nurul Haque. Proprietor of Messers Shamsul Alam, office-398/A, Khatungonj, Salma Tower, Police Station-Kotwali, District-Chittagong. At Present-Koygram, Fazil Khar Hat, Police Station-Patiya, District-Chittagong.

.....Complainant-Opposite party.

2. The State,

..... Opposite Party.

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District : Chattogram.

**In the Supreme Court of Bangladesh
High Court Division
(Criminal Miscellaneous Jurisdiction)**

Present:

Mr. Justice Syed Md. Ziaul Karim

And

Mr. Justice Mustafa Zaman Islam

Criminal Miscellaneous Case no. 20691 of 2014.

1. Md. Imtiaz Salim,
.... Accused-petitioner.

Versus

1. Mohammad Shamsul Haque,
..... Complainant-opposite party.

2. The State.
.....State- opposite party.

No one appears.

..... For the accused petitioner,

Mr. Cumar Debul Dey, Advocate.

...For the complainant-opposite party no.1.

Mr. Md. Asaduzzaman Monir, D.A.G. with

Mr. B.M. Abdur Rafell, D.A.G. and

Mr. Bahauddin Ahmed, A.A.G. and

Mr. Md. Kamal Haider, A.A.G.

..... For the State-opposite party no.2.

Heard on: 14-01-2020, and

Judgment delivered on: 15-01-2020.

Syed Md. Ziaul Karim, J:

By this Rule, the accused-petitioner by
filing an application under section 561A of the Code of

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Assistant Registrar
High Court,
Dhaka.

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Criminal Procedure (briefly as the Code) sought for quashing of the proceedings of Sessions Case no. 876 of 2013 arising out of C. R. Case no. 1723 of 2012 (Kotwali Zone) under section 138 of the Negotiable Instruments Act, 1881(briefly as the Act), pending in the Fourth Court of Metropolitan joint Sessions Judge, Chattogram.

Material facts leading to this Rule are that on 31-07-2012 opposite party no.1 as complainant filed a petition of complaint in the Court of Chief Metropolitan Magistrate, Chattogram, against the accused petitioner alleging that there was a business transaction between them for a long time and thereafter outstanding dues stood for Tk. 2,99,86,427/-. On repeated request the accused failed to repay the same, thereafter on 29.05.2012 the accused issued a cheque for Tk. 50,00,000/- in favour of him, the same was dishonoured on 03-06-2012 for the cause of insufficient of fund.

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Afterwards complying all legal formalities he filed the instant case.


On receipt of the complaint the learned Magistrate took cognizance of the offence and later charge was framed under section 138 of the Act. The case is now pending for trial before the fourth court of Metropolitan Joint Sessions Judge, Chattogram.

Feeling aggrieved the accused petitioner preferred the instant application and obtained the present Rule.

No one appears on behalf of the accused petitioner to support the Rule. In view of the facts it is an old case of 2012, we are inclined to take it up for disposal on merit considering the materials on record.

The learned Advocate appearing on behalf of the complainant opposite party no.1 and the learned Deputy Attorney General appearing on behalf of the State opposite party no. 2 oppose the

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Assistant Officer
Bangladesh Supreme Court,
High Court Division, Dhaka.

Rule. Their common contention are that the learned Judge of the Court below after considering the entire materials on record rightly framed charge which calls for no interference by this Court.

In order to appreciate their submissions we have gone through the record and given our anxious consideration to their submissions.

On going to the materials on record it transpires that complainant in its petition of complaint categorically narrated the manner of crime committed by the accused. Admittedly out of business transaction there was an outstanding dues which was not paid by the accused. It is the specific case that the accused issued a cheque for Tk. 50,00,000/- knowing fully well that he has no fund with the Bank. Subsequently the same was dishonored by the Bank for the cause of insufficient of fund. The accused malafide and deliberately issued the cheque. The learned Magistrate after considering the entire materials on record rightly


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took cognizance of the offence and later charge was framed. When the ingredients of offence discloses in FIR, the proceedings cannot be quashed. With this regard reliance can be placed in the case of Kabir alias Bakiruddin and other vs. The State 16 BLD(AD)290.

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 15 days of receipt of the notice. The accused admitted about the loan, issuance of cheques by him and dishonour of cheques 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

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Assistant Officer
Bangladesh High Court,
High Court Division, Dhaka.

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Instruments Act. (Relied Amir Hossain vs. MA Malek and others 56 DLR (AD)146). Since under section 138 of the Act an offence is committed if a cheque is dishonoured and if payment is not within 15 days after receipt of a legal notice, criminal proceeding can be proceeded independently of the civil suit. Since there is a prima-facie case the criminal proceedings cannot be quashed. (Relied Md. Monzur Alam vs. State and another 2002 BLD (AD) 228= 55 DLR(AD)62). Under section 138 of the Negotiable Instruments Act, an offence is committed if a cheque is dishonoured and if payment is not made within 15 days after receipt of a legal notice. So, if an offence is committed under the above section, the Criminal Court will be competent to try the case and pendency of civil suit will not put any hindrance to proceed with the criminal case because there is no possibility of any conflicting decision in the civil suit and criminal cases. (Relied Monzur Alam (Md) vs. State 9 BLC 88). Whether the accused received the legal notice

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or not, it is merely a disputed question of fact and the same should be decided in trial. The plea of the accused is nothing but the defence plea. Be that as it may, the proposition of law is now well settled that on the basis of defence plea or materials the criminal proceedings should not be stifled before trial, when there is a prima facie case for going for trial. (Relied Shamsul Alam vs. State 60 DLR 677).

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

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Assistant Bank Officer
Bangladesh High Court,
High Court Division, Dhaka.

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to honour the cheque or that it exceeds the amount 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

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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.

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Assistant Secret. Officer
Bangladesh Supreme Court,
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[(1A)] 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

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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 subsection (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)—.

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- (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."

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High Court Division Dhaka.

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

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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 i.e. dishonoured on any

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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. By no logic, it can be said that the drawer of the cheque does not know the consequence if a cheque is returned unpaid/dishonoured for the reasons as provided in sub-section (1) of section 138 of Act, 1881, because ignorance of law is no plea.

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The proviso to sub-sec (1) of section 138 of the Act 1881 is of prime importance and in fact, the cause of action to file a petition of complaint complaining the commission of an offence under the section arises only after observance of the formalities as detailed therein. If we read carefully clauses (b) and (c) of the proviso to sub-section (1) of section 138 of the Act, 1881 and clause (c) of section 141 thereof, it would appear that cause of action to file a petition of complaint complaining of an offence under sub-section (1) would arise only when the drawer of the unpaid/dishonoured cheque fails to make the payment of the amount of money of such cheque (s) 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 notice served under clause (b) of the proviso to sub-section (1) of section 138, though the offence shall be deemed to have been completed after the cheque is returned unpaid ie dishonoured on any of the grounds mentioned therein.

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It appears to us that the purpose of the notice as contemplated in clause (b) of the proviso to sub-section (1) of section 138 of the Act, 1881 is to give the drawer of the cheque (s) a cheque to make the payment of the amount of money of such cheque (s). So we do not see any loopholes or legal lacuna in giving one notice to the drawer of the unpaid/dishonoured cheque (s) demanding for the payment of the amount of money unpaid/dishonoured cheque (s). On a compact reading of section 138, it does not appear to us that for every unpaid/dishonoured cheque, separate notice has to be given to the drawer of such cheque (s) demanding payment of the amount of money mentioned therein. The Act, 1881 being a Special Law, its provisions have to be strictly adhered to and it must also be seen that the purpose of the law is not frustrated for putting too many unnecessary legal bar upon the payee or, as the case may be, upon the holder in due course of the cheque in approaching the court for hauling up the

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drawer of the cheque (s) who issued the same without arranging sufficient fund against the issuance of such cheque (s), it does not require any further elucidation for the proposition that the Act, 1881 being a special statute, its provisions shall have preference over the provisions of the Code. In this regard, reference may be made to sub-section (2) of section 5 of the Code.

In the context, we must also remember that in the case of commission of an offence under penal Code or under any other statute (as now in prevalence) cause of action to lodge a first information report or to file a petition of complaint, as the case may be, arises immediately after an offence is committed or an offence is found to have been committed, but in the case of an offence committed under sub-section(1) of section 138 of the Act, 1881 cause of action for filing a petition of complaint would arise only after compliance with the provision of clause (b) of the proviso to the sub

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section(1) coupled with the failure of the drawer of the cheque(s) to make the payment of the unpaid/dishonoured cheque(s) to the payee or as the case may be, to the holder in due course of the cheque(s) within the time mentioned in clause (c) to the proviso. To be clearer, the crucial fact to be considered in deciding the issue whether separate petition of complaint shall have to be filed for the commission of offence under the section against each unpaid/dishonoured cheque(s) or one complaint would do in respect of more than one cheque(s) shall depend upon the notice to be served under clause (b) by the payee, or as the case may be, by the holder in due course of the cheque read with clause(c) of the proviso to sub-section (1) of section 138 of the Act, 1881. In this regard, it is very pertinent to state that in both the impugned proceedings, one notice for each of the 6(six) unpaid/dishonoured cheque(s) was issued and admittedly the respective accused-petitioners failed to make the payment of the amount of the money of

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the unpaid/dishonoured cheque(s) within thirty days of the receipt of the said notices. As noted earlier, the purpose of the notice is to give the drawer a chance to make the payment against the cheque(s) which he issued.

We also do not see any prejudice on the part of the accused-petitioners for filing one complaint case against each set of 6(six) unpaid/dishonoured cheque(s) giving rise to the sessions cases in question, rather they should feel more relaxed, because had the payee, the complainant filed six petitions of complaint by giving separate notices demanding the payment of the amount of money against each unpaid/dishonoured cheque, then the accused would have to appear in six cases which would have entailed many legal ordeals on them. Further, if for every unpaid/dishonoured cheque a separate case be filed by giving separate notice then it would have created unnecessary hardship upon the payee, or,

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as the case may be, to the holder in due course of the cheque which as it appears to us is not the intention of the legislature. Had it been so, the legislature would have said so.

The next point to be decided is whether a proceeding under section 138 of the Act, 1881 would lie against the drawer of the unpaid/dishonoured cheque(s) when it/he obtained the loan (here the accused petitioners) by creating equitable mortgage and the complainant company had the option to recover the loan money by selling the mortgaged property even the cheque(s) returned unpaid.

A close reading of sub-section (1) of section 138 of the Act, 1881 shows that it has nothing to do with the recovery of loan amount. The whole scheme of the law as discussed hereinbefore, is to haul up the drawer of the unpaid/dishonoured cheque(s) for not arranging the funds against the issuance of such cheque(s) and then its/his failure.

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Bangladesh Supreme Court,
High Court Division, Dhaka.

to make the payment of the amount of the money of the unpaid/dishonoured cheque(s) on demand by the payee or, as the case be, by the holder in due course of the cheque(s) in writing within thirty days of the receipt of such notice a provided in clauses (b) and (c) respectively of sub-section (1) of section 138 of the Act, 1881.

As discussed above, an offence under section 138(1) of the Act, 1881 shall be deemed to have been committed when any cheque(s) 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 for the reasons stated therein and such unpaid/dishonoured cheque(s) gives rise to initial cause of action to the payee, or, as the case may be, to the holder in due course of the cheque(s) for filing a petition of complaint as provided in clause (a) of section 141 of the Act, 1881 subject to fulfillment of the conditions as

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detailed in clauses (a) (b) and (c) of the proviso to sub section (1) of section 138 of the Act, 1981 and attain its maturity after the drawer of such unpaid/dishonoured cheque(s) fails to make the payment of the amount of money of such cheque(s) within the period of thirty days of the receipt of the notice served under clause (b). In this regard, it is also significant to note that sub-section (3) of section 138 of the Act, 1881 has clearly provided that notwithstanding any thing contained in sub-sections (1) and (2) thereof, the holder of the cheque(s) shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque(s) remains unrealized.

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Court,
Dhaka.

We should bear in mind, credibility of testimony oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. When dealing with the serious question of guilt or innocence of persons charged



with crime, the following principles should be taken into consideration.

a) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecutor.

b) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused.

c) In matters of doubt it is safer to acquit than to condemn, for it is better that several guilty persons should escape than that one innocent person suffer.

d) There must be clear and unequivocal proof of the corpus delict.

e) The hypothesis of delinquency should be consistent with all the facts proved.

In spite of the presumption of truth attached to oral evidence under oath if the Court is

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not satisfied, the evidence inspite of oath is of no avail.

A "Charge" corresponds to an "indictment" in English Law and is very much more than a mere form. It is a precise formulation of specific accusation made against a person. Charge has to be framed on the basis of the material placed before the Trial Court and while doing so the Court is not bound by the inquiry report submitted under section 202 of the Code of Criminal Procedure or in a Police challan case by the report submitted under section 173 of the Code of Criminal Procedure.

A charge is an important step in a criminal proceeding. It separates the inquiry stage from trial. The whole object of framing a charge is to enable the defence to concentrate its attention on the case that he has to meet, and if charge is framed in such a vague manner that the necessary ingredients of the offence with which the accused is convicted are not brought out in the charge, then

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the charge is defective. The framing of a proper charge is vital to a criminal trial and this is a matter on which the Magistrate or Judge should bestow the most careful attention. A charge should be carefully drawn up in accordance with the offence disclosed. The charge should be precise in its scope and particular in its details. A charge is defined as a 'precise formulation of the specific accusation made against a person who is entitled to know its nature at the very earliest stage. The necessity of a system of written accusation specifying a definite criminal offence is the essence of criminal procedure.

The charge which the accused is called upon to plead is a very important document. It should be drawn up and considered with extreme care and caution, so that accused may have no doubt whatever as to the offences to which he is called upon to answer and the Judge of the Appellate Court also may have no doubt upon the

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matter. The word 'Ground' means basis, foundation or valid reason. The whole object of framing a charge is to enable the defence to concentrate its attention on the case that he has to meet. Conditions for framing of a charge are (i) presumption of the commission of an offence on the materials before the Court and (ii) offences triable exclusively by a competent Court.

In the case of Mohd. Aqil and another Vs. The State 1988 CrL. L.J. 1484 held:

" Framing of charge- Matters to be considered by Court indicated.

For the purpose of framing a charge the Court is required to consider judicially as to whether on consideration of the materials on record, it can be said that the accused has reasonably connected himself with the offence alleged to have been committed and that on the basis of the said material there is reasonable probability or chance of the accused being found guilty of the offence alleged. If

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High Court Division, Dhaka.



the answer is in the affirmative, the Court will be at liberty to presume "that the accused has committed the offence" as mentioned in S. 228 for the purpose of framing the charge. In finding out a prima-facie case not only the F.I.R. or complaint but even the statements of the witnesses recorded under S. 161 although the same may have been recorded after some delay during the investigation of the case are to be taken into consideration and if from all other material, a prima facie case is made out against the accused then the Magistrate has no option but to frame a charge against the accused. The Court is not expected to make a roving enquiry in the pros and cons of the matter and weigh the evidence as if he was conducting a trial. However, in a case, if two views are possible and the Judge is satisfied that evidence produced before him while giving rise to some suspicion does not give rise to grave suspicion against the accused, he will be fully within his right to discharge the accused."

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On further exploration of the materials on record it transpires that the complainant categorically narrated the manner of crime committed by the accused. The learned Judge after considering the entire materials on record rightly framed charge under Section 138 of the Act against the accused. Moreso, in defence the accused denied the entire allegations. So, when there is such denial, the question of innocence does not arise. With this regard reliance has been placed in the case of Abdur Rahim alias A.N.M. Abdur Rahman Vs. Enamul Haq and another 43 DLR (AD)-173. All that is required at the stage of framing charge is to see whether the prima-facie case regarding commission of certain offence is made out. The truth veracity and effect of evidence which prosecution proposes to adduce at the time is not to be meticulously judged at the stage of framing charge. In the instant case the accused stand indicted for offence punishable under Section 138 of the Act. Cognizance has been taken under the said section.

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Assistant District Officer
Bangladesh High Court,
High Court Division, Dhaka

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We have meticulously examined the allegations made by the complainant and we find that the offence punishable under Section 138 of the Act has been clearly disclosed in the instant case against the accused. We have gone through the grounds taken in the petition of Misc. case and we find that such grounds are absolutely the disputed question of facts and the same should be decided at trial. The pleas of the petitioner are nothing but the defence plea. Be that as it may the proposition of law is now well settled that on the basis of defence plea or materials the criminal proceedings should not be stifled before trial; when there is a prima-facie case for going for trial. In view of such facts the grounds taken in the petition of Misc. case are not the correct exposition of law. Moreso interruption of the course of Justice will set up a wrong precedent by which the course of justice instead of being advanced readily been stifled inasmuch as the grounds advanced before us are not correct or legal exposition of law. Therefore we

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hold that there are sufficient grounds for proceeding against the accused for going for trial under Section 138 of the Act. To that end in view we are at one with the learned Judge of the Court below regarding framing of charge against the accused. In view of the above we failed to discover any merit in this Rule. Thus the Rule having no merit fails.

Moreover, the impugned proceedings in its entirety is well founded in the facts and circumstances of the case. So the grounds advanced by the learned Counsel for the accused petitioners are not the correct exposition of law. On the contrary the submissions advanced by the learned Counsels for the opposite parties prevail and appear to have a good deal of force.

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

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Assistant Bench Officer
Bench Officer, Supreme Court,
High Court Division, Dhaka.



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legal infirmities which calls for no interference by this Court.

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

ASHRAF-UL-ALAM
Assistant District Officer
Magistrate, Supreme Court,
High Court Division, Dhaka.

In view of the facts, it is an old case of 2012, we are inclined to direct the learned Judge of the Court below to dispose of the case as early as possible preferably within 3(three) months from the date of receipt of this order.

The office is directed to communicate the order at once.

Justice Syed Md. Ziaul Karim

Mustafa Zaman Islam, J:

I agree.

Justice Mustafa Zaman Islam

Memo No..... Dated:

Copy of Court's Judgment dated 15.01.2020 forwarded to

1. Metropolitan Joint Sessions Judge, 4th Court, Chittagong for information and necessary action with reference to this Courts web No. 2020017572.

Type by: *M.H. Monir*
Date by: 30.06.2022

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Examined By
30 JUN 2022

[Signature]
Superintendent
30 JUN 2022
মোঃ বোরহান উদ্দিন
সুপারিনটেনডেন্ট

By Order
[Signature]
(Md. Zakir Hossain Patwary)
Assistant Registrar
Phone: 0222-3358584
30 JUN 2022