14 SCOB [2020] AD

APPELLATE DIVISION

PRESENT:
Mr. Justice Syed Mahmud Hossain
Chief Justice
Mr. Justice Hasan Foez Siddique
Ms. Justice Zinat Ara
Mr. Justice Md. Nuruzzaman

CRIMINAL APPEAL NOS.63-66 OF 2017.
(From the judgment and order dated 31.08.2016 passed by the High Court Division in Criminal Appeal Nos.2116-2119 of 2016.)

Md. Abul Kaher Shahin **:** -- Appellant.
(In all the cases)

=Versus=

Emran Rashid and another: --Respondents.
(In all the cases)

For the Appellant: (In all the cases)
For the Respondent No.1: (In all the cases)
For the respondent No.2 (In all the cases)

Mr. Mansurul Haque Chowdhury, Senior Advocate,
instructed by Mr. Zainul Abedin, Advocate-on-Record.

Mr. Moudud Ahmed, Senior Advocate, instructed by
Mr.Syed Mahbubar Rahman, Advocate-on-Record.
Mrs. Shirin Afroz , Advocate-on-Record.

Date of hearing : 04.12.2019 & 29.01.2020. Date of Judgment: 18-02-2020.

Dishonour of cheque, Section 118,138 of The Negotiable Instrument Act, 1881 ;

Once there is admission of the execution of the cheque or the same is proved to have been executed, the presumption under section 118(a) of the Act is raised that it is supported by consideration. The category of "stop payment cheque" would be subject to rebuttal and hence it would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal. 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 . ... (Para-17)

Where the amount promised shall depend on some other complementary facts or fulfillment of another promise and if any cheque is issued on that basis, but that promise is not fulfilled it will not create any obligation on the part of the drawer of the cheque or any right which can be claimed by the holder of the cheque. ... (Para-24)

A person issuing the cheque cannot escape liability even if there is a stoppage of payment of cheque, unless he disproves the same for the other reasons. In case a cheque issued by a person in favour of another is dishonoured by the bank for want of funds, the holder of the cheque is entitled to the amount as reflected in the cheque since cheque is a negotiable instrument governed under the Act. ... (Para-17)

JUDGMENT

Hasan Foez Siddique, J:

1.These Criminal Appeals being Appeal Nos. 63-66 of 2017 are directed against the common judgment and order dated 31.08.2016 passed by the High Court Division in Criminal Appeal Nos.2116-2119 of 2016 reversing those dated 17.02.2016 passed by the learned Metropolitan Sessions Judge, Sylhet in Sessions Case Nos.3079 of 2013, 172 of 2014, 174 of 2014 and 3080 of 2013.

2. Learned Sessions Judge, Sylhet convicted the respondent No.1 (the respondent) under Section 138 of the Negotiable Instrument Act, 1881 (the Act) in all the cases and sentenced him to suffer simple imprisonment for a period of 1(one) year and to pay tk.2,00,00,000/-(two crore) in Session Case No.3079 of 2013, simple imprisonment for a period of 1(one) year and to pay fine tk.2,00,00,000/- (two crore) in Session Case No.172 of 2014, simple imprisonment for a period of 1(one) year and to pay fine of tk.3,00,00,000/- (three crore) in Session Case No.174 of 2014 and simple imprisonment for a period of 1(one) year and to pay fine of tk.2,00,00,000/- (two crore) in Session Case No.3080 of 2013.

3. The complainant, in all the petitions of complaint, stated that the respondent, in order to pay the demand pursuant to the agreement No.1897 of 2012 of Gulshan Sub-Registry Office, issued 4(four) Cheques on 01.07.2013 in favour of the complainant for a sum of tk.1,00,00,000/- (one crore) vide Cheque No.0559568, tk.1,00,00,000/- (one crore) vide Cheque No. 0559569, tk.1,00,00,000/- (one crore) vide cheque No.0559570, tk.1,50,00,000/- (one crore fifty lac) vide cheque No. 0559571. The complainant presented those 4(four) cheques in the bank for encashment but all those cheques were dishonoured by the bank with endorsement that, "Payment stopped by drawer". The appellant served notices upon the respondent requesting him to pay the cheques amount who received the same but he did not pay any amount.

4. Thereafter, the complainant appellant observing all legal formalities as contemplated under the Act had filed four separate complaint cases. The trial Court convicted and sentenced the respondent under section 138 of the Act and sentenced him as aforesaid. The respondent, after making statutory deposit, preferred aforesaid 4(four) criminal appeals in the High Court Division and the High Court Division heard and disposed of all the appeals analogously and acquitted the respondent of all the charges by the impugned judgment and order dated 31.08.2016. Thus, the complainant appellant has preferred these 4(four) appeals in this Division upon getting leave.

5. Mr. Mansurul Haque Chowdhury, learned Senior Counsel appearing on behalf of the appellant, submits that the High Court Division committed subsential error in acquitting the respondent ignoring the spirit and object of the provision section 138 of the Act. He submits that after deletion of the words "for the discharge in whole or in part of any debt or other liability" by the Act No. XVII of 2002 , the Court is empowered to consider the contents of

the cheque and cheque only and it can not examine whether same was issued for the discharge of any debt or liability or not. He, lastly, submits that the High Court Division improperly dealt of the issues and points outside the purview of the registered agreement between the complainant and accused respondents, thereby erroneously interfered with the order of conviction. Mr. Chowdhury relied upon the case of Alauddin (Md.) Vs. State, reported in 24 BLC (AD)139.

6. Mr. Moudud Ahmed, learned Senior Counsel appearing for the respondent, submits that though the words "for the discharge in whole or in part of any debt or other liability" from section 138 of the Act have been deleted from the statute, the Court is empowered to examine the defence case as well as the bonafide of the claim of the drawee. He submits that the provision of section 138 of the Act is not an isolated provision and said provision has not been started with non-obstante clause rather it has been specifically mentioned that the said provision shall have to be effective, "without prejudice to any other provisions of this Act", the High Court Division upon proper appreciation of the evidence and law related to the case rightly disbelieve the claim of the appellant. He submits that the provisions of sections 4, 6, 8, 9, 43, 58, 118 and 138 of the Act should be read and consider together to find out the true intent of legislation and to ascertain the bonafide of the demand of the drawee and to fix liability of the drawer, the High Court Division right did so and acquitted the respondent. He further submits that in the petitions of complaint and evidence, the complainant admitted that the disputed cheques were issued pursuant to an agreement dated 13.03.2012 but complainant did not act as per terms and conditions of the said agreement, so, he was not entitled to get any amount on the basis of the agreement, the High Court Division elaborately discussed and considered the evidence and found the defence case acceptable and, thereby, acquitted the respondent. In support of his submission, Mr. Moudud Ahmed relied upon the case of Shahidul Islam Vs. Bangladesh and Others , reported in 2 SCOB (2015)HCD-1.

7. Admittedly, the respondent No.1 issued 4 different cheques for the amount mentioned above which were dishonoured with endorsement, "Payment stopped by drawer". The complainant, issuing statutory notices upon the respondent and upon complying all other legal provisions, filed four separate petitions of complaint. The trial court framed charge against the respondent No.1 for commission of offence punishable under section 138 of the Act in each case. The respondent denied the charges framed against him in all the cases and claimed to be tried. The prosecution examined 1(one) witness in support of its case and defence examined none. P.W.1 complainant Md. Abul Kaher Shahin produced the copy of agreement No.1897 of 2012 dated 13.03.2012 (Exhibit-"5"). From the trend of cross examination of the P.W. 1 it appears that the defence case was that the complainant did not work as per terms and conditions of the agreement (exhibit-5) and in the event of transfer of the property of the respondent, the complainant did not play any role so he was not entitled to get any commission pursuant to the agreement and, thus, the respondent stopped the payment of the amount to the appellant by giving information to the bank.

8. The important question in this case is that while considering the charge brought under section 138 of the 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 appeared in materials available on record.

9. A statute is not enacted to create a vacuum but in a framework of circumstances so as to give a remedy for a known state of affairs. The intention for the legislation of the Act has

been stated in the preamble where it has been mentioned; "whereas it is expedient to define and amend the law relating to promissory notes, bills of exchange and cheques, it is hereby enacted as follows:" Though the preamble is not of the same weight as an aid to construction of the section of the Act as are other relevant enacting words to be found elsewhere in the Act, or even in related Acts it may be legitimately consulted for the purpose of solving any ambiguity or fixing the meaning of words which may have more than one, or of keeping the effect of the Act with its real scope, whenever the enacting part is in any of these respects open to doubt.

10. Old Chapter XVII of the Act was titled, "Notaries Public" of the Negotiable Instrument Act, 1881. The same was substituted by new Chapter XVII i.e. "On penalties in case of dishour of certain cheques for insufficiency of funds in the Account" in the year 1994. Perhaps new chapter XVII was enacted with a view to encourage the culture of use of cheque and enhancing the credibility of the instrument. In the case of Dalmia Cement (Bharat) Ltd. V. Galaxy Traders and Agencies Ltd (AIR 2001 SC 676) the Supreme Court of India has referred to the object of section 138 of the Act holding that the Act was enacted and section 138 of the Act thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitiate the activities in the trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged.

11. The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there being deviations from the general law and procedure provided for the redressal of the grievances to the litigants.

In the case of Alauddin V. State (Supra), while disposing the case arising out of an application under section 561A of the Code of Criminal Procedure, we have observed that the offence punishable under section 138 of the Act is not a natural crime like hurt or murder. It is an offence created by a legal fiction in the statute. It is a civil liability, transformed into criminal liability under restricted conditions by way of amendment of the Act. This is to be remembered that the principle "*quando lex aliquid alicui concadit concedere videturet id sine quo res ipsel esse non potest",* that is, all the course whether civil or criminal, possess, in the absence of any express provision as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice. The intention of the legislature is to see that the concerned is made to pay the amount to the payee. Indeed, the complainant's interest lies primordial in recovering the money given rather than sending the drawer of the cheque to jail.

12. It is relevant here to reproduce the provisions of Sections 5, 6, 43, 118, 138 and 141 of the Act which are necessary for adjudication and to draw conclusion over the dispute in hand. The contents of those sections are as follows:

"Section 5. "Bill of exchange", - "A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay on demand or at a fixed or determinable future time a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument."

6. Cheque- A cheque is a bill of exchange drawn on a specified banker and not

expressed to be payable otherwise than on demand." 43.**Negotiabe instrument made, etc., without consideration.-** A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.

Exception 1.-No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.

Exception II.- No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.

118. Presumptions as to negotiable instruments of consideration.- Until the contrary is proved, the following presumptions shall be made:

(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;

(b) that every negotiable instrument bearing a date was made or drawn on such date;

(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

(d) that every transfer of a negotiable instrument was made before its maturity;

(e) that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

(f) that a lost promissory note, bill of exchange or cheque was duly stamped;

(g) that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him.

138. [(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 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 provision 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:

(underlined by us)

(3) Notwithstanding anything contained in sub- section (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.]

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.

[(1A) The notice required to be served under clasue (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 upto 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- section (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. 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.]]"

13. A cheque is a bill of exchange drawn on a banker payable on demand. A bill of exchange is a negotiable instrument in writing containing instruction to a third party to pay a stated sum of money at a designated future date or on demand . A cheque on the other hand, is a bill of exchange drawn on a bank by the holder of an account payable on demand. Thus, a cheque under section 6 of the Act is also a bill of exchange but it is drawn on a banker and is payable on demand. An instrument can be construed as a cheque only if such document satisfies the requirements under section 5 read with section 6 of the Act. So on the facts and circumstances of each case, the Court will have to examine whether the instrument involved in cheque as defined under section 5 read with section 6 of the Act or not.

Though section 141 of the Act begins with non-obstante clause carving out an exception to the provisions of the Code of Criminal Procedure. Section 141 (C) of the Act clearly provides that Court of Sessions shall try the offence punishable under Section 138 of the Act. That is, offence alleged to have committed under section 138 of the Act is Sessions triable.

14. Chapter XXIII of the Code of Criminal Procedure consisting of sections 265A to 265L deal with the procedure to be followed when the case is tried. Those provisions cast a duty upon the Sessions Judge to apply his judicial mind in considering the materials and evidence adduced by the prosecution in order to come to a decision whether charge framed against accused person is proved or not. If after recording evidence and on perusal of the same and hearing the parties the Sessions Court considers that the evidence adduced by the prosecution are not sufficient and reliable to convict the accused, the Court shall record order of acquittal under section 265H of the Criminal Procedure Code. Since the case under section 138 of the Act is Sessions triable case, the trial Judge shall follow the aforesaid provisions of the Code of Criminal Procedure for holding trial.

15. Mr. Moudud Ahmed, learned Senior Counsel, giving more emphasis upon the words, "without prejudice to any other provisions of this Act" in section 138 of the Act, submits that those words clearly indicate that section 138 is not an isolated provision and other provisions of the Act have not been excluded in deciding the case under section 138 of the Act.

The word "without prejudice to any other provisions of the Act" mentioned in section 138 clearly indicate that anything contained in the provisions following this expression is not intended to encapsulate the generality of the other provisions of the Act. It is well settled that the enumeration of specific matter "without prejudice to the generality" of a particular provision does not restrict the general application of that provision to the matters enumerated because the words "without prejudice" have the effect of preserving the full effect of the general provisions and also because the Rule of *ejusdeme generis* has no universe application. Those words clearly indicate that the provision of section 138 did not make any embargo in the application of other provisions of the Act. In the case of Raja Gowl Rajasima Rao V. State of AP. reported in AIR 1973 AP236 it has been observed that when general provisions are followed by certain particular provisions and when it is stated that the particular provisions are without prejudice to the general provision the particular provisions do not cut down the generality of the meaning of the preceding general provisions. That is the submission made by Mr. Ahmed has got force.

16. In this case prosecution was launched by the complainant for the offence punishable under section 138 of the Act basing on an agreement between the complainant appellant and the respondent pursuant to which the respondent issued the disputed cheques. Agreement (ext.5) produced by the complainant shows that he claimed the cheques amount as commission if he is able to sell the respondent's property.

17. There were 4 cheques issued by the respondent pursuant to one agreement which were presented for collection and those were returned with the endorsement, "payment stopped by drawer". Merely, because the draweer issued notice to the bank for stoppage of the payment will not preclude an action under section 138 of the Act by the drawer or the holder of a cheque in due course. A person issuing the cheque cannot escape liability even if there is a stoppage of payment of cheque, unless he disproves the same for the other reasons. In case a cheque issued by a person in favour of another is dishonoured by the bank for want of funds, the holder of the cheque is entitled to the amount as reflected in the cheque since cheque is a negotiable instrument governed under the Act. Once there is admission of the execution of the cheque or the same is proved to have been executed, the presumption under section 118(a) of the Act is raised that it is supported by consideration. The category of "stop payment cheque" would be subject to rebuttal and hence it would be an offence only if the drawer of the cheque fails to discharge the burden of rebuttal. 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.

18. 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. We find support of the aforesaid views in the cases of Bharat Barrel and Drum Manufacturer Co. Vs. Amin Chand Payrelal, reported in AIR 1999(SC) 1008 and Mallavarapu Kasivisweswara Rao V. Thandikonda Ramulu Firm and others reported in AIR 2008 SC 2898.

19. The Supreme Court of India in Kundan Lal Rallaaram vs. Custodian Evacuee Property, Bombay (AIR 1961 SC 1316) has declared that section 118 of the Act lays down a prescribed special rule of evidence applicable to negotiable instruments. The presumption contemplated thereunder is one of law which obliges the court to presume, inter alia, that the negotiable instruments or the endorsement was made or endorsed for consideration and the burden of proof of failure of consideration is thrown on the maker of the note or the endorser as the case may be. Relying upon the law laid down in Rameshwar Singh Vs. Bajit Lal (AIR 1929 PC 95) approved by Indian Supreme Court in Hiralal Vs. Badkulal (AIR 1953 SC 225), it was held:

"This section lays down a special rule of evidence applicable to negotiable instruments. The presumption is one of law and thereunder a court shall presume, inter alia that the negotiable instrument or the endorsement was made or endorsed for consideration. In effect it throws the burden of proof of failure of consideration on the maker of the note or the endorser, as the case may be. The question is, how the burden can be discharged? The rules of evidence pertaining to burden of proof are embodied in Chapter VII of the Evidence Act. The phrase 'burden of proof' has two meanings - one the burden of proof as a matter of law and pleading and the other the burden of establishing a case, the former is fixed as a question of law on the basis of the pleadings and is unchanged during the entire trial, whereas the latter is not constant but shifts as soon as a party adduces sufficient evidence to raise a presumption in his favour. The evidence required to shift the burden need not necessarily be direct evidence, i.e., oral or documentary evidence or admissions made by opposite party it may comprise circumstantial evidence or presumptions of law or fact."

20. When a presumption is rebuttable, it only points out that the party on whom lies the duty of going forward with evidence, on the fact presumed and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of the presumption is over. To rebut the statutory presumptions an accused is not expected to prove his defence beyond reasonable doubt as is expected of the complainant in a criminal trial. The accused may adduce direct evidence to prove that the cheque in question was not supported by consideration. 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.

21. It is clear from the agreement exhibit -5 and other materials on record in the cases that the respondent issued cheques for a sum of taka 4,50,00,000/- (four crore fifty lac) on condition that complainant shall sell the disputed property of the accused respondent as per market value and if he is able to sell the same he would be entitled to get a percentage of consideration of the property sold in view of such act. It is the defence case that the condition under which the cheque was issued had not been complied with by the complainant appellant. Thus, the respondent instructs the bank to stop the payment of cheque, accordingly, the bank returned the cheques with endorsement "payment stopped by the drawer".

22. The High Court Division being last court of facts upon elaborate consideration of the evidence both the oral and documentary has come to the conclusion that the complainant failed to take any step to sell the property of the respondent, rather the respondent and his brother and sister sold the said property to the U.S.A. Embassy and the complainant did not help the respondent in any way in that regard.

It is relevant here to quote the evidence of the complainant which he adduced before the trial court as P.W.1 which are as follows:

"আমি অত্র মামলার বাদী । আসামী ইমরান রশীদের সাথে ১৩/৩/১২ খ্রিঃ তারিখে

রেজিঃকৃত Memo নং Agreement যার নাম্বার ১৮৯৮/১২ । আসামী হাজির উপস্থিত নাই । উক্ত Agreement এর শর্তানুযায়ী আগামী ১/৭/১৩ খ্রিঃ তারিখে ১টা cheque

দেয় ১ কোটি টাকা । যার নং ০৫৫৯৫৭০ ইস্যু আমার নামীয় ব্যাংক Account এ বিগত ১৮/৭/১৩ খ্রিঃ তারিখে জমা দেই । K Š stop payment এর কারনে Dishonour হয় । ২৫/৭/১৩ খ্রিঃ তারিখে ইহা পুনরায় জমা দিলে অনুরুপ ভাবে Dishonour হয় । উক্ত বিষয়ে আমি ১৩/৮/১৩ খ্রিঃ তারিখ আসামীর c Z Legal Notice প্রদান করি । কিন্তু আসামী পাওনা পরিশোধ না করার কারণে অত্র মামলা দায়ের করি । অতঃপর ১০/৯/১৩ খ্রিঃ অত্র মামলা দায়ের করি । এই নালিশ (প্রঃ- ১) আমার

স্বাক্ষর (প্রঃ-১/১) এই সেই পত্রবয়ঁব (প্রঃ-২), এই সেই দুইটা Dishonour slips (Ext-3 series), এই সেই Legal Notice with postal receipts (Ext 4 series), এবং এই আমার Memo of Agreement (প্রঃ-৫) মূলে রুপ দায়রা৩০৭৯/১৩ মামলায় দাখিল আছে ।"

23. Nowhere in his examination-in-chief the complainant claimed that in terms of agreement (Ext-5) he had brought the purchaser to sell the respondent's property and, accordingly, the same was sold. In his cross examination, the complainant has admitted the fact saying, "Avgvi memo. of understanding এর ১নং শর্তে উল্লেখ আছে ৯০ কার্যদিবসের মধ্যে positive out coming নিয়ে আসতে হবে । ২(ধ) শর্তে উল্লেখ আছে বাজার মূল্যে ক্রেতা অনিতে পারিলে আমি (বাদী) কমিশন পাব ।"
(emphasis supplied)

He further said that, " কথিত শর্তের কারণে আসামী পক্ষ ৬ ৫.২৫ M dollar G H plot বিক্রয় পর্যন্ত দেয় মার্কিন দূতাবাসের নিকট " । He further said that, "০৩/০৭/১৩ খ্রিঃ তারিখে sale deed (deed of transfer) সম্পাদন ও রেজিষ্ট্রি হয় । তেজগাঁও Registry office এ registration হয় । ঐ deed এ আমি উপস্থিত ছিলাম না । " That is accused respondent offered the proposal to sell their property to the American Embassy and even, at the time of execution and registration of sale deed, the

appellant was not present in the Sub-Registrar's office. Ext.5 would create a liability of the respondent to pay commission under the agreement only when the appellant secured net market price of the respondent's property by sale what did not happen in this case. In his cross examination the complainant has said, "২ (ধ)শতে উল্লে খ আছে বাজার মল্যে ক্রেতা আনতে পারিল্লে আম (বাদী) কমশন পাব ।" There is no such averment, in the petition of complaint or in the evidence that the complainant has stated that he had brought any purchaser who offered market price of the property. From the evidence quoted above it appears that the condition under which the cheques were issued was not fulfilled by the complainant appellant.

24. Thus, the respondent instructed the bank not to encash the impugned cheques. Accordingly, the bank returned the cheques with endorsement, "payment stopped by the drawer". Where the amount promised shall depend on some other complementary facts or fulfillment of another promise and if any cheque is issued on that basis, but that promise is not fulfilled it will not create any obligation on the part of the drawer of the cheque or any right which can be claimed by the holder of the cheque. As such dishonesty or fraud cannot be attributed to the respondent in giving stop payment instructions. Consequently, the question of committing an offence by the accused respondent punishable under section 138 of the Act does not arise.

25. Thus, we are of the view that these appeals do not deserve any consideration. Accordingly, all the appeals are dismissed.