

**IN THE SUPREME COURT OF
BANGLADESH
HIGH COURT DIVISION
(CRIMINAL REVISIONAL JURISDICTION)**

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 3074 of 2018

Md. Amir Monjur Babar

-Vs-

The State

Mr. Ashok Kumar Banik, Advocate with

Mr. Amio Chackroborty, Advocate

.... For the convict petitioner

Mr. Khandker Shahriar Sarker, Advocate with

Ms. Suraya Jannat Sumy, Advocate

.....For the opposite party No.2

Mr. S.M. Golam Mostofa Tara, DAG with

Mr. A. Monnan, AAG

.... for the opposite parties

**Heard on 08.01.2024, 16.01.2024, 23.01.2024,
12.02.2024, 13.02.2024 and 15.02.2024.**

Judgment delivered on 27.02.2024.

This Rule under section 439 read with section 435 of the Code of Criminal Procedure, 1898 was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 30.01.2018 passed by the Additional Metropolitan Sessions Judge, Court No. 5, Chattogram in Criminal Appeal No. 335 of 2017 affirming the judgment and order dated 18.04.2017 passed by the Metropolitan Joint Sessions Judge, Court No. 2 (Kotwali Zone), Chattogram in Session Case No. 1067 of 2014 arising out of

C.R. No. 2240 of 2013 (Kotwali Zone) convicting the petitioner under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 01(one) year and to pay a fine of Tk. 12,00,000 should not be set aside and/or pass such other order or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that the complainant Mohammed Borhan Uddin filed C.R. Case No. 2240 of 2013 on 29.09.2013 in the Court of Chief Metropolitan Magistrate, Chattogram, Cognizance Court No. 1 (Kotwali Zone), Chattogram under Section 138 of the Negotiable Instruments Act, 1881 against the convict petitioner Md. Amir Monjur Babar alleging, inter alia, that the accused is previously known to the complainant and subsequently, they entered into business transactions between them. The accused deals with the business of selling Mobile Phones, SIMs and Mobile Card. He took a loan of several lakhs from the complainant. The accused obtained a loan amounting to Tk. 15,60,000 and executed an agreement on 07.06.2012 on a non-judicial stamp of Tk. 150. In the said agreement, it has been stipulated that the accused took a loan of Tk. 15,60,000 from the complainant. The said loan was secured by cheque No. 4756719 drawn on Brac Bank Limited, Chattogram for payment of Tk. 700,000 and Cheque No. 6780860 drawn on Jamuna Bank Limited, Chattogram for payment of Tk. 500,000. The accused had undertaken to pay the said amount within the next 03 months failing which the complainant would be entitled to realize the double of the said amount. After expiry of 03 months from the date of disbursement of the loan, the accused did not pay the said loan. When the complainant requested the accused to pay Tk. 12,00,000, he instructed the complainant to encash the cheques. Subsequently, the said cheques were presented to the bank on 20.05.2013 for encashment through the Dutch Bangla Bank Limited, Jubilee Road Branch, but said 02 cheques were dishonoured with a remark“insufficient funds”. Subsequently, the accused requested the complainant to present the cheques on 01.08.2013. The complainant presented the cheques dated 18.04.2013 through the respective

bank and on the same date, the Brac Bank returned the Cheque No. 4756719 drawn on Brac Bank Limited for payment of Tk. 7,00,000 with a remark “account closed” and Cheque No. 6780860 drawn on Jamuna Bank Limited for payment of Tk. 5,00,000 with a remark “insufficient funds”. After that, the complainant published a legal notice on 20.08.2013 in “The Daily Azadi” under section 138 (1)(e) of the Negotiable Instruments Act, 1881 for payment of the amount mentioned in those cheques. He did not pay the cheque amount and committed offence under section 138 of the Negotiable Instruments Act, 1881.

After filing the complaint petition, the learned Magistrate was pleased to take cognizance of the offence against the accused. Subsequently, the case was transferred to the Metropolitan Sessions Judge, Chattogram and the case was registered as Metropolitan Session Case No. 1067 of 2014. Thereafter, the Metropolitan Sessions Judge, Chattogram transferred the case to the Metropolitan Joint Sessions Judge, Court No. 2, Chattogram for trial. On 12.11.2014, the charge was framed under section 138 of the Negotiable Instruments Act, 1881 against the accused which was read over and explained to him. The accused pleaded not guilty to the charge and claimed to be tried following the law.

The prosecution examined 01(one) witness to prove the charge against the accused. After examination of the prosecution witness, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and the defence examined one DW. After concluding the trial, the trial court by impugned judgment and order dated 18.04.2017 convicted the accused under section 138 of the Negotiable Instruments Act, 1881 and sentenced him thereunder to suffer simple imprisonment for 1(one) year and to pay a fine of Tk. 12,00,000 against which the accused filed Criminal Appeal No. 335 of 2017 before the Metropolitan Sessions judge, Chattogram. Thereafter, the appeal was transferred to the Additional Metropolitan Sessions Judge, Court No. 5, Chattogram and the appellate court below by impugned judgment and

order affirmed the judgment and order passed by the trial court against which the convict petitioner obtained the instant Rule.

P.W. 1 Master Ali Ahamed Chowdhury stated that the accused issued 02 (two) cheques on 18.04.2013 to the complainant. The complainant presented 02 (two) cheques on 01.08.2013 for encashment and on the same date, the cheques were dishonoured with the remark "insufficient funds". On 20.08.2013, a legal notice was published in 'The Daily Azadi'. After that, the accused did not pay the cheque amount. Consequently, he filed the case on 29.09.2013. He proved the cheques as exhibit-2 series, dishonour slips as exhibit-3, the notice published in the daily newspaper as exhibit-4, the complaint petition as exhibit-5 and his signature as exhibit-5/1 and the agreement executed between the parties as exhibit-6. During cross-examination, he stated that in the complaint petition, it has been mentioned that 02(two) undated cheques were issued which might be a computer-type mistake. The complainant is his son and there was a previous relation between the accused and the complainant for which he obtained a loan based on an agreement. In the complaint petition, it has been mentioned that 02 (two) security cheques were issued. He denied the suggestion that the accused did not issue any cheque in favour of the complainant. He affirmed that at the time of issuance of the cheques and execution of the agreement, he was not present.

D.W. 1 Md. Amir Monjur Babar stated that his brother-in-law introduced the complainant to him. He had no business transaction with the complainant. He is a distributor of Grameen Phone. The complainant used to take a loan from him and deposited cheques against the loan. At the time of his illness, his Manager took a personal loan for him from the complainant. His Manager handed over 02 (two) undated cheques as security for the loan taken by him. Subsequently, his Manager paid Tk. 700,000 against the loan. The deposit slip of Tk. 700,000 was given to him. Subsequently, his manager paid Tk. 500,000 to the complainant. His Manager informed him that he would hand over the cheques but due to his illness, the two cheques were not

returned. He proved the deposit slip dated 18.4.2014 in favour of the Ms. Lucky Store as exhibit-Ka. The complainant handed over and issued cheques on 23.05.2009 against the loan taken from him. He proved the cheque dated 23.05.2009 as exhibit-Kha. He denied the suggestion that the deposit slip which has been produced in court today relates to the manager and the complainant.

The learned Advocate Mr Ashok Kumar Banik appearing on behalf of the convict petitioner submits that during the illness of the accused, his manager handed over two undated cheques on 07.06.2012 to the complainant against the personal loan taken by the manager and subsequently, the manager of the accused paid the loan and due to illness of the convict petitioner, the cheques were not returned to him. Subsequently, using the blank cheques which were kept in the custody of the manager of the accused, the complainant filed the case beyond the period of 06 months and no offence under section 138 of the Negotiable Instruments Act, 1881 was committed by the accused. He further submits that as per the complaint petition two blank cheques were handed over on 07.06.2012 to the accused which was presented on 01.08.2013 after 16 months for encashment and no notice under section 138(1)(c) of the Negotiable Instruments Act, 1881 was issued since "The Daily Azadi" is not a national newspaper. Therefore, in view of the provision made in section 138 (1)(a) and (c) of the Negotiable Instruments Act, 1881 no offence under section 138 of the said Act was committed. The prosecution failed to prove the charge under section 138 of the Negotiable Instrument Act,1881. Therefore, he prayed for making the Rule absolute.

The learned Advocate Mr. Khondoker Shahriar Shakir appearing along with the learned Advocate Ms. Suraya Jannath Sumy on behalf of the complainant opposite party No. 2 submits that the accused issued 02(two) cheques on 18.04.2013 and the complainant presented the said cheques on 20.05.2013 and 01.08.2013 for encashment but both the cheques were dishonoured and the complainant issued a legal notice through "The Daily

Azadi” to the accused to pay the amount of the cheque but he did not pay the amount of the cheque. Consequently, he filed the case on 09.09.2013 after complying with the procedure laid down in section 138 of the Negotiable Instruments Act, 1881 and both the courts below arrived at concurrent findings of facts that the accused issued the cheques and the prosecution proved the charge against the accused beyond all reasonable doubt. There is no illegality or legal infirmity in the impugned judgments and orders passed by the courts below. Therefore, he prayed for discharging the Rule.

I have considered the submission of the learned Advocates of both parties, perused the evidence adduced by both parties, the impugned judgments and orders of conviction and sentences passed by the courts below and the records.

At the very outside, it is noted that the legislature inserted section 1(A) of the Negotiable Instruments Act, 1881 by the Negotiable Instruments (Amended) Ordinance, 1962. Section 1(A) of the said Act states that every Negotiable Instrument shall be governed by the provision of this act and no uses or customs at variance with any such provision shall apply to any such instruments. The Negotiable Instruments Act, 1881 is a special law and enacted to deal with a particular form of contract and the provision under the said act overruled the provisions of other laws.

The issue involves the instant Rule whether the payee is entitled under section 138(1)(a) of the Negotiable Instruments Act, 1881 to present an updated or blank cheque beyond the period of 06 months from the date of delivery of the cheque.

On perusal of the complaint petition (exhibit-5), it reveals that the complainant stated in the complaint petition that the accused issued 02(two) undated cheques on 07.06.2012 for payment of the Tk. 500,000 and Tk. 700,000 and the complainant presented the said cheques on 01.08.2013 which were dishonoured on the same date. On scrutiny of the 02(two) cheques i.e.

exhibit-2 series, it reveals that cheque No. 6780860 was issued for payment of Tk. 500,000 and cheque No. 4756719 was issued for payment of Tk. 700,000. On a bare examination of the said cheques, it reveals that the figure Tk. 700,000 mentioned in cheque No. 4756719 was written with different ink and four kinds of ink have been used in cheque No. 4756719. Similarly in cheque No. 6780860 four kinds of ink have been used.

On perusal of the agreement dated 07.06.2012 (exhibit-6) executed between the complainant and the accused, it further reveals that the accused received Tk. 15,60,000 as a loan from the complainant and against the said loan, he delivered cheque No. 4756719 for payment of Tk. 700,000 and Cheque No. 6780860 for payment of Tk. 500,000 to the complainant as security. In the said agreement, it has been stipulated that the accused shall pay Tk. 15,60,000 within the next 03 months, failing which, the complainant would be entitled to recover double the said amount as compensation.

In the agreement dated 0706.2012 (exhibit-6) no date on the cheques has been mentioned. On examination of the said agreement and the complaint petition(exhibit-5), it further reveals that two undated cheques i.e. cheque No. 4756719 for payment of Tk. 700,000 and cheque No. 6780860 for payment of Tk. 500,000 were delivered to the complainant by the accused as security for the loan taken from the complainant. Section 21C of the Negotiable Instruments Act, 1881 states that a promissory note, bill of exchange or cheque is not invalid by reason only that it is anti-dated or post-dated. Proviso to section 21C provided that the anti-dating or post-dating does not involve any illegal or fraudulent purpose or transaction. A careful examination of the Negotiable Instruments Act, 1881 it transpires that there is no provision in the said act for the issuance of undated or blank cheques. However, section 21C of the Negotiable Instruments Act, 1881 had given protection to the anti-dated or post-dated cheque. The legislature fully knowing well about the consequence had given no protection to an undated or blank cheque.

In this respect, it is very pertinent to rely on a decision made in the case of Mohammad Alauddin and others vs. The State and others, reported in 39 BLD(AD) 53 para 14 judgment dated 24.10.2017 wherein our Apex Court held that;

“Another important issue is the issuance of a blank cheque without mentioning the date and amount will come within the definition on cheque or not. If the cheque is not drawn for a specified amount it would not fall within the definition of bill of exchange. Filling up amount portion and date are material. Any alteration without the consent of the party who issued the cheque rendered the same invalid. However, question of issuance of blank cheque and fraudulent insertion of larger amount than actual liabilities is a question of fact. Insertion of larger amount in blank cheque than actual liability is an ingredient of fraud which cannot be approved since fraud goes to the root of the transaction. Where there is an intention to deceive and means of the deceit to obtain an advantage there is fraud.”

An act or behaviour punishable under law is an offence. In the four corners of the Negotiable Instruments Act, 1881, no provision has been made to issue a blank or undated cheque. The legislature used the word ‘drawn’ in section 138 of the Negotiable Instruments Act, 1881. No definition of “drawn” has been given in the said Act. The Cambridge Dictionary defined the word “draw” as “to make a picture of something or someone with a pencil or pen”. Oxford Dictionary defined the word, “draw” as “to make pictures, or a picture of something, with a pencil, pen or chalk” (but not paint). The easy meaning of the word draw means writing the name of the payee, amount and date on the cheque. Although, no definition of the word ‘drawn’ has been given in the Negotiable Instruments Act, 1881 but in section 3 of the said Act the word ‘issue’ has been defined. Section 3(e) of the said Act says that issue means the first delivery of a promissory note, bill of exchange or cheque complete in form to a person who takes it as a holder. Section 3 (d) says that the delivery

means transfer of possession, actual or constructive, from one person to another.

Unless a cheque complete in form is delivered to another person it cannot be said that the cheque was issued in favour of that person. In section 138 of the said Act, the legislature used the word, “another person” indicating that the drawer issued the cheque in favour of a particular and specified person. If an undated or blank cheque is issued there is no scope to hold the view that the cheque was issued in favour of a particular and specified person.

It transpires that the accused handed over 02(two) undated cheques on 07.06.2012 to the complainant and on the same date the accused and the complainant also executed an agreement (exhibit-6). The legislature made provision in section 138 (1)(a) of the Negotiable Instruments Act, 1881 compelling the payee to present the cheque within six months from the date of issuance of the cheque in favour of the payee. The presentation of the cheque by the payee for encashment within 06 months from the date on which it is drawn or within the period of its validity whichever is earlier is not without any purpose. Therefore, in giving any interpretation, the period of 06 months is required to be considered following the intent of the legislature. Timeline “06 months” has been fixed by the legislature for presenting the cheque from the date of issuance of the cheque. Because of the proviso to section 138 of the said Act, if a cheque is presented beyond the period of 06 months no offence under section 138 of the Negotiable Instruments Act, 1881 would be committed. Therefore, if any undated or blank cheque is issued without writing the date, the payee is not entitled to present the cheque beyond the period of 06 months from the date of delivery of the cheque to the payee.

In the case of MA Mazid vs. Md. Abdul Motaleb, reported in 56 DLR 636 the High Court Division having considered section 138(1)(a) of the Negotiable Instruments Act, 1881 it has held that;

“Admittedly, in the present case the cheque was presented to the bank after expiry of 6 months from the date of drawing of the cheque. So, obviously this case under section 138 of the Negotiable Instruments Act is not maintainable in view of the restriction imposed by proviso (a) to the said section. So, the proceeding is liable to be quashed.”

In the instant case, the cheques were delivered on 07.06.2012 to the payee. An undated or blank cheque cannot be kept in the custody of the payee for an indefinite period. If the payee is allowed to keep undated or blank cheque in his possession without presenting the same within 06 months from the date of delivery of the cheque to the payee, the intent of the legislature would be frustrated. Practically, a man can't keep the money in his account for an indefinite period. Furthermore, the court cannot ignore the ground reality.

On perusal of the agreement dated 07.06.2012(exhibit-6), it reveals that the complainant would be entitled to recover double the amount of Tk.15,60,000 if the accused failed to pay the said amount within 03 months from the date i.e. 07.06.2012. No explanation has been given by the complainant as to why he did not present the cheques to the bank for encashment immediately after the expiry of three months from the date of execution of the agreement dated 07.06.2012 (exhibit 6).

In the case of *Hasanoo vs. S. Natesa Mudliar and Co*, reported in AIR 1959 Bom 267 in A.F.A.D. No. 613 of 1954 judgment dated 28.03.1958 it has been observed that;

“Thus, the main reason for drawing a distinction between a cheque and an instrument of other kind is that if a cheque is drawn by a drawer on a bank he is forced to keep sufficient funds in that bank for enabling the person in whose favour he has drawn the cheque to cash

it. As he has to keep his money tied up in that manner, he cannot properly withdraw it even if he knew that the condition of the bank was not satisfactory. It is for this reason necessary that cheques should be presented for payment without undue delay.”

At this stage, it is relevant here to rely on a decision made in the case of A.H. Ershadul Haque Advocate vs. the State and another passed in Criminal Appeal No. 1144 of 2021 judgment dated: 06.02.2023, wherein (Md. Shohrowardi,J) it has been held that;

“In view of provision of section 138(1)(a) of the said Act, a cheque is required to be 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. Be that as it may, there is no scope to issue an undated cheque. If the payee or holder in due course is allowed to present the undated cheque, the purpose of Section 138 (1)(a) will be frustrated. The presentation of the cheque within 06(six) months to the bank is not without any purpose. It is not practically possible for the drawer of the cheque to keep the money in the account for an indefinite period. Therefore, a cheque issued without mentioning the name of the payee or date does not come within the purview of section 138 of the said Act. Although there is no bar in issuing an antedated or post-dated cheque in view of the provision of section 21C of the said Act. Nothing has been stated in the said Act as regards issuance of undated cheque.”

The presumption under section 118(a) of the Negotiable Instruments Act, 1881 and the delivery of an undated or blank cheque are different issues.

It is a settled proposition that an accused is not supposed to prove or disprove anything and the onus lies on the prosecution to prove its case. Since admittedly two blank cheques were delivered on 07.06.2012 to the complainant by the accused, the complainant has to prove that the accused instructed or consented to put the date '18.04.2023' on the cheques. No evidence was adduced on behalf of the complainant to prove that the accused instructed or consented to the complainant to put the date '18.04.2013' on the cheques. Putting any date on undated or blank cheques beyond the period of 06 months from the delivery of the cheque to the complainant without any written consent of the drawer is a material alteration and renders the cheque invalid.

At this stage, it is relevant here to quote section 87 of the Negotiable Instruments Act, 1881. Section 87 of the said Act states that;

“Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;”

At this juncture, it is relevant here to rely on a decision made in the case of *Loonkaran Sethiya and ors vs. Ivan E. John and others*, reported in AIR 1977(SC)336 para 23 and 24 wherein it has been held that;

“A material alteration, according to this authoritative work, is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision; which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed.....The effect of making such an alteration

without the consent of the party bound is exactly the same as that of cancelling the deed.”

In paragraph 1378 of Volume 12 of Halsbury’s Laws of England(Fourth Edition) it has been stated that “if an alteration (by erasure, interlineation, or otherwise is made in a material part of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration to prevent the person who has made or authorised the alteration, and those claiming under him, who did not consent to the alteration any obligation, covenant, or promise thereby undertaken or made.”

In view of the provision made in section 138(1)(a) of the Negotiable Instruments Act, 1881 the payee is entitled to put the date on the blank or undated cheque, not exceeding 06 months from the date of delivery of the cheque to the payee. The alteration of the date or putting a date on the blank or undated cheque beyond 06 months from the date of delivery of the cheque may have the effect of lengthening the period of limitation as provided in section 138(1)(a) of the said Act. Therefore, putting a date on the blank or undated cheque without the written consent of the drawer is a material alteration.

The learned Advocate engaged on behalf of the petitioner relied on a decision made in the case of Ahmad Ullah vs. Younus, reported in 68 DLR(2016) 228. In the referred case, the cheque was issued on 28.07.2009 and presented on 12.08.2009 for encashment i.e. within 06 months from the date of issuance of the cheque. In the instant case, two undated cheques were admittedly issued on 07.06.2012 and the complainant presented the said cheques on 01.08.2023 beyond the period of 06 months. Therefore, the ratio decidendi adopted in the referred case is not applicable in the facts and circumstances of the instant case.

In the case of Mohanlal Malpani vs. The Loan Company of Assam Ltd, Shillong, reported in AIR 1960 Assam 191 (V47 C47) Para 34, Mehrotra, J observed that;

“The cheque is a negotiable instrument and the payee is the holder in due course. If the payee presents the cheque beyond reasonable time, the liability of the drawer stands discharged. The payee therefore becomes a creditor of the bank in respect of the amounts of the cheques under S. 84 (3) of the Act, and can claim a set-off in respect of these amounts.”

Section 20 of the Negotiable Instruments Act, 1881 is applicable in the case of inchoate stamped instrument. The cheque is not a stamped instrument. Therefore, section 20 of the Negotiable Instrument Act, is not applicable in the instant case. Since two cheques for payment of Tk. 12,00,000 were issued by the accused for payment of the loan, there is no bar in filing a civil suit for realization of the loan amount following law or filling a criminal case under the Penal Code, 1860.”

In view of the above facts and circumstances of the case, evidence findings, observation and the proposition, I am of the view that about the courts below failed to consider that the accused issued an undated or blank cheque on 07.06.2012 in favour of the complainant which was presented on 01.08.2013 long after 06 months in violation of the provision made in the section 138(1)(a) of the Negotiable Instruments Act, 1881. The complainant failed to present the cheques within the statutory period of 06 months from the date of delivery of the cheques. Therefore, I am of the view that no offence under section 138 of the Negotiable Instruments Act, 1881 was committed by accused.”

However, the complainant is at liberty to file a civil suit before the civil court for the realization of the cheque amount following the law or a criminal case under the Penal Code, 1860, if so advised.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders of conviction and sentence passed by the courts below are hereby set aside.

The accused Md. Amir Monjur Babar is acquitted from the charge framed against him.

However, there will be no order as to costs.

Send down the lower Court's record at once.