

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

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 7404 of 2020

Ashraf Khan

.....Appellant

-Vs-

The State and another

....respondents

Mr. Md. Zahed-ul-Anwar, Advocate

....For the convict petitioner.

Mr. Mohammad Redwanul Karim, Advocate

.....For the respondent No.2

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

Mr. A. Monnan, AAG

..... For the State

Heard on 29.11.2023

Judgment delivered on: 03.12.2023

This appeal under section 410 of the Code of Criminal Procedure, 1898 is directed against the impugned judgment and order of conviction and sentence dated 29.10.2020 passed by Additional Sessions Judge, Cox's Bazar in Session Case No. 1578 of 2019 arising out of C.R Case No. 845 of 2018 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer simple imprisonment for 6(six) months and to pay a fine of Tk. 6,00,000.

The prosecution case, in short, is that the complainant is the Proprietor of Sonali Auto Rice Mills and the accused Ashraf Khan is the Proprietor of General Merchant and Commission Agent and M/S Noor Enterprise. The accused received Tk. 83,00,000 from the complainant to supply rice but he did not supply the rice in time. The complainant demanded the said money from the accused and the accused issued cheque No. 4204439 on 28.06.2018 for

payment of Tk. 300,000 drawn on his Account No. 0825901024716 maintained in the name of M/S. Noor Enterprise, Pubali Bank Limited, Pahartoli Branch and another Cheque No. 4204440 on 02.07.2018 for payment of Tk. 300,000 maintained with the same bank. The complainant presented the said cheques for encashment through the AB Bank Limited, Chakaria Branch, Cox's Bazar which were dishonoured on 02.07.2018 with a remark, "insufficient funds" and the said bank returned the cheques on 04.07.2018. After that, the complainant issued a legal notice on 05.07.2018 under section 138(b) of the Negotiable Instruments Act, 1881 upon the accused through registered post with AD for payment of the cheque amount within 30 days. The accused received the notice on 11.07.2018 but he did not pay the cheques amount. Consequently, the complainant filed the complaint petition on 12.8.2018.

After filing the complaint petition, the learned Magistrate was pleased to take cognizance of the offence under section 138 of the Negotiable Instrument Act, 1881 against the accused. Thereafter, the accused voluntarily surrendered before the Court and obtained bail on 14.01.2019. The case was sent to the Sessions Judge, Cox's Bazar who transferred the case to the Additional Sessions Judge, Cox's Bazar for trial. The trial court by order dated 06.10.2019 framed charge under section 138 of the Negotiable Instruments Act, 1881 against the accused in absentia. During the trial, the prosecution examined P.W.1 to prove the charge against the accused. After concluding the trial, the trial court by impugned judgment and order convicted the accused and sentenced him as stated above against which the accused filed the instant appeal.

P.W. 1 Alhaj Fazal Karim is the complainant. He stated that the accused Ashraf Khan issued cheque No. 4204439 on 28.06.2018 and cheque No. 4204440 on 02.07.2018 for payment of a total Tk. 600,000. He presented those cheques on 02.07.2018 which were dishonoured with the remark "insufficient funds". On 05.07.2018, he issued a legal notice through registered post with AD but the accused did not pay the cheque amount. He proved the

complaint petition as exhibit-1, and the signatures on the complaint petition as exhibit-1/1 series, the disputed cheque as exhibit-2 series, dishonour slips as exhibit-3 series and legal notice with AD as exhibit-4 and 5 respectively. The defence did not cross-examine P.W. 1.

The learned Advocate Mr. Md. Zahed-ul-Anwar appearing on behalf of the accused submits that admittedly, both the complainant and the accused are businessmen and there is a long-standing fiduciary business relationship between them. The accused handed over two undated cheques as security of the transaction between the parties. Subsequently putting the date on the cheques filed the case against the accused to harass and humiliate him. Therefore, he prayed for setting aside the impugned judgment and order passed by the trial court.

The learned Advocate Mr. Reduanul Karim appearing on behalf of complainant respondent No. 2 submits that the accused took Tk. 83,00,000 for supplying the rice from the complainant and he did not supply the rice as per the oral agreement between the accused and the complainant and he issued two cheques for payment of Tk. 6,00,000 and after presenting the cheques, those were dishonoured with a remark “insufficient funds”. The complainant served legal notice upon the accused through registered post which AD which was duly received by the accused but he did not pay the cheque amount. He further submits that after complying with the legal procedure as provided in section 138 of the Negotiable Instruments Act, 1881, the complainant filed the complaint petition. He also submits that the accused did not cross-examine the P.W.1. Therefore, he admitted that he issued the cheque for payment of the consideration in favour of the complainant. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Md. Zahed-ul-Anwar who appeared on behalf of the appellant and the learned Advocate Mr. Reduanul Karim who appeared on behalf of respondent No. 2, perused the evidence, impugned judgment and order passed by the trial court and the records.

On perusal of the records, it appears that the accused issued cheque No. 4204439 on 28.06.2018 for payment of Tk. 300,000 drawn on his Account No. 0825901024716 maintained in the name of M/S. Noor Enterprise, Pubali Bank Limited, Pahartoli Branch and another Cheque No. 4204440 on 02.07.2018 for payment of Tk. 300,000 maintained with the same bank. The complainant presented the said cheques for encashment through the AB Bank Limited, Chakaria Branch, Cox's Bazar which were dishonoured on 02.07.2018 with a remark, "insufficient funds" and the said bank returned the cheques on 04.07.2018. After that, the complainant issued a legal notice on 05.07.2018 under section 138(b) of the Negotiable Instruments Act, 1881 upon the accused through registered post with AD for payment of the cheque amount within 30 days. The accused received the notice on 11.07.2018 but he did not pay the cheques amount. Consequently, the complainant filed the complaint petition on 12.8.2018. The defence did not cross-examine P.W. 1. Therefore, the evidence of P.W. 1 regarding the issuance of cheques remained uncontroverted by the defence. The prosecution proved the charge against the accused beyond all reasonable doubt.

Considering the gravity of the offence, I am of the view that the ends of justice would be best served if the sentence passed by the trial court is modified as under;

The accused Ashraf Khan is found guilty of the offence under section 138 of the Negotiable Instruments Act, 1881 and he is sentenced to suffer simple imprisonment for 3 (three) months and to pay a fine of Tk. 600,000.

In the result, the appeal is disposed of with a modification of the sentence.

The trial court is directed to do the needful.

Send down the lower Court's record at once.

