

Present:
Mr. Justice Farid Ahmed
And
Mr. Justice Md. Atoar Rahman

Criminal Misc. Case No.42393 of 2022.

Md. Nurul Hakim ..Accused-petitioner.

-Versus-

The State and another
....Opposite parties.

Mr. Md. Taizul Islam with
Ms. Fatema-Tuz-Johora, Advocates
..... For the petitioner.

Mr. Moshfiquddin Bakhtiar, Advocate
... For opposite party No.2.

Mr. Abdul Wahab, D.A.G with
Mr. Prince-Al-Masud with
Ms. Sabiha Yasmin with
Mr. Md. Ashikuzzaman Bablu, A.A.Gs
..... For opposite party No.1- State.

Heard on 15.05.2023, 25.05.2023 and
04.06.2023. Judgment on 11.06.2023.

Farid Ahmed, J.

This Rule was issued on an application under section 561A of the Code of Criminal Procedure, calling upon the opposite party to show cause as to why the proceeding of Sessions Case

No.2202 of 2020 arising out of C.R. Case No.25 of 2020 (Panchlaish) under section 138 of the Negotiable Instruments Act, 1881, now pending in the Court of learned Joint Metropolitan Sessions Judge, 4th Court, Chattogram should not be quashed.

The prosecution case, in short, is that on 07.01.2020 the opposite party No.2 namely Rafiqul Alam Chowdhury as an appointed attorney as complainant filed a petition of complaint against the accused-petitioner before the learned Metropolitan Magistrate Adalt No.03, Chattogram in committing of offence under section 138 of the Negotiable Instruments Act, 1881 alleging inter alia, that the complainant and the petitioner both are businessman. A good relationship was developed due to business reasons between them and as such the accused took loan an amount of Tk.1,80,00,000/- (one crore eighty lacs) from the complainant for doing business in terms payment within short time. For paying back the said loan money the petitioner issued a cheque to the complainant being CD No.1057331 dated 19.09.2019 of United Commercial Bank Limited (payable at any branch in Bangladesh) of an amount of Tk.1,80,00,000/- in favour of the complainant. Thereafter, the complainant presented the said cheque for encashment which was dishonoured and returned

unpaid with remark” Account closed/dormant blocked” with the advice slip issued by the Eastern Bank Limited, Hemedibag Branch, Panchlaish, Chattogram on 23.09.2019, 14.10.2019 and lastly on 12.11.2019. Thereafter, a legal notice was served upon the accused petitioner requesting him to pay the said cheque’s money to the complainant party through registered post office on 28.11.2019 under section 138(1A) of the Negotiable Instrument Act, 1881 but the accused did not make payment in time. Then the complainant’s attorney filed the instant case against the accused-petitioner. Hence, the prosecution case stated above.

Upon receiving the complaint petition filed by the Rafikul Alam Chowdhury, Attorney of Abu Ahmad, Proprietor, Forhad Trading, son of Alhaj Foez Ahmmad and Jahanara Begum learned Metropolitan Magistrate, Court No.3, Chattogram examined the complainant under section 200 of the Code of Criminal Procedure and took cognizance against the accused-petitioner under section 138 of the Negotiable Instruments Act, 1881 and issued summons. The accused-petitioner surrendered before the court below and obtained bail. When the case was made ready for hearing it was transmitted to the court of learned Additional Metropolitan Sessions Judge, Chattogram and it was re-numbered as Sessions

Case No.2202 of 2020 and the accused petitioner again obtained bail from the Court of Additional Metropolitan Sessions Judge, Chattogram. Now he is on bail. Thereafter the case was further transferred to the Court of learned Metropolitan Joint Sessions Judge, 4th Court, for holding trial.

The court below after taking cognizance fixed the matter for charge hearing. On 21.03.2021 the learned Advocate for the petitioner filed an application under section 265(c) of the Code of Criminal Procedure submitting that there is no consideration money and they had the financial transaction with each other and they are close relative. The petitioner did not issue any cheque to the complainant. There was a lease agreement (ভাড়াটিয়া চুক্তি) of the property in between them. The complainant invested an amount of Tk.70,00,000/- for business purpose. Later on several dates he paid back an amount of Tk.53,15,000/- to the complainant. For assuring payment of the loan three blank cheques were issued. But the complainant along with 5/6 unknown persons illegally entered into his business place and forcefully took away 7 pieces of signed cheques (including the cheque of the instant case) and 6 non-judicial stamp. The petitioner again and again asked to return the same but the real complainant Abu Ahmed did not pay heed to his

humble request. Finding no other alternative way the accused filed G.D. Entry being Panchlaish Police Station G.D. No.395 dated 09.12.2018. Thereafter he also on his final attempt filed a complaint to the RAB as well just to recovery the cheques which were taken forcibly from him. Learned court below without considering the content of the application under section 265(c) framed the charge against the accused-petitioner. Thereafter the Attorney of the real complainant Abu Ahmad called on for making deposition before the court below. Accordingly he as P.W.1 deposed before the court but he was not cross-examined instantly by the accused-petitioner.

Subsequently the accused-petitioner on surrender obtaining bail and on recall he cross-examined the P.W. On 25.05.2022. In reply to the cross-examination P.W.1 as Attorney denied the suggestion put to him. “ সত্য নয় যে, খালি চেকের উপরে বাদী পক্ষ ১কোটি ৮০ লক্ষ টাকা লিখে এই মিথ্যা মামলাটি করেছেন।” It was also suggested to the P.W.1 “ সত্য নয় যে, বাদী আবু আহমেদ আসামীকে ভয় ভীতি দেখিয়ে ০৬টি খালি চেক বা ০৭টি stamp জেরা পূর্বক আদায় করে নিয়েছিল বা আমি সব জেনেও মিথ্যা সাক্ষ্য দিচ্ছি।” Finally it was further replied on suggestion to the P.W.1 “সত্য নয় যে, আবু আহমদ মেসেঞ্জারে ০৬টি চেক নেবার বিষয়ে আসামীকে হুমকি দিয়েছেন বা, তৎমধ্য হতে ০১টি চেক কাজে লাগিয়েছেন মর্মেও হুমকি দেন বা পথে

বসাবেন হুমকী দেন। মেসেঞ্জারের কথোপকথন সম্পর্কে আমি কিছুই জানি না”

On the other hand accused-petitioner Md. Nurul Hakim as D.W.1 deposed before the court. He stated in his examination-in-chief that he took lease (ভাড়া) of the shop on the basis of lease agreement and he has given as ‘jamat’ three cheques. In total 7 cheques and 6 stamps were taken by the actual complainant Abu Ahmad and thereafter filed this case through Rafikul Alam Chowdhury by way of power of attorney. In his examination-in-chief he further stated that he filed G.D. being Panchlaish Police Station G.D. No.395 dated 09.12.2018 and filed complaint before the RAB for recovery of the cheques as well as stamp papers, since it was valuable documents. The accused frankly stated in his examination-in-chief ” ১টি চেক দিয়ে এই মামলা করার বিষয় বলেছে মেসেঞ্জারে। আমাকে পথে বসানোর হুমকী দেন। মূলতঃ বাদী আমার কাছ থেকে পাওনা আছেন ১৬ লক্ষ ৮৫ হাজার টাকা। In this regard he filed the separate case being C.R No.88/2020 which is pending before the revisional court. We are not discussing on that line.

On the above narration of fact it can be safely observed that defence will set up his case through suggestion, actually defence suggestions are the actual facts of the case.

The above discussion on instagram in between real

complainant Abu Ahman and the present accused-petitioner which is exhibited as Exbt. 'Gha' containing 11 pages and G.D. No.395 as Exbt.'Uma' one sheet. D.W.2 Ahmed Kabir deposed before the court supporting the deposition of D.W.1. He simply stated that he was aware about the problem and dispute in between the Abu Ahmad and Nurul Hakim. They sat together to resolve the dispute, but failed.

Learned Advocates Mr. Md. Taizul Islam along with Ms. Fatema-Tuz-Zohra appearing on behalf of the accused-petitioner filed supplementary affidavit with Annexure-F, G and H series. He submits on referring the cheque and deposition of D.W.1 that the impugned cheque being CD No.1057331 was alleged to have been given by the drawer stating the word as recorded in the evidence “খালি চেক”. Whether it was signed or not it is not clear. If it is signed or blank whatever may be according to depositions/evidences of D.Ws 1 and 2 impugned cheque was given without filling up all space, i.e. (a) name of the payee, (b) date of issue, (c) amount of money and (d) signature of the drawer. Learned Advocate for the petitioner submitted that this nature of blank cheque is not a cheque in the eye of law according to section 6 of the Negotiable Instruments Act. He also added that

the definition of section 5 of the Negotiable Instruments Act the cheque actually a bill of exchange which will be written by the drawer himself, without issuing the same as per provision of section 6 read with section 5 of the Negotiable Instruments Act. Drawer is facing criminal prosecution for drawing of the cheque i.e. in the instant case the complainant himself act as drawer writing down the date name, amount of money everything contained in the cheque but he is styling himself as complainant of the case. He should be the accused of the case for writing down the cheque, the date, amount of money, name of the person. These nature of illegal practice should not allow to continue. Something must be done by the Apex Court, it is quite injustice to the innocent drawer.

On the other hand learned Advocate Mr. Moshfiquddin Bakhtiar appearing on behalf of the opposite party No.2, the complainant submits that the accused-petitioner the drawer of the instant case issued a cheque and that has been placed for encashment and it was dishonoured for the cause of insufficient fund. Thereafter maintaining all statutory requirements of law as provided in under section 138 of the Negotiable Instruments Act filed the instant case. Everything will be decided by the trial court,

.....

.....

(a).....

(b).....”

6. **“Cheque”**—A ”cheque” is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand.”

A cheque as per section 6 actually a bill of exchange phraseology of the words of both the section the word “writing” stand before the word instrument, intention of the legislation is very clear that the instrument means the cheque under section 6, and bill of exchange under section 5 of the Negotiable Instruments Act, 1881. It shall be written (underline is mine) by the drawer himself, because if any of the space of the cheque, say, for mentioning the amount of money or the dates are not written by him, with full knowledge of the ultimate consequence of unwritten cheque, no one will issue the same, for being an accused of a criminal case it is not normal human behavior, human conduct, in this regard we can follow the provision of section 114 of the Evidence Act. In this regard, in this exceptional case it is evidenced in Exbt. ‘Gha’ and the deposition of D.W.1 and

supported by D.W.2 the very fact the cheque has not been issued, written by the drawer. The meaning of word “draw” also suggest that who draw the cheque who he is called “drawer” without drawing or issuing the cheque he made accused in this case. In this regard there is decision reported in AIR 2000 AP 379, the case of Goddom V. Andhra Bank. In this decision there are 7(seven) essential conditions of cheque which are as follows:

- (1) an instrument in writing;
- (2) it must contain unconditional order signed by the maker;
- (3) it must direct a specific banker to pay a sum of money, either
 - (a) to a certain person, or
 - (b) to the order of a certain person, or
 - (c) to the bearer of the cheque
- (4) it must be payable on demand, that is, it must not be expressed to be payable otherwise than on demand;
- (5) it must be for a certain sum of money;
- (6) the amount of the cheque must be mentioned clearly; and
- (7) the drawer must be a customer of the bank.

It is settled that defence will set up his case through suggestion, most of the suggestions were given by the defence lawyer to the P.W.1 rebutted by the evidence of D.W.1 and his exhibit-'Gha'(ঘ). and other exhibit clearly proved there was no consideration and the impugned cheque was not written/issued by the accused Nurul Hakim, if we read together the version of sections 5, 6 of the Negotiable Instruments Act and 114 of the Evidence Act we can safely hold the view that cheque was not issued by the accused-petitioner. This particular fact has been proved by D.W.1 and he disproved the case of the complainant, more so, D.W.1, was cross-examined by the complainant, nothing rebuttable evidence has been brought out by the opponent. There is no reason to disbelieve the testimony of D.W.1 and exhibit (ঘ) (gha) available in the record. This case has another legal aspect, since the case taking consideration of above evidence on record against the accused it is the case of no evidence and continuation of the same is sheer abuse of the process of the court. If we consider it was a matter of appeal, it would be improper, and injustice to the accused-petitioner because in filing the appeal accused have to deposit 50% of the cheque amount Tk.90,00,000/- (Taka ninety lac) before filing of the same. Therefore, it's a fit

case under section 561A of the Code of Criminal Procedure.

It is pertinent to mention here that, now a days all Banks are taking this opportunity and making the innocent drawer as accused of a criminal case. It is not exorbitant to state subordinate court now became rubber stamp of the banks. Most of the Banks took blank cheque for fulfilling the condition of taking loan, after granting loan the Bank authority by violating the provisions of sections 5 and 6 filled up the cheque as they wishes, the sum of money, date of the cheque and name as well and by making dishonor the same mechanically filed the case before the competent court.

Since it is a special law and it should be construed strictly, cognizance court should apply its legal acumen at the initial stage. By complying all these the lower courts should take cognizance of offence under section 138 of the Negotiable Instruments Act. The cognizance court can take another measure, that is, all complainant of section 138 cases, complainant must file an affidavit of facts regarding the impugned cheque had been drawn by the accused himself not by the complainant. Reasons are that if the cheque is drawn by the complainant he will face criminal prosecution for allegation of making false affidavit. If

this measure are taken the case under section 138 of the Negotiable Instruments Act will be considerably reduced in the initial stage.

But in the instant case it is evidenced from the deposition of D.Ws 1 and 2 as well as Exbt. 'Uma' and Exbt. 'Gha' containing 11 pages that is also submitted before the court before issuance of the Rule as stated in the supplementary affidavit. In the supplementary affidavit containing the conversation through instagram in between the real complainant attorney giver Abu Ahmad and the accused-petitioner Nurul Hakim. Everything and real fact disclosed in the conversation of the instagram as it is exhibited before the court below as exhibit (ঘ) (gha)..

Latest amendment of the Evidence Act on 2022 the conversation through electronic media like instagram can be accepted as evidence.

From the conversation we find from the record, it is necessary to quote herein below for proper appreciation how and what way the blank cheques have taken and used against the present accused-petitioner by the mighty Abu Ahmad (real owner of the money).

The accused-petitioner used to call him maternal uncle (মামা)

and facts suggest that they are close relative and they are carrying on business with some amount of money. The Exhibit-‘Gha’ containing 11(eleven) pages some of the conversation is quoted herein below:-

“ ৬টা থেকে ১টা চেক ব্যবহার করিলাম মাত্র তোর জীবন শেষ অয় যাইবু টাকা দিতেদিতো।“

The accused-petitioner humbly stated. “ জোর পূর্বক চেক ও ষ্ট্যাম্প নিয়ে কাজগুলো ঠিক হচ্ছে না মামু।“ In reply to this the mighty complainant said, “ তোরে আবার বেধে আনার সময় হয়েছে তুই যেখানেই থাকোস না কেন। এবার বেধে আনলে জায়গার কাগজপত্র সহ বাড়িঘর সব দিয়েও তুই কুলাইতে পারবি না। “

In reply the accused-petitioner very humbly stated, “ মামু, মানুষকে তুমি যেগুলো বলতেছো আমি সেগুলোর উত্তর দিচ্ছি, আমি সহজ সরল মানুষ। আমি কোন অপরাধ করি নাই, আমার সাথে কেউ কোন অন্যায় জুলুম করলে সেটা হবে অমানবিক। মামু তুমি রাগের মাথায় অনেক কিছু বলছো। ঠান্ডা মাথায় চিন্তা করে দেখো জীবনে টাকা পয়সা কিছুই না। তুমি যাদেরকে দিয়ে খবর দিতেছো আমি তো তাদেরকে বলছি তোমার পাওনা ১৬ লাখ টাকা কিস্তিতে পরিশোধ করে দিবো। দিয়ে দিবো। আমি তো কারও কাছে অস্বীকার করিনি তুমি টাকা পাও সেটা “ In reply to that the complainant said,

“ হক হালালীর মারে চুদ তোর চেক ও ষ্ট্যাম্প কথা বলবে। একটা চেক রফিক কে দিয়ে দিচ্ছি, এখন রফিক পাবে ১ কোটি ৮০ লাক টাকা তোর কাছে। এবার ঠেলা বুঝার না।

তুর চেক আরও ৫ খান আছে ভুলি ন জাইছ। তুই তো জানছ আই আবু যারে ফান্দত ফেলাই ইতের কি অবস্থা অয়?”

In reply to that the accused-petitioner most humbly said,

“ মামু, আমি নিরীহ মানুষ। হক হালালী ভাবে ১৬ লাখ টাকা পাবে তাই বলে এভাবে আমার কাছ থেকে জোর করে ৬টা খালি চেক ও স্ট্যাম্প নিয়ে আমাকে হয়রানি করলে আল্লাহর গজব পড়বে। আমি আল্লাহকে বিচার দিলাম।”

In reply to this, mighty complainant Abu said,

“ তুই তো জানছ আই যারে একবার বেকা চোকে চাইয়ুম ইতের জীবন বরবাদ হই যাইবু। তুর হেডাম থাকিলে চাই তোর দৌড় কতদুর।” Abu further said,

“ তোর মত হাকিমরে আমি কি করতে পারি তুই দেখ। তুই তো জানোছ এক মাগীর পুলারে তোর সামনে বাধি আনি আমি বাড়ি ভিটাত ফইর বানাইতে আর কতক্ষন লাগছে।”

Abu further said that,

“ তোর চেক আমি একটার পর একটা আমি আনুষকে দিয়ে মামলা করায় ১৬ কোটি টাকা আদায় করবো। নাহয় বাকি জীবন জেল খানাত থাকবি না হয় ঘর দুয়ার বাড়ি ভিটা বউ পুয়া সব আমারে দিয়েও কুল পাবি না তুই হাকিম।”

In reply the accused-petitioner said, “ মামু আমার অপরাধ কি? আমাকে হয়রানি করে লাভ কি হবে? আল্লাহ একজন আছেন।” In reply fearless mighty Abu said,

“ রফিকব কে চেক যেটা দিছি সেইটা দিয়ে তুর সবকিছু টান দিবো। তারপর বাকি ৫টা চেক ৫জনকে দিলে তোর কি অবস্থা হবে একবার ভেবে দেখ। আমি যারে ধরি তারে

জিন্দা লাশ বানাই ছাড়ি ভাগিনা তুই তো জানোছ।“

Now we discuss what we see in the practical field. If we/any one issue a cheque in specific name mentioned therein and each and every space of the cheque will be written by us. We may direct someone to write down the cheque except signature but responsibility is ours. In short burden lies upon the drawer of the cheque.. Section 138 of the Negotiable Instruments Act is special law. This special law shall override on general provision of law and if anything mentioned in the special law the general law will not be applicable. In the instant case section 141 of the Negotiable Instruments Act says,

“Section 141 Cognizance of offences—Notwithstanding (underline is given by us) anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898).

- (a) no Court shall take cognizance in any offence punishable under section 138 except upon 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 of section 138;

(c) no court inferior to the Court of Sessions shall try any offence punishable under section 138.

In the instant case the case has been filed before the learned Magistrate and upon examining the complainant under section 200 of the Code of Criminal Procedure took cognizance. But this section 141 clearly stated that 'notwithstanding' it means whatever may be stated in the Code of Criminal Procedure the following provision stated in clause (a) (b) and (c) will be followed. The complaint case under section 138 of the Negotiable Instruments Act must be filed and cognizance must be taken under section 141 of the Act if it is complied clause (b) and (c) of section 138 of the Negotiable Instruments Act.

Now another chapter i.e. section 118 of the Act is only one protection of the accused person is under section 118 of the Act. This section 118 of the Act says, which needs to be quoted herein below:-

Section 118-- Presumption as to consideration—Where execution of a promissory note is proved. Until contrary is proved there would be presumption that every negotiable instrument was made or drawn for consideration, and that such instrument when accepted, endorsed, negotiated or transferred, was endorsed,

negotiated or transferred for consideration.”

This section 118 of the Act the word until contrary is proved is explained in this way.

“Until the contrary is proved”—Until the contrary is proved, every negotiable instrument which is duly made or deemed to have been made should prima facie be held to be one supported by consideration—A. Palanisamy V M. Kuppusamy (2000)2 MLJ 334,

Held in V.R.S.R.M. Ramaswami Chettiar V. Sridevi Talkles (1976) 1 MLJ 22)

In V.R.S.R.M. Ramaswami Chettiar V. Sridevi Talkles (1976) 1 MLJ 22) it is held,

“Until the contrary is proved, every negotiable instrument which is duly made or deemed to have been made should prima facie be held to be one supported by consideration. Presumption under section 118 of the Negotiable Instrument Act, shifts the burden of proof in the second sense, that is, the burden of establishing a case shifts to the defendant, the defendant may adduce direct evidence to prove that the cheque was not supported by consideration and if he adduced acceptable evidence, the burden again shifts to the plaintiff, and so on. It is therefore clear

that the burden is ambulatory, at one time it is on the plaintiff, and according to the proof and circumstances, it shifts on to the shoulders of the defendant.”.

This decision discussed in this book and more clear that if a cheque is denied by the drawer but he did not filled up may signed or may not be signed by the accused petitioner and if it is proved by way of acceptable evidence its burden shift to the plaintiff, in the instant case to the complainant. There is no reason to disbelieve the deposition of D.W.1 and exhibit (घ) (gha) it is on the record. All the suggestions which were given to the P.W.1 has been proved by D.W.1 by his deposition before the trial court.

In order to clutch the hands of the cognizance court two directions may be imposed, say for example, of Section 27(Ka)/(Kha) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (amended up to 2003) provides that the complainant must give an affidavit regarding the local police station denied to accept his/her complaint and thereafter the Nari-O-Shishu Nirjatan Daman Tribunal may entertain directly with affidavit. We like to take the same legal procedural mechanism in this section 138 of the Negotiable Instruments Act cases. Reasons for imposing directions are innumerable, now a days we are dealing with

hundreds/thousands of case under section 561A of the Code of Criminal Procedure are being filed before the highest judiciary in different pleas and different reasons. Most of the reasons are the cheques were not written or filled up by the drawer as mandated under sections 5 and 6. The directions are as follows:-

(1) We direct the cognizance court to receive an affidavit of facts specify that the drawer has filled up all spaces of the cheque and signed with the petition of complaint under section 138 of the Negotiable Instruments Act, 1881.

(2) The cognizance must be satisfied on the contention of complaint petition.

It is already noted herein above if he signed a cheque he must ascertain what amount of money was written and in whose favour the cheque was issued and what was the date of placing the cheque for encashment. It should be construed strictly, as it is special law failing one of the conditions noted herein above the drawer will be liable for criminal prosecution. Nothing should be written behind his back.

With the above direction we find substance and sufficient material to interfere with the criminal proceeding. This nature of

proceeding is sheer abuse of process of the court. The depositions of P.Ws and D.Ws, Annexure 'Uma', GD Entry and Exbt. 'Gha' the conversation containing 11 pages finding on the record that it is evidenced that the cheque was not filled up by the accused-petitioner and there was no consideration.

We have considered the evidence on record and the normal human conduct and behaviour contemplated in section 114 of the Evidence Act as well as the latest amendment enacted in the year of 2022 of the Evidence Act. We can accept the contents of the social media like instagram. We find that the Rule has got merit. This kind of proceeding should not be proceeded. The prosecution initiated for harassing the petitioner by ignoring section 5 and 6 of the Negotiable Instruments Act, cheque of Tk.1,80,00,000/-was has been written by the complainant and initiate the criminal prosecution against the petitioner.

On the above discussion we find merit in this Rule.

In the result, the Rule is made absolute. The proceeding initiated by the complainant Abu Ahmad in Sessions Case No.2202 of 2020 arising out of C.R. Case No.25 of 2020 (Panchlaish) under section 138 of the Negotiable Instruments Act, 1881 now pending in the Court of learned Joint Metropolitan

Sessions Judge, 4th Court, Chattogram is hereby quashed.

Communicate this judgment to the concerned Court immediately.

Md. Atoar Rahman, J

I agree.

M.Islam.
B.O.