Present:
Mr. Justice Md. Shohrowardi

Criminal Revision No. 278 of 2023
Mamunur Rashid @ Abdullah Al Mamun
...Convict-petitioner
-Versus-
The State and another
...Opposite parties
Mr. Mohammad Shafiqul Islam, Advocate with
Mr. Md. Omar Farok, Advocate with
Mr. Md. Azharul Islam Sohel,
...For the convict-petitioner
Mr. Shaheen Ahmed Khan, Advocate with
Mr. Mohammed Selim Jahangir, Advocate
...For the complainant-opposite party No. 2
Heard on 07.01.2026, 22.01.2026 and 25.01.2026
Judgment delivered on 26.01.2026

On an application under section 439 read with section 435 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 30.11.2022 passed by Sessions Judge, Laxmipur in Criminal Appeal No. 541 of 2022 affirming the judgment and order of conviction and sentence dated 02.08.2022 passed by Joint Sessions Judge, Court No. 2, Laxmipur in Sessions Case No. 166 of 2016 arising out of C.R. Case No. 921 of 2015 convicting the petitioner under section 138 of the Negotiable Instruments Act, 1881 and sentencing him thereunder to suffer imprisonment for 6(six) months and fine of Tk. 20,00,000(twenty lakh) should not be set aside, and/or such other or further order or orders passed as to this Court may seem fit and proper.

The prosecution's case, in short, is that the complainant Abdul Malek, and the accused Mamunur Rashid are relatives. The accused Mamunur Rashid used to deal with the land business. On 01.01.2015, the accused Mamunur Rashid received Tk. 10,00,000(ten lakh) from the complainant Abdul Malek for business in the presence of witnesses. The accused undertook to pay the said amount within

17.03.2015, but he did not pay the said amount. When the complainant requested him to pay the said loan, the accused Mamunur Rashid issued Cheque No. 0941708 on 18.03.2015 drawn on his Account No. 1483/9 maintained with Janata Bank Ltd, Corporate Branch, Lakshmipur for payment of Tk. 10,00,000(ten lakh). The complainant presented the said cheque on 20.07.2015 for encashment, but it was dishonoured on the same date with the remark 'insufficient funds'. The complainant informed the matter to the accused and requested him to pay the cheque amount. On 27.07.2015, he sent a legal notice through registered post to the accused for payment of the cheque amount, but he did not pay the said amount within the time mentioned in the legal notice. Consequently, the complainant filed the case on 30.08.2015.

During trial, charge was framed against the accused Mamunur Rashid, under section 138 of the Negotiable Instruments Act, 1881, which was read over and explained to him, and he pleaded not guilty to the charge. The prosecution examined 1 P.W to prove the charge against the accused, and the defence cross-examined P.W. 1. Thereafter, the accused absconded, for which the trial Court could not examine the accused under section 342 of the Code of Criminal Procedure, 1898.

After concluding the trial, the Joint Sessions Judge, Court No. 2, Laxmipur, by judgment and order dated 02.08.2022, convicted the accused under section 138 of the Negotiable Instruments Act, 1881, and sentenced him thereunder to suffer imprisonment for 6(six) months and a fine of Tk. 20,00,000 against which the accused filed Criminal Appeal No. 541 of 2022 before the Sessions Judge, Laxmipur, who, after hearing the appeal by impugned judgment and order dated 30.11.2022, affirmed the judgment and order passed by the trial Court against which the convict-petitioner obtained the Rule.

P.W. 1 Abdul Malek is the complainant. He stated that on 18.03.2015, the accused Mamunur Rashid issued a cheque in his

favour for payment of Tk. 10,00,000. He presented the said cheque, but it was dishonoured on 20.07.2015. He sent a legal notice on 27.07.2015, but the accused did not pay the cheque amount. He proved the complaint petition as exhibit 1 and his signatures on the complaint petition as exhibits 1/1 and 1/2, cheque as exhibit 2, dishonour slip as exhibit 3, legal notice as exhibit 4, and the postal receipt as exhibit 5. During cross-examination, he admitted that the accused is a businessman. The accused is his distant brother in relation. He is not aware that Sona Miah and Tota Miah are his sons. He is not aware that his father transferred his entire property by registered deed in favour of the accused. He denied the suggestion that at the time of breaking the shop of the accused situated in front of the Upazilla Parishad gate, the accused kept the valuable goods of the shop and documents in his house. He denied the suggestion that there were three cheques along with the document or that he forged the signature of the accused and filed the case or that the specimen signature on the cheque is not identical to the specimen signature of the accused appearing on account opening form or that by forging, he created the cheque, or that the accused did not issue any cheque in his favour.

The learned Advocate Mr. Mohammad Shafiqul Islam appearing on behalf of the convict-petitioner submits that the signature of the accused on the cheque (exhibit 2) is not identical to the signature of the accused on the account opening form of the accused maintained with the bank and no cheque was issued in favour of the complainant, and by forging signature of the convict-petitioner on the cheque kept at the time of breaking his shops, he filed the case falsely implicating the convict-petitioner. Having drawn the attention of this Court to the disputed cheque dated 18.03.2015 (exhibit 2), the learned Advocate submits that there are two different dates on the cheques. In the complaint petition, it has been alleged that the accused issued the cheque on ‘18.03.2015’. After the alleged signature of the

accused on the cheque (exhibit 2), the date ‘18.03.2014’ has been mentioned, which clearly proved that no cheque was issued on 18.03.2015 and the cheque (exhibit 2) was not presented within the specified time as mentioned in clause (a) of the proviso to section 138 of the Negotiable Instruments Act, 1881. Learned Advocate further submits that the High Court Division by judgment and order dated 08.07.2019 passed in Criminal Revision Case No. 2218 of 2017 directed the trial Court to call for the records to examine the genuineness of the signature of the accused on the disputed cheque and in compliance with the said order passed by the High Court Division, the trial Court called for the account opening form and other documents relating to the account maintained in the name of the accused and the bank also sent those documents but the Courts below without comparing the alleged signature of the accused on the disputed cheque (exhibit 2), and the account opening form and specimen signature card illegally concluded that the accused issued the disputed cheque. Both the Courts below, without considering the statutory provision made in clause (a) and (c) of the proviso to sections 138 and 141(b) of the Negotiable Instruments Act, 1881, illegally passed the impugned judgment and order. He prayed for setting aside the impugned judgments and orders passed by the Courts below.

The learned Advocate Mr. Shaheen Ahmed Khan appearing along with learned Advocate Mr. Mohammed Selim Jahangir on behalf of the complainant-opposite party No. 2 submits that the accused issued the cheque on 18.03.2015 which was presented on 20.07.2015 complying with the provision made in clause (a) to the proviso of section 138 of the Negotiable Instruments Act, 1881 but it was dishonoured with the remark ‘insufficient funds’. Consequently, the complainant made a demand on 27.07.2015 in compliance with the provision made in clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881. He further submits that in view of

the provision made in section 27 of the General Clauses Act, 1897, it is to be presumed that the said notice was served upon the accused and the date of sending notice should be reckoned as the date of receipt of the notice by the accused, but the accused did not pay the cheque amount. Consequently, the complainant, complying with all the procedures under sections 138 and 141(b) of the Negotiable Instruments Act, 1881 filed the case on 30.08.2015, and during trial, P.W. 1 proved the charge against the accused beyond all reasonable doubt. He further submits that making a demand in clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881 is sine qua non, but sending notice in the manner stated in section 138(1)(1A) of the said Act is not mandatory. In support of his submission, the learned Advocate relied on a decision made in the case of Mohammad Shawkat Ali Vs. The State and another reported in 30 BLT 446 and the case of Kishorbhai Bhudabhai Chavda Vs. State of Gujarat reported in 2012 (2) DCR 1. Both the Courts below, on correct assessment and evaluation of the evidence, legally passed the impugned judgments and orders following the law. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Mohammad Shafiqul Islam, who appeared on behalf of the convict-petitioner, and the learned Advocate Mr. Shaheen Ahmed Khan, who appeared along with the learned Advocate Mr. Mohammed Selim Jahangir on behalf of the complainant-opposite party No. 2, perused the evidence, impugned judgments and orders passed by the Courts below, and the records.

At the very outset, it is noted that in the case of Md. Idris Chowkder @ Idris Vs. The State and another, reported in 3 LM (AD) (2017) (2) 560 judgment dated 03.07.2014, our Apex Court has held that;

> "An offence under section 138 of the Negotiable Instruments Act is not compoundable, it being a special law."

Provisions made in a special law are mandatory and shall prevail over general law when both deal with the same subject matter. This is based on the legal principle "Generalia specialibus non derogant," which states that a special law that relates to a specific subject takes precedence over a general law. When a conflict arises, or even in scenarios where both laws could apply, the Court will follow the special statute designated for that particular situation. The above well-known maxim has been explained in Mary Seward vs owner of 'Vera Cruz', (1884) 10 AC 59, in which it has been held that;

> " Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by an earlier legislation, you are not to hold, that the earlier and the special legislation is indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do, so."

The above view was also adopted by the Supreme Court of India in the case of U.P. State Electricity Board and others vs Hari Shanker Jain and others reported in AIR 1980 SC 65 judgment dated 28.08.1978, in which the Supreme Court of India has held that;

> "We have already shown that the Industrial Employment (Standing orders) Act is a Special Act dealing with a Specific subject, namely the conditions of service, enumerated in the Schedule, of workmen in industrial establishments. It is impossible to conceive that Parliament sought to abrogate the provisions of the Industrial Employment (Standing orders) Act,

> embodying as they do hard-won and precious rights of workmen and prescribing as they do an elaborate procedure, including a quasi-judicial determination, by a general, incidental provision like Sec 79(c) of the Electricity Supply Act. It is obvious that Parliament did not have before it the Standing Orders Act when it passed the Electricity Supply Act, and Parliament never meant that the Standing Orders Act should stand protanto repealed by Sec.79(c) of the Electricity Supply Act. We are clearly of the view that the provisions of the Standing orders Act must prevail over S. 79(c) of the Electricity Supply Act, in regard to matters to which the Standing Orders Act applies."

At the time of enactment of the Negotiable Instruments Act, 1881, the provision made in section 138 was not there. Subsequently, on 12.09.1994 by way of amendment, "Chapter XVII" was substituted in the said Act in place of "Chapter XVII" by Act No. XIX of 1994, but at the time of said amendment no provision was made in the said Act regarding the manner of service of notice upon the accused to ascertain the cause of action as stated in clause (c) of the proviso to section 138 of the Negotiable Instruments Act, 1881. In view of the provision made in section 27 of the General Clauses Act, 1897, when a letter has been sent to the correct address of the addressee, it is to be presumed that the notice has been served upon the notice receiver or addressee. Nothing has been stated in section 27 of the General Clauses Act, 1897 as to the determination of the date of service of notice upon the accused as stated in clause (c) of the proviso to section 138 of the Negotiable Instruments Act, 1881. In the above scenario, the parliament inserted sub-section (1A) in section 138 of the Negotiable Instruments Act, 1881, by Act No. III of 2006 on 09.02.2006. Despite the provision made in section 27 of the General Clauses Act, 1897, the legislature inserted the said provision

not without any purpose. It is already held that any provision made in a special law on a particular issue shall prevail over any other provision made in general law on the same issue. Therefore, there is no scope to depart from the legislative intent as to the insertion of sub-section (1A) of section 138 of the Negotiable Instruments Act, 1881.

In the case of Nizamuddin Mahmood vs Abdul Hamid Bhuiyan and another reported in 60 DLR (AD) 195 judgment dated 17.06.2008 as to the date of receipt of the notice by the accused or service of notice upon the accused, it has been held that;

> "Since the date of receipt is a question of fact to be ascertained at the time of trial, non-disclosure of such fact in the complaint petition cannot render the proceeding liable to be quashed to the great prejudice of the complainant who is entitled to prove his case on evidence."

Subsequently, in the case of Aleya vs The State and another reported in 12 ALR 90 judgment dated 20.02.2018, a division bench of this Court set up several principles to be followed by the cognizance Court and the trial Court, which are quoted below;

> **"Guidelines for the learned Magistrates who are empowered to take cognizance of the offence under Section 138 of the NI Act:**
>
> 1. The learned Magistrates shall not entertain any petition of complaint under Section 138 of the NI Act unless the same contains the following statements:
>
> (a) Date of issuance of the cheque in question,
>
> (b) Date of dishonour of the said cheque for the last occasion, i.e., the latest date of dishonour,
>
> (c) Date of receiving information as to the dishonouring of the cheque by the payee from the bank,

(d) Date of making written demand (by delivering it in person/by registered post/by publication in the Bangla national newspaper) by the payee to the issuer/drawer of the cheque,

(e) Date of receipt of the demand notice by the issuer/drawer of the cheque.

2. After going through the complaint petition, if the learned Magistrate finds that a single statement of the above statements is missing, s/he shall decline to examine the complainant under Section 200 of the Cr PC.

3. When the learned Magistrate would be satisfied that the above steps were perfectly taken by the payee as per the provisions of clauses (a) to (c) of the Proviso to Section 138 of the NI Act, then the learned Magistrate shall check as to whether the payee has approached the Court within one month from the date of receipt of the written demand notice.

4. If the learned Magistrate finds that the payee has approached the Court upon complying with the above provisions of law, only then s/he is competent to exercise his/her power of taking cognizance.

5. The learned Magistrates shall bear in mind that if, at this stage, the complainant simply makes statements in respect of the above steps in addition to producing the original cheque in question, it will be sufficient for the complainant to initiate his/her case, for, it shall rest upon the complainant to prove his/her above statements by adducing oral/documentary evidence at the trial.

Guidelines for the learned Sessions Judges/Additional Sessions Judges/Joint Sessions

Judges who are conducting the trial of the cases under Section 138 of NI Act:

(1) When an application for discharge under Section of 265C of the CrPC is filed by the accused only on the ground of non-compliance of the provisions of the clauses (a) to (c) of the Proviso to Section 138 and Section 141 (b) of the NI Act, the trial Court must not hesitate to discharge the accused if it appears to the Court that neither the petition of complaint contains nor the statements made by the complainant at the time of examination under Section 200 of the CrPC disclose the information enunciated hereinbefore under the caption "Guidelines for the learned Magistrates"

(2) If the above information is provided in writing in an application under Section 265C of the CrPC by the accused, the trial Court should not regard it as defence version, for, in bringing the non-compliance to the above provisions of Section 138 and 141 of the NI Act, the complainant is simply seeking to draw the attention of the Court that the petition of complaint does not or the statements made under Section 200 of the CrPC do not disclose any offence. At this stage, the trial Court shall not emphasize on the document/s in corroboration of the statements made by the complainant as to the various dates, because the complainant shall have the opportunity to prove his/her statements either by oral evidence or by documentary evidence at the time of making his/her deposition as a witness.

(3) No accused shall be discharged on the basis of the defence version, i.e., any information provided or documents produced by the accused at this stage in an application under Section 265C of the CrPC. However,

> if the defence version taken by the accused in the discharge application appears to the Court to be prima facie plausible, the Court should endeavour to complete the trial of the case within the shortest possible time to minimize the harassment."

In the case of Kishorbhai Bhudabhai Chavda Vs. State of Gujarat reported in 2012 (2) DCR 1, Gujarat High Court has held that;

> "The complainant served notice to the accused demanding the amount of the unpaid cheque. It appears from the notice Exh. 46 that it is not addressed to the drawer of the cheque as required under Section 138(b) of the Act. Therefore, in my view, the requirement of Section 138 of the Act with regard to notice is not complied with. It is also settled position that for an offence under Section 138 of the Act, notice to the accused making demand of unpaid cheque is sine qua non. As the complainant failed to serve notice, the trial Court was justified in recording acquittal."

Subsequently, a single bench of this Court in the case of Mohammad Shawkat Ali Vs. The State and another reported in 30 BLT 446 para 17 judgment dated 20.06.2021, it has been held that;

> "In the instant case, it appears from exhibit-3/1 a "postal receipt" that the legal notice was served upon the drawer by registered post with "acknowledgment due". It is admitted that sometimes the acknowledgment due was not returned and sometimes it was lost from the postal department also so, merely basing on such technical point that the acknowledgment due has not been received by the complainant or non-disclosing of the date of receipt of the notice in the petition of complaint a case cannot fail and the payee of the cheque cannot be deprived of

> having his legitimate demand from the drawer of the cheque when it was not denied that the disputed cheque has not been issued by the drawer and it was dishonoured."

On consideration of the judgment passed in the case of Mohammad Shawkat Ali (Supra) reveals that the said judgment dated 20.06.2021 was passed without considering the earlier judgment passed in the case of Nizamuddin Mahmood (Supra) and Aleya (Supra). This Court is not empowered to pass any judgment or order considering the difficulty of any party without considering the statutory provision.

A bare reading of our Negotiable Instruments Act, 1881, and the Negotiable Instruments Act, 1881 of India, reveals that the provision made in section 138(1)(1A) of our Negotiable Instruments Act, 1881 is a unique one. No such provision is made in the Negotiable Instruments Act, 1881 in India. Furthermore, the judgment relied on by the learned Advocate Mr. Shaheen Ahmed Khan made in the case of Kishorbhai Bhudabhai Chavda (Supra) is equally applicable in the instant case.

Now, a question has arisen as to whether notice sent under clause (b) of the proviso to section 138 of the said Act was served upon the accused before filing the instant case and as to whether the complainant filed the case following the provisions made in section 138 (1)(b), 138(1)(1A) and 141(b) of the said Act.

As per Black's Law Dictionary, "giving of notice" is distinguished from "receiving of the notice" (vide p.621): "A person notifies or gives notice to another by taking such steps as may be reasonably required to inform the other in the ordinary course, whether or not such other actually comes to know of it." A person "receives" a notice when it is duly delivered to him or at the place of his business."

The view expressed in the Black's Law Dictionary has been adopted in the case of K. Bhaskaran vs. Sankaran Vaidhyan Balan, and another reported in (1999) 7 SCC 510 para 18. As to the giving a notice and receipt of the notice mentioned in clause (b) and (c) of section 138 of the Negotiable Instruments Act, 1881, the Supreme Court of India has held that;

> "On the part of the payee he has to make a demand by "giving a notice" in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such "giving", the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days "of the receipt" of the said notice: It is, therefore, clear that "giving notice" in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address."

The mere presentation of a cheque within the specified time mentioned in clause (a) of the proviso to section 138 of the Negotiable Instruments Act, 1881 and sending notice in writing to the drawer of the cheque by the payee within thirty days from the date of receipt of information by him from the bank regarding the return of the cheque as unpaid does not constitute an offence under section 138 of the Negotiable Instruments Act, 1881 unless the said notice is served upon the drawer of the cheque and he failed to pay the cheque amount within thirty days from the date of receipt of said notice and the 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 of the said Act.

In clause (b) of the proviso to section 138 (1) of the Negotiable Instruments Act, 1881, the legislature used the words "makes a demand… in writing" and in clause (c) of the proviso to section 138 (1) of the said Act, the legislature used the words "receipt of the said notice". The literal meaning of the words "receipt of said notice" means that the drawer of the cheque received the notice on a specific date. No provision is made in the said Act as to how the court will determine that notice sent under clause (b) of the proviso to section 138 (1) of the said Act has been received by the drawer or served upon the drawer. In the absence of any statutory provision, as regards the determination of service of notice upon the drawer or receipt of the notice by the drawer, I am of the view that the actual date of service of notice upon the drawer or receipt of notice by the drawer on a particular date might have been reckoned as service of notice upon the drawer. Receipt of notice indicates that the drawer of the cheque had been notified about the dishonour of the cheque. If the drawer refused to receive the said notice, the date of refusal to receive the notice by the drawer might have been reckoned as 'receipt of said notice' mentioned in clause (c) of the proviso to section 138 (1) of the said Act.

At the time of enactment of the Negotiable Instruments Act, 1881 no provision was made as to the mode of service of notice upon the drawer of the cheque. The legislature inserted Sub-Section (1A) in Section 138 of the said Act by Act No. III of 2006, making provision regarding the mode of the service of notice under clause b of the proviso to Section 138 of the said Act. As per Section 138(1A) of the said Act, the notice under section 138(1)(b) of the said Act is required to be served upon the drawer of the cheque, 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. The

Negotiable Instruments Act, 1881 is a special law. Service of notice upon the accused in compliance with the provision made in Section 138(1A) of the said Act, at least by one mode as stated above, is sine qua non.

From the proposition discussed hereinabove, it is found that making a demand as mentioned in clause (b) of the proviso to section 138 of the Negotiable Instruments Act, 1881, and service of notice upon the accused as mentioned in clause (c) of the proviso to section 138 of the said Act are two different acts and both the acts must be proved by the complainant at the time of trial of the case under section 138 of the Negotiable Instruments Act, 1881. In clause (c) of the proviso to section 138 of the Negotiable Instruments Act, 1881, it has been clearly mentioned that the drawer is entitled to thirty days to pay the cheque amount after receipt of notice by him or service of notice upon the accused. In the instant case, it is found that the complainant sent a legal notice through registered post on 27.07.2015. Nothing has been stated in the complaint petition as to the date of service of notice upon the accused or the date of receipt of notice by the accused. Nothing has also been stated by P.W. 1 as to the date of service of notice upon the accused or the date of receipt of notice by the accused. To determine the cause of action as stated in clause (c) of the proviso to section 138(1) of the said Act, the prosecution shall prove the actual date of service of notice upon the accused or the date of receipt of notice by the accused, which is the clear intent of the legislature. The prosecution did not adduce any evidence to prove the cause of action for filing the case on 30.08.2015. From the evidence adduced by the prosecution, this Court also could not ascertain the cause of action for filing the case on 30.08.2015 under section 138 of the Negotiable Instruments Act, 1881.

The provisions made in clauses a to c of the proviso to section 138(1), and sections 138(1)(1A) and 141(b) of the Negotiable Instruments Act, 1881 are cumulative and compliance of the said

provisions by the payee before filing a case under section 138 of the said Act is sine qua non.

On perusal of the disputed cheque (exhibit 2), it reveals that two separate dates have been mentioned in the cheque (exhibit 2). The date '18.03.15' has been mentioned in the cheque, but after the alleged signature of the drawer, '18.03.14' has been written. This Court has drawn the attention of the learned Advocate Mr. Shaheen Ahmed Khan, regarding the alleged two dates, i.e., "18.03.15" and "18.03.14" appearing on the disputed cheque (exhibit 2), but the learned Advocate could not give any satisfactory reply as to the double dates on the cheque. I am of the view that the date "18.03.15" was subsequently written mala fide on the disputed cheque by the complainant to extend the time of presentation of the cheque as stated in clause (a) of the proviso to section 138 of the said Act and no cheque was issued by the accused on "18.03.15" as stated by the complainant in the complaint petition.

On perusal of the records, reveals that the trial Court by order dated 25.08.2021, called for the records from the Janata Bank and the Janata Bank Ltd, Lakshmipur Corporate Branch, by letter dated 03.02.2022, sent the attested copy of the account opening form and the specimen signature card of the accused Abdullah Al Mamun maintained with the said branch of the bank. In view of the provision made in sections 3 and 4 of the ব্যাংকার বহি সাক্ষ্য আইন, ২০২১, the attested copy sent by the branch of the bank is admissible in evidence. Since, in compliance with the order dated 25.08.2021, the Manager sent the said documents, the trial Court ought to have compared the signature of the accused appearing on the cheque (exhibit 2) and the specimen signature of the accused appearing on the account opening form and specimen signature card. I am of the view that for ends of justice, this Court should compare the signature of the accused appearing on exhibit 2 and his signature appearing on the account opening form and specimen signature card.

During cross examination, a suggestion was given to P.W. 1 that the specimen signature on the cheque is not identical to the specimen signature of the accused appearing on the account opening form or that the accused did not issue any cheque in favour of the complainant which has been denied by P.W. 1. On scrutiny of the alleged signature of the accused appearing on the disputed cheque (exhibit 2) and the admitted signature of the accused appearing on the account opening form of Account No. 1483/9 maintained with the Janata Bank Ltd, Lakshmipur Corporate Branch and the specimen signature of the accused of the said account reveals that the alleged signature of the accused on the disputed cheque (exhibit 2) is not identical to the signature of the accused appearing on the said account opening form and the specimen signature card. Therefore, I am of the view that the disputed cheque (exhibit 2) was not issued by the accused Mamunur Rashid, and the complainant mala fide forged the signature of the accused on the disputed cheque (exhibit 2) and committed forgery.

The trial Court or the Court of Appeal is not a machinery of conviction. The Court shall pass the judgment and order considering the evidence in accordance with the law. Both the Courts below, without considering the cross-examination of the P.W. 1 and the disputed cheque (exhibit 2) in juxtaposition, mechanically concluded that the accused issued the disputed cheque (exhibit 2) and arrived at a wrong decision as to the guilt of the accused.

Until the contrary is proved, there is a presumption under section 118(a) of the Negotiable Instruments Act, 1881 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. The presumption under section 118(a) of the said Act is rebuttable. The defence by cross-examining the prosecution witness or by adducing evidence is entitled to rebut the

said presumption. In the instant case, by cross-examining P.W. 1, the defence rebutted the presumption under section 118(a) of the said Act. I am of the view that the accused Mamunur Rashid @ Abdullah Al Mamun did not issue the cheque in favour of the complainant.

In view of the above evidence, findings, observation, and the proposition, I am of the view that the prosecution failed to prove the cause of action for filing the case on 30.08.2015. From the evidence adduced by the prosecution, the cause of action for filing the case could not be ascertained. The Courts below failed to construe the mandatory provision made in clauses a to c of the proviso to section 138(1), and sections 138(1)(1A) and 141(b) of the said Act. P.W. 1 filed the complaint petition, forging the signature of the convict-petitioner Mamunur Rashid @ Abdullah Al Mamun on the disputed cheque (exhibit 2) and falsely implicated him in the case.

It is submitted that during the pendency of the Rule, the complainant withdrew 50% of the cheque amount.

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 both the Courts below against convict-petitioner Mamunur Rashid @ Abdullah Al Mamun are hereby set aside.

The convict-petitioner Mamunur Rashid @ Abdullah Al Mamun is entitled to get back 50% of the cheque amount deposited by him before filing the appeal.

The complainant-opposite party No. 2 is directed to deposit 50% of the cheque amount received by him from the trial Court within 3(three) months from the date, failing which the trial Court is directed to recover 50% of the cheque amount from the complainant and refund the same to the convict-petitioner Mamunur Rashid @ Abdullah Al Mamun.

However, there will be no order as to costs.

Send down the lower Court’s records at once.