1 SCOB [2015] HCD 63

HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)

Criminal Appeal No. 6691 of 2011
with
Criminal Appeal No. 6692 of 2011

Md. Muksedur Rahman Badal
..... Convict appellant
-Versus-

The State and another
..... Respondents

Mrs. Hosneara Begum
..... For the appellant
Mr. Md. Monwar Hossain, Advocate
….. For the respondent no.2

Heard on 20.10.2014, 21.10.2014 and 27.10.2014
Judgment on 19.11.2014 and 20.11.2014

Bench:
Justice A.N.M. Bashir Ullah

Negotiable Instruments Act, 1881
Section 118:
Unless the contrary is proved there is a presumption that every negotiable instrument was drawn for consideration, that is, the complainant of a case presumed to have got the cheque for consideration.
...(Para 50)

As the very section 118 of the N.I. Act starts with the words 'until the contrary is proved' that means the defence has the authority to prove the contrary fact of the presumption that every negotiable instrument was made or drawn for consideration in favour of the holder in due course.
...(Para 52)

In a case under section 138 of the N.I Act, the legal presumption exists in favour of the "holder in due course of the cheque" that he got the cheque for consideration and that has been ensured by the provisions of sections 9 and 118 of the N.I Act but at the same time this presumption is a rebuttable presumption. Whenever any accused leads the evidence to rebut such presumption the burden again shifts to the complainant who is the holder in due course of the chque to proof by the legal evidence that the cheque was drawn in his favour for consideration. **...(Para 68)**

Judgment

A.N.M. Bashir Ullah, J:

1. These two criminal appeals under section 410 of the Code of Criminal Procedure (in short, the Code) have been taken up jointly for disposal as the facts of the two appeals are almost similar and common with a few differences in respect of the prosecution case but the defence cases are almost similar and all the points regarding the fact and law raised by the convict-appellant in both the appeals are almost common, as such, the same are being disposed of by this single judgment.

2. Criminal Appeal no. 6691 of 2011 has been preferred by the convict appellant Md. Muksedur Rahman Badal (in short, Mr. Badal) against the judgment and order dated 04.10.2011 passed by the Metropolitan Additional Sessions Judge, 5th Court, Dhaka in Metro Session Case no. 2154 of 2007 arising out of C.R Case no. 2121 of 2007 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 (in short, the N.I. Act) sentencing him to suffer simple imprisonment for 6(six) months with a fine of Taka 21,27,000/- (twenty one lacs twenty seven thousand).

3. The Criminal Appeal no. 6692 of 2011 has been filed by the same appellant against the judgment and order of conviction and sentence dated 04.10.2011 passed by the Metropolitan Additional Sessions Judge, 5th Court, Dhaka in Metro Session Case no. 133 of 2008 arising out of C.R Case no. 2592 of 2007 convicting the appellant under section 138 of the Negotiable Instruments Act, 1881 sentencing him to suffer to suffer simple imprisonment for 6(six) months with a fine of Taka 8,58,000/- (eight lacs fifty eight thousand).

4. The facts relevant for the disposal of the appeal no. 6691 of 2011, in short, is that Feroz Mahmood Rasel (in short, Mr. Rasel) as complainant filed a petition of complaint in the Court of Metropolitan Magistrate, Dhaka under section 138 of the Negotiable Instruments Act, 1881 against the present appellant Mr. Badal alleging, inter-alia, that the complainant Mr. Rasel is the proprietor of Prantik Enterprise, a business firm and also a bonafide businessman. The accused in order to run his business took a loan of Taka 21,27,000/- (twenty one lacs twenty seven thousand) from the complainant on 20.04.2006. The accused in order to make payment of the said loan money drew a cheque on 26.11.2006 being cheque no. 0000441948 of his account no. 01-684 1678-01of Standard Chartered Bank, Bangladesh Ltd. The complainant in order to encash the said cheque presented the same at Sonali Bank, Amin Bazar on 02.04.2007 and the cheque was lastly dishonoured on 04.04.2007 for insufficient of fund. Thereafter, the complainant issued a legal notice on 29.04.2007 through his engaged Advocate requesting the accused for making payment of the cheque value. But the accused did not make payment pursuant to the said legal notice. Thereafter, the complainant under compelling circumstances filed the petition of complainant in the competent Court of Metropolitan Magistrate, Dhaka on 21.06.2007. The Metropolitan Magistrate, Dhaka examining the complainant Mr. Rasel under section 200 of the Code of Criminal Procedure took cognizance of the said offence by his order dated 21.06.2007 and the case was registered as Complaint Case being no. 2121 of 2007.

5. The accused appearing in the Court of Metropolitan Magistrate sought bail and he was granted bail and when the case became ready for trial the same was transmitted in the Court of Metropolitan Sessions Judge, Dhaka where the case was registered as Metropolitan Sessions Case no. 2154 of 2007 and eventually the accused was put on trial before the Metropolitan Additional Sessions Judge, 5th Court, Dhaka where charge under section 138 of the N.I. Act against the accused Mr. Badal was framed to which he pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove the charge examined one witness and submitted some papers which were marked as exhibit nos. 1-4 and on completion of recording of the evidence of the prosecution witness the accused was examined under section 342 of the Code when he repeated his innocence and expressed his desire for examining of the defence witnesses and accordingly the defence examined 5 witnesses in the case. The trial Court on consideration of the evidence and other materials on record found the appellant guilty and convicted and sentenced him as aforesaid. The convict Mr. Badal being aggrieved by and dissatisfied with the said judgment of the trial Court dated 04.10.2011 preferred Criminal Appeal no. 6691 of 2011 in this Court.

7. The facts relevant for disposal of the Criminal Appeal no. 6692 of 2011, in short, is that Md. Nadim as complainant filed a petition of complaint under section 138 of the N.I. Act against the accused Badal alleging, inter-alia, that the accused being a relative of the complainant had approached him for a loan of Taka 10,00,000/- (ten lacs) in the 1st week of January, 2006 and the complainant in responding of the said request gave Taka 8,58,000/- to him with the stipulation that he will return back the same within the month of March of the same year. Later on, the complainant Mr. Nadim asked the accused for making payment of the said loan money and last of all the accused drew a cheque on 04.12.2006 for Taka 8,58,000/- being cheque no. 0000441950 of his Standard Chartered Bank Bangladesh Ltd. The complainant Mr. Nadim presented the cheque on several occasions at Janata Bank, Elephant Road, Dhaka and lastly the same was dishonoured on 29.04.2007. Thereafter, the complainant issued a legal notice on 24.05.2007 requesting the accused Mr. Badal for making payment of the said amount and though the accused received the legal notice on 28.05.2007 but did not respond to the said legal notice and under the said compelling circumstances the complainant Mr. Nadim filed the petition of complaint on 26.07.2007 before Metropolitan Magistrate, Dhaka.

8. The Metropolitan Magistrate, Dhaka examining the complainant Mr. Nadim under section 200 of the Code took cognizance of the said offence against the accused Mr. Badal under section 138 of the N.I. Act and the case was registered as C.R Case no 2592 of 2007.

9. The accused Mr. Badal surrendering in the Court of Metropolitan Magistrate, Dhaka sought bail and he was granted the same and when the case became ready for trial the same was transmitted into the Court of Metropolitan Sessions Judge, Dhaka where the case was registered as Metropolitan Sessions Case no. 133 of 2008 and eventually the accused was put on trial before the Court of Metropolitan Additional Sessions Judge, 5th Court, Dhaka. The trial Court framed charge against the accused under section 138 of the N.I. Act to which he pleaded not guilty and claimed to be tried.

10. The prosecution in order to prove the charge examined 1 witness and submitted some papers which were marked as exhibit nos. 1-4/1 and on completion of the recording of the prosecution evidence the accused was examined under section 342 of the Code when he repeated his innocence but expressed his desire to

examine defence witnesses and ultimately the defence examined 4 witnesses in the case and submitted some papers also. The trial Court on consideration of the evidence and other materials on record found the accused Mr. Badal guilty under section 138 of the N.I. Act and convicted and sentenced him as aforesaid.

11. The convict appellant Mr.Badal being aggrieved by and dissatisfied with the judgment of the trial Court dated 04.10.2011 preferred the appeal being no 6692 of 2011 in this Court.

12. It has been told earlier that the defence cases are almost same in both the cases. The defence case as it appears from the trend of cross-examination of the prosecution witnesses is the case of innocence, false implication and total denial of the prosecution case.

13. The further defence taken is that Feroz Mahmood Rasel is the brother's son of accused Moksedur Rahman Badal who (Feroz Mahmood Rasel) used to work in the business firm of the accused as an employee from 2000 to 2005 and on those years the accused was sick, as such, he was not in a position to look after his business attentively. Most of the work of his business firm was done by the complainant Feroz Mahmood Rasel. Since Feroz Mahmood Rasel is the family member of the accused he (accused) trusted him much. As such, all the transactions of the business firm of the accused like collection of the money from the parties, depositing of the money in the banks and payment to the other business firm for purchasing goods were also done by the complainant Feroz Mahmood Rasel. Feroz Mahmood Rasel taking the advantage of the full trustness of the accused had grabbed some pages of the cheque of the accused and when the accused came to know that Feroz Mahmood Rasel has not been working honestly and sincerely and when it was also detected that some pages of the cheque books are missing and when the total activities of the complainant Feroz Mahmood Rasel became doubtful to the accused he had ousted him from the business firm of the accused but the complainant Feroz Mahmood Rasel using the stolen cheques filed two false cases, one in his own name putting a figure of Taka 21,27,000/- in the cheque and another by his cousin Md. Nadim putting Taka 8,58,000/- in that cheque. The complainants had no financial ability t give any loan to the accused.

14. It is the further defence Case that there was no consideration for the drawing of such a cheque in favour of Feroz Mahmood Rasel. The accused did not take any loan from Feroz Mahmood Rasel and he had no any financial capacity to give loan of such amount to the accused Muksedur Rahman Badal.

15. The complainant Feroz Mahmood Rasel was not satisfied using the cheque for Taka 21,27,000/- he also filed another case through Nadim who happens to be the cousin of Feroz Mahmood Rasel and nephew of Moksedur Rahman Badal. Feroz Mahmood Rasel using another cheque of the accused putting an amount at their sweet will for Taka 8,58,000/- filed another case being C.R Case no. 2592 of 2007. The accused had no any business transaction with Md. Nadim. The accused did not take any loan from Nadim and Nadim had no any financial capacity to give loan to the accused and the accused did not drew any cheque in favour of Nadim for the amount shown in the cheque. Both the cheques were written and prepared for the purpose of the cases and there was no any reason for the accused to draw the cheques in favour of the complainants. The accused was innocent and have become the victim of circumstances.

16. At the time of hearing of these appeals Mrs. Hosneara Begum, the learned Advocate appearing for the appellant Moksedur Rahman Badal assailing the judgments of the trial Court and supporting the petition of appeals submits that the accused is a established and rising businessman who has been running the business of sands and stones at Amin bazar, Dhaka and he is a very promising businessman of that locality but from 2002 he became sick as such he was not in a position to look after his business firm closely and regularly and to cover his such absence he had inducted one of the family member Feroz Mahmood Rasel who is nobody but his brother's son to look after the business on his behalf and he Mr. Rasel had looked after of the business of the accused from 2002-2005. She further contends that the accused took treatment hither to thither trusting solely upon the complainant Feroz Mahmood Rasel who also had looked after the business properly at the early stage of his induction but at one stage he was misguided for the reasons best known to him. The complainant (Mr. Rasel) in discharging his duties in the business firm of the accused used to collect money from the parties, deposited the money in the banks and withdrew the same from the banks under and the cheque book of the accused was also in the custody of the complainant Mr. Rasel.

17. She further submits that in 2005 the accused found that some of the pages of his cheque book were missing and the total activities of the complainant Mr. Rasel had appeared to the accused very doubtful. Upon the above facts, the accused made a G.D entry recording the facts of missing of the cheques and the accused did not feel it suitable to continue Mr. Rasel from 2005 in his firm. Thereafter, he took the business in his own hand from Mr. Rasel but when he (Mr.Rasel) has been in the total responsibility of the business firm of the accused

had taken away some of pages of the cheque book and using the same filed the case in his own name showing Taka 21,27,000/- being C.R Case no. 2121 of 2007 and another case in the name of his cousin Mr. Nadim putting a figure of Taka 8,58,000/-.

18. The learned Advocate further submits that the story of loan as canvassed in both the petitions of complaint is nothing but a myth. They had no any financial capacity to give the loan to the accused. Mr. Rasel was an employee in the business firm of the accused. How could he lend an amount of Taka 21,27,000/- to the accused. Md. Nadim also had no any financial capacity to give loan of a figure like Taka 8,58,000/- to the accused. As such, there was no minimum reason on the part of the accused to draw the said two cheques in their favour in order to make payment of the cheque value.

19. She also submits that the complainant Mr. Rasel using the signed cheques of the accused which he had taken away in between 2002-2005 filed two false cases and the accused in his defence adducing sufficient numbers of witnesses including the family members who are nobody but the brothers and sisters of the accused proved this defence case and those brothers and sisters of the accused are the uncle and fufu of Mr. Rasel. They as the family members must not favour the accused only. They stand in the same distance from Mr. Rasel and the accused Mr. Badal. But the trial Court measurably failed to consider the defence case as well as the unequivocal and nitid evidences of those defence witnesses and thus came to a wrong conclusion finding the accused guilty under section 138 of the N.I. Act.

20. The learned Advocate also submits that the trial Court did not at all consider whether the complainants had any capacity to give the loans of the projected amount to the accused and also did not consider whether the accused had drawn the cheques in favour of them in order to make payment of his debts. The learned Advocate in her concluding submissions submits that in a case under section 138 of the N.I. Act in order to assert the conviction of the accused, the prosecution is under duty bound to prove that the complainants were holders of the cheques in due course as provided in section 9 of the N.I. Act but the prosecution could not prove the same. The complainants had managed to file the case using the signed cheques of the accused which they had got earlier by fraudulent means. Thus, the judgment and the order of conviction and sentence has been suffering from gross illegality and the same cannot sustain at all. So, the judgment and order of conviction and sentence passed upon the convict appellant by the trial Court in both the cases are liable to be set aside acquitting the convict appellant from the charges levelled against him.

21. On the other hand Mr. Md. Monowar Hossain, the learned Advocate appearing for the complainant-respondents in both the appeals supporting the judgment of the trial Court and opposing the appeals submits that the accused Moksedur Rahman Badol took a loan of Taka 21,27,000/- from Feroz Mahmood Rasel and also Taka 8,58,000/- from Md. Nadim. It is fact that both the complainants and the convict appellant are the relatives and that is why the convict was blessed with the said loans by the complainants but the convict failed to make payment of the said loan amount within the stipulated time, thus he drew two cheques in order to make payment of his such debts but the cheques were dishonoured by the Banks for insufficient of funds, thereafter both the complainants issued legal notice asking the convict for making payment of the cheques values but the convict intentionally did not respond to the claim of the complainants. Thus, the complainants finding no other alternative had filed the cases in the competent Court of Metropolitan Magistrate, Dhaka and at trial both the complainants Feroz Mahmood Rasel and Md. Nadim deposing in the Court proved that the cheques were drawn by the convict appellant and also proved the prosecution case and the trial Court rightly believing the evidence of the prosecution witnesses convicted and sentenced the convict accordingly. The trial Court did not commit any error of law and fact in believing the prosecution case which has been proved by the very cogent and nitid evidence of the complainants. So, the judgment and the order of conviction and sentence passed by the trial Court in both the cases are not liable to be set aside. So, the appeals are liable to be dismissed with costs.

22. I have considered the above submissions and arguments of the learned Advocates of both the parties with profound attention and have gone through the materials on record particularly the petition of complaints, the oral evidence adduced by the parties, the documentary evidences and other materials on record meticulously.

23. On going to the materials on record, it appears that in Sessions Case no. 2154 of 2007 the prosecution examined one witness and the defence examined 5 witnesses and both the parties had adduced documentary evidences. Now, in order to appreciate the arguments advanced by the learned Advocates of both the parties before me, let the oral evidence adduced by the parties in both the cases be sift and discussed.

24. In Sessions Case no. 2154 of 2007 Feroz Mahmood Rasel was examined as PW 1 who testified in the Court that accused Moksedur Rahman Badal in order to make payment of Taka 21,27,000/- had drawn a cheque

being cheque no. 0000441948 of the Standard Chartered Bank Bangladesh Ltd on 26.11.2006, the cheque has been marked as exhibit 1. He further testified that the cheque was dishonoured for insufficient of fund on 04.04.2007. The dishonor slip has been marked as exhibit 2. He also testified that on 29.04.2007 the accused was served with a legal notice, the legal notice and other supporting papers has been marked as exhibit 3 series. He further stated that he had filed the petition of complaint on 21.06.2007. The petition of complaint has been marked as exhibit 4.

25. In cross-examination of the defence, he has stated that the accused is the full brother of his father, he did not file any paper to show the ownership of the Prantik Enterprise, his father had 4 brothers and his father died in the year of 2005. He denied the defence suggestion that the accused is the owner of the Prantik Enterprise and Pentacle Intertrade and he cannot say who is the owner of Pentacle Intertratde. He denied the defence suggestion that he was an employee in the business firm of the accused from 2002-2005 and the cheques of the accused were in his custody and he filed the case using those cheques. He denied the further defence suggestion that he had no taka 21,87,000/- in his possession at any time.

26. The defence examined 5 witnesses in Sessions Case no. 2154 o 2007. DW 1 Alhaz Md. Moksedur Rahman, the accused himself testified that the complainant is his brother's son, the father of the complainant Mr. Rasel was a patient of cancer and he had suffered a lot in the said disease, he (accused Badal) has been suffering from lecuderma disease for the last 15 years and he could not perform all type of jobs, particularly the jobs which has contact with the dust. He also stated that since the father of the complainant Mr. Rasel was ailing their financial condition was bad and at the same time since he could not go in the sun light and in the meantime the father Mr. Rasel died on 09.05.2000 as such he was appointed as an employee in his business firm as Manager-Cum-Cashier and all the works of his business firm were looked after by the complainant Mr.Rasel, who used to transact the money with the parties.

27. He further stated that on 15.12.2005 he had gone at Ramzan Super Market under Pallobi Police Station along with the complainant Mr. Rasel to settle an account with a party and when he came to know that a cheque book of Standard Chartered Bank Ltd is missing and on search he did not get it, on 16.12.2005 the complainant Mr. Rasel was asked to place the accounts when he found disparity in the accounts of his business firm and from then the complainant Mr. Rasel was dropped from his job, thereafter, he has been looking for his own business, he lodged a G.D entry with Pallobi Police Station on 17.12.2005 for the missing of the cheque book being G.D entry no. 1057, marked as exhibit 'Ka'. He also stated that since the complainant Mr. Rasel was ousted from his business firm he was offering threat to him, on 15.05.2006 the complainant Mr. Rasel and his younger brother Jewel coming in his office assaulted him, he lodged an FIR to that effect with Savar Police Station. In the last part of 2007 he came to know that the complainant Mr. Rasel has filed a case under the provisions of N.I. Act against him and also came to know that the missing page of the cheque book has been used by Mr. Rasel which had been detected on 15.12.2005. He also stated that after some days he also came to know that another case has been filed by his nephew being case no. 139, in fact, that was also filed by Mr. Rasel, their family members took an attempt to settle the matter amicably and accordingly the complainant Mr. Rasel was requested to withdraw the case but he did not comply with such request whereupon all the relatives had set aside the relationship with Mr. Rasel.

28. DW 1 further stated that his financial condition is better, he did not take any loan from Rasel and he (Mr. Rasel) had no any financial capacity to give any loan to him, both the case were filed using the stolen cheques. DW 1 proved his trade license marked, exhibit (Kha); Income tax certificate, exhibit (Ga); certificate of his financial capacity, exhibit (Gha); bank deposit slips 52 pages, to show the transaction by the complainant Mr. Rasel, exhibit (Uma) series, the bank statements 78 pages, exhibit (Cha) series; a khata of 79 pages written and compiled by the complainant Mr. Rasel when he had served in his business firm, exhibit (Chha), counter parts of two cheque books, exhibit (Jha), ledger book written by the complainant, exhibit (Jhha).

29. He further stated that he cannot say how many pages were in the cheque book. He proved two receipts by which the complainant Mr. Rasel had purchased a SIM card of Grameen Phone, marked exhibit (Tha) and Tha/1, four deposit slips by which the complainant Mr. Rasel deposited money in the bank in the name of the accused, marked exhibit (Dha) series, six counter part of cheques of the Dhaka Bank Ltd written by the complainant when he was serving in his business firm, marked exhibit (Na series).

30. In cross-examination of the complainant DW 1 denied the prosecution suggestion that there was no signature of the complainant in the receipt of the Grameen Phone company. He denied the further prosecution suggestion that in the counter part of the cheque there was no hand writing of the complainant Mr.Rasel.

31. DW 2 Azizur Rahman, the full brother of Muksedur Rahman Badal has testified that the complainant Mr.Rasel is his brother's son, who used to work in the business firm of accused Muksedur Rahman Badal, since there was some differences regarding the accounts of the business of the accused, he (accused) had dropped the complainant Mr.Rasel from his business firm, thereafter, the complainant Mr.Rasel filed the case against the accused, they took an attempt to settle the matter but that did not see the light of the day. In cross-examination of the prosecution DW 1 stated that the accused is his younger brother, the accused did not draw any cheque in favour of the complainant Mr. Rasel. He denied the prosecution suggestion that he has land dispute with the complainant Mr. Rasel as such he deposed against him.

32. DW 3 Md. Abdul Haque Badal, another full brother of the accused testified that accused is his full brother while the complainant is his brother's son, the complainant (Mr. Rasel) used to work in the business firm of the accused and since there were some differences in the accounts in the business firm of the accused, the accused had dropped the complainant from his firm, the complainant Mr.Rasel stealing some pages of the cheque filed the case against the accused and after filing of the case they used to hate complainant Mr.Rasel. In cross-examination of the prosecution DW 3 stated that he did not hear anything about filing of the case for stealing of the cheque but he had heard about the GD entry for the same. He denied the prosecution suggestion that the complainant did not steal the cheque and the accused drew the cheque in order to discharge his debt to the complainant Mr.Rasel.

33. DW 4 Asuda Khatun, the full sister of the accused testified that the complainant Mr. Rasel is her brother's son while the accused is her brother, the complainant Feroz was the employee in the business firm of the accused and since there were some differences in the accounts of the said business firm, the complainant was dropped from the business firm of the accused, they asked both the parties to settle the matter amicably but they did not pay heed to it. In cross-examination of the prosecution DW 4 stated that the accused did not drew the cheque inf avour of the complainant. She denied the prosecution suggestion that since the accused is her full brothers, he has deposed falsely for him.

34. DW 5 Khorsheda Khatun, another full sister of the accused has testified that the complainant is her brother's son while the accused is her full brother, the complainant Mr.Rasel had stolen the cheque of the accused, they took an attempt to settle the matter but failed, the complainant Mr.Rasel had filed a false case. In cross-examination of the prosecution she stated that she cannot say whether the accused had filed any case for the stealing of the cheque but she is aware about the G.D entry. She denied the prosecution suggestion that on 26.11.2006 the accused drew the cheque in favour of the complainant Mr.Rasel. She further stated that her husband is dead and the accused has been maintaining her family. She denied the prosecution suggestion that for that reasons she had deposed in favour of the accused.

35. The prosecution examined 1 witness in Sessions Case no. 133 of 2008 and the defence examined 4 witnesses.

36. PW 1 Md. Nadim testified that accused Md. Muksedur Rahman Badal in order to make payment of Taka 8,58,000/- had drawn a cheque on 04.12.2006 of Standard Chartered Bank Ltd, the cheque has been marked as exhibit 1. He further testified that for encashment of the cheque, the same was presented to his Bank repeatedly but lastly on 29.04.2007 it was dishonoured for insufficient of fund, the disnonoured slip has been marked as exhibit 2 series, thereafter, he issued legal notice through his engaged Advocate on 24.05.2007, the legal notice and other papers connected to the legal notice has been marked as exhibit 3 series, since the accused did not make payment of the said amount, he filed the petition of complaint on 26.07.2007 in the Court Chief Metropolitan Magistrate, Dhaka, he proved the case and his signature on it, marked exhibit 4 and 4/1.

37. In cross-examination of the defence PW 1 stated that so far he knows the accused is a businessman of stones and sands, he had lended the money to the accused in the first week of January, 2006 but there was no any paper in support of the said transaction, he did not receive the cheque on the date of lending money, the accused is his cousin (fufato vi) and there was stipulation between them that the accused will return back the money within March, 2006. He further stated that he had deposed in Sessions Case no. 2154 of 2007 in favour of Feroz Mahmood Rasel who is his nepnew. He denied the defence suggestion that he filed the case relying on a cheque given by Feroz Mahmood Rasel in order to serve his purpose.

38. The defence examined 4 witnesses in Sessions Case no. 133 of 2008. DW 1 Muksedur Rahman Badal, the accused himself has testified that the complainant is his cousin (mamato bhai), the father of Mr. Rasel died of cancer disease, thereafter in compliance of the request of the near relatives he appointed Feroz Mahmood Rasel in his business firm as Manager-Cum-Cashier, on 15.12.2005 he and Feroz Mahmood Rasel had gone at

Ramzan Super Market under Pallabi Police Station to settle an account with one of his business partner and he coming back in his house came to know that a cheque book of Standard Chartered Bank is missing and some of the pages of the said cheque were signed by him and some of the pages were unsigned, on 16.12.2005 he found some anomaly in the accounts of his business whereupon Feroz Mahmood Rasel was dropped from his business firm, on 17.12.2005 he filed a G.D entry being no. 1057 regarding the missing of the cheque and after almost one year and five months by the by he came to know that Mr.Rasel and the present complainant Nadim have filed the cases under the provisions of Negotiable Instruments Act against him. In fact both the cases were filed using the missing cheques which was noticed to him on 15.12.2005, the complainant Nadim in collusion with Mr.Rasel filed the present case.

39. In cross-examination of the prosecution DW 1 denied the prosecution suggestion that after the death of the father of Mr.Rasel he used to look after the business firm namely Prantik Enterprise belonged to the father of Mr.Rasel. He denied the further suggestion that he did not go to Ramzan Super Market with Rasel. He cannot say exactly how many pages were lost and also cannot say how many pages were signed and unsigned. One cheque book was in the custody of Rasel. He denied the further prosecution suggestion that no cheque has been lost from him and he drew the cheque in order to make payment of his debts in favour of the complainant Nadim.

40. DW 2 Abdul Haque Badal, the full brother of accused Muksedur Rahman Badal has testified that complainant Nadim is his cousin (mamato bhai). Rasel had stolen the chque of the accused and using the same filed this case and another case. In cross-examination of the prosecution DW 2 stated that they sat two/three years ago for amicable settlement of the dispute but cannot say the exact date. They asked the complainant to withdraw the case. He denied the prosecution suggestion that Rasel did not steal the chqeue.

41. DW 3 Nurul Haque Rubel, the full brother of accused testified that complainant Nadim is his mamato bhai, the present case is false, Rasel used to serve in the company of the accused Badal and since they were some anomaly in the accounts of the business firm of accused Badal, he ousted Mr.Rasel and Mr.Rasel ultimately using the cheques which he got at the time of serving in the business firm of the accused filed one case in his own name and another through Nadim. In cross-examination of the prosecution DW 3 stated that he cannot say how many cheques were in the custody of Rasel. He denied the prosecution suggestion that since the accused is his full brother he has deposed falsely in his favour.

42. DW 4 Khorsheda Khatun, the full sister of the accused testified that Nadim is his cousin (mamato bhai), some cheques were lost from the custody of the accused Badal. Thereafter, they heard it that Rasel and Nadim have filed the cases against Badal. They requested the complainants to withdraw the case but they did not pay heed to it. In cross-examination of the prosecution she stated that 3-4 years ago the cheques were lost whereupon Badal lodged G.D entry and they took an attempt to settle the matter. She denied the prosecution suggestion that he has deposed falsely favouring his full brother accused Muksedur Rahman Badal.

43. These are the evidences that have been given by the prosecution and defence in both the cases.

44. From the evidence discussed so far it appears that in both the cases the defence case are same that Feroz Mahmood Rasel has been serving in the business firm of the accused from 2000-2005 and when all the papers of the business firm of the accused were in the custody of Rasel, he had taken some of the pages of the cheque behind the knowledge of accused and thereafter using the same, have filed two cases, one in his own name and another through his maternal uncle Nadim.

45. On the other hand the prosecution case is that both the complainants had lended money in different figure to the accused and the accused in order to make payment of the said loan money drew cheques in favour of the complainants.

46. Before amendment of section 138 of the Negotiable Instruments Act by the Act no. XVII of 2000 dated 6th July there was an open privilege for the accused to make out a case directly that he did not draw the cheque to discharge in whole or in part of any debt or other liability but in 2000 section 138 of the N.I. Act has been amended in our country omitting the following words from the section:

"for the discharge in whole or in part, of any debt or other liability".

47. Therefore, from 2000, that is, from the amendment of section 138, there appears serious hurdle on the part of the accused to claim that he did not draw the cheque to discharge any liability or debt. But the term

"holder in due course" of the cheque as envisaged in section 138 has been defined in section 9 of the N.I. Act in the following manner:

9. **"Holder in due course"-**"Holder in due course" means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before it became overdue, without notice that the title of the person from whom he derived his own title was defective."

48. From the plain reading of section 9 of the N.I. Act it appears that when a person becomes the holder in due course of a cheque he must get it for consideration leaving the scope to get it without any consideration.

49. The defence from the very beginning of the cases had canvassed that there was no any consideration for drawing of the cheques in favour of the complainants. But section 118 of the Act has given some privileges to the holder of a cheque. Section 118(a) of the Negotiable Instruments Act runs as follows:

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

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

50. From the plain reading of section 118(a) of the N.I. Act it appears that unless the contrary is proved there is a presumption that every negotiable instrument was drawn for consideration, that is, the complainant of a case presumed to have got the cheque for consideration.

51. Now from the discussion and citations made above what has been found is that in a case under section 138 of the N.I. Act, the payee or the holder of the cheque enjoys some legal privileges which has been enunciated in section 9 and 118 of the N.I. Act. In defining the 'holder in due course', section 9 provides that the holder in due course, means any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque. This indicates that whenever a person will be holder in due course, he must become holder in due course for consideration and section 118 of the N.I. Act has given more privileges to the holder in due course which provides that until the contrary is proved it is to be presumed that every negotiable instrument was made or drawn for consideration, that is, the law itself prescribed a privilege in favour of the holder of a cheque that for consideration the cheque was drawn in his favour but this presumption is a rebutable presumption.

52. 'Presumption' means to take anything without verification or prove or in other words an idea that is taken to be true on the basis of probability, as such, I find that whenever a cheque is drawn in favour of a person he enjoys a presumption that the cheque was drawn for some consideration but this presumption is a rebutable presumption . That is, the accused has a right to offer the evidence to prove that the said inference or presumption is not correct and the law has given the said privilege to the accused also, as the very section 118 of the N.I. Act starts with the words 'until the contrary is proved' that means the defence has the authority to prove the contrary fact of the presumption that every negotiable instrument was made or drawn for consideration in favour of the holder in due course.

53. The convict appellant in the two cases in order to rebut the presumption has come forward with the strong defence case that Feroz Ahmed Rasel had worked in his firm from 2002 to 2005 and within that period he used to manage all the affairs of his business and he used to deposit the money, withdraw the same and maintained the accounts of the business etcetera and taking the advantage of the same, he kept the cheque in his custody and whenever he was driven away from the business firm of the accused, he used the same in filing of two cases, one in his own name and another one in the name of his maternal uncle Mr.Nadim.

54. On the other hand complainant Feroz Mahmood Rasel all through of the case even at this stage of the hearing of the appeal categorically asserted that he did not serve in the business firm of the accused and the accused in order to discharge the liability issued the cheque and the same assertion has also been made by another complainant Mr.Nadim who is nobody but his (Rasel) maternal uncle.

55. Moksedur Rahman Badal as DW 1 in Sessions Case no. 2154 of 2007 categorically stated that Rasel had worked in his business firm of stones and sands as Manager-Cum-Cashier. DW 2 Azizur Rahman and DW 3 Abdul Haque, who are the full brothers of accused Moksedur Rahman Badal and at the same time father's brothers of Rasel, Asuda Khatun and Khorsheda Khatun who are the fufus of Rasel and full sisters of accused Badal and DW 3 Nurul Haque Rubel of Sessions Case no. 133 of 2008, the full brother of accused Muksedur

Rahman Badal Stated that Rasel had worked in the firm of Moksedur Rahman Badal. They were cross examined extensively by the Prosecution but there such evidence that complainant Mr. Rasel had worked in the business firm of accused has not been shaken away in any way.

56. Thus it is found that three full brothers and two sisters of the accused who are the uncles and fufus of accused Mr. Rasel in a clear and chorus voice very consistently testified that Rasel had worked in the business firm of the accused. It is difficult for any prudent man to disbelieve the evidence of such witnesses as both the complainant Rasel and accused Badal stand on the same distance of those witnesses. So, from the oral evidence adduced by the defence it has been proved very strongly that Rasel had worked in the business firm of the accused as his helping hand.

57. Over and above, the defence has submitted many papers to show the activities of Rasel in the business firm of the accused. The defence submitted a paper of grameen phone company by which Feroz Mahmood Rasel took a SIM from the same company, marked exhibit Tha-1 where there appears an initial signature of Feroz Mahmood Rasel. The defence submitted 52 deposit slips of bank, marked exhibits "Uma series" to show that by those deposit slips Rasel had deposited money on the various dates in the Dhaka Bank when he was in the business firm of the accused. Those deposit slips bear the initial signature of Rasel as depositor of money. Both the initial signatures appear in the deposit slips and the papers of the grameen phone are of the same man. Which established that Rasel as manager of the accused deposited money in the bank.

58. Over and above, the defence submitted one khata, the exhibit 'chha' and one ledger book, the exhibit 'jha' to prove that those khatas were maintained by the complainant Rasel in the business firm of the accused. There is nothing in the record to show that Rasel took any attempt to discard this evidence in order to establish his non involvement in the business firm of the accused.

59. The complainant Rasel did not challenge those documentary evidences in any manner. As such, relying on the oral evidence of the defence as well as the documentary evidence discussed so far. I find that though Rasel was in the business firm of the accused from 2002 to 2005 but for taking some undue advantage in the cases had denied the same.

60. As I have told it earlier that though from section 138 of the N.I Act the words "for the discharge in whole or in part, of any debt or other liability" has been omitted in 2000 by the amendment but section 118(a) of the N.I Act still allows the defence to rebut the presumption that the cheque was drawn for any consideration. The defence in this case adducing sufficient evidence proved that Rasel had worked in the business firm of the accused and taking the advantage of the same he got the cheques and used the same.

61. In answering the above defence case, there appears no attempt on the part of the complainants to prove that they got the cheque for any consideration. When the defence can prove that the cheque was drawn without any consideration the onus again shifts to the complainant to show and to prove that the cheque was drawn for consideration. In the case of Bharat Barrel & Drum Manufacturing Company-Vs-Amin Chand Payrelal (1999) 3 SCC 35 it was held by the Supreme Court of India in the following manner:

"Upon consideration of various judgments as noted hereinabove, the position of law which emerges is that once execution of the promissory note is admitted, the presumption under section 118(a) would arise that it is supported by a consideration. Such a presumption is rebuttable. The defendant can prove the non-existence of a consideration by raising a probable defence. If the defendant is proved to have discharged the initial onus of proof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus shift to the plaintiff who will be obliged to prove it as a matter of fact and upon its failure to prove would disentitle him to the grant of relief on the basis of the negotiable instrument. The burden upon the defendant of proving the non-existence of the consideration can be either direct or by bringing on record the preponderance of probabilities by reference to the circumstances upon which he relies. In such an event, the plaintiff is entitled under law to rely upon all the evidence led in the case including that of the plaintiff as well. In case, where the defendant fails to discharge the initial onus of proof by showing the non-existence of the consideration, the plaintiff would invariably be held entitled to the benefit or presumption arising under section 118(a) in his favour. The Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible for contemplated and even if led, is to be seen with a doubt."

62. From the above findings of the Supreme Court of India it appears that if the accused can discharge the initial onus to have no consideration for drawing of cheque in favour of the complainant, the latter will be under

legal obligation to prove that the accused drew the cheque to clear any bebt or other liability failing which he is not entitled to get any relief and in view of the above legal position, the complainant Rasel in order to discharge his such liability that he got the cheque for any consideration did not lead any evidence in this case. He and another complainant simply has stated in their evidence that accused Muksedur Rahman Badal in order to satisfy their debts drew the cheques in their favour. But the definite case of the defence is that Rasel and Nadim had no any financial capacity to give any loan to the accused. As it has been found that Rasel was the employee in the business firm of the accused from 2002 to 2005. So, the lending of money by Rasel to his uncle accused Muksedur Rahman Badal appears to be very farce which have no legs to stand at all. And though Nadim was not a staff of the accused but Nadim also could not lead any evidence in the case to show his financial ability that he can lend Taka 8,58,000/- to the accused.

63. Moreover, can a court of law rely on the evidence of PW 1 Feroz Mahmood Rasel who as PW 1 in Metro Sessions Case no. 2154 of 2007 stated in his cross-examination in the following ways:

"আমি প্রান্তিক এন্টারপ্রাইজের মালিক আমি। পেন্টাকল ইন্টারট্রেড এর মালিক কে বলতে পারব না।"

64. Exhibit 'Ta' will go to show that Feroz Mahmood Rasel filed C.R Case no. 29 of 2007 before the Magistrate Court, Dhaka against Muksedur Rahman Badal inserting his (Badal) address as proprietor of Pentacle Intertrade. Thus, it reveals that Rasel is a man did not know how a man tell the truth. So, there is no scope to rely on the oral evidence of PW 1 Md. Rasel that he had lended money more than taka 21,00,000/- to his uncle Muksedur Rahman Badal.

65. The defence proved the copy of a diary dated 17.12.2005 being Pallabi Thana G.D in 1051 which has been marked as exhibit 'Ka' and through the said diary Muksedur Rahman Badal informed the Police Station that a cheque book of Standard Chartered Bank with some pages have been lost. Though in the said G.D entry there appears no cheque numbers but as I have found from the reported case of Indian Supreme Court that whenever the accused adducing sufficient evidence rebuts the presumption that cheque was drawn for consideration the burden of proof heavily shifts and lies upon the complainant to show that cheque was drawn for consideration. From the whole record I find nothing to hold that for any consideration the cheques were drawn in favour of the complainant Rasel and Nadim. The trial Court without taking consideration of the defence case as well as the evidences led by the defence and without going into the root of the facts involved with the case found the accused guilty very arbitrarily in both the cases.

66. From the discussions made above, I am of the opinion that the trial Court totally failed to consider the facts of the case as well as the law involved with a case under section 138 of the N.I Act.

67. In this case the other issues particularly issuing of the legal notice, presentation of the cheque within time is not at all disputed. So, there is no necessity to give any attention to those points.

68. In a case under section 138 of the N.I Act, the legal presumption exists in favour of the "holder in due course of the cheque" that he got the cheque for consideration and that has been ensured by the provisions of sections 9 and 118 of the N.I Act but at the same time this presumption is a rebuttable presumption. Whenever any accused leads the evidence to rebut such presumption the burden again shifts to the complainant who is the holder in due course of the chque to proof by the legal evidence that the cheque was drawn in his favour for consideration. But in this case there appears nothing in the record to show that Rasel or Nadim had taken any attempt to prove that they got the cheque from Badal for any consideration. So, in my consideration the defence by the cogent evidence has been able to prove that Rasel had worked in the business firm of the accused Badal when he got some pages of the cheque and he using the said pages of the cheque filed the case one his own name and another by his maternal uncle Nadim. So, the conviction and sentence of Muksedur Rahman Badal did not justify at all under section 138 of the N.I. Act.

69. In the result, both the appeals are allowed. The order of conviction and sentence of accused Muksedur Rahman Badal dated 04.10.2011 passed by the Additional Metropolitan Sessions Judge, 5th Court, Dhaka in Metro Sessions Case no. 2154 of 2007 and 133 of 2008 are herby set aside. The convict-appellant is acquitted from the charge of both the cases. The accused is entitled to withdraw the money as deposited in the Court at the eve of filing of the appeals.

70. Let a copy of this judgment and order along with the lower Court's record be sent to the concerned Court for information and necessary action.

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