

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

**PRESENT:**

**Mr. Justice Md. Abdul Wahhab Miah**

**Mr. Justice Syed Mahmud Hossain**

**Mr. Justice Hasan Foez Siddique**

**Mr. Justice Mirza Hussain Haider**

**CRIMINAL APPEAL NOS.11-17 OF 2017 WITH CRIMINAL PETITION FOR LEAVE TO APPEAL NOS.533 OF 2017, 600 OF 2016, 493-502 OF 2016, 538-39 OF 2016, 480-83 OF 2016, 320,336,422-25 OF 2016, 1027 OF 2016, 342 OF 2017 CIVIL PETITION FOR LEAVE RO APPEAL NO.1330 OF 2016.**

(From the judgment and order dated 30.05.2016 & 01.08.2016, 19.02.2017,15.11.2015,22.11.2015,29.3.2016,22.02.2016,17.01.2016,9.5.2016, 03.02.2016, 04.09.2016 passed by the High Court Division in Criminal Miscellaneous Cases Nos.49199 of 2014, 38007, 35631, 35707, 35811,36511,36737 of 2011 & 37223-37225,37418 of 2013,5867 of 2014, 1195-96 of 2009,26268-71 of 2014, 40852 of 2014,17787 of 2015,26273-76 of 2014,17440 of 2015, 779 of 2015,10187 of 2011, 36564, 36566, 36568, 36570, 36571, 36565 and 8457 of 2014 respectively.)

Mohammad Alauddin	:	Appellant. (In CrI.A.Nos.11-17/17)
Md. Abdur Razzak Sabbir	:	Petitioner. (In CrI.P.No.533/17)
Narayan Chandra Roy	:	Petitioner. (In CrI.P.Nos.493-502/16)
A.F.M. Faruque	:	Petitioner. (In CrI.P.No.600/16)
S.M.Shams (Chan)	:	Petitioner. (In CrI.P.No.538-539/17)
Mohammad Mozahar Showdagor & another:		Petitioner. (In CrI.P.Nos.480-483/16, 320,336,422-425/16)
Md. Monirul Islam	:	Petitioner. (In CrI.P.No.342/17)
Nurul Alam	:	Petitioner. (In CrI.P.No.1027/16)
Abu Nayeem		Petitioner. (In CrI.P.No.1330/16)

**=Versus=**

The State, represented by the Deputy Commissioner, Chittagong and others:	:	Respondent. (In CrI.A.Nos.11-17/17)
The State and another	:	Respondent. (In all the petitions)

For the Appellant (In CrI.A.Nos.11-17/17)	:	Mr. A.J. Mohammad Ali, Senior Advocate (with Mr. Kayser Kamal, Advocate) instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Petitioner (In C.P.No.533/17)	:	Mr. Mr. M. Ashrafuzzaman Khan, Advocate-on-Record.
For the Petitioner (In CrI.P.No.600/16)	:	Mr. Shamsuddin Babul, Advocate instructed by Mr. Giasuddin Ahmed, Advocate-on-Record.
For the Petitioner (In CrI.P.Nos.493-502/16)	:	Mr. Md. Harun-Or-Rashid, Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the Petitioner (In Cr.A.No.1027/16)	:	Mr. Ramjan Ali Sikder, Advocate instructed by Mr. Zohirul Islam, Advocate-on-Record.
For the Petitioner (In CrI.P.Nos.538-539/16)	:	Mr. Bivash Chandra Biswas, Advocate-on-Record.

For the Petitioner : Mrs. Mahmuda Begum, Advocate-on-Record.  
(In CrI.P.No.342 of 2017)

For the Petitioner : Mr. Mohammad Abdul Hai, Advocate-on-Record.  
(In CrI.P.Nos.480-483/16)

For the Petitioner : Mr. Mohammad Abdul Hai, Advocate-on-Record.  
(In CrI.P.Nos.320,336,422-25/16:)

For the Petitioner : Mr.Zahirul Islam, Advocate-on-record.  
(In C.P.No.1330/16)

For Respondent No.2 : Mr. Ajmamul Hossain, Senior Advocate with Mr. Omar Sadat, Advocate instructed by Mr. Madhumaloti Chowdhury Barua, Advocate-on-Record.  
(In CrI.A.Nos.11-16/17)

For Respondent No.2 : Mr. Abdur Razzaque Khan, Senior Advocate instructed by Mrs. Sufia Khatun, Advocate-on-Record.  
(In CrI.A.No.17/17)

For Respondent No.1 : Mr. Mahbubey Alam, Attorney General instructed by Mr. M. Asrafuzzaman Khan, Advocate-on-Record.  
(In CrI.A.Nos.11-17/17)

Respondent : Not represented.  
(In CrI.P.No.533/17)

For Respondent No.2 : Mr. Mohammad Abdul Hai, Advocate-on-Record.  
(In CrI.P.No.600/16)

For Respondent No.1 : Mr. Mohammad Abdul Hai, Advocate-on-Record.  
(In CrI.P.No.600/16)

For respondent No.2 : Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.  
(In CrI.P.Nos.493/16)

Respondent No.1 : Not represented.  
(In CrI.P.Nos.493/16)

Respondents : Not represented.  
(In CrI.P.Nos.494-497/16)

For Respondent No.2 : Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.  
(In CrI.P.No.498/16)

Respondent No.1 : Not represented.  
(In CrI.P.No.498/16)

Respondents : Not represented.  
(In CrI.P.Nos.499-502/16)

Respondent : Not represented.  
(In CrI.P.Nos.538-39/16)

For Respondent No.2 : Mr. Omar Sadat, Advocate instructed by Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.  
(In CrI.P.Nos.480-483/16)

Respondent No.1 : Not represented.  
(In CrI.P.Nos.480-483/16)

For Respondent No.1 : Mr. Omar Sadat, Advocate instructed by Mrs. Madhumaloti Chowdhury Barua, Advocate-on-Record.  
(In C.P.Nos.320,336,422-425/16)

Respondent No.2 : Not represented.  
(In C.P.Nos.320,336,422-425/16)

Respondent : Not represented.  
(In CrI.P.Nos.1027/16)

Respondent : Not represented.  
(In CrI.P.No.342/17)

For Respondent No.3 : Mrs. Sufia Khatun, Advocate-on-Record.  
(In C.P.No.1330/16)

Respondent Nos.1-2 & 4-5 : Not represented.  
(In C.P.No.1330/16)

***Date of hearing* : 16.10.2017 & 24.10.2017**

***Date of judgment* : 24-10-2017**

### **J U D G M E N T**

**Hasan Foez Siddique, J:** All the appeals and the Criminal Petitions have been filed raising the common question of law and facts. Accordingly, we have heard all the appeals and petitions together and they are being disposed of by this common judgment.

Leave was granted to consider as to whether a commercial bank can file a case under section 138 of the Negotiable Instruments Act (in short, the Act) in respect of dishonour of a post dated cheque taken from a borrower despite taking collateral security from the borrower.

The learned Counsel for the appellants/petitioners submits that the commercial banks are not entitled to file a case under section 138 of the Act in respect of dishonour of a post dated cheque taken from a borrower despite taking collateral security from the borrower. On the other hand, the learned Counsel for the respondent banks submit that this issue has been decided in the case of *Majed Hossain Vs. the State*, 17 BLC(AD)177. The views expressed in the said case was as under:

"A reading of sub-section (1) of section 138 of the Act, 1881 shows that an offence under the section shall be deemed to have been committed, the moment a cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account is returned by the bank unpaid on any of the grounds mentioned therein. Sub-section (1) of section 138 has not made any qualification of the cheque so returned unpaid either post-dated given as a security for repayment of the loan availed by a loanee as alleged by the accused or any other cheque issued by the drawer for encashment currently. When the legislature has not made any difference between a post-dated cheque issued as security for the repayment of the loan availed by the loanee, here the petitioners, as argued by Mr. Chowdhury and a cheque issued for encashment currently, we do not see any scope of making any such difference. Facts to be taken into account to see whether an offence under sub-section (1) of section

138 of the Act, 1881 has been committed or not are (a) whether the cheque issued by the drawer was presented to the bank within a period of six months from the date on which the same was drawn or with the period of its validity whichever was earlier by the payee, or as the case may be, by the holder in due course of the cheque, (b) whether the cheque returned unpaid i.e. dishonoured on any of the grounds mentioned in sub-section (1)(c) whether demand for the payment of the amount of money of the unpaid/dishonoured cheque was made to the drawer of the cheque by the payee or, as the case may be by the holder of the cheque in due course of the cheque by giving a notice in writing within thirty days of the receipt of information from the bank by him regarding the return of the cheque unpaid and lastly (d) whether the drawer of the unpaid/dishonoured cheque failed to make the payment of the amount of money of such cheque within thirty days to the payee or, as the case may be, to the holder in due course of the cheque from the date of receipt of the notice

demanding such payment. By no logic, it can be said that the drawer of the cheque does not know the consequence if a cheque is returned unpaid/dishonoured for the reasons as provided in sub-section (1) of section 138 of the Act, 1881, because ignorance of law is no plea."

The provision of section 138(1) of the Act runs as follows:

"138. Dishonour of cheque for insufficiency, etc. of funds in the account-(1). Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to (thrice) the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a)the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b)the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within [thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c)the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, with [thirty days] of the receipt of the said notice."

The words "for the discharge in whole or in part, of any debt or other liability" were omitted by Act No.XVII of 2000 from original section 138 of the Act. In original provision of 138(1) of the Act, those words were incorporated in between the words, "from out of that account" and before the words, "is return by the bank". The Legislature, exercising its wisdom, deleted those words from the enactment purposely.

Consequently, the Court is not authorized to examine whether "any cheque" drawn by person was issued "for the discharge in whole or in part, of any debt or other liability" or not. That is, by amending the aforesaid provision of law the Legislature has limited the jurisdiction of the Court so that it cannot examine the cheque drawn by person on an account maintained by him with a banker for payment of any amount of money from his account to another person from out of that account "for the discharge in whole or in part, of any debt or other liability". In other words, in earlier provision there was a wide authority of the Court to consider whether the drawer has/had any debt or other liability to the payee of the cheque or not.

The question for consideration in this case is whether the dishonour of a post-dated cheque given for repayment of loan installment which is also described as "security" of the loan is covered by section 138 of the Act. It is the claim of the appellants/petitioners that that all the cheques were issued in advance as security against their loan. Only question, in this regard, for consideration is "where any cheque" drawn by a person includes posted cheque/advance cheque/security cheque.



In the case of Goddum V. Andhra Bank reported in AIR 2000 AP 379 it was observed that the followings are the essential requisites of a proper cheque:

- (1) an instrument in writing;
- (2) it must contain an 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 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.

One of the essential requisites of a "cheque" is that the amount of the cheque must be mentioned clearly. That is for avoiding forgery/interpolation of the amount of the cheque. The cheque should be written clearly without keeping blank space on the cheque before or after the amount, stated in the words and in

figures. A post dated cheque is a form of a crossed or account payee bearer cheque but post dated to meet the financial obligation at a future date. The question is whether a post dated cheque is really a cheque or not. Supreme Court of India in Anil Kumar Sahane V. Gulshan reported in (1993) 4 SCC 424 and Ashok Yeshant V. S.M. Nighosakar reported AIR 2001 SC 1315 has observed that a post dated cheque is only a bill of exchange when it is written or drawn; it becomes a cheque when it is payable on demand. The post dated cheque is not payable till the date which is shown on the face of the said document. It will only become a cheque on the date shown on it and prior to that it remains a bill of exchange under section 5 of the Act. As a bill of exchange a post-dated cheque remains negotiable but it will not become a 'cheque' till the date when it become payable on demand. In the case of Anil Kumer (Supra)it was observed that an offence to be made out under the substantive provisions of Section 138 of the Act it is mandatory that the cheque is presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. It is the cheque drawn which has to be presented to the bank within the periods

specified therein. When a postdated cheque is written or drawn it is only a bill of exchange and as such the provisions of Section 138(a) are not applicable to the said instrument. The postdated cheque becomes a cheque under the Act on the date which is written on the said cheque and the six months period has to be reckoned for the purposes of Section 138(a) from the said date. One of the main ingredients of the offence under Section 138 of the Act is, the return of the cheque by the bank unpaid. Till the time the cheque is returned by the bank unpaid, no offence under Section 138 is made out. A postdated cheque cannot be presented before the bank and as such the question of its return would not arise. It is only when the postdated cheque becomes a 'cheque', with effect from the date shown on the face of the said cheque, the provisions of Section 138 come into play. The net result is that a postdated cheque remains a bill of exchange till the date written on it. With effect from the date shown on the face of the said cheque it becomes a 'cheque' under the Act and the provisions of Section 138(a) would squarely be attracted.

In Ashok Yeshwant (supra) it was observed that from a bare perusal of Sections 5 and 6 of the

Act it would appear that bill of exchange is a negotiable instrument in writing containing an instruction to a third party to pay a stated sum of money at a designated future date or on demand. On the other hand, a 'cheque' is a bill of exchange drawn on a bank by the holder of an account payable on demand. Under Section 6 of the Act a 'cheque' is also a bill of exchange but it is drawn on a banker and payable on demand. A bill of exchange even though drawn on a banker, if it is not payable on demand, it is not a cheque. A post-dated cheque is not payable till the date which is shown thereon arrives and will become cheque on the said date and prior to that date the same remains bill of exchange.

For prosecuting a person for an offence under Section 138 of the Act, it is inevitable that the cheque is presented to the banker within a period of six months from the date on which it is drawn or within the period of its validity whichever is earlier. When a post-dated cheque is written or drawn, it is only a bill of exchange and so long the same remains a bill of exchange, the provisions of Section 138 are not applicable to the said instrument. The post-dated cheque becomes a cheque within the meaning of Section 138 of the Act on the date which is written

thereon and the 6 months period has to be reckoned for the purposes of Proviso (a) to Section 138 of the Act from the said date.

The views of the Indian Supreme Court is that if a cheque is issued as an advance payment for purpose of the goods and for any reason purchase order is not carried out, the cheque cannot be said to have been drawn for an existing debt or liability and dishonour of such cheque does not amount to an offence under section 138 of the Act. Drawing of a cheque in discharge of an existing or past adjudicated liability is *sine qua non* for bringing an offence under section 138 of the Act. [ref. Indus Airways Pvt. Ltd. and others V. Magnum Aviation Pvt. Ltd. and another reported in (2014)12 SCC 539]. That interpretation is not acceptable for us in view of the amendment of law mentioned above. The present position in view of the amendment of 2000 stood that once the loan was disbursed and installments have been taken due on the cheque as per the agreement, dishonour of such cheques would fall under section 138 of the Act.

Section 138 of the Act has been incorporated with a specific object of making special provision to facilitate to prevent smooth functioning of any transaction between the drawer

and the payee. The law relating to the Negotiable Instruments is the law relating to commercial world legislated to facilitate the activities in trade and commerce making the provision of giving sanctity to the instruments of credit which would be deemed to be converted into money and easily passable from one person to another. The offence under section 138 of the Act is not a natural crime like hurt or murder. It is an offence created by a legal fiction in the statute. It is a civil liability, transformed into a criminal liability under restricted conditions by way of an amendment of the Act. Before amendment, offending acts referred to section 138 of the Act constituted only a pure and civil liability.

The language used in section 138 of the Act is significant. The commencement of section stands with the words, 'where any cheque'. Those three words are of more significance, in particular, by reason of the user of the word 'any' - the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for whatever reason it may be, the liability under this provision cannot be avoided, if the same stands returned by the banker unpaid.

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

The High Court Division on an application under section 561A of the Code of Criminal Procedure is not authorized to quash a proceeding adjudicating a disputed question of fact. Once issuance of cheque and signature thereon are found to be genuine, the court shall proceed with the proceeding. Question of fraud or fraudulent insertion can only be determined by recording and considering evidence by the trial Court after

holding trial. However, if blank cheque is issued towards liability or as security, when the liability is proved, if the cheque is filled up and presented to the bank, the person who had drawn the cheque cannot avoid criminal liability.

In view of the aforesaid facts and circumstances our considered opinion is that the disputed question of fact as to the issuance of the cheque as 'security' or 'advance' or 'post dated' can only be decided upon recording evidence. Accordingly, we do not find any substances in the appeals and petitions.

Thus, all the appeals and petitions are dismissed.

**J.**

**J.**

**J.**

**J.**

**The 24<sup>th</sup> October, 2017.**  
M.N.S./words-3398 /