

**INTHE SUPREME COURT OF BANGLADESH
(APPELLATE DIVISION)**

PRESENT:

Mr. Justice Md. Muzammel Hossain, Chief Justice.
Mr. Justice Surendra Kumar Sinha.
Mr. Justice Md. Abdul Wahhab Miah.
Ms. Justice Nazmun Ara Sultana.
Mr. Justice Syed Mahmud Hossain.
Mr. Justice Muhammad Imman Ali.
Mr. Justice Muhammad Mamtaz Uddin Ahmed.

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.514 OF 2010

(From the judgment and order dated the 24th day of August, 2010 passed by the High Court Division in Criminal Revision No.1717 of 2009).

Md. Arif-Uz-Zaman. :Petitioner.

-Versus-

The State and another. :Respondents.

For the Petitioner. : Mr. Rokanuddin Mahmud, Senior Advocate instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.

For Respondent No.1. : Mrs. Mahmuda Begum, Advocate-on-Record.

For Respondent No.2. : Mrs. Sufia Khatun, Advocate-on-Record.

Date of Hearing : **The 9th day of June, 2011.**

(JUDGMENT)

Md. Abdul Wahhab Miah, J: This petition for leave to appeal is directed against the judgment and order dated the 24th day of August, 2010 passed by the High Court Division in Criminal Revision No.1717 of 2009 discharging the Rule.

Facts relevant to disposal of this petition for leave to appeal are that respondent No.2 as complainant filed a petition of complaint before the Chief Metropolitan Magistrate, Dhaka under section 138 of the Negotiable

Instruments Act, 1881 (the Act, 1881) alleging, *inter-alia*, that in order to discharge liability arising out of the business relationship of the accused with the complainant, the accused issued a cheque in favour of the complainant being No.6627971 dated 28.11.2008 for an amount of TK.20,00,000.00(twenty lacs only) drawn on his Account No.01-2751321-01 maintained with Standard Chartered Bank, Bangladesh. The aforesaid cheque was deposited by the complainant in his Bank, AB Bank Limited, Uttara Branch, for collection from the drawee Bank, i.e. Standard Chartered Bank, Bangladesh, but the cheque was dishonoured as informed to him by a dishonour slip bearing the remark “insufficient fund”, on 11.12.2008. Thereafter, in compliance with the provisions of section 138 of the Act, 1881 the complainant sent a notice on 15.12.2008 to the accused by registered post with acknowledgement due at his abode demanding payment of the amount due under the cheque within 30(thirty) days. The said notice was received by the accused on 17.12.2008, but he did not come forward to adjust the amount due under the cheque within the stipulated period mentioned in the notice, i.e. within 17.01.2009. Hence, the complainant filed the petition of complaint on 26.01.2009. After examining the complainant under section 200 of the Code of Criminal Procedure (the Code), the Chief Metropolitan Magistrate, Dhaka took cognizance in the case against the accused-petitioner under the said section of the Act, 1881. The accused petitioner surrendered before the Chief Metropolitan Magistrate, Dhaka and obtained bail. The case being ready for trial, the record of the case was transmitted to the Metropolitan Sessions Judge, Dhaka who took cognizance in the case against the petitioner under section 138 of the Act, 1881. The case was registered as Metropolitan Sessions

Case No.2939 of 2009. Eventually, the case was transferred to the Court of Metropolitan Joint Sessions Judge, 7th Court, Dhaka for trial. The accused-petitioner appeared before the said Metropolitan Joint Sessions Judge and obtained bail.

The accused-petitioner filed an application in the case under section 265C of the Code on 23.06.2009 for discharging him from the case. The learned Metropolitan Joint Sessions Judge by his order dated 12.08.2009 rejected the application and then by order dated 14.08.2009 framed charge against the petitioner under section 138 of the Act, 1881. Challenging the said order of framing charge the petitioner filed a revision application before the High Court Division under section 439 read with 435 of the Code and obtained the Rule vide Criminal Revision No.1717 of 2009.

A Division Bench of the High Court Division which heard the Rule by the impugned judgment and order discharged the same; hence, this petition for leave to appeal.

Mr. Rokanuddin Mahmud, learned Advocate, appearing for the petitioner has contended that the cheque which was allegedly dishonoured being a crossed cheque “account payee”, was not a negotiable instrument within the meaning of section 123A(2)(a) of the Act, 1881, therefore, the accused-petitioner was not liable to be prosecuted within the meaning of section 138 of the Act, 1881, the High Court Division ought to have interfered with the impugned order passed by the learned Metropolitan Joint Sessions Judge framing charge against him. Mr. Mahmud has further contended that the cheque was dishonoured by the drawee Bank, namely, Standard Chartered Bank not on the ground of “insufficiency of fund” but for the dissimilarity of the signature of the accused-petitioner on the cheque

and there being no dishonour slip from the said Bank in favour of the complainant, it could not be said that the offence as contemplated under section 138 of the Act, 1881 was committed by the accused-petitioner, the order passed by the Joint Metropolitan Sessions Judge, framing charge against the petitioner is liable to be set aside. Mr. Mahmud has further contended that the High Court Division fell into an error in not interfering with the order framing charge against the petitioner inasmuch as a suit being Title Suit No.33 of 2009 filed by the accused in respect of the dishonoured cheque is pending in the 4th Court of Assistant Judge, Narayanganj wherein it would be decided as to whether the accused-petitioner issued the dishonoured cheque or not. He has lastly contended that at least the proceedings of the sessions case in question is required to be stayed till the decision of the said title suit, otherwise, the suit shall become infructuous.

On the above submissions Mr. Mahmud prays for granting leave by this Court against the impugned judgment and order passed by the High Court Division.

Mrs. Sufia Khatun, learned Advocate-on-Record, entering caveat on behalf of the complainant-respondent, on the other hand, supported the judgment passed by the High Court Division.

We have gone through the petition of complaint, the order framing charge by the learned Metropolitan Joint Sessions Judge and the judgment passed by the High Court Division.

From the impugned judgment it appears that the High Court Division has clearly found that the petition of complaint was filed before the Chief Metropolitan Magistrate, Dhaka complying with all the requirements of

sections 138 and 141 of the Act, 1881. The High Court Division further found that the abbreviation etc (for etcetera) used in the heading of section 138 of the Act, 1881 covers any ground or reason, whatsoever, for which a cheque is bounced, and any other interpretation would not only frustrate the legislative intent of this piece of beneficial legislation, but shall amount to deviation from the plain and clear language as well as shall give a drawer of the cheque to take undue advantage of his own act by deliberately *“mismatching his signature on the cheque or by making stop payment order or otherwise in order to deprive the payee.”* The High Court Division further found that though the Standard Bank was the drawee Bank, the cheque in question having been deposited by the payee with his banker, A.B. Bank Limited, Uttara Branch, for collection, either because the cheque was a crossed cheque or the payee deposited the cheque after crossing it and the cheque having been returned as unpaid, the offence under section 138 of the Act, 1881 was committed. The High Court Division further found that the complainant was not “supposed” to receive the information about the letter dated 30.08.2009 issued by an officer of the drawee bank to its customer, the accused-petitioner to the effect that the signature of the drawer did not match with “the signature made on the cheque” and the same has no relevance to issue a demand notice under clause (b) of section 138(1) of the Act, 1881.

Mr. Rokanuddin Mahmud does not dispute the finding given by the High Court Division that the petition of complaint giving rise to the sessions case in question was filed complying with all the requirements as required by sections 138 and 141 of the Act, 1881, so in view of the findings given by the High Court Division and the submissions made by

the learned Advocates for the respective parties, the questions to be decided in the petition for leave to appeal are (i) whether the dishonoured cheque being a crossed cheque “account payee” returned to the bank of the payee A.B. Bank unpaid with the endorsement “insufficiency of fund” would attract the mischief of section 138 of the Act, 1881 (ii) whether the letter issued by the drawee bank on 30.08.2009 to the accused-petitioner to the effect that the signature of the drawer did not match with the signature “made on the cheque” can be taken into consideration in deciding the merit of a revision application preferred by the petitioner against the order framing charge under section 138 of the Act, 1881 (iii) whether a pending civil suit in respect of the dishonoured cheque can be used as a shield by the accused for his protection from being prosecuted in respect of an offence committed under section 138 of the Act, 1881.

Cheque has been defined in section 6 of the Act, 1881 as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. In section 6 nothing has been said about crossed cheque or an account payee cheque. We get the idea of crossed cheque or “account payee” cheque in section 123 and 123A of the Act, 1881. The said two sections read as follows:

123. Cheque cross generally—Where a cheque bears a cross across its face an addition of the words “and company” or any abbreviation thereof, between two parallel transverse lines, or of two paralleled transverse lines simply, either with or without the words “not negotiable”, that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally.

123A. Cheque cross “account payee”— (1) Where a cheque crossed generally bears across its face an addition of the words “account payee” between the two parallel transverse lines constituting the

general crossing, the cheque, besides being crossed generally, is said to be crossed “account payee.”

- (2) When a cheque is crossed “account payee”–
- (a) it shall cease to be negotiable; and
 - (b) it shall be the duty of the banker collecting payment of the cheque to credit the proceeds thereof only to the account of the payee named in the cheque.

From clause (a) of sub-section (2) of section 123A it appears that when a cheque is crossed “account payee” it ceases to be negotiable. Now we are to see what is the legal implication of these words “shall cease to be negotiable”; to answer this question effectively and squarely, we are to see the provisions of section 138 of the Act, 1881. The admitted position being that the petition of complaint was filed complying with the requirements of section 138 of the Act as spelt out in the proviso to sub-section (1) and the other sub-sections thereto, we are not required to consider those provisions but we are to consider the heading of section 138 as well as sub-section (1) without the proviso which read 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:

From a mere reading of sub-section (1) of section 138 of the Act it is apparent that the legislature has consciously used the word 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. Legislature very well knew about section 123A of the Act. Had it been the intention of the legislature to exclude a crossed cheque “account payee” as used in clause (a) of sub-section (2) of section 123A from the mischief of sections 138 and 141 of the Act, 1881, then they would have definitely mentioned cheque other than ‘crossed cheque’. It appears to us that the moment a cheque is dishonoured, either a bearer cheque or crossed cheque “account payee”, for any reason whatsoever including the alleged dissimilarity of the signature of the drawer on the cheque as found by the High Court Division while interpreting the meaning of the abbreviation “etc.” used in the heading of section 138, the offence under the section shall be complete and in that case the payee shall have the liberty to file a petition of complaint before the competent Magistrate against the drawer of the cheque, of course, by complying with the proviso to sub-section (1) of section 138. And in the instant case admittedly those requirements were clearly complied with before filing the case. The legislative mandate as used in clause (a) of sub-section (2) of section 123A of the Act, 1881 that when a cheque is crossed “account payee” shall cease to be negotiable means it cannot be negotiated or encashed with any other person except the person in whose favour the same was issued. To make it clearer, a crossed cheque “account payee” must be encashed through the account of the holder in whose favour it was issued. So, by no means, a crossed cheque “account payee” loses its character as a negotiable one within the meaning of section 138 of the Act, 1881. Moreover, section 13 of Act, 1881 which has defined “Negotiable instrument” has not made any distinction between crossed cheque “account payee” or cheque of other kind such as ‘bearer cheque’ as we ordinarily mean. Thus, we find that section 123A of the Act,

1881, in no way, creates any bar in proceeding with a case under section 138 of the Act, 1881. In other words, we do not see any nexus of section 123A with the proceedings to be initiated under section 138 of the Act. If the interpretation of Mr. Mahmud about clause (a) of sub-section (2) of section 123A of the Act, is accepted then the whole purpose of bringing into book of the defaulting drawer of the cheque shall be frustrated; accordingly, we reject his contention on the point. So, we find nothing wrong with the order of the learned Joint Metropolitan Sessions Judge in framing charge against the petitioner under section 138 of the Act, 1881.

The contention of Mr. Rokunuddin Mahmud that the cheque in the instant case was not dishonoured by the drawee bank because of the “insufficiency of fund” but because of the dissimilarity of the signature of the drawer on the cheque as apparent from annexure-X to the revision application, therefore, by such dishonourment no offence was committed by the accused has got no substance. It is the common banking practice that the holder of an account payee cheque deposits the cheque with his banker for collection of the amount of the cheque from the drawee bank through the clearing house. And in the instant case the said procedure was followed by the complainant as he deposited the cheque in question with his banker A.B. Bank Limited, Uttara Branch for collection of the amount of the cheque. The cheque was returned unpaid to his banker which gave the dishonour slip to him on 10.12.2008 with the endorsement for “insufficient fund” and thus, the complainant had the definite information about return of the cheque as contemplated in clause (b) of sub-section (1) of section 138 of the Act, 1881 and accordingly, he issued the notice asking the drawer to pay the money of the cheque. As per, the mandate of clause (b)

of the proviso to section 138(1) the complainant was not at all required to wait for any information from the drawee bank in respect of the dishonoured cheque. Moreover, the letter by the drawee bank having been issued on 30.08.2009 to the accused-petitioner, that is, after about 8(eight) months from the presentation of the cheque to the effect that the signature of the drawer “does not match with the signature of the drawer made on the cheque” cannot be a ground to absolve the accused-petitioner from the mischief of section 138 of the Act, 1881, particularly when charge in the case had already been framed on 14.08.2009. We also do not see any rationale in the submission of Mr. Mahmud in this regard, as the complainant was not supposed to have received such information from the drawee bank. Whether the cheque in question was dishonoured for the “insufficiency of fund” or for the “dissimilarity of the signature of the drawer on the cheque” as stated in the letter dated 30.08.2009 is a question of fact which can only be thrashed out during the trial. We do not see any scope of deciding such question in considering the merit of the revision application.

So far as the last question is concerned, we are of the view that the operation of section 138 of the Act, 1881 cannot be obstructed or, in any way, circumvented by the mere fact of filing of a suit by the drawer of the dishonoured cheque in civil Court whatever allegations may be in the plaint about the same and the relief prayed for therein, because such a device shall totally make the section itself nugatory. However, if a holder or the payee gets hold of a dishonoured cheque by fraudulent means or forgery, the drawer of the cheque shall have the liberty to take such defence during the trial.

For the discussions made above, all the 3(three) questions as formulated hereinbefore are answered in the negative, consequently we find no reason to interfere with the impugned judgment and order passed by the High Court Division.

Accordingly, this petition is dismissed.

C.J.

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