

30. In the view there is no substance in the Rule. Accordingly, the Rule is discharged without any order as to cost.

The order of stay granted at the time of issuance of the Rule is hereby vacated.

Ed.

### High Court Division (Criminal Miscellaneous Jurisdiction)

Md Rezaul Hasan J	}	Abdul Mannan (Md
Kashefa Hussain J		.....Accused-Petitioner
		(On Bail)
		vs
<b>Judgment</b>	}	State and another.....
January 13th, 2016		.....Opposite-Parties*

### Negotiable Instruments Act (XXVI of 1881) Section 138

The intent of the legislature is very much clear from all these amendments that, this piece of legislation is a welfare legislation, enacted and amended to protect benefit the payees or 'holders in due course' of a negotiable instrument. The drawee of a dishonoured cheque cannot escape his liability except in the manner laid down in section 82 of the Act, i.e. either (I) by cancellation, or (II) by release, or (III) by payment. On no other excuse or plea. ....(17)

Khondaker Mahtabuddin Ahmed vs State, 49 DLR (AD) 132; Monzur Alam vs State, 55 DLR (AD) 62; Shamsul Islam Chowdhury vs Uttara Bank Ltd. 11 BLC 116; Majked Hossain vs State, 17 BLC (AD) 177; Aminul Karim (Md) vs Government of Bangladesh, 67 DLR 355; Nurul Islam vs State, 49 DLR 464; Sheikh Mashuk Rahman vs State, 62 DLR 28 and MA Sukkur vs Md Zahirul Haque, 23 BLT (AD) 76 ref.

\*Criminal Miscellaneous Case No. 9295 of 2014.

Lokman Karim, Advocate—For the Accused-Petitioner.

Md Farrukh Rahman, Advocate—For the Opposite Party No. 2.

### Judgment

**Md Rezaul Hasan J :** In the instant application, filed under section 561A of the Code of Criminal Procedure, a Rule has been issued at the instance of the accused-petitioner, calling upon the opposite parties to show cause as to why the proceedings of Sessions Case No. 3623 of 2013 arising out of CR Case No. 140 of 2013 under section 138 of the Negotiable Instruments Act, 1881 now pending in the Court of Metropolitan Sessions Judge, Chittagong, should not be quashed and/or such other or further order or orders passed as to this court may seem fit and proper.

2. The facts relevant for disposal of the Rule, in brief, are that the opposite party No. 2, has filed a complaint petition before the Chief Metropolitan Magistrate, Cognizance Court No. 3, Chittagong, on 22-1-2013, alleging, inter alia, that the accused-petitioner induced the Bank to trust him and to give advance credit facility for the purpose of his business, doing under the name and style M/s Anika Trading. As per conditions of the sanction letter, the accused-petitioner had handed over three cheques, respectively, Cheque No. CD 7102681 for Taka 7,39,66,300, Cheque No. CD 0783371 for Taka 5,50,00,000 and Cheque No. CD 0783-372 for Taka 4,95,00,000 i.e. in total for Taka 17,84,66,300, under three cheques. It has further been stated in the complaint petition that the accused-petitioner made an assurance that all the cheques were fit (i.e good) for encashment. All the said three cheques are dated 26-8-2012 and were drawn in favour of the Opposite Party No. 2 (OP No. 2). Said three cheques were placed for encashment on 28-11-2012 and were dishonoured with the remarks "Insufficient Fund", on the cheque dishonor slip. Then the



Bank has issued demand notice dated 29-11-2012 upon the accused-petitioner, giving 30 days time, to repay the amount due under the said cheque. The said notice was received by the accused-petitioner on 5-12-2012, but he has not given any reply, nor he has met the demand made upon him. The 30 days time limit to repay the amount due under in the cheques has expired on 3-1-2013. Thereafter the Bank has filed a complaint petition, which was registered, following the proper procedure, as CR Case No. 140 of 2013, before the Chief Metropolitan Magistrate, Cognizance Court No. 3, Chittagong and thereafter the Court of Metropolitan Magistrate issued warrant of arrest and the accused-petitioner voluntarily surrendered before the court of Metropolitan Magistrate, Chittagong on 30-7-2013, with a prayer for bail and was enlarged on bail. The case being ready for trial it was sent, on 9-10-2013, to the Court of Metropolitan Sessions Judge, Chittagong and the same was registered as Sessions Case No. 3623 of 2013 for the purpose of holding trial. The accused-petitioner surrendered before the Court of Metropolitan Sessions Judge on 12-1-2014 with a prayer for bail and he was enlarged on bail and 23-2-2014 was fixed for framing of charge. Eventually, 26-2-2014 was fixed for framing charge and, on that date, the accused-petitioner filed an application under section 265C of the Code of Criminal Procedure (CrPC) for discharging him. The trial court having heard both the sides, however, by its order No. 5 dated 26-2-2014, has rejected the petition filed under section 265C of the Code of Criminal Procedure and has framed charge against the accused-petitioner, under section 138 of the Negotiable Instruments Act, 1881 (NI Act) and fixed 10-3-2014 for witness, and has issued summons upon the witnesses, since the petitioner did not plead guilty and prayed for trial. At this stage the accused-petitioner has moved this application under section 561A of the Code of Criminal Procedure and obtained the present rule. The

accused-petitioner has also filed a supplementary affidavit. Let the same do form part of the substantive petition.

3. Mr Lokman Karim, learned Advocate appearing on behalf of the accused-petitioner, has taken us through the petition, supplementary affidavit and other materials on record. He first of all submits that the three cheques in question were drawn in favour of the Bank, namely- Dutch Bangla Bank Ltd. The said Bank has also filed Artha Rin Suit No. 136 of 2012, the accused-petitioner being the defendant in that suit, for recovery of the loan amounting to Taka 19,40,25,301.73. Thereafter the Bank has got three cheques, all of which was received by the bank as security for re-payment of the loan, and the said Bank had placed the cheques on 28-11-2012 for encashment and the cheques were dishonoured on the same day. He further submits that, the cheques were placed in the concerned branch of the said bank from which the loan was taken. Thereafter the Bank has filed the complaint petition under section 138(1) of the Negotiable Instruments Act, 1881, on 22-1-2013. He therefore, contends that, the lender Bank being the payee of the cheque they should not have filed the case under Negotiable Instruments Act, inasmuch as the accused-petitioner has no obligation to pay the borrowed money twice. In short, he submits that, the accused-petitioner cannot be harassed by filing two cases for recovery of the same loan amount and as such the proceedings of the Sessions Case No. 3623 of 2013, arising out of CR Case No. 140 of 2013, under section 138 of the Negotiable Instruments Act, 1881, now pending before the court of Metropolitan Sessions Judge, Chittagong, is a clear abuse of the process of that court and to prevent the same the impugned proceeding is liable to be quashed. In support of his contention, the learned Advocate has relied upon a decision passed in Criminal Appeal No. 26 of 2005, reported in 23 BLT (AD) 2015 (MA Sukkur vs Md Zahirul Haque) and submits that the ratio decidendi of that case



applies directly to the instant case and the allegations made in the complaint petition does not constitute any offence under section 138 of the NI Act. He has also cited the decisions reported in 49 DLR (AD) 132 (*Khondaker Mahtabuddin Ahmed vs State*) which is a case under section 561A of the Code of Criminal Procedure, 55 DLR (AD) 62 (*Monzur Alam vs State*) judgment passed in Criminal Petition to Leave to Appeal Nos. 165-167 of 2001, 11 BLC 116 (*Shamsul Islam Chowdhury (Md) vs Uttara Bank Ltd.*), 17 BLC (AD) 177 (*Majked Hossain vs State*), 67 DLR, 355 (*Aminul Karim (Md) vs Government of Bangladesh*) and submits that these decisions are liable to be distinguished in the facts and circumstances of the instant case for the reason that, save one case, no Artha Rin suit was filed or pending in any of these cases.

4. Mr Md Farrukh Rahman, learned Advocate appeared for the Bank, Opposite Party No. 2. He has referred to three sanction letters annexed as Annexure-F to the Supplementary Affidavit as well as the substantive petition. He, at first, submits that the accused-petitioner has accepted the terms and condition of the loan sanction letter, by putting his signature on the duplicate copy of the sanction letter, and has availed the credit facilities subject to the terms and conditions of the sanction letter. He next submits that as per condition of the sanction letter, the petitioner has issued the said cheques for ensuring re-payment of his liability owed to the Bank. It has also been stipulated in the sanction letter that if the terms and conditions of sanction letter is acceptable to the borrower-accused then he should sign the duplicate copy of the sanction letter for availing the credit facilities. Learned Advocate further submits that the Bank has not compelled the accused-petitioner to issue the cheques. It is the petitioner himself who has voluntarily and willfully accepted the terms and condition of the loan sanction letter and signed on the duplicate copy of the sanction letter and had issued the cheques that were dishonoured, they mak-

ing himself liable to be prosecuted under section 138 of the NI Act. At the time of signing the cheques and accepting the sanction letter the accused-petitioner was quite aware that if he defaults in repaying the loan then the Bank would file Artha Rin suit against him as well as the Bank might also file complaint case under section 138(1) of the Negotiable Instrument Act, 1881, if the cheques issued by him were dishonoured. As such, the learned Advocate continues, in this case the only question that could have arisen in the case is whether the Artha Rin suit and the complaint case filed under section 138 of the Negotiable Instrument Act can proceed simultaneously. He then submits that it is settled law that a suit for recovery of money or a civil suit and a criminal case can stand together. The former is filed for recover of money and latter is filed for committing offence. He then adds that, the submission of learned Advocate for the petitioner is calculated to misdirect the attention of the case from the relevant issues. The learned Advocate next submits that there is even no mortgaged property to secure the repayment of loan and the Bank has accepted the said cheques as the security furnished by the borrower. The learned Advocate, in support of his contention, has referred to certain decision which will be discussed at the proper place. As regards the case reported in 23 BLT (AD) 76, relied upon by the learned Advocate for the accused-petitioner, the learned Advocate for the Opposite Party No. 2 submits that, in the case reported in 23 BLT (AD) 76, (Criminal Appeal No. 26 of 2005), charge was framed under sections 406/420 of the Penal Code, against the accused-petitioner. No charge was framed under section 138 of the Negotiable Instruments Act in that case. In 23 BLT (AD) 76, the apex court has considered whether the transaction between the Bank and the accused-petitioner amounts to a normal transaction of a civil nature and as to and whether there was any ingredients for framing charge under section 420 of the Penal Code, in the facts and cir-



cumstances of that very case. As such, he continues, the issues settled by the apex court in the case reported in 23 BLT (AD) 76 is liable to be distinguished from the case before us, which has arisen out of a proceeding initiated under section 138(1) of the Negotiable Instrument Act, 1881, in which charge has been framed under section 138 of NI Act, not under section 420 of the Penal Code. Before concluding his submission, the learned Advocate for the opposite party No. 2 also points out that the submissions advanced by the learned Advocate for the accused-petitioner is contrary to the law declared by the apex court in similar other cases on this point. He adds that, financial institution and payees of the cheques will be exposed to serious loss if the submission of the accused-petitioner is accepted as proper or fair. It will also encourage commission of such offences including that of cheating, criminal breach of trust, misappropriation and will destroy the practices prevailing in the trade, commerce and other transactions done on the basis of cheques, issued to secure re-payment obligations. Accordingly, the learned Advocate for the Opposite party No. 2 prays that this rule has no merit and the same may be discharged with cost.

6. We have heard the learned Advocate for both sides, perused the petition along with the supplementary affidavit and the documents annexed therewith as well as have consulted the parties decisions cited on behalf of the parties.

7. The facts leading to the issuance of this Rule has been noted herein before. Having perused the records, we find from the sanction letter issued by the Dutch-Bangla Bank Limited, Annexure-F, that the accused-petitioner has availed the loan (rescheduled) of Taka 15,46,70,000 upon providing certain security as mentioned in the sanction letter. The sanction letter contains, amongst other, a condition that the accused-petitioner shall provide 36 post

dated cheques along with other security to secure repayment of the loan. We also find, at the foot of the sanction letter, it has been stated that if the terms and conditions are acceptable to you please return the duplicate of this letter duly signed by you as a token of your acceptance at the earliest. Therefore, we find substance in the submission of the learned Advocate for the opposite party No. 2 that the accused-petitioner, for his own interest and for his own business purpose, has availed the loan by furnishing the aforesaid cheques as security for availing the reschedulement facility. We also find substance in the submission of the learned Advocate for the Bank that at the time of accepting sanction letter the accused-petitioner was aware that, in case of committing default in payment of loan, the Bank can file the Artha Rin Suit as well as a case under section 138(1) of the Negotiable Instrument, in case of dishonor of the cheques.

8. We have also noticed that the application under section 561A of the Code of Criminal Procedure has been filed after rejection of petition under section 265C of the Code of Criminal Procedure, filed by the accused-petitioner and after framing of charge and issuing of summons upon the accused-petitioner, by an order dated 26-2-2014, by the Metropolitan Sessions Judge, Chittagong. But, the accused-petitioner did not challenge the charge framing order dated 26-2-2014 by filing any revisional application.

9. We have consulted the decision cited by both sides.

10. We find that in 17 BLC (AD) 177 the issue, as to whether a suit for recovery of money and a criminal case filed under section 138(1) of the Negotiable Instruments Act can stand together, has been set at rest by the apex court, by holding that, "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."

11. It has further been held in 17 BLD (AD) 177 that,

"By no logic, it can be said that the drawers 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, because ignorance of law is no plea" and that "The Act, being a Special law, its provisions have to be strictly adhered to and it must also be seen that the purpose of the law is not frustrated for putting too many unnecessary legal bar upon the payee or, as the case may be, upon the holder in due course of the cheque in approaching the court for hauling up the drawer of the cheque (s) who issued the same without arranging sufficient fund against the issuance of such cheque(s)."

12. Towards further clarification of the ambit of section 138(1) of the NI Act, 1881 and scheme of that law, the apex court, in 17 BLC (AD) 177, has addressed, the issues as follows:- "The crucial fact to be considered in deciding the issue whether separate petition of complaint shall have to be filed for the commission of offence under the section against each unpaid/dishonoured cheque(s) or one complaint would do in respect of more than one cheque(s) shall depend upon the notice to be served under clause (b) by the payee, or as the case may be, by the holder in due course of the cheque read with clause(c) of the proviso to sub-section (1) of section 138 of the Act.....

The whole scheme of the law as discussed hereinbefore, is to haul up the drawer of the unpaid/dishonoured cheque(s) for not arranging the funds against the issuance of such cheque(s) and then its/his failure to make the

payment of the amount of the money of the unpaid/dishonoured cheque(s) on demand by the payee or, as the case be, by the holder in due course of the cheque(s) in writing within thirty days of the receipt of such notice as provided in clauses (b) and (c) respectively of sub-section (1) of section 138 of the Act."

13. Again in the case reported in 49 DLR (AD) 132, it has been held that,—

"There is nothing in law precluding a criminal case on account of a civil suit pending against the petitioners on the same facts. The criminal case stands for the offence, while the civil suit is for realization of money. Both can stand together....."

14. In view of the law thus settled, we have no hesitation to hold that two cases, one filed under Artha Rin Ain, 2003 and another under section 138(1) of the Negotiable Instruments Act, 1881, can stand together.

15. The accused-petitioner, as we can safely infer from the facts and circumstances of this case, has come before this court, at the stage aforesaid, with collateral purpose to delay the disposal of the case filed under section 138(1) of the Negotiable Instrument Act, after he has managed to obtain a huge amount of loan by furnishing these cheques, amongst other securities, and thereby earned trust of the Bank to re-schedule the classified loan by signing the duplicate copy of the sanction letter.

16. We must record our anxiety that, if this kind of fraudulent conduct and inducement for obtaining money cannot be stopped then the resultant situation is bound to collapse the financial institutions and trade practices in the hands of looters and cheaters. The cheque is not for the purpose only to repay the loan, but a cheque is issued to secure make payment of price of any goods or services purchased on credit or to repay a personal loan etc. Besides, the payee of a dishonoured cheque is left to



severe financial hardship, mental agonies, anxieties and irreparable losses, even ruination of a family or business.

17. The NI Act, 1881 has been amended by Act No. 3 of 2006, whereby a new sub-section (1A) to section 138 and a new section 138A have been inserted. By amending clause (c) of section 141 the power to try an offence under section 138(1) of NI Act has been vested in the Sessions Court, which was earlier vested in a Magistrate Court. Section 138A has imposed pre-condition that for preferring any appeal against an order of sentence under section 138(1) the appellant-convict should deposit not less 50% in the trial court. The intent of the legislature is very much clear from all these amendments that, this piece of legislation is a welfare legislation, enacted and amended to protect benefit the payees or 'holders in due course' of a negotiable instrument. The drawee of a dishonoured cheque cannot escape his liability except in the manner laid down in section 82 of the NI Act, 1881, i.e. either (I) by cancellation, or (II) by release, or (III) by payment. On no other excuse or plea.

18. We have also gone through the judgment reported in 23 BLT(AD) 76. As has been rightly pointed out by the learned Advocate for opposite party No. 2, in that case, the moot was whether there was ingredients of framing charge under sections 406/420 of the Penal Code. Notably, in that case no charge was framed under section 138(1) of the Negotiable Instruments Act, 1881, and no issue was either raised or decided as to whether Artha Rin suit or a civil suit can stand together with a criminal case, more particularly with a case filed under section 138(1) of the NI Act. Hence, ratio of said case, reported in 23 BLT (AD) 76, is not applicable in the facts and circumstances of this case before us. Rather, in 49 DLR 464: *Nurul Islam vs State* it has been pointed out that, "An offence under section 138 of the Negotiable Instru-

ments Act is for dishonour of a cheque for insufficiency of fund etc, whereas an offence under section 420 of the Penal Code for cheating is a distinct offence. The rule of law about the peremptory application of Special Law in the place of general law for trial of an offence hardly applies when the offence are distinct under the two laws." Similar view was taken in the case reported in 62 DLR 28: *Sheikh Mashuk Rahman vs State*.

19. Again, it is to be noted here that, if the loan is availed of by resorting to fraud and forgery, then such a transaction cannot be termed as a normal case of granting loan. Hence, the facts of each case has to scrutinized before applying a principle laid down in one case in the facts and circumstances of another case.

20. In view of the facts and circumstances we also held that, the case under Negotiable Instrument Act being Sessions Case No. 3623 of 2013 can stand along with Artha Rin Suit No. 136 of 2012 and filing of the case under Negotiable Instruments Act or cognizance taken by the Metropolitan Sessions Judge in Sessions Case No. 3623 of 2013 does not amounts to abuse of the process of the court.

21. We do not find any merit in this Rule.

#### Order

In the result, the Rule is discharged with cost.

The accused is petitioner is directed to pay cost of Taka 50,000 (fifty thousand) to the Opposite Party No. 2 (Bank) within 30 days of receiving the copy of judgment and order of this court by the trial court.

Order of stay is hereby vacated.

Send down a copy of this judgment and order to the court concerned.

Ed.