

11 SCOB [2019] HCD 102

**HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTION)**

CrI. Misc. Case No. 32098 of 2015.

Alhaj Md. Mahtab Hossain Molla

..... Petitioner

Vs.

The State and another

.....Opposite parties.

Mr. Sheikh Muhammed Serajul Islam,
Advocate

.....For the petitioners

Mr. Md. Zakir Hossain Masud, Advocate

..... For the opposite parties.

Heard on 02.03.2016, 14.03.2016,
21.03.2016, 27.03.2016

And

Judgment on 03.04.2016.

Present:

Mr. Justice Md. Rezaul Hasan

And

Madam Justice Kashefa Hussain

It is a settled principle of law that in order to construe the actual meaning and intention of a statute it must be read as a whole and not in part or in an isolated manner.

The provisions of the criminal law do not contemplate or consider the sustainability or maintainability of an isolated proceeding or case under Section 98 of the Code of Criminal Procedure. ... (Para 17)

The law as it exists does not provide any scope to file or initiate a separate case or proceeding in an isolated manner in under Section 98 in the absence of a pending case or proceeding filed in pursuance of an F.I.R or complaint whatsoever under any of the provisions of the Penal Code. ... (Para 19)

Section 98 only confers power upon Magistrate, empowered in this behalf to act in a particular manner to act according to the necessity appertaining to the facts and circumstances arising out of a particular case before the concerned Court arising out of an F.I.R or a complaint as the case may be. Hence a Magistrate, either Executive or Judicial as the case may be, to be able to act in accordance with the provisions of Section 98 being empowered in this behalf, can only proceed under the Section in a pending case and not in the absence of a case or proceeding and the existence of a case or proceeding is a sine qua non that is, an essential condition for resorting to the provisions of Section 98 of the Code. ... (Para 20)

It is true that in the case we are dealing with at present, the issue of the property not being 'stolen' or 'forged' etc. has arisen and the petitioner contended that hence the case does not fall within the mischief of Section 98 of the Code. We do not disagree with the point raised by the learned Advocate for the petitioner given that the property in dispute, that is the car not being a 'stolen' property cannot be recovered by resorting to the procedures laid down in Section 98 of the Code. Rather, in the event of a proper case being filed, the appropriate court could have passed an appropriate order in

respect of the property under Section 516A of the Code as deemed fit pending conclusion of the inquiry or trial or it could pass an appropriate order under Section 517 of the Code. ... (Para 23)

An application under Section 98 of the Code of Criminal Procedure not being isolatedly entertainable or lawfully maintainable at all, therefore in this case the application filed under Section 98 of the Code of Criminal Procedure before the Magistrate Court is not maintainable and is liable to be dismissed not being sustainable in the eye of law. ... (Para 26)

JUDGMENT

Kashefa Hussain, J:

1. Let the supplementary affidavit form part of the main petition.
2. Rule was issued in the case calling upon the opposite parties to show cause as to why the judgment and order dated 25.06.2015 passed by the learned Additional Sessions Judge, Barguna in Criminal Revision No. 69 of 2014 allowing the aforesaid Revision and thereby reversing the order dated 02.06.2014 passed by the learned Executive Magistrate, Barguna Sadar Police Station to recover the Car being No. Dhaka Metro-CHA-13-5455 from the accused petitioner and hand over the Car to the complainant opposite party, now pending in the court of the learned executive Magistrate, Barguna, Sadar Barguna should not be quashed and /or such other or further order or orders be passed as to this court may seem fit and proper.
3. The prosecution case in short is that on 24.03.2014 one Md. Abdur Rahim made a petition of complaint before the Executive Magistrate, Barguna alleging inter alia that he purchased a car being No. Dhaka Metro-Cha 13-5455 through Bank. The witnesses No. 01 helped him in releasing the car from the bank. A sum of Taka 2,04,000/- (two lac four thousand) is still due to the bank. The accused hired the car at a rent of Taka 60,000/- (sixty thousand) per month from the complainant. Accordingly he handed over the car to the accused on 02.11.2013 that the witnesses No. 02 is the driver. On 02.02.2014 he brought the car to his house located at Town Hall Sarak, Barguna. The accused snatched away the car and kept the same in his possession and the accused caused irreparable loss to the complainant by the keeping the same in his possession. On the basis of this complaint M.P case being No. 211 of 2014 under section 98 of the Code of Criminal Procedure was initiated.
4. The learned Executive Magistrate, Barguna examined the complainant under Section 200 of the Code of Criminal Procedure and directed the Officer-in-Charge, Barguna Sadar Police Station, Barguna to hold investigation having regard to ownership of the car and submit report and that thereafter on 10.04.2014 the investigating officer submitted report.
5. The accused petitioner filed an application for discharging him from the case.
6. On 02.06.2014 the learned Executive Magistrate on perusal of the record and hearing the parties directed the officer in charge, Barguna Sadar Police Station to hand over the aforesaid car to the accused petitioner observing inter alia that the accused petitioner has purchased the car from Abdul Kalam Azad the real owner of the car and accordingly the aforesaid car was handed over to the accused petitioner.

7. Being aggrieved by and dissatisfied with the aforesaid order dated 02.06.2014 the complainant filed a Criminal Revision No. 69 of 2014 before the learned Sessions Judge, Barguna.

8. On transfer the aforesaid revision was heard by the learned Additional Sessions Judge, Barguna who was pleased to allow the aforesaid revision vide order dated 25.06.2015 and thereby reversed the order of the learned trial court.

9. Being aggrieved by the order of the Additional Sessions Judge, Barguna passed on 25.06.2015 reversing the earlier order of the Executive Magistrate, Barguna passed on 02.06.2014 the accused petitioner filed the instant miscellaneous case which is hence before us.

10. Learned Advocate Mr. Sheikh Muhammed Sirajul Islam appeared on behalf of the petitioner while learned Advocate Mr. Md. Zakir Hussain Masud re-presented the complainant-opposite parties.

11. Mr. Sheikh Muhammed Sirajul Islam, learned Advocate for the petitioner submits that it appears from the materials on record that neither an information was lodged before any police station nor any petition of complaint was filed before the learned District Magistrate or an Executive Magistrate on any allegation of penal offence, but despite that the learned Executive Magistrate issued a notice upon the instant petitioner to show cause and issued search warrant for recovery of the car and directed the Officer-in-Charge, Borguna to submit report with respect to ownership of the car.

12. He further contends that provision under section 98 of the Code of Criminal Procedure can only be invoked when there is an allegation of Penal offence. He further assailed that in absence of substantive allegations, procedural law cannot be applied and hence the entire proceedings including the impugned judgment and order arising out of a case Under Section 98 of the Code of Criminal Procedure is not maintainable at all and is liable to be quashed. He asserts that in the absence of any substantive allegation either in the form of F.I.R or petition of complaint, isolated proceedings under procedural law i.e. under section 98 of the Code of Criminal Procedure is illegal and without jurisdiction. Moreover, he contends that the provision of section 98 under code of Criminal Procedure is applicable only when there are allegations of theft, forgery etc. and in absence of any specific allegation under a specific provision of the Penal Code, the application under section 98 of the Code of Criminal Procedure is illegal. He further argues that given that there had been a “criminal” case against the petitioner over the car, even then recovery of the car by issuing search warrant upon an application under section 98 of the Code of Criminal Procedure would be illegal inasmuch the aforesaid car is not a “stolen” car.

13. In support of his submissions he relied upon two decisions of this court one in the case of Saiduzzaman Vs. Munira Mostafa, 56 DLR(2004) 275 and another decision in the case of Q.H. Belali Vs. Capt. A. Azim Khan, 40 DLR(1988) 295. And accordingly the learned Advocate submits that the judgment and order of the Revisional court is not just and legal and that it is liable to be quashed and hence prayed for making the Rule Absolute.

14. Mr. Md. Zakir Hussain Masud learned Advocate for the complainant opposite party No. 2 submits that the judgment and order of the Revisional court is just and proper and there

has been no illegality in the order passed by the Sessions Judge, Barguna on 25.06.2015 and therefore the Rule bears no merit and ought to be discharged for ends of justice.

15. We have heard the learned Advocates, perused the materials on records including the respective judgment and order passed by the Executive Magistrate, Bagruna dated 02.06.2014 including the judgment and order passed by the learned Sessions Judge, Barguna dated 25.06.2015. In the case before us, it is manifest from the records that the complaint was in limine, directly filed under Section 98 of the Code of Criminal Procedure. The complainant as is obvious did not initiate his complaint upon any specific provision of the Penal Code which might be pertinent or appropriate to the context of the facts and circumstances leading to filing a case.

16. The learned Advocate for the petitioner while placing his arguments inter alia persuaded that in the absence of any substantive allegation either in the form of an F.I.R or any petition of complaint, “isolated” proceeding under Section 98 cannot be brought since the law does not contemplate resorting to such ‘isolated’ proceeding without first initiating a case whatsoever under the appropriate provisions of law. Upon our attempt to weigh the appropriateness or inappropriateness of a case only particularly on the point of the illegality of directly resorting to Section 98 of the Code of Criminal Procedure, we have examined the provisions of section 98 which falls under chapter VII part B of the Code of Criminal Procedure.

17. Now, it is a settled principle of law that in order to construe the actual meaning and intention of a statute it must be read as a whole and not in part or in an isolated manner. Bearing this principle in mind, we have perused the provisions contained in the Code of Criminal Procedure including those under Chapter VII of the Code. A thorough scrutiny of the relevant provisions reveal that the provisions of the criminal law do not contemplate or consider the sustainability or maintainability of an isolated proceeding or case under Section 98 of the Code of Criminal Procedure. In support of our views, we find it worthwhile to quote from the part of Section 98(1) for our purpose which is produced hereunder. Section 98(1) “If a District Magistrate, [or an Executive Magistrate specially empowered by the Government in this behalf], upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or, sale of stolen property”.

18. We have drawn our notice to the phrase “upon information” and after such inquiry and also the term “reason to believe” which conspicuously leads to the existence of a case or proceeding arising out of which and in pursuance of which the Magistrate, either Executive or Judicial as the case may be empowered to act upon, shall upon receiving the necessary “information” and pursuant to ‘inquiry’ and only if he has reason to believe that facts and circumstances exist which makes it imperative to act only then he may act in accordance with the procedural provisions of Section 98 of the Code of Criminal Procedure.

19. Accordingly, upon scrutiny into Section 98 and after scanning through the preceding sections under Chapter VII including other provisions of the Code, and after an understanding into the meaning and intention of the statute, we are of the considered view that the law as it exists does not provide any scope to file or initiate a separate case or proceeding in an isolated manner in under Section 98 in the absence of a pending case or proceeding filed in pursuance of an F.I.R or complaint whatsoever under any of the provisions of the Penal Code.

20. Section 98 only confers power upon Magistrate, empowered in this behalf to act in a particular manner to act according to the necessity appertaining to the facts and circumstances arising out of a particular case before the concerned Court arising out of an F.I.R or a complaint as the case may be. Hence a Magistrate, either Executive or Judicial as the case may be, to be able to act in accordance with the provisions of Section 98 being empowered in this behalf, can only proceed under the Section in a pending case and not in the absence of a case or proceeding and the existence of a case or proceeding is a sine qua non that is, an essential condition for resorting to the provisions of Section 98 of the Code.

21. Another aspect to which the learned Advocate for the petitioner had accentuated upon, is that Section 98 of the Code of Criminal Procedure is applicable in case the goods were 'stolen' property, but he emphasises that in the instant case as is apparent from the records there is no allegation of the disputed property, that is the car being 'stolen'.

22. It is true that Section 98 of the Code of Criminal Procedure does conceive of its applicability in situations or circumstances where the property is stolen or documents are forged etc. In context of the petitioner's submissions we have also looked into the decisions cited by the learned Advocate for the petitioner in the case of Saiduzzaman Vs. Munira Mostafa, 56 DLR(2004) 275 and another decision in the case of Q.H. Belali Vs. Capt. A. Azim Khan, 40 DLR(1988) 295.

23. Upon perusal it appears that these decisions however primarily focused upon the non-applicability of Section 98 in situations where the property in dispute does not involve the allegation of theft, forged documents etc. which may authorise a Magistrate being empowered under the provision of Section 98 to issue a search warrant. It is true that in the case we are dealing with at present, the issue of the property not being 'stolen' or 'forged' etc. has arisen and the petitioner contended that hence the case does not fall within the mischief of Section 98 of the Code. We do not disagree with the point raised by the learned Advocate for the petitioner given that the property in dispute, that is the car not being a 'stolen' property cannot be recovered by resorting to the procedures laid down in Section 98 of the Code. Rather, in the event of a proper case being filed, the appropriate court could have passed an appropriate order in respect of the property under Section 516A of the Code as deemed fit pending conclusion of the inquiry or trial or it could pass an appropriate order under Section 517 of the Code.

24. But however, in the case before us, these are hypothetical issues only, given that no complaint or case was priorly filed under any Section of the Penal Code, therefore in the absence of existence of any case before any court, renders unlawful the entire proceeding arising out of Section 98 and it will be a futile exercise to dwell further on this issue or give our, if any, which views could have been discussed had the situation or circumstance been different and not upon hypothesis.

25. Upon examination of the materials before us, it is also revealed that the Magistrate's order dated 02.06.2014 was passed upon factual aspects and he determined the ownership of the car as it appeared to him after weighing the facts and evidences. The Revisional Court also reversed the order of the Magistrate relying upon factual aspects only upon facts of evidences. We do not want to dwell upon the legality or appropriateness of the order of the Revisional Court dated 25.06.2014 passed from a factual point of view by the Additional Sessions Judge, Barguna. Our anxiety arise out of the facts that neither of the courts below applied a judicious mind and failed to address or otherwise appreciate the non-maintainability

and unlawful standing of an application under Section 98 of the Code of Criminal Procedure in the absence of a pending case. It somehow escaped the minds of both the courts below, and it did not even occur to them that in absence of a pending case filed under the provisions of the Penal Code, an isolated proceeding under Section 98 is not maintainable and is liable to be dismissed in limine. Moreover, in passing the Order, it escaped their judicious notice that the property in dispute, in this case, the car, not being 'stolen' property would not in any case come within the mischief of Section 98 of the Code of Criminal Procedure. But rather in an appropriate case, the appropriate court could have after exercising due discretion passed an order, under Section 516A or Section 517 of the Code of Criminal Procedure, as the case may be. Drawing our attention to the two decisions cited by the petitioner, we upon perusal of those arrive at our considered finding that the ratio decidendi of both the cases, cited by the petition mainly revolved around the non-applicability of Section 98 in cases other than 'stolen' goods, forged documents, etc. and emphasises that 'search warrants' therefore cannot be issued in circumstances except those expressly postulated in Section 98 of the Code which among a few others provide for authority to Magistrate, to issue search warrants.

26. We are of course in agreement with the ratio decidendi of these two decisions but bearing our respect towards the principles expounded in these decisions, however we are of the considered view that neither of the two decisions, in the case of Saiduzzaman Vs. Munira Mostafa, 56 DLR(2004) 275 and another in the case of Q.H. Belali Vs. Capt. A. Azim Khan, 40 DLR(1988) 295 somehow address upon the non-maintainability and lack of legal sustainability of an isolated application under Section 98 of the Code of Criminal Procedure to issue an order of search warrant in absence of any pending case filed under any provisions of the Penal Code arising out of an F.I.R or complaint. These two decisions are more or less silent on this particular issue. The 56 DLR decision in para 7 of the judgment however only touched upon the issue of non-maintainability of 'isolated' proceedings upon an application under Section 98 of the Code of Criminal Procedure holding it to be 'without jurisdiction' of the Metropolitan Magistrate. But apart from this allusion, these decisions do not elaborate upon the aspect of the non-maintainability or unlawfulness of an isolated proceeding under Section 98 of the Code of Criminal Procedure. We are of the considered view that an application under Section 98 of the Code of Criminal Procedure not being isolatedly entertainable or lawfully maintainable at all, therefore in this case the application filed under Section 98 of the Code of Criminal Procedure before the Magistrate Court is not maintainable and is liable to be dismissed not being sustainable in the eye of law.

27. It appears that the entire issue are essentially disputed matters of facts presented in the complaint petition and which ought to be decided upon in pursuance of a pending case or criminal proceedings initiated or filed under the relevant section of the Penal Code before a proper criminal court conferred with the jurisdiction to hear and decide upon the matter or under any other law relevant thereto.

28. Hence, it is our considered opinion that considering the facts and circumstance before us, an appropriate order could only be passed by a proper criminal court, constituted under section 6(1) of the Code of Criminal Procedure, in exercise of the power conferred upon such criminal court under Section 516 A or Section 517 A of the Code of Criminal Procedure as the case may be. Since the facts and circumstances of the case before us, do not fall within the purview of Section 98 of the Code, but appropriate orders under Section 516A or Section 517 whatsoever could only be passed if the same was arising out of a pending case filed under any provisions of the Penal Code.

29. As we also opined elsewhere, in the case before us, both the courts below while arriving at their findings based upon matters arising out of the facts only, but did not for once even raise the issue on point of law, that is, in this case, the question of maintainability or legal sustainability of an application to issue search warrant under Section 98 of the Code of Criminal Procedure in the absence of F.I.R, complaint case or proceeding whatsoever under the provisions of the Penal Code. And as is obvious from the records, the Revisional Court gave its own findings regarding ownership of the car relying upon facts again and reversed the finding of the Magistrate upon factual aspects only, but did not even once try to nor made any attempt to scrutinise the legal standing of such an application.

30. At one stage of the submissions of the learned Advocate for the petitioner, an issue regarding the Jurisdiction of an Executive Magistrate not being a proper criminal court and not being empowered conferred with the powers of such court to entertain such an application came up. Well, in an appropriate case we would have been inclined to examine and scrutinise the issue of the Jurisdictional bounds and limits of an Executive Magistrate. But that issue not being the case before us, given that in the present case, the application under Section 98 in absence of substantive allegation in the form of an F.I.R or complaint etc. whatsoever, being unlawful and therefore not maintainable in a isolated manner, at all, even before an appropriate court, hence we are not inclined to mull over or dwell upon the Jurisdictional issue of an Executive Magistrate in this particular case.

31. Be that as it may, upon an overall consideration of the facts and circumstances of the cases and after perusal of the findings of the courts below, and the decisions cited by the petitioner we are inclined to conclude that in this case, irrespective of the fact that the property in dispute, the car, being not a stolen property does not come within the mischief of Section 98 of the Code of Criminal Procedure, even precluding this particular aspect, the application under Section 98 of the Code of Criminal Procedure is not maintainable in absence of a pending case, under the provisions of the Penal Code and having no legal standing and ipso facto makes such an application un lawful. Therefore we find merits in the Rule.

32. In the result, the Rule is made absolute.

33. The Officer-in-charge (O.C), Barguna Sadar Police Station, Barguna is hereby directed to recover the aforesaid Car being No. Dhaka Metro Cha-13-5455 from the opposite party No.2 and hand over the same to the accused-petitioner within 10(ten) days from the date of receiving of this judgment.

34. Communicate this judgment and order at once.