**2 SCOB [2015] HCD 36**

**HIGH COURT DIVISION**
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 9150 of 2007

**Dr. Muhiuddin Khan Alamgir**
..... Petitioner

-Versus-

**The Government of Bangladesh represented by the Secretary of the Ministry of Home Affairs, Bangladesh Secretariat, Dhaka and others**
.....Respondents

Mr. Shah Monjurul Hoque with
Mr. Khairul Alam Choudhury, Advocates
.....For the petitioner.
Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Ms. Mosammat Khairun Nessa, AAG
….For the respondent no. 1.
Mr. Md. Khurshid Alam Khan, Advocate
....For the respondent no. 2.

Heard on 04.09.2014
Judgment on 10.09.2014

**Present:**
**Mr. Justice Moyeenul Islam Chowdhury**
**-And-**
**Mr. Justice Md. Ashraful Kamal**

**Anti-Corruption Commission Act, 2004:**

**Section 2(Umo) of the Act contemplates that "ce‡a" means the offences mentioned in the schedule of the Act. It is an indisputable fact that the alleged offences were not scheduled offences of the Act at the relevant point of time. So the question of enquiry into the alleged offences by the respondent no. 3 is out of the question. What we are driving at boils down to this: the respondent no. 3 was not empowered to enquire into the alleged offences, but none the less, he enquired thereinto. Furthermore, it is an admitted fact that the enquiry report submitted by the respondent no. 3 was treated as an ejahar by the concerned Police Station which gave rise to the instant case. In this regard, Mr. Md. Khurshid Alam Khan has candidly conceded that the treatment of the enquiry report as an ejahar is not sustainable in law. This being the panorama, we feel constrained to hold that the very initiation of the case is 'de hors' the law. ...(Para 13)**

**JUDGMENT**

**MOYEENUL ISLAM CHOWDHURY, J:**

1. On an application under Article 102 of the Constitution, a Rule Nisi was issued calling upon the respondents to show cause as to why the transfer of the Druto Bichar Tribunal Case No. 25 of 2007 arising out of D. A. B. G. R. Case No. 01 of 2007 corresponding to Kotwali (Comilla) Police Station Case No. 92 dated 30.03.2007, now pending before the Druto Bichar Tribunal, Chittagong pursuant to SRO No. 209-Ain/2007 dated 28.08.2007 (as evidenced by Annexure-A(4) to the writ petition) and why the continuation of the Druto Bichar Tribunal Case No. 25 of 2007, pending in the said Druto Bichar Tribunal, Chittagong, should not be declared to be without lawful authority being inconsistent with Section 6 of the Druto Bichar Tribunal Ain, 2002 and why the application of the Emergency Power Rules, 2007 to the said case should not be declared to be without lawful authority in the absence of any sanction required thereunder and as being hit by Section 3(3)(Ka) of the Emergency Power Ordinance, 2007 and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner is an ex-member of the Civil Service of Pakistan. After his retirement from the Civil Service, he was involved in politics. At one stage, he was appointed State Minister-in-Charge of the Ministry of Planning. Subsequently, he was appointed Minister-in-Charge of the Ministry of Civil Aviation and Tourism and the Ministry of Science and Technology. However, during the currency of the emergency period in 2007, the respondent no. 3, an officer of the Anti-Corruption Commission (respondent no. 2), lodged an enquiry report with Comilla Kotwali Police Station against the petitioner which was subsequently treated as an ejahar on 30.03.2007. On the basis of that ejahar, Comilla Kotwali Police Station Case No. 92 dated 30.03.2007 under Sections 198/420/109/120B of the Penal Code was initiated. It was alleged in the ejahar that by resorting to misrepresentation of facts, the petitioner obtained loan to the tune of Tk. 3,84,000/- from Agrani Bank, Rajgonj Branch, Comilla for construction of a building on his plot of land in Comilla; but he did not utilize the loan for the said purpose and that there was already a building on the plot of land in question which was rented out to another branch of Agrani Bank before sanctioning of the said loan and in this way, the petitioner deceived the bank. Anyway, it is the claim of the petitioner that he adjusted the entire loan amount on time. Although the offence was allegedly committed in between 01.01.1990 and 05.05.1999, that is to say, long before the proclamation of emergency on 11.01.2007, the Emergency Power Rules, 2007 framed under the Emergency Power Ordinance, 2007 can not be invoked. As the alleged offence is not a scheduled offence of the Anti-Corruption Commission Act, 2004, the respondent no. 3 had no legal authority to enquire thereinto and submit an enquiry report which was eventually treated as an ejahar. However, after registration of the case by Comilla Kotwali Police Station, the police investigated the same and submitted charge-sheet against the petitioner under Sections 198/420 of the Penal Code read with Rule 14 of the Emergency Power Rules, 2007. In the said charge-sheet, it was stated that the petitioner was allotted Plot No. 8, Block-N, Section-1 of Comilla Housing Estate on 07.12.1977 and thereafter he transferred the said plot in favour of his son, namely, Mr. Joy Alamgir by a deed of gift dated 01.01.1990. Having submitted the said deed of gift dated 01.01.1990, the petitioner obtained the loan of Tk. 3,84,000/- from Agrani Bank, Rajgonj Branch, Comilla for construction of a building on the plot by having recourse to fraud and deception. On 27.03.1990, he rented out the building on the plot to Agrani Bank, Housing Estate Branch which indicated that the building had been constructed before sanctioning of the loan. This conduct of the petitioner amounted to cheating. But it is his assertion that from the averments made in the charge-sheet, no case was disclosed against him either under Section 198 or under Section 420 of the Penal Code. Be that as it may, by SRO No. 209-Ain/2007 dated 28.08.2007, the case was transferred to the Druto Bichar Tribunal, Chittagong for trial in view of Section 6 of the Druto Bichar Tribunal Ain, 2002 read with Rule 18 of the Emergency Power Rules, 2007. But the Druto Bichar Tribunal has no jurisdiction whatsoever to try the said case thereunder. As the Emergency Power Rules, 2007 framed under the Emergency Power Ordinance, 2007 were not given any retrospective effect beyond 12.01.2007, their applicability to the case does not arise at all. This being so, the initiation and continuation of the case is without lawful authority and of no legal effect. Hence the Rule.

3. Neither the Government-respondent no. 1 nor the Anti-Corruption Commission-respondent no. 2 has filed any Affidavit-in-Opposition opposing the Rule. However, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 1 and Mr. Md. Khurshid Alam Khan, learned Advocate appearing on behalf of the respondent no. 2, have advanced submissions before this Court.

4. At the outset, Mr. Shah Monjurul Hoque, learned Advocate appearing on behalf of the petitioner, submits that in view of Section 17 (ka) of the Anti-Corruption Commission Act, 2004, the Anti-Corruption Commission may enquire and investigate the offences mentioned in the schedule of the Act; but indisputably the alleged offences punishable under Sections 198/420 of the Penal Code were not mentioned in the schedule of the Anti-Corruption Commission Act at the material time and this being the position, the respondent no. 3 had no legal authority to enquire into the alleged offences and submit an enquiry report which is malafide on the face of it.

5. Mr. Shah Monjurul Hoque further submits that admittedly the enquiry report submitted by the respondent no. 3 was treated as an ejahar by Comilla Kotwali Police Station and this treatment of the enquiry report as an ejahar is a classic case of illegality and consequentially, the initiation and continuation of the proceedings of the case are a nullity in the eye of law.

6. Mr. Shah Monjurul Hoque next submits by referring to the definition of "ce£¢a" as provided in Section 2(Umo) of the Anti-Corruption Commission Act that the word "ce£¢a" adverts to the offences mentioned in the schedule of the Act and as the alleged offences were not scheduled offences of the Anti-Corruption Commission Act at the relevant time, the entire exercise undertaken by the respondent no. 3 is 'de hors' the law.

7. Mr. Shah Monjurul Hoque also submits that if the complaint of cheating is not made by the person cheated, the case will fail and since admittedly the bank did not initiate the case, its continuation is of no legal effect, regard being had to the 'ratio' enunciated in the decision in the case of Surendranath Saha…Vs…The State reported in 12 DLR 178.

8. Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 1, submits that the materials on record prima facie disclose the commission of the offence of cheating and that being so, it cannot be said that the initiation and continuation of the case are a nullity in the eye of law.

9. Mr. Md. Khurshid Alam Khan, learned Advocate appearing on behalf of the respondent no. 2, submits that the scope of a writ petition in such a matter is very limited in view of the principle enunciated in the decision in the case of the Chairman, Anti-Corruption Commission and another….Vs…Enayetur Rahman and others reported in 64 DLR (AD) 14.

10. Mr. Md. Khurshid Alam Khan further submits that the enquiry was held properly by the respondent no. 3 and in course of enquiry, it transpired that the offences complained of were not scheduled offences of the Anti-Corruption Commission Act at the relevant time and in this view of the matter, it cannot be said that the respondent no. 3 committed any illegality in enquiring into the offences.

11. Mr. Md. Khurshid Alam Khan, however, concedes that the enquiry report submitted by the respondent no. 3 ought not to have been treated as an ejahar by the concerned Police Station and the treatment of the enquiry report as an ejahar is not tenable in law.

12. We have heard the submissions of the learned Advocate Mr. Shah Monjurul Hoque and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and the learned Advocate Mr. Md. Khurshid Alam Khan.

13. At this juncture, we feel tempted to refer to the definition of "ce£¢a" as postulated by Section 2(Umo) of the Anti-Corruption Commission Act. Section 2(Umo) of the Act contemplates that "ce£¢a" means the offences mentioned in the schedule of the Act. It is an indisputable fact that the alleged offences were not scheduled offences of the Act at the relevant point of time. So the question of enquiry into the alleged offences by the respondent no. 3 is out of the question. What we are driving at boils down to this: the respondent no. 3 was not empowered to enquire into the alleged offences, but none the less, he enquired thereinto. Furthermore, it is an admitted fact that the enquiry report submitted by the respondent no. 3 was treated as an ejahar by the concerned Police Station which gave rise to the instant case. In this regard, Mr. Md. Khurshid Alam Khan has candidly conceded that the treatment of the enquiry report as an ejahar is not sustainable in law. This being the panorama, we feel constrained to hold that the very initiation of the case is 'de hors' the law.

14. Of course, the police investigated the case and submitted charge-sheet against the petitioner under Sections 198/420 of the Penal Code. According to the claim of the prosecution, Agrani Bank was defrauded by the petitioner in the matter of obtaining the loan to the tune of Tk. 3,84,000/-.

Admittedly the bank authority did not come forward to lodge any case against the petitioner. In this connection, it transpires that Mr. Shah Monjurul Hoque has rightly relied upon the decision in the case of Surendranath Saha…Vs…The State reported in 12 DLR 178. The principle that has been enunciated in the decision is that where a complaint of cheating before the Court has been made not by the person defrauded but by another on his behalf, the case must fail. Keeping the above principle of law in view, we are led to hold that as the bank authority failed to lodge any case against the petitioner under Section 420 of the Penal Code, the present case initiated at the instance of the Anti-Corruption Commission is bad in law.

15. It is true that in a case of this nature, an aggrieved party can invoke the extra-ordinary jurisdiction of the High Court Division under Article 102 of the Constitution in some exceptional circumstances. It transpires that those circumstances have been specified in paragraph 7 of the decision reported in 64 DLR (AD) 14(supra). Paragraph 7 of the decision has been couched in the following terms:

> "7. This Court on repeated occasions argued that Article 102(2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extra-ordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill-suited to meet the demands of extra-ordinary situations, that is to say, where vires of a statute is in question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is intra vires but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102(2) of the Constitution."

16. Reverting to the case in hand, we find that the very initiation of the case is without any lawful authority inasmuch as admittedly the ejahar is predicated upon the enquiry report submitted by the respondent no. 3. From the materials on record, we find malice in law in the matter of initiation and continuation of the proceedings of the case. In fact, that malice is writ large on the face of the record. A proceeding initiated with bad faith vitiates everything. That is a settled proposition of law. So the initiation and continuation of the case stand vitiated by malice in law.

17. The offences specified in Section 6 of the Druto Bichar Tribunal Ain, 2002 do not attract the offences punishable under Sections 198/420 of the Penal Code. But by applying the provisions of Rule 18 of the Emergency Power Rules, 2007, the case was transferred to the Druto Bichar Tribunal, Chittagong for trial by a notification published in the official gazette on 28.08.2007. The offences punishable under Sections 198/420 of the Penal Code are not serious offences in any view of the matter. The consideration of the Government for transfer of any serious offence to any Druto Bichar Tribunal should be objective. There is no scope for any subjective consideration of the Government in this respect. In view of the materials on record, it seems that the Government was actuated by malice in transferring the instant case to the Druto Bichar Tribunal, Chittagong for trial. So the very transfer of the case to the Druto Bichar Tribunal, Chittagong is not tenable in law.

18. It is undisputed that the Emergency Power Ordinance was promulgated on 12.01.2007 and the Emergency Power Rules were framed thereunder. As the Emergency Power Ordinance of 2007 was not given any retrospective effect, the question of application of the Emergency Power Rules to the instant case does not arise at all. The record indicates that the alleged offence was committed by the petitioner long before the promulgation of the proclamation of the emergency, that is to say, in between 01.01.1990 and 05.05.1999. In this perspective, the question of applicability of the Emergency Power Rules of 2007 to the case in hand can not be raised at all. Precisely speaking, malice in law pervades the case from its very initiation up to the present stage. So the proceedings of the case being without lawful authority can not be proceeded with in the Druto Bichar Tribunal, Chittagong.

19. From the foregoing discussions and in the facts and circumstances of the case, we find merit in the Rule. The Rule, therefore, succeeds.

20. Accordingly, the Rule is made absolute without any order as to costs. The initiation of the Druto Bichar Tribunal Case No. 25 of 2007 arising out of D. A. B. G. R. Case No. 01 of 2007 corresponding to Kotwali (Comilla) Police Station Case No. 92 dated 30.03.2007 and its continuation in the Druto Bichar Tribunal, Chittagong are without any lawful authority and of no legal effect.

21. Communicate a copy of this judgment to the Druto Bichar Tribunal below at once.