

3 SCOB [2015] HCD 158**High Court Division****(Criminal Revisional Jurisdiction)**

Criminal Revision No.132 OF 2012

Hafez Ahmed.

..... Petitioner

-Versus-

The State & others

..... Opposite parties

Mr. Ahsanul Karim with
Mr. Md. Mizanul Hoque Chowdhury,
Advocate..... for the petitioner
Mr. Mohammad Faridul Islam, Advocate
..... for opposite party No.2Heard on 26.08.2015, 02.09.2015 and
Judgment on 15.09.2015.**Bench:****Mr. Justice Md. Ruhul Quddus****And****Mr. Justice Bhishmadev Chakrabortty****Penal Code, 1860****Section 161****and****Prevention of Corruption Act, 1947****Section 5(2)**

The offence under section 161 of the Penal Code relates to take illegal gratification by any public servant, while offence under section 5(2) of Act II of 1947 speaks of criminal misconduct by the same if he by corrupt and illegal means abusing his position as public servant obtains for himself any pecuniary advantage. The offences of the above sections are quite different and a person may be punished in each section separately and independently.(Para 15)

Judgment**Bhishmadev Chakrabortty, J:**

1. On an application under section 439 of the Code of Criminal Procedure filed by the accused petitioner this Rule was issued calling upon the opposite parties to show cause as to why the order dated 14.06.2010 passed by the Divisional Special Judge, Chittagong in Special Case No.12 of 2010 arising out of Hathazari Police Station Case No. 5(11)08 dated 03.11.2008 corresponding to G.R. No.229 of 2008 framing charge against the petitioner under sections 161/162 and 109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 (briefly Act II of 1947) should not be set aside.

2. At the time of issuance of the Rule all further proceeding of the case, so far it was related to the petitioner, was stayed for a period of 3(six) months. Eventually the said order of stay was extended till disposal of the Rule.

3. The facts relevant for disposal of the Rule, in short, are that Md. Ali Akbar, an Assistant Director of Anti-Corruption Commission, District Office, Chittagong (briefly the A.C.C. Chittagong) producing accused Md. Taslim Uddin, Sub-Assistant Officer, Chikandandi Land Office and five others of the same office including the petitioner to Hathazari Police Station lodged the First Information Report (briefly the FIR) alleging, *inter alia*, that accused Md. Taslim Uddin demanded Taka 15,000/- further as bribe from Md. Hosen Ali for mutating his name in respect of his purchased land. Hosen Ali agreed to pay and informed the matter in writing to the Director, A.C.C., Chittagong. The officer took permission from the Commission for conducting a trap case. After taking permission inventory of Taka 15,000/- currency notes to be given to Taslim Uddin was made. Hosen Ali with those currency notes went to the concerned Land Office to give it to him. The trap team at the time of handing over the currency notes to Taslim Uddin appeared, apprehended him and recovered the notes of Taka 15,000/- from him; that an additional amount of Taka 9,671/- was also seized from his possession. Other people who were present there at that time informed the trap team that usually the employees of that office takes bribe for each and every work. Searching body of the petitioner the team got Taka 11,500/-, they also got Taka 74,000/- from inside a trunk kept in his room under his control and he failed to explain the source of the amount. On the aforesaid allegations Hathazari Police Station Case No. 5 dated 03.11.2008 under sections 161/162 and 109 of the Penal Code read with section 5(2) of Act II of 1947 was started against the accused persons including the petitioner.

4. An Assistant Director A.C.C., investigated the case and submitted charge sheet against six accused including the petitioner under sections 161/162 and 109 of the Penal Code read with section 5(2) of Act II of 1947.

5. After submission of the charge sheet the case record was transmitted to the Court of Senior Special Judge, Chittagong and registered as Special Case No.5 of 2010 who took cognizance of the offence. The case was subsequently transferred to the Court of Divisional Special Judge, Chittagong for trial and renumbered as Special Case No.12 of 2010. The petitioner obtained bail therefrom and filed an application under section 241A of the Code of Criminal Procedure (briefly the Code) for his discharge. The said application was rejected by the impugned order and charge was framed accordingly under the aforesaid sections.

6. Being aggrieved by the said order of framing charge the petitioner moved before this Court and obtained the present Rule and interim order of stay.

7. Mr. Ahsanul Karim along with Mr. Md. Mizanul Hoque Chowdhury, learned Advocates appearing on behalf of the petitioner submits that according to the FIR, charge sheet and other materials laying with the record no allegation against the petitioner of demanding gratification from any person has been disclosed. The allegation brought against the petitioner do not come within the purview of sections 161/162 and 109 of the Penal Code. Furthermore, the offence as disclosed also do not come within the meaning of section 5(2) of Act II of 1974. Bringing the offence within the definition of section 5(1)(e) of Act II of 1947, the procedure as required was not followed. He further submits that failure to explain the source of money disproportionate to one's income does not create an offence and no such allegation has been brought in the *ejahar*. Referring to the provisions of law of sections 161/162 and 109 of the Penal Code and section 5(1)(e)/5(2) of Act II of 1947, Mr. Karim submits that as the allegation brought against the petitioner do not come within the meaning of any of the above sections, the very framing of charge cannot be sustained in law, and the Rule would be made absolute.

8. Lastly Mr. Karim submits that another co-accused Pankaj Kumar Sen filed Criminal Miscellaneous Case No.23614 of 2011 before this Court for quashment of the same proceeding. A Division Bench of this Court by the judgment and order dated 22.11.2012 was pleased to make the Rule of the said miscellaneous case absolute by quashing the proceeding against him. The petitioner having been on similar footing is entitled to get the similar relief from this Court.

9. On the other hand, Mr. Mohammad Faridul Islam, learned Advocate appearing on behalf of opposite party No.2, the A.C.C., referring the case of Gazi Mozibul Huq & others - Vs- Abid Hossain Babu, 5 MLR(AD) 63, submits that when there are prima facie ingredients of the offence alleged, the accused cannot be discharged. Unless the charge is ex facie groundless in the light of the materials on record, the prosecution should not be stifled by discharging the accused. The actual nature of the offence against the accused may well be thrashed out in a trial.

10. Referring to the provisions of section 27 of the A.C.C. Ain, 2004 Mr. Islam further submits that at the time of trial the petitioner is to explain to the Court about the money recovered from him and in case of failure to explain, the Court is empowered to take into account the aid of this section. Apparently Taka 85,500/-, recovered from the possession of the petitioner is disproportionate to his legal source of income and he would make explanation about it at the time of trial according to the provision of section 27 of the Ain, 2004, and as such Rule having no merit liable to be discharged.

11. We have heard the learned Advocates of the respective parties and perused the revisional application, the FIR, charge sheet, impugned order and consulted with the relevant provisions of law.

12. It appears from the ejahar that when the trap was laid and the team caught accused Taslim Uddin red handed with Taka 15,000/- paid to him as bribe, at the same time the team recovered Taka 11,500/- from the body of the accused-petitioner and also Taka 74,000/- from inside a trunk kept in his room. On interrogation he failed to furnish any explanation about the source of the amount. It also appears from the charge sheet that the key of the said trunk was with him. Although there is no specific allegation in the FIR that the petitioner at that time received that money from anybody as bribe in the pretext of doing official work, but from the FIR and charge sheet it appears that allegation has been made out that he took money as bribe and kept the same in a trunk under his control. The amount (Taka 85,500/-) recovered from him apparently appears disproportionate to his legal source of income. Section 5 (1)(e) of Act II of 1947 reads as follows:

“5. **Criminal Misconduct-** (1) A public servant is said to commit the offence of criminal misconduct

- (a)
- (b)
- (c)
- (d)

(e) if he or any of his dependents is in possession, for which the public servant reasonably account, of pecuniary resources or of property disproportionate to his known sources of income ”

13. In the case of **Hussain Muhammad Ershad -Vs- The state, 6 BLC (AD) 18**, it has been held:

“Further payment of Taka six and a half crore for construction of building being disproportionate to his known sources of income, also committed an offence under section 5(1)(e) of the Prevention of Corruption Act” (para-27).

14. In the case of **Md. Nazimuddin Ahmed @ Md. Nasiruddin -Vs-The State, 10 BCR 56**, it has been held:

“Separate punishment is legal under section 161 of the Penal Code and under section 5(2) of the Prevention of Corruption Act as the offence under those two sections are distinct and different.”

15. On going through the law of section 161 of the Penal Code, section 5(2) of Act II of 1947 and the principle of the case reported in 10 BCR 50, it can case of safely be held that the offence under section 161 of the Penal Code relates to take illegal gratification by any public servant, while offence under section 5(2) of Act II of 1947 speaks of criminal misconduct by the same if he by corrupt and illegal means abusing his position as public servant obtains for himself any pecuniary advantage. The offences of the above sections are quite different and a person may be punished in each section separately and independently.

16. On going through the citation referred by Mr. Islam and the provisions of section 27 of the Ain, 2004 we find force in his submission.

17. We have carefully perused the judgment and order dated 22.11.2012 passed by this Division in Criminal Miscellaneous Case No.23614 of 2011. It appears from the FIR and charge sheet that the allegation made against Pankaj Kurmar is that Taka 1580/- only was recovered form him. The said amount is very nominal and may have in any one’s pocket at any time. But the amount recovered from this petitioner (Taka 85,500/-) is apparently disproportionate to his (being a petty service holder) known or legal source of income. So the footing of Pankaj Kumar and the present petitioner are quite different, allegations are also not identical and as such the said judgment cannot help this petitioner in any way.

18. In the instant case charge sheet has been submitted under sections 161/162 and 109 of the Penal Code read with section 5(2) of Act II of 1947 and charge has also been framed against the petitioner under the aforesaid sections. But the trial Court during trial or even after conclusion of trial is empowered to alter the charge if the Court thinks it fit to that effect. Since some sorts of offence has been disclosed in the FIR which has been found true during investigation and charge has been framed, at this stage this Court should not interfere with the proceeding by setting aside the order of framing charge, giving a premium to the petitioner releasing him from the case. The questions raised by the petitioner that no offence under sections 161/162 and 109 of the Penal Code or under section 5(2) of the Act II of 1947 has been disclosed, should be decided at trial by taking evidence of the witnesses.

19. However, the trial Court is at liberty to alter the charge at any stage of trial if it seems justified for effective conclusion of the trial. The trial Court is empowered to do that even after conclusion of the trial and before pronouncement of the judgment.

20. In the above premises this Rule merits no consideration.

21. In the attending facts and circumstances, we find no illegality in the impugned order of framing charge and the same calls for no interference by this Court.

22. In the result, the Rule is discharged with observation made in the body of the judgment. The order of stay granted earlier stands vacated.

23. Communicate copy of the judgment at once.