

In the Supreme Court of Bangladesh
High Court Division
(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No. 19204 of 2017

In the matter of:

An application under Section 561A of the Code of Criminal Procedure

In the matter of:

Syeda Hamza

----- Accused-petitioners

-VERSUS-

The State

----- Opposite Party

Mr. Md. Idrisur Rahman with
Mr. Md. Harun Al Kaioum
Mr. Mosammat Morsheda Pervin and
Mr. Md. Bodiuzzaman, Advocate

--For the Petitioners

Mr. Harunur Rashid, D.A.G with
Mr. Mohammad Shaheen Mirdha, A.A.G
Mr. Md. Bahar Uddin Al-Razi and
Mr. Pujush Kumar Roy, A.A.G

----- For the State.

Present:

Mr. Justice Jahangir Hossain

And

Mr. Justice Md. Riaz Uddin Khan

Judgment on 17th December, 2019

Jahangir Hossain, J:

This Rule was issued by a Division Bench of this Court on 08.05.2017 calling upon the opposite parties to show cause as to why the impugned proceedings as contained in Certificate Case No.01 of 11-12 under the Public Demand Recovery Act, 1913, now pending in the Court of General Certificate Officer,

Ukhiya, Cox's Bazar arising out of S.T Case No. 177 of 2009 under section 386 of the Code of Criminal Procedure corresponding to C.R. No.20 of 2009 under section 138 of the Negotiable Instruments Act,1881, now pending in the Court of Sessions Judge, Cox's Bazar should not be quashed and/or such other or further order or orders as to this Court may seem fit and proper.

At the time of issuance of this Rule, all further proceeding of the said Certificate Case No. 01 of 11-12 was stayed.

Short facts for disposal of Rule are that the petitioner issued a cheque bearing No. 7272278 dated 30.11.2008 for Tk.2.50 lakh in favour of the complainant-opposite party with a view to refund the said amount of money as he failed to provide him a visa of Dubai. The cheque was subsequently dishonored on the plea of insufficient of fund and legal notice was also served upon the petitioner. Thereafter, the complainant opposite party filed a petition of complainant on 15.02.2009.

Eventually, the petitioner was found guilty of the charge under section 138 of the Negotiable Instruments Act, 1881, after conclusion of trial, held by the learned Sessions Judge, Cox's Bazar, who by judgment and order dated 15.11.2009 sentenced him to suffer imprisonment for 01[one] year with a fine of Tk. 5[five] lakh [double of the amount of cheque] directing that the complainant will get fifty percent i.e. Tk. 2.50 lakh and rest Tk. 2.50 lakh will be deposited to the government exchequer.

The petitioner had undergone the sentence of one year and was released from prison. Thereafter, the complainant filed an application in S.T Case No. 177 of 2009 under section 386(1)(a) of the Code of Criminal Procedure [shortly Cr.P.C] praying for recovery of Tk. 2.50 lakh only. The learned Sessions Judge entertained the application and directed to issue a levy warrant by order dated 10.01.2011 fixing 22.02.2011 for further order

subject to execution and return of the levy warrant.

The learned Sessions Judge, eventually by order dated 13.04.2011 was of the finding that the fine money of Tk. 5 lakh shall be recovered in the process as provided under section 386(1)(b) of the Cr.P.C. Pursuant to the direction as aforesaid the Certificate Officer, Ukhiya, Cox's Bazar instituted Certificate Case No. 01 of 11-12 dated 10.08.2011 and directed to issue notice under section 7 of the Public Demands Recovery Act, 1913 [hereinafter referred to as PDR Act] fixing 11.11.2011 for return. The petitioner appeared in the said Certificate Case and thereafter, challenged the proceeding of Certificate Case as noted above and obtained the instant Rule with an order of stay.

Learned Advocates from both sides have argued in support of their respective cases when the matter is taken up for hearing on merit. Contention of Mr. Mohammad Idrisur Rahman, learned Advocate for the petitioner, is

that taking cognizance of the offence by the learned Sessions Judge, under section 386 of the Cr.P.C is illegal and also being violative of provision of section 138(3) of the Negotiable Instruments Act, 1881.

Subsequent proceeding, at the instance of the learned Sessions Judge, under the PDR Act, 1913 is not sustainable in the eye of law. Because Negotiable Instruments Act is a special law which has been updated by amendments in the section concerned in needs of the litigant people. So its applicability shall prevail first than the others. According to section 138(3) of the Negotiable Instruments Act, the holder of the cheque shall have right to realize any part of the value of cheque through civil court, not by District Collector or General Certificate Officer under PDR Act. So, the proceeding as contained in Certificate Case No. 01 of 11-12 is liable to be quashed.

On the contrary, Mr. Harun-or-Rashid for the state opposite- party has tried to chastise the arguments of petitioner submitting

that as per section 138(3) of the Negotiable Instruments Act, cheque money means value of the cheque. Fine and money of the cheque is not same thing. The petitioner has tried to misconceive the provisions of section 138 (3) of the Negotiable Instruments Act. The recovery of money in question is not money of the cheque. It is absolutely fine imposed by the trial court as it proved by evidence that the cheque of the holder was dishonored due to insufficiency of fund in the bank account of the drawer.

Further submission of Mr. Md. Harunur Rashid, learned Deputy Attorney General is that according to section 3(6) of the PDR Act, levy warrant is deemed to be a decree. Realization of money of the fine through Civil Court will take time but it can be done on being summary proceeding under PDR Act. So, according to Article of the schedule-1 PDR Act, 1913, General Certificate officer is the appropriate person to realize the fine money from the petitioner through Certificate Case. Mr. Harun

finally urges the court that the Rule is liable to be discharged as it has no merit.

From the aforesaid arguments advanced by the learned Advocates for both the parties, it rationally creates many issues with law points which are to be addressed below for the ends of justice. Admittedly, the petitioner has served out the sentence of one year except the fine, double of the cheque amount, as imposed by the trial court.

Now the main question is before us how the fine will be realized from the petitioner since he has come out of the prison after suffering one year sentence passed by the trial court on 25.11.2009. Both the parties have agreed at the time of hearing that the fine imposed by the trial should have to be realized in accordance with law.

It appears from record that since the petitioner has failed to deposit the fine money, the complainant filed an application before the learned Sessions Judge, Cox's Bazar in S.T. Case No. 177/09 on 03.01.2011 praying

for recovery of fine of Tk. 2.50 lakh under section 386(1)(a) of the Cr.P.C. Learned Sessions Judge by order dated 10.01.2011 was pleased to issue a levy warrant in order to realize fine from the petitioner through attachment and sale of his moveable property. A report was given by Ukhiya police station stating that the levy warrant was executed as the petitioner had no immovable property. Thereafter, the learned Sessions Judge, on the prayer of the complainant, who also produced certified three copies of registered deeds for showing the ownership of the petitioner, by order dated 13.04.11 issued a warrant to the collector of the district authority to realize the amount of fine by execution in accordance with civil process against moveable and immoveable property of the defaulter.

According to the order dated 13.04.11 of the learned Sessions Judge, the Certificate Officer instituted Certificate Case No. 01/11-12 and issued notice upon the defaulter [petitioner] under section 7 of the PDR Act,

for recovery of the fine money through attachment of the moveable or immoveable property belonging to the defaulter. The notice was duly served upon the petitioner. Then the Assistant Commissioner [land], Ukhiya Cox's Bazar issued another notice upon him under section 46 of the PDR Act, 1913. It appears from order sheets of the said certificate case that the petitioner by filing applications took several adjournments till 20.03.2017 which indicates that he has no intention to make the payment of fine in normal course of practice rather in due process of law although he has served out the sentence.

It is interesting to note that the amount of money of the cheque was only 2.50 lakh and the litigation was started on 15.02.2009, the filing date of petition of complaint. In the meantime, around 10 years have elapsed as of today. It seems that both parties are so ferocious in combating legal battle. How long it takes more time to come to an end in disposal of such litigation. It is due to

colonial law established by British Raj in this Sub-continent. Now, time has come to look into this matter seriously. Otherwise, backlog of cases will never see the face of the light from the darkness of reducing in the judicial history of Bangladesh.

However, let us see section 386 of Cr.P.C for our convenience. It reveals from plain reading of this section, [that] how the fine is recovered from the offender. Two ways have been shown in section 386(1)(a)(b) for recovery of fine. Such as,

"(1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may-

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender:

(b) issue a warrant to the Collector of the District authorizing him to realise the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter."

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so....."

But in the proviso it has been said, if the offender has undergone the whole of such imprisonment in default to the direction of the court, then no court shall issue such warrant unless for special reasons to be recorded in writing, if necessary to do so.

In the present case this proviso is not applicable as there is no default clause in the judgment. Article 3 of schedule-1 of section 3(6) of the PDR Act, stipulates that,

"3. Any money which is declared by any law for the time being in force to be recoverable or realizable as an arrear of revenue or land revenue, or by the process authorized for the recovery of arrears of revenue or of the Public Revenue or of Government Revenue."

In criminal Rules and orders, a Form No. (P)59 was made for realization of fine in which the collector has been authorized to realize fine/unpaid part of the said fine as arrears from the movable or immovable property, or both, of the defaulter.

There is a little scope for recovery of fine under Article 3 of schedule-1 of section 3(6) of the PDR Act as because the levy warrant is seemed to be a decree. But rules do not prevail over the substantive laws as contained in section 386(3) of the Cr.P.C which runs as under ; 386 (3)

"Where the Courts issue a warrant to the Collector under sub-section (1), Clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the

meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the Decree, and all the provisions of that Code as to execution of decrees shall apply accordingly:

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender. "

As per this section, the collector is a decree holder within the meaning of the Code of Civil Procedure, 1908, for recovery of fine. The collector ought to have filed a suit in the nearest Civil Court for recovery of fine as if it is decretal amount, following all the provisions of that code as to execution of decree shall apply.

The collector has failed to do so in this regard. Rather he directed the Certificate Officer for recovery of fine money under the PDR Act, which is absolutely misconception of law. There is no scope to realize fine in question under the PDR Act in the instant case. Because collector is not the authority as under section 386(3) of the Cr.P.C for doing so as he is a decree holder.

Apart from this, the fine money of taka 2.50 lakh can also be recovered directly from the petitioner through Civil Court. Section 138 (3) of the Negotiable Instruments Act, contemplates that,

"Notwithstanding anything contained in sub-sections (1) and (2), the holder of the cheque shall retain his right to establish his claim through civil Court if whole or any part of the value of the cheque remains unrealized."

Negotiable Instruments Act, 1881 is a special law. This Act has also been amended, in particular sub-section 3 of section 138 was added by the Act No. XVII of 2000 dated 6th July in needs of litigant people, where it has been stated that the holder of the cheque shall retain his right to establish his claim of whole or any part of the value of the cheque, unrealized through Civil Court. So this sub-section has clearly given empowerment to the complainant for recovery of his cheque money directly through Civil Court.

Here, application of section 386 of the Cr.P.C has been ignored by incorporating sub-section (3) of section 138 of the Negotiable

Instruments Act. The intention of legislature is absent to apply section 386 of the Cr.P.C because legislature in their wisdom has incorporated sub-section (3) of section 138 of the Negotiable Instruments Act for recovery of unrealized whole or any part of the value of the cheque.

The learned Deputy Attorney General has argued that imposition of fine upon the petitioner is not value of the cheque. Rather it is purely a fine that can be realized through the PDR Act. After verdict of the trial court, government becomes the owner of 50% fine while complainant belongs to rest 50%. Government can recover its fine money applying section 386 of the Cr.P.C. Where collector will be the decree holder. In fact, remaining 50% i.e. Tk. 2.50 lakh is fine money. It is whole part of the value of the Cheque remains unrealized that can be recovered directly through Civil Court, not by Certificate Officer under the PDR Act, 1913.

Having regard to the facts, circumstances and the contentions of both parties and discussions with laws referred to above, we are constraint to hold that the petitioner's claim on merit is sustainable in the instant rule.

In the result, the Rule is made **absolute**. The impugned proceedings as contained in Certificate Case No. 01 of 11-12 under the PDR Act, 1913, now pending in the court of General Certificate Officer, UKhiya, Cox's Bazar is hereby quashed. The order of stay, granted earlier stands vacated and there will be no order as to costs.

Communicate the Judgment and order at once.

Md. Riaz Uddin Khan,J

I agree