

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTION)
CRIMINAL MISCELLANEOUS CASE NO. 53438 of 2017.

IN THE MATTER OF:

An application under section 561A of the
Code of Criminal Procedure.

-AND-

IN THE MATTER OF :

Rezwanur Rab Zia.

...Accused-Petitioner.

-Versus-

The State and another.

...Opposite parties.

Mr. Md. Shahidul Islam, Advocate

... For the

petitioner.

Mr. Kazi Md. Mohsin Advocate

...For opposite party No. 2.

Dr. Md. Bashirullah DAG with

Mr. MMG Sarwar AAG and

Ms. Farjana Shampa AAG

.....For the State

Heard On: 23.08.2020.

Judgment On: 27.08.2020.

Present:

Mr. Justice Jahangir Hossain

And

Mr. Justice Md. Badruzzaman

Md. Badruzzaman, J

On an application under section 561A of the Code of Criminal Procedure, this *rule* was issued calling upon the opposite parties to show cause as to why order dated 15.5.2017 passed by learned Additional Metropolitan Sessions Judge, 8th Court, Dhaka

in Criminal Revision No. 291 of 2016 affirming the order dated 11.01.2016 passed by Special Sessions Judge and Environment Court, Dhaka in Sessions Case No. 8776 of 2012 arising out of C.R Case No. 153 of 2012 (Bongshal) under section 138 of the Negotiable Instruments Act, 1881, now pending in the Court of learned Special Sessions Judge and Environment Court, Dhaka should not be set aside.

At the time of issuance of the *rule*, this Court vide ad-interim order dated 21.11.2017 stayed further proceedings of the aforesaid sessions case.

Short facts, for the purpose of disposal of this *rule*, are that opposite party No. 2 as complainant filed a petition of complaint against the accused petitioner before the learned Chief Metropolitan Magistrate, Dhaka under section 138 of the Negotiable Instruments Act, 1881. The case of the complainant was that the accused petitioner took an amount of Tk. 1,00,00,000/- (one crore) from the complainant as loan and being failed to repay the same in cash, he issued a cheque being No. JCD 4125523 in favour of the complainant on 20.07.2011 for the said amount of Tk. 1,00,00,000/-. The complainant placed the cheque on 17.01.2012 in his bank account for encashment which was dishonored on the same date for insufficiency of fund and thereafter, he issued legal notice through registered post with A/D on 25.1.2012 to the accused petitioner requesting him to pay the said amount within 30 days from the date of receipt of the notice. In spite of receiving the notice, the accused petitioner did not pay the said amount within the said specified time and hence the case.

After examining the complainant under section 200 of the Code of Criminal Procedure, learned Magistrate took cognizance of offence against the accused petitioner under the said section of law and issued summons against him. The case then was transferred to the learned Special Sessions Judge and Environment Court, Dhaka for trial. Learned Sessions Judge, after hearing both the parties, vide order dated 11.3.2013 framed charge against the accused petitioner under section 138 of the Negotiable Instruments Act who pleaded not guilty and claimed to be tried and learned Judge fixed the next date for taking evidence on 15.5.2013 and as per prayer of the defense, said date was shifted on several occasions and lastly, shifted to 24.3.2015.

On that date i.e on 24.3.2015 the complainant filed an application under section 65 of the Evidence Act praying for treating the photostat copies of 'dishonoured cheque' and the 'bank slip', containing information of such dishonour, as secondary evidence stating, *inter alia* that the originals of the said documents have been snatched away by the accused-petitioner when both parties sat in a meeting for amicable settlement out of Court on 7.6.2014 in a restaurant at Uttara for which he lodged GD with Uttara police station on 8.6.2014 being GD No. 518. Keeping the application pending for hearing, the trial Court recorded examination-in-chief of the complainant as PW1 on 30.7.2015 and fixed the next date for further evidence.

However, accused petitioner opposed the application by filing written objection on 16.1.2016 denying the allegations made against him and upon hearing both the parties, learned Sessions

Judge allowed the application of the complainant vide order dated 11.1.2016.

Being aggrieved by the said order dated 11.1.2016 the accused petitioner preferred Criminal Revision No. 291 of 2016 before the learned Metropolitan Sessions Judge, Dhaka which, on transfer, was heard by the learned Additional Metropolitan Sessions Judge, 8th Court Dhaka who, upon hearing both the parties, rejected the revision vide impugned judgment dated 15.5.2017 by affirming the order of the trial Court.

Opposite party No.2 filed counter affidavit and supplementary affidavit to oppose the *rule* stating, in brief, that after pronouncement of the judgment by the revisional Court, the case has been proceeded and the complainant produced and proved the photostat copies of the cheque and information slip on oath before the trial Court on 26.9.2017 and the same have been marked as exhibits 2 and 3 and the case had been fixed on 30.10.2017 for examination of the accused under section 342 of the Code of Criminal Procedure but the accused petitioner by suppressing those facts has filed this application and obtained the present rule and order of stay on 21.11.2017. As such, the rule should be discharged on the ground of suppression of facts.

Mr. Md. Shahidul Islam, learned Advocate appearing for the accused petitioner by taking us to the petition of complaint, the orders of the courts below and other relevant documents submits that both the courts below committed illegality in not rejecting the application for admitting the photostat copies of the impugned cheque and dishonour slip as secondary evidence because of the fact that the complainant upon receipt of the entire dues from the

accused handed over the original cheque and dishonour slip to the accused petitioner inasmuch as that the allegation of snatching away those documents by the accused petitioner from the complainant has been falsified upon enquiry of the GD by the police and as such, the impugned judgment should be set aside.

On the other hand, Mr. Kazi Md. Mohsin learned advocate appearing for opposite party No.2 by supporting the orders of both the courts below submits that both the courts committed no illegality in passing those orders because as per section 65 of the Evidence Act secondary evidence may be given when the original is in the possession of the other party. Learned advocate further submits that since, in the meantime, the impugned order of the trial Court has been acted upon by producing those documents on oath by the complainant in Court and the same has been marked as exhibits, this rule has become *infructuous*.

Mr. M.M.G Sarwar learned Assistant Attorney General appearing for the state supports the impugned judgment.

We have heard the learned Advocates and perused the records. The main issue in this case whether a Court upon an application of a party can admit secondary evidence without any formal proof.

Chapter 5 of the Evidence Act, which contains sections 61-90, speaks about the proof of documentary evidence. There are two kinds of documents viz. private and public documents. The contents of documents may be proved either by primary or by secondary evidence (section-61). Primary evidence means the document itself produced for the inspection of the Court (see s. 62). In respect of public documents secondary evidence may be

given by producing true copy (sec. 63). Section 65 of the Evidence Act mentions seven categories in which, secondary evidence relating to private documents is admissible. If the document is not admitted by the other party, a private document, primary or secondary, is subject to formal proof before the Court on oath by the witness for its admission. Without such proof method a private document cannot be admitted as evidence. Until proof had been given of its execution and its subsequent loss or destruction no secondary evidence of its contents is admissible (ref. Emmanuel Grech vs. Antonio Grech, 6 DLR PC 598, Husan Ali vs. Azmaluddin 14 DLR 392). Section 65 of the Evidence Act does not provide any power to the Court to treat or admit a private document as primary or secondary evidence upon an application of either of the parties to a judicial proceeding without any formal proof thereof.

In the instant case, the complainant filed an application under section 65 of the Evidence Act for treating/admitting the Photostat copies of the disputed cheque and dishonour slip as secondary evidence which was strongly opposed by the accused petitioner. In that situation, the proper way left before the Court to give the complainant an opportunity to produce and prove the contents of those documents on oath before it with proof of subsequent loss thereof with an opportunity to the accused petitioner to cross-examine the complainant to prove his defense plea. But the learned Judge of the trial Court by misconception of law illegally allowed the application of the complainant vide order dated 11.1.2016 which, in our view, is without jurisdiction. Learned Additional Sessions Judge also committed same mistake in upholding the order of the trial Court vide the impugned order

dated 15.5.2017. As such, those cannot be sustained in the eye of law.

In view of the discussion made above we find merit in this *rule*, which should be made absolute.

In the result, the *rule* is made absolute. The order dated 15.5.2017 passed by learned Additional Metropolitan Sessions Judge, 8th Court, Dhaka in Criminal Revision No. 291 of 2016 affirming the order dated 11.01.2016 passed by Special Sessions Judge and Environment Court, Dhaka in Sessions Case No. 8776 of 2012 arising out of C.R Case No. 153 of 2012 (Bongshal) under section 138 of the Negotiable Instruments Act, 1881, now pending in the Court of learned Special Sessions Judge and Environment Court, Dhaka is quashed.

The order of stay granted earlier is hereby vacated.

However, it appears that after passing the impugned order dated 15.5.2017 the trial Court fixed dates for taking further evidence but the accused remained absent by filing time petition. On 26.9.2017 the trial Court rejected the time petition of the accused petitioner and cancelled his bail and recorded further deposition of the complainant *ex-parte* and during his examination, the complainant produced those Photostat copies of the cheque and dishonour slip and other documents which have been admitted by the Court without any objection from defense side and marked those photostat copies as exhibits 2, 3 and other documents as exhibits 4, 5, 5/1, 6 and 7 and fixed the next date for examination of the accused under section 342 of the Code of Criminal Procedure. Thereafter, the accused obtained bail from the trial Court on 8.10.2017 and *rule* with an order of stay from

this Court on 21.11.2017 (affidavit of this application has been sworn in on 21.8.2017). It appears that the accused petitioner did not get opportunity to cross-examine the complainant to prove his defense plea. Accordingly, we are of the view that he should get an opportunity to cross examine PW1 and place his defense plea before the trial Court. In view of the above, the trial Court is directed to withdraw the case from the stage of examination of the accused under section 342 of the Cr. P.C and fix the next date for cross-examination of the complainant and further evidence of the prosecution and defense, if any, and then proceed with the case in accordance with law and conclude the trial expeditiously.

Communicate a copy of this judgment to the Court concerned at once.

(Justice Md. Badruzzaman)

I agree

(Justice Jahangir Hossain)