

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTION)

CRIMINAL MISCELLANEOUS CASE NO. 28869 of 2018.

IN THE MATTER OF:

An application for bail under Section 561A of
the Code of Criminal Procedure.

-AND-

IN THE MATTER OF :

Md. Anis Hossain Prodhan alias Anis Hasan
Prodhan alias Dollar.

...Accused-Petitioner.

-Versus-

The State, represented by the Deputy
Commissioner Lalmonirhat..

...Opposite partie.

Mr. Md. Hasan Rajib Prodhan, Advocate

... For the Petitioner.

Mrs. Yesmin Begum Bithi, D.A.G

...For the State.

Heard On: 04.07.2019, 17.10.2019, 24.10.2019,
30.10.2019.

Judgment On: 07.11.2019.

Present:

Mr. Justice Md. Habibul Gani

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 party to show cause as to why the proceedings of Cyber Tribunal Case No. 84 of 2017 arising out of Patgram Police Station Case No. 21 dated 18.08.2016 corresponding to G.R No. 179 of 2016 (Pat) under section 57 of the Information and Communication Technology Act, 2006, (wrongly written as 2015) now pending in the Court of Cyber Tribunal (Bangladesh), Dhaka should not be quashed.

At the time of issuance of rule, this Court vide ad-interim order dated 24.06.2018, stayed further proceedings of the aforesaid

case for a period of 06 (six) months which was subsequently extended from time to time.

Relevant facts for the purpose of disposal of this rule are that one Md. Kutubul Alam, Upazilla Nirbahi Officer, Patgram, Lalmonirhat lodged an FIR with Patgram Police Station on 18.8.2018 implicating this petitioner, a teacher of Government primary school within the Patgram Upazilla, alleging that the accused petitioner made derogatory and defamatory comments against him by sending some SMS to the Deputy Commissioner, Lalmonirhat and Divisional Commissioner, Rangpur from his cellular phone. The case has been registered under section 57 of the Information and Communication Technology Act, 2006, (wrongly written as 2015). Accused petitioner was arrested in connection with the case on 07.10.2016 and got bail from this Court on 13.11.2016 in Criminal Miscellaneous Case No. 40087 of 2016.

After investigation, the police submitted charge sheet on 02.12.2016 against the petitioner under the aforesaid section of law. Being ready, the case then transferred to the Cyber Tribunal (Bangladesh), Dhaka and renumbered as Cyber Tribunal Case No. 84 of 2017 who, upon considering the materials on record, framed charge against the accused petitioner under section 57 of the said Act and fixed next date for evidence. Thereafter, the petitioner has come up with this application under section 561A of the Code of Criminal Procedure for quashing the proceeding and obtained the instant rule and order of stay.

Mr. Hasan Rajib Pradhan, learned Advocate appearing for the accused petitioner by taken us to the FIR, charge sheet and other relevant papers submits that the allegations, even if, taken to be as true, do not constitute offence under section 57 of the ICT Act, 2006 against the petitioner and accordingly, the proceeding against him cannot be continued. By drawing our attention to the provision of

section 57 of the ICT Act, learned Advocate further submits that the precondition of constituting an offence under the said section some fake or obscene material must be deliberately published or transmitted by the offender in the **website** or **electronic form**. Learned Advocate further submits that mere making complaint or sending defamatory comments through cellular phone by SMS by an individual to his higher authority's personal cellular phone will not constitute offence under section 57 of the Act. Learned Advocate further submits that for constituting an offence under section 57 of the ICT Act the defamatory comment must be transmitted or published in the website or electronic form for public in general.

Mr. Yesmin Begum Bithi, learned Deputy Attorney General appearing for the State opposes the rule and submits that since cellular phone (mobile) is an electronic device and thereby any comment derogatory to any person, if send from a cellular phone to other's cellular phone, will constitute an offence under section 57 of ICT Act . As such, the proceeding cannot be quashed.

We have heard the learned Advocates and perused the records. Since the provision of section 57 of the ICT Act, 2006 is relevant for the purpose of disposal of the rule, the same is reproduced below:

“(৫৭) ইলেক্ট্রনিক ফরমে মিথ্যা, অশ্লীল অথবা মানহানিকর তথ্য প্রকাশ সংক্রান্ত অপরাধ ও উহার দন্ড।- (১) কোন ব্যক্তি যতি ইচ্ছাকৃতভাবে ওয়েব সাইটে বা অন্য কোন ইলেক্ট্রনিক বিন্যাসে এমন কিছু প্রকাশ বা সম্প্রচার করেন, যাহা মিথ্যা ও অশ্লীল বা সংশ্লিষ্ট অবস্থা বিবেচনায় কেহ পড়িলে, দেখিলে বা শুনিলে নীতিভ্রষ্ট বা অসৎ হইতে উদ্বুদ্ধ হইতে পারেন অথবা যাহার দ্বারা মানহানি ঘটে, আইন শৃঙ্খলার অবনতি ঘটে বা ঘটার সম্ভাবনা সৃষ্টি হয়, রাষ্ট্র ও ব্যক্তির ভাবমূর্তি ক্ষুণ্ণ হয় বা ধর্মীয় অনুভূতিতে আঘাত করে বা করিতে পারে বা এ ধরনের তথ্যাদির মাধ্যমে কোন ব্যক্তি বা সংগঠনের বিরুদ্ধে উস্কানী প্রদান করা হয়, তাহা হইলে তাহার এই কার্য হইবে একটি অপরাধ।

(২) কোন ব্যক্তি উপ-ধারা (১) এর অধীন অপরাধ করিলে তিনি অনধিক চৌদ্দ বৎসর এবং অনুন্য সাত বৎসর কারাদন্ডে এবং অনধিক এক কোটি টাকা অর্থদন্ডে দণ্ডিত হইবেন।”

A bare reading of section 57 of the ICT Act suggests that some criteria are to be fulfilled to constitute an offence under the said section. Firstly, a material must be deliberately published or transmitted by any person in the website or any other electronic form. Secondly, the material must be fake or obscene. Thirdly, its effect is such as to influence any person to become dishonest or corrupt or may defame anyone, causes to deteriorate or creates possibility to deteriorate law and order, prejudice the image of the State or person or causes hurt or may hurt religious belief or instigate against any person or organization.

Among three criteria, as stated above, the first one i.e deliberate publication or transmission of fake or obscene material/information by anyone in the **website** or **electronic form** is the main ingredient to constitute offence under section 57 of the ICT Act, 2006.

Now, let us look about the meaning of the terms publication, transmission, website, electronic form, SMS etc.

In general, **publication** means an act of making information or stories available to people in a printed or electronic form. A publication is something made to communicate with the public. Online publications are delivered via internet.

Transmission is the action or process of transmitting something or the state of being transmitted. In computer networking, transmission means the transfer of data over a communications channel.

ইলেক্ট্রনিক বিন্যাস as mentioned in section 57 of the Act is defined in sub-section (5) of section 2 of the said Ain as ‘electronic form’ and means, “ **electronic form** with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated

microfiche or similar device or technology”. As per sub-section (12) of section 2 of the Ain, ‘**website**’ means document and information stored in computer and web server which can be browsed or seen by the user through internet.

Website is a page or collection of pages on the World Wide Web (www). Website is a set of interconnected web-pages, usually including a homepage, generally located on the same server, and prepared and maintained as a collection of information by a person, group, or organization. *Facebook, Myspace, blogs, wikis* etc. are examples of websites. All the websites are accessible to the general public via internet.

“ইলেক্ট্রনিক বিন্যাস” and “ওয়েবসাইট” are related to modern communication technologies through which any information can be spread out in a moment to public in general.

As per Wikipedia SMS (short message service) is a text messaging service component of most telephone, internet and mobile device systems. It uses standardized communication protocols to enable mobile devices to exchange short text messages which can be forwarded to another person or persons through cellular phone or mobile devices. It uses standardized communication protocols to enable mobile devices to exchange short message. While SMS is most commonly used for text messaging between friends or co-workers, it has several other uses as well. For example, subscription SMS services can transmit weather news, sport updates, government or private notifications, sport updates and stock quotes to users’ phones. SMS can also notify employees of sales inquiries, service stops, and other information pertinent to their business.

Considering above definitions of website and electronic form, we can easily conclude that an information through SMS (short

message service) can be spread out through electronic form or website.

Now question arises whether sending SMS, through cellular phone, even if containing therein fake or obscene information, on one-to-one basis, will constitute an offence under section 57 of the ICT Act, 2006.

The main criteria for constituting an offence under section 57 of the Act is that the fake or obscene information/comments or materials shall have to be published or transmitted for public in general in the website or electronic form, not for any particular individual. Accordingly, we can safely conclude that mere sending obscene or fake information through SMS from one's cellular phone to another individual's cellular phone cannot be construed as a publication or transmission for public in general and hence, does not constitute an offence under section 57 of the ICT Act.

In the instant case, admittedly, the accused-petitioner is a Govt. primary school teacher who sent some SMS through cellular phone against the informant, Upazilla Nirbahi Officer to the cellular phone of his higher authority i.e the concerned Deputy Commissioner and Divisional Commissioner wherein the accused made some allegations against the informant and sought for appropriate actions against him. The said messages have been reproduced in the FIR. We have carefully perused those messages. The said messages though are vague but those may consider as one kind of complaint against the informant. But this is not the way of making complaint against any responsible officer from a teacher of a primary school. There are prescribed manner as to how a complaint is to be made against a government official. Obviously, in the said SMSs, the accused petitioner made some derogatory comments against the informant for which there was other legal way to proceed against the petitioner by the informant. But unfortunately, being a

responsible official of the Government, the informant without resorting to such legal process, filed this criminal case under a special law. Even if, the SMSs sent by the accused petitioner to the informant's higher authority in the cellular phone, are taken to be as fake or obscene, such activities of the accused petitioner will not constitute an offence under section 57 of the ICT Act, 2006 because sending such SMSs can never be construed as publication or transmission through website or electronic form. Since there is no ingredient to constitute an offence under section 57 of the Act against the petitioner, we are of the view that initiation of the present proceeding was an abuse of the process of the Court and as such, liable to be quashed.

In view of the discussion made above, we find merit in this rule.

In the result, the rule is made absolute. The proceeding of Cyber Tribunal Case No. 84 of 2017 arising out of Patgram Police Station Case No. 21 dated 18.08.2016 corresponding to G.R No. 179 of 2016 (Pat) under section 57 of the Information and Communication Technology Act, 2006 (wrongly written as 2015), now pending in the Court of Cyber Tribunal (Bangladesh), Dhaka is hereby quashed.

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

(Justice Md. Badruzzaman)

I agree

(Justice Md. Habibul Gani)