

Present:
Mr. Justice Obaidul Hassan
And
Mr. Justice S M Kuddus Zaman

DIST-DHAKA

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

CRIMINAL REVISION NO.733 OF 2019

IN THE MATTER OF:

Moudud Ahmed, son of late Maulana
Montazuddin Ahmad

.....*Accused petitioner.*

-Versus-

The State and another

..... *Opposite parties.*

Mr. Moudud Ahmed, Senior advocate
(In person) with Mr. Abdullah Al
Mahmud, Advocate

.....For the petitioner.

Mr. Rafi Ahmed, DAG with Mr.
Shafquat Hussain, AAG..... For the State

Mr. Md. Khurshid Alam Khan,
Advocate

.....For the ACC

The 8th day of April, 2019

Mr. Moudud Ahmed, the learned advocate by filing
an application under section 439 read with section 435 of
the Code of Criminal Procedure along with section 10 of
the Criminal Law Amendment Act has challenged the
order dated 04.03.2019 passed by the Special Judge, Court

No.6, Dhaka in Special Case No.11 of 2018 arising out of Gulshan Police Station Case No.47(9)07 dated 16.09.2007 corresponding to ACC G.R. No.99 of 2007 under sections 26(2)/27(1) of the Anti Corruption Commission Act, 2004 (ACC Act, 2004) rejecting the application of the petitioner filed under section 344 of the Code of Criminal Procedure.

The fact of the prosecution case, in short, is that on 11.02.2019 date was fixed for examination of prosecution witnesses and the accused petitioner duly appeared before the leaned court below and filed an application under section 344 of the Code of Criminal Procedure with a prayer to adjourn/postpone further proceedings of the case till disposal of Writ Petition No.7057 of 2007, Writ Petition No.9651 of 2007, Writ Petition No.4949 of 2008, Writ Petition No.4664 of 2009, Writ Petition No.5971 of 2009, Writ Petition No.5972 of 2009, Writ Petition No.2461 of 2007, Writ Petition No.6216 of 2009 and Writ Petition No.6217 of 2009, now pending before this Court as well as

Civil Appeal No.393 of 2009, now pending before the Hon'ble Appellant Division, all are relating to the 'income' of the accused petitioner for the Assessment Years 2002-2003 to 2007-2008. However, Anti Corruption Commission (ACC) prayed for time for hearing the application and the Court allowed the prayer. Instead of the hearing of the application the Court proceeded with the examination of prosecution witness and fixed the next date on 14.02.2019 for hearing of the application.

On 14.02.2019 the Court though heard both the parties on the application dated 11.02.2018, but did not allow the leaned advocate to make submission at length on the said application. After hearing the parties for a while on the application the Court proceeded with the recording of evidence of the prosecution witness and fixed the next date on 01.02.2019 for passing order on the said application. Thereafter on 18.02.2019 the Court instead of passing order on the application dated 11.02.2019 directed the accused petitioner to submit the

copy of the petitions which he has referred to in his application dated 11.02.2018 and then proceeded with the recording of evidence of prosecution witness and fixed the next date on 24.02.2019 for order on the said application.

On 24.02.2019 the accused petitioner filed two applications; one was pursuant to the order dated 18.02.2019 to submit the petitions as directed by the Court and another was for adjournment for proceeding till disposal of the application dated 11.02.2018. However, without disposing of the applications of the accused petitioner the Court proceeded with recording of evidence of prosecution witness and fixed the next date on 04.03.2019 for order on the application dated 11.02.2019. Subsequently, on 04.03.2019 the accused petitioner appeared before the Court and the Court did not pass the order in the open court and proceeded with the recording of evidence of PW 7 and said that the order will be passed later. Thereafter, on obtaining the certified

copy of the order dated 04.03.2019 the accused petitioner came to learn that the Court below rejected the application dated 11.02.2019.

Mr. Moudud Ahmed, the learned advocate appearing in person submitted that where the decision in a case pending before the High Court Division to determine the 'income' of the petitioner is likely to have a direct and vital bearing upon the alleged guilt or otherwise of the accused in the criminal case the proceedings of the present case should be adjourned for a short period till disposal of the said writ petitions by the High Court Division. He also submitted that the finding of the Court below that the subject matter of the writ petitions pending before the Hon'ble Court and the present proceedings are completely different in nature is not correct and an omnibus statement without any explanation as to how the 'income' of the accused petitioner for the present proceedings can be said to be different from that of the 'income' assessed by the Income

Tax Department when the very 'income' in question falls within the period of occurrence as mentioned in the First Information Report (FIR) and the charge sheet and therefore the impugned order dated 04.03.2019 is liable to be set aside.

He further submitted that the officials of the Income Tax Department function under a statute entrusted with the power to determine the 'income' of any person and impose tax thereupon. So assessment of 'income' of any person including that of the petitioner determined by the Income Tax Department has legal validity and cannot be questioned by any other authority unless they review their own assessment or revised by any competent Court of law. He also submitted that the 'income' mentioned in sections 26(1)/27(1) of the ACC Act, 2004 and the 'income' assessed by the Income Tax Department under the Income Tax Ordinance, 1984 connote one and same 'income' and they cannot carry any different meaning. Mr. Moudud further submitted that the Court below

miserably failed to appreciate that if the trial of the present case is concluded prior to the determination of 'income' of the petitioner for the assessment years 2002-2003 to 2006-2007 the petitioner will not be able to defend himself properly and adequately and as such the present proceedings may be adjourned for securing a fair trial which is a fundamental right of the petitioner under the Constitution. In such view of the matter the impugned order is liable to be set aside and the present proceedings may be adjourned.

Mr. Md. Khurshid Alam Khan, the learned advocate appearing on behalf of the opposite party No.2-ACC made elaborate submissions and he opposes the application on the grounds that the subject matter of the aforesaid writ petitions are in no way connected with the present proceeding. Thus, it will not be proper to stop the proceeding of the case until the aforementioned writ petitions are disposed of. He further submitted that all the writ petitions are of 2006, 2007 and 2008, till this date

Mr. Moudud Ahmed did not take any step to get these petitions heard. Now he has come before this Court to stop the present proceeding until and unless the Rules issued in the writ petitions mentioned in his application are disposed of. It is only a tactic to delay the proceeding of the present case. In the circumstances, he prays for rejecting the application.

We have considered the submissions of the learned advocates for both the parties and perused the application as well as the annexures annexed herewith.

It is to be mentioned here that regarding the selfsame proceeding Mr. Moudud Ahmed came before this Court at least thrice. First of all he came challenging the charge framing order, 2nd time for transferring the Court for having no confidence on it and 3rd time challenging an order of the Court rejecting the application filed under section 94 of the Code of Criminal Procedure. Now he has come again before us challenging an order dated 04.03.2019 by which the application filed under

section 344 of the Code of Criminal Procedure has been rejected by the trial Court.

Now let us see the scope of section 344 of the Code of Criminal Procedure. The contents of section 344 of the Code of Criminal Procedure runs as follows:

(1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may be a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than High Court Division shall be in writing signed by the presiding Judge or Magistrate.

Explanation-*If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that*

further evidence may be obtained by a remand, this is a reasonable cause for a remand."

According to section 344 of the Code of Criminal Procedure, for any reasonable cause if it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial the Court may, if it thinks just, by order in writing, stating the reasons thereof, from time to time postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable. It appears that "the power of court to adjourn is entirely a judicial discretion. Adjournments should not be made except upon strong and reasonable grounds. It is most inexpedient for a sessions trial to be adjourned. Judges should refrain from granting adjournments save in cases where they are clearly necessitated for the purpose of securing justice. It is thus totally a judicial discretion of the court to adjourn the inquiry or trial. But this discretion is to be exercised only if there is reasonable cause for the adjournment. If the Concerned judge is revealed to have exercised proper judicial discretion in

refusing adjournment a case, the High Court will not interfere with it.

When a judge is of opinion that a party before him is unnecessarily wasting time and protracting the case, he has a discretion to refuse adjournment. Further, a postponement *sine die* does not go with the intent of the provisions of this section. The correct method for the court is to postpone the case, not *sine die*, but for a fixed and definite period pending the disposal of the connected case arising out of selfsame fact. An adjournment *sine die* means an indefinite adjournment and cannot possibly be upheld. It is settled proposition of law that pendency of criminal matters would not be an impediment to proceed with civil suits. The criminal court would deal with the offence punishable under the relevant law. On the other hand, the courts rarely stay the criminal cases and only when compelling circumstances require the exercise of such power.

Section 344 empowers the criminal court to adjourn an inquiry or trial for any reasonable cause and the institution of a civil suit between the same parties and in respect of the same property may be considered as a reasonable cause for which criminal proceedings may be stayed. *Principle:* Where facts are dependent on findings of the Court in either case, trial may be stayed in the case where the settlement of the matter in issue would depend on the finding of its counterpart. Ordinarily criminal proceedings should not be started when the same question is also involved in a pending civil litigation and vice-versa. But, however, is not a rule of law but a rule dictated by prudence based on justification and its application must depend on the merits of each case. It is not an invariable rule that there cannot be any parallel proceedings on the same facts in the criminal and civil courts. There is no hard and fast rule that a criminal case should be kept stayed pending the disposal of a civil suit in relation to the same subject matter. Each case must be

decided upon its own facts and under the respective law. And the institution of a civil suit is not always a valid ground for adjourning a criminal prosecution, although the issues and evidence in the two cases may practically be the same. But finally it is highly undesirable that the same dispute should be allowed to be fought out simultaneously in the civil and criminal courts; and so the criminal proceedings should be stayed pending the decision of the civil suit.”

In the case in our hand we find that Mr. Moudud Ahmed filed some writ petitions challenging the decisions of the income tax authority in the year 2006,2007. In his submissions he emphasised to determine his income by the authority first, then to proceed with the present case. The dispute is between the income tax authority and Mr. Moudud Ahmed which is to be determined by a hearing of the said writ petitions. In the present case the ACC is the complainant-informant and many persons have been cited as witnesses in the charge

sheet from both the Office of ACC and the income tax department. If it is necessary, the petitioner, during trial, can put questions to the witnesses regarding his income and expenditure. More so at the time of examination under section 342 of the Code of Criminal Procedure the accused petitioner shall get ample opportunity to adduce DWs to prove his defence case.

In exercise of judicial discretion as provided in section 344 of the Code of Criminal Procedure, Court may pass an order postponing and adjourning the proceedings if it considers it just for securing ends of justice, but of course not for an indefinite period and in absence of a valid reason. The disposal of proceedings involving arraignment of 'corruption' punishable under the ACC Act must be given precedence. The ACC Act is in no way connected with the determination of income of the petitioner. The Court below rightly refused to consider the application under section 344 of the Code of Criminal Procedure.

Since neither of the parties including the petitioner took initiative to get the Rules issued in the writ petitions mentioned in the present application disposed of, it is uncertain when those Rules will be heard. In the circumstances, the present proceeding cannot be stopped for indefinite period. Thus, we do not find any illegality in the order passed by the Special Judge, Court No.6, Dhaka. Hence, we are not inclined to interfere with the same.

Mr. Moudud Ahmed, the learned advocate submitted that this Court in disposing another application of the present petitioner directed the trial Court to conclude the trial of the present case within 6(six) months, but the Court below could not conclude the trial within the said period of time. On query Mr. Moudud Ahmed submitted that the direction given from this Court to conclude the trial within a short period of time is directory. Thus, the Court below can proceed with

the case after disposal of the aforementioned writ petitions mentioned in the present application.

We are unable to accept his contention because as per Article 109 of the Constitution the High Court Division is the controlling authority of the subordinate judiciary, if any judicial order passed by this Court directing the subordinate Courts to dispose of any proceeding within a fixed time, it is the duty of the subordinate Court to comply with the order in toto. Since there is no mention of consequential measure in the order, only for this reason it cannot be said that the order passed by the High Court Division for concluding the trial within certain period of time is directory. In this regard we observe that there is a conception in the mind of some subordinate judicial officers that if any order was passed by the higher judicial authority to conclude the trial or to do any work within a certain period of time without expressing any consequential measure, the orders are directory in nature. It is absolutely a

misconception. If any Bench of the High Court Division or the Appellate Division directs any subordinate Court to conclude the trial within certain period of time, it should be considered by the Court concerned as mandatory, but if the concerned Court cannot conclude the trial within the time-frame stipulated by the High Court Division or the Appellate Division for any valid reason, it must seek for further time to the Court from which the order/direction was passed. If the Court (Either Division of the Supreme Court) is not satisfied with the reason submitted by the trial Court, the Supreme Court (Either Division) can take measure for violating the Courts' order.

However, considering all these aspects and reasonings given above the application is **rejected summarily**.

Communicate a copy of this order at once.