Present:
Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice Mohi Uddin Shamim

Criminal Revision No.3357 of 2019.

Anti-Corruption Commission
..... Petitioner.

-Versus-

Md. Zahirul Islam and another
..... Opposite-parties.

Mrs. Quamrun Nessa, Advocate
..... For the Petitioner.

Mr. A.K.M. Amin Uddin, D.A.G with
Mrs. Mahjabin Rabbani (Deepa), A.A.G
Mrs. Anna Khanom (Koli), A.A.G.
……. For the State-opposite Party.

Mr. Md. Robiul Alam Budu, Advocate,
.....For the Accused- opposite party No. 1.

Heard on 31.12.2020, 14.01.2021 and 21.01.2021
Judgment on: 24.01.2021.

Md. Nazrul Islam Talukder, J:

On an application under Section 10(1A) of the Criminal Law Amendment Act, 1958, this Rule, at the instance of the Anti-Corruption Commission (hereinafter referred to as the ACC), was issued calling upon the opposite-parties to show cause as to

why the order dated 12.06.2019 passed by the learned Special Judge, Rangpur in Special Case No.02 of 2019 arising out of Lalmonirhat Police Station Case No.41 dated 26.07.2018 under Sections 161/165A of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 discharging the accused-opposite party No.1 from the case, should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The relevant facts, for disposal of this Rule, in short, are that on 26.01.2018, one Jahangir Alam, Assistant Director, Anti-Corruption Commission, District Integrated Office, Rangpur being informant lodged a First Information Report with Lalmonirhat Sadar Police Station, Lalmonirhat alleging, *inter-alia*, that one Md. Tomiruddin, representative of

Messers M.S Traders, made a complaint to the Deputy Director, Anti-Corruption Commission to the effect that the F.I.R named accused Nos.1-2, who are the Executive Engineer and Assistant Engineer respectively of Rural Electrification Board, Kurigram, do not perform their works without bribe. They used to take bribe for passing the bills of contractor, for supplying electric poles and other articles. When the complainant submitted demand note to the accused No.1 for supplying of 120 electric poles and some other electric goods for giving electric connection in different areas, the accused No.1 demanded Taka 30,000/- for himself and Tk. 10,000/- for the accused No.2 as bribe. After receiving the complaint, Anti-Corruption Commission formed a team for conducting a trap case. Before laying the trap case, the informant and

others made inventory of Tk. 30,000/- for giving bribe to F.I.R named accused No. 1 and Tk. 10,000/- for giving bribe to F.I.R named accused No. 2. Accordingly the team members conducted a trap case on 26.07.2018. When the complainant gave Tk.30,000/- to the accused No.1 and Tk. 10,000/- to the accused No.2, the team members of Anti-Corruption Commission caught the accused persons red-handed with bribe. The team members searched them and recovered the inventoried money along with Tk.12,000/- from the pocket of the trouser, Tk. 50,000/- from the personal bag kept inside the vehicle of the F.I.R named accused No. 1 and also recovered the inventoried money along with Tk. 38,000/- from the possession of F.I.R named accused No.2. The accused persons failed to give any reasonable and satisfactory explanation about the

source of money. Thus the team members recovered Tk.92,000/- (Tk.12,000+50,000+30,000/-) from the possession of accused No.1 and Tk. 48,000/- (38,000/-+10,000/-) from the possession of accused No.2 and by doing so, the accused persons have committed offences under Sections 161/165 (Ra) of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947. Hence the F.I.R.

After initiation of the F.I.R, the case was investigated by one Md. Nur Alam, Sub-Assistant Director, Durnity Daman Commission, District Integrated Office, Rangpur and after completion of investigation submitted charge-sheet on 03.012.2018 under Sections 161/165(Ka) of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 against the accused persons.

Having received the charge-sheet, the case record was transmitted to the court of learned Special Judge, Rangpur for trial and disposal of the same.

During pendency of the case, on 06.05.2019, the accused-opposite party No.1 filed an application under Section 241A of the Code of Criminal Procedure for discharging him from the case.

Upon hearing the parties and perusal of the application, the learned Special Judge, Rangpur, by an order dated 12.06.2019, allowed the said application and discharged the accused opposite-party No.1 from the case.

Being aggrieved by the impugned order, the Anti-Corruption Commission preferred this criminal revision under Section 10(1A) of the Criminal Law

Amendment Act, 1958 before this court and obtained this Rule.

At the very outset, Mrs. Quamrun Nessa, the learned Advocate for the Anti-Corruption Commission, submits that the learned Special Judge in discharging the accused-opposite party No. 1 from the case has totally failed to consider the facts and circumstances of the case in proper perspective and passed the impugned order out of misconception of law and without applying his judicial mind and as such, the impugned order of discharge is liable to be set aside.

She next submits that the accused-opposite party No. 1 the Assistant Engineer of Rural Electrification Board, Kurigram being public servant received Tk.10,000/- (ten thousand) as bribe from

the complainant Md. Tomiruddin for supplying electric poles and other electric goods and the accused-opposite party No. 1 was caught red handed by the team members of Anti-Corruption Commission and inventoried monies were recovered from his possession and accordingly, a prima facie offence under Sections 161/165(Ka) of the Penal Code has been disclosed against the accused-opposite party No. 1 and as such, the learned Special Judge has committed an error of law in discharging the accused-opposite party No.1 from the case without considering the prosecution materials on record and that being the reason, the impugned order is liable to be set aside.

She then submits that the Anti-Corruption Commission lodged the First Information Report against the accused-opposite party No. 1 and another

for commission of specific offences under Sections 161/165(Ka) of the Penal Code read with section 5(2) of the Prevention of Corruption Act,1947 and the Anti-Corruption Commission after holding investigation into the allegations having found prima facie case submitted charge-sheet against the accused-opposite party No. 1 and another under the aforesaid sections and in such situation, the impugned order of discharging the accused-opposite party No. 1 from the case on the basis of defence materials and pleas are absolutely illegal and not sustainable in the eye of law and as such, the impugned order of discharge is liable to be set aside.

She further submits that the learned Special Judge in discharging the accused-opposite party No. 1 from the case has failed to consider that the scope of discharge of an accused from the case under

Section 241A of the Code of Criminal Procedure is very limited because an accused can be discharged from the case when there is no prima facie case to go for trial against the accused and the charge so framed are groundless but in the instant case, the learned Special Judge in spite of having prima facie case against the accused-opposite party No. 1 discharged him from the case, which is totally unlawful and not sustainable in the eye of law.

She candidly submits that the FIR discloses a prima facie case against the accused-opposite party No. 1 and the investigating officer having found prima-facie case also submitted charge-sheet against the accused-opposite party No. 1 and another and following the same, cognizance was taken against them and since there are sufficient prosecution materials and prima facie case to go for trial against

the accused-opposite party No. 1 and the allegations are the matters of trial and evidence, the learned Special Judge ought to have framed charge against the accused-opposite party No. 1 and hence, the order of discharge is illegal and liable to be set aside.

She lastly submits that in order to catch hold the accused-opposite party No. 1 red handed with the bribe in the given urgent and emergency situation, the informant and others conducted trap case without obtaining permission/approval/sanction from the concerned authority of the Anti-Corruption Commission but after conducting trap case, the informant submitted an application for post approval of the trap case, which was duly given and approved by the concerned authority of the Anti-Corruption Commission and in that case, the defect/irregularity if any before laying trap case has been cured and in

that view of the matter, there is no bar to proceed with the case against the accused-opposite party No. 1 and on that landscape, the impugned order of discharge should be set aside making the Rule absolute.

In order to buttress up the contentions, the learned Advocate for the Anti-Corruption Commission, has placed before us a number of legal decisions taken in the cases of **Anti-Corruption Commission Vs Rezaul Kabir and another, reported in 68 DLR(AD)(2016)291**, **Nuruzzaman (Md) Vs State, reported in 14BLC(HC)(2009)51, Redwan Ahmed Vs Bangladesh, reported in 16BLC(HC)(2011)70, Abdus Salam (Md) Vs State and another, reported in 16BLC(HC)(2012)873.**

In the case of **Anti-Corruption Commission Vs Rezaul Kabir and another, reported in 68**

DLR(AD)(2016)291, it was held that "It is the function of the Court to examine the reliability of evidence collected by way of trap after recording the evidence. The trapping party had followed the relevant Rules at the time of laying trap or not or in other words, prearranged raid/trap carries any evidentiary value or not for non-compliance of procedural formalities before laying traps should be considered by the Courts after recording evidence along with other evidence. The Court may or may not accept the evidence of decoy witness considering the facts, circumstances, the procedure to be followed for laying traps and that the officials laying traps were designated or not. There may be other reliable evidence in the hands of prosecution to connect with the offence."

In the case of **Nuruzzaman (Md) Vs State, reported in 14BLC(HC)(2009)51,** it was decided that "Rule 16 of the Anti-Corruption Commission Rules, 2007 provides for obtaining permission of the Commissioner in charge of investigation for the purpose of laying trap.... In the instant case, the Director of the Commission, Mr. Md. Zulfiquer Ali Mazumder led the trap operation and it is stated in the counter-affidavit of opposite party No.2 that before undertaking such operation, he sought permission from Md. Habibur Rahman, Commissioner (Investigation) to lead the operation and he was permitted to do so. Written permission is neither required under the Rule, nor it is practicable. It may be noted here that Mr. Md. Habibur Rahman is the concerned Commissioner for the purpose of according such permission who used to sit in the

Head Office in Dhaka and it is not possible on the part of the Director staying at Chittagong to obtain written permission from the authority in writing in case of such urgent need."

In the case of **Redwan Ahmed Vs Bangladesh, reported in 16BLC(HC)(2011)70,** it was laid down that "The sanction as contemplated under Section 32 of the Act is indeed an administrative Act which is not subject to any judicial scrutiny. This view finds support in this regard in the case of Bangladesh vs Iqbal Hasan Mahmood @ Tuku 60 DLR (AD)147 wherein it was observed that "the process of sanction is an administrative act and is not subject to any judicial scrutiny."

In the case of **Abdus Salam (Md) Vs State and another, reported in 17BLC(HC)(2012)873,** it

was decided that “The sanction is an administrative action of the Commission and if there be any variation in obtaining the same that may be mere irregularity not illegality and such irregularity in obtaining/giving sanction can be cured under Section 537 of the Code.”

On the other hand, Mr. Md. Robiul Alam Budu, the learned Advocate for the accused-opposite party No.01, has submitted counter-affidavit denying the relevant statements and grounds taken in the application by the Anti-Corruption Commission and stating, inter-alia, that the accused-opposite party No.01 did not demand bribe, the alleged bribe was demanded by the Executive Engineer who is the superior officer to the accused-opposite party No.01, the FIR does not disclose any offence against the accused-opposite party No.01, the charge-sheet does

not correspond to the allegation stated in the FIR, the allegation against the accused-opposite party No.01 has been brought without any basis, the accused-opposite party No. 1 has no liability, if the bribe was demanded in his name, the accused-opposite party No. 1 as of his official duty was under obligation to accompany his superior officer, otherwise he might face disciplinary action by the superior officer and at the same time, the learned Special Judge was inclined to frame charge against the F.I.R named accused No.1 the Executive Engineer after being satisfied with the prima-facie case that he allegedly committed the offence. The further statements made in the counter-affidavit are as follows:-

a) That on 25.07.2018, Md. Mozahar Ali Sarder, Deputy Director, Anti-Corruption Commission, District Integrated Office,

Rangpur got approval from the Anti-Corruption Commission (ACC) to conduct trap case against Executive Engineer Md. Mominur Rahman only by the Memo No. 00.01.4900.725.01.036.18-1526.

b) That on 25.07.2018, Zahangir Alam, Assistant Director, Anti-Corruption Commission, District Integrated Office, Rangpur inventoried Tk. 30,000/- (taka thirty thousand) for giving bribe to the Executive Engineer Md. Mominur Rahman.

c) That Md. Zahangir Alam, Assistant Director, Anti-Corruption Commission, District Integrated Office, Rangpur recovered an amount of Tk. 30,000/- from the possession of Executive Engineer Md.

Mominur Rahman and prepared seizure list on 26.07.2018 at 18:20 hours.

d) That on 26.07.2018, Md. Zahangir Alam, Assistant Director, Anti-Corruption Commission, District Integrated Office, Rangpur made inventory of Tk. 10,000/- for giving bribe to Assistant Engineer Md. Zahurul Islam i.e the accused-opposite party No. 1.

e) That Md. Zahangir Alam, Assistant Director, Anti-Corruption Commission, District Integrated Office prepared another seizure list on 26.07.2018 at 18:40 hours.

f) That on 29.07.2018, Md. Mozahar Ali Sarder, Deputy Director, Anti-Corruption Commission, District Integrated Office, Rangpur filed an application for

retrospective/post approval of the trap case conducted against the accused-opposite party No. 1 and the post approval was given by the concerned Commissioner on 01.08.2018.

g) That on 08.07.2018, Md. Zahurul Islam i.e the accused-opposite party No. 1 withdrew Tk. 60,000/- (taka sixty thousand) from his account No. 0148002189559 lying with the Janata Bank Limited.

h) That following the direction of this court, the accused-opposite party No.1 surrendered before the learned Special Judge, Special Court, Rangpur on 14.01.2020 and obtained bail therefrom on that day.

i) That Rule 16 of the Anti-Corruption Commission Rules, 2007 reads that "ফাঁদ

মামলা (Trap case)- দূর্নীতি প্রতিরোধের নিমিত্ত আইনের তফসিলভুক্ত অপরাধে জড়িত কোন ব্যক্তি বা ব্যক্তিবর্গকে হাতেনাতে ধৃত করিবার উদ্দেশ্যে তদন্তের দায়িত্বপ্রাপ্ত কমিশনার এর অনুমোদনক্রমে তৎকর্তৃক ক্ষমতাপ্রাপ্ত কর্মকর্তা ফাঁদ মামলা (Trap case) প্রস্তুত করিতে বা পরিচালনা করিতে পারিবেন।" but in the present case the informant did not take any prior approval to conduct the trap case against the accused-opposite party No.1.

Mr. Md. Robiul Alam Budu, the learned Advocate for the accused-opposite party No.01, then takes us through the submissions made in the counter affidavit, which run as follows:

I. That the revisional application is filed on misconception of laws, facts and circumstances of the case and the Anti-Corruption Commission has

failed to take into consideration of the additional facts and documents filed by the accused-opposite party No.1 during the hearing of the application under Section 241A of the Code of Criminal Procedure inasmuch as the Anti-Corruption Commission gave approval to conduct trap case against the FIR named accused No.1 only on some specific allegations and approved of filing case against the FIR named accused No.1 only, not against the instant accused-opposite party No.1, therefore, the allegation of recovery of inventoried money from the possession of accused-opposite party No.1 as stated in the F.I.R and charge-sheet is made with mala fide intention to implicate the instant accused-opposite party No.1 in the case and as such, the Rule is liable to be discharged.

II. That Md. Mozahar Ali Sarder, Deputy Director, Anti-Corruption Commission, District Integrated Office, Rangpur obtained approval to conduct trap case against Executive Engineer Md. Mominur Rahman only on 25.07.218 and it is evident from the F.I.R that the accused No. 1 demanded the amount of Tk. 30,000/- for himself and the amount of Tk. 10,000/- for the accused No.2 i.e. the allegation of demanding of total bribe money was made against the F.I.R named accused No.1 Executive Engineer Md. Mominur Rahman, not against the instant accused-opposite-party No. 1, moreover, there is no evidence or any allegation that the accused-opposite party No.1 was either aware of the demand of bribe or he demanded the same from the complainant or from the contractor and as such, the order passed by the learned Special Judge

discharging the accused-opposite party No.1 suffers from no illegality and that being reason, the Rule is liable to be discharged for ends of justice.

III. That Md. Zahangir Alam, Assistant Director, Anti-Corruption Commission, District Integrated Office, Rangpur did not take permission/approval to conduct trap case against the accused-opposite party No.1 and without taking approval, the informant and others of the case arrested the accused-opposite party No.1 on 26.07.2018 and after arresting the accused-opposite party No.1, Md. Mozahar Ali Sadar, Deputy Director, Anti-Corruption Commission, District Integrated Office, Rangpur filed an application for retrospective/post approval on 29.07.2018 and got post-approval from the concerned Commissioner on 01.08.2018 and in view of the principle of law laid

down by the Hon'ble High Court Division in the case of Rezaul Kabir-Versus-State and another, reported in 14 MLR(2009)(HC)482, the impugned order suffers from no illegality and the Rule is liable to be discharged.

IV. That as there is no allegation against the accused-opposite party No.1 of demanding bribe from complainant; no marked/inventoried notes were recovered from him; the accused-opposite party No. 1 is the legal owner of money which was recovered from him because the same were withdrawn from his personal account which is evident from Annexure-8 to the counter-affidavit; only mentioning the name of the accused-opposite party No. 1 in the F.I.R and charge-sheet is not sufficient to frame charge against him and in view of the legal decision settled by the Hon'ble High Court Division in the case of Nazrul

Islam-Versus-the State, reported in 50 DLR(HC)103, the learned special judge committed no error of law by discharging the accused-opposite party No.1 from the case and as such, the impugned order suffers from no illegality and the Rule is liable to be discharged.

Mr. Md. Robiul Alam Budu, the learned Advocate for the accused-opposite party No.01, in support of his submissions, has referred to legal decisions taken in the cases of **Md. Rezaul Kabir (Md.) Vs the State and another, reported in 14MLR(HC)(2009)482, Fani Bhushan Debnath Vs the State and another, reported in 3LNJ(HC)(2014)602 and Nazrul Islam Vs the State, reported in 50 DLR(HC) (1998)103.**

In the case of **Md. Rezaul Kabir (Md.) Vs the State and another, reported in**

14MLR(HC)(2009)482, it was held that "Keeping that view in mind, in administering justice, a duty is also cast upon the Court to see whether the imperative provisions of law as intended and meant by the legislature or the framers of law has been duly complied with in launching the prosecution against a person and having not so complied with there might be every likelihood of causing miscarriage of justice and unnecessary victimization of the accused to suit one's own purpose or jealousy as has been focused in the instant case on behalf of the accused-petitioner.....Considering all the above aspects of the matter we find that in laying and conducting the trap in the instant case, as alleged, the mandatory provisions of Rule 16 of the Anti-Corruption Rules, 2007 were not, at all, followed which vitiates the very initiation of proceeding in question. Thus, the

institution and continuation of the instant proceeding amounts to an abuse of the process of the court which is liable to be quashed. We find merit in this Rule."

In the case of **Fani Bhushan Debnath Vs the State and another, reported in 3LNJ(HC)(2014)602,** it was decided that "There was no sanction to initiate a trap case which is a clear violation of main element as well as prerequisites scheme of law as formulated by the legislature under Rule 16 of the Anti-Corruption Commission Rules, 2007. Thus the case proceeded without sanction has vitiated the trial abinitio. The impugned judgment awarded thereupon has got no legs to stand, which is liable to be set aside."

In the case of **Nazrul Islam Vs the State, reported in 50 DLR(HC) (1998)103,** it was

observed that "অভিযোগ গঠন বিষয়ে শুনানীর সময় আসামীর দাখিলী প্রমান তথা দলিল পত্র বিবেচনা করা যায় না এবং তার ভিত্তিতে আসামীর বিরুদ্ধে মামলা বাতিল করা যায় না.....আসামী পক্ষ থেকে মামলা অব্যাহতি দেয়ার জন্যে কোন দরখাস্ত দেয়া হোক বা না হোক আসামীর বিরুদ্ধে অভিযোগ গঠন করা হবে কিনা সে সম্পর্কে ২৬৫ সি ও ২৬৫ ডি ধারার বিধান অনুযায়ী দায়রা আদালত তথা যে কোন ট্রাইবুনালের দায়িত্ব হচ্ছে উপরোক্ত বিষয় বিবেচনা করে এবং পক্ষদের বক্তব্য শুনে সঠিক সিদ্ধান্তে উপনীত হওয়া। শুধুমাত্র এজাহারে নাম উল্লেখ থাকলে এবং আসামীর বিরুদ্ধে পুলিশ অভিযোগপত্র দাখিল করলে বা অভিযোগের দরখাস্তে আসামীর নাম উল্লেখ থাকলেই তার বিরুদ্ধে যান্ত্রিক ভাবে অভিযোগ গঠন করা সমিচীন নয়।"

With regard to the legal decision taken in the case of **Md. Rezaul Kabir (Md.) Vs the State and another, reported in 14MLR(HC)(2009)482,** Mrs. Quamrun Nessa, the learned Advocate for the Anti-Corruption Commission points out that the aforesaid

decision has been overruled by the Appellate Division in the case of **Anti-Corruption Commission Vs Rezaul Kabir and another, reported in 68 DLR(AD)(2016)291** and for this obvious reason, the submission of the learned Advocate for the accused-opposite party No.1 cannot sustain in the eye of law and the accused-opposite party No.1 cannot derive any benefit from it.

Mr. A.K.M Amin Uddin, the learned Deputy Attorney-General appearing for the State, submits that a prima-facie case has been disclosed against the accused-opposite party No. 1 and another in the prosecution materials and as such, the impugned order discharging the accused-opposite party No.1 from the case cannot logically sustain in the eye of law and as such, the Rule should be made absolute setting aside the impugned order.

We have gone through the revisional application and the counter-affidavit and carefully perused the materials annexed therewith. We have also heard the submissions advanced by the learned Advocates for the respective parties and considered them with our thoughtful analysis.

In view of submissions and counter-submissions of the parties, we are of the view that the Rule may be disposed of on merit coming into decision travelling through the following propositions:-

a) Whether the prosecution materials disclose a prima-facie case against the accused-opposite party No.1 and whether there is any justification to go for trial of the case by framing charge against the accused-opposite party No.1.

b) Whether the accused-opposite party No.1 is entitled to discharge from the case for non-compliance of procedural formalities if any before laying trap/s;

c) Whether the administrative acts/orders/post approval passed under Section 32 of the ACC Act, 2004 and Rule 16 of the ACC Rules, 2007 by the Anti-Corruption Commission can be challenged before the court of law and whether those are subject to judicial scrutiny;

d) Whether there is any incorrectness, illegality and impropriety in the impugned order discharging the accused-opposite party No.1 from the case.

Now we want to take up the first proposition for discussion and decision.

It is alleged in the F.I.R that one Md. Tomiruddin, representative of Messers M.S Traders, made a complaint to the Deputy Director, Anti-Corruption Commission to the effect that the F.I.R named accused Nos.1-2, who are the Executive Engineer and Assistant Engineer respectively of Rural Electrification Board, Kurigram, do not do their works without bribe. They used to take bribe for passing the bills of contractor, for supplying electric poles and other articles. When the complainant submitted demand note to the accused No.1 for supplying of 120 electric poles and some other electric goods for giving electric connection in different areas, the accused No.1 demanded Taka 30,000/- for himself and Tk. 10,000/- for the accused No.2 as bribe. After receiving the complaint, Anti-Corruption Commission formed a team for

conducting a trap case. Before laying the trap case, the informant and others made inventory of Tk. 30,000/- for giving bribe to F.I.R named accused No. 1 and Tk. 10,000/- for giving bribe to F.I.R named accused No. 2. Thereafter the team members conducted a trap case on 26.07.2018. When the complainant gave Tk.30,000/- to the accused No.1 and Tk. 10,000/- to the accused No.2, the team members of Anti-Corruption Commission caught the accused persons red handed with bribe. The team members searched them and recovered the inventoried money along with Tk.12,000/- from the pocket of the trouser, Tk. 50,000/- from the personal bag kept inside the vehicle of the F.I.R named accused No. 1 and also recovered the inventoried money along with Tk. 38,000/- from the possession of F.I.R named accused No.2 i.e. the accused-

opposite party No. 2. The accused persons failed to give any reasonable and satisfactory explanation about the source of money. Thus the team members recovered Tk.92,000/- (Tk.12,000 + Tk.50,000 + Tk.30,000/-) from the possession of accused No.1 and Tk. 48,000/- (Tk.38,000/-+Tk.10,000/-) from the possession of accused No.2 and by doing so, the accused persons have committed offences under Sections 161/165A of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

It may be mentioned that the allegations that have been brought against the accused-opposite party No.1 and another in the F.I.R are found prima-facie true by the investigating officer. Accordingly, after completion of the investigation, on 03.12.2018, the investigating officer having found prima-facie case

submitted investigation report against the accused-opposite party No.1 and another under the sections 161/165A of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

Section 161 of the Penal Code runs as under:

161. Public servant taking gratification other than legal remuneration in respect of an official act- Whoever, being or expecting to be a public servant, accepts or obtains or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or for bearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government or

Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

The word “gratification” is not restricted to pecuniary gratifications, or to gratifications estimable in money.

With reference to Section 161 of the Penal Code, it is argued on behalf of the accused-opposite party No. 1 that he did not demand for illegal gratification from anybody and for this reason, he cannot be implicated in this case since he had no *mens rea* to commit the alleged offence. In this regard, it may be mentioned that making demand for illegal gratification is not an essential ingredient of the offence under section 161 of the Penal Code rather conscious acceptance of any such gratification

other than legal remuneration makes a public servant liable to punishment under section 161 of the Penal Code but it is a duty of the prosecution to prove that there was conscious acceptance of the bribe money by the accused. In this regard, we should make one thing clear that mere plantation of money in possession of a public servant with mala fide intention and calculative design by any interested person/vested quarter in the garb of an alleged official act/s behind the back of one's concrete knowledge and conscious acceptance of the bribe money does not come within the purview of section 161 of the Penal Code. But it is, of course, a disputed question of fact.

It is evident from the prosecution materials that the inventoried money was recovered from the possession of accused-opposite party No. 1, which

prima facie indicates about the consenting mind of the accused-opposite party No. 1. Anyway, the matters as to consent of receiving the bribe money and conscious acceptance of the same by the accused-opposite party No. 1 are disputed questions of facts which require to be proved by oral, documentary and circumstantial evidence by the prosecution. Similarly, if there is any fact of alleged plantation of money in possession of public servant with dishonest intention by any interested person, the same is required to be proved by the public servant who alleges the same.

Section 165A of the Penal Code reads as follows:

Section 165A. **Punishment for abetment of offences defined in sections 161 and 165-**Whoever abets any offence punishable under section 161 or

section 165 shall, whether the offence abetted is or is not committed in consequence of the abetment, be punished with the punishment provided for the offence.

It is to be mentioned that allegations of offence punishable under sections 161 and 165A are to be scrutinized with reference to an official act. In the absence of an official act, the trial and/or conviction if any under sections 161 and 165A cannot sustain in the eye of law.

The criminal misconduct has been defined in section 5 of the Prevention of Corruption of Act, 1947, which runs as follows:

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

(a) if he accepts or obtains or agrees to accept or attempts to obtain from any person for himself or

for any other person, any gratification other than legal remuneration as a motive or reward such as is mentioned in section 161 of the Penal Code, or

(b) if he accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own

use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he by corrupt or illegal means or by otherwise abusing his position his position as public servant, obtains or attempts to obtain for himself or for other person any valuable thing or pecuniary advantage, or

(e) if he or any of his dependents is in possession, for which the public servant cannot reasonably account, of pecuniary resources or of property disproportionate to his known sources of income.

From the definition of “criminal misconduct” as has been defined in section 5(1) of the Prevention of Corruption Act, 1947, to constitute an offence under this law, the ingredients of criminal

misconduct are that the offenders must be public servants and they used corrupt or illegal means or otherwise abused their official position as public servants and they obtained for themselves or for any other person/s any valuable thing or pecuniary advantage. Criminal misconducts are of 5 categories mentioned in section 5(1) (a) to (e) and all these categories of misconducts have been made punishable under section 5(2) of the Prevention of Corruption Act, 1947. The public servants are said to be guilty of misconduct/s if they fall within the categories mentioned in section 5(1) of the Prevention of Corruption Act, 1947 punishable under section 5(2) of the Prevention Corruption Act, 1947.

From the F.I.R, charge-sheet and seizure list, it is apparent that the team members of the trap party recovered Tk. 92,000/- including the inventoried

money of Tk. 30,000/- from the possession of F.I.R named accused No. 1 and Tk. 48,000/- including the inventoried money of Tk. 10,000/- from the possession of accused-opposite party No.1 and both of them are public servants.

It is worthwhile to mention that in view of the offences under sections 161/165A of the Penal Code read with section 5(2) of the prevention of Corruption Act, 1947, the following facts and circumstances of the case are required to be proved before the trial court through evidence:

(i) Whether the accused-opposite party No. 1 was public servant at the relevant time of occurrence;

(ii) Whether the accused-opposite party No. 1 accepted or obtained or attempted to obtain gratifications other than legal remuneration;

(iii) Whether those gratifications were accepted or attempted to accept by corrupt or illegal means or otherwise by abusing their position as a public servant.

(iv) Whether the alleged gratifications were accepted or attempted to accept by accused persons at the abetment or instigation of any private person.

Following the given facts and circumstances and the allegations so brought against the accused-opposite party No.1 and another, we have no hesitation to hold the view that a prima-facie case to go for trial against the accused persons has been disclosed in the prosecution materials. It is now well settled by a series legal decisions of the Apex court that the disputed questions of fact can only be decided and resolved by the learned trial judge upon taking evidence from the witnesses of the respective

parties and similarly the truth or falsity of the allegations can only be determined and decided by the learned trial judge taking evidence from the parties of the case. In other words, it may be observed that a case having prima-facie case against the accused persons cannot be stifled by any technical reasons. If the charge is not framed, how the factual and legal aspects of the case would be resolved and settled taking evidence from the witnesses of the respective parties. Accordingly, our considered view on the first proposition is that the prosecution materials disclose a prima-facie case against the accused-opposite party No. 1 and another and there are sufficient reasons and justifications to go for trial of the case by framing charge against them.

Now we want to take up the second proposition for our thoughtful exploration and decision.

As per argument of the learned Advocate for the accused-opposite party No.1, the Anti-Corruption Commission, by an order dated 25.07.2018, gave permission to conduct trap case against the FIR named accused No.1 Executive Engineer Md. Mominur Rahman; accordingly, one Assistant Director, Anti-Corruption Commission, Rangpur made inventory in respect of Tk. 30,000/- for giving bribe to the FIR named accused No.1, Executive Engineer Md. Mominur Rahman; following a trap case, the team members recovered the inventoried money of Tk. 30,000/- along with other monies from the possession of FIR named accused No.1 Executive Engineer Md. Mominur Rahman and also recovered inventoried money of Tk. 10,000/- along

with other monies from the possession of the accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam in spite of the fact that no permission/approval/sanction was taken from the concerned authority of the Anti-Corruption Commission for conducting trap case against the accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam; and for non-compliance of the procedural formalities before laying trap, the proceeding of laying trap, preparation of inventory of Tk. 10,000/-, recovery of the same along with other monies from the possession of accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam and preparation of seizure list are illegal, mala fide and beyond the scope of law and for the aforesaid reasons, the learned trial judge rightly discharged the

accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam from the case.

In contrast to the aforesaid submissions, Mrs. Quamrun Nessa, the learned Advocate for the Anti-Corruption Commission, illustrates that when the alleged occurrence of taking bribe by the accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam from the representative of Messers M.S Traders took place, the team members of the trap party, lying in ambush, were waiting beside the place of occurrence; following the given circumstances, the members of the trap party were not in a position to obtain permission/approval/sanction from the concerned authority of the Anti-Corruption Commission staying at the place of occurrence; but immediately after catching hold the accused-opposite party No.1 red handed with the inventory

money along with other monies, the informant along with the team members informed the higher authority of the incident and prayed for post-approval of the trap case already carried out; on receiving the application, the concerned authority of the Anti-Corruption Commission provided post-approval to the trap case conducted by the team members of the trap party; under the circumstances, the irregularities that were there were corrected by taking post-approval from the concerned authority of the Anti-Corruption Commission; in view of the above, there is no bar to proceed with the case against the accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam together with FIR named accused No.1 Executive Engineer Md. Mominur Rahman; with reference to the decisions taken in the cases of **Anti-Corruption Commission**

Vs Rezaul Kabir and another, reported in 68 DLR(AD)(2016)291, Nuruzzaman (Md) Vs State, reported in 14BLC(HC)(2009)51 and Abdus Salam (Md) Vs State and another, reported in 17BLC(HC)(2012)873, Mrs. Quamrun Nessa has tried to impress upon us that there is no bar to obtaining post-approval of the trap case, the mere irregularities of the procedural formalities before laying trap case may be cured under Section 537 of the Code of Criminal Procedure, apart from the recovery of bribe from the possession of accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam, there are many witnesses and materials to connect him with the alleged offences and for the aforesaid facts and circumstances, the accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam cannot be discharged from the case simply on

the reason that at the time of laying trap case, the procedural formalities were not complied with.

Before coming to a decision in this issue, let us see what is the statement of law/rule in this regard in the Anti-Corruption Commission Rules, 2007. For convenience of discussion and decision, we want to quote Rule 16 of the Anti-Corruption Commission Rules, 2007, which runs as under:-

"ফাঁদ মামলা (Trap case)- দূর্নীতি প্রতিরোধের নিমিত্ত আইনের তফসিলভুক্ত অপরাধে জড়িত কোন ব্যক্তি বা ব্যক্তিবর্গকে হাতেনাতে ধৃত করিবার উদ্দেশ্যে তদন্তের দায়িত্বপ্রাপ্ত কমিশনার এর অনুমোদনক্রমে তৎকর্তৃক ক্ষমতাপ্রাপ্ত কর্মকর্তা ফাঁদ মামলা (Trap case) প্রস্তুত করিতে বা পরিচালনা করিতে পারিবেন।"

On a close reading of the aforesaid Rule, it appears that with a view to preventing corruption, the officer empowered by the Commissioner in

charge of investigation, in order to catch hold red handed any person or persons connected with the offences specified in the schedule to the Act, may, subject to the approval of the Commissioner in charge, lay the trap case or conduct the same.

It is evident from the aforesaid Rule that no consequence has been provided to the effect that if the procedural formalities before laying trap case are not fulfilled or complied with, the entire trap proceeding will be illegal and the person/accused connected therewith would be discharged from the case for such non-compliance of the procedural formalities. Accordingly, we are of the view that the procedures and formalities that have been laid down in Rule 16 of the Anti-Corruption Commission Rules, 2007 are not mandatory rather those are directory in nature. In this regard, it may be observed

that if there are any defects and irregularities in obtaining permission/approval/sanction from the concerned authority of the Anti-Corruption Commission, those may be rectified and cured by the Commission and by the court under Section 537 of the Code of Criminal Procedure as the case may be and trap case may be conducted by the empowered officers of the Anti-Corruption Commission if the facts and circumstances arisen out of urgent and emergency situations require to do the same for ends of justice even before taking approval/permission/sanction from the concerned authority of the Anti-Corruption Commission provided that post-approval/permission/sanction must be taken from the concerned authority of the ACC immediately after laying trap case explaining the reasons whatsoever. Anyway, it is to be borne in

mind that the act of laying trap case without approval/permission/sanction of the concerned authority must not be misused for any collateral purposes by interested and unscrupulous officials of the Commission or law enforcing agencies. Furthermore, there is no bar to obtaining post-approval/permission/sanction from the concerned authority of the Anti-Corruption Commission after conducting trap case if the circumstances demand so.

On going through the prosecution materials record, it is crystal clear that a prima facie allegation of taking bribe from the representative of Messers M.S Traders has been disclosed against the accused-opposite party No.1 Assistant Engineer Md. Zahurul Islam and another. It may be noted that the prosecution case relies on the prosecution materials collected by the prosecution. In order to prove the

prosecution case, the prosecution collects various types of materials by different ways and means required for proving the prosecution case. A trap case is one of the methods by which the prosecution collects the materials and evidence to be adduced and used before the trial court to prove the prosecution case. There may be many prosecution materials and evidence, as argued by the learned Advocate for the ACC, to connect the accused person/s with the alleged offences. It may or may not be logical that each and every piece of materials and evidence is convincing and reliable to prove the prosecution case. If the submission of the learned Advocate for the accused-opposite party No.1 for the sake of argument is accepted, in that case, one of the materials/evidence may not be worthy of consideration but the remaining materials and

evidence are still in the hands of the prosecution to prove the prosecution case. Under the circumstances, we may come into view that only for non-compliance of the procedural formalities before laying the trap case cannot be the ground for discharging the accused from the case. It is worthwhile to mention that the alleged occurrence as well as the act of laying trap case took place at Lalmonirhat. As per Rule 16 of the Anti-Corruption Rule, 2007, the informant for laying trap had to seek permission from the concerned authority of ACC, who used to sit in the Head Office of the Anti-Corruption Commission in Dhaka. Under the circumstances, it was not possible on the part of the informant staying at Lalmonirhat to obtain permission from the authority of Anti-Corruption Commission from Dhaka for conducting trap case

against the accused-opposite party No.01 under the given facts of urgent and emergency situation and necessity. It may be noted that the court may or may not accept the evidence of decoy witness considering the facts, circumstances and the procedures to be followed for laying traps but there may be other reliable evidence in the hands of prosecution to connect the accused/s with the offences brought against them.

In the case of **Anti-Corruption Commission Vs Rezaul Kabir and another, reported in 68 DLR(AD)(2016)291**, it was held that "It is the function of the Court to examine the reliability of evidence collected by way of trap after recording the evidence. The trapping party had followed the relevant Rules at the time of laying trap or not or in other words, prearranged raid/trap carries any

evidentiary value or not for non-compliance of procedural formalities before laying traps should be considered by the Courts after recording evidence along with other evidence. The Court may or may not accept the evidence of decoy witness considering the facts, circumstances, the procedure to be followed for laying traps and that the officials laying traps were designated or not. There may be other reliable designated or not. There may be other reliable evidence in the hands of prosecution to connect with the offence."

From the case of **Smt. Maneka Gandhi Vs Union of India, reported in AIR 1978 Supreme Court 597,** it appears that the passport of Smt. Maneka Gandhi was impounded without giving her showing cause and hearing and under the circumstances, the Supreme Court of India held that

the post decisional hearing is needed to cure the irregularities if any in the impugned memo and post decisional hearing is a hearing which takes place after a provisional decision is taken and post decisional hearing takes place when it may not be feasible to hold pre decisional hearing.

Taking into consideration of the analogy of the aforesaid decision, similarly, in an emergency situation, an officer being empowered by the Commission can lay trap and catch hold red handed any person who is involved in cognizable offences without taking prior permission of the Commissioner in charge of investigation. But post approval/permission/sanction is required from the concerned authority of the Anti-Corruption Commission to cure the irregularities if any for non-compliance of the procedural formalities before

laying trap. It is now well settled that the power of arrest may be exercised by an officer of the Commission under Section 54 of the Code of Criminal Procedure even before lodging the FIR or in course of inquiry/investigation or before taking cognizance of the offence if any person commits any cognizable offence or that person is concerned with the commission of such offence. This view and philosophy find support in the case of **Durnity Daman Commission Vs Abdullah-Al-Mamun and another, reported in 21BLC(AD)(2016)162.**

Under the aforesaid facts and circumstances, the arrest of any person/accused without the permission of Commissioner in charge of investigation would not be illegal if the offender is caught red handed by laying trap.

So considering the facts and propositions of law, the submission of the learned Advocate for the accused-opposite party No.1 in this regard does hold good in the eye of law. Accordingly, our considered opinion on the second proposition is that the accused-opposite party No. 1 is not entitled to discharge from the case for non-compliance of procedural formalities if any before laying trap/s.

Now want to take up the third proposition for our careful analysis and decision.

It is categorically argued by Mrs. Quamrun Nessa, the learned Advocate for the Anti-Corruption Commission that any act and/or order of the Anti-Corruption Commission including the order of granting permission/approval/sanction/post approval of the concerned authority of the Anti-Corruption Commission is administrative act/order of the

Commission, which cannot be questioned before any court of law because those are not subject to judicial scrutiny.

On the other hand, the learned Advocate for the accused-opposite party No. 1 repelling the aforesaid submission points out that this court has ample jurisdiction, power and authority to interfere with any act/order of the Anti-Corruption Commission when there are sufficient reasons to believe that the imperative provisions of law as intended and meant for by the legislature or the framers of law have not been duly complied with in launching the prosecution against a person and having not so complied with there might be every likelihood of causing miscarriage of justice and unnecessary victimization of the accused to suit one's own purpose or jealousy as has been focused in the

instant case and that there is no scope on the part of the Court to put a different word to give a different meaning other than the one which was meant by the expression employed by the framers of the law, therefore, the provisions as laid down in Rule 16 of the Anti-Corruption Commission Rules, 2007 are construed to be mandatory and that the courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused.

Before coming to a decision on this issue, we want to discuss about some matters which we usually and typically notice, face, act, think and feel in our social life.

Nowadays, we see in various news media including electronic and print media that the Anti-Corruption Commission is busy with recovery of

money than strengthening the legal procedures in major corruption cases as a result of which accused persons are getting advantages in their defence. Money recovery is not the duty of the ACC as the law has not given them such power. The money recovery may be a prima facie presumption that the accused/person embezzled or laundered the money. It cannot be gainsaid that there is an ample opportunity for the ACC to take speedy legal action/s against them. But in many cases, even after years, the ACC couldn't submit charge-sheet/enquiry report which is totally a violation of statutory provisions of law. Moreover, in many cases no actions have been taken against the investigating/inquiry officer/s though there is a special provision for taking legal action/s against the concerned officials in the statute. We have noticed

that many cases were filed for embezzlement of money through corruption in the banks, financial institutions and in many government departments but no positive steps are being taken to expedite the proceedings of inquiry, investigation and trial as well. No satisfactory explanations are being given by the Commission. The question arises-is the Commission above the law? The answer is certainly 'no'. The functions of the Commission have been briefly narrated in the ACC Act, 2004 and in the ACC Rules, 2007. The Commission should strict to its own legal position in preventing the corruptions and corrupt practices prevalent in the country. The role of ACC has been defined in the statute itself and it cannot exercise any power which is not provided in the ACC Act, 2004 and the ACC Rules, 2007. The ACC should strictly adhere to the procedures and

timeframe prescribed for inquiry/investigation as well as the procedure in according sanction under section 32 of the ACC Act, 2004 and Rule 15 of the ACC Rules, 2007 to bring the accused to justice and conduct the prosecution case efficiently for securing justice so that the corruptions and corrupt practices in the country are stopped and rooted out. If the act/order/activity/inaction of the Commission becomes contrary to the purpose and object of the ACC Act, 2004 in preventing the corruption and corrupt practices in the country and if the Commission remains silent in the matter of taking proper and positive steps in preventing corruption and corrupt practices in the country, all the effort and toil of the ACC and the purpose and object of the ACC Act, 2004 in preventing corruption would be frustrated. Under the aforesaid facts and

circumstances of the case, our considered view is that if any act/order/inaction of the Anti-Corruption Commission affects and frustrates the purpose and object of the Anti-Corruption Commission Act, 2004 for prevention of Corruption and other corrupt practices in the country and also affects and frustrates the proceedings of inquiry and investigation of Corruption and other specific offences and matters incidental thereto without following the laws and rules prejudicing the purpose and object of the Anti-Corruption Commission Act, 2004 and the Anti-Corruption Commission Rules, 2007, those act/order/inaction may be interfered with by this court. Apart from these, the High Court Division normally does not interfere with the acts/orders of the Anti-Corruption Commission, which are curable and rectifiable by the Commission

as well as by the learned trial judge during pendency of the case.

It is now well settled that the sanction as contemplated under Section 32 of the ACC Act, 2004 is indeed an administrative act which is not subject to judicial scrutiny. The aforesaid view find support in the decision taken in the case of **Bangladesh Vs Iqbal Hasan Mahmood @ Tuku, reported 60DLR (AD)147.** Similarly, the permission/approval/sanction given by the concerned authority of the Anti-Corruption Commission for conducting trap case is also an administrative act/order which is also not subject to any judicial scrutiny. Also, the post-approval order rectifying the defects and irregularities of the procedural formalities before laying trap is not subject to judicial scrutiny. Accordingly, our considered

viewpoint on the third proposition is that the administrative acts/orders/post approval passed under Section 32 of the ACC Act, 2004 and Rule 16 of the ACC Rules, 2007 cannot be challenged before the court of law as those are not subject to judicial scrutiny.

Considering all the aspects of the case, our standpoint on the fourth proposition is that we find incorrectness, illegality and impropriety in the impugned order discharging the accused-opposite party No. 1 from the case as a result of which the same cannot sustain in the eye of law.

The legal decisions referred to by the learned Advocate for the accused-opposite party No. 1 are not applicable to the attending facts and circumstances of the instant case at hand and on top of that, the ratio of law laid down in the case of Md.

Rezaul Kabir (Md) vs the State and another, reported in 14 MLR(HC) (2009) 482 was overturned by the Appellate Division in the case of **Anti-Corruption Commission Vs Md. Rezaul Kabir and another, reported in 68 DLR(AD)(2016)291.**

Having considered all the facts and circumstances of case, the submissions advanced by the respective parties, the propositions of law cited and discussed above and the forgoing discussions, observations and reasons, we find merit in this Rule.

Consequently, the Rule is made absolute.

In consequence thereof, the impugned order dated 12.06.2019 passed by the learned Special Judge, Rangpur in special case No. 02 of 2019 discharging the accused-opposite party No.1 from the case is set aside.

There is no bar to proceed with the case against the accused-opposite party No. 1 along with other accused person in accordance with law.

The learned trial judge is directed to proceed with the case in accordance with law and conclude the trial of the case as early as possible preferably within 01 (one) year from the date of receipt of this judgment and order.

Communicate this judgment and order to the learned judge of the concerned court below at once.

Mohi Uddin Shamim, J:

I agree.