

Present:

Mr. Justice Md. Shohrowardi

Criminal Revision No. 294 of 2007

Shafi Mia and another

...Convict-petitioners

-Versus-

The State

...Opposite party

Mr. Dewan Abdun Naser, Advocate

...For the convict-petitioners

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan, A.A.G

...For the State

Heard on 17.01.2024, 31.01.2024, 07.02.2024

and

28.02.2024

Judgment delivered on 23.04.2024

On an application filed under Section 439 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order dated 09.04.2006 passed by Additional Sessions Judge, Court No. 2, Dhaka in Criminal Appeal No. 6 of 2002 affirming the judgment and order of conviction and sentence dated 9.12.2001 passed by Metropolitan Magistrate, Dhaka arising out of Hajaribag P.S. Case No. 2 dated 2.8.1999, corresponding G.R. No. 3202 of 1999 convicting the petitioners under Section 406 of the Penal Code, 1860 and sentencing them to suffer rigorous imprisonment for 6(six) months should not be set aside and/or to pass such other or further order or orders as to this court may deem fit and proper.

Relevant fact for disposal of the Rule is that the informant Sufia Begum was the wife of late Nazrul Islam who was the owner of two shops situated at Moneshar Lane, Hazaribagh. After the death of Nazrul Islam, the accused persons executed a contract with the informant to run the shops. After that, they partly paid the profit to the informant following the contract. The accused No. 1 is the uncle of the accused No. 2. After a few days, in connivance with each other, the accused persons by selling the goods of the two shops misappropriated the entire money on 05.07.1999 and fled away on 05.07.1999 and

03.07.1999 respectively. They fraudulently and dishonestly misappropriated total Tk. 1,43,480. The informant claimed that she went to the village home of the accused persons but they did not pay the misappropriated money.

Police took up the investigation of the case. During the investigation, the investigating officer visited the place of occurrence, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and after completing the investigation found prima facie truth of the allegation against the accused persons and submitted charge sheet under Sections 420/406 of the Penal Code, 1860 against them. During trial, charge was framed under Sections 420/406 of the Penal Code, 1860 which was read over and explained to them and they pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 04(four) witnesses to prove the charge against the accused persons. After examination of the prosecution witnesses, the accused persons were examined under Section 342 of the Code of Criminal Procedure, 1898 and they declined to adduce any D.W.

After concluding the trial, the trial Court by judgment and order dated 09.12.2001 convicted the accused under Section 406 of the Penal Code, 1860 and sentenced them to suffer rigorous imprisonment for 6(six) months against which the convict-petitioners filed Criminal Appeal No. 06 of 2002 before the Sessions Judge, Dhaka and the appeal was transferred to the Additional Sessions Judge, Court No. 2, Dhaka for disposal. The appellate Court below by impugned judgment and order affirmed the judgment and order of conviction passed by the trial Court against which the convict-petitioners obtained the instant Rule.

P.W. 1 Sufia Begum is the informant. She stated that the accused Shafi Mia fled away from her shop along with money on 02.07.1999 and the accused Mohiuddin fled away on 03.07.1999. Subsequently stated on 05.07.1999. They were the employees of her shops. They used to look after her shops. There was an agreement regarding the payment of profit of Tk. 135 everyday by Shafi Mia. The

accused took Tk. 43,580 in cash. There were two freezers, fans and goods in the shops. She proved the FIR as exhibit 1 and her signature as exhibit 1/2. During cross-examination, she stated that nothing was stated in the FIR as to the date of appointment of the accused persons. The contract was executed on 03.06.1997. During lifetime, her husband appointed the accused persons in his shop as employees. She denied the suggestion that after the death of her husband, she did not pay the salary of the accused persons for ten months for which she compelled them to leave the shops.

P.W. 2 Md. Nurul Islam stated that he could not remember the date of occurrence which took place about 3/4 years back. The informant is her sister. Two shops were situated beside Hazaribagh. There was a contract between the accused Shafi and the informant to pay Tk. 135 every day to the informant. Another accused Mohiuddin was the employee. A shalish took place and subsequently, the accused persons fled away. He denied the suggestion that the accused persons did not flee away along with the money.

P.W. 3 Md. Abdus Satter stated that the occurrence took place on 02.07.1999 at 9.00 pm. The husband of the informant was the owner of the shops and the accused persons used to run the shops. They fled away without paying the rent. There was total debt of Tk. 99,900 to Mohiuddin and Tk. 43,580 to Shafi Mia. After shalish they fled away. The accused persons were the employees of the shops. They used to pay the rent. He denied the suggestion that after the death of the husband of the informant, no salary was paid to the accused persons.

P.W. 4 S.I Sirajul Islam Molla is the Investigating Officer. He visited the place of occurrence and prepared the sketch map and index. He proved the sketch map as exhibit 2 and index as exhibit 3. He recorded the statement of witnesses and seized the contract. He proved the seizure list as exhibit 4 and his signature as 4/1. During the investigation, he found the prima facie truth of the allegation against the accused persons and submitted charge sheet against them. During cross-examination, he stated that on 10.09.1999 he recorded the statement of witnesses Satter and Selim and recorded the statement of

Nurul Islam on 24.09.1999. The adjacent shops were closed for which he could not record the statement of the owner of those shops. On 10.09.1999 he seized the documents. He denied the suggestion that he did not visit the place of occurrence.

Learned Advocate Mr. Dewan Abdun Naser appearing on behalf of the convict-petitioners submits that they were employees of the husband of the informant and after the death of her husband their salary was not paid by P.W. 1 informant Sufia Begum and under compelling circumstances, they left the shop due to non-payment of the salary by P.W. 1. He further submits that admittedly there was a contract between the informant and the accused persons. Therefore it is a pure and simple civil dispute between the parties and no offence under Section 406 of the Penal Code, 1860 was committed by the accused-persons. Therefore, he prayed to make the Rule absolute.

Learned Deputy Attorney General Mr. S.M. Golam Mostofa Tara appearing on behalf of the State submits that there is a fiduciary relation between the accused persons and the informant and they committed breach of trust. The informant handed over two shops after the death of her husband to the accused and they sold all the goods of the shops and misappropriated the money and fled away from the shops. Therefore, they committed an offence under Section 406 of the Penal Code, 1860.

I have considered the submission of the learned Advocates of both parties, perused the evidence, impugned judgments and orders passed by the Courts below and the records.

The learned Advocate Mr. Dewan Abdun Naser filed an application for abatement of the Rule so far relates to convict-petitioner Shafi Mia and annexed a death certificate issued by the Registrar, No. 7 Gangutia Union Parishad, Dhamrai, Dhaka stating that during the pendency of the Rule, the accused Shafi Mia died on 24.02.2024. Therefore, in view of the provision of Section 431 of the Code of Criminal Procedure, 1898, the Rule so far it relates to convict-petitioner Shafi Mia is abated.

On perusal of the records, it appears that the accused persons were the employees of the shops owned by the husband of the informant P.W. 1 and after the death of the husband of P.W. 1, they were appointed by P.W. 1. Admittedly there is a contract between the accused-persons and the informant P.W. 1. The dispute has arisen out of the agreement executed between P.W. 1 and the convict-petitioners to run the business. Therefore, it is a pure and simple civil dispute between P.W. 1 and the convict petitioners. Both the Courts below failed to consider that the dispute between the convict-petitioners and P.W. 1 is civil in nature and no criminal offence was committed.

Because of the above facts and circumstances of the case, evidence, findings and proposition, I am of the view that no offence under Section 406 of the Penal Code, 1860 is committed by the convict-petitioner Mohiuddin. However, the informant P.W. 1 is at liberty to file a money suit before the civil Court for realization of the money, if so advised.

In the result, the Rule so far relates to Shafi Mia is abated and the Rule so far relates to Mohiuddin is made absolute.

The impugned judgments and orders of conviction and sentence passed by the Courts below against convict-petitioner Mohiuddin are hereby set aside.

Send down the lower Court's records at once.