

Present:
Mr. Justice Md. Emdadul Huq
And
Mr. Justice Mohammad Ullah.

Criminal Miscellaneous Case No. 15405 of 2007

Md. Abul Kalam Azad and another.

..Accused- Petitioners.

-Vs-

The state

.....Opposite Parties.

Mr. Fazla Rabbi, Advocate.

.....For the Petitioner

Mr. Shafiul Bashar Bhandary.

....For the Opposite Party No.1 State.

Mr. A. K. M. Fazlul Huq, Advocate.

....For the Opposite Party No.2

Anti-Corruption Commission

Hearing on.10.04.12, 08.07.12 and 16.07.12

And

Judgment on 03.09.2012

Mohammad Ullah,J.

Upon an application under section 561A of the Code of Criminal Procedure (**shortly the Code,1898**) a Rule was issued upon the opposite parties to show cause as to why the proceedings of Special Case No. 13 of 2007 pending in the court of Special Judge, 2nd Court, Dhaka should not be quashed.

By the Rule issuing order dated 2.11.2007 further proceedings of the said case was also stayed.

The facts relevant for disposal of the Rule are briefly stated below:

On 18.4.2007 the informant Md. Shafiul Alam, Sub Inspector of Police, attached to RAB-3, Tikatuly, Dhaka lodged First Information Report (**shortly the FIR**) with the Shahabag Police Station against the accused petitioners narrating the offences punishable under sections 161 and 165A of the Penal Code read with section 5 (2) of the Prevention of Corruption Act, 1947 (**shortly the Act, II of 1947**). He stated that he had received information that the officers and staff of the Education Directorate at ċnrjihe (**shortly Directorate Building**) had been habitually taking bribe from the teachers of various educational institutions of the country. So the informant and his companion police force headed by Additional Superintendent of Police Saha Mizan Safiur Rahman went to the Directorate Building on 17.4.2007 at about 3 p.m. after obtaining permission of the superior authority of the RAB-3. The team members started watching people at the Building.

At one stage of such watching the team found that the accused petitioner No. 1 Md. Abul Kalam Azad, being the Head Assistant, Non-Government Secondary School Section of the Education Directorate, took a khaki colour envelope from a person and kept the same in the drawer of his table. On query, the informant learnt that the said person being Nitish Kumar Pramanik was a school teacher, that under compelling circumstances he delivered that envelope containing Tk. 6,000/- to the accused petitioner No. 1 as bribe for obtaining salary as a M.P.O listed teacher. Upon interrogation, the accused Abul Kalam Azad handed over the said envelope with Tk.

6,000/- to the informant. The informant also recovered Tk. 5,012/- from underneath the table of accused petitioner No.1.

Then the informant on suspicion searched into the file cabinet and the drawer of the accused petitioner No. 2 Md. Amirul Islam being an office assistant of the Directorate and recovered Tk. 18,000/- therefrom. The informant seized all the moneys by preparing seizure lists in presence of witnesses.

Thus the accused persons being government employees committed offences under sections 161 and 165(A) of the Penal Code read with section 5(2) of the Act, II of 1947.

Shahabag Police Station Case No. 35 dated 18.4.2007 was recorded under those sections. The Anti-Corruption Commission (**shortly the ACC**) took up the matter, and an Assistant Director of the ACC was entrusted with the investigation of the case. After Investigation charge sheet dated 07.10.2007 was submitted against the accused petitioners under the said sections after obtaining necessary sanction for prosecution from the ACC.

The learned Metropolitan Senior Special Judge, Dhaka took cognizance of the offences against the accused petitioners under those sections. Eventually the case record was transferred to the learned Special Judge Court No.2, Dhaka for trial and he framed charge on 4.11.2007 against the accused petitioners under sections 161 and 165 of the Penal Code read with section 5(2) of the Act, II of 1947.

Thereafter the accused petitioners approached this Court and rule was issued and stay order was passed as stated above.

Mr. Fazla Rabbi, the learned Advocate appearing for the accused petitioners, at the very outset submits that the mandatory provision of Rule 16 of the দুর্নীতি দমন বিধিমালা, 2007 (**shortly the Bidhimala, 2007**) for laying trap was not observed and therefore the allegations do not legally constitute any offence and continuation of the proceeding would be an abuse of the process of the court.

Mr. Rabbi, the learned Advocate, next submits that if the allegations made in the FIR are taken in its entirety as true, do not disclose any offences against the petitioners under sections 161 and 165 of the Penal Code and section 5(2) of the Act, II of 1947 as they had no role to sanction or release the M.P.O fund in favour of the teachers.

Mr. Rabbi, the learned advocate, lastly submits that no officer below the rank of Deputy Director of the ACC can investigate the alleged offences and the instant case was investigated by an unauthorized person being Assistant Director of the ACC and therefore the proceeding would be an abuse of the process of the court.

In support of his submission, Mr. Rabbi the learned Advocate refers to an unreported judgment delivered by another Division Bench of this Court in the case of Md. Shafiqul Islam vs. State and another in Criminal Miscellaneous Case No. 11259 of 2009.

In reply Mr. A.K.M. Fazlul Huq, the learned Advocate appearing for the ACC, submits that the present case is not a trap case and therefore the requirement of rule 16 of the Bidhimala, 2007 is not applicable.

Mr. Huq, the learned Advocate next submits that no provision of the দুর্নীতি দমন কমিশন আইন, 2004 (**shortly the Ain,2004**) and the Bidhimala, 2007 prohibit the detection of the offences of physical bribe taking and the instant arrest of the bribe taker by a competent law enforcing agency member.

Mr. Huq, next submits that a member of the law enforcing agency specified in the জরুরী ক্ষমতা বিধিমালা, 2007 including RAB was authorized to arrest any person even before lodging the FIR if any cognizable offences is found to be committed in his presence as in the present case.

Mr. Huq, the learned Advocate, lastly submits that under section 20 of the Ain, 2004 the ACC may authorize any of its subordinate officers to investigate the offence under the Ain, 2004 and also the offences specified in the Schedule thereof and this authorization has been clearly stated in the charge sheet with reference to the sanction letter.

In support of his submission Mr. Huq refers to the cases of (1) Md. Shahabuddin Vs. the State reported in BCR 1990 (AD), 355 and (2) Bayojit (Md.) Vs. the State reported in 61 DLR, 772.

We have considered the submissions of the learned Advocates for both sides and the materials on record and also the grounds taken by the petitioners in their application under section 561A of the Code, 1898. We have also gone through the decisions referred to by the learned Advocates.

It appears from the FIR and the charge sheet that the informant and his companion force had gone to the office of the accused petitioners and the informant had seen the fact of delivery of the bribe money by a school teacher named Nitish Kumar to accused petitioner No.1, and then the informant in presence of the witnesses recovered the said money. The informant also recovered Tk. 5012/-from beneath the table of the accused petitioner No.1.

The accused petitioner No.1 is admittedly a public servant and there are specific allegations of taking bribe by him while he was on duty as a public servant and such allegations were found to be established in investigation. So the allegations against him constitute at least the offences under section 161 of the Penal Code read with section 5 of the Prevention of Corruption Act, 1947.

It is noted that detection of the offences of the physical act of accepting or taking bribe may take place by various means and that laying a trap is just one of those means of detection. There is no provision in the Ain, 2004 or any other law that prohibits a competent law enforcing agency to detect the physical act of taking bribe by public servant.

However the credibility of the evidence relating to detection of the physical act of taking bribe compared to laying a trap is altogether a different aspect and subject to scrutiny in a trial .

With regard to the requirement of Rule 16 of the ACC Bidhimala, 2007, we hold that the said rule is applicable only in a case when an officer of the ACC lays a trap for catching hold of a bribe taker red handed. But this provision does not oust the jurisdiction of other competent law enforcing agencies to detect physical act of taking bribe.

The alleged offences are cognizable and triable by the Special Judge in view of the provision of section 4 and 5 of the Criminal Law Amendment Act, 1958. But whether the accused petitioner No. 1 had committed any offences or not is, of course, subject to proof by evidence.

The defense plea to the effect that the accused petitioner is a petty clerk or had no role to put up the file for sanctioning or releasing the M.P.O. fund cannot be considered in a case under section 561A.

We have gone through the judgment dated 11-11-2010 passed by another Division Bench of this Court in the unreported case of Shaiful Islam vs. the State and another (Criminal Miscellaneous Case No.11259 of 2009). The facts of that case are different to those of the present case and the reasonings recorded therein are not applicable to the present case.

We agree with the submission of the learned Advocate for the ACC to the effect that during the emergency period, the Emergency Rules, 2007 framed under the Emergency Ordinance, 2007 was in force and a member of the disciplined forces mentioned therein including RAB was authorized to arrest any person even before lodging the FIR if he found that a public servant was taking bribe. Because the offences under section 161 of the Penal Code and section 5 of the Act II of 1947 are cognizable offences as per section 28 (1) of the Ain, 2004. Again according to Rule 15 read with Rule 2(ka) of the SI, 2007 a member of the RAB was legally authorized to detect the offences in question and to lodge FIR. Rule 2(ka) and 15 are quoted below.

২। সংজ্ঞা-বিষয় বা প্রসংগের পরিপন্থী কিছু না থাকিলে, এই বিধিমালায়-

(ক) আইন-শৃংখলা রক্ষাকারী বাহিনী অর্থ পুলিশ বাহিনী, আর্মড পুলিশ ব্যাটালিয়ান, র‍্যাপিড এ্যাকশন ব্যাটালিয়ান, আনসার বাহিনী, ব্যাটালিয়ান আনসার, বাংলাদেশ রাইফেলস, কোস্ট গার্ড বাহিনী, জাতীয় নিরাপত্তা গোয়েন্দা ও প্রতিরক্ষা গোয়েন্দা সংস্থার সদস্যগণ এবং বাংলাদেশ সশস্ত্র বাহিনী;

১৫। দুর্নীতি অপরাধ সম্পর্কিত বিধান।- জরুরী-অবস্থা ঘোষণার কার্যকরতাকালে রাষ্ট্র ও জনগণের অর্থনৈতিক জীবন, স্বার্থ ও নিরাপত্তা বিপন্নকারী দুর্নীতি (২০০৪ সনের ৫ নং আইন) [মানিলডারিং প্রতিরোধ আইন, ২০০২ (২০০২ সনের ৭ নং আইন) এবং income tax Ordinance, 1984 (Ord. No. XXXVI of 1984) এর অধীন আয়কর,] দুর্নীতি ও মানিলডারিং সম্পর্কিত অপরাধসমূহ কার্যকরভাবে দমন করিবার জন্য আইন-শৃংখলা রক্ষাকারী বাহিনীসমূহ [বা কমিশন কর্মকর্তা উক্ত অপরাধ উদঘাটন বা অনুসন্ধান] [অভিযোগ বা মামলা দায়েরা] এবং অপরাধের সহিত সংশ্লিষ্ট অপরাধীগণকে, প্রয়োজনে গ্রেপ্তার করিয়া, তদন্ত ও বিচারার্থে যথাযথ আইনানুগ কর্তৃপক্ষের নিকট সমর্পণ করিবার লক্ষ্যে উপযুক্ত ব্যবস্থা গ্রহণ করিবে। underline added.

We do not find any substance in the submission of the learned advocate for the petitioner to the effect that the instant case was a trap case and that approval under Rule 16(1) of the ACC Rules, 2007 was required to recover the alleged bribe money at the given stage.

But no doubt taking of such approval under Rule 16 (1) of the ACC Rules, 2007 is mandatory in respect of a trap case, if any, to be led by the ACC in the cases of investigation conducted by ACC. Because this is the clear intention of the law maker, to prevent any abuse of this power.

The learned Advocate for the petitioners also raised a question about investigation of the offences by an officer not below the rank of Deputy Director of the ACC. In this respect section 20 of the ACC Act, 2004 is required to be looked into which reads as follows:-

২০। তদন্তের ক্ষমতা-(১) ফৌজদারী কার্যবিধিতে যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র কমিশন কর্তৃক তদন্তযোগ্য হইবে।

(২) উপ-ধারা (১) এ উল্লিখিত অপরাধসমূহ তদন্তের জন্য কমিশন, সরকারী গেজেটে প্রজ্ঞাপন দ্বারা, উহার অধঃস্তন কোন কর্মকর্তাকে ক্ষমতা প্রদান করিতে পারিবে।

(৩) উপ-ধারা (২) এর অধীন ক্ষমতাপ্রাপ্ত কর্মকর্তার, অপরাধ তদন্তের বিষয়ে, থানার ভারপ্রাপ্ত একজন কর্মকর্তার ক্ষমতা থাকিবে।

(৪) উপ-ধারা (২) ও (৩) এর বিধান সত্ত্বেও, কমিশনারগণের ও এই আইনের অধীন অপরাধ তদন্তের ক্ষমতা থাকিবে।

So Section 20 of the Ain, 2004 clearly envisages that the ACC may empower/authorize any of its officers to investigate of the offences under the Ain and the offences mentioned in its schedule.

Therefore we do not find any substance in the submission of the learned Advocate for the petitioner about unauthorized investigation of the offences by an Assistant Director of the ACC.

We do not find any reason to interfere with the case under section 561A of the Code, so far the case relates to accused petitioner No.1 Abul Kalam Azad.

Next comes the question of the accused petitioner No.2. Allegation against him is that the informant recovered Tk. 15,000+3,000=18,000/- from his file cabinet and the drawer of table on the same day on 17.4.2007.

The Investigating Officer has stated that the accused petitioner No.2 had taken Tk. 15,000/- on 8.4.2007 for the purpose of granting M.P.O fund to one Jahidul Islam, a school teacher as bribe and kept the same in his office file cabinet till recovery on 17.4.2007.

There is nothing on record to show that the said Jahidul Islam was examined or cited as a witness of the instant case. The prosecution story so far it relates to the petitioner No. 2 appears to be a preposterous one.

Considering the facts and circumstances as discussed above we are of the view that there is no legal materials on record on the basis of which charge could be framed against the petitioner No.2, Md. Amirul Islam. We do not find any material that justifies a charge against the petitioner No. 2 Md. Amirul Islam.

In view of the above, the Rule is to be made absolute in part.

In the result, the Rule is made absolute-in-part so far it relates to the accused petitioner No.2 Md. Amirul Islam, and the Rule is discharged in respect of accused petitioner No.1 Md. Abul Kalam Azad.

The charge framing order dated 04.11.2007 passed by the learned Special Judge, 2nd Court, Dhaka, in Special Case No. 13 of

2007 is partly set aside so far it relates to petitioner No.2 Md. Amirul Islam and as a result he is discharged from the liability of that case.

The stay order stands vacated.

Bail granted to the petitioner No. 1 Md. Abul Kalam Azad by this Court will continue, if there is no misuse of the privilege of bail.

Send a copy of this judgment to the learned Special Judge court No.2, Dhaka who shall take steps to proceed with and to dispose of the case as against the accused petitioner No.1 Md. Abul Kalam Azad in accordance with law.

Md. Emdadul Huq, J.

I agree.