

9 SCOB [2017] HCD 173**HIGH COURT DIVISION
(Criminal Revisional Jurisdiction)**

Criminal Revision No.259 of 2013

**Zobeda Khatoon & another
Vs.
State & another**Mr. Shamsuddin Babul with
Mr. Kanai Lal Saha, Advocates
...for the petitionersMr. Mohammad Sazzad Hossain,
Advocate
...for Opposite Party No.2Heard on: 02.09.2015, 13.09.2015
Judgment on: 15.11.2015**Present:****Mr. Justice Md. Ruhul Quddus
And
Mr. Justice Bhishmadev Chakraborty****Criminal Law Amendment Act, 1958****Section 6****And****Code of Criminal Procedure, 1898****Section 222:**

It also appears from the FIR that the alleged occurrence took place in between January 2004 to November 2006. The lodging of the FIR and framing of charge covering the whole period is permissible under the provisions of law of sections 6 (IB) of the Criminal Law Amendment Act, 1958. A single case can be filed and trial may be proceeded by framing charge for more offences, which has been done in the present case. The provisions of section 222(2) of the Code is no manner of application in this case. ... (Para 12)

Framing of Charge:

Where the allegation has been brought against the petitioners that they made the payment okay on some cheques by which the money was misappropriated, the cheques were essential alamots to prosecute the petitioners. In the absence of those, on which the petitioners were indicted with allegations that the payment was made in violation of the constitution of the Samity and also that they abetted the offence, the prosecution will not succeed in any manner. Moreover, we find that in the absence of seizing of those cheques as alamots, there was no sufficient materials before the Court to frame charge against the petitioners under the aforesaid sections. Moreover, the written statement of principal accused Nos.1 and 2 dated 14.12.2006 and 28.11.2007 before the departmental inquiry committee shows that they did not utter a single word implicating the petitioners.

In the aforesaid facts and circumstances, we find that the Special Judge framed charge against the petitioners under the aforesaid sections in violation of the settled principle of

law of framing charge. The Divisional Special Judge, Rajshahi framed charged against the petitioners, in the absence of sufficient materials against them before it.

... (Para 14 & 15)

Judgment

Bhishmadev Chakraborty, J:

1. This Rule, at the instance of 2(two) accused in a criminal case, has been issued under section 439 of the Code of Criminal Procedure calling upon the opposite parties to show cause as to why the impugned order dated 03.02.2013, so far it relates to the petitioners, passed by the Divisional Special Judge, Rajshahi, in Special Case No.25 of 2011 arising out of Boalia Model Police Station Case No.28 dated 18.11.2008 corresponding to M.G.R. No.1030 of 2008, framing charge under sections 409/477 and 109 of the Penal Code read with section 5(2) of Act II of 1947, should not be set aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

2. At the time of issuance of the Rule further proceedings of the aforesaid Special Case, so far it was related to the petitioners, was stayed for a period of 6(six) months, which was extended from time to time. Lastly it was extended on 15.03.2015 for a further period of 1(one) year from the date of expiry which still subsists.

3. Briefly the facts, necessary for disposal of the Rule, are that A.Q.M. Mofakkharul Islam, Inspector, Railway on 18.11.2008 lodged an FIR making G.M. Iman Ali and M.K. Roy of Railway Nirapatta Bahini Kallyan Samity, West Zone, Rajshahi (in brief the Samity) as accused bringing allegation of misappropriation of Taka 12,75,538/- from the account of the Samity lying with the Bank. On the aforesaid allegation Boalia Police Station Case No.28 dated 18.11.2008 under sections 409/447A/109 of the Penal Code was started.

4. An Assistant Director of Anti-Corruption Commission, District Office, Rajshahi (briefly the A.C.C. Rajshahi) investigated into the allegation and submitted charge sheet against 6(six) accused including the petitioners under sections 409/477A/109 of the Penal Code read with section 5(2) of Act II of 1947. In the said charge sheet the petitioners have been shown as accused Nos. 5 and 6 respectively who were the Bank officials where the account of the Samity was lying. In the said charge sheet allegation brought against the petitioners are that petitioner No.1 being the manager of the said branch disbursed money amounting to Taka 4,11,000/- vide some cheques in the signature of one Monsur Rahman who was not the director of the said Samity and also of paying taka on four other cheques only on single signature of G.M. Iman Ali, which was not permitted by the constitution of the Samity. In the similar way petitioner No.2 during the period of 28.04.2005 to 27.06.2006 as bank official disbursed Taka 4,19,000/- by twelve cheques to the above persons and thus both of them abetted the offence of misappropriation done by G.M. Iman Ali and M.K. Roy.

5. In course of time the record of the case was transmitted to the Senior Special Judge, Rajshahi and numbered as Special Case 25 of 2011 (Raj). The Special Judge took cognizance of the offence against all the accused including the petitioners under the selfsame sections. Eventually the case was transferred to the Divisional Special Judge, Rajshahi for trial.

6. The petitioners appeared and obtained bail therefrom. Later on they filed an application under section 241A of the Code for their discharge, which was rejected on 08.11.2012.

Subsequently the learned Special Judge by the impugned order dated 03.02.2013 framed charge against the petitioners and others under sections 409/477A/109 of the Penal Code read with section 5(2) of Act II of 1947 which prompted the petitioners to file the instant revision before this Court.

7. Mr. Shamsuddin Babul, learned Advocate for the petitioners submits that according to the statement of the FIR the said Samity is a non-government and unregistered one. Accused G.M. Iman Ali and Mr. M.K. Roy, the then member secretary and director of the Samity respectively, had misappropriated the money in their personal capacity, and as such the allegation as made in the FIR do not come within the purview of section 409 of the Penal Code. At best the same may be an offence under section 406 of the Penal Code which is not a scheduled offence of the A.C.C. Act. The lodgment of the FIR referring the case to the A.C.C. for investigation and the investigation done by the Commission are all without jurisdiction, and as such charge against the petitioners under the aforesaid sections cannot be sustained in law. The informant had no authority to file the case to any Criminal Court according to the provisions of section 86 of the Samabaya Samity Ain, 2001. Mr. Babul further submits that the allegations brought against the petitioners do not disclose any offence under sections 409/477A/109 of the Penal Code read with section 5(2) of Act II of 1947, and as such the continuation of the proceeding is also illegal. The Samity being a non-government and unregistered and as the office bearers of the said Samity misappropriated the amount in their personal capacity, the initiation of the case under section 409 of the Penal Code is misconceived. The offence as alleged under the schedule of the A.C.C. Act is not tenable and the continuation of the proceeding being illegal, the very order of framing charge against the petitioners is liable to be set aside. The petitioners made payment in discharging their official duties and the allegation so brought against them do not disclose any offence. Mr. Babul further submits that in an internal audit of the Bank the petitioners were found innocent. The said report shows that the members of the Samity had misappropriated the money and as such the charge sheet implicating these petitioners is a perfunctory one. He also submits that specimen signatures of the newly elected committee to operate the account was sent to the Bank and accordingly, the petitioners paid the money on the cheques duly signed by them. The alleged misappropriation was done in between January 2004 to November 2006 covering a period of three years, but charge has been framed for the whole period of three years in violation of the mandatory provisions of law of section 222(2) of the Code which is not curable.

8. Mr. Babul finally submits that it is evident from the body of the charge sheet that the Investigating Officer seized some documents, 13 (thirteen) in numbers, but the cheques by which the misappropriation was alleged to have been done, were not seized and no separate seizure list has been prepared. Even if the allegation made in the FIR, charge sheet and other materials are taken into consideration in their entirety, the prosecution will not succeed in proving case against the petitioners in the absence of those cheques as prosecution materials, and as such the continuation of the proceeding will be nothing but wastage of time and harassment.

9. Mr. Mohammad Sazzad Hossain, learned Advocate appearing on behalf of opposite party No.2, the A.C.C., submits that the learned Special Judge considering the contents of the FIR, charge sheet and other materials lying with the record, found strong *prima-facie* case against the petitioners and those being sufficient materials, rightly framed charge against them under the aforesaid sections. The question raised by the learned Advocate for the

petitioners may be decided at the trial by taking evidence of the witnesses, and as such the Rule is liable to be discharged.

10. We have heard the learned Advocates on behalf of the respective parties, perused the application, supplementary affidavit filed today, documents appended with the application and consulted with the relevant provisions of law.

11. It appears from the record that these petitioners were not named in the FIR. Only G.M. Iman Ali and M.K. Roy were made accused on the allegation that they being officials of the Samity had misappropriated the fund from the bank, but no allegation whatsoever was brought against the present petitioners in the FIR. It has been mentioned in the FIR that the Samity in question is a 'বেসরকারী সমিতি'. We are unable to ascertain whether the term as above means an unregistered Samity. The informant being Assistant Director of the Samity had every authority to file the present case under the aforesaid sections in criminal Court on the allegation of misappropriation of fund of the Samity. If the contention of learned counsel for the petitioners is taken into consideration that the Samity is an unregistered one, in that event the petitioner cannot take resort of any provision of law of Samabaya Samity Ain, 2001. Moreover, section 86 of the Ain, 2001 does not debar an aggrieved person to take shelter in criminal Courts, instead of lodging complaint to the Samabaya Samity authority. So, the submission made by the learned counsel for the petitioners to the effect that the informant was not authorised to file the case, bears no substance.

12. It also appears from the FIR that the alleged occurrence took place in between January 2004 to November 2006. The lodging of the FIR and framing of charge covering the whole period is permissible under the provisions of law of sections 6 (IB) of the Criminal Law Amendment Act, 1958. A single case can be filed and trial may be proceeded by framing charge for more offences, which has been done in the present case. The provisions of section 222(2) of the Code is no manner of application in this case. In the case of **State –vs- Ibrahim Ali, 66 DLR (AD) 33**, it has been held: *“Any number of offences punishable under the Criminal Law Amendment Act irrespective of the period over which the offence was committed, may be tried at one trial. All the offences committed over any length of period of time could be tried in one trial upon framing one charge.”*

13. But it appears from the record that the allegation made against the petitioners of making payment to accused Nos.1 and 2 on some cheques in violation of the constitution of the Samity. They paid money on the cheques on some of those the drawer put a single signature and on some of the cheques on signature of a person who was not authorized by the constitution of the Samity to sign in and withdraw the money. The allegation against the petitioners made in the charge sheet are that they disbursed money on those cheques and abetted the offence of misappropriation done by accused Nos. 1 and 2. It appears from the charge sheet that during investigation the Investigating Officer seized some documents, 13 (thirteen) in numbers, as alamots. On perusal of the list it is found that the alleged cheques were not at all seized. By the supplementary-affidavit the petitioners annexed an information slip of the instant case which transpires that no separate seizure list has been prepared.

14. In such a case, where the allegation has been brought against the petitioners that they made the payment okay on some cheques by which the money was misappropriated, the cheques were essential *alamots* to prosecute the petitioners. In the absence of those, on which the petitioners were indicted with allegations that the payment was made in violation of the constitution of the Samity and also that they abetted the offence, the prosecution will not succeed in any manner. Moreover, we find that in the absence of seizing of those cheques as

alamots, there was no sufficient materials before the Court to frame charge against the petitioners under the aforesaid sections. Moreover, the written statement of principal accused Nos.1 and 2 dated 14.12.2006 and 28.11.2007 before the departmental inquiry committee shows that they did not utter a single word implicating the petitioners.

15. In the aforesaid facts and circumstances, we find that the Special Judge framed charge against the petitioners under the aforesaid sections in violation of the settled principle of law of framing charge. The Divisional Special Judge, Rajshahi framed charged against the petitioners, in the absence of sufficient materials against them before it.

16. In view of the above, we find substance in the final argument made by the learned Advocate for the petitioners.

17. We find merit in this Rule and consequently, the Rule is made absolute.

18. The impugned order dated 03.02.2013 passed by the Divisional Special Judge, Rajshahi in Special Case No.25 of 2011 arising out of Boalia Model Police Station Case No.28 dated 18.11.2008 corresponding to M.G.R. No.1030 of 2008 framing charge under sections 409/477/109 of the Penal Code read with sections 5(2) of Act II of 1947, so far it relates to the accused-petitioners, is hereby set aside. The accused petitioners are hereby discharged from the aforesaid case. They are also discharged from their bail bonds.

19. The order of stay granted earlier stands vacated.

20. Communicate the judgment at once.