

**Present**  
**Mr. Justice Sheikh Abdul Awal**  
**Criminal Revision No. 1699 of 2016**

Gouranga Poddar

.....Convict-Petitioner.

-Versus-

The State and another.

.....Opposite party.

Mr. A.K.M. Jahangir Alam, Advocate

.....For the Petitioner.

Ms. Shahida Khatoon, D.A.G with

Ms. Sabina Perven, A.A.G with

Ms. Kohenoor Akter, A.A.G.

.... For the State-Opposite party No.1.

**Heard on 09.05.2024 and**

**Judgment on 12.05.2024**

**Sheikh Abdul Awal, J:**

This Rule was issued calling upon the opposite parties to show cause as to why the impugned judgment and order dated 14.09.2015 passed by the learned Sessions Judge, Khulna in Criminal Appeal No. 37 of 2015 allowing the appeal and convicting the petitioner under section 420 of the Penal Code and sentencing him thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 5,000/- (five

thousand) in default to suffer rigorous imprisonment for a period of 3 (three) months more after setting-aside the judgment and order of acquittal dated 04.12.2014 passed by the learned Senior Judicial Magistrate, Khulna in C.R Case No. 94 of 2011 (Rupsha) acquitting the accused petitioner from the charge under section 420 of the Penal Code should not be set-aside and/or such other or further order or orders passed as to this Court may seem fit and proper.

Material facts relevant for disposal of the Rule, briefly, are that one, Md. Abdul Gafur Sana as complainant filed a petition of complainant being C.R Case No. 94 of 2011 (Rupsha) in the Court of the learned Senior Judicial Magistrate, Khulna under section 406/420 of the Penal Code against the convict petitioner alleging, inter-alia, that out of good business relationship accused petitioner took Taka 2,00,000/- as loan on 15.08.2009 in cash on condition that he will adjust the loan money by supplying shrimp fish in favour of business farm named M/S Raju Fish Treaders owned by the complainant but the accused did not adjust the loan amount by supplying shrimp fish and in this way the accused misappropriated Taka 2,00,000/- and thereafter the complainant on 04.01.2010 sent a legal notice to accused asking him to pay the loan amount but the

accused did not pay any hit to it and thereafter on 30.07.2010 the complainant asked to pay the loan amount but the accused denied to pay the same and thereafter on 31.07.2010 at 11 a.m. the complainant disclosed the matter to Officer-in-charge of Rupsha Police station while he asked the complainant to file case in Court and hence, the case.

On receipt of the petition of complaint, the learned Magistrate examined the complainant under section 200 cr. p. c. and took cognizance against the accused-petitioner under section 420 of the Penal Code fixing next date on 11.07.2011.

Thereafter, the accused surrendered before the court and obtained bail on 19.07.2011. In this backdrop the learned Chief Judicial Magistrate also pleased to send the case for trial before the learned Senior Judicial Magistrate, 3<sup>rd</sup> Court, Khulna in which the accused petitioner was put on trial to answer a charge under sections 420 of the Penal Code, 1881 to which the accused petitioner pleaded not guilty and prayed to be tried stating that he has been falsely implicated in the case.

At the trial, the prosecution side examined in all 4(four) witnesses and exhibited some documents to prove the case, while the defence examined none. The

defence case, from the trend of cross-examination of the prosecution witnesses and examination of the accused-petitioner under section 342 of the Code of Criminal Procedure appeared to be that the accused-petitioner was innocent and he has been falsely implicated in the case.

On conclusion of trial the learned Senior Judicial Magistrate, Khulna by his judgment and order dated 04.12.2014 found the accused not guilty and thereby acquitted the accused-petitioner from the charge levelled against him.

Aggrieved complainant then preferred Criminal Appeal No. 37 of 2015 before the learned Sessions Judge, Khulna, who after hearing the matter by his judgment and order dated 14.09.2015 found the accused-petitioner guilty under section 420 of the Penal Code, 1860 and thereupon, sentenced him thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for a period of 3 (three) months more after setting-aside the judgment and order of acquittal 04.12.2014 passed by the learned Senior Judicial Magistrate.

Being aggrieved by the aforesaid impugned judgment and order of conviction dated 14.09.2015

passed by the learned Sessions Judge, Khulna the convict petitioner moved before this Court and obtained the present Rule.

Mr. A.K.M. Jahangir Alam, the learned Advocate appearing for the convict-petitioner submits that the learned Sessions Judge without applying his judicial mind into the facts and circumstances of the case and law bearing on the subject most illegally set-aside the well founded judgment and order of acquittal passed by the learned Senior Judicial Magistrate. He further submits that the allegations as attributed in the petition of complaint are absolutely a civil claim which cannot be the basis of a criminal case and in this case there is no specific promise for payment by specific date and as such, the trial Court justly passed the order of acquittal although the learned Sessions Judge mechanically found the accused-petitioner guilty under section 420 of the penal Code and the same is liable to be set-aside. He further submits that the petition of complaint itself manifests that what happened between the parties was in due course of normal and regular business transaction for which no criminal action lies. At best the complainant may go for civil action against the accused-petitioner. Finally, the learned Advocate submits that the allegations as attributed in the petition of complaint even

if they are taken as a whole and accepted its face value, do not constitute the offence under section 420 of the Penal Code. The learned Advocate to fortify his argument has relied on the decision reported in 10 BLD (AD) 168.

Ms. Shahida Khatoon, the learned Deputy Attorney-General appearing for the State-opposite party, on the other hand, simply support the impugned judgment, which was according to her just, correct and proper.

Having heard the learned Advocate and the learned Deputy Attorney General for the parties, perused the criminal revisional application under section 439 read with section 435 of the Code of Criminal Procedure, petition of complaint, deposition of witnesses and other materials on record including the judgments of 2 Courts below, now the only question that calls for my consideration in this Rule is whether the Court of appeal below committed any error in finding the accused petitioner guilty of the offence under section 420 of the Penal Code.

On scrutiny of the record, it appears that the complainant filed the petition of complaint against the convict petitioner under sections 406/420 of the Penal Code stating, inter-alia, that out of good business

relationship accused took Taka 2,00,000/- as loan on 15.08.2009 in cash on condition that he will adjust the loan money by supplying shrimp fish to complainant's business farm named M/S Raju Fish Treaders but the complainant did not adjust the loan amount in time and in this way the accused misappropriated Taka 2,00,000/- and thereafter the complainant on 04.01.2010 sent legal notice to accused asking him to pay the loan amount but the accused did not pay any hit to it. It further appears that at the trial the prosecution side examined in all 4 witnesses out of which PW-1, complainant of the case stated that he had good business relationship with the accused. The accused took Taka 2,00,000/- with promise to adjust the same by supplying fish but he did not supply the same and finally, on 30.07.2010 he refused to pay money and thereafter the complainant served legal notice on 04.01.2010 but the accused did not come forward to adjust the loan money. This witness proved the petition of complaint as "Ext.-1" and his signature thereon as "Ext.-1/1". This witness in her cross-examination stated that- ".১৫/০৮/০৯ তারিখের অরেজিকৃত অঙ্গীকার নামায় আমার সাক্ষর নাই। আমার কথা মতো আরজী লেখা হয়েছে।" This witness denied the suggestion of the defence in the following language- "আমার প্রতিষ্ঠানের মালিক রাজু ফিস ট্রেডার্স কর্তৃক পূর্বের মামলা দায়ের স্বত্ত্বেও একই বিষয় নিয়ে বর্তমান মামলা

কল্পনা প্রসূত == সাক্ষী বলেন উভয় কথা সত্য নহে।” PW-2, Md. Sayeed Molla stated in his deposition that- “আমি মামলার বাদী ও আসামীকে চিনি। আসামী গৌরাঙ্গ রাজু ফিস ট্রেডার্সের থেকে ২ লক্ষ টাকা চুক্তি সই করে ১৫/০৮/০৯ তারিখে নেয় ৩ মাসের মধ্য মাছ দেওয়ার শর্তে। আসামী চুক্তির শর্ত মোতাবেক মাছ দেয় নাই।” PW-3, Bijon Bihari Mondal and PW-4, Laxman Chandra Sarkder, both of them corroborated the evidence of PW-2 in respect of all material particulars.

It is found that the learned Senior Judicial Magistrate on due consideration of the entire evidence and materials of record by his judgment and order dated 04.12.2014 acquitted the accused-petitioner from the charge on the finding that there is no specific promise for payment by any specific date or time.

The learned Sessions Judge in its turn allowed the appeal and set-aside the judgment and order of acquittal of the trial Court dated 04.12.2014 on the ground that the complainant has been succeeded to prove his case against the accused-petitioner under section 420 of the Penal Code.

On scrutiny of the judgments of 2 Courts below together with the evidence and other materials on record it appears to me that the complainant paid Taka 2,00,000/- in favour of the accused-petitioner for



supplying fish but the accused-petitioner did not supply it in time in this way the accused-petitioner misappropriated Taka 2,00,000/-. The allegations as attributed in the petition of complaint as well as in the deposition of witnesses, it appears to me that at the time of taking loan the petitioner made any promise with the complainant that he will return the money within a specific time or date and I also do not find any allegation of inducement for getting the loan money from the complainant. Rather, I find from the petition of complaint the accused petitioner took the money from the informant as loan for business purpose and, as such, in the allegation I do not find any ingredients of entrustment or that the money was taken with any specific promise or inducement. The whole allegation in the petition of complaint, even if true, cannot form the basis of any Criminal proceeding, much less for cheating, for the alleged liability incurred is essentially civil in nature.

Thus, in the absence of such definite allegation it cannot be held that taking of money as loan and subsequent failure or refusal by itself shall constitute criminal offence and the trial Court rightly on assigning sound reason acquitted the accused-petitioner from the charge levelled against him but the appellate Court

below failed to properly evaluate the evidence as well as law thereby reaching a wrong decision that the complainant has been succeeded to prove its case beyond doubt against the petitioner which occasioned a miscarriage of justice. In that light, the judgment of the appellate Court is to be interfered with.

In the result, the Rule is made absolute. The impugned judgment and order dated 14.09.2015 passed by the learned Sessions Judge, Khulna in Criminal Appeal No. 37 of 2015 allowing the appeal and convicting the petitioner under section 420 of the Penal Code and sentencing him thereunder to suffer rigorous imprisonment for a period of 1(one) year and to pay a fine of Taka 5,000/- (five thousand) in default to suffer rigorous imprisonment for a period of 3 (three) months more is set-aside and the judgment and order of acquittal dated 04.12.2014 passed by the learned Senior Judicial Magistrate, Khulna in C.R Case No. 94 of 2011 (Rupsha) is hereby restored.

Convict petitioner, Gouranga Poddar is discharged from his bail bond.

Send down the lower Court records at once.