

Present:

***Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice K.M. Hafizul Alam***

CRIMINAL MISCELLANEOUS CASE NO. 5245 OF 2018

Professor Dr. Abul Khair

..... ***Accused-petitioner.***

-Versus-

The State and another

..... ***Opposite-parties.***

Mr. Moudud Ahmed, Senior Advocate with
Mr. Raziuddin Ahmed, Advocate

..... ***For the Accused-petitioner.***

Mr. A.K.M. Amin Uddin, D.A.G with
Mrs. Helena Begum China, A.A.G

..... ***For the State-opposite party.***

Mr. Ashif Hasan, Advocate

..... ***For the Anti-Corruption Commission***

Heard on 23.10.2018, 30.10.2018, and 11.11.2018

Judgment on 14.11.2018

Md. Nazrul Islam Talukder, J.

On an application under section 561A of the Code of Criminal Procedure, this Rule, at the instance of the accused-petitioner, was issued calling upon the opposite-parties to show cause as to why the proceeding of Special Case No.06 of 2009 corresponding to ACC G.R. Case No.33 of 2009 arising out of Sudharam Police Station Case No.10 dated 13.01.2009, under section 5(2) of the Prevention of Corruption Act, 1947, now

pending in the court of learned Senior Special Judge, Noakhali should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts, relevant for the purpose of disposal of this Rule, in short, are that on 13.01.2009 one Md. Benozir Ahmed, Deputy-Director of the Anti-Corruption Commission (in brief the ACC) lodged a First Information Report (in short the FIR) with the Sudharam Police Station being Sudharam Police Station Case No.10 against the accused-petitioner alleging *inter-alia* that the petitioner as the Vice-Chancellor of Noakhali Science and Technology University by corruption, nepotism and misuse of power has appointed 6 officers and 108 employees at the University against an approved post of 105 without publishing any advertisement or approval of the University Regent Board and thus he has committed offence punishable under section 5(2) of the Prevention of Corruption Act, 1947.

The investigation officer of the ACC after investigation having found *prima-facie* case submitted charge-sheet being no.118 dated 15.06.2009 against the accused-petitioner and others under section 5(2) of the Prevention of Corruption Act, 1947 on 15.06.2009.

Thereafter, the learned Senior Special Judge, Noakhali fixed 02.07.2017 for taking cognizance of the case and for appearance of the petitioner. The petitioner voluntarily surrendered before the learned Senior Special Judge on that date and he was enlarged on bail on 02.07.2017.

The learned Senior Special Judge, Noakhali fixed 12.11.2017 for framing charge and the petitioner filed an application under section 265C of the Code of Criminal Procedure,1898 (in short the CrPC) praying for discharging him from the charge. The learned Judge vide order dated 12.11.2017 rejected the said application and further fixed 26.11.2017 for framing charge.

Being aggrieved by and dissatisfied with the proceeding of the Special Case No.06 of 2009, the accused-petitioner has approached this Court with an application for quashing the impugned proceeding under section 561A of the CrPC and obtained this Rule along with an order of stay on 24.01.2018.

At the time of Rule hearing, Mr. Moudud Ahmed, Senior Advocate with Mr. Raziuddin Ahmed, Advocate appearing for the accused-petitioner, submits that within the four corner of the FIR and the charge-sheet and the other prosecution materials on record, no *prima-facie* case under section 5(2) of the Prevention of Corruption Act, 1947 has been disclosed against the accused-petitioner.

Mr. Ahmed next submits that the accused-petitioner was appointed as project director of Noakhali Science and Technology University in the year of 2004 and thereafter, he was appointed as Vice-Chancellor of the said University in April 2006 and in order to start

academic sessions of the University within 64 days in June 2006, the accused-petitioner by his sincerity appointed necessary staffs, employees and teachers in the said University for the welfare of the student.

He further submits that the petitioner by exercising his power conferred upon him by section 11(12) of the Noakhali Science and Technology University Act, 2001 formed a committee which consists of petitioner himself, the Deputy Registrar and other senior officials of the University for appointing the teachers and other staffs of the said university and the accused-petitioner had no mens rea and there is no allegation in the FIR or in the prosecution materials that he received any kind of pecuniary advantage from any one and as such the impugned proceeding is liable to be quashed.

He next submits that as per section 14 of the Noakhali Science and Technology University Act, 2001, appointment of the aforesaid staffs has to be approved by the Regent Board but at that time formation of the

Regent Board was not possible as it required a lengthy process and as such the accused-petitioner by exercising his power given under section 12 of the said Act appointed required number of staffs, employees and the teachers in the said University for the welfare of the students as such the impugned proceeding is liable to be quashed.

He then submits that the allegations that have been brought against the accused-petitioner are totally *malafide*, motivated, malicious, baseless and intended to harass and humiliate him in the society and to lower-down his image and position in the society as such the impugned proceeding should be quashed.

He strongly submits that the issue of the instant case has already been settled by the Bangladesh University Grant Commission as such initiation of criminal proceeding is nothing but the abuse of process of the Court.

He next submits that in order to attract Section 5(2) of the Prevention of Corruption Act, 1947, the prosecution has to show beyond reasonable doubt that the accused person has accepted or obtained any gratification or any valuable things or any pecuniary advantage by corrupt or illegal means or dishonestly or fraudulently misappropriates any property from any person in connection with his official capacity, but in the present case there is no allegation anywhere in the FIR that the petitioner has committed any such offence as stated above as such the proceeding against the petitioner is liable to be quashed.

He lastly submits that since there is no mens rea in appointing the necessary staffs, employees and teachers in the University and he has discharged his duty in good faith and for the welfare of the students without having any allegation or pecuniary advantage from any one as such the impugned proceeding is liable to be quashed.

Mr. Moudud Ahmed, in support of his contentions, has referred to a number of decisions taken in different cases like as 36 DLR(AD)14; 46DLR149; 24DLR151, 15 DLR 549 and 8 BLC 440.

On the other hand, Mr. Md. Ashif Hasan, learned Advocate appearing on behalf of the Anti-Corruption Commission has submitted counter-affidavit denying the statements made in the said application under section 561A of the CrPC and strongly submits that the instant application for quashment has been filed before framing of charge but it is well settled proposition of law by our Apex Court that the proceeding should not be quashed before framing of charge and as such the application is premature one and in this regard, he refers the cases of **Khizir Haider & others vs The State** reported in **13 MLR(AD)157** and **Nazrul Islam vs The State** reported in **13 MLR(AD)184**.

He next submits that according to sections 11(9)/14 of the Noakhali Science and Technology University,

2001 the Vice-Chancellor is under legal obligation to take approval of the Regent Board to appoint teacher, officer and employees but the petitioner without approval of the Regent Board and even publishing any appointment circular and without any examination appointed 108 employees resorting to corruption, nepotism and misusing the power as public servant and in the FIR, there is a specific allegation of nepotism, corruption and misuse of power against him and the truthfulness of the same has been found by the investigating officer in his investigation, so it cannot be said that there is no allegation against him for misappropriation of money.

He further submits that as *prima facie* case has been disclosed in the FIR and the charge sheet against the petitioner and the truthfulness of the *prima facie* case can only be decided by way of recording evidence and the same being matter of fact, there is no scope to interfere into the matter under section 561A of the CrPC.

He then submits that the prosecution needs to prove the fact of misappropriation of money and that the very factum of the misappropriation of money may be proved before the trial Court on giving evidence before the trial Court.

He next submits that allegation of nepotism, corruption, misuse of powers or presence of means rea in respect of appointment of the staffs and employees are disputed questions of facts and defense version which may be proved /disproved on taking evidence by the witness of the respective parties by the trial Court as such the proceeding initiated against the accused-petitioner should not be quashed.

Mr. Hassan referring to the case of **Hussain Mohammad Ershad vs The State** reported in **14 BLD(AD) 178** submits that - in a proceeding under section 561A of the Code of Criminal Procedure, the High Court Division cannot embark upon an enquiry to

ascertain the truth or otherwise of the prosecution case or of facts which are not in the prosecution case. When a *prima facie* case is disclosed there is no legal impediment for the proceeding to continue.

He next submits that the petitioner earlier filed Criminal Miscellaneous Case No. 14828 of 2009 before the Hon'ble High Court Division of the Supreme Court of Bangladesh challenging the proceeding and obtained Rule and stay and subsequently the Rule was discharged after hearing vide judgment and order dated 31.08.2016 on the ground that the proceeding cannot be quashed unless cognizance is taken but the petitioner again has challenged the proceeding before framing of charge.

He submits that falsehood and truth being matter of fact cannot be looked into under the purview of section 561A of the CrPC as such the Rule is liable to be discharged.

Mr. Ashif Hasan very vigorously submits that though the accused-petitioner constituted an appointment

committee consisting of himself with 3(three) others but the fact remains that the petitioner produced and submitted a list mentioning the name of his own people so it cannot be said that he had no nepotism or corruption or misuse of power as a public servant being the Vice Chancellor of Noakhali University as such the Rule should be discharged.

He categorically submits that in addition to that the accused-petitioner appointed 6 staffs without publishing any advertisement and without taking any examination as such the Rule should be discharged.

He then submits that the decisions as referred to by the learned Advocate for the accused-petitioner are not at all applicable in the instant case for quashing the instant proceeding.

He next submits that the petitioner claims that in order to meet the emergency situation under compelling circumstances for the welfare of the students he had to appoint the staffs and officers but this claim is nothing

but it is a disputed question of facts and defense version as such there is no scope to decide the disputed question of facts and defense version of the petitioner at this stage, therefore, the Rule should be discharged.

Mr. Hasan lastly submits that the decision of the University Grant Commission dated 11.12.2012 was related in respect of appointment beyond budget but the allegations against the accused-petitioner in the instant case is that he employed some people without advertisement and without taking any examination and without taking any permission from the Regent Board, therefore, the reference given by the learned Advocate for the accused-petitioner is also a defense material which cannot be looked into by this Court under section 561A of the CrPC at this stage.

We have gone through the application under section 561A of the CrPC and the prosecution materials annexed thereto. We have also considered the submissions advanced by the learned Advocate for the

accused-petitioner and the learned Advocate for the Anti-Corruption Commission.

On perusal of the FIR it appears that there is specific allegation against the petitioner that he by corruption, nepotism and misuse of power in violation of the recruitment rules has appointed 6 officers and 108 employees at the Noakhali Science and Technology University without publishing any advertisement and without taking any competitive examination or approval of the University Regent Board and thus he has committed offence punishable under section 5(2) of the Prevention of Corruption Act, 1947. The investigation officer also found the truthfulness of the said allegation and accordingly submitted charge sheet against him and others.

It also appears that the petitioner has admitted that due to meet up the emergency situation and for the welfare of the students he appointed the alleged officers

and employees without publishing any advertisement and without approval of the Regent Board.

From the facts and circumstances of the case and the discussions made above, it appears that there is a specific allegation against the petitioner in the FIR and charge sheet and *prima facie* case has been disclosed against him in the prosecution materials. It also appears that the letter dated 11.12.2007 of the University Grant Commission annexed with the application under section 561A is a defense material. Moreover, whether the petitioner had received any pecuniary benefit or he had any mens rea regarding appointment of the staffs or not and whether he appointed the alleged staffs for the welfare of the students to meet the emergency situation are all disputed questions of facts and defence version.

In view of the above, we are of the view that disputed questions of facts and defense version of the petitioner cannot be adjudicated at this stage rather that

should be adjudicated by the court below by taking evidence at the time of trial.

In the facts and circumstances stated above, the decisions passed by our apex court may be relevant in this regard.

In the case of *Faridul Alam vs State* reported in **61 DLR(AD)93**, it has been held:

"This is not a case which is barred by any law nor this is a case in which the contentions of the complaint, even if admitted in its entirety, no offence is disclosed. The stage of considering the evidence has also not yet reached as the recording of evidence has not even started."

In the case of *Anti-Corruption Commission vs. Mehedi Hasan* reported in **67DLR(AD)(2015) 137**, our apex court held:

“It is a settled principal of law that disputed questions of fact cannot be determined by

the High Court Division by invoking its extraordinary jurisdiction under section 561A of the Code of Criminal Procedure. What's more is whether the allegations of abetment in manipulating the tender for sale of disputed properties are true or false can only be resolved during the trial of the case. In addition, the admissibility, propriety or sufficiency's of materials collected by the prosecution are matter of evidence.”

We have also found the similar view of our apex court in a recent case of *Khaleda Zia vs. State* reported in **70 DLR (AD)(2018)99**, wherein it has been held:

"For quashing a proceeding under section 561A of the Code, the High Court Division has scope only to see whether there are materials on record showing that the allegations made in the FIR and charge sheet, constitute an offence. If there be any

such material the proceeding shall not be quashed, in that case the trial Court will decide the case on the basis of evidence to be adduced by the parties in the case."

The Appellate Division in the above case also discussed the case of **Ali Akkas vs Enayet Hossain**, reported in **17 BLD (AD) 44 = 2BLC (AD) 16** wherein it was held that to bring a case within the purview of section 561A of the Code for the purpose of quashing a proceeding, one of the following conditions must be fulfilled:

- (I) Interference even at an initial stage may be justified where the facts are so preposterous that even on admitted facts no case stands against the accused;
- (II) Where the institution and continuation of the proceeding amounts to an abuse of the process of the Court;
- (III) Where there is a legal bar against the initiation or continuation of the proceeding;

(iv) In a case where the allegations in the FIR or the petition of complaint, even if taken at their face value and accepted in their entirety, do not constitute the offence alleged and

(v) The allegations against the accused although constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge."

We have very carefully gone through the decisions referred above and considered the principles laid down in the said cases for quashment of a proceeding. It is apparent from the referred decisions that there is no scope to quash a proceeding where disputed questions of fact are involved and *prima facie* case is disclosed. The learned counsel for the petitioner's also could not make out any case which could attract either of the conditions as laid down in the aforesaid decisions. Moreover the decisions referred by the learned Advocate for the petitioner are not applicable in the instant case because

the facts and circumstance of the case is quite different and distinguishable from the case in hand.

In view of the above, we don't find any application of the principles with regard to quashing a proceeding in the instant case in hand.

Considering the facts and circumstances of the case and the propositions of law settled by the Appellate Division, we are of the view that in the instant case, the petitioner cannot get any remedy under section 561A of the Code, therefore, we don't find any merit in this Rule and this Rule is liable to be discharged.

Accordingly, the Rule is discharged.

The order of stay granted earlier by this court at the time of issuance of this Rule is hereby recalled and vacated.

The learned judge of the trial court is directed to proceed with the case in accordance with law and to conclude the trial of the case as early as possible

preferably within 6 months from the date of receipt of a copy of the judgment and order.

Let a copy of this judgment and order be communicated to the concerned court below at once.

K.M. Hafizul Alam, J.

I agree