

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 3932 OF 2018

IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

-AND-

IN THE MATTER OF:

A.K.M. Zakaria Hossain Choudhury
..... Petitioner.

-Versus-

Chief Metropolitan Magistrate, Dhaka and others
.....Respondents.

Mr. Junayed Ahmed Chowdhury, Advocate
.....For the petitioner.

Mr. Md. Motaher Hossain (Sazu), DAG with
Mr. Muhammad Jaber, DAG,
Ms. Purabi Rani Sharma, AAG,
Ms. Purabi Saha, AAG and
Mr. Md. Mizanur Rahman, AAG
....For the respondents

The 21st May, 2018.

Present:

Mr. Justice Moyeenul Islam Chowdhury

And

Mr. Justice Md. Ashraful Kamal

Let the Supplementary Affidavit do form part of the main application.

This is an application under Article 102 of the Constitution of the
People's Republic of Bangladesh.

Mr. Junayed Ahmed Chowdhury, learned Advocate appearing on behalf of the petitioner, submits that the petitioner is an accused in Complaint Case No. 367 of 2018 under Section 138 read with Section 140 of the Negotiable Instruments Act, 1881 filed by the respondent no. 2-complainant, now pending before the Chief Metropolitan Magistrate, Dhaka.

Mr. Junayed Ahmed Chowdhury also submits that the offence punishable under Section 138 of the Negotiable Instruments Act is not a strict liability offence and that being so, the petitioner can set up defence pleas, if any, during the trial of the case. In support of this submission, Mr. Junayed Ahmed Chowdhury relies on the decision in the case of Shafiqul Islam (Md) and others....Vs...Bangladesh and others reported in 68 DLR (HCD) 283.

Mr. Junayed Ahmed Chowdhury further submits that *mens rea* or criminal intent is an essential ingredient of any criminal offence; but stunningly enough, no *mens rea* was pleaded in the petition of complaint which was lodged with the learned Chief Metropolitan Magistrate of Dhaka and as such the Complaint Case No. 367 of 2018 can not be proceeded with and in this perspective, the proceedings of the case are liable to be quashed. To buttress up this submission, Mr. Junayed Ahmed Chowdhury adverts to the decision in the case of Sunil Bharti Mittal and 3 others...Vs...State of U.P. & another which was rendered by the Lucknow Bench of the High Court of Judicature at Allahabad, India on 09.02.2017.

Mr. Junayed Ahmed Chowdhury next submits that the accused-petitioner did not invoke the criminal miscellaneous jurisdiction of the High Court Division under Section 561A of the Code of Criminal Procedure, 1898

with a view to quashing the proceedings of the case and instead he has come up with the present Writ Petition for quashing the proceedings of the case, regard being had to the decision in the case of the Government of the People's Republic of Bangladesh and others...Vs...Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku reported in 60 DLR (AD) 147.

Mr. Junayed Ahmed Chowdhury also submits that a Division Bench of the High Court Division has already held in the case of Jahangir Hossain Howlader (Md).....Vs.....CMM, Dhaka and others reported in 58 DLR (HCD) 106 that filing of an application under section 561A of the Code of Criminal Procedure is not an adequate alternative remedy as contemplated under Article 102(2) of the Constitution and by that reason, he has invoked the writ jurisdiction of the High Court Division under Article 102 of the Constitution and on that score, the Writ Petition is maintainable.

We have heard the submissions of the learned Advocate Mr. Junayed Ahmed Chowdhury and perused the Writ Petition, Supplementary Affidavit and relevant Annexures annexed thereto.

Indisputably the Cognizance Court No. 27 of Dhaka Metropolitan Magistracy took cognizance of the offence punishable under section 138 read with section 140 of the Negotiable Instruments Act on 18.02.2018 on the basis of the petition of complaint lodged by the respondent no. 2-complainant under section 190(1)(a) of the Code of Criminal Procedure and the Court summoned the petitioner to appear before it on 17.04.2018. But the accused-petitioner did not appear before the Court below on 17.04.2018 as summoned; rather he surrendered before the Court of first instance on 13.05.2018 and was enlarged on bail. Anyway, what is curious is that

without submission of the petitioner to the jurisdiction of the lower Court, the constituted attorney of the petitioner sworn the affidavit of the instant Writ Petition on 18.03.2018. It is ex-facie clear that at that point of time, the petitioner was a fugitive from law.

What we are driving at boils down to this: without submitting to the jurisdiction of the Court below, the accused-petitioner, or for that matter, his attorney can not swear any affidavit in support of the Writ Petition before this Court. In this regard, we reiterate that it is a settled proposition of law that a fugitive from law is not entitled to get any relief from any Court of law. This practice of swearing any affidavit by any accused or his attorney while the accused is still at large can not be countenanced at all. We strongly deprecate this practice. On this count alone, the accused-petitioner can not cross the threshold of the writ jurisdiction of the High Court Division under Article 102 of the Constitution.

In the case of the Chairman, Anti-Corruption Commission and another...Vs...Enayetur Rahman and others reported in 64 DLR (AD) 14, it has been spelt out in paragraph 7:

“7. This Court on repeated occasions argued that Article 102(2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extraordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill-suited to

meet the demands of extra-ordinary situations, that is to say, where vires of a statute is in question or where the determination is mala fide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is intra vires, but the action taken is without jurisdiction and the vindication of public justice requires that recourse may be had to Article 102(2) of the Constitution.”

The facts and circumstances as stated in the present Writ Petition, according to us, do not attract any of the extra-ordinary situations that have been specified in paragraph 7 of the decision reported in 64 DLR (AD) 14.

In the decision in the case of Golam Nabi and another....Vs....Anti-Corruption Commission and others reported in 65 DLR (HCD) 181, it has been clearly, unambiguously, categorically and unmistakably held that the decision reported in 64 DLR (AD) 14 has ousted the jurisdiction of the writ Court to quash the proceedings of a criminal case unless the ‘vires’ of any law is found to have been challenged.

In the decision in the case of Anti-Corruption Commission...Vs... Mehedi Hasan and another reported in 67 DLR (AD) 137, it has been observed in paragraph 27 that there is no scope for quashing a criminal

proceeding under the writ jurisdiction under Article 102 of the Constitution unless the ‘vires’ of the law involved is challenged.

Admittedly the ‘vires’ of any of the provisions of the Negotiable Instruments Act has not been challenged in the Writ Petition before us. So the question of quashing the proceedings of Complaint Case No. 367 of 2018, now pending before the Court below, is out of the question.

Mr. Junayed Ahmed Chowdhury has emphatically relied upon the decision in the case of the Government of the People’s Republic of Bangladesh and others....Vs...Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku reported in 60 DLR (AD) 147 for his ‘standing’ under Article 102 of the Constitution. We have gone through that decision with a fine tooth-comb. It does not transpire that the decision reported in 60 DLR (AD) 147 and the decision reported in 67 DLR (AD) 137 are fundamentally, perspectively and notionally conflicting to each other. In the facts and circumstances of the case reported in 60 DLR (AD) 147, the Appellate Division maintained the ‘standing’ of the writ-petitioner under Article 102 of the Constitution. But reverting to the case in hand, we find that the decision reported in 60 DLR (AD) 147 has no manner of application; rather the decision reported in 67 DLR (AD) 137 fits in therewith.

From the foregoing discussions, it is abundantly clear that for quashing the proceedings of Complaint Case No. 367 of 2018, now pending before the Court below, the proper remedy for the accused-petitioner lies in the miscellaneous jurisdiction of the High Court Division under Article 561A of the Code of Criminal Procedure. As the petitioner has failed to cross the threshold of the writ jurisdiction of the High Court Division under

Article 102 of the Constitution, we refrain from making any observation on the *mens rea* or any other dimension of the case touching upon its merit.

As it is a thoughtless, slapdash and frivolous application, some exemplary costs should be imposed on the accused-petitioner.

For all the reasons stated above, the Writ Petition is rejected in limine with costs of Tk. 50,000/- (fifty thousand) only.