

**Present:**

**Mr. Justice M. Enayetur Rahim**

**And**

**Mr. Justice Md. Mostafizur Rahman**

**Criminal Revision No.796 of 2016**

Anti-Corruption Commission

----- Petitioner

**-Vs-**

Md. Abul Kashem and others

-----Opposite Parties

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

----For the Petitioner

Mr. S.M. Shahjahan, Advocate with

Mr. Mohammad Ali, Advocate

---- For the Opposite Parties

**Heard on 04.11.2020 &**

**Judgment on 10.12.2020**

**M. Enayetur Rahim, J:**

This Rule was issued calling upon the opposite parties to show cause as to why the order No.29 dated 26.01.2012 passed by the Divisional Special Judge, Sylhet in Special Case No.12 of 2009, arising out of Tahirpur Police Station Case No.5 dated 05.04.2007, corresponding to G.R. No.55 of 2007, under sections 409/420/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act,1947 discharging the accused opposite party Nos.1-4 under the provision of section 494 of the Code of Criminal Procedure should not be set aside

and/or pass such other or further order or orders as to this Court may seem fit and proper.

Relevant necessary facts for disposal of the instant Rule are as follows:

The present accused opposite party Nos.1-4 were put on trial before the Court of Division Special Judge, Sylhet in Special Case No.12 of 2019 to answer charge under sections 409/420/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act,1947.

On 05.04.2007 A.K.M. Goniuzzaman Laskar, Officer in charge, Taherpur Police Station, Sunamganj lodged a First Information Report with the said police station implicating the present petitioner No.1 alleging, *inter alia*, that the accused was the Chairman of No.4 Borodal Uttar Union Parishad and he misappropriated C.I. sheets (Corrugated Iron Sheet) allotted for relief fund from the Upazila Parishad for distributing among the poor People. Eventually, the case was investigated by the Anti-Corruption Commission and charge-sheet was submitted against 04(four) persons i.e. opposite party Nos.1-4 under sections 409/420/109 of the penal code read with section 5(2) of the Prevention of Corruption Act,1947.

On being ready for trial, the case record was transmitted to the court of Senior Special Judge, Sylhet which was registered as Special case No.12 of 2009.

The learned Special Judge, Sylhet vide his order dated 14.10.2009 framed charge against the opposite party Nos.1-4 under the above provisions of law. Eventually, the case was transferred to the Court of Divisional Special Judge, Sylhet for trial.

The Special Public Prosecutor at the instance of the District Public Prosecutor, Sylhet on 03.08.2010 filed an application before the learned Divisional Special Judge with a prayer for withdrawal of the case along with a copy of the office memo. স্ম- (আইন-১) মামলা প্রত্যাহার-১৪/২০০৯ (১১তম সভা)/৪০২, তারিখ-১১ ফেব্রুয়ারী ২০১০ issued by the Ministry of Home.

Accordingly, the learned Divisional Special Judge, Sylhet by the impugned order dated 26.01.2012 allowed the said application for withdrawal of the case and discharged the accused persons from the charges brought against them.

Being aggrieved by the said order, the Anti-Corruption Commission (hereinafter referred to as the Commission) moved this court by filing a revisional application under section 10(1A) of the Criminal Law Amendment Act, 1958 (briefly, the Act

of 1958) read with sections 439/435 of the Code of Criminal Procedure (shortly, the Code) and obtained the instant Rule.

Mr. A.K.M. Fazlul Haque, learned advocate appearing for the petitioner having drawn our attention to the impugned order together with the provisions of section 494 of the Code as well as section 10(1A) of the Act of 1958 submits that the Ministry of Home i.e. the Government has got no authority to give decision for withdrawal of a case filed or investigated by the Commission. According to him, section 494 of the Code is not applicable to the case(s) where the Commission is the prosecutor and the offence(s) is/are exclusively triable by the Special Judge under the Act of 1958.

Per contra, Mr. S.M. Shajahan, learned Advocate appearing for the opposite parties contends that the submission made by the learned Advocate for the Commission is misconceived one inasmuch as the Government's power to withdraw a case under section 494 of the Code has not in any way been curtailed by the provision of section 10(1A) of the Act of 1958.

He further submits that since the order of withdrawal has been passed after framing of charge which amounts to acquittal, the revisional application is not maintainable, rather the

commission ought to have filed an appeal. Mr. Shajahan has also tried to convince us saying that the allegations made against the petitioners are insignificant and as such, the prolongation of the proceeding will be nothing but a sheer abuse of the process of Court.

Heard the learned Advocates of the respective parties, perused the impugned order as well as the relevant provisions of laws as referred to by the learned Advocates.

It transpires from annexure-2(1) to the supplementary affidavit filed by the accused-opposite-parties that Ministry of Home vide its office Memo: স্বম(আইন-১)/মামলা প্রত্যাহার-১৪/২০০৯(১১তম সভা)/৪০২ তারিখ-১১ ফেব্রুয়ারী ২০১০ decided not to proceed (Nolle Prosequi) with the case. The content of the said memo runs as follows:

“গণপ্রজাতন্ত্রী বাংলাদেশ সরকার

স্বরাষ্ট্র মন্ত্রণালয়

আইন শাখা-১

স্মারক নং-স্বম(আইন-১)/মামলা প্রত্যাহার-১৪/২০০৯(১১তম সভা)/৪০২, তারিখ-১১ ফেব্রুয়ারী ২০১০।

বিষয়ঃ ফৌজদারী কার্যবিধি, ১৮৯৮ এর ৪৯৪ ধারার আওতায় মামলা প্রত্যাহার।

উপর্যুক্ত বিষয়ে নির্দেশক্রমে জানানো যাচ্ছে যে, সরকার ফৌজদারী কার্যবিধি, ১৮৯৮ এর ৪৯৪ ধারার আওতায় সুনামগঞ্জ জেলার তাহিরপুর থানার মামলা নং-০৫, তারিখ-০৫/০৪/২০০৭, ধারা-৪২০/৪০৬/২০১ দণ্ডবিধি এর প্রসিকিউশন না চালানোর (Nolle Prosequi) সিদ্ধান্ত গ্রহণ করেছে।

২। ফৌজদারী কার্যবিধি, ১৮৯৮ এর ৪৯৪ ধারার আওতায় উক্ত মামলাটি প্রত্যাহার করার লক্ষ্যে সুনামগঞ্জ জেলার বিজ্ঞ পাবলিক প্রসিকিউটরকে প্রয়োজনীয় পরামর্শ প্রদানের জন্য অনুরোধ করা হ'ল।

স্বাক্ষর/- মোহাম্মদ আবু সাঈদ মোল্লা

সহকারী সচিব।”

Thereafter, as per instruction of the public prosecutor, Sunamganj and Sylhet respectively the Special Public Prosecutor, Divisional Special Court, Sylhet on 03.08.2010 filed an application for withdrawal of the case. And accordingly, the learned Divisional Special Judge passed the impugned order.

In the instant case, we are called upon to determine a pertinent question whether in exercise of power under section 494 of the Code the Ministry of Home i.e. the Government has got power or authority to instruct the public prosecutor to withdraw a case relating to the scheduled offences under the Act of 2004 which are exclusively tribal by the Special Judge constituted under the Act of 1958.

To appreciate the above issue, we need to look at the following provisions of laws.

Section 494 of the Code runs as follows:

“Any public prosecutor may, with the consent of the court, before the judgment is pronounced, withdraw from the prosecution of any person either generally

or in respect of any one or more of the offences for which he is tried; and upon such withdrawal,- (a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences; (b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences."

Section 10(4) of the Act of 1958 runs as follows:

"No prosecution under this Act against any person either generally or in respect of any one or more of the offences for which he is being tried shall be withdrawn except under the orders in writing of the Commission." (Underlines supplied)

Admittedly, the Anti-Corruption Commission is an independent statutory body constituted by a statute which runs business under its own law and Rules. In the preamble of the Act of 2004 it has categorically been mentioned that:

"An Act to provide for the establishment of an independent Anti-Corruption Commission for the purpose of prevention

of corruption and other corrupt practices in the country and for conducting inquiry and investigation of corruption and other specific offences and for matters incidental thereto."

In section 2A of the Act of 2004 it has been clearly spelt out that:

"Notwithstanding anything contained in any other law for time being in force, the provisions of this Act shall prevail."

And, in section 3 of the said Act it has also been stipulated that:

(1) . . . . .

(2) The Commission shall be an independent and impartial Commission.

(3) The Commission shall be an autonomous body having perpetual succession and a common seal, with power, subject to the provisions of this Act and rules made thereunder, to acquire, hold and dispose of property, both movable and immovable, and shall by the said name sue and be sued.'

Section 28 of the Act of 2004 provides that the offences under this Act and specified in its Schedule shall be tried exclusively by a special judge and the provisions of the Act of 1958 shall apply to trial of cases and disposal of appeal for



the offences under the former Act and specified in its schedule.

Section 32 of the Act of 2004 speaks that- 'Notwithstanding anything contained in the Code of Criminal Procedure or in any other law for the time being in force, no court shall take cognizance of an offence under this Act, without the sanction of the Commission in the prescribed manner.

According to section 33 of the Act of 2004, there shall be a permanent prosecution unit under the Commission to conduct the cases before the court of special judge.

Section 6(3) of the Act of 1958 enjoins that the provisions of Chapter XX of the Code shall apply to trial of cases under this Act, in so far as they are not inconsistent with the provisions of this Act.

On a meticulous consideration of the scheme of the Act of 2004 together with the Act of 1958, we have no hesitation in holding that in view of the non-obstante clause appearing in section 2A of the Act of 2004, the provisions of the Act of 2004 shall prevail over other provisions of law.

In the case of Kamruzzaman vs. State, reported in 1990 BLD(AD), Page-190 our Appellate Division has held as under:

"While interpreting the provisions of a General Statute and a Special Statute, legislative intent to bring about harmonious construction should be effected in order to remove an anomalous situation. There is no dispute that the Code of Criminal Procedure is a general law of procedure and the Special Powers Act is a special law for trial of certain offences, and that in the case of any conflict between the two, the Act shall prevail under the principle 'Generalia specialibus non-derogant.'"

In the case of Managing Director, Rupali Bank vs. Tafazal Hossain, reported in 44 DLR(AD), Page-260 wherein it has been held:

"Relation between a general law and a special law is governed by the principle known as **Generalia specialibus non derogant-** which in English means, "General words do not derogate from the special". In other words, if any legal remedy ordinarily available under both general law and special law the remedy prescribed by the special law must be sought to the

exclusion of the remedy otherwise available under the general law.

This principle of law had been nicely expounded by Willes J. in *Wolverhampton New Waterworks Co vs. Hawkesford* (6 CBN 6.336) which was approved by the House of Lords in *Neville vs. London Express Newspaper* (1991 AC 368) where it was observed:

"Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it- the party must adopt the form of remedy given by the statute."

It is a well known canon of interpretation of statute that a Special Law overrides the general law and in a conflict between general statute and special statute the latter prevails.

'Interpretation of Statutes' by Bindra (7<sup>th</sup> edn. 631) it has been narrated that: 'If there is a Special Act and a general Act, dealing with the same matter, the Special Act override the General Act.'

This principle has been followed all through by our Appellate Division. Reference may be made to the case of *Bangladesh Vs. Abdul Mannan and others*, reported in 29 DLR(AD), Page-17, *Rafiqul Alam Vs.*

Mostafa Kamal, 42 DLR (AD), page-137 and Anti Corruption Commission Vs. Mohammad Shahidul Islam and others, reported in 68 DLR (AD), page-242.

If we consider the present issue at our hand in the light of the above proposition of law, we have no other option but to hold that since section 10(4) of the Act of 1958 has authorised the Commission only to withdraw a case, the Government has nothing to do in such matter as the provision of section 494 of the Code shall not be applicable or come into play in respect of the scheduled offences under the Act of 2004 which are triable by the Special Judge constituted under the Act of 1958. Even then, materials on record go to show explicitly that in exercise of power under section 494 of the Code the Government has decided to withdraw Special Case No.12 of 2009 pending in the Court of the Divisional Special Judge, Sylhet and persuaded the same through public prosecutor. Such an endeavour on the part of the Government can be regarded as a naked interference in the affairs of an independent body like the Commission. Because section 3(2) of the Act of 2004 postulates in clear terms that the Anti-Corruption Commission shall be an independent and impartial body. More so, it has already been noticed that as per mandate of section 10(4) of the Act of

1958, the Anti-Corruption Commission is the only authorised body to withdraw from the prosecution against any person either generally or in respect of any one or more offences under the Act of 2004 or the Act of 1958. Thus, it is patent that the Government has nothing to do in respect of withdrawal of a case filed under the Act of 2004 or the Act of 1958.

Be that as it may, if the Government wants to withdraw a case pending before the Court of Special Judge in that event it can only make a request or express its pious wish to the Commission and if the government makes such a request, the Commission is free to decide indifferently whether it would consider such request or proposal of the Government or not.

With regard to the maintainability of the present revisional application, we are of the view that the application is maintainable in revisional form since the impugned order is void ab-initio. Moreover, this court has got power to adjudicate the propriety and legality of an order passed by any inferior Criminal Court even, suo-moto.

In the aforesaid premises, it is apparent that the learned Special Public Prosecutor has erred in law in filing the application for withdrawal of the

case without obtaining prior approval from the Commission.

Furthermore, on a plain reading of the impugned order it also transpires that the learned Judge without applying his judicial mind passed the impugned order in a mechanical way which cannot be endorsed or appreciated.

Having discussed and considered as aforesaid, we find merit in the Rule.

Accordingly, the Rule is made Absolute.

The order dated 26.01.2012 passed by the Divisional Special Judge, Sylhet in Special case No.12 of 2009 is set aside.

The learned Divisional Special Judge, Sylhet is directed to proceed with the case in accordance with law.

The opposite parties Nos.1-4 are directed to surrender before the court of Divisional Special Judge, Sylhet within a period of 04(four) weeks from the date of receipt of this judgment and order.

However, the opposite party Nos.1-4 may approach to the Commission for withdrawal of the case; and the Commission is at liberty to consider the representation of the opposite party Nos.1-4, if so makes before it keeping in mind the nature and gravity of the offence of the present case and the

fact that for the last 13(thirteen) years the accused-petitioners are in litigation and by this time they have suffered in various ways.

Communicate a copy of the judgment and order to  
1. The Secretary, (জননিরাপত্তা বিভাগ), Ministry of Home Affairs, Government of Bangladesh and 2. The Chairman, Anti-Corruption Commission besides the court concerned.

**Md. Mostafizur Rahman, J:**

I agree.

I.Sarwar/B.O