

Present :
Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice Ahmed Sohel

CRIMINAL MISCELLANEOUS CASE NO. 53717 OF 2018.

Md. Saidul Kabir @ Mukul @ Saidur Kabir and others

..... *Petitioners.*

-Versus-

The State and another

..... *Opposite -parties.*

Mr. Sohal Azad, Advocate

..... *For the Petitioners.*

Mr. A.K.M. Amin Uddin, D A.G with
Mrs. Mahjabin Rabbani (Deepa), A.A.G,
..... For the State opposite-party.

Mrs. Saima Rahman, Advocate,

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

Mr. A.B.M Bayezid, Advocate

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

Heard on :03.03.2020 & 29.09.2020

Judgment on: 18.10.2020.

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.29/16(10/16) arising out of Petition Case No.31 of 2014 under Sections 467/468/471 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947, now pending in the court of learned Special Judge, Faridpur, 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 to disposal of this Rule may be, briefly, stated as follows:-

The opposite-party No.1 being complainant filed a petition of complaint in the Court of learned Senior Special Judge, Madaripur against the accused-petitioners alleging, inter-alia, that the father of the complainant Abdus Samad Sarder accepted Abdus Salam alias Lal Mia as foster son from his boyhood. Abdus Samad had two wives and out of them, Hasmatonnessa was issueless. The

complainant was the son of Jobeda Khatun. Hasmatonnessa being issueless accepted Salam Mia as son and while Salam Mia became major, Hasmatonnessa vide Registered Heba-bil-Ewaz Deed No.3013 dated 17.05.1967 gifted him 45.50 decimals of land. The complainant was the identifier of that deed. As the Complainant and his other brothers and sisters would live in different places, Abdus Salam would look after their properties. At the time of S.A record, the foster brother of the complainant namely Salam Mia alias Lal Mia alias Lal Mia claiming him as the son of Samad Sarder included his name in the S.A record along with the complainant and his other brothers and sisters. On the basis of said record, the father of the accused namely Salam alias Lal Mia never claimed the property as paternal heir. After death of

Salam alias Lal Mia, his heirs, that is, the accused persons in a pre-planned manner took a certified copy of Deed No.3013 dated 17.05.2067 from the Kalkini Sub-Registry Office. In the 7th line of 2nd page of the said deed, the accused persons by forgery managed a writing to the effect that “তুমি আমার আপন পুত্র” in place of “তুমি আমার পালক পুত্র” and submitted the same on 24.08.2011 in Civil Suit No.96/2013 in the Court of Joint District Judge, 1st Court, Madaripur. The accused persons claimed that Abdus Salam alias Lal Mia was the son of the father of the complainant. Originally, the father of the accused persons was not the son of the father of the complainant, rather he was his foster son. Hence, the petition of complaint.

Being aggrieved by the impugned proceeding, the accused-petitioners approached this court with

an application under Section 561A of the Code of Criminal Procedure and obtained this Rule along with an order of stay.

None appears on behalf of the accused-petitioners, when this Rule is taken up for hearing.

The main grounds taken in the application by the accused-petitioners are as follows:-

- I) That the accused-petitioners are innocent, they have no complicity with the alleged offences and as such, the instant criminal proceeding is liable to be quashed.
- II) That when such offences are alleged to have been committed by a party to any proceeding in any court in respect of a document produced or given in evidence, in that case, any proceeding except on the complaint in writing of such court or some

other court to which such court is subordinate, is not maintainable and as such, the instant proceeding is an abuse of the process of the Court which should be quashed for ends of justice.

III) That on plain reading of the petition of complaint, inquiry report as well as other materials on record, it reveals that the instant case is of pure civil nature and as such, the instant proceeding should be quashed to secure the ends of justice.

Mrs. Saima Rahman, the learned Advocate appearing on behalf of the opposite party No.1, submits that this criminal miscellaneous case has been filed without any legal basis and as such, the Rule should be discharged and the order of stay should be vacated.

She next submits that there are many decisions from the Appellate Division of the Supreme Court of Bangladesh that after commencement of trial, no application lies under section 561A of the Code of Criminal Procedure for quashing the proceeding and as such, the Rule may be discharged and the order of stay should be vacated.

She then submits that the original of the forged deed in question has not been produced and given in evidence and as such, there is no bar to proceed with the present case. In support of her submission, he has produced a decision taken in the case of Abdul Gafur alias Kana Mia and others Vs Md. Nurul Islam, reported in 56DLR(HC)(2004)519 wherein it was held that “words” document produced or given in evidence

contemplate to produce original document alleged to have been forged and not a photocopy.”

She lastly submits that the accused-petitioners did not take any steps for hearing of the Rule keeping trial of the case in abeyance and depriving the complainant of getting justice and as such, the Rule should be discharged and the order of stay may kindly be vacated.

Mr. A.B.M Bayezid, the learned Advocate appearing on behalf of the Anti-Corruption Commission, has submitted counter-affidavit controverting the statements and grounds made in the application under Section 561A of the Code of Criminal Procedure.

Mr. Bayezid, the learned Advocate appearing on behalf of the Anti-Corruption Commission, submits that the accused-petitioners in

collaboration with each other inserted their names in S.A Khatian by way of forgery and as such, the criminal proceeding against the accused-petitioners under Sections 467/468/471 should not be quashed.

He next submits that the Durniti Daman Commission after holding investigation having found prima-facie case submitted charge-sheet against the accused-petitioners and following the same, the learned Special Judge rightly framed charge against the accused-petitioners.

He then submits that the original document alleged to be forged was not produced and given in evidence before any court and for this reason, there is no bar to proceed with the case at hand in accordance with law.

He lastly submits that all the facts as alleged in the F.I.R as well as in the charge-sheet are disputed

questions of fact which require to be proved before the trial court on taking evidence from the witnesses of the respective parties, and considering the facts and circumstances of the case, the Rule should be discharged.

Mr. AKM Amin Uddin, learned Deputy Attorney- General appearing for the State, submits that all the facts emanated from the prosecution materials are disputed questions of fact and for this reason, this Rule is liable to be discharged.

We have gone through the application under Section 561A of the Code of Criminal Procedure and perused the prosecution materials annexed thereto. We have heard Mrs. Saima Rahman, the learned Advocate for the opposite-party No.1 and Mr. A.B.M Bayezid, the learned Advocate for the Anti-Corruption Commission and Mr. AKM Amin Uddin,

the learned Deputy Attorney-General for the State at length and considered their submissions to the best of our wit and wisdom. Before coming to a decision in this matter, it is pertinent to note that the inherent power under Section 561A of the Code of Criminal Procedure can be invoked at any stage of the proceeding even after conclusion of the trial, if it is necessary to prevent the abuse of process of the court or otherwise to secure the ends of justice. The aforesaid view finds support in decision in the case of **Sher Ali (Md)** and others Vs The State, reported in **46 DLR (AD) (1994) 67** wherein it was decided as under:-

“the inherent power under Section 561A of the Code of Criminal Procedure can be exercised to quash a proceeding or even a conviction on conclusion of a trial if the court concerned got no

jurisdiction to hold the said trial or the facts alleged against the accused do not constitute any criminal offence, or the conviction has been based on 'no evidence' or otherwise to secure ends of justice".

The guidelines and principles for quashing a proceeding were initially formulated and settled in the decision in the case of **Abdul Kader Chowdhury Vs The State reported in 28 DLR (AD)(38)**. Subsequently, the aforesaid views were reiterated in the decision in the case of **Ali Akkas Vs Enayet Hossain and others, reported in 17BLD(AD)(1997) 44=31 DLR(AD)69** wherein it was spelt out that to bring a case within the purview of Section 561A of the Code of Criminal Procedure 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 as 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.

The aforesaid principles were reechoed recently in the decision in the case of Begum Khaleda Zia Vs. The State and another, reported in 70 DLR (AD)(2018) 99.

Now, question arises as to whether the principles and guidelines for quashing a proceeding settled by our Appellate Division, are applicable in the instant case at hand for quashing the same.

It appears from the plain reading of the petition of complaint as well as charge-sheet that at the time of S.A record, the foster brother of the complainant

namely Salam Mia alias Lal Mia alias Lal Mia claiming him as the son of Samad Sarder included his name in the S.A record along with the complainant and his other brothers and sisters. On the basis of said record, the father of the accused namely Salam alias Lal Mia never claimed the property as paternal heir. After death of Salam alias Lal Mia, his heirs, that is, the accused persons in a pre-planned manner took a certified copy of Deed No.3013 dated 17.05.2067 from the Kalkini Sub-Registry Office. In the 7th line of 2nd page of the said deed, the accused persons by forgery managed a writing to the effect that “তুমি আমার আপন পুত্র” in place of “তুমি আমার পালক পুত্র” and submitted the same on 24.08.2011 in Civil Suit No.96/2013 in the Court of Joint District Judge, 1st Court, Madaripur. The accused persons claimed that Abdus Salam alias Lal

Mia was the son of the father of the complainant. Originally, the father of the accused persons was not the son of the father of the complainant, rather he was his foster son. The investigating officer after holding investigation found the truthfulness of the allegation made in the petition of complaint and thereby submitted charge-sheet against the accused-petitioners having found prima-facie case against them. Accordingly, we find that a prima-facie case has been disclosed in the prosecution materials against the accused-petitioners. It is now well settled principle of law that the disputed questions of facts cannot be resolved by this court sitting in the jurisdiction under Section 561A of the Code of Criminal Procedure. Apart from this, it is evident from the petition of complaint that the original document of the forged deed has not been submitted

before the civil court or before the criminal court as yet. It is noticeable from the petition of complaint, which runs as follows:-

.....উক্ত ৩০১৩ নং দলিলের সহিমহুরী নকলের ২য় পাতায় ৭ লাইনের শেষে আসামীগণ প্রকৃত দলিল “তুমি আমার পালক পুত্র” এর স্থলে অসৎ উদ্দেশ্যে জ্বাল জালিয়াতির মাধ্যমে “তুমি আমার আপন পুত্র” লিখিয়া ২৪/০৮/২০১১ ইং তারিখে মাদারীপুর সদর সাব-রেজিস্ট্রি অফিস হইতে সরবরাহকৃত (অত্র সাথে সংযুক্ত) জ্বাল সহিমহুরী নকলের কপি মাদারীপুর বিজ্ঞ যুগ্ম জেলা জজ ১ম আদালতে বিচারাধীন দেওয়ানী ৯৬/২০১৩ নং মামলায় অত্র আসামীগণ দাখিল করেন এবং যাহার বলে আসামীগণের পিতা আবদুছ সালাম ওরফে লাল মিয়া কে বাদীর পিতা পুত্র বলিয়া দাবী করেন। প্রকৃত পক্ষে আসামীগণের পিতা বাদীর পিতার ঔরষজাত সন্তান নহে। সে তাহার পালক পুত্র ছিল। যাহা অত্র দলিলের মূল দলিলে “তুমি আমার পালক পুত্র” লিপিবদ্ধ আছে (মূল দলিলের ছায়ালিপি কপি সংযুক্ত) উক্ত দেওয়ানী ৯৬/২০১৩ মামলার মূল দলিল বাদী দাখিল করিয়াছেন।

To appreciate the grounds taken by the accused-petitioners, the complainant-opposite party No.1 and the Anti-Corruption Commission, it would be profitable to quote the section 195 (1) (c) which is as follows:-

“195 (1) No Court shall take cognizance:-

(a)

(b)

(c) of any offence described in section 463 or punishable under section 471, section 475 or 476 of the same Code, when such offences is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate.

From a careful reading of the above section, it is found that when an offence under clause (c) of section 195(1) of the Code of Criminal Procedure appears to have been committed by a party to any proceeding to any Court in respect of a document produced and given in evidence in such a proceeding, no Court is competent to take cognizance of such an offence except on the complaint in writing of the Court concerned or some other Court to which it is subordinate. This provision thus puts restriction on the general power conferred upon all Courts of the Magistrate by section 190 of the Code of Criminal Procedure to take cognizance. To bring a case within its fold in particular, an offence must be an offence of forgery in respect of document which is produced and given in evidence in a proceeding. It may be mentioned that Section

195 has put an embargo on the taking of cognizance by Court of certain offences as mentioned therein. Of these offences, those mentioned in clause (a) relate to contempt of lawful authority of public servants. No cognizance of these offences shall be taken except on a complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate. But to make such a complaint no special procedure has been laid down. However, in respect of the offences described in clauses (b) and (c) which are committed in, or in relation to proceedings in court specified procedure and method for filing complaint by a court have been laid down in Section 476 of the Code of Criminal Procedure. Provisions in Section 195 like the provisions in sections 196-198 of the Code of Criminal Procedure are exceptions to the general and

ordinary powers of a criminal court to take cognizance of an offence under Section 190 of the Code of Criminal Procedure. A Private party may be the real victim of the commission of an offence, but he is debarred from making a complaint directly to the court.

Now in the present case whether the said principle of law would apply or not is the only question left for consideration. From the perusal of clause (c) of section 195(1) of the Code of Criminal Procedure, it appears that words “document produced or given in evidence” contemplate to produce original document alleged to have been forged and not a photocopy or a certified copy. The words “a document produced” and “given in evidence in such proceeding”, in the section shows that the aforesaid two terms are conjunctive in

nature. Thus, where the original document in respect of forgery has not been produced and given in evidence, clause (c) of section 195(1) does not apply. This interpretation has been established by several decisions.

In the case of **Girdhari lal Vs. Emperor reported in AIR 1925 (Oudh) 413** and in the case of **Sanmukhsingh and another vs. The King reported in AIR in 1950 Privy Council 31**, it was consistently held that the absence of complaint by Court cannot stand as a bar to a trial of any offence for forgery if the original alleged document is not used or given in evidence in the Court. This is for simple reason that if the original document alleged to be forged is not produced before the Court, it cannot express any opinion about the genuineness of the same.

On this point, in **the case of King Emperor Vs. Shaskari Baksh Singh (1905) (8) OC 313**, it was held that:-

“Words produced or given in evidence” in section 195, CrPC refer to the production of the original and not the production of a copy, and this is for the very sound reason that the Court before which a copy of a document is produced is not really in a position to express any opinion about the genuineness of the original.” This decision was followed in the **case of Girdhari Lal vs. Emperor reported in AIR 1925 (Oudh) 413**.

In the case of **Sanmukhsingh and another vs. King reported in AIR 1950 Privy Council 31**, it was spelt out as under:-

“Where the document in respect of which a charge of forgery had been laid against the accused

had not itself been produced or given in evidence in certain proceedings but, on the contrary, a copy of it had been produced, the absence of complainant under section 195 (1) (c) cannot operate as a bar to the trial of the accused.”

This principle was reflected in several decisions of our country and particularly in the case of **Shamsuddin Ahmed Chowdhury vs. State** reported in **49 DLR (AD) 159** wherein it was held as follows:-

“It is absolutely clear that unless the document is filed in Court, the Court cannot make a complaint. In the present case in view of the positive finding of the High Court Division and on the failure of the learned Advocate to show before us that, in fact, the allegedly fraudulent document was produced in CR

Case No.116 of 1983, the private complaint at the instance of the informant is not barred.”

In the case of **Moklesur Rahman Sharif Vs State reported in 47DLR(HC)(1995)229**, it was held that:-

“Use of a photocopy of the forged document could not amount to the use of a forged document”

In the case of **Shambhu Nath Saha and others Vs the State reported in 43DLR(HC)(1991)660**, it was laid down as follows:-

“Prosecution for a document given in evidence-
From a perusal of the provision of law it appears that the words “documents produced and given in evidence contemplate the documents alleged to be forged and not a certified copy of the same. If the document in question is not produced in Court, but a

certified copy of the same is produced, no complaint from the court is necessary for prosecution of the alleged offenders. In view of the decision in the case of Sanmukhsingh and others Vs. The King AIR 1950 (PC) 31, the absence of complaint cannot stand as a bar to the trial of the accused-petitioner in the present case for forgery relating to the sale deed produced in Court in the earlier SCC suit.”

In the case of **Shamsuddin Ahmed Chowdhury Vs State and another reported in 49DLR(AD)(1997)159**, it was decided as under:-

“When a fraudulent document is not produced in a proceeding before court private complaint is not barred.”

In the case of **Abdul Hye Khan and others vs. State reported in 40 DLR(AD) 226**, it was decided as follows:-

“The main ingredient of the prohibitory provision of S.195 is the production in a court proceeding of a forged document by a party thereto. If a forged document is produced in proceeding by a party thereto, the court before which the proceeding is pending, will acquire sole jurisdiction to make a complaint if it is of opinion that it is expedient in the interest of justice. The materials for filing a complaint having already been before it the court is in a better position than a private complainant, to file a complaint not only for the use of the forged document but also for the offence of forging it, irrespective of the date of forgery.”

Apart from the proposition of law, we have also gone through the order of framing charge framed against the accused-petitioners. It appears that the learned Special Judge rightly framed charge as we do

not find any illegality in framing the charge. As per submissions of the learned Advocate for the complainant-opposite party No.1, the learned trial judge recorded evidence of the complainant on 04.07.2018 as P.W.1.

Considering the facts and circumstances of the case and the propositions of law cited and discussed above, we do not find any merit in this Rule.

Accordingly, the Rule is discharged.

The order of stay granted at the time of issuance of the 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 conclude the trial of the case as early as possible preferably within 6 (six) months from the date of receipt of this judgment and order.

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

Ahmed Sohail, J:

I agree.