

**IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL APPELLATE JURISDICTION)**

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 4658 of 2019 with

Criminal Appeal No. 4536 of 2019

S.F. Shah Farhad Hossain

.....Appellant in Cril. Appl. No. 4658 of 2019

Md. Murad Morshed

.. Appellant in Cril. Appl. No. 4536 of 2019

-versus-

The state and another

.....respondents in both the appeals

Mr. Ali Mustafa Khan, Advocate with

Ms. Kazi Samsun Nahar, Advocate

.... For the appellant in Cril. Appl. No. 4658 of 2019

Mr. S.M. Shahjahan, Advocate with

Mr. Omar Sadat, Advocate

...For the appellant in Cril. Appl. No. 4536 of 2019

Mr. Md. Omar Farook, Advocate

For the respondent No.2 in Cril. Appl. No. 4658 of
2019

Ms. Fowjia Akhter Popi, Advocate

For the respondent No. 2 in Cril. Appl. No. 4536 of
2019

Mr. S.M. Golam Mostofa, DAG with

Mr. Md. A. Mannan, AAG

....For the State in both the appeals.

**Heard on. 24.08.2023. 10.01.2024, 14.01.2024,
15.01.2024, 23.01.2024.**

Judgment delivered on 29.01.2024.

The above-mentioned criminal appeals have arisen out of the impugned judgment and order passed by the trial court. Therefore, both appeals were heard analogously and disposed of by this single judgment.

The criminal appeals mentioned hereinabove are directed under section 10 of the Criminal Law Amendment Act, 1958 challenging the legality and propriety of the impugned judgment and order dated 16.04.2019 passed by Special Judge, Faridpur in Special Case No. 14 of 2013 convicting the appellants under sections 406/109 of the Penal Code, 1860 and sentencing them thereunder to suffer rigorous imprisonment for 3 years and fine of Tk.50,000, in default, to suffer imprisonment for 3(three) months and also convicting them under section 5(2) of the Prevention of Corruption Act, 1947 and sentencing them thereunder to suffer rigorous imprisonment for 05(five) years and fine of Tk. 5000, in default, to suffer imprisonment for 3(three) months more.

The prosecution case, in a nutshell, is that the accused S.F. Shah Farhad Hossain is the Manager of the United Commercial Bank Ltd, Faridpur Branch and the accused Md. Murad Morshed is the Senior Officer of United Commercial Bank Ltd, Faridpur Branch. The accused Md. Robiul Haque is the proprietor of Mrs Haque Enterprise and obtained secured overdraft (SOD) or excess over limit from the said bank and accused Md. Kabirul Islam Siddique was the guarantor of the said secured overdraft. The accused Md. Rabiul Haque applied for SOD loan of Tk. 8,00,000 to the Manager of the said branch. The Manager S.F. Shah Farhad Hossain approved the said loan and issued the sanction letter on 19.01.2003 to pay the loan by 30.12.2003. The said loan was secured by the FDR of Tk. 10,00,000. Before full payment of the said loan, S.F. Shah Farhad Hossain disbursed Tk. 3,12,44,004 from 09.01.2003 to 01.08.2004 by 120 cheques

to the accused Md. Rabiul Haque. The accused S.F. Shah Farhad Hossain and Md. Murad Morshed in connivance with the accused Md. Rabiul Haque had withdrew the secured over limit without any approval from the head office and also without taking any additional security from the accused Md. Rabiul Haque. After that out of total loan amounting to Tk. 3,12,44,004, total Tk. 2,70,81,671 was paid by the accused Md. Rabiul Haque till 2010. He failed to pay the balance amount Tk. 41, 62,333. Thus Tk. 41,62,333 was misappropriated by accused Md. Rabiul Haque in connivance with the accused S.F. Shah Farhad Hossain and Md. Morad Murshed and committed offence under sections 406/9/109 of the Penal Code, 1860 and read with section 5(2) of the Prevention of Corruption Act, 1947. P.W.1 Md. Abu Bakkar Siddique lodged the FIR on 15.11.2011.

P.W. 1 Md. Abu Bakar Siddique was appointed as investigating officer on 15.11.2011. During the investigation, he visited the place of occurrence and seized the documents from the Bank. After completing the investigation submitted a memo of evidence against the accused. The Anti-Corruption Commission by office order dated 08.04.2012 had approved for submission of charge sheet against the accused persons. After that, the investigating officer submitted charge sheet on 17.04.2012 against the accused Md. Rabiul Haque, appellants and co-accused Md. Kabirul Islam Siddique.

After that, the case record was sent to the Special Judge, Faridpur who took cognizance of the offence against the accused persons on 30.05.2012 and sent the case records to the Senior Special Judge, Faridpur. Thereafter, the case was sent to the Special Judge, Faridpur for disposal of the case. On 24.06.2018, the trial Court framed charge against the accused Md. Rabiul Haque, appellants and accused Md. Kabirul Islam under sections 406/409/109 of the Penal Code, 1860 read with section 5(2) of the Prevention of Corruption Act, 1947. At the time of the framing charge, the accused Md. Rabiul Haque was absconding. The charge framed against the

appellants was read over and explained to them and they pleaded not guilty to the charge.

The prosecution examined 4 P.Ws to prove the charge against the accused persons. After the examination of the prosecution witnesses, the accused persons were examined under section 342 of the Code of Criminal Procedure, 1898 and they again pleaded not guilty to the charge framed against them and submitted documents through firisti and the trial court fixed the next date on 06.02.2019 for defence witnesses. The accused Md. Kabirul Islam Siddique examined 2 D.Ws and the state cross-examined them. After concluding the trial, the trial Court by impugned judgment and order convicted the accused Md. Rabiul Haque and the appellants and sentenced them as stated above and acquitted co-accused Md. Kabirul Islam Siddique from the charge framed against him against which the appellants preferred this appeal.

P.W. 1 Md. Abu Bakkar Siddique is the Deputy Director, Combined District Officer, Pabna. He stated that from 2009 to 2012 he was discharging his duty at the Anti-Corruption Commission, Head Office, Dhaka. The Anti-Corruption Commission, Head Office appointed him to inquire into the allegation against the accused persons. During the inquiry, he collected the memo dated 20.03.2011 from the United Commercial Bank Ltd, Faridpur Branch. He proved the attested copy of said memo (21 pages) as exhibit-1 series. He proved the records dated 03.04.2011(02 pages) as exhibit-2 series. He proved the photocopy of the memo dated 19.07.2011 issued by the bank as exhibit-3 series. He obtained the memo dated 26.08.2011(four pages) and proved the photocopy of the same as exhibit-4 series. The accused Md. Rabiul Haque applied on 19.01.2003 to the Manager of the United Commercial Bank Ltd, Faridpur Branch for SOD loan of Tk. 800,000 and accused S.F. Shah Farhad Hossain on 19.01.2003 issued the sanction letter approving SOD limit of Tk. 800,000 and the loan was required to be paid within 31.12.2003. The said loan was secured by a

fixed deposit amounting to Tk. 10,00,000. The accused Md. Rabiul Haque had withdrawn Tk. 800,000 on 19.01.2003 but he did not pay the loan within 31.12.2003. Furthermore, from 19.01.2003 to 01.08.2004 accused obtained total excess over limit of Tk. 3,12,44,004 by 120 cheques. The accused S.F. Shah Farhad Hossain and the accused Md. Murad Murshed misused office funds and without the approval of the head office and also without any security by 120 cheques disbursed the said amount and misappropriated. The accused Md. Kabirul Islam Siddique was the guarantor of the said loan. He affirmed that out of Tk. 3,12,44,004, total Tk. 2,70,81,671 was paid but Tk. 41,62,333 remain unpaid. He obtained the approval for submitting the charge sheet. He proved the FIR as exhibit-5 and his signature as exhibit-5/1. During cross-examination, he stated that the bank disbursed and recovered the loan. He affirmed that the accused Md. Rabiul Haque obtained a loan of Tk. 800,000 against the FDR amounting to Tk. 10,00,000. The accused had withdrawn total Tk. 3,12,44,004 and paid total Tk. 2,70,81,671. He also affirmed that on different dates the accused had withdrawn the money and also deposited the money on different dates. During the inquiry, he did not find any documents of rescheduling of the loan. He affirmed that on 04.09.2016 the bank rescheduled the loan of Tk. 45,62,633.35 for one year. On 07.12.2006 loan was rescheduled for one year. On 21.07.2008 the loan was rescheduled for further one year. On 16.11.2009 the money was deposited. The bank authority did not lodge the FIR against the accused. He also denied the suggestion that after the disbursement of the loan, the accused persons recovered the loan. He denied the suggestion that he deposed falsely. During cross-examination, on behalf of the accused Md. Kabirul Islam, he stated that in the FIR it has not been mentioned that the loan was illegally disbursed. He denied the suggestion that he did not inquire correctly.

P.W. 2 Md. Rakib Uddin was the Manager of Jamuna Bank Limited, Banani Branch. He stated that on 02.01.2011 he was posted at United

Commercial Bank, Faridpur Branch. He submitted the documents of the secured overdraft (SOD No. 8947, FDR No. 41004328) and the application dated 19.01.2003 for opening the account and the relevant documents to Abdu Bakkar Siddique, Deputy Director of the Anti-Corruption Commission. He proved the memo dated 20.03.2011 as exhibit-1(Ka). He proved his signature on memo No. 1103 dated 03.08.2011 as exhibit-2(Ka). He proved his signature on memo No. 2244 dated 19.7.2011 as exhibit 3(Ka). He proved his signature on memo No. 2572 dated 16.08.2011 as exhibit-4(Ka). During cross-examination, he affirmed that he submitted the mortgage deed to the officer of the Anti-Corruption. All the documents produced before the court are photocopies. He submitted the photocopies of the documents. The mortgage deed No. 831 dated 19.02.2008 was executed by the United Commercial Bank Ltd, Faridpur and the accused Md. Kabirul Islam Siddique, Md. Fazlul Haque and Md. Rabiul Haque. Total 22 decimals of the land of Schedule Ka, 2.99 decimals of land of schedule (Kha), 80.25 decimals of land of Schedule Ga, 143.68 decimals of land of Schedule Gha, 69 decimals of land of Schedule Uma were mortgaged. There is no connection between the FDR loan and documents relating to the properties mentioned in the schedule of the mortgage deed No. 831 dated 09.02.2004. The United Commercial Bank Ltd also inquired against him. He denied the suggestion that the accused persons did not misappropriate the money. He denied the suggestion that he deposed falsely.

P.W. 3 Mafizul Islam Khandaker is an Officer (Cash) of the United Commercial Bank Limited. He stated that from 28.01.2002 to 07.01.2004 he was posted at United Commercial Bank Ltd, Faridpur Branch. Tk. 3,12,44,004 were paid to Mrs Haque Enterprise in 120 cheques. There was a limit of Tk. 800,000. Tk. 3,04,44,004 were paid as excess over limit without approval. The Manager S.F. Shah Farhad Hossain, Officer Md. Murad Hossain and Second Officer Rasheda Khanam passed the cheque and put the seal "pay cash" and thereafter handed over those cheques to

him. Thereafter, he paid the money. During cross-examination, he stated that he was entrusted with the duty to disburse the money. He was not aware of the instructions of the Bangladesh Bank. He affirmed that he was discharged from service. He is an accused of Special Case No. 33 of 2014 of Feni District. He could not say whether the Manager was empowered to disburse an additional amount beyond the limit. He denied the suggestion that the accused persons did not misappropriate dishonestly. He denied the suggestion that the Manager was empowered to disburse excess over limit. He also denied the suggestion that the accused persons disburse the loan for the interest of the bank.

P.W. 4 Md. Abu Bakar Siddique is the Deputy Director of the Anti-Corruption Commission. He stated that on 18.12.2011 he was posted at Head Office, Anti-Corruption Commission, Dhaka. He took up investigation of the case on 18.12.2011. During the investigation, he seized the documents. The accused Md. Rabiul Haque filed an application on 19.01.2003 for SOD loan of Tk. 800,000. Subsequently, he stated that the accused applied for loan of Tk. 10,00,000 and Tk. 800,000 was sanctioned. The accused disbursed the loan on different dates from 19.01.2003 to 01.08.2004 by 120 cheques and disbursed the excess over limit amounting to Tk. 3,12,44,004. The accused S.F. Shah Farhad Hossain abusing his power without the approval of the Head Office disbursed the loan violating the condition of the sanctioned letter. The accused Md. Murad Morshed, Senior Officer signed the cheques and accused Md. Kabirul Islam Siddique is the guarantor. Till 29.04.2010, total Tk. 2,70,81,671 was paid. The accused persons did not pay Tk. 41,62,333 and in connivance with each other, the accused persons misappropriated the said amount. On 21.12.2011 accused Md. Kabirul Haque paid Tk. 400,000 and the accused persons misappropriated Tk. 37,62,333 for which he submitted the memo of evidence against the accused-persons. The Anti-Corruption Commission vide memo dated 08.04.2012 had approved for submission of the charge

sheet against the accused persons. He proved the sanction letter as exhibit 6. He submitted charge sheet dated 17.04.2012 against the accused persons. During cross-examination on behalf of the accused S.F. Shah Farhad Hossain and the accused Md. Murad Morshed, he stated that he did not visit the loan recovery division of the bank. He did not get a copy of the letter dated 16.11.2009 issued by the Head Office of United Commercial Bank. He also did not see the instruction dated 19.03.1984. He denied the suggestion that intentionally he did not seize the letter issued by the Head Office of the Bank. He denied the suggestion that accused persons did not misuse their power and they did not misappropriate any money. He also denied the suggestion that there was no material against the accused persons for submitting charge sheet. During cross-examination, on behalf of the accused Md. Kabirul Islam Siddique, he stated that he is the informant as well as the investigating officer. He denied the suggestion that he is an interested witness. He denied the suggestion that he deposed falsely.

D.W. 1 Shahidul Islam Mollah is the Manager of United Commercial Bank Limited, Faridpur Branch. He stated that he is discharging his duty as Manager of United Commercial Bank Limited, Faridpur Branch from 12.09.2018. There was a total debt of Tk. 37,62,333. The accused Md. Kabirul Islam Siddique paid Tk. 30,39,089.30. As of today the total dues of the bank is Tk. 7,23,244.05. Considering the application of accused Kabirul Islam Siddique unapplied interest was waived. The applied interest is now due and accused Md. Kabirul Islam Siddique filed an application to the bank for a waiver of the applied interest. He could not say whether the accused persons fraudulently misappropriated the money. In the instruction circular dated 19.03.1984, it has been mentioned that the statement regarding excess over limit is required to be submitted weekly to the Head Office. There is a photocopy to show that the weekly statement was sent to the Head Office. He proved the photocopy of the statement as exhibit-Ka series and the original was produced in court.

The circular dated 19.03.1984 is rescinded by the circular of 2007. The Head office of the Bank issued a letter on 07.12.2006 for adjustment of the loan. On 21.02.2008 Head Office of the Bank also issued a letter to the loanee. During cross-examination, he stated that accused Md. Rabiul Haque did not file any application for a waiver of loan. The accused S.F. Shah Farhad Hossain and Md. Murad Morshed were in service at the time of disbursement of the loan. Clause 5 of the circular dated 19.03.1984 is in force today. He could not show the copy of the letter dated 07.12.2006 and 21.07.2008. Without any sanction from the Head Office, the Manager is not legally empowered to disburse the excess over limit.

D.W. 2 Md. Touhidul Alam Khan is an Executive Officer, United Commercial Bank Ltd, Satoirbazar, Faidpur. He stated that following the requisition of the Court, he produced the mortgage deed No. 831 dated 19.02.2004. He produced the photocopy of the said deed. The first party of the said deed is Md. Kabirul Islam Siddique, Md. Fazlul Haque and Md. Rabiul Haque and the second party is United Commercial Bank Limited, Faridpur Branch and there are 5 schedules of the said mortgage deed. There are 22 decimals of land in the first schedule, 299.04 decimals of land in the second schedule, 82.05 decimals of land in the third schedule, 143.68 decimals of land in the fourth schedule, 69 decimals of land in the fifth schedule. The said mortgage deed was executed and registered against the CC hypo loan of Kabirul Islam Siddique. The ACC seized those documents on 03.04.2011. The then Manager Rakib Uddin presented those documents. The mortgage deed was submitted to the United Commercial Bank Ltd, Faridpur Branch while he was discharging his duty at Faridpur Branch. Dabir Uddin Ahmed was the Manager. Against the two loan accounts, the said mortgage deed was executed. He did not submit the mortgage deed of Mrs. Haque Enterprise and no mortgage deed was registered against the loan of accused Rabiul Haque.

The learned Advocate Mr. S.M. Shajahan appearing on behalf of the accused Md. Murad Morshed along with learned Advocate Mr. Omar Sadat having drawn the attention of this court to the circular dated 19.03.1984 submits that at the relevant time the excess over limit was not prohibited by the Head Office of the bank by issuing any circular or office order. Rather by issuing the said circular, the bank impliedly instructed the Managers of the branches to disburse the excess over limit and no offence was committed by the accused persons. There was a practice of the bank for disbursement of the excess overdraft or excess over limit and by 120 cheques the accused disbursed the loan. The accused persons also sent the weekly statement of the excess over limit to the Head Office of the Bank following the said instruction circular. He further submits that the disbursement of the loan for the interest of the bank is not an offence under the Penal Code, 1860 and the Prevention of Corruption Act, 1947. He also submits that at the time of disbursement of the loan, the accused Md. Murad Morshed was the Senior Officer of the Bank and no action was taken by the Bank for disbursement of the loan and he was promoted to the Executive Vice-President of United Commercial Bank Limited and retired from service with all service benefits. In the meantime, the total loan liability of the bank has been adjusted by the loanee co-accused Md. Rabiul Haque and the trial court failed to consider the circular dated 19.03.1984 in its true perspective. He lastly submits that the trial Court found that no offence was committed by the accused persons under section 409 of the Penal Code, 1860 but illegally convicted the accused persons under section 406/109 of the Penal Code, 1860.

The learned Advocate Mr. Md. Ali Mostafa Khan appearing on behalf of the accused S.F. Shah Farhad Hossain submits that at the relevant time of disbursement of the excess over limit the accused was the Manager of the United Commercial Bank Ltd, Faridpur Branch and no departmental action was taken against him by the Bank. Rather he was promoted to First

Assistant Vice-President and the bank allowed him to retire from the service with all service benefits. He adopted the submission of the learned Advocate Mr. S. M Shahjahan.

The learned Advocate Mr. Omar Farook appearing on half of respondent No. 2 in Criminal appeal No. 4658 of 2019 submits that a sanction letter was issued on 19.1.2003 for disbursement of the SOD loan of Tk. 800,000 and violating the terms and conditions of the said sanction letter and without approval of the bank the accused persons disbursed total Tk. 3,12,44,004 infavour of co-accused Md. Rabiul Haque. No security document was executed by co-accused Md. Rabiul Haque before disbursement of the SOD loan. Therefore, the accused persons committed the offence of criminal breach of trust under section 406 of the Penal Code, 1860. He further submits that the accused persons are public servants and without prior approval of the authority of the bank disbursed the loan and thereby committed the offence of misconduct as defined in section 5(1) of the Prevention of Corruption Act, 1947 and the trial court on proper assessment and evaluation of the evidence of the prosecution and the defense witnesses legally passed the impugned judgment and order. He prayed for the dismissal of the appeal.

The learned Advocate Ms. Fowjia Akther Popi appearing on behalf of respondent No. 2 in Criminal Appeal No. 4536 of 2019 submits that in the sanction letter dated 19.1.2003 issued by the accused S.F. Shah Farhad Hossain, it has been stated that the excess over limit is strictly prohibited and the accused violating his order without approval of the Head Office of the Bank on 19.1.2003 disbursed total loan amounting to Tk. 38,38,661 and before payment of the said amount, he disbursed total loan of Tk. 3,12,44,004. Therefore he committed an offence under section 5(2) of the Prevention of Corruption Act, 1947. The learned Advocate in support of her submission relied on decisions made in the case of Nakuleswar Saha Vs the

state reported in 35 DLR (AD) 284 and the case of AKM. Mosharaf Vs. the State reported in 65 DLR 564.

I have considered the submission of the learned Advocates who appeared on behalf of the appellants and the learned Advocates who appeared on behalf of the ACC, the evidence adduced by the parties, the impugned judgment and order passed by the trial court and the records.

On perusal of the records, it appears that the co-accused Rabiul Haque is the proprietor of Mrs Haque Enterprise and he applied for SOD loan of Tk. 10,00,000 to the appellant S.F. Shah Farhad Hossain who was the Manager of United Commercial Bank Limited, Faridpur Branch and SOD loan of Tk. 800,000 was sanctioned by sanction letter dated 19.01.2003(exhibit-1(9)). In the said sanction letter it has been stipulated that the excesses over limit is strictly prohibited. The statement of loan account of co-accused Md. Rabiul Haque exhibit-1(3) depicts that Tk. 800,000, Tk. 200,000 and Tk. 28,38,661, total Tk. 38,38,661 were disbursed by 3 cheques on 19.01.2003.

P.W. 1 stated that from 19.01.2003 to 01.08.2004 total Tk. 3,12,44,004 were disbursed to the co-accused Md. Rabiul Haque as excess over limit by 120 cheques. During cross-examination, he admitted that out of Tk. 3,12,44,004 the accused paid total Tk. 2,70,81,671. He affirmed that on 04.09.2006 the loan amounting to Tk. 45,62,633.35 was rescheduled for 01 year. On 07.12.2006 the loan was re-scheduled for further 01 year and on 21.07.2008 the loan was lastly re-scheduled for 01 year. He also affirmed that no statement is made in the FIR that the loan was illegally disbursed. P.W.3 Mofizul Islam Khondaker, Officer (Cash) stated that by 120 cheques, total Tk. 3,12,44,004 were paid by S.F. Shah Farhad Hossain, the Manager of the United Commercial Bank Limited, Faridpur Branch. The appellant Murad Hossain and Second Officer Rasheda Khanom approved the cheques and put the seal i.e. 'pay cash' and handed over those

cheques and he (P.W. 3) made the payment. But the investigating officer did not implicate the Second Officer Rasheda Khanom and P.W. 3 as accused in the case. No explanation was given by the investigating officer (P.W. 4) Md. Abu Bakar Siddique as to why he did not implicate the Second Officer Rasheda Khanom and P.W. 3 Mofizul Islam Khondakar, Officer (Cash) of the bank as accused in the case, although both of them stand on the same footing along with the appellants.

The investigating officer P.W. 4 Abu Bakkar Siddeque stated that co-accused Mr. Rabiul Haque paid total Tk. 2,70,81,671 within 29.04.2010. On 21.12.2011 co-accused Md. Kabirul Islam Siddeque paid Tk. 400,000. D.W. 1 Md. Shahidul Islam Mollah, Manager of the United Commercial Bank Limited, Faridpur Branch stated that he is discharging his duty as Manager of the said branch from 12.09.2018 and out of total debt amounting to Tk. 37,62,333, the co-accused Md. Kabirul Islam Siddeque paid total Tk. 30,39,089.30 on 27.12.2018. He was examined on 06.02.2019. He stated that till today the total Tk. 7,20,244.05 is due. The said amount is applied interest and accused Md. Kabirul Islam Siddique filed an application to the bank for waiver of the applied interest. He also stated that in the instruction circular dated 19.03.1984 in clause 5 it has been stated that the statement of excess over limit is required to be submitted to the head office weekly and the statement of the excess over limit account of the co-accused Md. Rabiul Haque was sent to the head office. He proved the said statement sent to the head office by the concerned branch as exhibit-Ka series. He affirmed that the circular dated 19.03.1984 has been rescinded by another circular of 2007.

At this stage, it is relevant here to quote the instruction circular dated 19.03.1984 which runs as follows;

“United Commerce Bank Ltd.
Credit Division
Head Office

58, Motijheel Commercial Area, Dhaka.
Instruction Circular No.5 Dated: 19.3.1984.

All branches

Submission of weekly statement of Temporary Overdraft and statement of excess over limit or Drawing Power.

Branches are advised to submit weekly statements of temporary overdrafts and weekly statements of excess drawings allowed over limit or drawing power during the week with effect from 25.3.1984 on the enclosed proforma.

The statements should be prepared each Friday of the week along with branch comments regarding adjustments and consideration for allowing such facility.

Please acknowledge receipt.

(H.A. Tayyah) (M.S. Chowdhury)

Vice President Sr. vice-President

C.C. to P.S. to President.”

It appears that Tk. 3,12,44,004 was admittedly paid on different dates by 120 cheques from 19.01.2003 to 01.08.2004. No suggestion was given to D.W. 1 by the prosecution that the circular dated 19.03.1984 was not in force at the time of disbursement of the said loan. The statement of D.W. 1 as regards the issuance of the instruction circular dated 19.03.1984 by the Head Office, United Commercial Bank Ltd is admitted by the prosecution. From the above evidence, it is crystal clear that at the time of disbursement of the said loan, the circular dated 19.03.1984 was in force.

On perusal of the instruction circular dated 19.03.1984, it reveals that the Head Office of the United Commercial Bank Ltd instructed the Managers of all the branches to submit the weekly statement of temporary overdraft and excess over limit with effect from 25.03.1984 for consideration of the authority of the bank. D.W. 1 stated that weekly statement (exhibit-Ka series) was sent to the Head Office of the UCBL. The said circular was subsequently rescinded in 2007. Therefore, I am of the

view that no rule or circular of the United Commercial Bank Ltd was violated at the time of disbursement of the said loan.

In the case of Shakir Hussain vs. The State reported in 9 DLR(SC) 14 Para 3 it has been held that;

“Where the charge against an accused person is that of criminal breach of trust, the prosecution must prove not only entrustment of or dominion over the property but also that the accused either dishonestly misappropriated, converted, used or disposed of that property himself or that he wilfully suffered some other person to do so.”

In the case of Dewan Obaidur Rahman vs. State and another reported in 4 BLC(AD) 167 para 9 our Apex Court dealt with the issue of ‘non-payment of loan’ and has held that;

“Having gone through the impugned petition of complaint and the statements recorded thereunder by the concerned Magistrate under section 200 CrPC we cannot but hold that the alleged transaction between the complainant and the appellant is clearly and admittedly a business transaction. The appellant had already paid a part of the money under the contract to the complainant. The failure on the part of the appellant to pay the complainant the balance amount under the bill does not warrant any criminal proceeding as the obligation under the contract is of civil nature. The learned Judges of the High Court Division were not justified in holding that the petition of complaints having disclosed an initial element of cheating, the case in question can not be quashed.”

In the case of Syed Ali Mandal vs. The State report in 46 DLR 149 Para 25 it was held that;

“Their activities or acts may be construed as acts of negligence and violation of rules and instructions. But mere violation of rules and instructions cannot be a ground for finding the guilt of these appellants under section 5(2) of Act II of 1947. In such a case the prosecution is bound to prove the mens rea or criminal intent of these appellants which is very much lacking in the present case and none of the witnesses stated that appellants Bholai Pramanik, Abdur Rashid, Moksed Ali and Akkel Ali with criminal intention misappropriated the HSD oil or abetted the offence of misappropriation. It is well-settled that mere violation of rules and instructions in the absence of mens rea do not render the person criminally liable.”

Although there was no formal approval for disbursement of the excess over limit in favour of the co-accused Md. Rabiul Haque but by subsequent rescheduling the outstanding loan amounting to Tk. 45,62,633.35 on 04.09.2006, 07.12.2007 and 21.07.2008 by the Head Office of the United Commercial Bank Ltd had given implied approval of the excess overdraft or excess over limit and no objection was raised by the bank at any time regarding the disbursement of the excess overdraft in favour of the co-accused Md. Robiul Haque. Under the circular dated 19.3.1984 excess over limit or excess overdraft was not prohibited.

In the case of Islam Ali Mia @ Md. Islam vs. Amal Chandra Mondal and another reported in 45 DLR (AD)27 Para 4 judgment dated 01.09.1992 it has held that;

“Business transactions were going on between the complainant and the accused for a long time relating to supply of fish and the latter made payments in parts. A balance amount claimed by the complainant was not agreed on and the accused refused to pay it. This refusal to pay the balance does not constitute any criminal offence under sections 406/420 of the Penal Code.”

In the case of S.M. Mahabubullah vs. The State and others passed in Criminal Miscellaneous Case No. 14659 of 2009 para 27 judgment dated 05.06.2017 the High Court Division quashed the proceedings of the case holding that;

“On perusal of the charge sheet itself, it appears that the Investigating Officer after a thorough investigation of the case found that out of 37 Bank accounts 17 accounts were fully adjusted, 16 accounts were re-scheduled by the Board of Directors of the Bank concerned and in respect of the rest 4 accounts money suits have been filed against the borrowers for realization of money. In the charge-sheet, the Investigating Officer also mentioned that the accused did not commit any offence punishable under section 409 of the Penal Code as he did not commit any crime relating to criminal breach of trust. The Investigating Officer further mentioned that the accused committed irregularities in sanctioning loan through said 37 Bank accounts for which a departmental proceeding has already been initiated against him and he has been dismissed from his service.”

In the case of Safiul Alam vs the State reported in 64 DLR 6 Para 28 judgment dated 11.1.2012 the High Court Division dealt with the issue of ‘disbursement of loan’ by the bank official and ‘non-payment of the loan’ by the loanee and has held that;

“Mere delay in payment of the loan money or refusal to pay the same does not amount to misappropriation and the same constitutes no offence under section 406 of the Penal Code. The breach of terms of the contract does not mean the breach of any trust and, as such, failure to fulfil the terms of a contract does not amount to any criminal offence.”

In the case of Mohammad Musa vs. Kabir Ahmed reported in 41 DLR 4 judgment dated 04.02.1988 para 6 it has been held that;

“To establish a charge under section 405 of the Penal Code the prosecution must prove not only entrustment of or dominion over the property but it must also prove that the accused has dishonestly misappropriated or converted to his own use or dishonestly used or disposed of that property or willfully suffered any other person so to do.”

In the case of Mir Amir Ali vs. The State reported in 45 DLR 250 judgment dated 11.12.1991 para 9 it has held that;

“In order to bring the allegation within the ambit of an offence under section 409 or 405 of the Penal Code there must be ingredients of entrustment of money or any property or in any manner having the dominion over the same and then the questions of misappropriation of such property or conversion to

own use in violation of any direction of law prescribing the mode in which such trust is to be discharged or wilfully suffering any other person so to do will arise.”

In the case of Md. Safiuddin vs. The State reported in 1981 BLD 150 the HCD has held that;

"Section 405 does not cover the case of a loan or of an advance of money when the borrower or depositor intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest or compensation for the use thereof."

In the case of State vs. Azizur Rahman and another reported in 1937 CrL. J 225 (Karachi) it has been held that;

"Without going into the question whether papers with regard to GP Fund can be treated as valuable property under section 405 PPC it is evident that the dispute between the parties is of a civil nature and the complainant resorts to use the Criminal Courts to settle civil disputes which cannot be permitted".

In the instant case, the loan was disbursed to the co-accused Md. Rabiul Haque following the circular dated 19.03.1984 issued by UCBL and the appellants had no control over the loan disbursed to him. The breach of the terms and condition of the loan agreement by the loanee is not breach of trust. Furthermore, the trial court found that the prosecution failed to prove

the allegation of misappropriation against the appellants. The trial court held that the appellants are the public servants as defined in section 110 of the Banking Company Act. I am of the view that a Public servant is only liable to be convicted and sentenced for committing the offence of criminal breach of trust under section 409 of the Penal Code, 1860 or section 5(2) of the Prevention of Corruption Act, 1947. The appellants disbursed the loan as an officer of the Bank i.e. the public servant. Therefore, section 406 is not applicable in the case of the appellants.

The next question required to be addressed by this court as to whether the appellants committed the offence of criminal misconduct as defined in section 5(1) of the Prevention of Corruption Act, 1947. It is already found that at the relevant time the excess over limit was not prohibited by any circular of the United Commercial Bank Ltd, Head Office, Dhaka. Rather the bank by issuing a circular on 19.03.1984 impliedly authorised the Managers of the branches of the United Commercial Bank Ltd to regularise the excess over limit. No allegation has been made by the United Commercial Bank Ltd against the appellants that they have disbursed the loan violating any particular circular or rules of the bank. The bank authority neither initiated any departmental proceedings against the appellants nor filed any criminal case against them. Rather the appellants were promoted up to the post of Vice-President of the United Commercial Bank Ltd. Therefore, I am of the view that no offence of criminal misconduct was committed by the appellants as defined in section 5(1) of the Prevention of Corruption Act, 1947. The trial court failed to apply its judicial mind in passing the impugned judgment and order of conviction and sentence against the appellants.

It is found that the appellants disbursed the loan on different dates by 120 cheques from 19.01.2003 to 01.08.2004 and total Tk. 2,70,81,671 were paid till 29.04.2010. Therefore, it is a clear case of non-payment of the entire loan or part payment of loan by the loanee i.e. co-accused Md. Rabiul

Haque. Non-payment of the entire loan or part payment of the loan is not a criminal offence under law. Total Tk. 7,23,244.05 was due as of 06.02.2019 which is admittedly the applied interest out of the total loan amounting to Tk. 3,12,44,004 and now under consideration of the authority of the bank for deciding waiver of interest. Therefore, I am of the view that the appellants did not commit any offence under the law.

Because of the above facts and circumstances of the case, evidence, findings, observation, reasoning and proposition, I am of the view that the prosecution failed to prove the charge against the appellants beyond all reasonable doubt. The trial court failed to apply judicial mind and illegally passed the impugned judgment and order of convict and sentence against them.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial court against the appellants are hereby set aside.

Send down the lower Court's record at once.

