

Present:

Mr. Justice Md. Nazrul Islam Talukder

And

Mr. Justice S.M. Mozibur Rahman

Criminal Revision No.2964 of 2019

IN THE MATTER OF:

Durnity Daman Commission

..... Petitioner.

-Versus-

Muhammad Shawkat Ali alias Md. Shawkat Ali and another

..... Opposite-parties.

Mr. Md. Khurshid Alam Khan, Advocate

..... For the Petitioner.

Mr. A.K.M. Amin Uddin, D.A.G with,

Mrs. Anna Khanom (Koli), A.A.G

Mr. Md. Shaifour Rahman Siddique, A.A.G

... For the State-opposite party.

Mr. Md. Shahria Kabir, Advocate

....For the Accused-opposite-party No.1

Heard on 30.06.2021 and 11.08.2021

Judgment on: 11.08.2021

Md. Nazrul Islam Talukder, J:

On an application under Section 10(1A) of the Criminal Law Amendment Act, 1958, this Rule was issued calling upon the opposite-party No.01 to show cause as to why Order No.36 dated 01.09.2019 passed by the learned Metropolitan Senior Special Judge,

Dhaka granting bail to the accused-opposite party No.01 in Metropolitan Special Case No.56 of 2019 arising out of Dudak G.R. No.72/19 arising out of Sojeka Dhaka-1 of Case No.03 dated 25.06.2019 under Sections 420/467/468/471/411/166/109 of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947, now pending in the Court of Metropolitan Senior Special Judge, Dhaka should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in brief, is that on 25.06.2019, one Md. Abu bakar Siddique, Deputy Director, Durnity Daman Commission, Head Office, Dhaka being informant lodged a First Information Report before the Deputy Director of the Durnity Daman Commission, integrated District Office, Dhaka against the accused persons including the present accused-opposite party No.01 under Sections

420/467/468/471/411/166/109 of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 alleging, *inter alia*, that the accused-opposite party No.01 is the owner of the land who got an allotment of the plot in question from the DIT (now renamed as RAJUK). Thereafter, he entered into a contract with Rupayan Housing Estate Ltd. for developing the plot by collecting a plan from the proper authority. Having received the plan, a 15th storied building was constructed. Then, the said building was extended up to 16th to 18 floor getting revised plan and approval from RAJUK. The allegation mentioned in the FIR is that the accused-opposite party No.01 in connivance with other accused extended the building up to 19th to 23rd floor which is not approved by the RAJUK. Since the RAJUK has not approved the plan for extending the floor from 19th to 23rd floor, the accused-opposite party No.01 being owner of the plot

has got direct involvement with the passing of the plan illegally and extended the building up to 19th to 23rd floor unlawfully. Hence, the accused-opposite party No.01 and others committed offences under Sections 420/467/468/471/411/166/109 of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (II of 1947). Accordingly, Dudak Sojeka Dhaka-1 Case No.03 dated 25.06.2019 corresponding to Dudak G.R. No.72/19 under Sections 420/467/468/471/411/166/109 of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 was lodged against the accused-persons. Hence, the F.I.R against the accused persons including the accused-opposite party No.01.

It is stated in the application that the case is now under investigation by the Durnity Daman Commission and no investigation report has yet been submitted under section 173 of the Code of Criminal Procedure.

It is further stated in the application that the accused-opposite party No.1 was arrested by the investigating officer who then forwarded him before the learned Metropolitan Senior Special Judge, Dhaka. During pendency of the case, the accused-opposite party No.1 submitted an application for bail in Metropolitan Special Case No.56 of 2019 before the Metropolitan Senior Special Judge, Dhaka, who after hearing the parties granted bail to the accused-opposite party No.1 by order No.21 dated 20.08.2019.

Being aggrieved by order No.36 dated 01.09.2019 passed by the learned Metropolitan Senior Special Judge, Dhaka in Metropolitan Special Case No.56 of 2019 granting bail to the accused-opposite party No.1, the Anti-Corruption Commission preferred this criminal revision under section 10(1A) of the Criminal Law Amendment Act, 1958 (XL of 1958) before this court and obtained Rule along with an an-interim order of

stay of the impugned order granting bail to the accused-opposite party No.1 together with direction upon the accused-opposite party No.1 to surrender before the concerned court below and to submit his passport to the concerned court below.

At the very outset, Mr. Md. Khurshid Alam Khan, the learned Advocate appearing for the Anti-Corruption Commission, submits that there is specific allegation mentioned in the FIR against the accused-opposite party No.01 under Sections 420 / 467 / 468 / 471 / 411 / 166 / 109 of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (II of 1947), but that has not been considered by the learned Metropolitan Senior Special Judge, Dhaka and as such, the learned Metropolitan Senior Special Judge, Dhaka committed serious illegality in granting bail to the accused-opposite party No.01 during investigation of the case.

He next submits that the learned Metropolitan Senior Special Judge, Dhaka without considering the gravity of offences most illegally granted bail to the accused-opposite party No.1.

He then submits that a prima-facie case has been made out against the accused-opposite party No.01 mentioned in the FIR and as such, he has committed offences under Sections 420 / 467 / 468 / 471 / 411 / 166/109 of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (II of 1947), but the learned Metropolitan Senior Special Judge, Dhaka committed serious illegality in granting bail to the accused-opposite party No.01.

He candidly submits that the accused-opposite party No.01 in connivance with other accused extended 19th to 23rd floor of the building which is not approved by the RAJUK and as such, he committed punishable offences under Sections 420/467/468/471 /411/166/109

of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (II of 1947), but the learned Metropolitan Senior Special Judge, Dhaka committed serious illegality in granting bail to the accused-opposite party No.01.

He vigorously submits that under the revisional jurisdiction, this court has power and authority to pass ad-interim order to stay the order of bail even without hearing the accused if the circumstances demand such as apprehension of fleeing away from the country and as such, the Rule may be made absolute setting aside the impugned order of bail.

He lastly submits that ingredients of sections 420/467/468/471/411/166/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 (II of 1947) are available in the instant case which have been made out in the prosecution materials against him but the learned Metropolitan Senior Special Judge,

Dhaka committed serious illegality in granting bail to the accused-opposite party No.1 without considering the prosecution materials in proper perspective.

On the other hand, Mr. Md. Shahria Kabir, the learned Advocate appearing for the opposite-party No.01, submits that the notice of the aforesaid criminal revision has been served upon the accused-opposite party No.01 after issuance of the Rule and the contents of the same have been explained to the accused-opposite-party No.01 by the learned counsel and he has understood the same; the accused-opposite party No.01 has been advised to controvert only those statements which are relevant for the purpose of disposal of the Rule and truthfulness of the statements which are not specifically admitted hereinafter shall be deemed to have been denied by the accused-opposite-party No.01.

He next submits that the F.I.R accused No.01 is the owner of the land in question getting allotment from

the then DIT, now RAJUK; thereafter, he entered into a contract with a developer company namely Rupayan Housing Estate Ltd. for developing the land/plot getting a plan from the authority concern; later on, a 15th storied building was constructed thereon, which was extended subsequently from 16th to 18th floor getting revised plan and approval from RAJUK; however, Rupayan Housing Estate Ltd then made it 23rd storied building getting another approval from RAJUK; the accused-opposite party No.01 being Deputy Director (Estate) of RAJUK, he had no direct involvement with the passing of the revised plan and construction of the building in question; the accused-opposite party No.01 is an infirmed person due to his old age, who is suffering from various diseases like heart disease, back pain, liver and cancer and he is under the supervision of medical treatment.

He candidly submits that this court has no power and authority to pass any ad-interim order to stay the order of bail granted by the learned judge of the court below without hearing the accused who was enlarged on bail and as such, the Rule is liable to be discharged and the accused-opposite party No.1 may remain on bail following the order of the Appellate Division.

He lastly submits that on 05.11.2019, this Rule was issued and the petitioner obtained an order of stay of the impugned order; as per direction of this Court, the accused-opposite party No.01 voluntarily surrendered before the concerned court below; remaining in custody, he preferred Criminal Petition For Leave To Appeal No.1688 of 2019 before the Appellate Division of the Supreme Court of Bangladesh; upon hearing the parties, the learned Judges of the Appellate Division were pleased to enlarge the present accused-opposite party No.01 on

bail and also pleased to stay operation of the ad-interim order dated 05.11.2019 passed by the High Court Division in this Criminal Revision till disposal of the Rule; however, the direction relating to depositing the passport has been maintained; accordingly, the present accused-opposite party No.01 is on bail and as such, the Rule may be discharged.

Mr. A.K.M. Amin Uddin, the learned Deputy Attorney-General appearing for the State opposite-party, has adopted the submissions advanced by the learned Advocate for the Anti-Corruption Commission.

We have gone through the application under Section 10(1A) of the Criminal Law Amendment Act, 1958 and perused the prosecution materials annexed thereto. We have also heard Mr. Md. Khurshid Alam Khan, the learned Advocate appearing on behalf of the

petitioner, Mr. Md. Shahria Kabir, the learned Advocate appearing for the accused-opposite-party No.01 and Mr. A.K.M. Amin Uddin, the learned Deputy Attorney-General for the State opposite-party at length and considered their submissions to the best of our wit and wisdom.

On going through the prosecution materials on record, it appears that the F.I.R named accused No.01 is the owner of the land who got an allotment of the land in question from the DIT (now renamed as RAJUK). Thereafter, he entered into a contract with Rupayan Housing Estate Ltd. for developing the plot by getting a plan from the proper authority. Having received the plan, a 15th storied building was constructed. Then, the said building was extended up to 16th to 18th floor getting revised plan and approval from RAJUK. The allegation disclosed in the FIR is that the accused-opposite party No.01 in connivance with other accused

extended 19th to 23rd floor of the building which is not approved by the RAJUK. Since the RAJUK has not approved the plan for extending the floor from 19th to 23th floor, the F.I.R named accused No.01 being owner of the plot has got direct involvement with the passing of the revised plan and extended the building up to 23rd floor illegally in collaboration with accused-opposite party No. 01 and others. Hence, the accused-opposite party No.01 and others committed offences under Sections 420/467/468/471/411/166/109 of the penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947 (II of 1947). It may be mentioned that due to unlawful approval for construction, unscientific floor management, and defective entry and exit systems of the building, 25 persons died and 73 persons became seriously injured following a devastating fire broken out in the building. The investigation of the case is under way. The accused-

opposite party No.1 was arrested by the investigating officer and then he was forwarded to the court of learned Metropolitan Senior Special Judge, Dhaka. During pendency of the case, the accused-opposite party No.1 submitted an application for bail before the court of learned Metropolitan Senior Special Judge, Dhaka who upon hearing the parties granted bail to the accused-opposite party No.1 by order No.36 dated 01.09.2019. Being aggrieved by the order granting bail to the accused-opposite party No.1, the Anti-Corruption Commission filed this criminal revision before this court under section 10(1A) of the Criminal Law Amendment Act, 1958 and obtained Rule and an ad-interim order of stay of the order granting bail to the accused-opposite party No.1 along with a direction to surrender before the court below within 7(seven) days from the date of receipt of the order by the court below together with a further direction to deposit his passport

to the concerned court below. It may be mentioned that at the time of issuing Rule and passing an ad-interim order of stay and direction, the learned Advocate for the accused-opposite party No.1 could not remain present before the court since no notice was received by the accused-opposite party No.1. Anyway, following the order dated 05.11.2019 passed by this court, the accused-opposite party No.1 in line with the direction of this court surrendered before the concerned court below and being aggrieved by the same preferred Criminal Petition For Leave To Appeal No.1688 of 2019 before the Appellate Division. The learned judges of the Appellate Division upon hearing the parties enlarged the accused-opposite party No. 01 on bail, stayed the operation of the ad-interim order dated 05.11.2019 passed by the High Court Division in Criminal Revision No.2964 of 2019 till disposal of the Rule and maintained the direction relating to depositing

the passport and directed the High Court Division to hear and dispose of the Rule on merit expeditiously. In view of the above facts and circumstances, the Rule has appeared in the list for hearing.

At the time of hearing of the Rule, Mr. Shahria Kabir, the learned Advocate for the accused-opposite party No.1 has raised a question on the power and authority of the High Court Division in passing ad-interim order of stay of the order of bail granted by the learned judge of the court below without hearing the accused-opposite party No.1 at the time of issuing of the Rule. It is categorically argued by the learned Advocate for the accused-opposite party No.1 that it is not proper and legal on the part of the High Court Division to pass ad-interim order of stay of the order of bail passed by the learned judge of the court below without hearing the accused-opposite party No.1 who

was enlarged on bail by the learned judge of the court below.

In order to appreciate the submissions of the learned Advocate for the accused-opposite party No.1, we want to quote section 439 of the Code of Criminal Procedure, which runs as under:

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court Division may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an

opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by [a Metropolitan Magistrate or] a Magistrate of the first class.

(4) Nothing in this section shall be deemed to authorize the High Court Division to convert a finding of acquittal into one of conviction, or to entertain any proceedings in revision with respect to an order made by the Sessions Judge under section 439A]

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.

Before coming to a decision in this matter, let us discuss about the power, scope and authority which may be exercised by the High Court Division under the revisional jurisdiction.

It is worthwhile to mention that the controlling and final power of revision in some cases rests with the High Court Division. Section 439 of Cr.P.C must be read along with and subject to the provisions of section 435 of Cr.P.C. The purpose and object is to confer a kind of paternal and supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect

of proper precautions and apparent harshness of treatment. The revisional Jurisdiction of High Court Division is very extensive. The Jurisdiction under sections 439 and 435 of Cr.P.C is very wide and the same may be exercised by this court to test the correctness, legality or even the propriety of the finding, sentence or order of the subordinate court subject to satisfying itself as to the legality of the powers mentioned in sub-section (1) of section 439 of Cr.P.C which merely describes some of the reliefs which the High Court Division may grant. But it is not exhaustive. It has all the powers of an Appellate Court and more, it can enhance sentence. The revisional power though very wide is purely discretionary to be fairly exercised according to the exigencies of each case. It is an extra-ordinary power which must be exercised with due regard to the circumstances of each particular case. A private party, who has no right of

appeal, can come in revision before this court where the Government/Commission fails to exercise the right of appeal.

In view of the facts and circumstances of the case and the discussions made above, we are of the view that for rectification of injustice, if caused for any manifest reasons and for determination of any question of facts, where onus is wrongly placed upon any party or an incorrect principle has been applied in determining the question of facts or any material piece of evidence has been ignored by the Court below, High Court Division being a revisional Court having paternal and supervisory jurisdiction can certainly, in the interest of justice, scrutinize and go into facts and examine the propriety of the finding of the impugned order in question.

Sub-section (2) of section 439 of the Code of Criminal Procedure provides that no order under this

section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence. It may be noted that any ad-interim order in nature is not the final order because an ad-interim order staying the order of bail granted by the learned judge of the court below may be altered, modified, affirmed, recalled and vacated on merit at the time of hearing of the Rule or before hearing of the Rule upon hearing the parties of the case. It is pertinent to note that before passing final judgment and order on Rule and ad-interim order, an opportunity of being heard either personally or by pleader must be given to the accused. So, the High Court Division invoking its revisional jurisdiction has power, scope and authority to pass an ad-interim order staying the order of bail and/or any order which is *ex-facie* illegal being passed on non-

application of mind, and without jurisdiction and the same has been passed basing on incorrect principle of law and ignoring the material piece of evidence and discretionary power has not been fairly exercised following the facts and circumstances of the case and the relevant laws. Furthermore, if there is any bona fide reason, emergency and apprehension to the effect that if the accused remains on bail, the accused may flee away from the proceeding as well as from the country to frustrate the proceeding initiated against the accused, in that case, it is incumbent upon the High Court to pass an ad-interim order to meet the emergency situation and other situations for ends of justice.

In view of the above facts and circumstances of the case and the propositions of law mentioned in section 439 of the Code of Criminal Procedure, the

High Court Division invoking its revisional jurisdiction may stay the order granting bail to an accused by the learned judge of the court below even without hearing the accused on the following circumstances:

(i) if the gravity of the offence is not considered in proper perspective by the learned judge of the court below;

(ii) if the laws and parameters of granting bail to an accused are not considered and followed in granting bail to an accused by the learned judge of the court below;

(iii) if the merit of the case is not taken into consideration in granting bail to an accused;

(iv) if the custody period of an accused appears to be very short;

(v) if the bail is granted to an accused on medical ground without medical report subject to submitting the medical report in the next date;

(vi) if there is a bona fide reason and apprehension that if the accused is enlarged on bail, the accused may flee away from the proceeding as well as from the country to frustrate the proceeding;

(vii) if the accused is enlarged on bail in an offence and/or offences which have serious negative impact on the society and the citizen of the country;

(viii) if the impugned order appears to be *ex-facie* illegal and the same is passed without application of judicial mind;

(ix) if the impugned order itself is without jurisdiction;

(x) if there is an emergency situation and bona fide reasons and ad-interim order is needed for the greater interest of justice.

Having considered all the facts and circumstances of the case, the submissions advanced by the learned Advocates for the respective parties and the propositions of law cited and discussed above, we are of the view that the Rule may be disposed of with the aforesaid observations and directions.

Accordingly, with the aforesaid observations and directions, the Rule is disposed of.

Anyway, the accused-opposite party No.01 shall remain on bail till conclusion of the trial of the case if any and the learned judge of the court below is directed to cancel the bail of the accused-opposite party No. 01, if he misuses the privilege of the bail in

any manner and prays for adjournment of the trial of the case for making delay in disposing of the case.

The learned judge of concerned court below is directed to proceed with the case in accordance with law and conclude the trial of the case if any as expeditiously as possible.

Communicate this judgment and order to the learned judge of the concerned court below at once.

S.M. Mozibur Rahman, J:

I agree.