

**IN THE SUPREME COURT OF BANGLADESH**  
**APPELLATE DIVISION**

**Present:**

Mr. Justice Syed Mahmud Hossain, *Chief Justice*  
Mr. Justice Hasan Foez Siddique  
Mr. Justice Md. Nuruzzaman  
Mr. Justice Obaidul Hassan

**CRIMINAL APPEAL NO.38 OF 2010**

*(From the judgment and order dated 27.03.2008 passed by the High Court Division in Criminal Miscellaneous Case No.2033 of 2008)*

Mohammad Amir Ali Mostafa : .....Appellant  
Versus  
Shah Md. Nurul Alam and others : .....Respondents

For the appellant : Mr. Sarwar Ahmed, Advocate,  
instructed by Mr. Syed Mahbubur  
Rahman, Advocate-on-Record.

For the respondents : Mr. Habibul Islam Bhuiyan,  
No.1-3 Senior advocate, instructed by  
Mrs. Sufia Khatun, Advocate-on-  
Record.

For the respondent : Mrs. Mahmuda Begum,  
No.4 Advocate-on-Record.

Date of hearing : 14.10.2020, 03.11.2020, 17.11.2020 &  
01.12.2020

**Date of judgment : 01.12.2020**

**JUDGMENT**

**Obaidul Hassan, J.** This Criminal Appeal is directed against the judgment and order dated 27.03.2008 passed by a Division Bench of the High Court Division in Criminal Miscellaneous Case No.2033 of 2008 filed by the respondents making the Rule absolute and quashing the proceeding of C.R. Case No.1966 of 2005 pending in the Court of Chief Metropolitan Magistrate, Dhaka so far as it relates to the accused respondents.

Facts necessary for the disposal of the appeal are that the appellant filed the above C.R. Case No.1966 of 2005 against the respondents and others under Sections 420/467/468/471 of the Penal Code, 1860 (shortly, the Penal Code) stating, *inter alia*, that Plot No.3 of Block No.CWN(C) Gulshan Avenue, Gulshan measuring about 3330 ajutangsh of land as described in the schedule of the above C.R. Case, was allotted to one Musa Khan and then lease deed No.6759 dated 27.02.1961 was executed and registered in his favour. Musa Khan on 10.06.1970, transferred the above land to Mustari Begum, his mother whereupon she mutated her name and after getting the plan approved from DIT/RAJUK constructed a two-storied building thereon. On 05.09.2005 Masturi Begum gifted the said house to the petitioner and his two sisters. The petitioner and his two sisters were in possession of the said land and had been residing thereon. On 02.11.2005 suddenly 5/6 mastans entered into their house and forcibly took away the petitioner and his father from their house by a microbus and after some time the respondent No.1, the Chairman of the Mercantile Bank Limited along with some officials of the said bank came to their house and declared that the respondent No.1 had purchased the said house. Then on the same date at 7:30 p.m. the petitioner and his father were released. The mother of the petitioner on the same date lodged an First Information Report (FIR) with Gulshan Police Station. On

03.11.2005 the aforesaid incident was published in many newspapers. At the instance of the respondent No.1 an advertisement was also published in the Daily Star to the effect that the respondent No.1 had purchased the said house. Then the petitioner on obtaining the certified copy of the concerned purchased deed came to know that the respondents in collusion with each other, had obtained the said deed by the false personification of Masturi Begum. The learned Chief Metropolitan Magistrate, Dhaka after examining the petitioner under Section 200 of the Code of Criminal Procedure, 1898 (shortly, the Code) by order dated 09.11.2005 gave a direction for holding judicial inquiry and then, on 28.02.2006, the learned Metropolitan Magistrate, Dhaka after taking the deposition of five witnesses including the petitioners submitted a report to the effect that offence under Sections 467/ 471 of the Penal Code has been proved against the respondents No.1 and 2 as they created the forged deed and also respondents No.3 and 4 as they became witnesses to the said deed. On the basis of above report, the learned Metropolitan Magistrate, Dhaka on 07.03.2006 took cognizance of the offence under Sections 467/471 of the Penal Code and issued summons against the respondents No.1-4, but the respondents without appearing before the court of Metropolitan Magistrate filed Criminal Miscellaneous Case No.3923 and 4317 of 2006 before the High Court Division and

obtained anticipatory bail. Then the above respondents filed an application before the learned Metropolitan Magistrate, Dhaka praying for dispensing with the personal appearance, which was rejected by order dated 15.03.2007. Thereafter, they filed Criminal Revision No.237 of 2007 in the Court of Metropolitan Sessions Judge under Sections 435/439A of the Code and on 04.04.2007. The learned Metropolitan Sessions Judge admitted the said case, which has been pending for hearing. In the meantime the respondents No.1-3, against whom charges were not framed and who also did not submit any application under Section 241A of the Code of Criminal Procedure before the trial Court, by suppressing facts, filed Criminal Miscellaneous Case No.2033 of 2008 before the High Court Division under Section 561A of the Code of Criminal Procedure praying for quashment of the proceedings of C.R. Case No.1966 of 2005 whereupon the Rule was issued on 13.02.2006 and the High Court Division after hearing by its judgment and order dated 27.03.2008 made the Rule absolute quashing the proceedings of the above C.R. Case No.1966 of 2005.

In the above scenario, the appellants preferred Criminal Petition for Leave to Appeal challenging the judgment and order dated 27.03.2008 passed by the High Court Division.

In the criminal petition for leave to appeal the learned counsel for the petitioners submits that no charge was framed

against the respondents No.1-3 in C.R. Case No.1966 of 2005 till the relevant time and the respondents No.1-3 also did not file any application under Section 241A of the Code of Criminal Procedure for discharging them from the charges brought against them in the above C.R. Case No.1966 of 2005 and without exhausting their remedies and also by suppressing the facts, prayed for quashment of the proceedings of C.R. Case No.1966 of 2005. The High Court Division made the Rule absolute on the grounds that the civil litigation being pending between the parties in respect of the same properties, the criminal proceeding cannot run and the above C.R. Case was also not maintainable under Section 195 of the Code of Criminal Procedure.

The High Court Division did not at all consider that as per established principles of law, criminal proceeding shall run on its own way, any civil litigation cannot stand on the way of continuation of such criminal proceedings. The above C.R. Case was started against the respondents on the basis of judicial inquiry and also on the basis of definite and specific allegation. Accordingly, the said proceeding can not in any way be regarded as abuse of the process of the Court and further the matter in dispute i.e. whether the respondents No.1-3 are involved with the creation of forged deed, cannot be disposed of without examining the witnesses. The view taken by the High Court Division to the effect that the above C.R. Case was barred

under Section 195 of the Code Criminal Procedure is also erroneous. Section 195 of the Code of Criminal Procedure has got no manner of application in the facts and circumstances of the instant case. On the basis of submissions of the learned advocate of the petitioners the leave was granted.

Mr. Sarwar Ahmed, learned advocate, appearing for the appellant submits that the trial court did not frame any charge against the respondents No.1-3 in CR Case No.1966 of 2005 and that the respondents No.1-3 had the opportunity to file application under Section 241A of the Code of Criminal Procedure for discharging them from the case. The said respondents without exhausting the procedure of law filed Criminal Miscellaneous Case under Section 561A of the Code of Criminal Procedure for quashment of the proceeding and the High Court Division without considering the same illegally passed the impugned judgment and order which is liable to be set aside. He also submits that the High Court Division made the Rule absolute by giving extra emphasize to the facts that there are civil litigations between the parties in respect of the same properties for which the criminal proceeding cannot run. As per established principles of law, criminal proceeding shall run in its own way for the criminal offences and that the civil litigation shall not create any bar on continuation of criminal proceedings. The High Court Division was misdirected to follow

the procedure of law and arrived at a wrong decision in passing the judgment and order and, as such the judgment and order of the High Court Division is liable to be set aside. He further submits that the case was started against the respondents and others on the basis of judicial inquiry and with a definite and specific cause of action. The said proceeding did not abuse the process of the court and that the matter in dispute as to whether the respondents No.1-3 were involved with the creation of forged deed cannot be disposed of without examining the witnesses thereof, but the High Court Division failed to consider this aspect of the case and made the Rule absolute quashing the proceeding of the criminal case which is liable to be interfered by this Honorable Court and be set aside.

In reply, Mr. Habibul Islam Bhuiyan, learned senior advocate, appearing for the respondents No.1-3 and Mrs. Mahmuda Begum, learned advocate-on-record appearing for the respondent No.4, made submissions supporting the impugned judgment and order of the High Court Division and prays for dismissal of the appeal.

We have examined the complaint, the judgment and order passed by the High Court Division and the connected materials on record.

From the materials on record, it appears that the appellant filed a C.R. Case under Sections 420/467/468/471 against the

respondents stating that the respondents had executed and registered a forged deed of gift by the false personification of Mustari Begum, the mother of the appellant as well as the owner of the disputed land. But the respondent No.1 declared that he had purchased the land. The mother of the appellant lodged an FIR on 02.11.2015 against the respondents with Gulshan Police Station. The learned Chief Metropolitan Magistrate, Dhaka after examining the petitioner under Section 200 of the Code of Criminal Procedure, 1898 (shortly, the Code) by order dated 09.11.2005 gave direction for holding judicial inquiry and then, on 28.02.2006, the learned Metropolitan Magistrate, Dhaka after taking the deposition of five witnesses including the appellants submitted a report to the effect that offence under Section 467/471 of the Penal Code has been proved against the respondents No.1 and 2 as they created the forged deed and also respondents No.3 and 4 as they became witnesses to the said deed. On the basis of above report, the learned Metropolitan Magistrate, Dhaka on 07.03.2006 took cognizance of the case under Section 467/471 of the Penal Code and issued summons against the respondents No.1-4.

It appears that the respondents without appearing before the Court of Metropolitan Magistrate filed Criminal Miscellaneous Cases No.3923 and 4317 of 2006 before the High Court Division and obtained anticipatory bail. From the materials



on record, it also appears that the above respondents filed an application before the learned Metropolitan Magistrate, Dhaka praying for dispensing with the personal appearance, which was rejected by order dated 15.03.2007. Thereafter, against the said order of rejection they filed Criminal Revision No.237 of 2007 in the Court of Metropolitan Sessions Judge under Sections 435/439A of the Code and on 04.04.2007 the learned Metropolitan Sessions Judge admitted the said case, which was pending for hearing.

The High Court Division by its judgment and order quashed the proceedings of C.R. Case No.1966 of 2005 based on the application made by the respondents No.1-3. Fact remains cognizance was taken in C.R. Case No. 1966 of 2005 by the Metropolitan Magistrate, no charge was framed against the respondents No.1-3 and the respondents No.1-3 did not file any application under Section 241A of the Code of Criminal Procedure before the trial Court. From the judgment of the High Court Division, it appears that the High Court Division did not make any observation regarding the non-submission of application under Section 241A of the Code of Criminal Procedure or about framing charge against the respondents. It may be presumed that either the respondents suppressed the facts of non submission of any application under Section 241A of the Code of Criminal Procedure or the High Court Division

overlooked this very important issue. The respondents filed Criminal Miscellaneous Case No.2033 of 2008 before the High Court Division under Section 561A of the Code of Criminal Procedure praying for quashment of the proceedings of C.R. Case No.1966 of 2005. The High Court Division made the order of quashment of C.R. Case No.1966 of 2005 holding that over the same deed two cases are pending i.e. one is civil suit being Title Suit No.1 of 2006 filed by the appellant for declaration of deed of gift to be illegal, unlawful, void and of no legal effect and the respondents had not acquired right, title and interest by virtue of the said deed mentioned in the schedule and another is Title Suit No.504 of 2005 filed by the respondents. The High Court Division observed that C.R. Case No.1966 of 2005 is not pending for trial, the same is barred under Section 195 of the Code of Criminal Procedure. On these findings, the High Court Division quashed the C.R. Case No.1966 of 2005.

From the materials on record, it appears that the certified copy of the disputed deed being No.19974 dated 31.10.2005 was produced before the Court, not the original copy of the deed. Only the production of the certified copy of the alleged deed cannot attract the provision of Section 195(1)(c) of the Code of Criminal Procedure, 1898. To attract the provision of Section 195(1)(c) of the Code, the original copy of the deed should have been produced before the Court, because the genuineness of the

said claim i.e. the alleged deed is a forged deed and the involvement of the accused persons in the creation of the forged deed is subject to proof by examining the witnesses. When the certified copy of a deed was produced on a claim that the deed was forged and the original copy was not produced, then it was not possible to determine the genuineness of the certified deed. So, the proceeding of C.R. Case No.1966 of 2005 is not barred under Section 195 of the Code of Criminal Procedure.

As the learned Metropolitan Magistrate took cognizance against the respondents No.1-3, they should have filed application under Section 241A of the Code of Criminal Procedure for discharge. Fact remains charge was not framed against the respondents till filing of the Criminal Miscellaneous Case No.2033 of 2008. Without exhausting the procedure the respondents were not entitled to make application for quashment of the said criminal proceeding. When a competent Court or Tribunal takes cognizance of an offence, then it can be said to be pending and at that stage, the accused has to exhaust all the procedures he is entitled to, before making application for quashment of the proceeding.

The power of quashment of the proceeding under Section 561A of the Code of Criminal Procedure, 1898 lies with the High Court Division true, but before exercising this power the High Court Division must be satisfied that the other available remedies

have been exhausted by the applicant. It was held in the case of *Habibur Rahman Mollah (Ex-Member of Parliament, Dhaka 4) Vs. State and another* [62 DLR (AD) 233] that, **“Inherent power of the High Court Division is generally exercised where no other remedy is available for obtaining justice in the cause-it should not be invoked where another remedy is available. This power has not been vested upon the High Court Division where another remedy is available. This is an extraordinary power and is exercised in extraordinary circumstances in the interest of justice.”** In the present case, the respondents No.1-3 had other remedy available before making application for quashment of the proceeding i.e. making prayer for discharge under Section 241A of the Code of Criminal Procedure, 1898.

On the other hand, the appellants filed Title Suit No.1 of 2006 for declaration of the disputed deed of gift as illegal, unlawful, void and be of no legal effect on 01.01.2006, the C.R. Case No.1966 of 2005 was lodged on 08.11.2005. The respondents filed Title Suit No.504 of 2005 for declaration of title and recovery of possession on 30.11.2005 where both the civil suits instituted subsequent to the C.R. Case No.1966 of 2005. Besides, the C.R. Case was started based on judicial inquiry and with a specific cause of action.

It is a settled principle of law that if there are criminal cases and civil suits between the same parties in respect of the same

properties, even then it cannot be a bar to the continuation of the criminal proceeding i.e. the criminal proceeding will run in its own way. It was held in the case of *State Vs. Sailendra Chandra Borman* [13 BLC (AD) 65] that, **“pendency of a civil suit cannot bar the proceedings of criminal case for criminal offence.”** The same observation was given by our Appellate Division in the case of *Khandaker Abul Bashar Vs. State and another* [63 DLR (AD) 79] **“There is no legal impediment to file a criminal case even if a civil suit is pending on the selfsame allegations provided the ingredients of the offence are present.”** It was also held in the case of *Khondoker Mahtabuddin Ahmed and others Vs. State* [49 DLR (AD) 132] that, **“There is nothing in law precluding a criminal case on account of a civil suit pending against the petitioners on the same facts.”**

In consideration of the above discussion, we are of the view that only because of the subject matter of the criminal case and civil litigation being the same, it will not be a bar for continuation of the criminal proceeding, rather the criminal case will run in its own way. In this case, the respondents should have exhausted the procedure of Section 241A of the Code of Criminal Procedure before making application for quashing of C.R. Case under Section 561A of the Code.

It appears that the High Court Division has not considered the aforesaid facts as well as the legal aspects of the case while

passing the judgment and order quashing the proceedings of C.R. Case No.1966 of 2005 thereof. Rather, it appears that the judgment and order passed by the High Court Division was not justified and misconceived. The judgment and order passed by the High Court Division in Criminal Miscellaneous Case No.2033 of 2008 on 27.03.2008 is absolutely erroneous. The quashment of C.R. Case thereof cannot also be said to be lawful. Thus, we are constrained to interfere.

The appeal is thus **allowed** and the judgment and order of the High Court Division dated 27.03.2008, passed in Criminal Miscellaneous Case No.2033 of 2008 is set aside and the proceedings of C.R. Case No.1966 of 2005 be restored to its original number.

C. J.

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