

**Present**

*Mr. Justice A.S.M. Abdul Mobin*

&

*Mr. Justice Md. Mahmud Hassan Talukder*

**Criminal Miscellaneous Case No. 5033 of 2020.**

Khandakar Mohammad Omar Faruq Kamal

...Petitioner.

Vs.

The state and another

....Opposite Parties.

Mr. Bivuti Tarofder, Advocate

..... for the petitioner.

Ms. Samira Tarannum Rabeya (Miti), D.A.G with

Mr. Mohammad Akter Hossain, A.A.G

..... for the state.

Heard on: 22.02.2024.

Judgment on: 28.02.2024.

**A.S.M.ABDUL MOBIN,J.**

This Rule was issued calling upon the opposite parties to show cause as to why the proceedings of T.R. Case No. 549 of 2018 arising out of C.R. Case No. 1418 of 2018, under section 420 of the Penal Code, 1860, now pending in the Court of Metropolitan Magistrate, Court No.2, Chattogram should not be quashed.

The complainant opposite party No.2 initiated the case by filing a Complaint Petition in the Court of Chief Metropolitan Magistrate, Chattogram alleging

*inter alia* that he had Excavator business. He used to give his excavator for rent. The accused petitioner told him that he got a contract for construction of a road from Ruma to Bogalake under Bandarbon Upazila. He wanted to take his excavator on rent for construction work. The complainant agreed and an agreement was signed on 21.01.2017. At the time of signing the agreement, the accused petitioner gave him Tk. 3,00,000/- in advance. The accused petitioner after taking over the excavator in his possession, did not communicate with the complainant, even did not pay the rent. The complainant could not recover the excavator. The complainant issued a legal notice. A shalish was held. In the shalish the accused petitioner admitted to pay the rent but did not pay the rent. The complainant having found no other alternative, filed the instant complaint.

The learned Magistrate on receipt of the complaint examined the complainant under section

420 of the Penal Code and took cognizance under section 420 of the Penal Code against the accused petitioner and issued process against him. The accused petitioner surrendered before the trial Court and obtained the rule.

The case was taken up for trial. Charge was framed under section 420 of the Penal Code against the accused petitioner. After framing of the charge, the accused petitioner filed this miscellaneous case under section 561 of the Code of Criminal Procedure and obtained the present rule.

Mr. Bivuti Tarofder, the learned Advocate appearing for the accused petitioner submits that allegations made in the complaint petition only discloses a civil wrong and the allegation does not come under any Penal law. He submits that since the transaction arose out of an agreement, the Criminal proceedings against the accused petitioner is an abuse of the Court and liable to be quashed. He further submits that it is admitted fact the accused

petitioner paid Tk. 3,00,000/- in advance to the complainant. In view of payment of the said money initial intention to deceive the complainant cannot be attributed against this petitioner. He finally submits that the allegation does not come within the purview of section 420 of the Penal Code and as such the proceeding is liable to be quashed.

On the other hand, the learned Deputy Attorney General opposes the rule.

We have considered the submissions of the learned advocate, perused the application and all other relevant papers annexed thereto. On perusal of the record it appears that complaint was filed by the complainant on an allegation of transaction of renting out an excavator. It is admitted fact that the accused petitioner at the time taking rent of the excavator paid Tk. 3,00,000/- to the complainant. Nowhere in the complain petition it is stated that particular amount of money was remained unpaid for rent of the excavator.

For the purpose of Cheating, it is essential to show that the accused had fraudulent and dishonest intention at the time of making promise or representation. However, in any event, if the accused fails to keep his promise, in absence of culpable intention will not make him liable for the offence punishable under section 420 of the Penal Code.

On perusal of the record, it further appears that the transaction has been initiated on an agreement. Since there is an agreement to make payment of particular amount for rent or otherwise and failure on the part of the accused to keep his promised may saddle him with civil liability.

In view of the facts and circumstances of the case, the very criminal proceeding is an abuse of the process of the Court and liable to be quashed.

In the result, the rule made absolute. T.R. Case No. 549 of 2018 arising out of C.R. Case No. 1418 of 2018, under section 420 of the Penal Code, now

pending in the Court of Metropolitan Magistrate,  
Court No.2, Chattogram is hereby quashed.

Communicate this order to the concerned court  
at once.

**MD. MAHMUD HASSAN TALUKDER,J.**

I agree.