

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CRIMINAL MISCELLANEOUS JURISDICTON)

Criminal Miscellaneous Case No. 27415 of 2021

IN THE MATTER OF:

An application under section 561A of the Code
of Criminal Procedure.

AND

IN THE MATTER OF:

Md. Nurul Amin

.....Accused-Petitioner

Versus

The State and another

....Opposite Parties

Mr. Ashok Kumar Banik, Advocate

.....For the Accused-Petitioner

Mr. Farid Uddin Khan, D.A.G. with

Mr. Md. Anichur Rahman Khan, D.A.G.,

Mr. Md. Shahadat Hossain Adil, A.A.G.,

Mr. Rezbaul Kabir, A.A.G.,

Mr. Sultan Mahmood Banna, A.A.G. and

Mr. Md. Azadul Islam, A.A.G.

.....For the Opposite Party No. 1

Mr. Md. Sameer Sattar, Advocate with

Mr. Mahbub Hasan, Advocate

.....For the Opposite Party No. 2

Present:

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

Heard on 21.11.2024 & 28.11.2024.

Judgment on 03.12.2024.

Md. Iqbal Kabir, J:

On an application under Section 561A of the Code of Criminal Procedure, this Rule was issued calling upon the opposite parties to show cause as to why the proceedings of Sessions Case No. 4477 of 2019 arising out of C.R. No. 769 of 2018 (Doublemooring Zone) under Section 138 of the Negotiable Instruments Act, 1881, now pending in the Court of **Metropolitan Joint Sessions Judge, 7th Court, Chattogram** should not be quashed and/or pass such other or further order or orders as to this Court may seem fit and proper.

Short facts, as averred in the petition of complaint, are that the complainant (the complainant opposite Party No. 2) hereinafter is incorporated under the Bank Companies Act and runs its Banking business all over Bangladesh through different Branches and Kadamtili Branch, Chattogram one of them is the complainant Bank hereinafter, the accused is a businessman and during business through his business institution namely M/S Sadia Trading, the various credit facilities from the Bank and as per terms and conditions of the aforesaid credit facility the accused petitioner issued Cheque being No. CB/CD 2987179 dated 25.04.2018 amounting to 1,00,00,000/- (one Corer) taka of The City Bank Limited, Kadamtali Branch, Chattogram for the adjustment of the partial outstanding liabilities in favor of the Complainant Bank and thereafter on 25.04.2018 the aforesaid Cheque was placed by the Complainant Bank but it was dishonored with the remark of "Insufficient Fund" and then the Complainant Bank served a Legal Notice dated 30.04.2018 upon the accused petitioner by registered post requesting payment of the cheque amount within 30 (thirty) days from the date of the receipt of the aforesaid Notice and same was received by the accused petitioner and he did not pay the same and hence the prosecution case.

Upon examining the complainant under section 200 of the Criminal P C (the Code), the learned Magistrate, Chittagong issued a summon upon the petitioner for his appearance. Having not appeared on the date so fixed for his appearance the court issued the warrant of arrest against the accused petitioner. However, he voluntarily surrendered before the concerned Court and obtained bail.

Ultimately the case was transferred to the Court of Metropolitan Sessions Judge, Chattogram, and cognizance was taken under Section 138 of the Negotiable Instruments Act, 1881(the Act) and the case was registered and renumbered as Sessions Case No. 4477 of 2019 and subsequently, the same transferred to the Court of Metro Joint Sessions Judge, 7th Court, Chattogram for trial.

The petitioner filed an application under Section 265C of the Code which was ultimately rejected by the said court and the charge was framed under section 138 of the Act against the petitioner fixing 28.02.2021 for evidence.

At this juncture, the accused petitioner by filing the instant application under section 561A of the Code has challenged the impugned proceedings.

In this regard the contention of the accused petitioner is that the cheque was issued as per the terms and conditions of the contract as a security cheque to meet the liability, thus, no proceedings can be initiated against the petitioner. He claims the opposite party bank is not entitled to receive the amount due thereon from the petitioner as the cheque in question was obtained from the petitioner by means of practicing fraud.

He submits under sub-section 2 of section 138 of the Act, the opposite party No. 2 is entitled to realize the face value of the cheque amount and admittedly the Artha Rin Suit was filed for

recovery of the loan. Sub-Article 2 of Article 20 of the Constitution prohibits a person from unearned income. In such view of the matter pursuing two special forums by the opposite party No. 2 for recovery of loan is not permissible and therefore impugned proceedings is an abuse of the process of the Court and as such the same is liable to be quashed.

Mr. Md. Sameer Sattar, learned Advocate appearing for the opposite party No. 2, Bank by filing a counter affidavit categorically submits that the statements and submissions made in paragraphs 7 to 17 of the instant Criminal Miscellaneous Case are misconceived, baseless, and hence denied. In this regard, it is submitted that the issue and legality of “security cheques’ have been decided in the case of *Majed Hossain vs State* 17 BLC (AD) 177, where it has been clearly said that:

“...

Sub-section (1) of section 138 has not made any qualification of the cheque so returned unpaid either post-dated given as security for repayment of the loan availed by a loanee as alleged by the accused or any other cheque issued by the drawer for encashment currently. When the legislature has not made any difference between a post-dated cheque issued as security for the repayment of the loan availed by the loanee, here the petitioners, as argued by Mr. Chowdhury, and a cheque issued for encashment currently, we do not have any scope of making any such difference. ... By no logic, it can be said that the drawer of the cheque does not know the consequence if a cheque is returned unpaid/dishonoured for the reasons as provided in sub-section (1) of section 138 of the Act, 1881, because ignorance of law is no plea.”

He submits that the offence committed under Section 138 of the Act, and its consequences are different from the consequences

contemplated under the provisions of the Artha Rin Adalat Ain, 2003. He claims it is admitted that the Artha Rin Suit relates to the realization of money whereas dishonoring a cheque relates to a criminal offence under the Act of 1881. This position has been upheld in the case of *Md. Monzur Alam vs. the State and another*, 55 DLR (AD) 62 and more recently in *Majed Hossain Vs State and another*, 17 BLC (AD) 177.

Mr. Md. Sameer Sattar brought our notice that section 138(3) of the Act of 1881 also clearly preserves the right of the holder of the cheque to institute a civil suit in order to realize all or part of his/her claim.

Moreover, it has brought notice to this Court that in the case of *Md. Mofizur Rahman Vs Bangladesh*, 69 DLR(2017) 402 it has decided that there is no relevance with sections 5(e), 7, and 9 of the Bank Companies Act, 1991 relied upon by the petitioner in the present case. It was held that in fact, a plain reading of these legal provisions of law shows that there is neither any requirement to deposit undated/postdated cheques as security against any loan nor is there any bar in doing so.

He lastly submits that the Accused-Petitioner filed the instant Criminal Miscellaneous case on the basis of some disputed questions of facts and relying upon some defence materials. According to him without taking evidence and without conducting a full trial it is not possible to determine such disputed questions of fact and make findings on the defense materials. In this context, he relied upon a decision of *Shamsul Alam alias Babul V State and another* 60 DLR (HCD) 677, wherein it was observed that:

“...Be that as it may, the proposition of law is now well settled that on the basis of defense plea or materials the criminal proceedings should not be stifled before

trial, when there is a prima facie case for going for trial.”

He submits in the above-noted position the instant Criminal Miscellaneous Case is not maintainable. But taking device with an ill motive the accused petitioner tried to delay the completion of the lawful proceedings initiated by the Opposite Party Bank. He claims the accused petitioner failed to establish a prima facie claim to invoke the present case.

We have considered the submission made by the petitioner and the opposite part No. 2 and perused the complaint petition, and other documents on record.

It is noted that in this case, the accused petitioner issued a cheque in favour of the opposite party No. 2, and it was dishonored due to insufficient funds by the Bank. The opposite party by serving legal notice and complying with provisions of law filed a case under section 138 of the Act, 1881 where the charge was framed.

Indeed the reason expressed by the petitioner in his application is a defence plea. That may be placed during trial and it can be considered at the time of hearing of the original case. At this juncture suffice to say that section 561A of the code empowers this court to intervene on three counts. i.e., (a) to give effect to any order under this Code, (b) to prevent abuse of the process of any Court, (c) otherwise to secure the ends of justice. This Court can invoke any category of these three independently, separately, and or jointly. However, this Court did not find any reason to exercise unfettered judicious power in the case in hand based on fact and relied upon the above-cited decisions.

In the premises of the above-noted cited decision, on which the opposite party relied, there is no scope to allow the present application, and we find no merit in the instant Rule.

Accordingly, the Rule is discharged.

The order of stay granted earlier at the time of issuance of the Rule is hereby vacated.

There will be no order as to cost.

Communicate the order.

Md. Riaz Uddin Khan, J:
I agree.