

IN THE SUPREME COURT OF BANGLADESH
Appellate Division

PRESENT

Mr. Justice M. Enayetur Rahim
Mr. Justice Md. Abu Zafor Siddique,
Mr. Justice Md. Shahinur Islam,

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.2769 OF 2023

(From the judgment and order dated the 3rd day of August, 2023 passed by the High Court Division in Criminal Appeal No.248 of 2023).

Debdulal Basu :Petitioner

-Versus-

The State, represented by the :Respondents
Deputy Commissioner Dhaka and
another

For the Petitioner : Mr. Dewan Abdul Naser, Advocate,
instructed by Mr. Md. Shafiqul Islam
Chowdhury, Advocate-on-Record

For Respondent No.1 : Mr. A.M. Amin Uddin, Attorney
General with Mr. Sayeem Mohammad
Murad, Assistant Attorney General
appeared with the leave of the Court.

For Respondent No.2 : Mr. Sukumar Kumar Biswas, Advocate
with Mr. Sree Probir Kumar Ghosh,
Advocate, instructed by Mr. Haridas
Paul, Advocate-on-Record

Date of hearing and judgment : The 3rd day of June, 2024

JUDGMENT

M. Enayetur Rahim, J: This criminal petition for leave to appeal is directed against the judgement and order dated 03.08.2023 passed by a Division Bench of the High Court Division in Criminal Appeal No.248 of 2023 dismissing the appeal.

The facts, relevant for disposal of the instant criminal petition for leave to appeal, are that, present victim, respondent No. 2, Shila Halder being complainant filed a

complaint before the Nari-O-Shishu Nirjatan Daman Tribunal No.8, Dhaka, against the present accused-appellant-petitioner under Section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (amended in 2003) alleging *inter-alia* that the accused-petitioner on 23.12.2017 upon showing respect to Hindu religious idol and claiming married her started conjugal life with the complainant in a rented house at Mirpur. Thereafter, while she asked the accused-petitioner to take her into his village home, the accused-petitioner refused to do so. The complainant then came to know that the accused-petitioner is a married person having another wife and child. On 05.01.2022 at about 10:00 p.m. the accused-petitioner lastly caused physical relation with the complainant. The complainant to that end went to the Mirpur Model Police Station for filing a case against him, but the police refused to register the case and advised her to file the case before the Court, then she was compelled to file the petition of complaint being No. 118 of 2022 before the Nari-O-Shishu Nirjatan Daman Tribunal No. 8, Dhaka, on 28.07.2022.

The learned Judge of the Tribunal upon recording the statement of the victim-complainant had directed the Police Bureau of Investigation (PBI), Metro. (North), Dhaka to inquire into the matter and to submit a report thereto.

Upon inquiry, the PBI submitted a detail report on 13.11.2022. Upon receiving the said inquiry report the learned Judge of the Tribunal took cognizance of the offence against the accused-petitioner under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Amended in 2003).

Then, the accused-petitioner filed an application for anticipatory bail before the High Court Division and the High

Court Division enlarged him on anticipatory bail and after obtaining bail the accused-petitioner filed an application under section 265(C) of the Code of Criminal Procedure before the Tribunal for his discharge from the case. However, the Tribunal rejecting the said application vide its order dated 02.01.2023 framed charge against him under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000.

Being aggrieved by the said refusal order, the accused-petitioner filed Criminal Appeal No.248 of 2023 before the High Court Division, which was admitted on 31.01.2023 and after hearing the Appeal the High Court Division dismissed the Appeal by the impugned judgment and order. Hence, the accused has filed the instant criminal petition for leave to appeal.

Mr. Dewan Abdul Naser, learned Advocate appearing for the accused-petitioner submits that the inquiry report prepared by the inquiry officer though it was mentioned that *prima facie* case was found against the accused-petitioner under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000, but in fact nothing was found on inquiry to the effect that the accused petitioner raped her within the meaning of section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (as amended in 2003).

Learned Advocate also submits that the High Court Division failed to consider that after examining the complainant doctor prepared a report wherein the doctor opined that "considering physical examination findings and microbiological report, I am of the opinion that the victim named 'Shila Halder' has no sign of forceful sexual intercourse found on her body", and as such judgment and

order passed by the High court Division is liable to be set aside. He further submits that the High Court Division failed to consider that the sexual intercourse with the consent of the adult woman does not constitute offence of rape under section 9(1) of the Nari-O-Shishu Nirjatan Damon Ain, 2000 (as amended 2003).

Learned Advocate finally submits that the Nari-O-Shishu Nirajtan Tribunal illegally took cognizance of the offence on the basis of inquiry report submitted by PBI which is not permitted as per section 27(1 Ka) of the Nari-O-Shishu Nirjatan Daman Ain, and, as such the judgment and order passed by the High Court Division is liable to be set aside.

Mr. A.M. Amin Uddin, learned Attorney General appearing for respondent No. 1 made submissions in support of the impugned judgment and order of the High Court Division.

Mr. Sukumar Biswas, learned Advocate appearing for the complainant-respondent No. 2 also made submissions supporting the impugned judgment and order of the High Court Division. He further added that since the medical examination was held long after the date of occurrence and, as such, recent sign of rape may not be there, but the medical report itself shows that the hymen of the victim was found ruptured and there have been multiple old tears present and, therefore, those materials on record shows that the accused petitioner upon giving false assurance as of marrying the victim, has committed rape on her for several times and as such, in the medical report the above material symptoms were detected. Learned Advocate for the complainant-respondent further argued that in the case of rape, only relying upon a part of medical examination report, even without taking other

material evidence on record, relying on the defence plea cannot claim to be discharged.

Learned Advocate thus seeking dismissal of the leave petition submits that since charge has already been framed upon finding *prima-facie* materials and, as such, at this stage only upon relying on the defence plea a case of committing rape under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2000 (Amended in 2003) cannot be brushed away and the order of charge cannot be set aside without taking evidence, at the trial, as per the settled decision of our Apex Court.

We have considered the submissions of the learned Advocates appearing for the respective parties, perused the petition of complaint, the impugned judgement, relevant laws and other materials as placed before us.

In the instant case it is admitted position that the learned Judge of the Tribunal having found *prima facie* case against the accused petitioner framed charge against him under section 9(1) of the Nari-O-Shishu Nirjatan Daman Ain, 2003 having considered the facts and circumstances of the case and materials on record. We find substance in the submission of the learned Advocate for the complainant-respondent that at this stage there is no scope to discharge the accused-petitioner from the charge brought against him relying on any defence plea or materials, if any.

The learned Advocate for the petitioner having referred to the words “সম্ভব হইলে অভিযোগটি অনুসন্ধানের (inquiry) জন্য কোন ম্যাজিস্ট্রেট কিংবা অন্য কোন ব্যক্তিকে নির্দেশ প্রদান করিবেন এবং.....” as contemplated in section 27(1) (Ka) has tried to convince us that Police Bureau of Investigation (PBI) will not come within the meaning of ‘অন্য কোন ব্যক্তি’ and PBI being one of the unit of Police is not permitted

to make any inquiry under the Nari-O-Shishu Nirjatan Daman Ain, 2000 and thus the inquiry on the allegation of the present case by PBI is without jurisdiction and illegal, and on the basis of such inquiry report proceeding of the present case is also illegal and without jurisdiction. In support of his contention, he relied on the case of Mohammad Khorshed Alam alias Md. Khorshed Alam vs The state and another, 17 SCOB(2023)AD 61, wherein it has been held that:

“Having considered and discussed above, we are of the view that the Tribunal did not commit any illegality in entertaining the complaint filed by respondent No. 2. Section 27 (1 Ka) clearly speaks that if the learned Judge of the Tribunal is satisfied as to the filing of the complaint he can direct the Magistrate or any other person to make an inquiry with regard to the allegation. The expression ‘অন্য কোন ব্যক্তি’ (any other person) does not include any police officer but, it includes any public officer or any private individual or any other responsible person of the locality upon whom the Tribunal may have confidence to conduct the inquiry in respect of the complaint logged before it.

In the instant case the learned Judge of the Tribunal acted illegally in directing the Officer-in-Charge of Pahartoli Police Station to make an inquiry in respect of the complaint and, thereafter, taking cognizance on the basis of such inquiry report has vitiated the entire proceeding. (Underlines supplied).

To address the above issue let us examine section 27 of the Nari-O-Shishu Nirjatan Daman Ain, 2000, which runs as follows:

“২৭। ট্রাইব্যুনালের এখতিয়ার।-(১) সাব-ইন্সপেক্টর পদমর্যাদার নিম্নে নহেন এমন কোন পুলিশ কর্মকর্তা বা এতদুদ্দেশ্যে সরকারের নিকট হইতে সাধারণ বা বিশেষ আদেশ দ্বারা ক্ষমতাপ্রাপ্ত কোন ব্যক্তির লিখিত রিপোর্ট ব্যতিরেকে কোন ট্রাইব্যুনাল কোন অপরাধ বিচারার্থ গ্রহণ করিবেন না।

(১ক) কোন অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন মর্মে হলফনামা সহকারে ট্রাইব্যুনালের নিকট অভিযোগ দাখিল করিলে ট্রাইব্যুনাল অভিযোগকারীকে পরীক্ষা করিয়া-

(ক) সম্ভূত হইলে অভিযোগটি অনুসন্ধানের (inquiry) জন্য কোন ম্যাজিস্ট্রেট কিংবা কোন ব্যক্তিকে নির্দেশ প্রদান করিবেন এবং অনুসন্ধানের জন্য নির্দেশপ্রাপ্ত ব্যক্তি অভিযোগটি অনুসন্ধান করিয়া সত কার্য দিবসের মধ্যে ট্রাইব্যুনালের নিকট রিপোর্ট প্রদান করিবেন;

(খ) সম্ভূত না হইলে অভিযোগটি সরাসরি নাকচ করিবেন।

(১খ) উপ-ধারা (১ক) এর অধীন রিপোর্ট প্রাপ্তির পর কোন ট্রাইব্যুনাল যদি এই মর্মে সম্ভূত হয় যে,

(ক) অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন এবং অভিযোগ সমর্থনে প্রাথমিক সাক্ষ্য প্রমাণ আছে সেই ক্ষেত্রে ট্রাইব্যুনাল উক্ত রিপোর্ট ও অভিযোগের ভিত্তিতে অপরাধটি বিচারার্থ গ্রহণ করিবেন;

(খ) অভিযোগকারী উপ-ধারা (১) এর অধীন কোন পুলিশ কর্মকর্তাকে বা ক্ষমতাপ্রাপ্ত ব্যক্তিকে কোন অপরাধের অভিযোগ গ্রহণ করিবার জন্য অনুরোধ করিয়া ব্যর্থ হইয়াছেন মর্মে প্রমাণ পাওয়া যায় নাই কিংবা অভিযোগের সমর্থনে কোন প্রাথমিক সাক্ষ্য প্রমাণ পাওয়া যায় নাই সেই ক্ষেত্রে ট্রাইব্যুনাল অভিযোগটি নাকচ করিবেন;

(১গ) উপ-ধারা (১) এবং (১ক) এর অধীন প্রাপ্ত রিপোর্ট কোন ব্যক্তির বিরুদ্ধে অপরাধ সংঘটনের অভিযোগ বা তৎসম্পর্কে কার্যক্রম গ্রহণের সুপারিশ না থাকা সত্ত্বেও ট্রাইব্যুনাল, যথাযথ এবং ন্যায্যবিচারের স্বার্থে প্রয়োজনীয় মনে করিলে, কারণ উল্লেখপূর্বক উক্ত ব্যক্তির ব্যাপারে সংশ্লিষ্ট অপরাধ বিচারার্থ গ্রহণ করিতে পারিবেন।”

On a careful examination of section 27(1 ka) coupled with sub-section (ka) it becomes crystal clear that on receipt of a complaint supported by an affidavit if the Tribunal is satisfied upon examining the complainant that after being refused by the concerned police officer or the authorized person he/she directly came to the Tribunal in that event an order for holding inquiry on the complaint can be made.

In the case in hand, the complainant filed the petition of complaint before the Tribunal supported by an affidavit stating that statements made in the complaint is true. And in the complaint it was asserted that she went to the police station but the police refused to accept her complaint and the concerned Tribunal being satisfied about the same, upon

examining the complainant, directed the PBI to hold an inquiry into the allegation.

The intention of Section 27 (1 ka) is that before filing of the complaint before the Tribunal, the complaint should approach to the concerned police station first, and if he/she is refused in that event he/she can file the complaint before the Tribunal with an affidavit in regard to his/her refusal by the police. This provision of law will come into operation when the concerned police officer of a particular Police Station refused to accept or lodge the complainant.

In the earlier case as cited by the learned Advocate for the accused-petitioner, the Tribunal directed for holding inquiry to the Officer-in-Charge of the same Police Station, which refused to lodge the FIR. But in the instant case Tribunal directed PBI to hold an enquiry on the allegation. PBI is an independent investigating agency/unit of police. Officer-in-Charge of a Police Station has no authority on the PBI inquiry/investigation process. PBI acts on the basis of PBI Regulations 2016 (পুলিশ ব্যুরো অব ইনভেস্টিগেশন বিধিমালা, ২০১৬)। In Bidhi 2(9) it has been stipulated that ‘পিবিআই সদস্য’ অর্থ পিবিআই এ নিয়োজিত কোন পুলিশ সদস্য।’ Bidhi 4 clearly speaks that ‘পিবিআই এর হেডকোয়ার্টার্স ঢাকায় থাকিবে।’

So, PBI has an independent and separate identity.

It is true that the word ‘অন্য কোন ব্যক্তি’ has not been defined in the Nari-O-Shishu Nirjatan Daman Ain, 2000. Thus, we can take aid of General Clauses Act 1897, where the word person (ব্যক্তি) has been defined as under:

Person-“*person*” shall include any company or association or body of individuals, whether incorporated or not: (underline supplied)

If we consider the definition of 'person' (ব্যক্তি) as defined in the General Clauses Act coupled with the fact that the PBI is an independent body/organization/unit of police, which acts by its own Regulations thus, we have no hesitation to hold that PBI, is an independent body i.e. body of individuals and it will come within the meaning/definition of 'অন্য কোন ব্যক্তি' as contemplated in section 27(Ka) of the Nari-O-Shishu Nirjatan Daman Ain, 2003. Thus, the inquiry held by the PBI in this particular case is within the ambit of the law, and there is no scope to say that PBI or any other independent law enforcing agency is not authorized to hold any inquiry or investigation on the allegations made under the Nari-O-Shishu Nirjatan Daman Ain, 2000. Thus, the submission made by the learned Advocate for the petitioner has no leg to stand.

Further, we have to understand the intention of the legislature. If we read section 27(1) and 1(Ka) of the Ain together, then it will be clear that intention of the legislature is that the police officer who refused to accept the complaint/FIR he should not be directed again to make inquire/investigation for fair and impartial inquiry/investigation and the enquiry or investigation should be done by any other person (অন্য কোন ব্যক্তি) other than the said police officer or any officer of the same Police Station. This provision has been made for the interest of the complainant/victim, and an accused or offender is not entitled to get benefit of it.

The facts of the cited case is quite distinguishable from the facts of the present case and it will not help the present accused petitioner in anyway.

Having discussed and considered as above, the instant criminal petition for leave to appeal is dismissed.

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