

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.380 OF 2022
(From the judgment and order dated 16.02.2022
passed by the High Court Division in Criminal
Appeal No.7403 of 2021)

The State Petitioner

=VERSUS=

Omit Hasan @ Azmir Respondent

For the Petitioner :Mr. Samarendra Nath
Biswas, Deputy Attorney
General, instructed by
Mrs. Sufia Khatun,
Advocate-on-Record

For the Respondent :Mr. Md. Ariful Islam,
Advocate, instructed by
Mr. Zainul Abedin,
Advocate-on-Record

Date of hearing and
judgment on :The 31st August, 2022

JUDGMENT

MD. NURUZZAMAN, J:

This criminal petition for leave to appeal
is directed against the order dated 16.02.2022

passed by the High Court Division in Criminal Appeal No.7403 of 2021 granting bail to the accused respondent.

Prosecution case, in brief, is that one Md. Abdus Salam, Sub-Inspector of Detective Branch, Mymensingh as informant lodged the First Information Report (in short, FIR) against the FIR named accused persons on 14.03.2014 under sections 4/6 of the Explosive Substances Act, 1908 (as amended in 2002) (in short, Act) and section 19A of the Arms Act, 1878 (as amended in 2002) (in short, Act) before the Officer-in-Charge, Valuka Model Police Station, District Mymensingh alleging, inter alia, that the informant along with his associates found some incriminating materials from the house of accused Nos.1 and 2, then

after interrogation police went to Munshir Vita and after searching, police found the seized materials and accused Ziaul Islam Zifa and Md. Al-Amin were arrested by them. They disclosed that they were engaged by the accused Golam Sarwar Rahat and the accused Omit in connection in the present case and, as such, they gave money for helping the offence. Hence, the accused persons committed offence under section 4/6 of the Act and section 19A of the Act. Accordingly, Valuka Police Station Case No.15 dated 14.03.2014 corresponding to G.R. No.70/2014 under sections 4/6 of the Act and section 19A of the Act was started against the accused persons. Hence the case.

The police, after completion of investigation, submitted charge-sheet being

Charge-sheet No.199 dated 11.08.2014 under section 4/6 of the Act against the accused persons which was submitted before the Chief Judicial Magistrate, Mymensingh.

The learned Chief Judicial Magistrate, Mymensingh transferred the case record to the learned Judge of the Special Tribunal No.5, Mymensingh for disposal and trial, who took cognizance against the accused persons under section 4/6 of the Act and registered the Special Tribunal Case No.21 of 2015.

The learned Judge of the Special Tribunal No.5 framed charge against the accused persons under section 4/6 of the Act. The said charge read over to them in which they pleaded not guilty and claimed to be tried. The accused

appellant on 10-10-2021 also prayed for bail which was rejected.

Feeling aggrieved by the order dated 10.10.2021 passed by the learned Judge of the Special Tribunal No.5, Mymensingh, the accused respondent filed Criminal Appeal No.7403 of 2021 before the High Court Division.

The High Court Division, upon hearing both the parties, by its order dated 16.02.2022, granted bail to the accused-respondent.

Hence, the State as petitioner feeling aggrieved by the judgment and order dated 16.02.2022 of the High Court Division, preferred the instant Criminal Petition for Leave to Appeal No.380 of 2022 before this Division.

Mr. Samarendra Nath Biswas, the learned Deputy Attorney General appearing on behalf of the Petitioner-State submits that the interim order of bail granted by the High Court Division clearly shows non-application of judicial mind having failed to appreciate that the accused respondent is named in the FIR having strong prima-face and specific overt act of committing heinous offence under section 4/6 of Act. He further submits that the accused respondent being the active member of "JMB" a banned organization who was committing terrorist activities (Jongi) to make unrest throughout the whole country inspired the general mass to create unrest in the country with view to deteriorate the law and order situation in the country, to destroy our holy

sovereignty, accordingly to damage the important buildings, place, the safety and security of the general mass to inspire them to destroy secularism, kill the important persons of the country from whose explosive control and possession huge number of explosive substances, banned books, leaflets, destructive materials were recovered. He finally submits that the case is under trial, at this stage, the interim order of bail will totally frustrate the purpose of prosecution case creating obstacle in the way of free/fair trial and, as such, the impugned order of ad-interim bail dated 16.02.2022 passed by the High Court Division is liable to be set aside.

Mr. Md. Ariful Islam, the learned Advocate appearing on behalf of the accused respondent

filing an application for dismissing this Civil Petition for Leave to Appeal made submissions apprising this Division that the Criminal Appeal No.7403 of 2021 was dismissed as being not pressed by the appellant before the High Court Division, therefore, this Criminal Petition for Leave to Appeal has become infructuous, as Civil Petition arose from the appeal is not alive.

We have considered the submissions of the learned Deputy Attorney General for the leave petitioner and the learned Advocate for the accused respondent. Perused the impugned ad-interim order of bail of the High Court Division and connected other materials on record.

On perusal of the case record it is revealed that learned Judge-in-Chamber, Appellate Division on 28.02.2022 stayed the impugned judgment and order of the High Court Division for 06 (six) weeks and directed that regular leave petition be filed within that time. Thereafter, the petitioner filed regular petition along with a petition for extension of stay on 22.03.2022 which is well within 06 weeks.

Now, the moot question before this Division whether submission advanced by the learned Advocate for accused respondent is acceptable or require to explain the situation as prevail in the present case. Thus, the question is replied in the following manner.

It is a general Rule of custom or usage practiced in the Appellate Division of the Supreme Court of Bangladesh and followed through the years that in any pending petition, if file any application within stipulated time for extension of order of stay passed by the learned Judge-in-Chamber be regarded as continuation of the stay order passed earlier. It was recognized in view of the long standing convention and judicial discipline and maintained as good as a legal provision unflinchingly by all concerned. The same view was postulated and enshrined through a written Office Order of the Appellate Division of the Supreme Court of Bangladesh bearing Memo No.এফ-১-৪৭/০৫ এসসি (এডি) dated 17-10-2006. The crucial

piece of the said Office Order is worth quoting:

“ আদিষ্ট হইয়া এই মর্মে সংশ্লিষ্ট সকলের অবগতির জন্য জানানো যাইতেছে যে, হাইকোর্ট বিভাগ অথবা আপীল্যাট ট্রাইব্যুনাল কর্তৃক প্রদত্ত রায় বা অন্তর্বর্তীকালীন আদেশের বিরুদ্ধে বাংলাদেশ সুপ্রীম কোর্ট আপীল বিভাগে দায়েরকৃত সিভিল মিস পিটিশন, সিভিল পিটিশন, ক্রিমিনাল মিস পিটিশন, ক্রিমিনাল পিটিশন, সিভিল আপীল, ক্রিমিনাল আপীল ইত্যাদি মোকদ্দমায় জুগিতাদেশ, নিষেধাজ্ঞা, জিতাবস্থা, অন্তর্বর্তীকালীন আদেশ, জামিন, আদালতের নির্দেশ ইত্যাদি বিষয়ে অত্রাদালত কর্তৃক পূর্বে প্রদানকৃত আদেশের মেয়াদ বৃদ্ধির আবেদনপত্র যথাসময়ে ফাইল করা হইলে এবং ঐরূপ দরখাস্ত কোর্টের আদেশের অপেক্ষায় থাকা অবস্থায় অত্রাদালতের practice অনুসারে জুগিতাদেশ বা অন্তর্বর্তীকালীন আদেশের মেয়াদ বলবৎ (in force) আছে মর্মে ধরিয়া নেওয়া হয়।”

The said Office Order simply reinforced the very existence of the said convention, custom or usage practiced in the Apex Court of Bangladesh since long.

There is a concept in the arena of customary international law which is known as "opinio juris" (Latin) "opinion that an act is necessary by rule of law" which requires that the custom or practice be accepted as law or followed from a sense of legal obligation. *This* element is necessary to establish a legally binding practice or custom. "opinio juris" denotes a subjective obligation, a sense on behalf of a state that it is bound to the law in question. If any such customs or usages or practices pass the test of "opinio juris" for a reasonable time then it is recognized as a legally provision. The same test and standard too are applied in the laws of the states since immemorial in countless ramifications. Regarding the above mentioned practice or

custom it is evident that a sense on behalf of the stakeholders established that they are bound to the law in question. Hence, it could easily be said that it passed the test of "opinio juris" in its arene, as such, attained the strength of law.

On the basis of the above discussion the custom or usage of the Appellate Division in discussion, in our opinion, has the force of law and consequently, the order was of prohibiting nature.

In the case of Bessesswari Chowdhurany Vs. Horro Sundar Mozumdar and Ors (1892) reported in 1 CWN 226 (MANU/WB/0134/1892) the High Court of Calcutta decided that if an order is in the nature of a prohibitory order, it would only bind courts below when communicated. The same

view is maintained till date by the Apex courts in this region. The Supreme Court of India endorsed the same view in the case of Mulraj V. Murti Raghunathji Maharaj reported in AIR 1967 SC 1386. This Division too maintained the same in the ruling of Chairman, Kushtia Co-Operative industrial Union Ltd. vs. Md. Mujibur Rahman and others reported in 44 DLR (AD) (1992) 219.

This Division, in the same ruling reported in 44 DLR(AD) (1992)219 decided that where there is a prohibiting order of the higher court, the subordinate courts thereto is bound not to proceed with the case. The Appellate Division observed:

"As soon as the executing Court comes to know of the, stay order either by receiving a communication from the

court passing the stay order or from an affidavit from one of the parties to the proceeding or in other way, it will stay its hands till further order and, if it does not do so, it not only acts illegally but will also be liable for contempt of the court that passed the order."

However, we too endorse the expanding view of matter by another bench of Calcutta High Court referred in *Hukum Chand Boid V. Kamalanand Singh* (1906) ILR 33 Cal. 927, that an order of stay takes effect from the moment it is passed and the knowledge of the court or others concerned is immaterial. However, the information of the existence of such a prohibiting order must be communicated in any

way to the courts below for the purpose of proceedings to be taken against any person for contempt of the authority of the higher Court. But the operation of the order is not in any way postponed till it has been communicated to the Subordinate Court or the party intended to be affected by it.

The court may receive knowledge either on receipt of an order of stay from the court that passed it or through one party or the other supported by an affidavit or in any other way such as lawyer's certificate with affidavits. In the case of a stay order, it prohibits courts below from proceeding further, as soon as the court has knowledge of the order it is bound to obey it and if it does not, it not only acts illegally, and all proceedings taken

after the knowledge of the order but also all proceedings taken even without knowledge too would be a nullity in toto.

As Officer of the Court it is the foremost duty of the learned Counsel engaged to inform the same in the courts below each and every occasion needed.

Before passing any order it is the duty of the High Court Division by applying its ordinary prudence to enquire from the learned Counsels concerned whether there pending any prohibitory order from the Apex Court in the matters concerned. As Officer of the Court, the learned Advocates pressing the petition too is duty bound to communicate any such information before the Court and be restrained themselves from lodging or hearing any such petitions.

However, with great compunction we witnessed that ignoring it the learned Advocate pressed the non-prosecution petition and High Court Division allowed the same of the present respondent for disallowing the appeal for non-prosecution on 27-06-2022 pending the Criminal Petition for Leave to Appeal as well as a prohibiting order.

In the present case in absence of any solid-concrete evidence as to that the High Court Division passed the impugned order with conscious defiance of the higher courts our considered view as eloquent above is that the order was passed in ignorance of the order of stay and it may be said that there was no willful disobedience of the order. However, it is highly expected that courts below including

the High Court Division should maintain cautiousness in the matters discussed above for coming days.

In the result, this Criminal Petition for Leave to Appeal is disposed of with the following order and observation. The application for dismissing this criminal petition is rejected.

Resultantly, the order of the High Court Division for dismissing the criminal appeal no. 7403 of 2021 allowing the petition for non-prosecution on 27.06.2022 is set aside and the Criminal Appeal no.7403 of 2021 is hereby restored to its original file and number and in the category of Rule hearing. The order of stay granted by this Division to be continued till disposal of the Rule.

Learned member of the Bar is directed to hear the matter at once in any appropriate Bench. The High Court Division is further directed to dispose of the Rule on merit. The copy of this judgment be communicated to the Judges of the criminal Benches of the High Court Division at once for further reference and steps.

J.

J.

J.

The 31st August, 2022
Hamid/B.R/*Words 2,298*