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

Present

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

Criminal Miscellaneous Case No. 51468 of 2022

IN THE MATTER OF:

An application under Section 561A of the Code of Criminal Procedure

-And-

IN THE MATTER OF:

A.K.M. Shafiqur Rahman

... Accused-Petitioner

Versus

The State and another

...Opposite Parties

Mr. Tufailur Rahman, with
Mr. Foizur Rahman Chowdhury and
Mr. Md. Jahangir Alam, Advocates

....For the Accused-Petitioner

Ms. Chowdhury Nasima, Advocate

...For the Opposite Party No. 2
(Anti Corruption Commission)

Mr. Md. Jasim Sarker, DAG with
Mr. Md. Shahadat Hossain Adil, AAG,
Ms. Laboni Akter, AAG and

...For the State

Judgment on: 18.03.2025

Md. Riaz Uddin Khan, J:

By this Rule the opposite parties were asked to show cause as to why the proceeding of the Gulshan Police Station Case No. 12 dated 06.07.2015 corresponding to A.C.C (Dudak) G.R. Case No. 439 of 2015 under sections 406/409 of the Penal Code, now pending in the Court of Chief Metropolitan Magistrate, Dhaka should not be

quashed and or such other or further order or orders should not be passed as this court may deem fit and appropriate.

At the time of issuance of Rule all further proceedings of Gulshan Police Station Case No. 12 dated 06.07.2015 corresponding to A.C.C (Dudak) G.R. Case No. 439 of 2015 under sections 406/409 of the Penal Code, was stayed till disposal of the Rule.

Facts, in a nutshell, for disposal of this Rule are that one Md. Ferdous Kabir as informant lodged an ejahar against the accused petitioner alleging inter alia that the accused is a high official of RAJUK and he is known to the accused and at one stage of their understanding the accused proposed him to allot a plot in RAJUK Purbachal project and took Tk. 81,50,000/- in different times but failed to do the work and at one stage the accused executed a deed of agreement in presence of the local people to return Tk. 60,00,000/- but did not do so and took time by giving false promise and the informant tried to settle the matter but all his effort went in vain. At last finding no other alternative, he lodged the FIR against the accused for legal action.

During investigation, the petitioner was arrested by police and obtained bail on 22.11.2018 and since then he is on bail and on

15.03.2022 was fixed for submitting investigation report. The case is under investigation and next date was fixed on 06.06.2022 for police report. At this stage the accused petitioner moved this Court and obtained Rule and order of stay as stated at the very outset.

The Respondent No. 2, Anti-Corruption Commission entered appearance and filed affidavit-in-compliance instead of filing counter affidavit stating *inter alia* that the accused-petitioner made confessional statement under Section 164 of the Code of Criminal Procedure and the Investigating Officer after completion of investigation filed investigation report before the Anti-corruption Commission on 24.11.2016 but Anti-corruption Commission was not satisfied with the report and to meet up some query for further investigation appointed another Investigating Officer on 30.03.2017 who submitted his report on 01.03.2018 and after receiving the report Anti-corruption Commission with some opinions appointed another Investigating Officer. The Investigating Officer filed his report on 10.07.2019. After receiving the report Anti-corruption Commission being not satisfied gave some directions and then the Investigating Officer sent the disputed cheque No. 1513101690241001 dated 10.07.2014 to examine the signature of the accused by forensic department

on 31.07.2019. Thereafter one A.K.M Mahabur Rahman was appointed as new Investigating Officer due to retirement (PRL) of previous Investigating Officer and at this stage the proceeding of the instant case was stayed by this Court and meanwhile the report of the Hand Writing Expert was submitted on 29.12.2019.

Mr. Tufailur Rahman, the learned advocate for the accused-petitioner submits that the Durnity Damon Commission (Dudak) appointed its Deputy Director, S.M. Rofiqul Islam vide letter under Memo dated 28.07.2015 for investigating the case and thereafter on 24.11.2016 the Investigating Officer S.M. Rafiqul Islam recommended to submit charge sheet against the accused-petitioner under section 406/409 of the Penal Code and submitted it for approval of higher authority of Dudak. But the case was sent for further investigation by another Investigating Officer (I.O) appointing Deputy Director Mr. Anaruzzaman vide letter under memo dated 02.04.2017 and thereafter on 01.03.2018 he submitted report with memo of evidence. But the authority again appointed another Deputy Director Mr. Suresh Chandra Dutta for further investigation vide letter under memo dated 23.05.2018 who submitted memo of evidence on 14.07.2019. The signature of the cheque issuer was sent to CID for forensic lab test vide memo

dated 11.07.2019 and it was reported on 29.12.2019 that the cheque which was submitted by the informant Ferdous Kabir was not signed by the Accused-Petitioner, A.K.M Shafiqur Rahman. In the meantime, the informant realized his mistake and out of his own accord he engaged a Lawyer and submitted an application before the learned Chief Metropolitan Magistrate, Dhaka on 19.09.2021 stating that the disputed matter has been settled out of the court and he no longer is interested to continue the case and he has no objection if the accused is acquitted from the allegation and any verdict in favour of the accused and the matter was acknowledged by the learned Magistrate. The informant through his engaged Advocate has also submitted an application to the Durnity Daman Commission (Dudak) on 19.09.2021, stating the facts that the dispute between the parties has already been resolved and there is no allegation against the accused-petitioner and hence prayed for the proceeding to be dropped. Even then the Chairman of RAJUK suspended the accused-petitioner vide Memo No. প্র: শা: ১৭/৪৫/৯৭৬ স্থা: dated 13.04.2016 which was enforced with effect from 11.04.2016 and the accused-petitioner submitted an application to the Chairman of RAJUK to allow him to Join his work as Director (Zone-8) dated 10.07.2016, but the Chairman of RAJUK did not dispose of the application yet.

Referring such background Mr. Rahman submits that the dispute between the parties regarding 'cheque' which is quasi civil in nature and in the meantime about 07 (seven) years have already been elapsed for investigation but the investigation having remained incomplete and the Durnity Daman Commission yet did not take any decision on the matter and repeatedly sent the case for further investigation without any lawful jurisdiction which has resulted in the harassment of the accused-petitioner. Section 20Ka of the Durnity Damon Commission Ain, 2004 provides completion of the investigation within 120 working days and a further 60 days may be extended but in the event of failure to complete the investigation within the said period a new Investigation Officer may be appointed so as to complete the investigation within further 90 days. In the event of failure to complete the investigation within the time limit provided by section 20Ka of the said Ain it had been provided in the subsection of (3)(Kha) of aforesaid section for taking departmental proceeding which indicates that the time limit given in the section to be mandatory because the said provision implies that the legislature intended the completion of the investigation within the time limit given in the section and not to leave it to an indefinite period causing unnecessary

harassment of the person concerned and as such proceeding of the instant case is liable to be quashed.

He then submits that the consequence has been given in subsection 3 (ka) and (kha) of section 20Ka regarding duration of investigation that is failure of investigation within specified time shall be subjected to departmental proceeding on an accusation of inefficiency of the Investigating Officer in accordance with laws or regulations applicable to the Commission, Police or the relevant organization as the case may be and hence, the proceeding pending for long 07 (seven) years by appointing one after another Investigating Officer without any lawful jurisdiction and even then the investigation remained incomplete and no investigation report has reached finality resulting in harassment to the Accused-Petitioner and as such the provision laid down under section 20Ka of the Durnity Damon Commission Ain, 2004 limiting the time to complete investigation is mandatory and not directory.

The learned advocate further submits that it is clear from above provisions of law, that the Investigating Officer has failed to complete the investigation within specified period, the relevant officer shall have to face departmental proceeding on an accusation of inefficiency as

being consequence which is the mandatory provision of law and the same already has been violated and yet no proceeding has been initiated and hence the case is liable to be quashed.

He further submits that the dispute between the parties is simply financial and personal dispute and as such the matter does not attract the provisions of section 2(ka) of Durnity Damon Commission Ain, 2004 as the offence of section 406/409 of the penal code, because from the facts of the case as stated in the Complainant lodged it would appear that Accused-Petitioner and the complainant being well known to each other tried to help the complainant in getting a 10 katha plot at Purbachal Rajuk Project as the Accused-Petitioner was high official of Rajuk and for the said purpose the complainant paid an amount of Tk. 81,50,000/- (Taka Eighty one Lac and fifty Thousand) only at different times but as the Accused-Petitioner failed to help the complainant to get the said 10 katha plot the Accused-Petitioner agreed to pay back an amount of Tk. 60 lacs (sixty Lacs) only and accordingly in presence of the local people or relations of the parties an agreement was executed by the complainant and the Accused-Petitioner. The Accused-Petitioner handed over a cheque for Tk. 10,00,000/- (Taka Ten Lacs) only which the complainant deposited to encash. In view of the

above facts it cannot be said that there was any element of fraud or Criminal breach of trust but at best it is simply a case of breach of contract and the liability is of civil nature and therefore section 406/409 of the Penal Code being not attracted the proceeding pending in the court being abuse of process is liable to be quashed.

He next submits that the Complainant by filing a petition addressed to the Chairman, Durnity Damon Commission (Dudak) states that the Complaint recorded as ejhar was made due to misunderstanding between the parties and since the matter had been resolved and as such he has no grievance against the Accused-Petitioner hence he wants that the matter be disposed of legally. Therefore, as the investigation is still incomplete the further continuation of the proceedings now pending in the court will be an abuse of process and therefore it may be quashed.

Mr. Rahman further submits that interference even at an initial stage of the case may be justified where facts are so preposterous that even on admitted facts no case can stands against the accused as enunciated in reported cases of 17 BLD(AD) 44 & 28 DLR(AD) 38. Virtually, the petitioner have been falsely implicated in the instant case only for the purpose of harassment as the way of preposterous manner being biased by the official rival groups and as such

continuation of the instant case is the abuse of the process of the court and the same is liable to be quashed.

The learned advocate lastly submits that nothing is stated in the FIR that the accused denied that he would not return the received money from the informant. So the accused petitioner committed no criminal offence under section 420/409 of the Penal Code. The allegation made in the FIR does not disclose any criminal offence. According to FIR the case has been arisen from the breach of contract. Allegation if any made in the FIR which is civil in nature which may be settled amicably through mutual discussion but the instant case has been lodged only for the purpose of harassment.

In support of his submissions the learned advocate for the petitioner cited the decisions of 17 BLD (AD) 44; 28 DLR(AD) 38; 9 ALR (AD) 75 and AIR 1962 Madhya Pradesh 180 (V 49 C 54).

Per contra, Ms. Chowdhury Nasima, the learned advocate for the Respondent No.2 submits that the instant case should not be quashed on the ground of incompletion of investigation in time specified in the law.

In support of her submission the learned advocate for the opposite party No.2 cited the decisions reported in 67 DLR(AD) 278; 23 BLC 256 and 24 BLC 48.

We have heard the submissions made at the Bar and perused the application along with annexures, supplementary affidavit and affidavit in compliance and the materials on record available before us. According to the learned advocate for the accused petitioner the accusation as alleged in the FIR is civil in nature and does not disclose any offence of cheating and/or criminal breach of trust under section 420/409 of the Penal Code.

In this context, now let us look at section 415 of the Penal Code, the definition of “cheating”, which reads as under:

‘415. whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.’

As we understand it plainly, the ingredients of cheating are deception of one person by another person and fraudulently or dishonestly inducing the person so deceived to deliver any property. It is therefore clear that the acts of

deceiving and thereby dishonestly or fraudulently inducing the person deceived are acts which must precede the delivery of any property. The Indian Supreme Court in a case reported in AIR 1974 SC 1811 observed that essential ingredients of “cheating” are as follows: (i) there should be fraudulent or dishonest inducement of a person by deceiving him; (ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by (ii) (b) the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property. Therefore, to constitute an offence under section 420 of the Penal Code, there should not only be cheating, but as a consequence of such cheating the accused should have dishonestly induced the person deceived to deliver any property to any person, or to make, alter or destroy wholly or in part a valuable security or anything which is capable of being converted into a valuable security.

In committing offence of cheating the intention of the parties is very important and the intention of defrauding the other side or

‘mens rea’ can be seen or surfaced by any act or acts of parties and is to be gathered from surrounding circumstances. Thus, in the case of cheating the intention of the accused person can be found only at the time of commission of offence. Each and every case depend upon the facts and circumstances of that particular case only and the offence alleged can be established by the prosecution or complainant on production of evidence at the time of trial. This view gets approval from a series of cases set out in our jurisdiction as well as of this sub-continent. In the case of State Versus Iqbal Hossain reported in 48 DLR (AD) 100 our Appellate Division made the following observation:-

> “Transaction based on contract ordinarily gives rise to civil liabilities but that does not preclude implications of a criminal nature in a particular case and a party to the contract may also be liable for a criminal charge or charges if elements of any particular offence are found to be present. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time as alleged which may be judged by subsequent act.”

Therefore the true position is that even in a transaction based on contract, apart from civil liability, there may be elements of an offence or offences for which a prosecution may be competent against a party to the contract and to find such offence the evidence has to be examined carefully to see whether there is any criminal liability. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time as alleged which may be judged by his subsequent act. Our this view gets support from the decision reported in 6 ADC 165 in the case of Haji Alauddin Vs. The state and another wherein the Appellate Division held:

> "In order to gather the intention, the attending circumstances and the conduct of the parties has to be examined in the context of the transaction itself, necessarily requires evidence or materials which cannot be possible without examination of witnesses."

While section 405 of the Penal Code defines "criminal breach of trust" which is reproduced below:

'405. whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses

or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.’

Therefore, the ingredients of the offence of criminal breach of trust are:-- (1) the accused was entrusted with- (a) property, or (b) dominion over property; (2) the accused– (a) misappropriated, or (b) converted the property of his own use, or (c) used or disposed of the property or willfully suffered any person to do so dispose of the property; (3) the accused did so in violation of – (a) any direction of law prescribing the modes in which the entrusted property should be dealt with or (b) any legal contract express or implied which he had entered into relating to the carrying out of the trust or (c) the accused did so dishonestly.

The first ingredient of the offence of criminal breach of trust is that there ought to be an entrustment with property or with dominion over property to the accused by the complainant. If there is such entrustment and the accused dishonestly uses or disposes of that property in violation of any legal contract express or implied which he has made touching the discharge

of such trust or willfully suffers any other person so to do he is said to commit criminal breach of trust. The word ‘entrustment’ in section 405 connotes that the accused holds the property in a fiduciary capacity. According to ATM Afzal, J (as his lordship then was) in the case of Shamsul Alam & others Vs. AFR Hassan & others the expression ‘entrustment’ in section 405 is used in its legal and not in its figurative or popular sense. If the expression ‘entrustment’ is applied to a thing which is not money, it would indubitably indicate that such thing continues to remain the property of the prosecutor during the period in which the accused is permitted to retain its possession or is permitted to have any dominion over it. When money is ‘entrusted’ within section 405 to the accused it would be transferred to him under such circumstances which show that, notwithstanding its delivery, the property in it continues to vest in the prosecutor, and the money remains in the possession or control of the accused as a bailee and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with the instructions. The word ‘trust’ is a comprehensive expression which has been used not only to cover the relationship of trustee and beneficiary but also those of bailor and bailee, master and servant, pledgor and pledgee, guardian

and ward and all other relations which postulate the existence of a fiduciary relationship between the complainant and the accused.

When the criminal breach of trust is committed by the capacity of a public servant, or by banker, merchant, factor, broker, attorney or agent is an offence punishable under section 409 of the Penal Code.

In the present case the question is therefore arises for consideration is whether the material on record prima facie constitutes any offence against the accused-petitioners. Is there any ingredient of criminal offence under sections 420/409 of the Penal Code in the light of above decisions of our apex Court? In the present case the complainant alleged that the accused is a high official of RAJUK and he was known to the accused and at one stage of their understanding the accused proposed him to allot a plot in RAJUK Purbachal project and took Tk. 81,50,000/- in different times but failed to do the work and at one stage the accused executed a deed of agreement in presence of the local people to return Tk. 60,00,000/- but did not fulfill his promise and took time by giving false promise and the informant tried to settle the matter but all his effort went in vain and finding no other alternative he lodged the ejahar. Admittedly the accused petitioner is an officer of “Rajuk”, a

statutory body for which he is a public servant. The allegation that being an officer of Rajuk he entered into an oral agreement with the complainant to allot him a Rajuk plot, is a very serious allegation and it cannot be in any way a legal contract or agreement. It is not compoundable. It is a schedule offence of Dudak and Dudak is competent to investigate the matter in accordance with law. Thus, we find it difficult to accept the submission of the learned advocate for the petitioner that no criminal liability arises by the conduct of the accused-petitioner or there is no ingredient of cheating along with criminal breach of trust under sections 420/409 of the Penal Code.

Now, let us consider the next point raised by the learned advocate for the petitioner regarding the failure of completion of investigation within specified period as contemplated under section 20Ka of the Durnity Damon Commission Ain, 2004.

The provision of section 20Ka of the Ain, 2004 is reproduced below:

> 20Ka. Duration of investigation.—(1) Notwithstanding anything contained in any other law, the Investigating Officer shall complete the investigation of offences specified in this Act and the Schedule within 120 (one hundred and twenty) working

days from the date of being empowered under section 20.

(2) Notwithstanding anything contained in subsection (1), if the investigation cannot be completed within the specified period on any reasonable grounds, the Investigating Officer may apply for extension of time to the Commission and in such case, the Commission may extend the period of time not exceeding 60 (sixty) working days.

(3) If the investigating Officer fails to complete the investigation within the specified period mentioned in subsection (1) or, as the case may be, in subsection (2)-

(a) a new officer shall be assigned as per section 20 to complete that investigation within a period of 90 (ninety) working days; and

(b) the relevant officer shall be subjected to departmental proceeding on an accusation of inefficiency in accordance with laws or rules regulations applicable to the Commission, police or the relevant organization, as the case may be.

From plain reading of the provision it appears that the legislature fixed specific number of working days (120 working days) within which the Investigating Officer is to complete

the investigation. Sub-section 2 clearly states that if the Investigating Officer fails to conclude the investigation then on any reasonable grounds upon an application by the Investigating Officer the Commission may extend the period for 60 (sixty) more working days. Sub-section 3(ka) states that if the Investigating Officer fails to complete the investigation within the said specified time, a new Investigating Officer shall be assigned by the Commission who shall complete the investigation within 90 (ninety) working days. Sub-section 3(kha) provides for accountability of the person(s) who is/are responsible for failure to complete the investigation on an accusation of inefficiency as mandated under the Ain. From reading the section as a whole it is crystal clear that if the provisions of the Ain is not followed, then the purpose of the Ain would be frustrated which cannot be the intention of the legislature. There is difference between the mere directory provision and the provision of section 20Ka of the Durnity Damon Commission Ain. The former has no consequence or to do anything while in the later case the Commission is to take some action. The provision may not be mandatory; nonetheless, it does not in any way mean that the Dudak is not obliged to follow the provision of law enacted by the parliament so far it is in the statute unless

declared unconstitutional by the Supreme Court. Nowhere in any decision of the Supreme Court it is held that directory provision is not to be followed. The spirit of the section 20Ka of the Ain, 2004 is speedy investigation having public importance for the purpose of speedy trial as mandated by our Constitution under Article 35(3) and if the Dudak does not follow the provisions specified in the Ain then this provisions become nugatory. The legislature in their wisdom incorporated such a provision which is *intra vires,* we do not understand why the Dudak shall not follow that provision. In such view of the matter, we are of the opinion that the section 20Ka is not mandatory in the sense that if the investigation is not completed beyond the (120+60+90) 270 working days then the investigation will not be illegal or without jurisdiction. But the Dudak is obliged to follow the law enacted by the legislature and not declared *ultra vires* the constitution by the Supreme Court. No doubt that it is obligatory for the Dudak to complete the investigation within the time frame but it does not mean that failing which the proceeding should be quashed. Rather the relevant officer(s) shall be subjected to departmental proceeding on the accusation of inefficiency.

In the present case we have already noticed that Dudak has appointed 4 (four) Investigating officers one after another. The 1st Investigating officer was appointed on 28.07.2015 and the instant rule was issued on 18.10.2022. In the mean time more than 7 (seven) years have been passed. No authority should commit fraud on the statute to defeat the purpose or requirement of a statute. No authority should abuse or circumvent the purpose of a statute to evade the legal requirements. In the present case the way Dudak prolonged the investigation, we cannot appreciate it at all. However, there is prima facie allegation and the investigation is to be completed as early as possible keeping in mind that in the meantime more than 9 (nine) years have been passed.

In view of the discussions made above and the reasons stated hereinbefore we hold that the instant proceeding is not liable to be quashed but Durnity Damon Commission (Dudak) is directed to complete the investigation as early as possible.

In the result, the Rule is **disposed of with the above observations**.

The order of stay passed at the time of issuance of Rule is hereby recalled and vacated and the Durnity Damon Commission (Dudak) and court below are directed to proceed with the case

in accordance with law in the light of observations made above.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.

Ziaul Karim
Bench Officer