

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

Present:

Mr. Justice Md. Bashir Ullah

Criminal Appeal No. 4612 of 2023

In the matter of:

An Appeal under Section 10(1)(a) of the
Criminal Law Amendment Act, 1958.

And

In the matter of:

Poritosh Barai

... **Appellant**

-Versus-

The State and another

... **Respondents**

Mr. Saqeb Mahbub, Advocate with
Mr. Tareq Bhuiyan, Advocate and
Mr. Razu Ahamed, Advocate

... For the Appellant

Mr. Md. Anwarul Islam, Advocate

... For the Respondent No. 2

Mr. S.M. Aminul Islam Sanu, D.A.G with
Mr. Md. Nasimul Hasan, A.A.G with
Mr. Md. Golamun Nabi, A.A.G and
Ms. Farhana Abedin, A.A.G

... For the State

**Heard on: 19.02.2026, 23.02.2026,
26.02.2026, 02.03.2026, 04.03.2026
08.03.2026 and 09.03.2026**

Judgment on 12.03.2026

This appeal, preferred under Section 10(1)(a) of the
Criminal Law Amendment Act, 1958 is directed against the

judgment and order dated 18.04.2023 passed by the learned Special Judge (District Judge), Noakhali in Special Case No. 05 of 2009, arising out of Ramganj Police Station Case No. 08 dated 14.02.2008 corresponding to G.R. No. 128 of 2008, convicting the appellant under Section 409 of the Penal Code and sentencing to suffer rigorous imprisonment for 03 (three) years with a fine of Taka 1,00,000/- (one lac) in default to suffer 02(two) months more. The appellant was also convicted under Section 5(2) of the Prevention of Corruption Act, 1947 and sentenced him to suffer simple imprisonment for 02 (two) years with a fine of Taka 20,000/- (twenty thousand) in default to suffer simple imprisonment for 01(one) month, the sentences to run concurrently.

The facts relevant for disposal of the appeal, in short, are that one Md. Monzur Alam, Assistant Director, Anti Corruption Commission, Dhaka lodged a First Information Report (FIR) stating *inter alia* that upon scrutiny of Dudok file no. Dudok/87-2007(Anu-2), he came to know that 1) Ziaul Haque Zia, former State Minister of LGRD, 2) Md. Abul Hashem, former UNO, Ramganj, Lakshmipur, 3) Paritosh

Barai, former Project Implementation Officer (PIO), Lakshmipur, Noakhali, 4) Delower Hossain, Proprietor of M/s Delower Hossain, 5) Md. Akhter Hossain Khan, in connivance with each other by misusing their official positions in implementing Rural Infrastructure Maintenance Program (TR Special), Lakshmipur, Ramganj for the fiscal year of 2004-2005 and misappropriated of the value of 320 Metric Tons of rice valued at Taka 50,29,760/- (fifty lac twenty nine thousand and seven hundred sixty), thereby committed offences under Sections 409/109 of the Penal Code and Section 5(2) of the Prevention of Corruption Act, 1947. During the investigation, the informant came to know that the Deputy Commissioner Lakshmipur gave allotment of 100 Metric Tons of rice on 05.06.2005 for TR Special project for the financial year 2004-2005 which were allotted for 37 projects, and the former State Minister, Ziaul Haque Zia gave his consent on it, subsequently, on 29.06.2005 the Deputy Commissioner of Lakshmipur further gave allotment of 220 metric tons of rice for the financial year 2004-2005 for 59 projects and the said 59 projects were approved by the State Minister Ziaul Haque Zia

on 25.06.2005. On 30.06.2005, a Delivery Order was issued for 320 metric tons of rice but the said Delivery Order was not handed over to the project committee of 96 projects and as per instruction of Ziaul Haque Zia, the UNO has delivered rice to one Delwar Hossain Delu. The former UNO, Abul Hashem had received Taka 41.50 lacs through cheque and cash and he had opened an FDR in the name of Md. Akhter Hossain for Taka 30,00,000/- (thirty lac) vide No. 0021196/1566 and the copy of said FDR was delivered to Nasima Hoque, wife of Ziaul Haque Zia, Then the UNO kept Taka 11,00,000/- (eleven lac) by showing it office miscellaneous cost and Taka 50,000/- (fifty thousand) was kept in his custody in cash. Thereafter, the former State Minister Ziaual Hoque Zia gave instruction to transfer the FDR of Taka 30,00,000/- (thirty lacs), which was issued in the name of Akhter Hosain from Agrani Bank to Janata Bank, Ramganj Branch on 14.07.2005 vide FDR No. 540700/1567. The UNO had misappropriated Taka 11,00,000/- (eleven lac) and he did not preserve any record about the said expenses of Taka 11,00,000/- (eleven lac), after examining the record and witness, the investigation officer

came to know that in financial year of 2004-2005 96 projects of Rural Infrastructure Maintenance Program (TR Special), Ramganj Upazilla were not completed in proper way and 320 metric tons of rice was delivered to Delwar Hossain Delu as per the instruction of former State Minister Ziaul Haque Zia and the UNO, Abul Hashem, due to fear of State Minister and as per instruction of Abul Hashem and with the cooperation of PIO the subordinate officer has prepared false muster roll which was endorsed later on by the UNO. Subsequently, Akhter Hossain admitted his guilt and deposited Taka 33,08,267/- (thirty three lac eight thousand and two hundred sixty seven) to the Government exchequer through challan, thus the State Minister Ziaul Haque Zia kept the custody of FDR Taka 30,00,000/- (thirty lac) for two years and in 2004-2005 financial year 320 metric tons rice under 96 project of Rural Development and Maintenance (TR special) project was not accomplished and former State Minister Ziaul Haque Zia, former UNO Abul Hashem, Former PIO Paritosh Barai and Delwar Hossain Delu misappropriated 320 metric tons of rice which is equivalent to Taka 50,29,760/- (fifty lac twenty nine

thousand and seven hundred sixty) and they have committed offence under Sections 409/109 of Penal Code and Section 5(2) of the Prevention of Corruption Act, 1947 and as such FIR was lodged.

Upon closure of the investigation, the Investigating Officer, namely, Md. Manjur Alam submitted charge sheet being No. 129 on 08.10.2008.

The case was transmitted for trial to the learned Special Judge, Noakhali and registered as Special Case No. 05 of 2009. The charge was framed on 19.08.2009 under Sections 409/109 of the Penal Code read with Section 5(2) of the Prevention of Corruption Act, 1947, while the accused pleaded not guilty and claimed to be tried when the same was readout and explained to the accused. The prosecution examined 14 witnesses, while the defence examined none. The accused could not be examined under Section 342 of the Code of Criminal Procedure as they were absconding and were tried in absentia.

The learned Special Judge after completion of the evidence and on perusal of the same found the appellant guilty and convicted the appellant under Section 409 of Penal Code

and awarded sentence for 03(three) years rigorous imprisonment with a fine of Taka 1,00,000/- (one lac) and 02(two) years imprisonment with fine of Taka 20,000/- (twenty thousand) under Section 5(2) of the Prevention of Corruption Act, 1947 and ordered the sentences to run concurrently.

Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence, the convict preferred this appeal before this Court and the appellant was enlarged on bail for 06(six) months on 01.06.2023.

Mr. Saqeb Mahbub, the learned Advocate appearing on behalf of the appellant, contends that the appellant had no involvement in the alleged misappropriation, nor did he receive or handle any of the alleged misappropriated funds. He further contends that the FDR amounting to Taka 30,00,000/- (thirty lac) was opened in the name of one Akhter Hossain at the instance of the then State Minister, accused No.1 and the same was introduced by the UNO, accused No. 2, who subsequently expired before delivery of judgment.

He next contends that the appellant merely countersigned muster rolls in discharge of his official duties and under the

direction of his superior authorities, namely the State Minister and the UNO, without any dishonest intention or personal gain.

He further argues that Akhtar Hossain, accused No. 5 was not sent up for trial by the investigating officer although he received the misappropriated funds and made FDR in his own name and subsequently he refunded the misappropriated money to the exchequer of the Government through T.R. challan, thereby creating a serious lacuna in the prosecution case.

In the same vein, Mr. Razu Ahamed, the learned Advocate appearing on behalf of the appellant, contends that at the time of the occurrence the appellant was in a probation period and it was impossible for him to refuse any instruction passed by a State Minister and his superior authority, the UNO.

The learned Advocate further contends that the trial Court convicted the appellant under Section 409 of the Penal Code and Section 5(2) of the Prevention of Corruption Act, 1947 for the same alleged act amounts to double jeopardy, and is legally impermissible.

He further contends that the informant and the Investigating Officer being the same person vitiates the investigation and gives rise to a serious conflict of interest as it offends the principles of natural justice and creates a reasonable apprehension of bias in the mind of the accused.

In support of his contention, he refers to the decision passed in the case of *Moslem Uddin Vs. The State*, reported in 10 MLR (HCD) 199; *Syed Ali Mondal alias Syed Ali and Others*, reported in 46 DLR (1994) 149 and *Mahbub Hassan Vs. The State*, reported in 33 BLD (2013) 83.

The learned Advocate finally prays for allowing the appeal.

Per contra, Mr. Anwarul Islam, the learned Advocate appearing on behalf of the respondent No. 2, contends that the accused-petitioner was absconding from the date of framing of charge and the trial held in absentia though the appellant abetted the principal accused, the State Minister and the Upazilla Nirbahi Officer so he is equally liable to be punished under Sections 409 and 109 of the Penal Code and 5(2) of the Prevention of Corruption Act.

He next submits that the appellant was an important officer to implement the T.R. project and he signed with the UNO each and every page of muster rolls and issued certificates which were produced before the trial Court as exhibits 24, 26, 27, 28, 29, 30, 31, 32 and 33.

He next contends that the appellant was in charge of the project implementation and he was entrusted with the misappropriated rice and thus committed breach of trust and as such he is liable to be punished under Section 409 of the Penal Code.

Mr. Islam further contends that the appellant obtained pecuniary advantage for himself and for other persons like the State Minister and the UNO, abusing his position as a public servant and as such he is liable to be punished under Section 5(2) of the Prevention of Corruption Act, 1947 for his grave criminal misconduct.

Learned Advocate contends that the impugned judgment and order of conviction do not suffer from any illegality or infirmity. He finally prays for dismissal of the appeal.

I have considered the submissions of the learned Advocates for both sides, perused the evidence on record, impugned judgment and order passed by the trial Court and the other materials on records.

To consider the merit of the case and analyze the facts, let me visit the evidence of the prosecution's case.

PW1, Rafikul Alam, Manager, Janata Bank, Mogbazar Corporate Branch, seizure list witness stated that on 02.07.2007, an Officer of the Anti Corruption Commission came to his office and seized some documents and kept the same under his custody. He proved his signature on the seizure list as exhibit 1/1/1, application for FDR as exhibit 3, page No. 108 of FDR ledger No. 3 as exhibit 5.

PW2, Bhagabat Chandra Banik, Second Officer, Janata Bank Ltd. Ramganj Branch, Lakshmipur, seizure list witness stated that the officer of the Anti Corruption Commission seized some documents on 02.07.2007 and prepared a seizure list. He put his signature on the seizure list. He proved the seizure list as exhibit 1.

PW3, Md. Abdul Kuddus, retired Deputy General Manager, Agrani Bank, Head Office, Dhaka, another seizure list witness stated that one officer from the Anti Corruption Commission came to the bank and he presented FDR account, pay order related documents before the officer as per his instruction. The Anti-Corruption Commission Officer seized the documents and gave them to his custody. He proved the seizure list as exhibit No. 6.

He also proved the deposit slip of Taka 11,00,000/- (eleven lac) and 10(ten) cheques by which Taka 11,00,000/- (eleven lac) was withdrawn between 04.07.2005 and 05.09.2005 as exhibit 8 series.

He further proved the statement of the account namely M/s. Delowar Hossain being Cash Credit Account No. 33 and cheque No. 1097197 dated 03.07.2005 for Taka 41,00,000/- (forty one lac) as exhibit 9 series. He further proved application for Savings Account No. 9739 of Akhtar Hossain Khan and FDR No. 11A-0021196/1566 dated 03.07.2005 for Taka 30,00,000/- (thirty lac) as exhibit 10 series and 11 series.

He next proved pay order No. 1461845 dated 13.07.2005 as exhibit 12 series.

PW4, Md. Manjur Alam, the informant stated that he lodged the FIR and proved it as exhibit No. 13. He seized 03(three) files regarding the T.R. project for the fiscal year of 2004-2005 and proved the same as exhibit 14. He seized SS Card of Savings Account No.1126; the statements of accounts of M/s. Delowar Hossain; Savings Account No. 9739; FDR No. 11A 0021196/1566 dated 03.07.2005 and pay order and proved the seizure list as exhibit 6. He also proved the Challan Form of Bangladesh Bank as exhibit 16.

PW5, Md. Manjur Alam, the Investigating Officer, stated that he visited the place of occurrence and recorded the statements of witnesses and seized the documents and sent the file for sanction. Subsequently, he submitted charge sheet No. 129 dated 08.10.2008 after having the sanction. He proved the sanction letter as exhibit 18.

PW6, Md. Shah Alam, clerk of the office of the Deputy Commissioner, Lakshmipur, seizure list witness stated that Mr. Manjur Alam, investigating officer came to his office and

seized some documents and prepared a seizure list. He signed the seizure list and proved it as exhibit 15. He also proved application for deposit of Taka 30,00,000/- (thirty lac) with interest to the Government exchequer which was allotted for the year of 2004-2005 for the T.R. project as exhibit 19. He further proved the office order dated 03.07.2007 for depositing the misappropriated money as exhibit 20.

PW7, Md. Shahadat Hossain, seizure list witness stated that on 04.07.2007, an officer of the Anti Corruption Commission came to his office and seized some documents. He proved his signature put on the seizure list as exhibit 15/4.

PW8, Md. Mizanur Rahman, former Junior Auditor, Upazilla Accounts officer, Ramganj, seizure list witness stated that on 04.07.2007, an officer of the Anti Corruption Commission came to their office and seized some documents. He was a witness to the seizure list and signed on it. He proved his signature as exhibit No. 16/2.

PW9, Md. Nazrul Islam, Upazilla Accounts Officer, seizure list witness stated that when he was serving as auditor, on 04.07.2007, an Anti Corruption Officer, Manjur Alam

seized some documents from their office. He was a witness of seizure list and put his signature on it. He proved his signature as exhibit No. 16/3.

PW10, Md. Ismail Hossain, Photocopy Operator, Office of the Upazilla Nirbahi Officer stated that he was a night guard at Ramganj Upazilla. He withdrew Taka 9,75,000/- from Agrani Bank, Ramganj Branch with the instruction of the UNO, Abul Hashem. He gave the money to the UNO through office Assistant Sambunath Kunda. The UNO also had withdrawn Taka 50,000/- through peon Manjur. He saw to sign the UNO on the cheques.

PW11, Amir Hossain, Upper Divisional Assistant, Disaster Management Office stated that he served as Office Assistant at the office of Ramganj Upazilla Project Implementation Officer from 2002 to 2011. 100 M. Tons of rice were allotted under office Memo No. 398 dated 05.06.2005 and 220 M. Tons of rice were allotted under Memo No. 472 dated 29.06.2005 for the T.R. project. Delivery Order was issued. Subsequently, he heard that the rice was sold out in the open market without distributing for the project. Taka 30

lac out of that money was deposited in the form of FDR in the name of Akhtar Hossain, who was a relative of the then State Minister, Ziaul Haque Zia. Rest 11,00,000/- (eleven lac) was deposited in an account of the office of the UNO. He provided an office note to issue the Delivery Order for rice and it was presented to the PIO. A cheque for Taka 1,00,000/- (one lac) was given to him and after being withdrawn he paid the money to the UNO.

PW12, Pervin Aktar, former Commissioner, Ramganj Pourashava stated that she served as commissioner for 8 years. 21 M. Tons of rice was allotted for five projects during her tenure. She was shown as chairperson of the implementation committee, but she had no knowledge about the committee. She gave no signature on any document.

PW13, Md. Aman Ullah, the seizure list witness stated that he served as office PIO at Ramganj Upazilla Union Office. On 01.07.2017, an officer of the Anti-Corruption Commission came to his office and seized some documents. He signed on the seizure list. He proved the seizure list as exhibit 14, muster

roll as exhibit 27 series, project note sheet as exhibit 28, and another muster rolls as exhibit 30 series.

PW14, Md. Ismail, former Chairman, Chandipur Union Parishad stated that he served as chairman from 2003 to 2011. 21 metric tons of rice were allotted for the year 2004-2005. His name was shown as Chairman of the Project Implementation Committee, but he had no knowledge about the committee. He signed on a few papers at the request of the then State Minister. He did not put any signature on the paper of the muster rolls and the withdrawal of rice.

He answered to the question of the trial Court that the State Minister requested him verbally to do the signature.

PW4, Assistant Inspector of the Anti-Corruption Commission as informant lodged the FIR and proved the same as exhibit 13. The relevant portion of the FIR runs as follows:

“ডিও গুলি প্রকৃত পক্ষে বর্ণিত ৯৬টি প্রকল্পে প্রকল্প কমিটি নিকট হস্তান্তর না করে সাবেক এলজিআরডি প্রতিমন্ত্রী ও লক্ষ্মীপুর জেলার দায়িত্ব প্রাপ্ত মন্ত্রী জনাব জিয়াউল হক জিয়ার নির্দেশে উক্ত ইউএনও তৎকালীন পিআইও এর সহযোগিতায়

এলাকার প্রকল্পের চাল, গমের ক্রেতা/বিক্রেতা জনাব দেলোয়ার হোসেন দেলুর নিকট হস্তান্তর করেন।

... সাবেক ইউএনও জনাব আবুল হাসেম ০৩/০৭/০৫ইং তারিখ প্রতিমন্ত্রী জনাব জিয়াউল হক জিয়ার একান্ত আস্থাভাজন এবং ঘনিষ্ঠ ব্যক্তি মোঃ আখতার হোসেন কে সংগে নিয়ে অগ্রনী ব্যাংক রামগঞ্জ শাখায় যান। উক্ত ব্যাংকে অবস্থানরত জনাব দেলোয়ার হোসেন দেলুর নিকট হতে প্রতি টন ১৩,০০০/-টাকা হিসাবে ৩২০ মেঃ টন চালের মূল্য বাবদ ৪১,৬০,০০০/-টাকার মধ্যে ০৩/০৭/২০০৫ইং তারিখে অগ্রনী ব্যাংক, রামগঞ্জ শাখার তার সিসি হিসাব নং ৩৩ হতে চেকের মাধ্যমে ৪১ লক্ষ টাকা এবং নগদ ৫০,০০০/-টাকা মোট ৪১.৫০ লক্ষ টাকা উপজেলা নির্বাহী কর্মকর্তা জনাব আবুল হাশেম কে প্রদান করেন। ইউএনও জনাব আবুল হাসেম একই তারিখে একই ব্যাংকে জনাব মোঃ আখতার হোসেনের নামে নিজে সনাক্তকারী হিসাবে স্বাক্ষর পূর্বক একটি সঞ্চয়ী হিসাব খুলতে সাহায্য করেন। অতঃপর উক্ত ইউএনও চাল বিক্রয় বাবদ গৃহীত ৪১,৫০,০০০/-টাকার মধ্যে ৩০ লক্ষ টাকা দিয়ে প্রতিমন্ত্রী জিয়াউল হক জিয়ার মনোনীত প্রতিনিধি জনাব মোঃ আখতার হোসেনের নামে একই তারিখে একই ব্যাংকে একটি

এফডিআর খোলেন, যার নাম্বারে ০০২১১৯৬/১৫৬৬। পরবর্তীতে উক্ত আখতার হোসেন এফডিআর এর মূল রিসিটটি ঢাকার প্রতিমন্ত্রীর বাসায় প্রতিমন্ত্রীর স্ত্রী মিসেস নাসিমা হকের নিকট হস্তান্তর করেন। অবশিষ্ট টাকা হতে ইউএনও জনাব আবুল হাশেম তার অফিস সহকারী শম্মুনাথ কুন্ডুর মাধ্যমে জমা রিসিট লিখিয়ে তার অফিসের বিবিধ হিসাব খাতে হিসাব নং ১১২৬ তে একই তারিখে ব্যাংকে ১১ লক্ষ টাকা জমা রাখেন এবং বাকী ৫০,০০০/-টাকা নিজের কাছে রাখেন।

... জনাব জিয়াউল হক জিয়ার নির্দেশে উক্ত আখতার হোসেন ৩০ লক্ষ টাকার এফডিআর টি ভাংগিয়ে ১৪/০৭/২০০৫ তারিখে জনতা ব্যাংক, রামগঞ্জ শাখায় নতুন ভাবে উক্ত আখতার হোসেনের নামেই ৩০ লক্ষ টাকা এফ, ডিআর খোলেন, যার নাম্বার ৫৪০৭০০/১৫৬৭। অনুসন্ধানকালে আরও জানা যায় যে ইউএনও আবুল হাশেম বিবিধ হিসাব নং ১১২৬ তে জমাকৃত টাকা বিভিন্ন সময়ে বিভিন্ন চেকের মাধ্যমে উত্তোলন পূর্বক আত্মসাত করেন।

... বরাদ্দকৃত ৩২০ মেঃ টন চালের পুরোটাই সাবেক প্রতিমন্ত্রী জিয়াউল হক জিয়ার নির্দেশে তৎকালীন ইউএনও আবুল হাশেম সাহেব এলাকার চাল, গম ব্যবসায়ী জনাব দেলোয়ার

হোসেন দেলুর নিকট বিক্রয় করে দিয়েছেন। শুধুমাত্র প্রতিমন্ত্রীর ভয়ে এবং ইউএনও আবুল হাসেমের নির্দেশে সংশ্লিষ্ট পিআইও এর সহযোগিতায় তার অফিসের নিম্নপদস্থ কর্মচারীগণ ভুয়া মাষ্টার রোল প্রস্তুত ও দাখিল করেছেন এবং ইউএনও আবুল হাসেম সাহেব উক্ত মাষ্টার রোল সমূহ মিথ্যা ভাবে সমন্বয় করেছেন।

... পরবর্তীতে উক্ত আখতার হোসেন বর্নিত এফডিআর এর টাকা তার নিজের নয় এবং এই টাকা টিআর প্রকল্পের চাল বিক্রয়ের টাকা তথা সরকারের টাকা উল্লেখ পূর্বক জেলা প্রশাসক, লক্ষ্মীপুরের স্মারক নং ব্রান/গ্রাঃ আঃ রঃ/৪-৬/২০০৬-২০০৭/২৭৩ তারিখ ০৩/০৭/২০০৭ইং এর অনুমোদনক্রমে জনতা ব্যাংক রামগঞ্জ শাখায় রক্ষিত এফডিআর টি ভাংগিয়ে সুদে আসলে প্রাপ্ত সর্বমোট ৩৩ লক্ষ ৮ হাজার ২ শত ৬৭ টাকা ট্রেজারী চালানের মাধ্যমে একই দিনে সরকারী কোষাগারে জমা প্রদান করেন।”

It is evident from the above-mentioned FIR that the convict-appellant had no dominion or control over the alleged misappropriated rice amounting to 320 metric tons. Accused No. 2, Md. Abul Hashem, former UNO of Ramganj, issued the

Delivery Order (DO), and upon receipt thereof, the concerned Food Officer released the said rice from the Upazilla Food Storage and delivered the same to accused No. 4, Delwar Hossain, the purchaser. The convict-appellant had no role of his own in the sale, release, or custody of the rice, nor did he exercise any control over the same. He seems to have acted in good faith under the directions of his superior authorities, namely the State Minister and the UNO, and had no knowledge of any alleged misappropriation. There is no evidence that he received any financial benefit from the buyer or from his superiors. Mere signing of official papers in the discharge of duties, without dishonest intention, does not constitute an offence under Section 5(2) of the Prevention of Corruption Act, 1947. As per Section 24 of the Penal Code, “dishonestly” requires intention to cause wrongful gain to one person or wrongful loss to another. The essential ingredients (i) intention, (ii) unlawful means, and (iii) acquisition of property without lawful entitlement are totally absent in the present case.

For an offence under Section 5(2) of the Prevention of Corruption Act, 1947, the prosecution must prove entrustment

or dominion over the property and dishonest misappropriation, or obtaining of pecuniary advantage. In the present case, none of these essential ingredients has been established against the convict-appellant. As held in *Md. Moslem Uddin Vs. The State* (Supra), mere association with official acts, without proof of entrustment, dishonest intention, or pecuniary gain, does not attract liability under Section 5(2) of the Act.

Absence of personal gain is a crucial factor in determining dishonest intention. A public servant performing administrative duties under the lawful direction of his superior, without having dominion over the property and without deriving any personal benefit cannot be held liable for criminal breach of trust. In the present case, the entire 320 metric tons of rice were sold by the then State Minister and the UNO to Delwar Hossain, and they received the full sale proceeds. The convict-appellant neither handled the rice nor received any part of the sale money. He merely discharged his administrative responsibilities in good faith under superior authority and counter signed the muster rolls as part of official procedure.

In the absence of dishonest intention, dominion, or personal gain, the conviction is unsustainable in law. In *Mahbub Hassan Vs. The State*, reported in 33BLD (2013) 83, it has been held:

“*mens rea* or dishonest intention is a necessary ingredient of the offence of criminal misconduct as defined in section 5(1) (d) of the Prevention of Corruption Act, 1947. The mere fact due to the decision taken or acts done by the public servant or servants concerned someone got pecuniary ‘benefit or advantage would not ipso facto bring the said public servant or servants within the mischief of section 5(1) (d) of the said Act.”

On a close scrutiny of the evidence adduced by the prosecution and other materials on record it appears that it is seriously doubtful whether the convict-appellant was involved with *mens rea* in misappropriating the value of rice as alleged in the FIR and as such the benefit of doubt should be given to the accused-appellant. In this connection reliance may be placed on the case of *Shahidul Islam (Md) alias H. M. Shahid vs. State* (supra), wherein it has been held that on

consideration of the entire evidence and materials on record it appears to the court that the prosecution case is doubtful the benefit of doubt must be given to the accused and he should be acquitted of the offence.

It appears from the record that accused No. 4, Delowar Hossain withdrew Taka 41,00,000/- (forty one lac) from his account at Agrani Bank Limited and with Taka 50,000/- (fifty thousand) in cash, paid Taka 41,50,000/- (forty one lacs and fifty thousand) to the UNO, Md. Abul Hashem as consideration of misappropriated of 320 metric tons of rice. On the same date, an FDR of Taka 30,00,000/- (thirty lac) was opened in the name of Akhtar Hossain, nominated person of the State Minister Ziaul Haque Zia, and identified by the UNO, which was later transferred to Janata Bank Limited. The remaining Taka 11,00,000/- (eleven lac) was deposited by the UNO in his office as a miscellaneous account, and Taka 50,000/- (fifty thousand) was retained by the UNO, Abul Hashem. These facts are evident from the FIR, Charge Sheet and testimonies of PW1, PW3, PW4 and PW11.

Thus, there is no evidence that the convict-appellant received or misappropriated any money. As the essential ingredients of Section 405 of the Penal Code namely entrustment and dishonest misappropriation are absent, the conviction under Section 409 of the Penal Code is unsustainable in law.

In the case of *Syed Ali Mondal alias Syed Ali and Others*, reported in 46 DLR (1994) 149 it has been held:

“It is well settled that in a case punishable under Section 409 of the Penal Code the prosecution must prove the entrustment of the goods and its subsequently misappropriation with criminal intention. It is also well settled that in a case punishable under section 5(2) of Act II of 1947 the prosecution must prove the *mens rea* of the accused-persons.”

The alleged 320 metric tons of rice were sold to accused No. 4 for Taka 41,50,000/- (forty one lacs and fifty thousand). Out of the said amount, accused No. 2, Md. Abul Hashem, former UNO, deposited Taka 30,00,000/- (thirty lac) in the form of FDR in the name of Akhter Hossain, who is a relative of the then State Minister Ziaul Haque Zia. Subsequently, Taka

33,08,000/- (thirty three lac and eight thousand) with interest was recovered from Akter Hossain. The remaining Taka 11,00,000/- (eleven lac) was deposited by the UNO into an office miscellaneous account, and Taka 50,000/- (fifty thousand) was retained by him, which he later withdrew by different cheques. PWs 3, 4, 6, 10 and 11 admitted these facts. There is no evidence that the convict-appellant misappropriated the rice or the sale proceeds, or converted any amount to his own use.

It appears from the evidence adduced by PW6, Md. Shah Alam that Akhter Hossain Khan filed an application to the Deputy Commissioner, Lakshmipur (exhibit No. 19) to refund the misappropriated money which was kept under Janata Bank, Ramganj Branch, in the form of FDR No. 540700/1567 dated 14.07.2005 for Taka 30,00,000/-. Then the Deputy Commissioner permitted him to refund the misappropriated money under memo No. ত্রান/প্রাঃঅঃ বঃ/৮-৩/২০০৬-২০০৭/২৭৩ dated 03.07.2007 (exhibit No. 20). It is evident that the State Minister misappropriated Taka 30,00,000/- (thirty lac) out of the value of the rice and kept the money under the custody of

his relative, Akhter Hossain. Subsequently, Akhter Hossain refunded the misappropriated money to the exchequer of the Government. The remaining amount of Taka 11,00,000/- (eleven lac) was kept under the custody of the UNO, Abul Hashem. No involvement of the appellant is found in the whole transaction of misappropriated money.

PW12 and PW14, who were the members of different projects in FY 2004-2005, admitted that they signed certain papers under the directions of the State Minister and UNO. It appears from the muster rolls (exhibit 24 series) that the project committee certified as follows:

“এতদ্বারা সার্টিফিকেট দিতেছি যে, প্রকল্পের কাজ সন্তোষজনকভাবে সম্পন্ন হইয়াছে এবং প্রাপকের পাওনা খাদ্য শস্য/টাকার পরিমাণ অনুযায়ী প্রাপককে ঠিকভাবে দেওয়া হইয়াছে।”

The appellant and the UNO signed the muster rolls (attendance sheet) after getting such certificates signed by the project committee consisting of 05(five) members. But no committee member was made an accused in the instant case and prosecuted, thereby creating a serious inconsistency in the

prosecution case and entitling the appellant to the benefit of doubt and such benefit of doubt goes in favour of the appellant. On the totality of evidence and facts unveiled, it depicts patently that the appellant merely performed administrative duties in good faith under the lawful directions of his superiors, without any personal gain. Therefore, he cannot be held liable under the Prevention of Corruption Act or for criminal breach of trust.

The record shows that one Md. Monzur Alam, Assistant Director, the Anti-Corruption Commission, Dhaka lodged the First Information Report as informant and he also conducted an investigation into the matter as the investigating officer and submitted charge sheet. The informant and the Investigating Officer being the same person is contrary to the settled principles of fair and impartial investigation and gives rise to a serious conflict of interest. Such a procedure offends the principles of natural justice and creates a reasonable apprehension of bias in the mind of the accused. The investigation, therefore, stands vitiated in law, and any conviction based solely upon such a tainted investigation report

is unsustainable. This dual role led to biased evidence, which is a strong ground for acquittal of the appellant. The informant and the investigating officer must be different people. The officer who lodged the FIR should not have investigated into the case. This strikes at the very root of the case and the investigation cannot be said to be impartial and such a practice is prejudicial to a fair trial. When the informant and the Investigating Officer was the same person, the evidence adduced by him appeared to be doubtful and a fatal flaw to the prosecution which leads to a miscarriage of justice. A person who is interested in the success of the prosecution should not be the one to conduct the impartial search for truth.

Considering the gravity of the offence and the facts and circumstances of the case and the evidence on record, this Court finds that the prosecution has failed to prove the guilt of the convict-appellant beyond all reasonable doubt. More so, this Court finds illegality, impropriety and infirmity in the impugned judgment and order of conviction passed against the convict-appellant.

In the result, the appeal is allowed.

The judgment and order dated 18.04.2023 passed by the learned Special Judge (District Judge), Noakhali in Special Case No. 05 of 2009 is hereby set aside so far as it relates to the convict-appellant.

The convict-appellant, Poritosh Barai is acquitted of the charges leveled against him.

The convict-appellant is released from his bail bond. Let the lower Court's records (LCR) be sent down at once and the judgment and order be communicated to the Court concerned forthwith.

(Md. Bashir Ullah, J)

Md. Sabuj Akan
Assistant Bench Officer.