

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 8746 of 2023

Md. Forman Ullaha

...Convict-appellant

-Versus-

The State and others

...Respondents

Mr. Fockrul Bahar Shaki, Advocate

...For the convict-appellant

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

Mr. Mir Moniruzzaman, A.A.G with

Mr. Md. Sarwar Alam Khan, A.A.G with

Ms. Nargis Parvin (Alija), A.A.G

...For the State

Mr. M. Sarwar Hossain, Advocate

...For the respondent No. 2 (ACC)

Mr. Md. Munsurul Hoque Chowdhury, Senior
Advocate with

Mr. Niaz Murshed, Advocate

...For the respondent No. 3

Heard on 07.01.2026, 08.01.2026, 14.01.2026,
18.01.2026, 19.01.2026, 22.01.2026 and 18.02.2026**Judgment delivered on 01.03.2026**

This appeal under section 10(1)(a) of the Criminal Law Amendment Act, 1958 is directed challenging the legality and propriety of the impugned judgment and order dated 10.04.2023 passed by Divisional Special Judge, Chattogram in Special Case No. 56 of 2021 convicting the appellant under sections 420/ 406/ 467/ 468/471 of the Penal Code, 1860 and sentencing him to suffer rigorous imprisonment for 3(three) years and fine of Tk. 5,00,000, in default, to suffer rigorous imprisonment for 6(six) months under section 406 of the Penal Code, 1860, rigorous imprisonment for 3(three) years, and a fine of Tk. 20,000, in default, to suffer rigorous imprisonment for 1(one) month under section 420 of the Penal Code, 1860, rigorous imprisonment for 3(three) years, and a fine of Tk. 20,000, in default, to suffer rigorous imprisonment for 1(one) month

under section 467 of the Penal Code, 1860, rigorous imprisonment for 3(three) years, and a fine of Tk. 20,000, in default, to suffer rigorous imprisonment for 1(one) month under section 468 of the Penal Code, 1860, and rigorous imprisonment for 3(three) years and a fine of Tk. 20,000, in default, to suffer rigorous imprisonment for 1(one) month under section 471 of the Penal Code, 1860, which will run concurrently.

The prosecution's case, in short, is that the complainant, Faridul Alam, and the accused Md. Abul Fazal and accused Forman Ullaha were known to each other. The accused persons claimed that they are the owners of 3.4 acres of land described in the schedule of the complaint petition, and mortgaged the schedule land to the petitioner for 3 years and received Tk. 3,55,000 and executed the Mortgage Deed being No. 41(03)06 on 14.03.2006 in favour of the complainant, but did not transfer the possession of the mortgage land. After the query, he came to know that the accused persons have no title on the land, which is the government's khas land. The accused persons, in connivance with each other, dishonestly induced him to execute the mortgage deed. The complainant made several attempts to settle the dispute through arbitration but failed. Lastly, on 07.11.2015, he denied the transaction and the mortgage deed and threatened him with dire consequences. Thereafter, the complainant filed the complaint petition on 15.11.2015 before the Special Judge, Cox's Bazar.

After filing the complaint petition, the Special Judge, Cox's Bazar, by order No. 1 dated 16.11.2015, sent the complaint petition to the Anti-Corruption Commission, Head Office, Dhaka, for investigation. Md Riaz Uddin, Sub-Assistant Director of the Combined District Office, Chattogram-2, was appointed as Investigating Officer of the case. During the investigation, the Investigating Officer seized documents and recorded the statement of witnesses under section 161 of the Code of Criminal Procedure, 1898.

During the investigation, the accused Md. Abul Fazal died. After completing the investigation, the Investigating Officer found the prima facie truth of the allegation against the accused Md. Forman Ullaha under sections 420/467/468/471 of the Penal Code, 1860 and with prior sanction dated 14.11.2019 of the Anti-Corruption Commission, Head Office, Dhaka submitted charge sheet against him.

During the trial, charge was framed against the accused Md. Forman Ullaha under sections 420/406/467/468/471/506 of the Penal Code, 1860. The prosecution examined 6(six) witnesses to prove the charge against the accused. During the trial, the accused Md. Forman Ullaha was absconding. Since the accused was absconding, he was not examined under section 342 of the Code of Criminal Procedure, 1898. After concluding the trial, the trial court, by impugned judgment and order, convicted the accused as stated above, against which the appellant filed the instant appeal.

P.W. 1 Shafiul Alam stated that he is the elder brother of informant Faridul Alam, who now lives abroad. On 29.10.2019, the officer of the Anti-Corruption Commission seized a certificate of Notary Public and deed of mortgage and prepared the seizure list. He signed the seizure list. He proved the seizure list as exhibit 1 and his signature as exhibit 1/1. He proved the seized certificate and the deed of mortgage as exhibits 2 and 3 respectively. The accused Abul Fazal and Forman Ullaha mortgaged their property at a consideration of Tk. 3,55,000 in favour of his three brothers, but they could not hand over the possession of the land. Subsequently, he came to know that the accused persons are not the owners of the land. The accused persons mortgaged the government land and did not return the consideration money. The accused was absconding.

P.W. 2 Faridul Alam stated that he is the informant. The accused Forman and Abul Fazal mortgaged 3.40 acres of land of RS Khatian No. 910 on 14.03.2016 and received Tk. 3,55,000. Abul Fazal was the owner of the land. He paid the money in cash. The

mortgage was for 3 years. But the accused persons could not hand over the possession. After the query, it was found that the accused persons were not the owners of the land, but the government was the owner of the land. He and his brothers demanded refund of the money. They promised to refund the money on 07.11.2015, but subsequently threatened. Thereafter, he filed the complaint petition. He proved the complaint petition signed by him as Exhibit 4. The accused was absconding.

P.W. 3 Md. Selim Chowdhury stated that the complainant, Faridul Alam, and the accused persons, Md. Abul Fazal and Forman Ullaha were known to him. They are the resident of the locality. He is a resident of the adjacent Union of the complainant. He and the accused persons are residents of the same Union. He was the Chairman of the Union Parishad. The complainant said that the accused Abul Fazal and his son Forman received Tk. 3,55,000 to mortgage his land. He made an allegation that the accused persons did not hand over the possession. He called the complainant and the accused persons. The complainant appeared, but the accused persons did not come. The accused persons took the money to mortgage the land. The accused Fazal died earlier. The accused is absconding.

P.W. 4 Zahir Ahmad stated that he is the Union Assistant Land Officer (retired). He stated that while he was discharging his duty as Union Assistant Land Officer, Kalamar Chhora, he submitted a report regarding the Khatian No. 788. Since the land exceeded the limit, 19.82 acres of land, including 3.40 acres of land, were included in the khas khatian in Misc. Case No. 1/88-89. He submitted the report on 15.01.2017. He proved the report as exhibit 5 and his signature as exhibit 5/1.

P.W. 5 Sudhansu Bikash Dey is the former Head Assistant, Upazilla Land Office, Moheshkhali, Cox's Bazar (retired). He stated that on 25.10.2018, he discharged his duty as Head Assistant, Moheshkhali Land Office. Following the instructions of the officer of

the Anti-Corruption Commission, he submitted the records of the Misc. Case No. 1/1988-89. The officer of the Anti-Corruption Commission seized those documents and handed them over those documents to his custody. He proved the Jimmanama as exhibit 6 and his signature as exhibit 6/1. He proved the photocopy of the document as material exhibit I. The accused was absconding.

P.W. 6 Mohammad Riaz Uddin is the Assistant Director of the Anti-Corruption Commission. He stated that while he was discharging his duty as Sub-Assistant Director of Chattogram, he was appointed as Investigating Officer of the case. He proved his appointment letter as Exhibit 7. On 25.10.2018, he seized the relevant documents from the Upazilla Land Office, Moheshkhali, and handed over those documents to the custody of the Assistant Commissioner (Land). He proved the seizure list as exhibit 8 and his signature thereon as exhibit 8/1. He proved the Jimmanama as exhibit 6 and his signature as exhibit 6/2. The Assistant Commissioner (Land), Moheshkhali, vide memo dated 21.01.2017, sent documents regarding the investigation of the case. He proved the letter as Exhibit 9. On 29.10.2019, he seized the mortgage deed. He proved his signature as Exhibit 1/2. During the investigation, the accused Abul Fazal died. He found that the accused made an attempt to misappropriate the government khas land. The accused persons received money to lease the government land, showing their private property. The Anti-Corruption Commission had given sanction, and accordingly, he submitted the charge sheet. He proved the sanction letter as Exhibit 10. The accused is absconding.

Learned Advocate Mr. Fockrul Bahar Shaki, appearing on behalf of the appellant, submits that the procedure laid down in sections 87 and 88 of the Code of Criminal Procedure, 1898, was not complied with before publishing the name of the appellant Md. Forman Ullaha in the official gazette on 30.12.2021, for which the accused was not aware of the charge framed against him.

Consequently, the trial was held in absentia, and the accused did not get the opportunity to defend himself in the trial. He further submits that the schedule land is a private land and wrongly recorded as khas land, and the father of the appellant Md. Forman Ullaha filed application to the Additional Deputy Commissioner, Cox's Bazar and considering the application of the petitioner, the schedule land was excluded from the khas land by order dated 10.07.1994 passed in Miscellaneous Appeal No. 18 of 1994 by Additional Divisional Commissioner, Chattogram and cancelled the order dated 20.02.1994 passed in Miscellaneous Case No. 1 of 1988-89 and the complainant suppressing the said order falsely implicated the accused in the case and fraudulently obtained the impugned judgment and order from the trial Court. He prayed for setting aside the impugned judgment and order passed by the trial Court.

Learned Senior Advocate Mr. Md. Munsurul Hoque Chowdhury, appearing on behalf of the respondent No. 3 complainant Faridul Alam, along with learned Advocate Mr. Niaz Murshed, submits that the accused received Tk. 3,55,000, and fraudulently mortgaged the khas land, creating forged documents regarding the mortgage land. He further submits that the trial Court published the gazette notification under section 6(1A) of the Criminal Law Amendment Act, 1958, and proceeded with the trial following law, and the accused persons maliciously refrained from appearing in the trial Court to defend himself. Therefore, no illegality was committed by the trial Court in holding trial of the case. He also submits that the accused did not cross-examine the prosecution witnesses and thereby admitted that he received Tk. 3,55,000 as consideration to mortgage 3.40 acres of khas land, forging the documents, and the prosecution proved the charge against the accused beyond all reasonable doubt, and the trial court, on correct assessment and evaluation of the evidence legally passed the impugned judgment and order.

Learned Advocate Mr. M. Sarwar Hossain, appearing on behalf of the respondent No. 2 (ACC), submits that since the trial was held in his absence, the case should be sent back on remand to the trial Court to allow the accused to cross-examine the prosecution witnesses. He prayed for sending the case on remand to the trial Court.

I have considered the submission of the learned Advocate Mr. Mr. Fockrul Bahar Shaki who appeared on behalf of the appellant, learned Senior Advocate Mr. Md. Munsurul Hoque Chowdhury who appeared along with learned Advocate Mr. Niaz Murshed on behalf of the respondent No. 3 and the learned Advocate Mr. M. Sarwar Hossain who appeared on behalf of the respondent No. 2 (ACC), perused the evidence, impugned judgment and order passed by the trial Court and the records.

The issue involves the appeal as to whether sections 87 and 88 of the Code of Criminal Procedure, 1898 are applicable in the proceedings of the Special Judge and whether the trial Court complying with the procedure under section 6(1A) of the Criminal Law Amendment Act, 1958 proceeded with the trial of the case.

On perusal of the evidence, reveals that the complainant Faridul Alam filed the complaint petition in the Court of Senior Special Judge, Cox's Bazar who by order dated 16.11.2015 was pleased to send the complaint petition to the Director (Enquiry and Investigation), Anti-Corruption Commission, Head Office, Dhaka for investigation of the case and after investigation, P.W. 6 Mohammad Riaz Uddin, Sub-Assistant Director submitted the charge sheet against the accused Md. Forman Ullaha under sections 320/467/468/471 of the Penal Code, 1860. During the investigation, the accused Abul Fazal died, and the Senior Special Judge, Cox's Bazar, by order dated 09.03.2020, accepted the charge sheet, and the case was registered as a special case, but on 09.03.2020 no further date was fixed. In the order No. 1 dated 30.11.2021, the Divisional Special Judge,

Chattogram, (In-charge) wrote that the Senior Special Judge, Cox's Bazar by order dated 26.04.2020 took cognizance of the offence against the accused and sent the case for disposal. The Divisional Special Judge, Chattogram, (In charge) also passed an order on 30.11.2021 for publishing the name of the accused in the Bangladesh Gazette and fixed the next date on 15.02.2022 for gazette notification, and accordingly, the gazette was published on 30.12.2021 and the next date was fixed on 27.03.2022 for framing charge. After that, the Divisional Special Judge, Chattogram, by order No. 3 dated 27.03.2022, framed charge against the accused Md. Forman Ullaha under sections 420/406/467/468/471/506 of the Penal Code, 1860. During the trial, the prosecution examined 6(six) witnesses to prove the charge against the accused, and at the time of framing charge, the accused Md. Forman Ullaha was absconding and did not cross-examine the prosecution witnesses, and after concluding the trial, the trial Court by impugned judgment and order convicted the accused Md. Forman Ullaha and sentenced him as stated above against which the accused filed the instant appeal.

The Code of Criminal Procedure, 1898 is the parent law to be followed during the trial of a criminal case. In the instant case, the trial was held by the Special Judge, Cox's Bazar. The Criminal Law Amendment Act, 1958, is a special law. The provision of the said law will prevail in a proceeding initiated in the Court of special Judge. Section 6(1) of the Criminal Law Amendment Act, 1958 states that the provisions of the Code of Criminal Procedure, 1898, shall in so far as they are not inconsistent with this Act, apply to the proceedings of the Court of a Special Judge and for the purposes of the said provisions, the Court of a Special Judge shall be deemed to be a Sessions Judge, which clearly speaks that the application of the Code of Criminal Procedure, 1898 is not fully excluded in the proceeding of the Special Judge. The provisions made in the Code of Criminal Procedure, 1898, so far are not inconsistent with the provisions of the

Criminal Law Amendment Act, 1958, is applicable in the proceedings of the Special Judge.

In section 6(1A) of the Criminal Law Amendment Act, 1958, it has been mentioned that if a Special Judge has 'reason to believe' that an accused person has absconded or is concealing himself so that he cannot be arrested and produced before him for trial, he may, by order notified in the official Gazette, direct such person to appear before him within such period as may be specified in the order, and if such person fails to comply with such direction he may be tried in his absence.

The term "reason to believe" as mentioned in section 6(1A) of the said Act required interpretation. Without any 'reasonable material' before the Court, a Court of law cannot believe that an accused person cannot be arrested and produced before it for trial. Furthermore, the application of the Code of Criminal Procedure, 1898, is not fully excluded. There is no such provision in the Criminal Law Amendment Act, 1958 like the provision made in section 87 and 88 of the Code of Criminal Procedure, 1898. I am of the view that the provision made in sections 87 and 88 are not inconsistent with any provision of the said Act. Therefore, to arrive at a finding as to the 'reason to believe' that the accused cannot be arrested or produced before him for trial, the Special Judge shall follow the procedures of sections 87 and 88 of the Code of Criminal Procedures, 1898. The provisions made in sections 87 and 88 of the Code of Criminal Procedure, 1898 and section 6(1A) of the said Act are cumulative. After complying with the procedure laid down in sections 87 and 88 of the Code of Criminal Procedure, 1898, the Special Judge shall proceed with the procedure provided in section 6(1A) of the said Act.

In the instant case, there was no 'reasonable material' before the trial Court to conclude that the accused Md. Forman Ullaha absconded or concealed himself so that he could not be arrested and produced before him for trial, and without complying with the

provision made in sections 87 and 88 of the Code of Criminal Procedure, 1898, the trial Court proceeded with the trial in the absence of the accused beyond his knowledge. I am of the view that the accused was not properly notified regarding the charge framed against him, and the trial was held in absentia in violation of the mandatory provision made in sections 87 and 88 of the Code of Criminal Procedure, 1898, and section 6(1A) of the Criminal Law Amendment Act, 1958.

The above view of this Court lends support from the decision made in the case of Shamsul Alam vs State reported in 6 BLC 184 para 10 judgment dated 18.01.2001, in which, the High Court Division (Md Munsurul Hoque Chowdhury, J.), held that;

“Publication of notice in the newspapers under section 27(6) of the Special Powers Act. Such notice shall be published when the Tribunal has "reason to believe" that the accused is absconding or concealing himself and there is no immediate prospect of arresting him. But, in the above section, there is nothing to show on what basis such belief can be inferred. However, in our view, if all the normal processes as provided in the Code of Criminal Procedure for the arrest of the accused fail, only then, as a last resort, the order for publication of the notice in the newspapers may be made. In view of the provisions of section 29 of the Special Powers Act, the provisions of the Code of Criminal Procedure shall apply to the proceedings of the Special Tribunal, so far as the provisions of the Code are not inconsistent with the provisions of the Act. There is no provisions like the provisions of sections 87 and 88 of the Code in the Act, but there are specific provisions relating to holding trial in absentia in this Act. So, relating to a proceeding of a Special

Tribunal for holding trial in absentia, provisions of section 27(6A) and 27(6) shall apply instead of the provisions of section 339B of the Code.”

In the case of *Shahjahan vs State* reported in 64 DLR 49, para 16 judgment dated 01.12.2011, the High Court Division (Moyeenul Islam Chowdhury, J.), echoes with the view made in the case of *Shamsul Alam (Supra)* in which it has been held that;

“It is not the claim of the prosecution that the petitioner surrendered or was arrested by the police during the trial of the case, and at one point in time, he absconded by misusing the privilege of bail. In this context, Mr. Md. Khurshid Alam Khan argues that had the petitioner absconded by misusing the privilege of bail at some point in time during the trial of the case, his fate would have been sealed once for all; but the landscape is otherwise. In this regard, we see eye to eye with Mr. Md. Khurshid Alam Khan. In such a posture of things, we are led to hold that the petitioner was prejudiced in his defence though no fault of his own. Unless the provisions of sub-section (6) of section 27 of the Special Powers Act are strictly complied with by the Tribunal below, it can not assume any jurisdiction with regard to the trial of the petitioner. So it can not be said that the petitioner invoked the extraordinary jurisdiction of the High Court Division under section 561A of the Code of Criminal Procedure with unclean hands.”

It is found that the accused was absconding all through and the provision of sections 87 and 88 of the Code of Criminal Procedure, 1898 and section 6(1A) of the Criminal Law Amendment Act, 1958 was not complied with before framing charged against the accused and the accused was not notified about the charge framed against him

for which the trial was held in absentia beyond the knowledge of the accused and he was prejudiced in his defence. The provisions made in sections 87 and 88 of the Code of Criminal Procedure, 1898 are procedural, but those procedures are substantive concerning the right of the accused to be notified regarding the charge to be framed against him. Therefore, the provisions made in sections 87 and 88 of the Code of Criminal Procedure, 1898, are applicable in the proceedings of the Special Judge.

The above view of this Court also lends support from the decision made in the case of Lal Mia Vs. the State reported in 42 DLR 15 para 10 judgment dated 06.02.1989, in which the High Court Division (Anwarul Hoque Choudhury, J.) held that;

“Though a trial in absentia is a new concept under the present amended law, the provision for bringing an absconder to trial is an old one exhaustively provided for under sections 87 and 88 of the Code of Criminal Procedure. Thus, even when an accused having absconded and is to be tried and convicted in his absence, the court could apply its coercive power for compelling him to attend, even by selling his movable and immovable properties after proper publication made for his presence and surrender as provided under sections 87 and 88 of the Criminal Procedure Code. Section 339 B(1) of the Code of Criminal Procedure thereafter, now, has been added to the Code, finally providing for the trial of such an offender in his absence. It is provided in that section that such a trial could only be held if the court has reasons to believe that even after complying with all the requirements of section 87 and section 88 of the Code an accused had absconded and is concealing himself and cannot be arrested and produced in trial and that there is no such

immediate prospect of his arrest, the court then would again order him to appear within a certain time, having it notified in the official Gazette and at least in one Bengali daily newspaper and then only try him in absentia, if he yet failed to appear.”

In the case of Balayet Howlader Vs. The state reported in 49 DLR 520 para 14 judgment dated 07.07.1997, a Division Bench of this Court has held that;

In this case, the process was issued by the trial Court through SP for arrest, proclamation, and attachment of the accused, and admittedly, no return of compliance was received by him in spite of repeated reminders. It appears that the learned trial Court, without taking further steps or ascertaining about the compliance of sections 87 and 88 of the Code of Criminal Procedure referred above, directed the publication of notice in Faridpur “দৈনিক ঠিকানা”. On such facts on record we find that it cannot be said that the learned trial Court had reasonable materials to hold that the accused was avoiding arrest and concealing himself from appearing in court and his attendance or arrest was not possible and, as such, the publication of notice in newspaper and commencing the trial was in clear violation of the mandatory provision of law as provided under section 20(5) (kha) of the Act and thereby vitiated the whole trial.”

On scrutiny of the order sheets of the Special Judge, reveals that no W/A and P & A was issued by the Special Judge against the accused to secure his arrest or produce him before the Special Judge and there was no ‘reasonable material’ before the trial Court to believe that the accused absconded or is concealing himself so that he cannot be arrested and produced before him for trial and the trial

Court in violation of the provision made in sections 87 and 88 of the Code of Criminal Procedure, 1898 and section 6(1A) of the Criminal Law Amendment Act, 1958 proceeded with the trial against the accused. Therefore, the case should be sent back on remand to the trial court to give the accused Md. Forman Ullaha an opportunity to cross-examine the prosecution witnesses. Since I have decided to send the case on remand to the trial Court, I refrained from making any opinion concerning the merit of the case.

The impugned judgment and order passed by the trial Court against the accused Md. Forman Ullaha is hereby set aside, and the case is sent back on remand to the trial Court.

In the result, the appeal is allowed.

The case is sent back on remand to the trial Court with a direction to allow the accused Md. Forman Ullaha to cross-examine the prosecution witnesses already examined by re-calling them. The trial Court shall also examine the accused under section 342 of the Code of Criminal Procedure, 1898. The accused Md. Forman Ullaha will be entitled to adduce evidence in his defence, if so advised.

The trial Court is directed to conclude the trial expeditiously, preferably within 6(six) months.

The accused Md. Forman Ullaha is directed to surrender before the trial Court within 7(seven) days from the date of receipt of this judgment and order by the trial Court. The trial Court is at liberty to consider the bail of the accused following the law.

However, there will be no order as to costs.

Send down the lower Court's records at once.