

**Present:**

Mr. Justice Md. Shohrowardi

Criminal Revision No. 1226 of 2005

Md. Kanchon Miah

...Convict-petitioner

-Versus-

The State

...Opposite party

Mr. Md. Humayun Bashar, Advocate

...For the convict-petitioner

Mr. Md. Rejaul Islam Reaz, A.A.G

...For the State

Heard on 07.07.2024 and 29.08.2024

**Judgment delivered on 01.09.2024**

On an application filed under Section 439 of the Code of Criminal Procedure, 1898 Rule was issued calling upon the opposite party to show cause as to why the impugned judgment and order of affirmance dated 25.06.2005 passed by Additional Sessions Judge, Bhola in Criminal Appeal No. 6(1)2001 should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that Abdul Kader was the Secretary of the West Donia Small Agricultural Association and the said association took loan of Tk. 30,000 for agricultural purposes from the Proshika and purchased Yeanmar Machine No. 09157, 16 horsepower on 21.12. 1991 from the accused Md. Kanchon Miah at a price of Tk. 31,000 and executed an agreement. In the said agreement it has been stated that if anyone claim the said machine, the accused will pay the compensation. After a few days, the Chairman of BRDB with the help of the local police seized the machine but the accused did not return the money following the agreement and the complainant filed a case in the village Court against him. He also sent the legal notice through the learned Advocate but he did not repay the money.

After filing the complaint petition, the learned Magistrate was pleased to take cognizance of the offence against the accused under Sections 406/420 of the Penal Code, 1860 and the case was sent to the Magistrate, First Class, Bhola. During the trial, charge was framed against the accused under Section 420 of the Penal Code, 1860 which was read over and explained to him and he pleaded not guilty to the charge and claimed to be tried following the law. The prosecution examined 4(four) witnesses to prove the charge against the accused and the defence cross-examined those witnesses. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and the defence declined to adduce any D.W.

After concluding the trial, the trial Court by judgment and order dated 14.02.2001 was pleased to convict the petitioner under Section 420 of the Penal Code, 1860 and sentenced him thereunder to suffer imprisonment for 2(two) years and a fine of Tk. 2,000, in default, to suffer imprisonment for 6(six) months against which the accused Md. Kanchan Miah filed Criminal Appeal No. 6(1)2001 before the Sessions Judge, Bhola which was heard by the Additional Sessions Judge, Bhola. After hearing the appeal, the appellate Court below by impugned judgment and order dated 25.06.2005 dismissed the appeal converting the simple imprisonment to a sentence of rigorous imprisonment against which the convict-petitioner obtained the Rule.

P.W. 1 Abdul Kader is the complainant. He stated that on 21.12.1991 he purchased the machine and the transaction was made in the house of the accused. He is the Secretary of the West Donia Small Agricultural Association. The said association is also involved with the Proshika. In 1991 the said association took a project of irrigation and took loan of Tk. 30,000 from the Proshika and purchased a machine on 21.12.1991 from the accused at a price of Tk. 11,000 and executed an agreement. After payment of the money,

he took the delivery of the machine. At the time of selling the machine, the accused stated that if any inconvenience took place, he would take responsibility. After a few days, the BRDB authority seized the machine. At that time, the responsible Officer of the BRDB said that the accused obtained a loan from BRDB against the machine but he did not pay the money. The accused did not repay the money to him and subsequently, he filed a complaint to the local Chairman and the Chairman advised to file a case against the accused. The accused did not repay the money. Consequently, he filed the case. P.W. 1 proved the complaint petition as exhibit 1 and his signature as exhibit 1/1. He produced the agreement in Court. He produced the order sheet of the case filed in the Union Parishad. During cross-examination, he stated that after five years, he filed the case. He did not submit any documents to show that the machine was purchased from the BRDB. When the BRDB seized the machine, he was present at the place of occurrence. He affirmed that no document is produced in Court to show that the accused purchased the machine from BRDB. He went to the house of the accused in the afternoon. He denied the suggestions that the accused was falsely implicated in the case and that he did not purchase a machine from the accused.

P.W. 2 Nazmul Karim is a Field Organizer of Proshika. He stated that Abdul Kader took loan of Tk. 30,000 and purchased the machine from the accused. The accused stated that if any inconvenience happened he would take the responsibility. He proved the project form as exhibit 2. On 18.12.1991 when the project was taken he was not serving there, he knows the fact. The complainant purchased the machine on 21.12.1991. After a few days, BRDB took the machine. He denied the suggestion that he deposed falsely.

P.W. 3 Md. Idris is a member of the West Donia Small Agricultural Association. They purchased a machine at a price of Tk. 31,000 from the accused. The accused said that he was the

owner of the machine. The agreement was executed following his instructions. Subsequently, BRDB seized the machine from them. The accused told them that he would repay the money. Subsequently, a case was filed in the Union Parishad. After that, the case was filed. During cross-examination, he stated that he was a member of the association but he did not pay any money.

P.W. 4 Abdur Rashid is a member of the West Donia Small Agricultural Association. He stated that in 1991 he purchased a machine for irrigation from the accused. After a few days, BRDB took the machine. The accused told them that he would return the money. A complaint was filed to the Chairman and he admitted that he would pay the money but he did not pay the money. The Chairman instructed them to file the case. At the time of purchasing the machine, an agreement was executed. During cross-examination, he stated that he did not find any document regarding the ownership of the machine. At the time of taking the machine by BRDB, he was not present. After 3/4 years the accused refused to pay the money.

Learned Advocate Mr. Md. Humayun Bashir appearing on behalf of the convict-petitioner submits that in the complaint petition, it has been alleged that at the time of purchasing the machine from the accused, an agreement was executed between the complainant and the accused but no agreement was proved during trial of the case. In the complaint petition, it has been alleged that the complainant purchased the machine at a price of Tk. 31,000 from the accused but P.W. 1 complainant stated that he purchased the machine at a price of Tk. 11,000. The evidence of P.W. 1 regarding the purchase value of the machine is also contradicted by P.Ws. 2 to 4. The prosecution failed to prove the charge against the accused beyond all reasonable doubt.

Learned Assistant Attorney General Mr. Md. Rejaul Islam Reaz appearing on behalf of the State submits that the accused purchased the machine from BRDB against the loan and without

paying the loan he sold the machine to the complainant suppressing the fact that the machine was mortgaged to the BRDB and when the BRDB seized the machine, he did not repay the money to the association to whom he sold the machine. Therefore, he committed an offence under Section 420 of the Penal Code, 1860 and both the Courts below on proper assessment and evaluation of the evidence rightly convicted the accused. He prayed for discharging the Rule.

I have considered the submission of the learned Advocate Mr. Md. Humayun Bashar who appeared on behalf of the convict-petitioner and the learned Assistant Attorney General Mr. Md. Rejaul Islam Reaz who appeared on behalf of the State, perused the evidence, impugned judgments and orders passed by the Courts below and the records.

In the complainant petition (exhibit 1), it has been alleged that the complainant purchased a machine at a price of Tk. 31,000 from the accused and executed an agreement on 21.12.1991 and the accused took Tk. 31,000 from the complainant. P.W. 1 is the complainant. He stated that he purchased the machine at a price of Tk. 11,000. P.W. 2 Nazmul Karim is a Field Officer of Proshika. He stated that Abdul Kader purchased the machine and took a loan of Tk. 30,000 from Proshika. During cross-examination, he stated that at the time of purchasing the machine, he was not present. P.W. 3 Md. Idris stated that they purchased a machine from the accused at a price of Tk. 31,000. During cross-examination, he stated that he was a member of the association but he did not pay the money. P.W. 4 Abdur Rashid is a member of the West Donia Small Agricultural Association. He stated that in 1991 he purchased the machine from the accused but he did not say anything as regards the price.

On scrutiny of the evidence of the prosecution witnesses, it reveals that no agreement regarding the purchase of the machine from the accused by West Donia Small Agricultural Association was proved during the trial of the case, although in the FIR, it has been

alleged that an agreement was executed on 21.12.1991 regarding the purchase of the said machine. The statement made by P.W. 1 in the complainant's petition regarding the price of the machine is contradicted by him while he deposed in Court. P.W. 4 did not say anything as regards the value of the machine. In the absence of an agreement regarding the purchasing of the machine from the accused, it cannot be said that the complainant purchased a machine from the accused.

In view of the above evidence, facts and circumstances of the case, findings and proposition, I am of the view that the prosecution failed to prove the charge against the accused beyond all reasonable doubt. Both the Courts below failed to apply the correct principle of law regarding the assessment and evaluation of the evidence of the prosecution witnesses and wrongly recorded the finding as to the guilt of the accused.

I find merit in the Rule.

In the result, the Rule is made absolute.

The impugned judgments and orders of conviction and sentence passed by the Courts below against the convict-petitioner Md. Kanchon Miah are hereby set aside.

However, there will be no order as to costs.

Send down the lower Court's records at once.