

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. 1883 of 1999**

**IN THE MATTER OF:**

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

-And-

**IN THE MATTER OF:**

Md. Saidul Islam and others

... Accused-Petitioners

Versus

Md. Mohran Ali and another

... Opposite Parties

None

...For the petitioners

Mr. Rasel Ahmmad, DAG with

Mr. Md. Shahadat Hossain Adil, AAG

Mr. Md. Shamsil Arefin, AAG and

Ms. Zohura Khatoon (Jui), AAG

...For the State

**Judgment on: 20.02.2025**

**Md. Riaz Uddin Khan, J:**

By this Rule the Deputy Commissioner, Pabna was asked to show cause as to why the Criminal Proceeding of C.R. Case No. 281 of 1998 (Pab), pending in the Court of learned Magistrate, First Class, Pabna should not be quashed and or such other or further order or orders passed as to this Court may seem fit and proper.

At the time of issuance of Rule all further proceedings in C.R. Case No. 281 of 1998 (Pab)

was stayed for a period of three months which was lastly extended on 19.10.2020 till disposal of the Rule.

The fact of the case in brief is that the complainant filed the CR case alleging *inter alia* that, the accused have used to purchase Oil from the complainant's Oil Mills and the accused purchased Oil from the complainant on 17.9.97 on credit valued at Tk. 1,28,851/= only and thereafter purchased Oil on 4.10.1997 which stood total valued at Taka 4,24,162/= Only and the Said Money was due to the accused and supposed to be paid when the complainant would asked for it. Thereafter, the complainant demanded his due money which the accused owe to him but the accused paid Only Taka 83100/= and promised that the rest amount will be repaid within a short time. The Complainant demanded the rest amount of Taka 3,41,062/= but it was denied by the Petitioners on 8.5.1998 hence the case.

The learned Magistrate on 18.5.1998 took cognizance of the case against the accused petitioners under sections 406/420/109 of the Penal Code and issued warrant of arrest against them.

The petitioners surrendered before the court of Magistrate, 1st Class, Pabna on 25.3.1999 and prayed for bail which was initially denied but bail was granted on 01.04.1999 and the case was transferred for trial.

At this stage the petitioners moved this Court invoking inherent jurisdiction under section 561A of the Code of Criminal Procedure for quashing the proceeding and obtained Rule and order of stay as stated above.

No one appears to support or oppose the rule when it was taken up for hearing.

It is stated in the application that the Petitioner no. 1 is a businessman having Oil Business while petitioner nos.2 and 3 are businessmen having no connection with oil business of their brother petitioner no.1 or with the complainant. Petitioner no.4 is a bank manager of a branch of Agrani Bank. All the petitioners are full brothers. It is further stated that the Petitioner No.1 was purchasing Oil from the complainant and there were business transactions between the Petitioner No.1 and the Opposite No. 1 for long time. The Petitioner No.1 has been paying the price of oil to the C. C. account of the Opposite Party No. 1 from 23.9.1997 to 30.9.98 through Bank T. T. of Pubali Bank which is amounting to Taka 7,47,000 (Seven Lakh and Forty seven thousands Only).

Ground has been taken that since admittedly there were continuous business-transactions between the parties by allegation of non-payment of certain amount there may have civil liability but cannot be any offence either of criminal breach of trust or cheating as alleged under

section 406 or 420 of the Penal Code. The case has been filed only to harass the petitioners who are full brothers.

We have perused the application filed under section 561A of the Code of Criminal Procedure along with Annexures including the petition of complaint.

In this context, now let us look at section 405 of the Penal Code, the definition of 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.

While section 415 of the Penal Code defines 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.”

In the case reported in 7 BLT (AD) 132 the Appellate Division observed:

“A transaction may be of a civil nature but by reason of the allegations made in a particular case there may also appear elements/ingredients of criminality in the transaction. .... It will be for the complainant to prove

his allegations by evidence at the trial. He cannot be shut out at this stage by telling him that his remedy lay in suit for specific performance of contract.”

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 406/420/109 of the Penal Code in the light of above decisions of our apex Court?

In the case of Islam Ali Mia alias Md. Islam vs. Amal Chandra Mondal and another reported in 45 DLR (AD) 27 the Appellate Division observed *that business transactions were going on between the parties for a long time and that the complainant had full confidence in the accused and that the transaction(s) in question did not take place on a particular occasion but it consists of serious of transactions spread over a year. During this period the complainant supplied fish to the accused who also made payments in part. A balanced amount claimed by the complainant was not agreed on and the accused refused to pay it. This refusal to pay the balance does not constitute any criminal offence. The question of offence of cheating does not arise as there is nothing to show that the accused had dishonestly induced the complainant*

*to sell the fish to him on credit. As to the allegation of breach of trust, there is nothing to show that any entrustment of the fish was made to the accused, for sale of fish on credit is not "entrustment" of the fish which is to be disposed of according to the direction of the person making the entrustment, in this case, the seller.*

From our clear-cut understanding cheating may occur even in course of carrying out business by any of the side of the business partner subject to the condition that the complaint is not related merely to the issue of miscalculation of the transaction or amount. In the present case the complainant alleged that the accused no.1 used to purchase Oil from the complainant's Oil Mills and the accused purchased Oil from the complainant on 17.9.97 on credit valued at Tk. 1,28,851/= only and thereafter purchased Oil on 4.10.1997 which stood total valued at Taka 4,24,162/= Only and the Said Money was due to the accused and supposed to be paid when the complainant would asked for it. Thereafter, the complainant demanded his due money which the accused owe to him but the accused paid Only Taka 83100/= and promised that the rest amount will be repaid within a short time. The Complainant demanded the rest amount of Taka 3,41,062/= but it was denied by the accused. The facts of the present case are squarely similar to the facts of the above mentioned reported case of 45 DLR (AD)

27. In the present case admittedly business transactions were going on between the parties for a long time and that the complainant had full confidence on the accused and that the transaction(s) in question did not take place on a particular occasion but it consists of serious of transactions spread over a year. During this period the complainant supplied oil to the accused who also made payments in part. It is alleged that the amount claimed by the complainant was not agreed on and the accused refused to pay it. This refusal to pay the balance does not constitute any criminal offence. The question of offence of cheating does not arise as there is nothing to show that the accused had dishonestly induced the complainant to sell oil to him on credit. As to the allegation of breach of trust, there is nothing to show that any entrustment of oil was made to the accused. For sale of oil on credit or money due for purchasing oil is not "entrustment".

Moreover, with regard to offence of cheating which has been defined under section 415 there must be intention of cheating for deception at the time of transaction. Nowhere in the petition of complainant, the complainant alleged that when they were entered into agreement, though oral, the accused had intention to deceive him rather admitted series of transactions and part payment. From the facts stated above as mentioned in the

petition of complaint, this is not the case that the accused had no intention to fulfill the terms of the oral contract at the very initial stage of its execution.

In the light of above settled provision of law, in the given facts and circumstances of the case, since no ingredients of section 406 and or 420 of the Penal Code are present, we have no option but to interfere with the instant proceedings invoking our inherent jurisdiction under section 561A of the Code of Criminal Procedure at an initial stage as a rarest of the rare case. In view of the above the irresistible conclusion is that the instant proceeding must be quashed.

In the result therefore, the rule is made **absolute.**

The proceeding of C.R Case No. 281 of 1998 (Pab) under Sections 406/420/109 of the Penal Code, pending in the Court of learned Magistrate, First Class, Pabna is hereby quashed.

Communicate the judgment and order at once.

**Md. Iqbal Kabir, J:**

I agree.