

Present:

Mr. Justice Md. Emdadul Huq.

And

Mr. Justice Mohammad Ullah.

Criminal Miscellaneous Case No. 14338 of 2008

Ruhul Kuddus Talukder Dulu

... Accused-Petitioner.

-Versus-

The State

.....Opposite Parties.

Mr. Moudud Ahmed with

Mr. Md. Aminul Haque Helal.

.....For the Petitioner

Mr. Shafiul Bashir Bhandary, DAG

... For the Opposite Party No. 1 State.

Mr. A. K. M. Fazlul Huq, Advocate

... ..For the Opposite Party No. 2

Hearing on.10.05.2012 and 16.07.2012

Judgment on 18.07.2012

Mohammad Ullah, J.

Upon an application under section 561A of the Code of Criminal Procedure (**shortly the Code, 1898**) a Rule was issued on 13.08.2008 calling upon the opposite parties to show cause as to why the proceeding of Special Case No. 5 of 2007 arising out of ACC G. R. Case No.31 of 2007, then pending in the court of Special Judge, 1st Court, Dhaka, should not be quashed.

By the Rule issuing order the proceeding of the said case was stayed initially for a period of 3 (three) months and subsequently extended till disposal of the Rule.

The petitioner was also granted bail by this Court.

The facts relevant for disposal of the rule are briefly stated below:

The Secretary of Anti-Corruption Commission (**shortly the ACC**) issued a notice on 18.2.2007 under sections 18 and 26(1) of the দুর্নীতি দমন কমিশন আইন, 2004 (**shortly the Ain, 2004**) read with rule 15 Gha (1) and (2) of the Emergency Power Rules, 2007 (**Shortly the Rules, 2007**) upon the petitioner, asking him to submit declaration of assets and liability of himself, his wife and other dependents. Accordingly the petitioner through his Advocate submitted statements on 25.2.2007 to the ACC. But on preliminary inquiry, it was found that the properties actually acquired were disproportionate to petitioner's known source of income and also of his wife.

So Mst.Mafuza Khatun, Assistant Director of ACC (Specially empowered for Rajshahi Office) Head Office, Dhaka on 19.04.2007 lodged First Information Report(**shortly the FIR**) with the Adabor Police Station, DMP, Dhaka against the petitioner, Ruhul Kuddus Talukder Dulu and his wife Mst. Sabina Yasmin alleging that the petitioner acquired assets worth Tk.9, 13, 80,745/- beyond his known legal source of income and concealed assets of Tk. 3, 06, 55,246/- by way of showing less value on account of various properties.

After investigation into the matter, one Nurjahan Ahmed, Assistant Director of ACC, Dhaka on 19.7.2007 submitted charge sheet under sections 26(2) and 27(1) of the Ain, 2004, section 5(2) of the Act II of 1947, Rule 15 Gha (5) of the Rules, 2007 read with section 109 of the Penal Code against the accused petitioner and his wife with due approval dated 19.7.2007 of the Commission.

Then on 25.7.2007 the case record was transferred to the learned Special Judge, Court No.1, Dhaka who by his order dated 25.7.2007 took cognizance of the offence under sections 26(2) and 27(1) of the Act, 2004, section 5(2) of the Act II of 1947, read with section 109 of the Penal Code against the accused petitioner and his wife Mst. Shabina Yasmin.

Thereafter the learned Special Judge, 1st Court, Dhaka by his order dated 29.08.2007 framed a charge against the accused petitioner under sections 26(2) and 27(1) of the Ain, 2004, Rule 15 Gha (5) of the Rules, 2007 read with section 5 (2) of the Act II of 1947 by rejecting the discharging application filed by the petitioner and framed another charge against the co-accused Mst. Sabina Yasmin under section 27 (1) of the Ain, 2004 read with section 109 of the Penal Code. Thereafter the petitioner approached this Court and Rule was issued and order of stay and bail was also granted as stated above.

The learned Senior Advocate Mr. Moudud Ahmad at the very outset submits that initiation and continuation of the proceeding against the petitioner is a nullity in the eye of law, as the initial notice dated 18.02.2007

pursuant to which the proceeding was drawn up was issued by the Secretary of the Commission, at the time when the Commission was not in existence as defined in section 3 and 5 of the Ain, 2004.

Mr. Ahmed further submits that the said notice was served upon the petitioner to submit statement of assets within 72 hours, but the petitioner was in custody at that time and he could not get reasonable opportunity to check-up the details of the assets or examination of his records or consult with his lawyer and other concerned persons and as such the said notice was not a notice in the eye of law. So the initiation and continuation of the proceeding against the petitioner is sheer abuse of the process of the court and thus the proceeding is liable to be quashed.

In support of his submission Mr.Ahmed referred to the case of Anti-Corruption Commission -vs.- Dr. Mohiuddin Khan Alamgir and others reported in 62 DLR (AD) (2010), 290 and Joynal Abedin Hazari -vs.-State and another reported in 64 DLR,(2012) 58.

In reply Mr. A.K.M Fazlul Huq, the learned Advocate for the Anti-Corruption Commission submits that unlike section 26(2), an offence under section 27 is an independent offence and section 27 does not require service of any notice prior to the initiation of a criminal proceeding. So the offence under section 27 as alleged in the charge sheet can be prosecuted independently.

Mr. Huq further submits that FIR and charge sheet clearly disclosed at least the offence under section 27 of the Ain, 2004 and therefore the proceeding in question cannot be quashed.

In support of his submission he referred a decision in the case of Salma Shahdat Vs. the State reported in 14 BLC, (2008) 26.

We have perused the materials on record namely the FIR, charge sheet, charge framed and the grounds taken by the petitioner in his application under section 561A of the Code, 1898 and supplementary affidavits filed by the petitioner and considered the submissions of the learned advocates for both the sides. We have also gone through the referred decisions.

We have noticed that all the Commissioners of the ACC resigned from the Commission on 07.02.2007 and it was reconstituted on 24.02.2007. The Commission existed as an institution on 18.02.2007, when the notice was issued upon the petitioner, but no person was holding the office of any Commissioner during the period for 7th to 24th February, 2007 and therefore in reality there was no commission within the meaning of section 3 read with section 5 of the Ain, 2004 on that date.

Section 26(1) of the Ain, 2004 provides for declaration of assets for better understanding the said section is quoted below:

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This section provides that if the Commission is satisfied that a person has possession of assets beyond his known source of income through illegal means then the Commission by an order in writing can direct the said person to submit description of his assets and liabilities and any other information required by the Commission.

This section clearly requires the satisfaction of the Commission itself and of no other person. The notice to submit statement of assets may be issued by any authorized person, but the decision to issue such a notice must be taken by the Commission or by other person(s), if authorized by the Commission under Section 18 of the Ain, 2004.

In the present case the notice dated 18.02.2007 under section 26 (1) of the Ain, 2004 was issued by the Secretary of the Commission, who is nothing more than a person carrying out the decision of the Commission. When the notice was served upon the petitioner there was no Commission, as such apparently the Secretary issued the notice on 18.02.2007 on his own motion without any satisfaction and decision from the Commission. This was a clear violation of section 26(1) of the Ain, 2004.

Moreover notice was served upon the petitioner asking him to submit statement of assets within 72 hours, when he was admittedly in custody. The Appellate Division in the case of Anti-Corruption Commission -vs-Dr.

Mohiuddin Khan Alamgir has recorded the following observations about service of notice upon a detenu:

“Besides, the notice dated 18-2-2007 was not a notice required by law; the notice directed the respondent No.1, a detenu, to submit return of his assets within a period of 72 hours, is itself a worst example of arbitrary action on the part of the concerned authority. A notice must allow a reasonable time to check-up the details of the assets of a person, if necessary, on examination of his records and after consultation with his lawyers and other concerned person, section 26 certainly does not envisage a notice upon a persons who is in detention and he is not expected to give any details of his assets within the time specified. The person concerned must be afforded a fair and reasonable opportunity to respond to the notice; otherwise, it is no notice in the eye of law. A notice issued under section 26 of the Act to a detenu, away from his hearth and home, cannot be said to be a fair and bonafide exercise of power.”

Similar views were also expressed by this Court in the case of Joynal Abedin Hazari -vs.- State and another reported in 64 DLR, (2012), 58.

It appears that the provision for furnishing wealth statement within 72 hours was embodied in Rule 15 Gha (2) of the Emergency Powers Rule 2007, but in the Act itself there is no provision to submit the wealth statement within 72 hours.

In the facts and circumstance of the instant case the notice dated 18.02.2007 issued by the Secretary upon the petitioner was not issued on the authority or satisfaction of the Commission as required under section 26(1) of the Ain, 2004 and as such the notice is without jurisdiction and also nullity on many counts.

Mr. Fazlul Huq Khan, the learned advocate for the Anti-Corruption Commission submits that notice is not required to prosecute the petitioner

under section 27 of the Ain, 2004. But we failed to accept the contention of Mr. Huq, because without a notice no one can submit his wealth statement as required under section 26(1) of the Ain, 2004. There must be a process for submitting a declaration of assets as required by the Ain, 2004 and without such notice the statement of assets and liabilities cannot be submitted by a person.

We have gone through the decision of this Court in the case of Salma Sahadat -vs.-State reported in 14 BLC (2008), 26 as referred to by Mr. Huq, the learned Advocate for the ACC. That case was with regard to quashment of a proceeding where only a First Information Report was filed and investigation was going on. The issue of satisfaction of the Commission and the legal requirement of a notice for prosecuting an offence under section 27(1) were only an incidental issue in that case. Moreover, after decision of the Appellate Division passed in the case of Anti-Corruption Commission-vs.- Dr.Mohiuddin Khan Alamgir reported in 62 DLR (2010) (AD), 290 the observation made in the 14 BLC case is not applicable in the present facts and circumstance of the instant case.

Finally we hold that the notice dated 18.02.2007 issued by the Secretary of the Anti Corruption Commission was without any lawful authority and that it was not a notice in the eye of law therefore any proceeding based on the said notice can not be allowed to continue.

In the result, the Rule is made absolute.

The proceeding of Special Case No. 5 of 2007 pending in the court of Special Judge, 1st Court, Dhaka is hereby quashed so far it relates to the petitioner Ruhul Kuddus Talukder Dulu.

The petitioner Ruhul Kuddus Talukder Dulu is discharged from the liability of the Special Case No. 5 of 2007 arising out of Adabor P.S Case No. 17 dated 19.4.2007 which subsequently gave rise to ACC G.R. Case No. 31 of 2007.

The petitioner is discharged from the bail bond, if furnished any.

Send a copy of this judgment to the leaned Special Judge, 1st Court, Dhaka.

Md. Emdadul Huq, J.

I agree