

Present:

Mr. Justice Borhanuddin

And

Mr. Justice K.M. Kamrul Kader

CRIMINAL MISCELLANEOUS CASE NO. 3006 OF 2010

Md. Shahadat Hussain

... Accused-Petitioner

-Versus-

The State and another

... Opposite party

Mr. A. M. Mahbub Uddin, Advocate with

Mr. Ahmed Mahbubul Haque Khan, Advocate

... For the accused-Petitioner

Mr. Khorshed Alam Khan, Advocate

... For the A.C.C

Mr. Md. Aminur Rahman Chowdhury, AAG

... For the State

The Judgment on 4th June, 2014

K.M. Kamrul Kader, J:

This Rule was issued calling upon the opposite party to show cause as to why the proceeding of Special Tribunal Case No. 05 of 2008, arising out of G.R. No. 40 of 2007, corresponding to Madhabpur Police Station Case No. 19 dated 18.02.2007 under Section 409 of the Penal Code and Section 5(2) of the Prevention of Corruption Act, 1947, now pending before the Court of learned Special Judge, Sylhet, should not be quashed.

Short facts, relevant for the purpose of disposal of this Rule, are that on 18.02.2007, one Ahmed Farhad Hossain, Field Officer of the Anti- Corruption Commission (herein after

called as 'ACC') District Office- Hobigonj, as Informant lodged a First Information Report to the Madhabpur Police Station against this accused-petitioner alleging inter-alia, that the accused-petitioner is a Government employee, served as Assistant Commissioner (Land), Upazilla- Madhabpur, District- Hobigonj, he opened a bank account being No. 3090, with Bangladesh Krishi Bank, Madhabpur Branch on 28.3.2006, the accused-petitioner by illegally using his official post deposited an amount of Tk. 4,04,918/- during the period of 28.3.2006 to 09.01.2007. Thereafter, he withdraw an amount of Tk. 4,00,000/- from that account on 09.01.2007 vide a cheque and sent the same to his another account being No. 11074 of Bangladesh Krishi Bank, Maizdi Court Branch, Noakhali, through Telegraphic Transfer (T.T.) being No. 114/2006-2007 dated 09.01.2007. Next, on 31.01.2007 and 07.02.2007, he sent Taka 3,50,000/- and Taka 2,00,000/- respectively through two different T.T. to the said account of Bangladesh Krishi Bank, Maizdi Court Branch, Noakhali. By sending in total an amount of Taka 9, 50,000/-, through his illegal income he has committed an offence under Section 409 of the Penal Code read with section 5(2) the Prevention of Corruption Act, 1947. During inquiry, it was proved that the accused-petitioner by misusing his power taken bribe of an amount of Taka 9,50,000/- and misappropriated the same, hence the case and the same was registered as Madhabpur

Police Station Case No. 19, under Section 409 of the Penal Code read with section 5(2) of the Prevention of Corruption Act.1947.

One Mohammad Nasir Uddin, Deputy Commissioner, of ACC District Office, Sylhet, was appointed as Investigating Officer on 15.3.2007 to investigate the case and after conclusion of investigation, he submitted a Charge-Sheet being No. 54 dated 10.3.2008 under Section 409 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 against the accused-petitioner.

Thereafter, the case record was transmitted in the Court of learned Special judge, Sylhet, for trial and the same was numbered as Special Case No. 05 of 2008. Thereafter, on 18.01.2009 the accused-petitioner filed an application under Section 265 (C) of the Code of Criminal Procedure before the learned Special Judge, Sylhet, to discharge him from the allegations levelled against him and after hearing the parties the learned Special Judge rejected the application and framed charge Under Section 409 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 against the accused-petitioner vide his Order dated 23.3.2009.

Having aggrieved by and dissatisfied with the impugned proceeding of Special Case No. 05 of 2008, the accused-petitioner preferred the instant application under Section 561-

A of the Code of Criminal Procedure before this Division and obtained the instant Rule and an order of stay.

Mr. A. M. Mahbub Uddin, learned Advocate appearing for the accused-petitioner submits that the petitioner is a BCS officer. He is a Government servant and working as Assistant Commissioner of Land, Madhabpur, Hobigonj. There is no ingredients of offence in the FIR, Charge-Sheet and other materials on record, to frame charge against the accused-petitioner under Sections 409 read with section 5(2) of the Prevention of Corruption Act, 1947. In the FIR as well as Charge-Sheet no criminal offence has been disclosed against this accused-petitioner. The Informant in connivance with an army officer with the intention to harass and press the accused-petitioner lodged this false and fabricated allegation against the petitioner, during the emergency period. He further submits that the ACC lodged the instant case against this accused-petitioner without there being any complaint against him from any aggrieved person or quarter against the accused-petitioner under Rules 3 and 4 of the Anti-Corruption Commission Rules, 2007 (hereinafter referred to as 'the ACC Rules') and the allegations are vague, groundless, frivolous, vexatious, oppressive and preposterous. In this circumstances, lodgment of this instant case against the accused-petitioner is malafide and ex-facie illegal. He further submits that the allegation against this accused-petitioner is

that he deposited an amount of Taka 9,50,000/- in his bank account and sent the same to his another bank account on different dates, the allegations itself does not constitute any offence, which comes within the preview of Section 409 of the Penal Code and the Section 5(2) of the Prevention of Corruption Act, 1947. On its face, the allegation as incorporated in the F.I.R. and charge Sheet against the accused petitioner are so preposterous, even if the facts are admitted in their entirety, on their face value, the same do not disclose any criminal offence, so the initiation and continuation of the impugned proceeding against this accused petitioner is an abuse of process of the court. He next submits that allegation against this petitioner that he earned property disproportionate to his known source of income but the ACC did not serve any notice according to the provision of Section 26 of the Anti-Corruption Commission Act, 2004 (hereinafter referred to as 'ACC Act') and Sections 8 and 17 of the ACC Rules. ACC failed to give any opportunity to this accused-petitioner to explain his position how he earned the said amount, which is flagrant violation of law as enunciated in Section 26 of the ACC Act and Sections 8 and 17 of the ACC Rules as well as violation of principle of natural justice. He also submits that the Investigating Officer who investigate the case was not authorized vide gazette notification by the ACC as required under Section 20 of the ACC Act. He further

submits that the Investigating Officer has continued the investigation after 60 days in violation of Section 10 of the ACC Act and no departmental action was taken or initiated against him. The Investigating Officer has acted illegally and the investigation was perfunctory. He further submits that a departmental proceeding was drawn against this accused-petitioner on the self same allegation and after conclusion of the inquiry, the inquiry officer did not find anything adverse against the accused-petitioner and he was acquitted from the allegation vide Memo No. সম/শঃ১ (২) (বিমা) ০২/২০০৮-৩৪৩ dated 21.08.2008. Since the Government exonerated the petitioner from the departmental proceeding, as such, the instant criminal proceeding against the petitioner liable to be quashed. The learned advocate for the petitioner placed reliance in the cases of **Mohammad Jahangir Hossain Howlader Vs. Chief Metropolitan Magistrate, Dhaka and others, 26 BLD (HCD) 2006** and **Syeda Sajeda Chowdhury Vs. The State, being Criminal Miscellaneous Case No. 42595 of 2012.**

Mr. Khurshed Alam Khan, the learned advocate appearing for the Anti-Corruption Commission submits that there are specific allegations against this accused petitioner. He has pointed out that the alleged amount of money was found in the bank account of the accused-petitioner and he gained these properties by dishonest means, disproportionate

to his known source of income. The Investigating Officer after conclusion of investigation, finding prima facie case against the accused petitioner submitted charge sheet under section 409 of the Penal Code and Section 5(2) of the Prevention of Corruption Act, 1947. He also submits that according to the provisions of the Anti-Corruption Rules, 2007, it is not necessary to send any notice to the accused-petitioner to explain his position how he earned the said amount and in Criminal Justice system the principle of natural justice is not applicable. He further submits that all these are question of facts, need to be decided by adducing evidence at the trial court and this court in exercising jurisdiction under section 561A of the Code of Criminal Procedure cannot decide on the factual aspect of this case. He lastly submits that there are no illegalities and irregularities in the proceeding and there are ingredients of offence, which attracts criminal breach of trust and misconduct should not be interfered by this Court at this stage, because the trial of this case has already been started and as such, this Rule is liable to be discharged. To substantiate his submission the learned Advocate for the opposite party cited the case of **Golam Sarwar Hiru Vs. The State and another, 13 MLR (AD) 2008 (104)**.

We have gone through the application under section 561A of the Code of Criminal Procedure and the materials annexed thereto.

Under Section 561-A of the Code of Criminal Procedure, the High Court Division has inherent power to make such order, which may be necessary to give effect to any order passed under the Code, or this power may be used to prevent abuse of the process of any Court or to secure ends of justice. The instant case does not fall in the first category; rather it involves only the question whether institution and continuation of criminal proceeding would amount to abuse of the process of the Court and quashing of the proceeding is needed to secure ends of justice.

The **First** question is as to whether or not the inherent power under section 561A of the Code of Criminal Procedure can be invoked at any stage of the proceeding even at an initial stage, if it is necessary to prevent the abuse of the process of the court or otherwise to secure the ends of justice. Learned Advocate for the ACC cited the Case of **Golam Sarwar Huru Vs. The State and another, 13 MLR (AD) 2008 (104)** and submits that the instant application under Section 561-A of the Code of Criminal Procedure is not maintainable and there is hardly any scope for quashment of the proceedings, as the trial of the case has already been started. In the instant case, we find that charge was framed against the accused-petitioner, no prosecution witness was examined and next date was fixed for examination of the prosecution witnesses. As such, the decision of our Apex Court cited above is not

applicable in this Case. The inherent power of this Court under section 561A of the Code of Criminal Procedure can be invoked at any stage of the proceeding even at an initial stage. We find support of this contention in the case of **Abdul Quader Chowdhury vs. The State, 28 DLR (AD) (1976) 38**. Similar view was taken in another decision of our Apex Court in the case of **Ali Akkas Vs. Enayet Hossain and others, 17 BLD (AD) (1997) 44**.

The **Second** question is as to whether or not allegations made in the F.I.R and Charge Sheet attracts the provision of Sections 409 of the Penal Code and section 5 (2) of the Prevention of Corruption Act. 1947.

(A) In order to constitute an offence under section 409 of the Penal Code it is necessary that there must be an entrustment of property or with any dominion over property in his capacity of a public servant, who commits criminal breach of trust in respect of that property. For constituting offence under this Section the accused must commits criminal breach of trust within the meaning of section 405 of the Penal Code. Entrustment is an essential ingredient of offence of the criminal breach of trust, a man cannot be held guilty of this offence unless he is entrusted with some valuable property or things. The accused must be entrusted with property or with dominion over property, which he misappropriates or converts to his own use or dispose of. For an offence under this section

the first requirement is that the property must be proved to have been entrusted and a subsequent conversion of the property entrusted to him or use of the property by the accused. In a case where the charge against an accused person is that of criminal breach of trust, the prosecution must prove not only entrustment of or dominion over property but also that the accused dishonestly misappropriated, converted, used or disposed of the property himself or that he willfully suffered some other person to do so. "Dishonesty" is the essential ingredient of the offence under section 409. In the instant case, the accused-petitioner is a Government employee, he served as Assistant Commissioner (Land), Madhabpur, Hobigonj, he opened a bank account being No. 3090, with Bangladesh Krishi Bank, Madhabpur Branch on 28.3.2006, he deposited an amount of Tk. 4,04,918/- during the period of 28.3.2006 to 09.01.2007. On 09.01.2007 he withdraw an amount of Tk. 4,00,000/- from that account and sent the same to his another account in Bangladesh Krishi Bank, Maizdi Court Branch, Noakhali, through Telegraphic Transfer (T.T.). Next, on 31.01.2007 and 07.02.2007, he sent Taka 3,50,000/- and Taka 2,00,000/- respectively through two different T.T. to the said account, in total he transferred an amount of Taka 9,50,000/- of his alleged illegal income, as such, he has committed an offence under Section 409 of the Penal Code read with section 5(2) the Prevention of Corruption

Act, 1947. Transfer of an amount Taka from one account to another will not attract the provision of Section 409 of the Penal Code. To bring home the charge, the prosecution must prove not only the entrustment of or dominion over the property but must also prove that the accused either dishonestly misappropriated the property or converted, used or disposed of that property himself or that he willfully suffered some other person to do so. We do not found any allegation that the petitioner misappropriated any property which was entrusted to him or he dishonestly misappropriated the said amount or converted, used or disposed of that amount or that he suffered some other person to do so. We are of the view that no offence under section 409 of the Penal Code has been disclosed in the instant proceeding.

(C) In order to constitute an offence under section 5 (2) of the Prevention of Corruption Act 1947, it is necessary that there must be an allegation that the accused petitioner as public servant who commits or attempts to commits “criminal misconduct” within the meaning of section 5 (1) of the Prevention of Corruption Act 1947. Section 5 (1) of the Prevention of Corruption Act 1947, runs as follows:

5. Criminal Misconduct.- (1) *A public servant is said to commit the offence of criminal misconduct,*

(a) if he accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the 3[Penal Code], or

(b) if he accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he by corrupt or illegal means or by otherwise abusing his position as public servant, obtains 4[or attempts to obtain] for himself or for other person any valuable thing or pecuniary advantage 5[, or]

(e) if he or any of his dependents is in possession, for which the public servant cannot reasonably account, or pecuniary resources or of property disproportionate to his known sources or income.

Explanation.- In this clause "dependent" in relation to a public servant means his wife, children and step children, parents, sisters and minor brothers residing with and wholly dependent on him.]

In the Instant case, the allegations were made against this accused petitioner are that an amount of money was found in the bank account of the accused-petitioner and he gained these properties by dishonest means, by abusing his position as public servant, which disproportionate to his known source of income. We have perused the materials on record. It transpires that in the four corners of the FIR and charge sheet there is no allegation that the accused petitioner obtained any valuable things or pecuniary advantages from any person by abusing his position as public servant. To bring

home charge under section 5 (1) (e) the following ingredients should be present,

- I. the accused is a public servant;
- II. he himself or any of his dependents is in possession of property disproportionate to his known sources of income;
- III. he cannot reasonably or satisfactorily account for such property.

The third ingredient requires some explanation from the accused himself that how he deposited the said amount in his Bank account and transferred the same to his another account. After enactment of the Anti-Corruption Commission Act, 2004 and the Anti-Corruption Commission Rules, 2007, it was intention of the Legislature that in such cases accused should be given an opportunity to explain his position how he deposited the said amount in his Bank account. In the instant case, the Anti-Corruption Commission failed to give any opportunity to the accused-petitioner to explain his positions how he deposited the said amount in his Bank account. The nature of allegation as contained in the FIR demand an explanation from the accused how he deposited the said amount in his Bank account. The ACC clearly acted in breach of Section 26 of the ACC Act and Sections 8 and 17 of the ACC Rules. The ACC also acted in breach of Section 20 (2) of the ACC Act. Section 20 of the ACC Act provides for power of

investigation by the ACC. Section 20(2) provides that the Commission, by notification in the official Gazette, empower any of its subordinate officers to investigate the offences that may be investigated by the Commission. Yet no such notification has been published in the official Gazette empowering Mohammad Nasir Uddin to investigate into the offence alleged to have been committed by the petitioner. However, we are of the view that it is mere irregularities.

The ACC also acted in breach of Rule 10 of the ACC Rules in relation to the investigation of the case. Rule 10 (1)-(2) is reproduced hereunder as verbatim-

“১০। মামলার তদন্তকার্য সম্পন্ন ও প্রতিবেদন দাখিল-

(১) তদন্তের দায়িত্বপ্রাপ্ত কর্মকর্তা মামলা তদন্তের নির্দেশ প্রাপ্তির তারিখ হইতে অনধিক পঁয়তাল্লিশ কার্যদিবসের মধ্যে তদন্তকার্য সমাপ্ত করিয়া তফসিলের ফরম-৪ এ বর্ণিত হুক অনুযায়ী তাহার নিয়ন্ত্রণকারী কর্মকর্তার নিকট তদন্ত প্রতিবেদন দাখিল করিবেন।

(২) উপ-বিধি (১) এ উল্লিখিত সময়ের মধ্যে যদি যুক্তিসঙ্গত কোন কারণে তদন্ত প্রতিবেদন দাখিল করা সম্ভব না হয়, তাহা হইলে তদন্তকারী কর্মকর্তা উহার কারণ লিপিবদ্ধ করিয়া উক্ত পঁয়তাল্লিশ কার্যদিবস সমাপ্ত হইবার পূর্বেই তদন্তের দায়িত্বপ্রাপ্ত পরিচালক বরাবর অতিরিক্ত সময় চাহিয়া আবেদন করিতে পারিবেন এবং উক্তরূপ আবেদন যথাযথ বলিয়া প্রতীয়মান হইলে উক্ত পরিচালক অনধিক পনের কার্যদিবস পর্যন্ত সময় উক্ত পঁয়তাল্লিশ কার্যদিবসের ধারাবাহিকতায় বর্ধিত করিতে পারিবেন।”

A maximum of 60 days was allowed to the ACC to investigate the case of the Petitioner under Rule 10(1)-(2). However, the F.I.R. was lodged on 18.02.2007 and the

Investigating Officer submitted Charge-Sheet on 10.3.2008 after 13 months of lodgment of the FIR. However we are of the view that these provisions are directory only not mandatory. In the case of ***Syeda Sajeda Chowdhury Vs. The State, in Criminal Miscellaneous Case No. 42595 of 2012*** this Division held that:

“So far as Rule 10 is concerned, we can, however, not be in agreement with the petitioner’s contention, because, in our introspection, for the reasons stated above, commands made through Rule 10 are directory only.”

The **final** question is as to whether or not a criminal proceeding against the accused should be quashed, when Government exonerated him from the departmental proceeding. A departmental proceeding was started against the accused-petitioner on the self same alleged offence. The accused-petitioner was suspended on 18.03.2007 in connection with the instant case. The accused-petitioner has been discharged from the departmental proceeding on 18.8.2008 as the allegation against him was not proved. The order of suspension of the accused-petitioner has been withdrawn on 04.11.2012. Now he has been discharging the duty as Assistant Commissioner in the Nejarat Section of the office of Deputy Commissioner, Chittagong. In the case of ***“Mohammad Jahangir Hossain Howlader Vs. Chief***

Metropolitan Magistrate, Dhaka and others” 26 BLD (HCD) 2006, 83 it was held that:-

“The case in hand is the rarest of rare cases in which the writ jurisdiction can reasonably be invoked. The special feature of this case is that the Ministry of Finance, Internal Resources Division, constituted a high powered committee consisting of the three high officials who in their report found that the petitioner had performed his duty in accordance with law. On the basis of that report, the Government exonerated the petitioner from the departmental proceeding. The Government, however, has allowed a criminal case to proceed against the petitioner on the self-same occurrence. Such an attitude of the Government in two different forums cannot be accepted. Since the Government exonerated the petitioner from the departmental proceeding we find that the criminal proceeding so far as it relates to the petitioner should be quashed in the facts and circumstances of the instant case.”

Under such circumstances, we are of the view that the allegations have been made against the accused petitioner are preposterous and no offence under section 409 of the Penal Code and section 5 (2) of the Prevention of Corruption Act 1947 has been disclosed in the instant proceeding. We find

that the ACC has deliberately and meticulously hyperboles the materials and facts contained in the F.I.R. and charge sheet in order to prosecute the accused petitioner for harassments.

Under the facts and circumstances of the case and the observation made above, we find substance in the submissions made by the learned advocate for the petitioner.

Accordingly, the rule is made Absolute.

The proceeding of Special Case No. 05 of 2008 arising out of G.R. No. 40 of 2007, corresponding to Madhabpur P.S. Case No. 19, dated 18.02.2007 under Sections 409 of the Penal Code and Section 5(2) of the Prevention of Corruption Act, 1947 is hereby quashed.

The order of stay granted earlier at the time of issuance of this rule, is hereby vacated.

Communicate a copy of this Judgment to the Court concern at once.

Borhanuddin, J:

I agree.