

Present:

Mr. Justice Mohammad Marzi-ul-Huq
and

Mr. Justice Md. Ruhul Quddus

Criminal Misc. No.4896 of 2005

M. A. Gani

... Petitioner

-Versus-

The State and another

... Opposite Parties

Mr. Mohammad Ali Zinnah, Advocate

... for the petitioner

Mr. Yousuf Mahmud Morshed, A.A.G.

...for the State-opposite party

Judgment on 28.5.2012

Md. Ruhul Quddus, J:

This Rule at the instance of an accused was issued on an application under section 561A of the Code of Criminal Procedure for quashment of the proceedings in Petition Case No. 403(1)2004 under sections 420,406 and 409 of the Penal Code that was pending before the Magistrate of first class, Third Court, Jamalpur.

The complainant Md. Joynal Abedin (herein opposite party No. 2) filed a petition of complaint on 2.12.2004 before the Magistrate of first class, Jamalpur alleging, *inter alia*, that the accused petitioner M. A. Gani and two others proposed the complainant and witness Nos.1-3 to do business of manufacturing and trading of bricks, which they agreed to do and gave the accused take five lac on 26.9.1996. A hand note between the parties were executed on a stamp paper worth Taka fifty to that effect.

On receipt of the money, the accused persons undertook that immediately after manufacturing the bricks in first round, they would supply them proportionate number of bricks in their share. If they fail, the complainant will be entitled to get the money back. Thereafter, the accused persons avoided to supply bricks to the complainant. The complainant also called a shalish, to which the accused persons did not respond. Then he sent a legal notice through his learned Advocate on 25.11.2002 requesting them for payment of the money, which they had refused and ultimately denied to pay the money.

The Magistrate examined the complainant and issued summons upon the accused persons including the petitioner. As they failed to appear, the Magistrate issued warrant of arrest against them by order dated 17.1.2005. At that stage, the accused petitioner surrendered before the Court and after obtaining bail, moved in this Court with the instant criminal miscellaneous case under section 561A of the Code for quashment of the proceedings and obtained the Rule with an order of stay.

Mr. Mohammad Ali Zinnah, learned Advocate appearing for the petitioner submits that in the present case the petitioner allegedly took money from the complainant on execution of hand note. In such a case even if he failed or denied to pay the money, it would not constitute any criminal offence. The allegation being civil in nature, the complainant has remedy in civil Court. The proceeding in the present criminal case for a

civil liability is, therefore, an abuse of the process of Court and as such liable to be quashed. In support of his submission learned Advocate refers to *Md. Reazuddin Ahmed Vs. The State and another*, 2 MLR(AD) 37.

Mr. Yousuf Mahmud Morshed, learned Assistant Attorney General appearing for the State-opposite party submits that on same fact both civil and criminal case can proceed simultaneously, if there is any criminal offence in spite of civil liability on the part of the accused. In the present case, there are ingredients of offence under sections 420 and 406 of the Penal Code and as such the Rule is liable to be discharged. He further submits that the charge has not yet been framed in the present case and in that view of the matter, the present application for quashment is premature as well.

We have considered the submissions of the learned Advocates for both the parties and gone through the decision cited. In the case cited the accused took loan from complainant on execution of a hand note. For non-payment of loan money, he was tried in absentia and was convicted and sentenced under section 406 of the Penal Code by the trying Magistrate. A criminal appeal preferred against the said judgment and order of conviction and sentence was also dismissed by the Additional Sessions Judge, Kishorganj. The convict-appellant then moved in the High Court Division with a time-barred criminal revision. The High Court

Division summarily rejected the revisional application on the ground of delay.

Leave was granted to consider the grounds that the rule of practice relating to 60 days limitation for filing revisional application in criminal case not being an inflexible rule, whether the learned Single Judge of the High Court Division was justified in dismissing the revisional application merely on ground of delay without considering the merit of the case; and that the conviction and sentence as passed against the petitioner being totally unsustainable in law and on facts, the learned Single Judge of the High Court Division ought to have condoned the delay and admit the revisional application for consideration on merit to prevent gross miscarriage of justice.

In that case the appellate division allowed the appeal on setting aside the judgment and order of conviction holding that refusal of non payment of loan taken against hand note does not constitute an offence of criminal breach of trust.

The hand note as alleged in the present petition of complaint is neither annexed with the application nor the text of it is reproduced to enable us to see whether it was a mere hand note or an agreement or mixture of the both. But from the statement made in the complaint with reference to the 'hand note', we find some ingredients of an agreement as well. The case cited was a simple case of money lending and the accused was convicted under section 406 of the Code only. But in the case before

us cognizance has been taken under both the sections 420 and 406 of the Code and it is not a case of money lending. The petition of complaint shows that the money given to the accused persons was actually invested in brick business, which the accused persons dishonestly misappropriated in breach of the terms of hand note, firstly by not giving the complainant the bricks produced, secondly by not giving the money back and refusing to do so. The money was actually entrusted to the accused, not given as loan. So, the case cited is distinguishable.

This is correct that there is civil liability arising out of breach of contract on the part of the petitioner, for which the aggrieved party has remedy in civil Court. But it is also correct that there are ingredients of criminal offence against the petitioner as already shown. In such a position, there is no legal bar to proceed simultaneously with a civil and criminal case on same fact. This view lends support from *Md. Monzur Alam Vs. The State and another*, 11 BLT (AD) 156 and *Shahidullah Patwary Vs. State*, 35 DLR (AD) 281.

In the present case no civil litigation reportedly has been initiated to address the grievance of the complainant. Since both civil and criminal case on same fact can proceed simultaneously, there can be no wrong in proceeding with a prior criminal case.

Moreover, charge has not yet been framed in the present case. In such position, the petitioner has ample opportunity to approach the trial Court with an application for discharge, whereupon the trial Court can

also see whether the materials before it are satisfactory to proceed against him.

In both view of the matter, we do not find any reason to interfere with the impugned proceedings at this stage on the plea that the allegation made in the complaint is of civil nature.

The Rule is, therefore, discharged. Stay granted at the time of issuance of the Rule is vacated.

Communicate a copy of the judgment.

Mohammad Marzi-ul-Huq, J:

I agree.