

IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(CRIMINAL MISCELLANEOUS JURISDICTION)

**Criminal Misc. Case No. 289 of 2013**

Md. Motiar Rahman  
.....Petitioner

-Versus-  
The State and another  
.....Opposite parties

Mr. Ashif Hasan, Advocate  
..... For the petitioner  
Mr. Md. Harun-Ar-Rashid, D.A.G.  
.....For the opposite party

**Heard on: 30.07.2015**

**Judgment on: 30.08.2015**

**Present:**

***Mr. Justice M. Moazzam Husain***

***And***

***Mr. Justice Md. Badruzzaman***

**M. Moazzam Husain, J.**

This Rule was issued at the instance of one Md. Motiar Rahman calling in question the order dated 06.01.2012 passed by Mr. Md. Akhtar Hossain, Sessions Judge, Borguna, in Criminal Miscellaneous Case No. 297 of 2012 whereby he affirmed an order passed by the Senior Judicial Magistrate, Pathorghata, refusing an application made by the petitioner praying for *jimma* of goods seized in connection with Pathorghata PS Case No.01 of 2011 u/s 25B of the Special Powers Act.

Facts of the case, in brief, are that one Md. Abdul Jalil a Coast Guard lodged on 6.1.2011 an F.I.R. with Pathorghata Police Station against 13 persons arrested on spot alleging, *inter alia*, that at 3.00 A.M. on 03.01.2011 he along with other members of Coast Guard were on a special campaign conducted in a high speed boat. While on such operation they noticed a fishing boat styled "MB Khaza" sailing close to Kakchira Ferri Ghat of Bishkhali River. They challenged the boat. But the boat instead of stopping tried to flee on a higher speed. They caught the boat by chasing, arrested the persons on board; interrogated them who disclosed that there are various Indian goods inside the boat. They dragged the boat to Pathorghata *ghat* and informed their higher authority who in turn communicated the matter to the customs authority. Persons in authority of both the departments rushed to the spot. In presence of all of them the raiding party recovered from the boat georgette saree, three piece and shirting jointly valued at Tk. 2,46,24000/-. The informant seized the goods including the boat and deposited all the

seized goods in the Divisional Customs Godown and handed over the boat to the customs authority. The arrestees are organized smugglers. They could not show any valid papers in support of the goods. On interrogation they said that they took the goods on board from a place close to Hiron Point from an Indian trawler. The occurrence gave rise to Patharghata P.S. Case No. 1 dated 6.1.2011 under section 25(B) of the Special Powers Act, 1974 (shortly "the SPA").

The case was investigated by two police officers successively. The investigation was first taken up by one SI Abul Munsur of Patharghata Police Station and after his transfer the investigation was taken over by SI Md. Lokman Hossain another police officer of the same police station. After investigation the Investigating Officer (I/O) submitted charge-sheet on 14.5.2011 against all the *majhi-malla* (sailors) arrested on board and one Nur Islam as the owner of the boat to stand their trial under section 25B of the SPA. None was arrested or charge-sheeted as owner of the goods.

Meanwhile on 04.4.2011, that is, during pendency of investigation this petitioner floated and filed an application directly before the Court of Sessions, Barguna, boldly claiming himself to be the lawful owner of the seized goods and on that basis asked for *jimma* of the goods which was rejected by the learned Sessions Judge by his order dated 24.5.2012 with direction to dispose of the seized goods by auction sale. Let it be mentioned that the petition was contested by the local PP as well as a private lawyer specially engaged by the customs authority.

This petitioner, however, challenged the order in revision before the High Court Division which was rejected as not being pressed. Thereafter the petitioner filed a Writ Petition bearing No. 9707 of 2012 making the same prayer which was summarily rejected by a Division Bench of this Division with an observation to the effect that the petitioner might file an application for *jimma* before the concerned court wherein the case is pending if he is so advised. Thereafter, the petitioner went back to the court of Magistrate and initiated a fresh battle for *jimma* of the goods seized. Learned Magistrate rejected the petition by his order dated 05.8.2012 on the ground that similar petition was earlier rejected by the learned Sessions Judge wherein the learned Judge directed the custom to dispose of the seized goods by selling in auction, therefore, the petition was not maintainable.

The petitioner again challenged the rejection-order passed by the Magistrate in the Court of the Sessions Judge, Barguna which was registered as Criminal Misc. Case No. 297 of 2012. Learned Judge (incidentally the same judge who rejected the earlier petition) upon hearing by his impugned order summarily rejected the petition having found the same not maintainable as earlier decided.

The petitioner did not stop there and blissfully chose to carry his high-stake battle to its last. In his bid he again and for the third time knocked the door of the High Court Division possibly being emboldened by the fact that never ever in the long battle he was confronted with the most pertinent question coming from court or argued at the Bar as to how as self-proclaimed

owner of goods seized as smuggled goods in connection with which a smuggling case is pending instead of being arrested outright as an accused remained at large and initiated a fight for *jimma* of the goods seized. He, however, succeeded in taking the instant Rule from a Division Bench of this Division and got the matter fixed before us for hearing.

Mr. Ashif Hasan learned Advocate, appearing for the petitioner, submits with emphasis that the petitioner is a renowned businessman, a taxpayer, and the lawful owner of the seized goods. He is the Vice-President of Khulna Chambers of Commerce. He procured the goods, though Indian, from different licensed importers in Dhaka and is possessed of valid documents including import-documents, invoice, release order, money receipts, exit pass etc. enough to establish the fact. The goods were loaded in a cargo-boat on 01.01.2011 from Dhaka river port *en route* to its Khulna destination. The boat unfortunately lost its route in a foggy weather and sailed far downstream from the route and crossed Kakchira Ferri *Ghat* of Bishkhali River. The Coast Guard seized the opportunity and tried to harvest on the misfortune. All papers and documents were shown to the members of Coast Guard and asked to release the boat but they instead demanded huge money as a pre-condition for releasing the goods and remained firm on the demand. The petitioner being the lawful owner did not yield to the pressure and pressed for immediate release of the boat with goods. It is the stubbornness of the petitioner that fired back as the seizure of the goods along with the boat and initiation of the instant case against the poor *majhi-malla* and the innocent boat-owner. Mr. Hasan lamented that although the petitioner was possessed of valid papers and documents in support of his claim as lawful owner of the seized goods he could not sell his case before any court and consequently the valuable merchandise is going to be sold in auction at a nominal price to the utter peril of the petitioner as a businessman.

Mr. Md. Harun-Ar-Rashid, learned D.A.G. opposing the Rule submits on the other hand that this petition is not maintainable in that the relief sought on a set of defense or extraneous materials truth or falsehood of which cannot be ascertained on affidavits by the High Court Division in exercise of its extraordinary jurisdiction u/s 561A of the Code of Criminal Procedure (hereinafter referred to as "the Code"). He contended that the boat by which the goods were being carried into Bangladesh was seized from a place close to KaKchira ferry-*ghat* which is far off from Dhaka-Khulna route and the story that the boat was sailing from Dhaka for Khulna with the goods and reached the spot which is at least 30km downstream from the route, on account of foggy weather is not believable. Over and above, the goods are subject to natural decay and must be disposed of by auction sale and the entitlement of the sale proceeds would be **decided upon trial**. The prayer of the petitioner for *jimma* is, therefore, rightly rejected by the learned Sessions Judge.

We have heard the learned Advocates and perused the records.

In this case a boat loaded with huge quantity of goods valued about two and a half crores taka, said to be smuggled into Bangladesh, were seized

by Coast Guard and the sailors of the boat were arrested as persons suspected to be involved in smuggling punishable u/s 25B of the SPA. FIR was accordingly lodged; investigation started and carried out successively by two officers of the local Thana. After investigation charge-sheet was submitted on 14.5.2011 against in all 14 persons including the 13 sailors arrested on board. The 14<sup>th</sup> man is the boat-owner. The sailors are found to be poor villagers selling their labor/services for money. Question of their ownership of seized goods does not arise. The boat-owner was not charge-sheeted as one at whose instance the goods were brought into Bangladesh from India. By contrast a particular person who is admittedly a distinguished businessman is before us claiming *jimma* of the seized goods on the ground that he is the lawful owner of the same by virtue of series of papers and documents possessed by him. He has been fighting for *jimma* since before submission of charge-sheet but curiously enough he was not arrested or charge-sheeted as an accused. In the factual background a lingering question was lurking in mind as to how the self-proclaimed owner of the goods escaped sight of both the two I/Os as well as two lawyers, ie., the public prosecutor and the custom's lawyer who resisted the *jimma*- prayer in the court of the Sessions made by the petitioner before submission of charge-sheet and still steering clear the case.

At a stage we called for the case diary and directed the I/O to appear before us personally. He appeared with the case diary. On examination of the case diary it appears that the I/O took some cosmetic efforts to find out the kingpin and in his bid put some of the arrested *majhi-malla* to interrogation. According to him, all of them denied knowledge and made incoherent statements about the identity of the owner of the goods, therefore, he, despite all efforts, failed to trace the kingpin out. We brought to his notice the fact that almost one and a half months before filing of charge-sheet this petitioner approached the local Sessions Court for *jimma* of the goods claiming himself as lawful owner of the goods on the basis of series of papers and documents in which L/C records were called for; the local PP and lawyer privately engaged by the Customs authority appeared and opposed the prayer and asked: given the fact what was the reason of his failure, as the I/O, to trace the kingpin out. He plainly denied his knowledge about the court proceedings on *jimma*. We then put him the question pointblank that when the case records were shuttling between courts at the instance of the owner, orders were being enterer in the note-sheet, the PP was fighting against the self-proclaimed owner of the goods does it lie in the mouth of the I/O to say that he continued unaware about everything that was happening in court. His simple reply was that the case was investigated under supervision of an ASP and the memo of evidence was vetted by the PP before filing charge-sheet but he did not come know anything from any quarters. Confronted with the questions- is there still any scope left to cure the defect the I/O, however, replied in the positive and said, further investigation may be prayed for in order to bring the principal offender to book.

Nothing said and done really meets the disturbing question how on earth the mastermind remained unnoticed to all the persons and authorities directly or indirectly connected with investigation especially when he had set his face in court during pendency of investigation and has been fighting till today a parallel battle up to the High Court Division for *jimma* of the seized goods claiming himself as the owner of the goods on the basis of series of documents. The whole thing smacks of foul play on the part of the quarters responsible for prosecution. The higher authority of police is better placed to answer the question and we leave the issue to them to see how this ominous flaw could take place in such a massive smuggling case.

Back to *jimma*, in the scheme of the Code of Criminal Procedure (shortly, “the Code”) there is only one section, ie., section 516A wherein provisions are laid providing disposal of property, used in or regarding which an offence allegedly committed, during enquiry or trial. Section 516A reads as follows:

*“ When any property regarding which any offence appears to have been committed, or which appears to have been used for commission of any offence, is produced before any criminal court during any inquiry or trial, the court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may after recording such evidence as it thinks necessary, order it to be sold, or otherwise dispose of.”*

The section deals with disposal of property either used in commission of or regarding which any offence appears to have been committed. It confers power so to do during pendency of inquiry or trial and finally the section empowers, the criminal court to exercise the power when the property is produced before it. The section has prescribed a mode of disposal saying that if the property is subject to speedy or natural decay the court may order it to be sold, or otherwise dispose of.

Although concerned with disposal of property after conclusion of inquiry or trial Section 517 as well as section 523 need be read together for an overview of the whole landscape of disposal of judicial power-base in disposing of property seized in connection with a criminal case. Section 517 reads as follows:

*“(1) when an inquiry or a trial in any criminal court is concluded, the court may make such order as it thinks fit for disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise or any property or document produced before it or in its custody or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.*

(2) \*\*\* \*\*

(3) \*\*\* \*\*



that the goods seized were seized as smuggled goods and *prima facie* case of smuggling was found established after investigation leading to submission of charge-sheet. Once the goods recovered found to be subject of smuggling and C/S is submitted the person claiming ownership of the goods turns into an accused in the case and loses standing to ask for custody of the same. For the present, his claim at best can serve to furnish his defense plea to be vindicated throughout trial, nothing more.

In view of our observation made above, the impugned order passed by the Sessions Judge merely rejecting the prayer for *jimma* and thereby letting the petitioner to go scot-free, for all practical purposes, amounted to extending an undue indulgence to an accused of a smuggling case. The view expressed by us about the standing and competence of the petitioner to ask for *jimma* seems not to have crossed the mind of the learned Judge. The concurrent failure of the Magistrate and of the Sessions Judge to take appropriate action at the right time has not only allowed an accused to remain at large but also emboldened him to initiate and continue an otherwise unjust legal battle and thereby saddle the machinery of courts years together. A little of application of judicial mind might have saved huge public money and time spent on a fruitless litigation. We cannot but deprecate such mindless and care-free attitude on the part of the judicial officers in exercise of their judicial functions.

Be that as it may, the police report that has been already submitted is conspicuously silent about the petitioner. Notwithstanding the silence of police report there are materials available on records of *jimma*-cases filed and fought by the petitioner up to the High Court Division which are judicially noticeable u/s 56 of the Evidence Act and the Tribunal is free, as per section 27 of the SPA, either to take cognizance of offence against the petitioner straightway or direct the I/O or any other competent police officer to make further investigation. If the Tribunal decides to adopt the first option provided by law it may examine the materials of the records of Cr. Miscellaneous Case Nos. 72 of 2011 and 297 of 2012 filed by the petitioner in the court of the Sessions Judge, Barguna, praying for *jimma*; the Petition filed by him before the Court of Magistrate for the same purpose and the petition with annexures of the instant case (Cr. Misc. Case No.289 of 2013) fought before us and take its decision.

It is in the fitness of things, we are of opinion that ends of justice would be better served if this Rule is disposed of with direction instead of discharging the same outright.

Accordingly, the Special Tribunal assigned with the trial of the case is directed to take either of the two courses as mentioned hereinabove, and bring the petitioner to justice, subject to its satisfaction derived from the materials we have already indicated or upon report to be submitted by police after further investigation, as the case may be.

This Rule is thus disposed of with direction.



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Communicate a copy of this judgment with a copy of the petition (including annexures) of the instant case to the Court of the Sessions Judge, Barguna, at once.

**Md. Badruzzaman, J:**

*I agree*

Osman