

**In the Supreme Court of Bangladesh
High Court Division**

(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No. 50055 of 2014

In the matter of:

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

In the Matter of :

Md. Altaf Hossain

í í ..Accused-petitioner.

-Versus-

The State

í í í í ..Opposite party

Mr. Mintu Kumar Mondal, Advocate

í For the petitioner

Mr. A.K.M. Zahirul Huq DAG with

Mr. M. Masud Alam Chowdhury, AAG

Mr. Shah Abdul Hatem, AAG

.....For the opposite party

Mr. Khurshed Alam Khan, Advocate

(With the permission of the Court)

Heard and Judgment on 26.2.2015

Present:

Mr. Justice M. Moazzam Husain

And

Mr. Justice Md. Badruzzaman

M. Moazzam Husain, J:

This Rule was issued calling in question the proceedings in GR Case No.158 of 2011 u/s 13(12)2011 read with section 420 of the Penal Code now pending in the court of the Metropolitan Magistrate, Court No. 25, Dhaka.

Facts as disclosed in the FIR, in brief, are that the informant, his wife and his minor daughter bought 39.80 decimal of land (described in the schedule of the FIR) from accused

petitioner Altaf Hossain by a registered sale deed on consideration of Tk. 55 lakh. Few days before execution of the deed accused Altaf Hossain told him that he took some loan from Al-Arafa Islami Bank mortgaging the land. Unless the land is released by paying off the loan the land could not be sold. The petitioner, therefore, needed money to settle the loan account first and release the property. The informant being convinced paid 55 lakh Taka, as asked for, to accused Altaf Hossain soon thereafter. Accordingly on 19.7.2010 accused Altaf Hossain executed a sale deed in favour of the informant, his wife, and minor daughter in Uttara Sub-Registry Office. The informant having thus purchased the land constructed a house in the land and ever since been carrying on business therein.

On 12.12.2011 a staff of Agrani Bank Head Office came and told the caretaker of the informant that the land must be vacated immediately as the same was going to be sold in auction. He further disclosed that accused Altaf Hossain took loan from Agrani Bank long ago but failed to repay the loan. Bank filed Artha Rin Suit, Artha Rin 162/09, in the Artha Rin, First Court, Dhaka and got decree. The informant rushed to the Bank head office and confirmed for himself that the land was a mortgaged property of the Agrani Bank. Meanwhile suit was filed against the accuse petitioner for arrear of loan money and decree was also passed against him by a competent court. And the land was going to be put to auction.

The sale-talk, release of the land paying money and selling the same after clearing the land from all kinds of encumbrances as

said by the petitioner are all false and mere pretext just to induce the informant to part with money and grab the same. The act done by the petitioner is out and out cheating, forgery and criminal misappropriation. Accordingly FIR was recorded under section 406/420/467/468/471 & 506 of the Penal Code.

The FIR gave rise to Turag PS Case No. 13(12)2011 corresponding to the impugned GR Case No. 158 of 2011 under sections 406/420/467/468/471 & 506 of the Penal Code.

The case was investigated by police and a charge-sheet was submitted under sections 420 and 406 of the Penal Code against the petitioner and another. The Chief Metropolitan Magistrate, Dhaka, sent the case to the court of Mr. Md. Atiqur Rahman, Metropolitan Magistrate, Dhaka for trial. Learned Metropolitan Magistrate framed charge against the petitioner and another under section 420 and 109 of the Penal Code on 16.7.2014 and fixed 03.2.2014 for examination of witnesses. The petitioner appeared before the trial court and obtained bail.

In the backdrop of facts the petitioner obtained the present rule for quashing the proceedings essentially on the ground that the proceeding is *coram non judice* as the Magistrate is totally devoid of jurisdiction to try an offence under section 420 of the Penal Code in that after amendment of the Anti-Corruption Commission Act, 2004 (hereinafter referred to as the ACC Act) by the amending Act No. 60 of 2013 offences under section 420 is made exclusively triable by the Special Judge as per section 28 of the Act and secondly, the allegations made constitutes, if any, a

civil liability and no offence within the mischief of section 420/109 of the Penal Code.

Mr. Mintu Kumar Mondal, learned Advocate, appearing on behalf of the petitioner submits that ACC Act is a special statute having overriding effect over all other law now in force. The ACC Act and Rules framed thereunder provide for special procedure to examine the complaints, make inquiry, and investigation including provision for sanction before filing of charge-sheet and initiation of trial. Furthermore, jurisdiction of ordinary court to try the offences referred to in the Act is completely ousted and vested only in the Special Judge constituted under the Criminal Law Amendment Act, 1958.

In this case Anti- Corruption Commission is not made a party. Mr. Khurshid Alam Khan learned Advocate, with our permission made his submissions. Mr. Khan tried to defend the jurisdiction of the Magistrate to try the case on the ground that the case is filed in pre-amendment days and even cognizance was taken before amendment, therefore, there is no bar for the case to be tried by the Magistrate. He referred to us two decisions: one is of the Appellate Division and another is of a Division Bench of this Division respectively reported in 38 DLR (AD) 240 and 16 BLT 263 by which he wanted to say that the view taken in those two cases lends support to his contention.

By an amendment ie, Amendment Act No.60 of 2013 the ACC Act, 2004, is amended by which, amongst others, section 420 and 109 of the Penal Code were inserted in the schedule of the Act. ACC Act, 2004 is a special statute and practically came

into being as a hybrid legislation creating a number of penal clauses by itself and a Commission for the purpose of prevention of corruption (meaning the offences created by itself and a good number of other corruption-related offences drawn from different Acts as described in its schedule) and for enquiry and investigation of certain offences ancillary thereto. More particularly, the ACC Act provides both substantive and procedural law and encompasses in its schedule offences created by itself; a good number of offences of the Penal Code including section 420; offences punishable under the Prevention of Corruption Act, 1947; offences punishable under the Money Laundering Act, 2012 and abetments including that mentioned in section 109 of the Penal Code. The law is given overriding effect over all other laws now in force.

Notwithstanding that the word ‘corruption’ is nowhere defined in the Act it is described as to mean ‘offences specified in the schedule to the Act.’ In 2007 rules called ‘Anti- Corruption Commission Rules, 2007’ were framed under the law. A bare reading of the Act and the Rules suggests that special procedure for receiving complaint, scrutiny, inquiry, investigation and prosecution are made in order to prevent and deal with offences of corruption more effectively. There is, however, special provision for sanction to be given by the Commission as a pre-condition for submitting charge-sheet by the investigating officer and for taking cognizance of the offence by the court. There are provisions for constituting Commission’s own prosecution unit and opportunity

for the accused to explain his position during inquiry and investigation and to be tried by a Special Judge.

Section 28 of the ACC Act says, *inter alia*, that ~~Notwithstanding anything contained in any other law for the time being in force, offences under this Act and specified in the schedule shall be triable exclusively by the Special Judge.~~ Rule 4 of the ACC Rules says, *inter alia*, that ~~there shall be no bar to lodge complaint with police station relating to any offence mentioned in the schedule to the Act, but the police station concerned upon receipt of the complaint enter it in a register and send within two working days the same to the nearest district office of the Commission for investigation~~

The ACC Act does not contain any transitory provision regulating cases/proceedings that were pending for inquiry or trial at the time the 2013- Amendment came into being. It is no denying that section 420 of the Penal Code is included in the Schedule of the ACC Act, 2004 and if ~~cheating~~ as defined thereunder found relatable to corruption or proves to be ancillary to corruption must come within the sweep of the ACC Act to be dealt with strictly in accordance with the procedure laid down in the Act. But fact remains that the instant case arose long before the amendment of the ACC Act that included section 420 in the schedule and cognizance of the case for trial by a competent court of Magistrate was also taken before the amendment came into being. Question naturally arises and indeed rightly raised as to the competence of the Magistrate to try the case in the new legal regime.

Law that alters merely forms of procedure, such as forum, limitation, inquiry, investigation, mode of recording evidence etc is procedural. It is settled that unless contrary intention appears procedural law is always presumed to be retrospective and none can claim vested right in procedure. But if in the process existing rights are affected or allowing retrospective operation causes inconvenience or injustice the change of law cannot be given retrospective effect unless legislature by express words or by necessary intendment makes the enactment retrospective. In absence of express provision to the contrary, if it means by necessary implication of the language employed that the legislature intended the law or a particular section to have retrospective operation, the court will give it such an operation. Our view lends support from the cases of *State v Mohammad Jamil* reported in 20 DLR (AD)315; *Adnan Afzal v Sher Afzal* reported in PLD 1969 SC187, *Garbachan Singh v Satpal Singh* reported in AIR 1990 SC 209, *New India Insurance Company v Shanti Mishra* reported in AIR 1976 SC237 and *Khan Asfandyan Wali v Pakistan* reported in. PLD 2001 SC 607.

Mr. Khurshid Alam Khan, learned Advocate, hammered much in favour of continuation of the case in the court of Magistrate otherwise, as he feared, a serious anomaly and dislocation will follow. Unfortunately for him, law leans heavily against him. Furthermore, curing the defect of law, if any, is more within the domain of legislature than of the court. One thing more to say about his argument, the view taken in the Appellate Division case cited by Mr. Khan seems to speak against him and

conforms more with the settled view reflected in the aforementioned decisions. At a stage Mr. Khan curiously, disputed the jurisdiction of this court to hear the matter as there is a specific Bench designated to hear and dispose of all corruption related cases, therefore, according to him, it would be proper to let this case go out of list to be heard by the appropriate Bench. We notice a Division Bench constituted, amongst others, to hear and dispose of amongst others: *ওঁ দুৰ্নীতি দমন আই নৱ অধীন দা য়ৱকৃত মামলা, ৱায়, আ দশ...* that is cases filed under the Anti-Corruption Commission Act. The instant case is filed under section 561A of the Criminal Procedure Code challenging jurisdiction of the Magistrate. Therefore, we see no conflict of jurisdiction between the two Benches.

Be that as it may, the language employed in the ACC Act, 2004 and the Rules framed thereunder, to our mind, indicates by necessary implication that legislature intended the law to have retrospective effect provided the penal clauses arrayed under the schedule is fairly relatable to *corruption* properly so called or ancillary thereto and facts of the present case involving abuse of the credit facilities (that is depositors' money) extended by Bank deceiving the informant, though a private individual, in the name of the repayment of loan, making false sale deed in respect of land mortgaged with the Bank by abusing the office of the Sub-Registrar and finally dragging the matter into the court smack of corruption as meant under the ACC Act which pumps the case out of the sway of ordinary prosecuting system and brings the case within the ambit of Anti-Corruption Commission (The

Commissioner for short) with the necessary consequence that the jurisdiction to try the case by the Magistrate stands ousted.

For what we have stated above we find ample force in the argument of Mr. Mintu Kumar Mondal, learned Advocate that the proceeding is clearly *coram non iudice* as the Magistrate has no jurisdiction to try the case. The Rule bears merit at least so far as it relates to the question of competence of the Magistrate to try the same. But mere absence of jurisdiction does not absolve the petitioner of his criminal liability. He must face trial before a competent Court.

The case started in 2011 ie., long before 2013-amendment of the ACC Act including, amongst others, section 420 of the Penal Code in the Schedule of the Act. The FIR was lodged in the police station; investigation was made by PS police and charge-sheet submitted by them according as the law prevailing at the material time. The case as per law then prevailing was registered as a GR case and transferred to the Court of Magistrate for trial. Meanwhile charge has been framed by the Magistrate against the accused petitioner and another. None is at fault here. We are not inclined to see that the party's sufferings are multiplied under our order to start from the beginning. The circumstance, in our view, is exigent and by resort to fiction of law be resolved as one under proviso of Rule 13(3) of the Anti-Corruption Commission Rules, 2007, which empowers the Special Judge to directly accept the complaint if refused so to do by the Commission or the police station.

In the result, the Rule is made absolute. The proceeding of the case before the Metropolitan Magistrate is quashed on the ground that he is not competent to try the case. The learned Metropolitan Magistrate, Court No.25, Dhaka, however, is directed to transmit the case records to the court of Special Judge, competent to try the same forthwith. Learned Special Judge having received the case records will direct the Commission to investigate into the allegations and take, in exercise of its own discretion, other measures as mandated by law.

Communicate at once.

I agree

Md. Badruzzaman, J: