

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

Present

Mr. Justice Md. Salim

And

Mr. Justice Shahed Nuruddin

CRIMINAL MISCELLANEOUS CASE NO.15937 OF 2017

Amir Jahan Dilshad Begum and another
..... Accused- Petitioners

Versus

The State and another

.....Opposite Party

Mr. Md. Shafiqur Rahman, Advocate

----- For the petitioners

No one appears

---- For the opposite party No.2.

Mr. B.M. Abdur Rafell, DAG with

Mr. Binoy Kumar Ghosh, A.A.G.

Mr. A.T.M. Aminur Rahman (Milon), A.A.G.

Ms. Lily Rani Saha, A.A.G.

.....For the State.

**Heard on 30.11.2023, 13.12.2023,
04.01.2024 and 17.01.2024**

Judgment on 18.01.2024.

MD. SALIM, J:

By this Rule, the opposite parties were asked to show cause as to why the proceedings of Complainant Case No.809 of 2016 under Section 406 / 420 / 34 of the Penal Code, now pending before the learned Judicial Magistrate, Cognizance Court No.1, Naogaon should not

be quashed and/or pass such other or further order or orders as to this Court may deem fit and proper.

The facts necessary in a nutshell are that the complainant based on a tenancy agreement rented a shop from the accused persons for a monthly rent of Tk.1000/- and paid Tk.1,10,000/- to the accused persons as security. In clause No.8 of the said tenancy agreement, it was stipulated that the accused petitioners would return the security deposit to the complainant at the expiry of the tenancy agreement. The complainant and her husband carried on a business of computers and other stationeries there and duly paid the rent to the accused petitioners. However, during the absence of the complainant, her husband secretly sold out most of the product and left the shop after handing over the key to the complainant. Although the shop was closed for the rest of the tenancy period the complainant regularly paid the rent to the accused petitioners. After the expiry of the tenancy agreement, the complainant asked for the return of the security deposit as per clause 8 of the tenancy agreement, but instead of paying the amount the accused petitioner No.2 threatened the father of the complainant,

yelled at them indiscriminately and also refused to refund the security deposit.

After receiving the complaint the Magistrate examined the complainant under Section 200 of the Code of Criminal Procedure and sent the matter for inquiry to police. After the inquiry, a report has been submitted by the police before the Judicial Magistrate. The judicial Magistrate considered the inquiry report as well as the petition of complaint took cognizance of the offense against the accused persons under section 406/420/34 of the penal code and issued a warrant of arrest against the accused petitioners.

The accused petitioners appeared before the Judicial Magistrate and obtained bail. Thereafter, they filed an application under Section 561A of the Code of Criminal Procedure for quashing the proceeding of the instant case and this court by an order dated 13.04.2017 issued the Rule and passed an order of stay of the proceeding of the case.

Mr. Md. Shafiqur Rahman, the learned Counsel appearing on behalf of the accused petitioners submits that the allegation in the petition of the complaint being

civil in nature which arose out of breach of contract by the complainant, and there being no ingredients of the offense under section 406/420/34 of the penal code, continuation of the instant proceeding would be an abuse of process of the court.

On the other hand, Mr. B.M. Abdur Rafell the learned Deputy Attorney appearing on behalf of the state opposes the contention so made by the learned counsel for the accused petitioner and submits that there are specific allegations against the accused petitioners thus the Rule may be discharged.

We have anxiously considered the submission of both parties and perused the petition of complaint, the inquiry report, and the other materials on record. For better appreciation of the submission advanced by the learned counsel for both parties, we may be cited the relevant law as follows:--

“405. whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law

prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.

It manifests that to prosecute an accused under section 406 of the Penal Code the abandoned duty of the complainant/ prosecution to prove that the accused must have been entrusted with the property or with any dominion over the property or he has dishonestly misappropriated the property for his use.

“415. whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”.

It manifests that cheating may occur even in the course of carrying out business by any of the sides of the business partner subject to the condition that the complaint is not related merely to the issue of miscalculation of the transaction or amount.

The intention of defrauding the other side can be seen or surfaced by any act or acts of parties. Thus, in the case of cheating or criminal breach of trust, the intention of the accused person can be found only at the time of the commission of the offense. Importantly a transaction on its face though may apparently be of a civil in nature may give and does many a time give rise to criminal liability. In a proper case breach of contract also amounts to cheating and/or a criminal breach of trust which is a punishable offence under penal law. So it cannot be said that in all cases of breach of contract, no criminal liability lies and civil recourse is the only forum. Each case depends upon the facts and circumstances of that particular case only and the offence alleged can be established by the prosecution or complainant on the production of evidence at the time of trial. In this context,

the case of State Vs Iqbal Hossain reported in 48 DLR (AD) 100 held –

“Transaction based on contract ordinarily gives rise to civil liabilities but that does not preclude implications of a criminal nature in a particular case and a party to the contract may also be liable for a criminal charge or charges if elements of any particular offense are found to be present. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time as alleged which may be judged by subsequent act.”

Therefore the true position is that even in a transaction based on a contract, apart from civil liability, there may be elements of an offense or offenses for which a prosecution may be competent against a party to the contract and to find such offence the evidence has to be examined carefully to see whether there is any criminal liability. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time as alleged which may be judged by his subsequent act.

It is now a settled proposition of law that the alleged act of failure to perform the contract does not constitute an offense of criminal breach of trust or breach of contract. In this context, the case of *Awalur Hasan Vs the state* reported in 16 BLC(HCD) 410 held--

“The petition of complaint discloses no initial intention of accused-petitioners to deceive the complainant. Nowhere in the petition of complaint it is alleged that though the accused had no intention to sell the land and building they falsely promised to sell the land with the building to have the money. The subsequent conduct of the accused also does not show that they had the intention to defraud the complainant.

It is purely a breach of civil contract. The accused persons allegedly contracted to sell their land and building to the complainant for taka 14 lakh and received taka 2 lakh as earnest money agreeing to execute and get the sale deed registered on receipt of balance consideration, but ultimately refused to sell the land and building. It is a clear case of non-performance of contract or breach of contract,

which is a civil liability. There is no criminal liability. The complainant allegedly paid Taka 2 lakh as earnest money, which became the money of the accused. That money was not entrusted to the accused keeping its ownership with the complainant. So there is no criminal breach of trust. The ingredients of cheating also are absent. There is nothing to show that the complainant gave the accused persons the money on the promise of the accused persons to sell their land with the building to the complainant though they had no such intention to sell the building. Having regard to the above context the allegations made in the petition of complaint even if accepted as true do not constitute any offence of criminal breach of trust punishable under section 406 or cheating punishable 420 of the Penal Code. Therefore, the proceeding of the case if prolonged would be harassment of the accused-petitioners and, as such, it is a sheer abuse of the process of the Court. Therefore, the proceeding of the case is liable to be quashed to secure the ends of justice.”

In the present case, we have already noticed that in the four corners of the petition of complaint or the inquiry report there is no allegation that at the time when the contract for rent of the shop was entered into and received a security deposit, the accused petitioners had any dishonest intention to deceive the money. Moreover, from a plain reading of the petition of complaint and inquiry report it manifests that the accused persons allegedly contracted to rent a shop to the complainant for Tk 1,10,000/- as a security deposit, and whilst the complainant asked the accused persons to return the said security deposit the accused persons refused to pay the money does not constitute any criminal offense. Therefore, we hold that the alleged transaction between the complaint and the accused persons is clearly and admittedly a business transaction and that the allegation brought against the accused petitioners is a civil liability and is a case of non-performance of contract or breach of contract as the ingredients of cheating are vacuous. So, the institution and continuation of the instant case would amount to harassment of the accused petitioners.

Having come to the conclusion that the proceedings under sections 406 and 420 of the Penal Code cannot be maintained, the question is whether the instant proceeding is liable to be quashed at this stage. In the case of Abdul Quader Chowdhury and others Vs the State reported in 28 DLR (AD) 39 that our Appellate Division categorizes the cases where the High Court Division can/should interfere to quash a criminal proceeding and observed: ----

Interference even at an initial stage may be justified where the facts are so preposterous that even on the admitted facts no case can stand against the accused and that a further prolongation of the prosecution would amount to harassment to an innocent party and abuse of the process of the Court. Besides, some categories of cases may also be indicated where the inherent jurisdiction can and should be exercised for quashing the proceeding. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to abuse of the process of the Court or that the quashing of the impugned proceedings would

secure the ends of justice. If the criminal proceedings in question are in respect of an offense alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings the High Court would be justified in quashing the proceedings on that ground. Cases may also arise where the allegations in the First Information Report or the complaint even if they are taken at their face value and accepted in their entirety, do not constitute the offense alleged, in such cases no question of appreciating evidence arises, it is a matter merely of looking at the complaint or the First Information Report to decide whether the offense alleged is disclosed or not. In such cases, it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person.

In the light of the above-settled provision of law, in the given facts and circumstances of the case, since no ingredients of sections 406 and 420 of the Penal Code are present, we have no option but to interfere with the instant proceedings invoking our inherent jurisdiction

under section 561A of the Code of Criminal Procedure at an initial stage as a rarest of the rare case. Because of the above, the irresistible conclusion is that the proceeding of the instant case must be quashed.

Resultantly, the Rule is made absolute.

Let the proceeding of Complainant Case No.809 of 2016 filed under Section 406 / 420 / 34 of the Penal Code, now pending before the learned Judicial Magistrate, Cognizance Court No.1, Naogaon is hereby quashed.

Communicate the judgment and order to the Court concerned at once.

SHAHED NURUDDIN, J:

I agree.