

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

Present

Mr. Justice Md. Iqbal Kabir

And

Mr. Justice Md. Riaz Uddin Khan

Criminal Miscellaneous Case No. 64543 of 2022

IN THE MATTER OF:

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

-And-

IN THE MATTER OF:

Krishibid Dilip Kumar Voumik and others

... Accused-Petitioners

Versus

The State and another

...Opposite Parties

Mr. Md. Arifur Rahman, Advocate

...For the Petitioners

Mr. Md. Yadnan Rafique, Advocate

...For the Opposite Party No. 2

Mr. Farid Uddin Khan, DAG with

Mr. Md. Anichur Rahman Khan, DAG

...For the State

Judgment on: 27.11.2024

Md. Riaz Uddin Khan, J:

By this Rule the opposite parties were asked to show cause as to why the judgment and order dated 18.05.2022 passed by the Senior Sessions Judge, Jamalpur in Criminal Revision No. 160 of 2021 affirming the order dated 03.11.2021 passed by the Senior Judicial Magistrate, 3rd Court, Jamalpur in C.R Case No. 604(1)2020 under sections 420/109 of the Penal Code, 1860 now pending in the Court of Senior Judicial Magistrate, 3rd Court, Jamalpur should not be

quashed and or such other or further order or orders should not be passed as this court may deem fit and appropriate.

At the time of issuance of Rule all further proceedings of C.R Case No. 604(1)2020 under sections 420/109 of the Penal Code, 1860 was stayed initially for a period of 06(six) months from date which was lastly extended till disposal of the Rule.

Facts, in a nutshell, for disposal of this Rule are that one Md. Faruque Ahmed filed a petition of complaint before the Court of Learned Cognizance Court of Jamalpur Sadar, Jamalpur under Sections 406/420/109 of the Penal Code against the accused-petitioners alleging *inter alia* that an oral agreement was executed between the Complainant and the accused and by which complainant took delivery of insecticides from the accused in consideration of cash. On the inducement of the accused as a *bonafide* purchaser the complainant paid in total Tk-21,19,527/= to the accused through several transactions in cash or bank cheque or online transfer. The accused delivered products i.e., insecticides equivalent to Tk-6,01,106/= to the complainant. Therefore, the accused owe products equivalent to Tk-15,18,421/= only to the complainant. The complainant requested the accused to deliver the rest products or pay back the money but the accused did not pay any heed to it. Then the

complainant sent a legal notice on 18.08.2020 to the accused through registered post with A/D but without any fruitful result. Lastly on 21.08.2020 the complainant at his office demanded the same to the accused orally but the accused refused to comply. Thus when all the initiatives taken by the complainant went in vain he filed the instant case against the accused under section 406/420/109 of the Penal Code, 1860 before the Cognizance Court of Jamalpur Sadar, Jamalpur.

The learned Magistrate after examining the complainant ordered the Assistant Commissioner (Land) Jamalpur sadar to enquire into the matter and submit report and accordingly the Assistant Commissioner (Land) submitted inquiry report being No. রানাঃইউঃভূঃআঃ/সদর/জামাল/৯৫ dated 01.11.2020 before the learned Magistrate and the learned Magistrate finding *prima facie* case against the accused petitioners took cognizance under section 406/420/109 of the Penal Code by his order dated 06.11.2020. Thereafter on 09.12.2020 the accused petitioners voluntarily surrendered before the Additional Chief Judicial Magistrate, Jamalpur and obtained bail. Thereafter the case was transferred to the Senior Judicial Magistrate, Court No. 3, Jamalpur for trial. The Senior Judicial Magistrate, Court No. 3, Jamalpur on 03.11.2021 framed charged against the accused petitioners under sections 420/109 of the Penal Code.

Against the Order dated 03.11.2011 passed by the Senior Judicial Magistrate the accused-petitioners filed Criminal Revision No. 160 of 2021 before the Senior Sessions Judge, Jamalpur. The learned Senior Sessions Judge after hearing both the parties vide impugned judgment and order dated 18.05.2022 was pleased to reject the Revision and affirmed the charge framing order passed by the learned Magistrate.

Being aggrieved by and dissatisfied with the impugned judgment and order dated 18.05.2022 passed by the Senior Sessions Judge the accused petitioners moved this Court under section 561A of the Code of Criminal Procedure on the contentions *inter alia* that as admittedly there were business transactions between the parties and contractual obligation was partly complied with there was no initial intention to deceive, hence no case lie under section 420 of the Penal Code.

The Complainant-Opposite Party No. 2 entered appearance and filed counter-affidavit stating *inter alia* that accused petitioners categorically admitted the allegation that they did not give products of an amount of Tk-15,18,421/- by which he made offence of breach of trust and cheating and the facts suggest that *prima facie* there are ingredients of offence under section 420/109 of the Penal Code hence the learned Magistrate lawfully framed charge against them and the

learned Session Judge duly affirmed the same which cannot be deemed as abuse of the process of the Court and the Rule deserved to be discharged with cost for ends of justice.

Mr. Md. Arifur Rahman, the learned advocate for the accused-petitioners submits that it is admitted fact that the complainant has bought several products from the accused-petitioners' company and paid the due money through installments. But finally he claimed Tk-15,18,421/- to the accused petitioners which is totally contradictory with his claim as the complainant admitted that he received products from the accused-petitioners' company amounting to Tk. 6,01,106/- which proves that there is continuation of business transaction with the accused-petitioners and the complainant. There were transactions of money to the account of accused-petitioner No.1 several times by the complainant which prove there was part performance by the accused-petitioners and as such there was no ingredient of cheating at the time of business transaction. Because to justify prosecution for cheating under this section there must be initial intention to deceive. The learned advocate then submits that in this case there is no element under section 420/109 of the Penal Code where there were only Bank Account transaction and business transaction. The transaction between the parties was a business

transaction and the amount fell due after accounts at the end of the transaction. Under such circumstances the liabilities, if any, may be considered a civil liability only.

He finally submits that a case should not continue without a minimum amount of evidence with the case docket which may cause the conviction of the accused, but in the instant case it is apparent that there is civil dispute between the parties and the Complainant is lodging cases against the owner of the company and its employee which definitely comes under the definition of abuse of process of court. As such the impugned judgment and order of framing charge should be quashed for ends of justice.

In support of his submissions the learned advocate for the petitioners cited the decisions of Nasiruddin Mahmud & others Vs Momtazuddin Ahmed & another reported in 36 DLR (AD) 14; Islam Ali Mia Vs Amal Chandra Mondol reported in 45 DLR (AD) 27; Barman-Vs Md. Nasirul Hoque reported in 6 ALR(2) (AD) 93; Dewan Obaidur Rahman Vs State and another reported in 4 BLC (AD) 167; Syed Mohammad Hashem @ Hashim Vs State reported in 48 DLR (AD) 87 and Md. Motaleb Hossain Vs The State & another reported in 6 MLR 1689.

Per contra, Mr. Md. Yadhan Rafique, the learned advocate for the complainant opposite party no.2 submits that the complainant made a contract with the accused petitioners to purchase

insecticides and being a *bona fide* purchaser Complainant paid in total Tk.21,19,527/- only to the Accused-Petitioners through several transactions in cash or bank cheques or online transfers by the inducement of the Accused-Petitioners. The Accused-Petitioners delivered some products i.e., insecticides equivalent to Tk.6,01,106/- only to the Complainant and thereafter deceived the complainant by inducing him to deposit huge amount of money though not due to them. Hence, it is evident that the instant Accused-Petitioners' act of inducement fall under the purview of cheating. Therefore, the learned Senior Judicial Magistrate rightly framed charge against the instant Accused-Petitioners under section 420/109 of the Penal Code and hereby it is not an abuse of the process of the court. The learned advocate then submits that there may be elements of cheating in business transaction even there is part performance, if there is inducement. Whether the case is civil or criminal in nature is a matter to be decided after examination of witnesses as it primarily depends on the intention of the parties, which is to be gathered from all the attending circumstances including the transaction itself.

In support of his submissions the learned advocate for the complainant opposite party cited the decisions of Arifur Rahman @ Bablu vs.

Shantosh Kumar Sadhu and another reported in 46 DLR (AD) 180; Haji Alauddin vs. The State and another reported in VI ADC 164; State vs. Md. Iqbal Hossein and others reported in 48 DLR (AD) 100 and Md. Habib Jamal and others vs. The State reported in 38 BLD (AD) 29.

We have heard the submissions made at the Bar and perused application along with annexures and counter-affidavit and the materials on record. According to the learned advocate for the accused petitioners there is no ingredient of cheating in the petition of complaint. On the other hand according to the learned advocate for the complainant opposite party there is sufficient allegation of such offence committed by the accused petitioners in the petition of complaint which deserved to be tried and not to be interfered with at this stage of framing of charge.

In this context, now let us look at section 415 of the Penal Code, the definition of cheating which is reproduced below:

“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".

In our plain understanding the ingredients of cheating are deception of one person by another person and fraudulently or dishonestly inducing the person so deceived to deliver any property. It is therefore clear that the acts of deceiving and thereby dishonestly or fraudulently inducing the person deceived are acts which must precede the delivery of any property. The Indian Supreme Court in a case reported in AIR 1974 SC 1811 observed that essential ingredients of "cheating" are as follows: (i) there should be fraudulent or dishonest inducement of a person by deceiving him; (ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) in cases covered by (ii) (b) the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property. Therefore, to constitute an offence under section 420 of the Penal Code, there should not only be cheating, but as a consequence of such cheating the accused should have dishonestly induced the person deceived to deliver any property to any person, or to make,

alter or destroy wholly or in part a valuable security or anything which is capable of being converted into a valuable security.

In committing offence of cheating the intention of the parties is very important and the intention of defrauding the other side or 'mens rea' can be seen or surfaced by any act or acts of parties and is to be gathered from surrounding circumstances. Thus, in the case of cheating the intention of the accused person can be found only at the time of commission of offence. Importantly, a transaction on its face though may apparently be of a civil nature may give and does many a time give rise to criminal liability. Each and every case depend upon the facts and circumstances of that particular case only and the offence alleged can be established by the prosecution or complainant on production of evidence at the time of trial. This view gets approval from a series of cases set out in our jurisdiction as well as of this sub-continent. In the case of State Versus Iqbal Hossain reported in 48 DLR (AD) 100 his Lordship A T M Afzal, CJ speaking for the Court observed:-

“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 offence 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 contract, apart from civil liability, there may be elements of an offence or offences 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. Our view gets support from the decision reported in 6 ADC 165 in the case of Haji Alauddin Vs. The state and another wherein the Appellate Division held:

“In order to gather the intention, the attending circumstances and the conduct of the parties has to be examined in the context of the transaction itself, necessarily requires evidence or materials which cannot be possible without examination of witnesses.”

In the case reported in 7 BLT (AD) 132 our apex court observed:

“A transaction may be of a civil nature but by reason of the allegations made in a particular case there may also appear elements/ingredients of criminality in the transaction. It will be for the complainant to prove his allegations by evidence at the trial. He cannot be shut out at this stage by telling him that his remedy lay in suit for specific performance of contract.”

In the case of Khondakar Abul Bashar Vs. The state reported in 63 DLR (AD) 79, our Appellate Division held:-

“There is no legal impediment to file a criminal case even if a civil suit is pending on the selfsame allegation provided the ingredients of offence are present”.

The learned advocate for the complainant opposite party heavily relied upon the decision of Arifur Rahman alias Bablu Vs. Shantosh Kumar Sadhu and another reported in 46 DLR (AD) (1994) 180. In that case the accused requested the complainant to supply two trucks of jute at Taka 83,059.00 and assured him that he would pay Taka 40,000 in cash at the time of delivery and the rest Taka 43,059.00 within three days thereafter.

After the Accused paid Taka 40,000.00 the Complainant, in good faith, supplied the goods, but the Accused did not pay the balance within three days. Speaking for the Court MH Rahman, J observed:-

"5. Here, the complainant's case is that he, in good faith, delivered the jute on the accused's inducement of part payment and specific promise to pay the balance within three days. From what has been alleged in the complaint it cannot be said that there was no prima facie case against the accused. The High Court Division correctly refused to quash the proceeding."

Relying upon the said decision the learned advocate submits that the facts of the above case is squarely similar to the present case and therefore, it can be said that cheating and deception took place since the allegations put forward by the Complainant-Opposite Party falls within the purview of section 420 of the Penal Code, 1860.

Let us now consider the relevant cases cited by the accused-petitioners. In the case of *Islam Ali Mia Vs Amal Chandra Mondol* reported in 45 DLR (AD) 27, business transactions were going on between the complainant and the accused for a long time relating to supply of fish and the latter made payments in parts. A balance amount claimed by the complainant was not agreed on and

the accused refused to pay it. The Appellate Division held that this refusal to pay the balance does not constitute any criminal offence under section 420 of the Penal Code. In the case of Nasiruddin Mahmud & others Vs. Momtazzuddin Ahmed & another reported in 36 DLR (AD) 14 our apex court held in a majority decision that there was a partnership business between the parties and in case of partnership every partner has dominion over the partnership property by reason of the fact that he is a partner. Where under an agreement between the partners the working partner is authorised to recover the dues of the partnership, he cannot be said to have been guilty of criminal breach of trust even with respect to the dues realised by him from certain person by not depositing them in the Bank. Once it is held that it was a partnership business and the parties were partners such prosecution cannot be maintained. If the prosecution for criminal misappropriation cannot be maintained, the prosecution for cheating cannot also be maintained.

In the present case the question is therefore arises for consideration is whether the material on record prima facie constitutes any offence against the accused-petitioners. Is there any ingredient of criminal offence under sections 420/109 of the Penal Code in the light of above decisions of our apex Court? In the present case

the complainant alleged that an oral agreement was executed between the Complainant and the accused and by which complainant took delivery of insecticides from the accused in consideration of cash. On the inducement of the accused as a *bonafide* purchaser the complainant paid in total Tk-21,19,527/= to the accused through several transactions in cash or bank cheque or online transfer. The accused delivered products i.e., insecticides equivalent to Tk-6,01,106/= to the complainant. Therefore, the accused owe products equivalent to Tk-15,18,421/= only to the complainant. The complainant requested the accused to deliver the rest products or pay back the money but the accused did not pay any heed to it. Thus, we find it difficult to accept the submission of the learned advocate for the petitioners that no criminal liability arises by the conduct of the accused-petitioners or there is no ingredient of cheating along with abetment under sections 420/109 of the Penal Code.

In the present case we have already noticed that there is allegation that the Complainant-Opposite Party was dishonestly induced by the Accused-Petitioners to pay money in advance in order to secure the delivery of products i.e., insecticides and the Complainant-Opposite Party in good faith paid in advance but the Accused-Petitioners did not deliver the products accordingly. So, without taking evidence it

cannot be said at this stage of framing charge that there is no ingredients of cheating in the petition of complaint or there was no intention to cheat at the time of transactions. The complainant brought prima-facie allegation of cheating and the onus or burden of proof of the said prima-facie allegations against the accused-petitioners is heavily on the complainant and the accused-petitioners are at liberty to controvert all those allegations during trial by cross-examining the prosecution witnesses and also by adducing and producing witnesses and documents before the trial court.

At the same time, it is also noticed that there is a growing tendency of complaints attempting to criminalization of matters which are essentially and purely civil in nature, either to apply pressure on the accused to gain benefit, or out of enmity or to harass the accused. Sometimes it may happen because the justice delivery system in civil court of our country is lengthy. Whatever may be the case, criminal proceedings should not be used for settling scores or to pressurize parties to settle civil dispute.

In view of the discussion made above and the reasons stated hereinbefore we hold that there is no reason for interference by this Court at this stage by invoking inherent jurisdiction under section 561A of the Code of Criminal Procedure.

We find that there is a prima-facie case to be tried by the trial court and thus the rule has no legs to stand being devoid of substance, is destined to fail.

In the result, the Rule is **discharged**.

The order of stay granted earlier by this Court is hereby recalled and vacated.

The trial court is at liberty to proceed with the C.R. Case No. 604(1)2020 in accordance with law.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.