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. 5334 of 2022

IN THE MATTER OF:

An application under Section 561A of the Code of Criminal Procedure, 1898

-And-

IN THE MATTER OF:

Md. Munsur Rahman and another

... Accused-Petitioners

Versus

The State and another

...Opposite Parties

Mr. Md. Raihan Kawsar, Advocate

....For the Petitioners

Mr. Md. Anamul Hossain, Advocate

...For the Opposite Party No. 2

Mr. Farid Uddin Khan, DAG with
Mr. Md. Anichur Rahman Khan, DAG

...For the State

Judgment on: 12.12.2024

Md. Riaz Uddin Khan, J:

By this Rule the opposite parties were asked to show cause as to why the proceedings of C.R Case No. 951 of 2019 under sections 406/420 of the Penal Code, pending in the Court of Senior Judicial Magistrate, Court No. 1, Chapi Nawabganj should not be quashed and or pass such other or further order or orders as to this court may deem fit and appropriate.

At the time of issuance of Rule all further proceedings of C.R Case No. 951 of 2019 under

sections 406/420 of the Penal Code, was stayed till disposal of the Rule.

The facts of the case, in brief, is that the accused-petitioner no. 2 took loan of Tk. 3(three) crore from IFIC Bank through sanction letter no. 01/2012 dated 25.04.2012 and in this regard her husband, accused no. 1 and her brother-in-law late Mofizuddin gave mortgage of some land against that loan vide the registered mortgage deed no. 5890/2012 dated 03.05.2012 and a irrevocable power of attorney deed vide no. 5891/2012 dated 03.05.2012 was executed. The loan money was scheduled to repay in 52 installments within 31.03.2019. However, on 25.08.2019 the complainant went to the Tahsil Office for paying the rent of said scheduled land but the complainant noticed that the scheduled land was sold by the accused nos.1-2 in connivance with each other to the accused nos. 3-11 vide the different registered deeds on different dates after mutating the same in order to defraud the complainant. Then the complainant on 15.09.2019 went to the house of accused- petitioners and asked about the matters and the accused-petitioners admitted the facts but denied the repayment of loan money. Hence the instant case is filed.

In course of time the trial court framed charge under section 406 and 420 of the Penal Code on 04.11.2021 against the accused

petitioners. The case was fixed for examination of witnesses and at this stage the accused petitioners moved this Court invoking section 561A of the Code of Criminal Procedure for quashing the proceedings and obtained the Rule and order of stay as stated at the very outset.

The Complainant Opposite Party No. 2 Bank entered appearance and filed counter-affidavit wherein it is stated that Complaint-Opposites party on 07.10.2019 instituted C.R Case No. 951 of 2019 under sections 406/420 of the Penal Code, 1860 against the accused-Petitioners and others on the allegations of criminal breach of trust and cheating because the accused petitioners mutated their names in the mortgaged property and sold those to accused nos.3-11 without the consent of the complainant bank, the mortgagee.

Mr. Md. Raihan Kawsar, the learned advocate for the accused-petitioners, submits that no immovable property under registered mortgage can be re-mortgaged or sold without the written consent of the mortgagee, and if any re-mortgage or sale is made that will be void as per section 53D of the Transfer of Property Act, 1882. If the action of sale of the mortgaged property is considered as *void ab initio,* the act of sale equals to non-transfer for which no penal provision should be attracted as no sale took place in the eye of law. In addition, no interest of mortgagee extinguishes or hampered on transfer

of the property by the mortgagor as per section 48 of the Transfer of Property Act as previous encumbrance gets priority over the subsequent encumbrance in case of payment of the sale proceeds of the mortgaged property. The property mortgaged is owned by the accused-petitioner no.1 as a guarantor who creates an encumbrance upon his property through mortgage, the enforceability of which depends on a future event of non-payment of loan by the borrower and the complainant did not get any absolute ownership on the mortgaged property. In such a circumstance, it should not be claimed that the complainant was the owner of the property which was entrusted to the mortgagor.

The learned advocate then submits that the complainant Bank has a contingent interest over the mortgaged property and actual value of the property was unascertained, the ownership of which would become absolute on the happening of a future event of non-payment and after a calculation of total payment and outstanding of the disbursed loan. The actual value of the property could also be more than that of the loan availed by the loanee. Where the ownership of the complainant on the mortgaged property has not been ascertained yet and loan tenor has not been elapsed yet and event of default did not take place, no question of offence under section 406 and 420 of the Penal Code should arise and hence

the proceedings against the petitioners should be quashed for the ends of justice.

He further submits that mere failure or refusal to pay a loan is not an offence under section 406/420 of the Penal Code. As the accused petitioner no.2 is just a loanee who deserves to be relieved from the vexatious case which is totally of a civil nature so far her transaction is concerned. In support of this contention he referred 2 (two) decisions of the case of MA Sukkur Vs. Zahirul Hoque and Md. Hasibul Bashar Vs. the state reported in 23 BLC (AD) 148 and 26 BLD 630 respectively.

He then submits that the Appellate Division made an observation in the case of *Syed **Ali Mir v Syed Omar Ali [42 DLR (AD) 240]**: Money claims not the outcome of a particular transaction but arose after year-end accounting following regular business between the parties. If on settlement of accounts at the end of the period some money falls due to one party from the other party and the other party fails to pay the dues, such liability cannot be termed criminal liability. Allegation that dues were allowed to accrue dishonestly, neither attract an offence under section 420 nor under section 406 or under any other section. The whole allegation in complaint petition, even if true, cannot form basis of any criminal proceeding and the proceedings are quashed'*.

He next submits that the High Court Division made an observation in the case of ***Abdul Mannan Sarker v The State and another [6 BLC 450]:*** *'The accused-petitioner took Taka one lac sixty-four thousand from the informant in three installments as loan for his business purpose. In the absence of any promise to repay the loan money to the complainant within a specific period of time and in the absence of any allegation of inducement for getting the loan money from the complainant, mere failure or refusal to repay the said loan money shall not constitute the offence under sections 406/420 of the Penal Code and hence the proceedings is quashed'.*

He persistently submits that it is settled principles of law that *'Failure to pay the amount did not necessarily mean any dishonest intention on the part of accused; Inability to pay or refusal by accused to pay the outstanding could not give rise to criminal liability which had given rise to civil liability only and offence under sections 406 and 420 of the Penal Code, therefore, prima facie was not made out'.*

The learned advocate strenuously submits that there is no specific averment in the complaint petition that the accused petitioner no.2 directly induced the other accused to transfer the mortgaged property. In addition, it is the promise made by the mortgagor to the Bank in the mortgage deed that he would not transfer

his land until the loan was repaid by the loanee wherein there was no duty burdened upon the loanee by law to take care of that property or to ensure that the mortgaged property not transferred by the mortgagor. Moreover, there is no legal provision that the mortgagor is bound to abide by the instruction given by the loanee during loan period, if he receives any instruction from the loanee not to transfer the mortgaged land. In such a circumstance, it will be an abuse of process, if the loanee is prosecuted for the act committed by the mortgagor and hence the proceeding against the accused petitioner no.1 should be quashed for the ends of justice.

The learned advocate for the accused petitioners finally submits that the decision of the case of Ansar Ali Vs. Manager, Sonali Bank reported in 3 BLC (AD) 86 is related to the transfer of movable property but in the instant case is of the transfer of immovable property in relation to which transfer has been declared *void ab initio* by section 53D of the Transfer of Property Act and priority of rights has been ensured by the specific provision under section 48 of the said Act and hence no delivery or disposal of the property took place and the Bank also has the priority rights over the mortgaged land and as such the proceedings against the

petitioners should be quashed for the ends of justice.

On the other hand Mr. Md. Anamul Hossain, learned Advocate on behalf of the complainant opposite party No. 2 submits that in order to secure the loan facility in the name of the borrower-accused petitioner no. 2, borrower herself along with her husband the accused no. 1 and her brother-in-law late Mofizuddin executed a Registered Mortgage Deed and an Irrevocable Power of Attorney Deed in favour of the Complaint-Opposite Party Bank and being mortgaged with the Bank, in order to defraud the bank, without prior permission of the mortgagee bank, mortgagors executed partition deed among themselves, subsequently created Mutation Khatian and executed sale deed in favour of the 3rd party (accused nos.3-11) which is clearly comes under section 406/420 of the Penal Code, offence of criminal breach of trust and cheating.

He then submits that accused-petitioner by executing the partition deed of the mortgaged property abolished the butted and boundary of the schedule of mortgaged property and by selling of the mortgaged property accused-petitioner tried to make the Bank powerless to sale out the mortgaged property which is clearly criminal breach of trust and cheating as per definition of the Penal Code. By selling of the mortgaged property accused-petitioner breach the terms and

conditions of the Registered Mortgage Deed and Power of Attorney Deed as well as deprived the Bank to exercise its legal authority to sale out the mortgaged property as per section 12 of Artha Rin Adalat Ain, 2003.

The learned advocate next submits that the facts stated in the petition of complaint clearly constitute offence of criminal breach of trust and also cheating, triable by the Trial court. The facts stated and the documents submitted by the complainant in the trial Court in support of the case at the time of filing the Petition of complaint sufficiently established the prima facie case and once there is a prima facie case the proceeding cannot be quashed and as such the Rule is liable to be discharged.

He further submits that the Trial Court having found the prima facie case on the face of the record has rightly framed charge against the accused Petitioners and if feel aggrieved against the said order, petitioners could file revision in appropriate forum but filed the instant application before this Court and as such the Rule is not maintainable and liable to be discharged. Moreover, the pleas on basis of which the accused petitioners seek quashing the proceedings are defence pleas and disputed question of facts, yet to be proved by the accused petitioners before the Trial court. In fact, the accused petitioners have filed the

instant Criminal Miscellaneous case with a view to delay the proceeding of the complaint case.

The learned advocate for the complainant lastly submits that in the case of Ansar Ali (Md) Vs. Manager, Sonali Bank [3 BLC (AD) 86], it has been held that selling/removal of the mortgaged property without consent of the mortgagee is a criminal breach of trust and proceeding cannot be quashed and as such in that view of the case the instant Rule is liable to be discharged.

We have heard the submissions made at the Bar and perused the materials on record. According to the learned advocate for the accused petitioners there is no ingredient of either criminal breach of trust or cheating in the petition of complaint. On the other hand according to the learned advocate for the opposite party Bank there is sufficient allegation of such offence committed by the accused petitioners in the petition of complaint which deserved to be tried.

In this context, now let us look at sections 405 and 415 of the Penal Code, the definitions of criminal breach of trust and cheating respectively which are reproduced below:

“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”.

“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”.

The first ingredient of the offence of criminal breach of trust is that there ought to be an entrustment with property or with dominion over property to the accused by the complainant. If there is such entrustment and the accused dishonestly uses or disposes of that property in violation 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 he is said to commit criminal breach of trust. The word ‘entrustment’ in section 405 connotes that the accused holds the property in a fiduciary capacity. According to ATM Afzal, J (as his lordship then was) in the

case of Shamsul Alam & others Vs. AFR Hassan & others the expression ‘entrustment’ in section 405 is used in its legal and not in its figurative or popular sense. If the expression ‘entrustment’ is applied to a thing which is not money, it would indubitably indicate that such thing continues to remain the property of the prosecutor during the period in which the accused is permitted to retain its possession or is permitted to have any dominion over it. When money is ‘entrusted’ within section 405 to the accused it would be transferred to him under such circumstances which show that, notwithstanding its delivery, the property in it continues to vest in the prosecutor, and the money remains in the possession or control of the accused as a bailee and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with the instructions. The word ‘trust’ is a comprehensive expression which has been used not only to cover the relationship of trustee and beneficiary but also those of bailor and bailee, master and servant, pledgor and pledgee, guardian and ward and all other relations which postulate the existence of a fiduciary relationship between the complainant and the accused.

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 our Appellate Division made the following observation:-

> “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 this 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 of Khondakar Abul Bashar Vs. The state reported in 63 DLR (AD) 79, our Apex Court held that:-

> "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".

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-petitioner. Is there any ingredient of criminal offence under sections 406/420 of the Penal Code in the light of above decisions of our apex Court?

In our plain understanding cheating may occur even in course of carrying out business by any of the side 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. In the present case the complainant Bank and the accused are not business partners rather it is alleged that the accused petitioner no.2 took loan for her business purpose whereas the accused petitioner no.1 was the guarantor of the said loan by giving mortgage of his property, who is the husband of the petitioner no.2. The complainant alleged that after the death of one of the mortgagor-guarantors, the accused petitioners, who are husband and wife, in connivance with each other mutated the mortgaged property in their names and then sold those mortgaged property to the 3rd party without the consent of the complainant in order to defraud the complainant bank. Meanwhile the accused petitioners became defaulter and they

have sold the mortgage property so that complainant cannot recover the loan money. It is true that ownership remains with the mortgagor, while the mortgagee holds a secured interest until the debt is repaid or foreclosure/sale enforced. As per section 48 and 53D of the Transfer of Property Act, 1882 such sale of mortgaged property would be treated as void but the act of the accused petitioner cannot be said to be done without dishonest intention. If there is any dishonest intention or use of forged documents it is clearly punishable under section 406 of the Penal Code. In our view, in the case of mortgaged property absolute ownership of the property of the prosecutor is not a *sine qua non* of the offence described in section 405 of the Penal Code. Because, restrictions are imposed upon the absolute ownership of the property of the mortgagor as he cannot sale the same without repayment of the total loan or without permission of the mortgagee. It appears that the complainant alleged that the accused persons were entrusted with the mortgaged property but were sold by the accused no.1, (the mortgagor) in connivance with accused no.2 (the loanee) without the knowledge of the Bank and they happens to be the husband and wife. In such circumstances, whether the accused petitioner no.2 had any involvement in those acts in violation of the entrustment or not cannot be decided at this

stage without taking evidence. The instant case has not been filed for realization of loan money or for mere failure to repay the loan money but for alleged sell of mortgaged property. Thus, we find it difficult to accept the submission of the learned advocate for the petitioner that no criminal liability arises by the conduct of the accused-petitioners or there is no ingredient of either criminal breach of trust or cheating under sections 406/420 of the Penal Code.

It is settled principle of law that failure to pay the loan amount does not necessarily mean any dishonest intention on the part of the loanee. Inability to pay or refusal to pay the outstanding does not constitute any criminal liability but give rise to civil liability only.

In the light of above facts and circumstances let us now consider the decisions cited at the bar. In the case of M.A. Sukkur Vs. Md. Zahirul Haque and another reported in 23 BLC (AD) 148 = 23 BLT (AD) 76 the accused took loan from a Bank and defaulted in making repayment in time for which he issued cheque which was bounced back for insufficient fund. Bank filed case and charge was framed under section 420 of the Penal Code. Against the framing of charge the accused moved the High Court Division which refused to interfere. Being aggrieved the accused went to the Appellate Division and the apex Court held-

> “13. The allegations of bouncing of cheque simpliciter does not ipso facto constitute any offence as defined under Section 115 (sic) (it would be 415) of the Penal Code punishable under Section 420 of the Penal Code and as such, framing of charge against the appellant under Section 420 of the Penal Code suffered from serious illegality.”

The above mentioned reported case also does not help the cause of the present petitioners as the instant case has not been filed for non-payment of loan money rather for sold out of mortgaged property in order to defraud the complainant. In the case of 42 DLR (AD) 240 (supra) it was held that *if on settlement of accounts at the end of the period some money falls due to one party from the other party and the other party fails to pay the dues, such liability cannot be termed criminal liability.* The fact of the case is not at all tally with the present case for which the ratio of this case is not applicable at all in the present case.

On the other hand the facts of the case of Ansar Ali Vs. Manager, Sonali Bank reported in 3 BLC (AD) 86 is identical to the present case. In the reported case the complaint was filed by the Bank under sections 406/418/420 of the Penal Code

on the allegation of selling/removing hypothecated bricks, machinery and coal against the loanee and the appellant, a guarantor. The High Court Division refused to quash the proceeding on the prayer of the guarantor who then moved the Appellate Division and the Court held-

> "5. From petition of complaint it is found that co-accused loanee ….. in collusion with the present petitioner who was a guarantor sold/removed mortgaged properties kept in the custody of the loanee. There being such averment in the petition of complaint the proceeding cannot be quashed as has been rightly found by the learned judges of the High Court Division."

In the present case as we have already noticed that in the petition of complaint the complainant-opposite party brought allegations against the accused-petitioners for selling mortgaged property and thereby committed offence of criminal breach of trust and cheating which prima-facie disclose criminal offence and the onus or burden of proof of the said prima-facie allegations against the accused-petitioner 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. Whether accused persons jointly misappropriated the mortgaged property or accused no.1 solely done it or at all any mortgaged properties were misappropriated, these all are question of facts and can only be decided by the trial court after taking evidence.

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 trial court is at liberty to proceed with the C.R. Case No. 951 of 2019 in accordance with law.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.

Ziaul Karim
Bench Officer