

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. 61753 of 2023

IN THE MATTER OF:

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

-And-

IN THE MATTER OF:

Md. Ziaul Haque @ Iftexhar Afzal

... Accused-Petitioner

Versus

The State and another

...Complainant-Opposite Parties

Mr. Zobair Abbas, Advocate

....For the Petitioner

Mr. Abdul Alim, Advocate

...For the Opposite Party No. 2

Mr. Farid Uddin Khan, DAG with

Mr. Md. Anichur Rahman Khan, DAG

...For the State

Judgment on: 28.11.2024

Md. Riaz Uddin Khan, J:

By this Rule the opposite parties were asked to show cause as to why the order dated 11.07.2023 passed by Sessions Judge, Narayanganj in Criminal Revision No. 180 of 2023 affirming the order dated 02.10.2022 passed by the Chief Judicial Magistrate, Narayanganj in C.R Case No. 24 of 2017 under sections 406/380/427 of the Penal Code, pending in the Court of Chief Judicial Magistrate, Narayanganj should not be quashed and or such other or further order or

orders should not be passed as to this Court may deem fit and proper.

The facts of the case, in brief, is that the complainant filed a petition of complaint alleging *inter alia* that the complainant is a banking company and the accused petitioner as a client of the said bank availed composite investment facilities of Tk-50.00 crore which was subsequently enhanced up to Tk-100.00 crore for the purpose of importing raw cotton by giving security of pledge goods (raw cotton). The accused imported the goods which were kept in the 2 godowns. On 29.09.2015 when it was inspected by the officials of the complainant bank it was found that the side wall of the godown was broken and most of the bales of raw cottons are stolen by the accused persons from both the godowns amounting to Taka more than 39 crore and thus the accused persons committed criminal breach of trust and theft. Thereafter, the accused persons made commitment to give mortgage of properties owned by them and accordingly submitted some documents but subsequently those were found forged deeds. With these allegations the complainant filed the instant case under sections 380/381/406/414/427/447/448/34/109 of the Penal Code.

In course of time on 02.10.2022 the court of Magistrate as trial court framed charge against the accused petitioner and others under sections

406/380/427 of the Penal Code on which the accused petitioner pleaded not guilty. Being aggrieved by the charge framing order the petitioner filed Criminal Revision No. 180 of 2023 before the Sessions Judge, Narayanganj who after hearing was pleased to reject the same by his judgment and order dated 11.07.2023.

Being aggrieved by and dissatisfied with the said judgment and order dated 11.07.2023 the accused petitioner preferred the instant criminal miscellaneous application under section 561A of the Code of Criminal Procedure and obtained the Rule only as stated at the very outset.

The Opposite Party No. 2, Islami Bank Bangladesh Ltd. entered appearance and filed counter-affidavit wherein it is stated that the case arose out of the breach of trust and misappropriation and theft of property/goods which are offences spelled out in sections 380/406/427 of the Penal Code. The Petitioner availed composite investment facilities of Tk. 50.00 Crore which has been enhanced upto Tk. 100.00 Crore for the purpose of importing raw cotton for trading under 1 (one) year revolving basis from the Opposite Party No.2 by giving security of pledge of MPI/Bai-Murabaha goods including prescribed goods security to be sold under deferred payment and to be held under effective control of the bank on payment of bank's dues within due date and Lien on goods to

be released under TR till disposal and deposit of sale proceeds towards adjustment of the related investment account with the branch, TR to be obtained duly executed along with delivery order duly signed by the Investment client. The accused-petitioner was entrusted by the bank that he can sell the goods only on the consent of the complainant Bank but the Accused-Petitioner sold out the cotton without prior consent of the Bank with collusion of other accused keeping the complainant in dark and breaching of trust of the complainant Opposite Party. The Petitioner and other accused admitted their offence by writing letters on several dates and assured the Opposite Party/Bank that they will return the cotton price but the petitioner failed. The Petitioner wrote a letter to the Opposite Party No.2 on 11.10.2015 admitting the offence committed by the accused. On 09.11.2015 the Opposite Party wrote a letter to the Petitioner informing that after effective inquiry made by the Bank it was revealed that the Petitioner also forged the title deed and supplied the same to the opposite party against the investment facilities.

It is further stated in the counter-affidavit that on 29.09.2015 the officers of the Opposite Party No.2 visited the storage house (Godown/storehouse) in the presence of security guards of both the parties and found that the petitioner stolen the pledge goods from the

Khalpar storage house and thereafter, they held an inquiry regarding pledge goods (raw cotton) and found nothing left but only 600 Bells cotton out of 10740 Bells and then, it was also found from Jatramura Godown/storehouse only 100 Bells out of 7,510 Bells and all have been stolen from the said storage house within the period of 22.08.2015 to 07.09.2015. Thereafter, the Opposite Party no.2 communicated with the Petitioner for taking necessary steps for repayment of money of stolen goods and the accused assured on several dates that they will return the money of stolen goods and repay the all outstanding dues but they failed and therefore, the Opposite Party/Bank has no option but to file this Criminal Case.

Mr. Zobair Abbas, the learned advocate for the accused-petitioner submits that the accused petitioner is a *bonafide* businessman and the instant case brought against the petitioner is false, vague and only to harass and humiliate the accused petitioner and as such the impugned order of framing charge is liable to be quashed for the ends of justice. He then submits that the instant proceeding is civil in nature and there were transaction in between the parties as bank and client and as such the impugned order of framing charge is liable to be quashed for the ends of justice. He next submits that the charge has been framed by the trial court under Sections 406, 380

and 427 of the Penal Code which is illegal and without due process of law and the ingredients of the Penal Sections do not attract the complaint case and as such the proceeding cannot be sustained in law and the impugned order is liable to be quashed for the ends of justice.

The learned advocate finally submits that the alleged first cause of action was on 22.08.2015 and second cause of action on 07.09.2015 and there has 1(one) months gape in between two cause of action and case has filed on 09.01.2017 after 1 (one) year 5(five) months where there has no action of the complainant within the period and the trial court framed charge under Section 406, 380 and 427 of the Penal Code which is barred under Section 222 of the Code of Criminal Procedure which cannot be sustained in law and as such the impugned judgment and order is liable to be quashed for the ends of justice.

On the other hand Mr. Abdul Alim, learned Advocate on behalf of the complainant opposite party No. 2 Bank submits that the accused petitioner out of surmise and conjecture and with a *malafide* intention has filed the instant application by way of misinterpretation of law and facts to delay the criminal proceeding. The Petitioner is trying to mislead and misinterpret the provision of section 222 of the Code of Criminal Procedure. Referring Sub-Section (2) of

Section 222 of Code of Criminal Procedure the learned advocate submits that the trial court did not violate the provision in framing charge against the accused. The offence has been committed by the petitioner keeping the opposite party no.2 in dark and therefore, stating the approximate dates and gross sum of stolen goods values in charge framing order are sufficient to frame charge. The Magistrate framed charge properly following the provisions of Section 221 of the Code of Criminal Procedure and nothing wrong has been committed in framing charge. On 02.10.2022 the trial court framed charge following the provisions of the Code of Criminal Procedure and fulfilling the form prepared under Form 28(2) of 5th Schedule of the Code of Criminal Procedure, 1898.

The learned advocate for the opposite party bank finally submits that according to Black's Law Dictionary Pledge means "a bailment of goods to a creditor as security for some debt or engagement. A bailment or delivery of goods by a debtor to his creditor, to be kept till the debt is discharged". The fundamental principle of Pledge goods is that ownership lies with creditor and to be transferred prior consent of the creditor is required and therefore, in the present facts of the case the Accused-Petitioner committed offence under sections 406/380/427 of the Penal Code by transferring the pledge goods

without prior consent of the Complainant-Opposite Party No.2.

We have heard the submissions made at the Bar and perused the materials on record. According to the learned advocate for the accused petitioner there is no ingredient of either criminal breach of trust or theft or mischief 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 petitioner in the petition of complaint which deserved to be tried.

In this context, now let us look at sections 405, 378 and 425 of the Penal Code, the definitions of criminal breach of trust, theft and mischief 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”.

“378. Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.”

“425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits “mischief”.”

In our plain understanding the ingredients of criminal breach of trust is one person is to be entrusted with property which he dishonestly misappropriates or converts to his own use or uses or disposes of that property in violation of any direction of law or of any legal contract. 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. Apart from that it is to be looked into in the present case that whether there is any ingredient of offence of theft and/or mischief. From plain reading of definition of theft it is clear that

the ingredient is dishonestly taking away any moveable property of a person without the consent. The consent may be expressed or implied and may be given either by the person in possession or by any person having authority for that purpose. In the case of offence of mischief it is not essential that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

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 406/380/427 of the Penal Code? In the present case the complainant Bank and the accused are not business partners rather it is alleged that the accused took loan for business purpose of importing goods (raw cotton). The complainant is a banking company and the accused petitioner is a client of the said bank. The accused petitioner availed composite investment facilities for the purpose of importing raw cotton for trading by giving security of pledge of MPI/Bai-Murabaha goods including prescribed goods security to be sold under deferred payment and to be held under

effecting control of the bank on payment of bank's dues within due date and lien on goods to be released with consent and deposit of sale proceeds towards adjustment of the related investment account with the bank. The accused-petitioner was entrusted by the bank that he can sell the goods only on the consent of the Opposite Party/Bank but the Accused-Petitioner removed or sold out the cotton without prior consent of the Bank with collusion of other accused keeping the Opposite Party in dark and breaching of trust of the Opposite Party. It is further alleged that the Petitioner and other accused admitted their offence by writing letters on several dates and assured the Opposite Party/Bank that they will return the cotton price but the petitioner failed. The Petitioner wrote a letter to the Opposite Party No.2 on 11.10.2015 admitting the offence committed by the accused. It is also alleged that on 29.09.2015 the officers of the Opposite Party No.2 visited the storage house (Godown/storehouse) in the presence of security guards of both the parties and found through inquiry that the petitioner stolen the pledge goods from 2 (two) storage houses and all have been stolen from the said storage houses within the period of 22.08.2015 to 07.09.2015. It appears that the complainant alleged that the accused persons were entrusted with the hypothecated/pledged goods stored in the godown

but on inspection those goods found missing as those were sold/removed by the accused without the knowledge of the Bank. In such circumstances, whether the accused sold/removed those hypothecated goods in violation of the agreement 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/removal of hypothecated/pledged goods by the accused. 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-petitioner or there is no ingredient of either criminal breach of trust or theft or mischief under sections 406/380/427 of the Penal Code.

The facts of the present case are identical to the facts of the case of Ansar Ali Vs. Manager, Sonali Bank reported in 3 BLC (AD) 86. In the reported case (supra) 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 apex 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-petitioner for selling/removing pledged goods without the consent 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-petitioner is 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 pledged goods or accused was solely done it or at all any goods were misappropriated, these

all are questions 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.

Now, regarding the submission of violation of section 222 of the Code of Criminal Procedure, we do not find any substance of such submission. Section 222 of Code of Criminal Procedure states: "(1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to

have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234:

Provided that the time included between the first and last of such dates shall not exceed one year."

From plain reading of the section along with the framing of charge in the present case we do not find any illegality in the present case in framing charge.

In view of the discussions 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. 24 of 2017 in accordance with law.

Communicate the judgment and order at once.

Md. Iqbal Kabir, J:

I agree.