

LEX/BDHC/0214/2016

Equivalent Citation: 69 DLR (2017) 380

IN THE SUPREME COURT OF BANGLADESH (HIGH COURT DIVISION)

Criminal Revision Case No. 1062 of 2016

Decided On: 09.11.2016

Appellants: **Durnity Daman Commission**
Vs.

Respondent: **Monjur Morshed Khan and Ors.**

Hon'ble Judges:

M. Enayetur Rahim, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Md. Khurshid Alam Khan, Advocate

For Respondents/Defendant: Rakanuddin Mahmud, Shah Monjurul Hoque and Ragib Rouf Chowdhury, Advocates

JUDGMENT

M. Enayetur Rahim, J.

1. By filing an application under section 10(1A) of the Criminal Law Amendment Act, 1958 petitioner Durnity Daman Commission (hereinafter referred as Commission) has challenged the order dated 2-6-2016 passed by the learned Metropolitan Senior Special Judge, Dhaka in Metro Special Case No. 80 of 2016 arising out of Gulshan Police Station Case No. 36 dated 31-12-2013 rejecting the prayer for further investigation as well as the Naraji Petition. And accordingly, the instant Rule has arisen. Short facts for disposal of the Rule are as follows:

The commission on 31-12-2013 lodged an FIR with the Gulshan Police Station implicating the present opposite party Nos. 1 to 3 alleging, inter-alia, that they had committed offence of Money Laundering as defined in section 4 of the Money Laundering Protirodh Ain, 2009 and section 4 of Money Laundering Protirodh Ain, 2012. The said FIR was registered as Gulshan Police Station Case No. 36 dated 31-12-2013 under section 4 of Money Laundering Protirodh Ain, 2009 and section 4 of the Money Laundering Protirodh Ain, 2012.

2. In the FIR it was alleged that in course of an enquiry vide ER No. 8 of 2013 the Commission came to know that the learned Attorney General for Bangladesh in the month of January 2009 made a Mutual Legal Assistance Request (MLAR) to the concerned authority of Hong Kong for providing information regarding the wealth of accused Morshed Khan and Faishal Morshed Khan, In reply to said MLAR the concerned authority of Hong Kong sent the relevant documents to the learned Attorney-General for Bangladesh, who after receiving the same sent to the Commission. From the said documents the Commission found Bank accounts in the name of "Far East Telecommunications Ltd.," of which the accused were the owners, in the Standard Chartered Bank, Hong Kong Ltd. And in the name of the said firm 7 (seven) Multi Currency Accounts were being maintained of which 1 (one) USD Currency Account, 1 (one). USD Savings Account, 4 (four) Fixed deposited accounts and an Investment account. Respective passport numbers of the accused persons

were mentioned in the Bank documents. In the said accounts huge amount of money were deposited and transacted, details of which were mentioned in the FIR. Some of the accounts were operated by accused Morshed Khan and some were operated by accused Nasrin Khan and Faisal Morshed Khan jointly. The accused persons did not obtain any permission from the Government of Bangladesh to open such bank accounts in abroad as per the relevant provisions of Foreign Exchange Regulation Act, 1947. Even, they did not inform about the said bank accounts and its transaction to Bangladesh Bank and disclose about the said wealth before the competent authority of Bangladesh. Thereby, they concealed and converted the said money and committed the offence of Money Laundering as defined in section 2(ট)(অ) of Money Laundering Protirodh Ain, 2009 and section 2(ক)(১)(ফ)(আ) of Money Laundering Protirodh Ain, 2012.

3. After investigation of the case the concerned Investigating officer submitted final report after obtaining sanction from the Commission recommending to discharge the accused opposite parties.

4. The Metropolitan Senior Special Judge, Dhaka after receiving the case record registered the same as Metro. Special Case No. 80 of 2016 and by its order dated 5-4-2016 accepted the final report and discharged the accused opposite parties and released the seized alamat Nos. 1 and 2 and also discharged the Jimmadar from the liabilities of the Jimma Nama.

5. However, on 29-5-2016 on behalf of the Commission an application under section 173(3B) of the Code of Criminal Procedure read with sections 19 and 20 of the Durnity Daman Commission Ain, 2004 was filed for further investigation of the case and also a Naraji Petition.

6. In the Naraji Petition it was contended that the concerned investigating officer of the case being influenced by certain quarters prepared the final report suppressing the relevant materials keeping the Commission in dark and obtained sanction for filing the final report before the court. Eventually, Commission found that it was improper to file final report in the case. The Commission after much endeavor, on request Mutual Legal Assistance through the Central Authority under the United Nations (UN) Against Corruption brought information about the offence of Money Laundering of the accused persons by illegally keeping and transferring huge amount of money in abroad and thereby caused serious loss and injury to the country. And, as such, filing of final report before the court is not illegal but also malafide.

7. The learned Metropolitan Senior Special Judge after hearing the said application and the Naraji Petition by its order dated 2-6-2016 rejected those holding that after accepting the police report on 13-3-2016 and releasing the accused persons from the case the court became functus officio and, as such, the application for further investigation and Naraji petition were not entertainable.

8. In support of the Rule Mr. Md Khurshid Alam Khan, the learned Advocate, appearing for the Commission submits that in order to carry out the purpose Durnity Daman Commission Ain of 2004 (hereinafter referred to as the Ain of 2004) the Commission is competent to take any action, incidental and ancillary, for investigation including further investigation if the report is found to be biased or otherwise incomplete or defective. Referring to section 17 of the Ain of 2004 he further submits that Commission is empowered to perform any function to achieve the object of the law relating to prevention of corruption which necessarily includes further investigation. The learned Special Judge accepted the report mechanically without applying its judicial mind. It is the duty of a court to have perused and

considered the police report before passing any order on it to ascertain whether prima facie offence has been disclosed or not and thereby, mechanical acceptance of the report by the learned Special Judge has occasioned failure of justice.

9 . Mr. Rokanuddin Mahmud, the learned Advocate, appearing for the accused opposite parties supporting the impugned order submits that the order of acceptance of final report releasing the opposite parties from the charges brought against them, have taken effect and the entire process has been completed and thereby the accused opposite parties have acquired a vested right and thereby, at this stage there is no scope to hold further investigation on the same allegation. In this connection he submits that the principle of Locus Poenitentiae will be applicable and he has referred to the cases of Shahbaz vs the Crown, reported in PLD 1956, page 46, Venkatesh Yeshwant Deshpande vs Emperor, reported in AIR 1938, Nagpur, Page 513 and Collector of Central Excise and Land Customs vs Azimuddin Industries Ltd., reported in PLD (SC) 1970, page 439. A Hannan vs the Collector of Custom, reported in LEX/BDHC/0074/1988 : 40 DLR 273.

10. Mr. Mahmud further submits that in the above cases it has been enunciated that an executive authority cannot in exercise of the rule making power or the power to amend, vary or rescind an earlier order, take away the right vested in the citizens by law. In the instant case the Commission earlier decided not to prosecute the accused opposite parties accepting the recommendation of the investigating officer recommending them to discharge from the charges brought against them and now the Commission, which is a statutory body, cannot rescind its earlier decision which has already taken effect and direct to take steps for further investigation of the case. Referring to annexure-F to the supplementary affidavit filed by the Commission he further submits that said memo does not speak that the Commission has rescinded its earlier decision/order and it has taken a fresh decision for further investigation of the case and thus, action of the Commission is barred by the principle of Locus Poenitentiae.

11. Heard the learned Advocate for the parties, perused the impugned order dated 2-6-2016 as well as the order dated 5-4-2016 passed by the learned Special Judge and other materials on record.

12. Having regard to the fact that in the instant case the Commission has given sanction to file final report prepared by the concerned investigating officer recommending discharge of the accused opposite parties to the Court and when the said report was submitted before the Court with the sanction of the Commission the learned Metropolitan Senior Special Judge accepted the same by its order dated 5-4-2016 and discharged the accused opposite parties.

13. Thereafter, on 29-5-2016 on behalf of the Commission an application under section 173(3B) of the Code of Criminal Procedure read with section 19 and 20 of the Durniti Daman Commission Ain, 2004 was filed for further investigation. And again on 31-5-2016 a Naraji petition was also filed. The learned Special Judge rejected the application for further investigation as well as the Naraji petition holding that the Court accepted the final report on 13-3-2016 without any objection and the matter was closed and the Court is now functus officio.

14. On the face of impugned order dated 2-6-2016 passed by the learned Metropolitan Senior Special Judge we do not find any illegality with the same. The learned Special Judge rightly held that after passing the order dated 5-4-2016 accepting the report under section 173 of the Code of Criminal Procedure there was no scope to entertain the Naraji petition as well as the application for further

investigating.

15. Further, we have no hesitation to hold that filing of Naraji petition and the application for further investigation after acceptance of the report under section 173 of the Code of Criminal Procedure are misconceived attempt. Moreover, Commission cannot file a Naraji petition against a report of investigation which was done or conducted by itself.

16. Now, the question is whether in the peculiar facts and circumstances of the present case, this Court can adjudicate the propriety of the order dated 5-4-2016 passed by the learned Metropolitan Senior Special Judge, though the said order has been not challenged before this Court.

17. It is now well settled that High Court Division in exercising its revisional power may also suo motu call for the record of the Courts sub-ordinate to it and set aside any order passed by such courts in a legal proceeding which has caused miscarriage of justice. [Reference: Reazuddin Ahmed vs State, 49 DLR (AD) page 64]

18. A court has a duty to scrutinize the report under section 173 of the Code of Criminal Procedure and it cannot pass any order mechanically on it. Before passing any order the Court is to be satisfied that whether any prima-facie offence has been disclosed or not in the said report and whether there is any defect or illegality with the same. On perusal of the order dated 5-4-2016 we do not find that any such endeavor was made by the learned Special Judge before accepting the report.

19. On a plain reading of the report under section 173 of the Code of Criminal Procedure it appears to us that the said report was prepared in a perfunctory manner. The learned Special Judge accepted the said report mechanically without applying its judicial mind. He was not precluded to send the case for further investigation despite the sanction of the Commission.

20. In the case of Dhanaj Sing vs State of Punjab, reported in [2004] 3 SCC, page 654 it has been held:

"5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect: to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective."

(Underlines supplied)

21. In the case Sathi Prashad vs State of Uttar Pradesh, reported in (1972) 3 SCC, page 63 it has also been held that:

"It is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored."

22. In the case of State of Karnataka vs Kyarappa Reddy, reported in (1999) 8 SCC, page 714 it has been held that:

"It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The Court must have predominance and preeminence in criminal trials over the action taken by the investigating

officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officers suspicious role in the case."

(Underlines supplied)

23. In the case of Dayal Sing vs State of Uttranchal, reported in (2012) 8 SCC page 263 it has been held that:

"During the course of the trial, the learned presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subverted. For truly attaining this object of a 'fair trial', the Court should leave no stone unturned to do justice and protect the interest of the society as well."

24. In view of the above proposition coupled with the facts and circumstances of the present case it is our considered opinion that the Court cannot play into the hands of the investigating officer who designedly made a perfunctory investigation and misled the Commission and Court should act objectively in a correct perspective.

25. Mr. Mahmud has tried to convince us that in view of the principle of Locus Poenitentiae i.e; the right vested in a person cannot be taken away by any subsequent action.

26. The above principle of Locus Poenitentiae has been enunciated on an order of the executive and it is our considered view that this principle will not be applicable so far it relates to the enquiry/investigation or trial of a criminal case as it is now well settled that criminal offence never abates. Discharging of the accused opposite parties on the basis of misleading police report does not create any vested right in favour of them. In view of Article 35 (2) of the Constitution of the Peoples Republic of Bangladesh and section 403 of the Code of Criminal Procedure a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal seem is in force, not be liable to be tried again for same offence. In view of the above, there is no room to say that by accepting the report under section 173 of the Code of Criminal Procedure a vested right has been created in favour of the accused opposite parties. In the instant case the opposite parties were neither acquitted nor convicted. Further, in the Naraji application Commission categorically asserted that it was misled by the investigating officer as he placed the report before the Commission suppressing material facts, which fact, was detected by the Commission after some times of its earlier decision. Any order, obtained by misleading or suppressing material facts is a nullity in the eye of law and it vitiates all the subsequent proceedings/order/decision on the same. Thus, the decision of the Commission dated 8-3-2016 giving sanction to submit the final report recommending the accused opposite parties from the charges brought against them and the order dated 5-4-2016 passed by the learned Metropolitan Sessions Judge, Dhaka relying on the said sanction are nullity and those have got no legal basis and thus, liable to be interfered and set aside.

27. Hence, the principle of locus poenitentiae as argued by Mr. Mahmud is not applicable in this case.

28. Section 173(3B) of the Code of Criminal Procedure runs as follows:

"Noting in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (1) has been forwarded to the Magistrate and, whereupon such investigation, the officer in-charge of the police Station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-section (1) to (3A) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (1)."

29. In view of the above provision of law the investigating agency has got the unfettered power to hold further investigation and to file supplementary charge sheet and for holding further Investigation there is no necessity of any order of the Court,

30. Having considered and discussed as above, we are inclined to dispose of the Rule.

31. The order dated 5-4-2016 passed by the learned Metropolitan Senior Special Judge accepting the report under section 173 of the Code of Criminal Procedure and discharging the accused opposite parties from the case is hereby set aside.

32. In view of the provision of section 173 (3B) of the Code Criminal Procedure the Anti-Corruption Commission is at liberty to hold further investigation into the case and submit report and for that purpose no formal order is needed from the court and thus, we do not feel any necessity to pass any order on the impugned order dated 2-6-2016 that is refusing to accept the Naraji petition and rejecting the application for further investigation.

33. The opposite parties No. 1-3 are directed to surrender before the learned Senior Metropolitan Special Judge, Dhaka within 6 (six) weeks from the date of receipt of this order and the learned Special Judge is at liberty to enlarge them on bail, if they surrender before it in compliance of the Courts order and make such prayer. Order of freezing of the wealth in question passed earlier by this Court will continue till 31st March, 2017 and the court concerned is at liberty to pass appropriate order on the matter after taking consideration the progress of investigation, if the Anti-Corruption Commission seeks any prayer to that effect.

Communicate the order at once.

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