IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Hasan Foez Siddique
-Chief Justice
Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim

CRIMINAL PETITION FOR LEAVE TO APPEAL NO.516 of 2017.

(From the judgment and order dated 12.04.2017 passed by the High Court Division in Criminal Miscellaneous Case No.4397 of 2008).

Dr. Zubaida Rahman, wife of Mr. Tarique Rahman. : .....Petitioner.

-Versus-

The State and another. : .....Respondents.

For the Petitioner. : Mr. A. J. Mohammad Ali, Senior Advocate instructed by Mr. Zainul Abedin, Advocate-on-Record.

For Respondent No.1. : Mr. A. M. Aminuddin, Attorney General (with Mr. Biswajit Debnath, Deputy Attorney General appeared with the leave of the Court)

For Respondent No.2. : Mr. Khorshed Alam Khan, Senior Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record.

Date of Hearing : **The 13th April, 2022.**

J U D G M E N T

Borhanuddin, J: This criminal petition for leave to appeal is directed against the judgment and order dated 12.04.2017 passed by the High Court Division discharging the Rule in Criminal Miscellaneous Case No.4397 of 2008.

Facts leading to disposal of the leave petition, in brief, are that the present petitioner filed the Criminal

Miscellaneous Case under section 561A of the Code of Criminal Procedure for quashing the proceedings of Kafrul Police Station Case No.52 dated 26.09.2007 under section 26(2), 27(1) of the Anti-Corruption Commission Act, 2004 read with section 109 of the Penal Code and section 15(D)(5) of the Emergency Power Rules, 2007 pending before the Additional Chief Metropolitan Magistrate, Dhaka, contending interalia that the petitioner is a permanent citizen of Bangladesh and is a Physician having MD degree in Cardiology; The petitioner is an income tax payee; On 29.05.2007 the Anti-Corruption Commission sent a notice to the husband of the petitioner to submit his wealth statement and furnish the accounts of assets of his wife and other dependents; In response to the notice, husband of the petitioner submitted his wealth statement on 07.06.2007 alongwith statement regarding his wife's assets; On 26.09.2007 first information report was lodged by one Mohammad Zahirul Huda, Assistant Director, Anti-Corruption Commission against the accused-petitioner and another and accordingly Kafrul Police Station Case No.52 dated 26.09.2007 was initiated.

The prosecution case, in short, is that Mr. Tarique Rahman son of Late President Ziaur Rahman, No.6, Shahid Moinul Road, Dhaka Cantonment in his submitted wealth statement concealed assets worth BDT 23,08,561.37 and submitted false statement thereof, and the Principal accused, in collusion with his wife Dr. Zubaida Rahman (nee Zubaida Khan) and Syeda Iqbal Mand Banu, wife of Late Rear Admiral Mahbub Ali Khan, Road No.5, House No.49, Dhanmondi R/A, Dhaka (Mother-in-law of Principal accused) misrepresented in his statement of wealth dated 27.06.2007 with regard to Tk.4,23,08,561.37 (Taka four crore, twenty three lakhs, eight thousand and five hundred and sixty one and thirty seven paisa only) and BDT 35,00,000/- worth of FDR, the source of which is undeclared and allegedly illegal and not shown in the Principal accused's statement of wealth and hence the case.

The petitioner in her petition stated that on 31.03.2008, vide a memo being No.4563 dated 27.03.2008 of the head office of Anti-Corruption Commission a charge sheet was submitted under section 109 of the Penal Code

against the petitioner. It is further stated that the learned Additional Chief Metropolitan Magistrate kept the matter for further order on 07.04.2008 as is evident from the order dated 05.03.2008. The allegation as levelled against the petitioner with regard to FDR No.0046739 for BDT 10,00,000/- and FDR No.41006271 of BDT 25,00,000/- dated 31.07.2005 totalling Tk.35,00,000/- is false and fabricated as she inherited that money after her father's death from rental of family property. The explanation is given in paragraph no.8 of the writ petition. Excepting the FDR money as mentioned above there is no other specific allegation against the petitioner. It is further stated that tax for the aforesaid FDR money of Tk.25,00,000/- and Tk.10,00,000/- for the years 2005-2006 and 2006-2007 have been paid by the petitioner in her income tax returns.

Upon hearing learned Advocate for the petitioner, a Division Bench of the High Court Division issued Rule on 08.04.2008 and stayed further proceedings of the case.

Opposite party no.2 Anti-Corruption Commission filed counter affidavit.

After hearing the parties, a Division Bench of the High Court Division discharged the Rule vide judgment and order dated 12.04.2017 with a direction to the petitioner to appear before the court concern within 8(eight) weeks from the date of taking cognizance against her.

Feeling aggrieved, the petitioner preferred instant criminal petitioner for leave to appeal under Article 103 of the constitution.

Mr. A. J. Mohammad Ali, learned Advocate appearing for the petitioner after taking us through the impugned judgment and order and other relevant papers submits that the High Court Division wrongly discharged the Rule having failed to appreciate that the allegation against the petitioner in the FIR and the charge sheet are absolutely preposterous which is evident from a plain reading of the FIR inasmuch as the allegation against the petitioner is "প্রমাণের চেষ্টা" but not aiding the Principal accused in committing of any offence and such allegation of "প্রমাণের চেষ্টা" does not constitute "abetment of an offence" within the meaning of sections 107 and 108 of the Penal Code, thus the FIR allegation against the petitioner,

even if taken at their face value do not disclose any offence under section 109 of the Penal Code. He also submits that the High Court Division erred in law having failed to appreciate that the allegation levelled against the petitioner in the charge sheet that "the petitioner and her mother in collusion with Principal accused Tarique Rahman tried to prove that the two FDR amounting Tk. (25+10)=35 lacs are accrued from legal source through false statement and documents and thus committed offence under section 109 of the Penal Code" also do not attract the ingredients of an offence under section 109 of the Penal Code as such the allegation in the charge sheet against the petitioner is liable to be found preposterous.

He next submits that the High Court Division erroneously discharged the Rule without considering the materials on record and the fact that the petitioner had shown the FDRs in her personal income tax returns for the assessment year 2005-2006 and 2006-2007 and paid tax thereon which is evident from her income tax returns as such allegation against the petitioner abetting her

husband by concealing truth about the said FDRs or the source thereof are entirely preposterous. In support of his submissions, learned Advocate referred to the case of Abdul Quader Chowdhury and others Vs. The State, reported in 28 DLR (AD) 38; The case of The State Vs. Mohammad Nasim, reported in 57 DLR (AD) 114; The case of Anti-Corruption Commission Vs. Nargis Begum and others, reported in 62 DLR (AD) 279 and the case of State Vs. Mohammad Mominullah and others, reported in 11 BLC (AD) 51.

On the other hand, Mr. Khorshed Alam Khan learned Advocate for the respondent no.2 submits that accused petitioner filed the application under section 561A and obtained Rule and stay without surrendering before the court of competent jurisdiction as such the petitioner is fugitive from justice when she filed and moved the application before the High Court Division. He again submits that it is a settled Principle of law that a fugitive from justice is not entitled to any relief from a court of law unless surrenders to the jurisdiction of the court. He also submits that since no cognizance has

been taken against the petitioner, she cannot challenge the allegation brought against her by way of FIR and charge sheet at this stage. He further submits that the question of abetment is a question of fact which can only be decided at the time of trial by adducing evidence and as such the leave petition is liable to be dismissed. He further submits that the High Court Division erroneously directed 'the petitioner to appear before the concerned court within 8(eight) weeks from the date of taking cognizance of the offence, if any, so that she can defend herself in accordance with law' which is beyond the scope of law. In support of his submissions, learned Advocate referred to the case of Abdul Huque and others Vs. The State, reported in 60 DLR (AD) 1 and the case of Moudud Ahmed and others Vs. State and others, reported in 68 DLR (AD) 118.

Mr. A. M. Aminuddin, learned Attorney General appearing on behalf of the respondent no.1 submits that admittedly the petitioner was a fugitive when she moved the application under section 561A before the High Court Division and obtained the Rule and stay inasmuch as a

fugitive she has no locus standi to seek any remedy or relief from the court of law without surrendering before the competent court having jurisdiction. He also supports the contention of the learned Advocate of the Anti-Corruption Commission that since no cognizance has been taken against the petitioner as such she is debarred from filing the application under section 561A seeking quashment of the proceedings at this stage.

Heard the learned Advocate for the petitioner, learned Attorney General for the respondent no.1 and learned Advocate for the respondent no.2 Anti-Corruption Commission. We have gone through the impugned judgment and order passed by the High Court Division as well as the FIR, charge sheet and other papers/documents contained in the paper book.

We have thoroughly and meticulously perused the impugned judgment and order alongwith the FIR and charge sheet. It appears that the High Court Division discharged the Rule on the findings that: (i) no cognizance had yet been taken against the petitioner as per section 4(1) of the Criminal Law Amendment Act, 1958 (ii) the allegations

brought against are not preposterous rather there are specific allegations in the FIR and the charge sheet and truthfulness thereof can only be determined by taking evidence in the trial and (iii) investigation report (charge sheet) having already been submitted recommending prosecution of the petitioner and the matter is at the stage of taking cognizance, it would not be just to interfere with the proceedings by exercising power vested in section 561A at this stage.

We are in conformity with the reasonings of the High Court Division in discharging the Rule. But we failed to understand that how a Division Bench of the High Court Division entertained the application under section 561A of the Code of Criminal Procedure by issuing Rule and granting order of stay at the stage when even cognizance was not taken against the petitioner and the petitioner did not surrender before the competent court of law.

From paragraph no.6 of the application under section 561A of the Code of Criminal Procedure the petitioner stated that 'on 31.03.2008 vide a memo being no.4563 dated 27.03.2008 of the Head Office of the Anti-

Corruption Commission a charge sheet was submitted under section 109 of the Penal code against the petitioner.' It is further stated that 'the learned Additional Chief Metropolitan Magistrate kept the matter for further order on 07.04.2008 as is evident from the order dated 05.03.2008.'

From the above it is obvious that no cognizance of the offence against the petitioner was taken. It may be mentioned here that the Additional Chief Metropolitan Magistrate is not competent to take cognizance of an offence under section 109 of the Penal Code which is exclusive jurisdiction of a Special Judge under section 4(1) of the Criminal Law Amendment Act, 1958. Before the case records alongwith charge sheet could be forwarded to the Special Judge, the petitioner moved the High Court Division under section 561A of the Code of Criminal Procedure and Rule was issued staying proceedings of the case. The High Court Division interfered in this case purporting to exercise its inherent power under section 561A of the Code of Criminal Procedure at the stage when only charge sheet was submitted by the Dudak, and from

the records it does not appear nor is it the case of the petitioner that the case records has been sent to the Special Judge or cognizance of the offence has been taken against the petitioner.

It is settled Principal of law that initiation of a criminal proceedings starts after taking cognizance of offence. Submission of charge sheet cannot be treated as finality of investigation until cognizance of the offence is taken by the appropriate court.

In the case of Bangladesh Vs. Tan Kheng Hock and Bangladesh Vs. Rizal Bin Matnur, reported in 31 DLR (AD) 69, this Division observed that:

> *"From this it should not be presumed that we are expressing the view that the High Court Division is not competent to examine propriety of the charge sheet, but this can be done at a proper stage. Because, after cognizance is taken on the basis of the charge-sheet and on proper occasion for quashing the proceedings, certainly the High Court shall examine the charge sheet to ascertain as to whether the allegations made therein constitute a criminal offence. But before cognizance is taken by the appropriate court, there is hardly any scope for saying that charge sheet would lead to abuse of the process of the court, because,*

> *the court competent to try the case has ample power to refuse taking cognizance of the offence on the facts disclosed in the police report and pass an appropriate order."*

Before issuance of the Rule it was incumbent upon the High Court Division to look into the matter that the proceedings which is challenged is not initiated yet because no cognizance of offence has been taken by the appropriate court against the petitioner and even the charge sheet was not produced before the concerned court.

Furthermore, the Rule issuing Bench of the High Court Division overstepped in its jurisdiction in not considering that the petitioner filed the application under section 561A of the Code of Criminal Procedure without surrendering to the jurisdiction of the appropriate court and thus illegally entertained the application under section 561A and stayed further proceedings of the case.

It is well settled that when a person seeks remedy from a court of law either in writ jurisdiction or criminal appellate, revisional or miscellaneous jurisdiction under section 561A of the Code of Criminal

Procedure, he/she ought to submit to due process of justice. The Court would not Act in aid of an accused person who is a fugitive from law and justice.

It is stated in paragraph no.6 of the application under section 561A by the petitioner that a charge sheet under section 109 of the Penal Code against the petitioner was submitted on 31.03.2008 and vide order dated 05.03.2008 the Additional Chief Metropolitan Magistrate kept the matter for further order on 07.04.2008. But it appears from the application under section 561A that the deponent, friend and tadbirkar of the petitioner, sworn affidavit on 06.04.2008 and the Rule issuing Bench of the High Court Division without considering that the petitioner did not surrender before the appropriate court and cognizance also was not taken by the appropriate court, entertained the application under section 561A. On 07.04.2008 the Rule issuing Bench ordered that "the petitioner appears in court in person. The application is heard-in-part. Mr. Anisul Huq, the learned Advocate for Dudak assisting the state prays for 1(one) day time. The prayer is allowed. The personal

appearance of the petitioner Dr. Zubaida Rahman is dispensed with. Let this application come up in the list on 08.04.2008 for further hearing and order." And on the following day i.e. on 08.04.2008 High Court Division interfered by issuing Rule and staying proceedings of the case which is palpably illegal and beyond the scope of law.

As per Article 27 of the constitution all citizens are equal before the law and are entitled to equal protection of law. The judges of the apex court have taken oath to administer justice in accordance with law without fear or favour. The judiciary must stand tall and unbend at all circumstances, even in adverse situation. The judiciary should not create a precedent which cannot be applicable for all. Each and all of the citizens are entitled to get equal treatment from the court of justice. There is no high or low before the court of law.

In the premises above, we are of the view that the petitioner was a fugitive in the eye of law when she filed the application under section 561A of the Code of Criminal Procedure.

That being so, direction of the High Court Division in the concluding portion of the impugned judgment and order that:

> *"However, since at the time of issuing the Rule this Court dispensed with the appearance of the petitioner, she should be allowed to appear before the concerned Court without any hindrance. The petitioner is directed to appear before the concerned Court within 08(eight) weeks from the date of taking cognizance of the offence, if any so that she can defend herself in accordance with law."*

-is outside the purview of law and hence struck off.

Thus the impugned judgment and order is modified with the above observation.

Accordingly, the criminal petition for leave to appeal is dismissed.

No order as to costs.

CJ.

J.

J.

J.

The 13th April,2022.
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