

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Mr. Justice Md. Abu Zafor Siddique

CRIMINAL PETITION FOR LEAVE TO APPEAL NOS.55-58 OF 2023.

(From the judgment and orders dated 25.10.2022 passed by the High Court Division in Criminal Miscellaneous Case Nos.55586, 55583, 55584 and 55585 of 2022).

Sajjad Hossain. :Petitioner.
(In all the cases)

-Versus-

Md. Lutful Hasan and another. :Respondents.
(In all the cases)

For the Petitioner. : Mr. S. M. Shahjahan, Senior
(In all the cases) Advocate instructed by Ms. Nahid Sultana, Advocate-on-Record.

For Respondent No.1. : Mr. Ashraf Ali, Advocate
(In all the cases) instructed by Mr. Md. Abdul Hye Bhuiyan, Advocate-on-Record.

For Respondent No.2. : Not represented.
(In all the cases)

Date of Hearing. : The 4th April, 2023.

Date of Judgment. : The 4th April, 2023.

J U D G M E N T

Borhanuddin,J: Since all the aforementioned criminal petitions for leave to appeal involve identical point of law based on similar facts as such all the petitions have been taken together for hearing and disposed of by this common judgment.

These criminal petitions for leave to appeal are directed against the judgment and orders dated 25.10.2022

passed by a Division Bench of the High Court Division in Criminal Miscellaneous Case Nos.55586, 55583, 55584 and 55585 of 2022 and disposing of the same enlarging the convict prisoner i.e. Md. Lutful Hasan on bail for a limited period of 02(two) months for the purpose of preferring appeal against the order of conviction and sentence to suffer simple imprisonment for a period of 01(one) year and also to pay a fine of Tk.50,00,000/- (fifty lacs) passed by the learned Joint Metropolitan Sessions Judge, 5th Court, Chattogram in Sessions Case No.1467 of 2021 arising out of C.R. Case No.423 of 2020, Sessions Case No.1464 of 2021 arising out of C.R. Case No.424 of 2020, Sessions Case No.1465 of 2021 arising out of C.R. Case No.425 of 2020 and Sessions Case No.1468 of 2021 arising out of C.R. Case No.422 of 2020 respectively in all the cases.

The prosecution case in short is that the petitioner herein as complainant lodged separate complaint petition before the learned Chief Metropolitan Magistrate, Chattogram against the respondents under Sections 138 and 140 of the Negotiable Instruments Act, 1881, contending interalia, that there was business transaction between

him and the accused persons and as a result of this the accused persons borrowed Tk.50,00,000+50,00,000+50,00,000+50,00,000 in total Tk.2,00,00,000/- from the complainant on different occasions; In order to pay the borrowed money the accused persons issued 04(four) cheques, each of Tk.50,00,000/-, on different dates drawn from the City Bank Limited (payable at any branch in Bangladesh) infavour of the complainant; On 01.06.2020 the complainant presented aforementioned 04(four) cheques in the United Commercial Bank Ltd., Muradpur Branch, Chattogram, for encashment but all the cheques have been dishonoured due to insufficient fund on the same date; Thereafter, the complainant demanded the cheque money from the accused persons serving legal notices on 22.06.2020 which were received by the accused persons on 28.06.2020 but without any response; Hence the complainant filed separate complaint petition under Sections 138 and 140 of the Negotiable Instruments Act, 1881 before the learned Chief Metropolitan Magistrate, Chattogram and aforementioned C.R. cases were started.

In all the complaint petition, learned Metropolitan Magistrate recorded statements of the complainant under

Section 200 of the Code of Criminal Procedure and took cognizance against the accused persons under Sections 138 and 140 of the Negotiable Instruments Act, 1881 on 19.08.2020. Thereafter, all the accused persons were enlarged on bail by the learned Metropolitan Magistrate.

The Learned Chief Metropolitan Magistrate, Chattogram transferred all the cases to the learned Metropolitan Sessions Judge, Chattogram, who took cognizance in all the cases and thereafter transferred the same to the learned Joint Metropolitan Sessions Judge, 5th Court, Chattogram for trial.

The trial court on 07.10.2021 framed charges against the accused persons under Sections 138 and 140 of the Negotiable Instruments Act, 1881. As all the accused persons were absconding during trial, it was not possible to explain and read over the charges so framed to the accused persons.

The prosecution examined 01(one) witness in each case and submitted the documentary evidences which were marked as exhibits. As the accused persons were absconding

during trial, the prosecution witness was not cross-examined by the defence.

After conclusion of the evidence of prosecution, all the cases were fixed for examination of the accused under Section 342 of the Code of Criminal Procedure. But the accused persons were not examined as they were absconding.

The learned Joint Metropolitan Sessions Judge, 5th Court, Chattogram upon hearing the prosecution and perusing evidence on record found accused Md. Kamruzamman and Md. Lutful Hasan guilty of the offence committed under Section 138 of the Negotiable Instruments Act, 1881 and sentenced them to suffer simple imprisonment for a period of 01(one) year and also to pay a fine of Tk.50,00,000/- (fifty lacs) each in all the cases vide judgment and orders dated 04.11.2021.

Thereafter, convict Md. Lutful Hasan filed applications in the cases under Section 426(2A) of the Code of Criminal Procedure to grant him bail for a limited period in order to file appeal against the judgment and order of conviction and sentence dated

04.11.2021 passed by the Joint Metropolitan Sessions Judge, 5th Court, Chattogram, who upon hearing both the parties rejected the petitions for non-compliance of the provisions stipulated in Section 138A of the Negotiable Instruments Act, 1881 vide order dated 26.09.2022.

Having aggrieved by the order dated 26.09.2022, the convict Md. Lutful Hasan preferred aforementioned Criminal Miscellaneous Petitions before the High Court Division invoking Section 561A of the Code of Criminal Procedure.

A Division Bench of the High Court Division upon hearing the parties and perusing the materials on record disposed of all the criminal miscellaneous petitions and thereby granted bail to the convict Md. Lutful Hasan for a period of 02(two) months so that he can prefer appeal vide impugned judgment and orders dated 25.10.2022 holding that:

"As mentioned above, the petitioner was on conclusion of trial convicted in above cases under Section 138 of the Negotiable Instruments Act, 1881 and sentenced to suffer simple imprisonment for one year. As such the learned Joint Metropolitan Sessions Judge, 5th Court, Chattogram, should have

keeping in mind the provisions of Section 426(2A) of the Code of Criminal Procedure granted the petitioner bail for a limited period to enable him to prefer an appeal against above judgment and order of conviction and sentence. But the learned judge has committed an error in rejecting above petition."

Having aggrieved by and dissatisfied with the impugned judgment and orders, the Opposite Party No.2-complainant Sajjad Hossain as petitioner preferred aforesaid criminal petitions for leave to appeal invoking Article 103 of the Constitution.

Mr. S. M. Sahajahan, learned Advocate appearing for the petitioner in all the petitions submits that the High Court Division erred in law in granting bail to a convict prisoner under Section 561A of the Code of Criminal Procedure inasmuch as the convict prisoner has only forum left is filing appeal complying the condition mentioned in Section 138A of the Negotiable Instruments Act, 1881. He further submits that application of bail filed under Section 426(2A) of the Code of Criminal Procedure is rejected by the court who awarded sentence and the aggrieved party must seek relief against such rejection order in a revisional forum as per provisions of the Code

of Criminal Procedure but the convict prisoner without exhausting the forum filed application before the High Court Division invoking Section 561A of the Code of Criminal Procedure though the High Court Division was "*Corum Non Judice*" to entertain the application upon the attending facts and circumstances of the case. He lastly submits that High Court Division without issuing any Rule has given full relief in disposing of the application and also granting bail which is against the principle of natural justice and as such the impugned judgment and order passed by the High Court Division are liable to be set-aside.

On the other hand Mr. Ashraf Ali, learned Advocate appearing for the respondent no.1 supports the impugned judgment and order passed by the High Court Division.

Heard the learned Advocate for the respective parties. Perused the papers/documents contained in the paper books.

The question is to be decided that whether the High Court Division can entertain an application under Section 561A of the Code of Criminal Procedure against the order

passed under Section 426(2A) of the Code of Criminal Procedure.

To address this point we need to refer Section 426(2A) and 561A of the Code of Criminal Procedure.

Section 426(2A) of the Code of Criminal Procedure runs as follow:

"426(2A) *When any person is sentenced to imprisonment for a term not exceeding one year by a Court, and an appeal lies from this sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under Sub-Section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended."*

Again, Section 561A of the Code of Criminal Procedure states that:

"561A. Saving of Inherent Power Of High Court Division: *Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

On perusal of record it transpires that respondent no.1 alongwith other accused Md. Kamruzamman were convicted and sentenced to suffer simple imprisonment for a period of 01(one) year and also to pay a fine of Tk.50,00,000/- (fifty lacs) in all cases under Section 138 of the Negotiable Instruments Act, 1881. It should keep in mind that conviction is awarded upon the accused persons under a special law i.e. the Negotiable Instruments Act, 1881.

From the sections quoted above it appears that Section 426(2A) of the Code of Criminal Procedure provides specific provision for bail for a limited period in order to prefer appeal by a convicted person who is sentenced to suffer imprisonment for a term not exceeding one year. Section 561A of the Code of Criminal Procedure deals with the inherent power of the High Court Division that can be exercised only for either of the three purposes specifically mentioned in that section namely,

- (i) for the purpose of giving effect to any order passed under the Code of Criminal Procedure;
- (ii) for the purpose of preventing abuse of the process of any court;
- (iii) for otherwise securing the ends of justice.

It is pertinent here to mention that Section 561A of the Code of Criminal Procedure do not empower the High Court Division to grant bail to a convict prisoner for the purpose of filing appeal. Though the power of the High Court Division under Section 561A i.e. the inherent power is very wide but it is a Rule of practise that it will only be exercised in exceptional circumstances and the main goal and purpose of this special extraordinary power is to save the litigant people from the agony of the abuse of the process of the court and also is intended to do substantial justice and at the same time it cannot be invoked in respect of any matter covered by the specific provision of the Code of Criminal Procedure, so that the ordinary course of justice be obstructed or diverted.

The Supreme Court of India in the case of *Pampapathy vs. State of Mysore*, reported in AIR 1967 (SC) 286, held:

"The inherent power of the High Court mentioned in Section 561A, Criminal Procedure Code can be exercised only for either of the three purposes specifically mentioned in the section. The inherent power cannot be invoked in respect of any matter covered by the specific provisions of the Code. It cannot also be invoked if its

exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provisions of the Code then Section 561A can come into operation."

(emphasis supplied)

Again, the Supreme Court of India in the case of *The State of Uttar Pradesh vs. Mohammad Naim*, reported in AIR 1964 (SC) 703, held:

"It is now well settled that the section confers no new powers on the High Court. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice. The section provides that those powers which the court inherently possesses shall be preserved lest it be considered that the only powers possessed by the court are those expressly conferred by the Code and that no inherent powers had survived the passing of the Code."

Furthermore, the Supreme Court of India in the case of *The Madhu Limaye vs. The State of Maharashtra*, reported in (1977) 4 SCC 551, held:

"At the outset the following principles may be noticed in relation to the exercise of the inherent power of the High Court which have been followed ordinarily and generally, almost invariably, barring a few exceptions: (1) That the power is not to be resorted to if there is a specific provision in the Code

for the redress of the grievance of the aggrieved party;

(2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

(3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code."

(emphasis supplied)

The Lucknow Bench of the High Court of Allahabad in the case of *Ram Narain vs. Mool Chand and Ors.*, reported in AIR 1960 All 296, held the following principles should be fulfilled in exercising the inherent jurisdiction of the High Court given by Section 482 (same as our Section 561A) of the Code of Criminal Procedure:

"In order to make it necessary three conditions should be fulfilled:

In the first place the injustice which comes to light should be of a grave character and not of a trivial character.

The second condition which in my opinion should exist before the High Court exercises its inherent powers is that the injustice which is noted is of a clear and palpable character and not of a doubtful character.

The third condition which should be fulfilled is that there exists no other

provision of law by which the complainant could have sought relief."

(emphasis supplied)

This Division in the case of *State vs. Aman Ullah Arman*, reported in 10 ADC (2013) 263, held:

"The inherent power of the High Court Division is neither an alternative nor an additional in its correct sense and is to be rarely invoked only in the interest of justice so as to seek redress of grievances for which no other procedure is available. This section confers no new powers on the High Court Division. It merely safeguards all existing inherent powers possessed by the High Court Division to secure the ends of justice. The section provides that those powers which the court inherently possessed shall be preserved lest it be considered that the only powers possessed by the Court are those expressly conferred by the Code and that no inherent powers had survived the enactment of the Code. This provision should not be used to obstruct or divert the ordinary course of justice. The jurisdiction is neither an appellate nor a revisional one. It is a special extraordinary jurisdiction, the main aim and object of which is to save the people from the agony of the abuse of the process of the Court and also is designed to do substantial justice."

So, there is no reason to deviate from the proposition of law set by various jurisdictions including our Apex Court.

Now the question requires to be addressed that what would be the remedy of a convicted person whose bail petition filed under Section 426(2A) of the Code of Criminal Procedure in order to prefer an appeal is rejected by the Court who awarded the punishment.

In this regard we need to refer Section 435 of the Code of Criminal Procedure which is reproduced below:

435. Power to call for records of inferior Courts-(1) The High Court Division or any Sessions Judge, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation-All Magistrates, whether Executive or Judicial, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-Section.

(emphasis supplied)

Section 435 of the Code of Criminal Procedure enunciated under Chapter-XXXII with the heading "**Of**

Reference and Revision" and the said section confers revisional jurisdiction to the High Court Division as well as Sessions Judge including Metropolitan Sessions Judge also. The essence of the said section is that the High Court Division or the Sessions Judge including the Metropolitan Sessions Judge may call for any record from respective lower courts for the purpose of examining the correctness, legality or propriety of any findings, sentence or order recorded or passed by that court. Again, the most important power vested upon the High Court Division or the Sessions Judge including the Metropolitan Sessions Judge by this section is the suspension of execution of any sentence and thereby release the convicted person on bail pending the examination of the record. Thus, on plain reading of this section it appears that the High Court Division as well as the Sessions Judge including the Metropolitan Sessions Judge, as the case may be, is empowered under Section 435 of the Code of Criminal Procedure to examine the correctness, legality or propriety of any order passed by court inferior to them.

On perusal of record it appears that the respondent-convict Md. Lutful Hasan filed a bail petition under Section 426(2A) of the Code of Criminal Procedure before the Joint Metropolitan Session Judge, 5th Court, Chattogram, for a limited period in order to file appeal and the same is rejected for non-compliance of the provisions of Section 138A of the Negotiable Instruments Act, 1881 vide order dated 26.09.2022. It is to be mentioned here that the learned Judge who passed the order dated 26.09.2022 is inferior to the court of learned Metropolitan Sessions Judge, Chattogram. Thus, considering the provision of Section 435 of the Code of Criminal Procedure the learned Metropolitan Sessions Judge, 5th Court, Chattogram is duly empowered to examine the legality, correctness and propriety of the order passed by the Joint Metropolitan Sessions Judge, Chattogram under Section 426(2A) of the Code of Criminal Procedure. Furthermore, learned Metropolitan Sessions Judge, Chattogram also have the power to suspend the sentence of Md. Lutful Hasan pending examination of the impugned order dated 26.09.2022 as per the provision of Section 435 of the Code of Criminal Procedure.

Consequently, it appears that there is a specific provision in the Code of Criminal Procedure for preferring revisional application against the order of rejection of the bail petition filed under Section 426(2A) of the Code of Criminal Procedure.

In the case of *Muhammad Ayub vs. Muhammad Yaqub and The State*, reported in 19 DLR (1967) (SC)38, it is held:

"the provisions of Section 435 of the Code, which enable the High Court or a Sessions Judge or a District Magistrate or a specially empowered Sub-Divisional Magistrate, to 'call for and examine the records of any proceeding before any inferior criminal court, for the purposes of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed', etc. and empower them, when calling for such record, to direct 'that the execution of such sentence be suspended, and if the accused is confined, that he be released on bail or on his own bond pending the examination of record.' It would be more correct to say therefore that the question of bail to convicted and accused persons is exhaustively dealt with in Sections 426 and 435 and chapter XXXIX of the Code. Under Section 426 there is exercise of appellate jurisdiction and under Section 435 that of revisional jurisdiction, whereas the subject of bail to accused persons, prior to

conviction, forms the subject of Chapter XXXIX and is partly covered by Section 435."

(emphasis supplied)

From the discussions made above and the principles enunciated in the cited cases, our view is that there are specific provision in Sections 426 and 435 of the Code of Criminal Procedure for bail of a convicted person and if bail petition filed by a convicted person under Section 426(2A) of the Code of Criminal Procedure is rejected, then the remedy lies under Section 435 of the Code of Criminal Procedure in "*Revisional Jurisdiction*".

Considering the facts and circumstances of these cases as well as the discussions made above, it appears that the High Court Division without appreciating the scope of Section 561A of the Code of Criminal Procedure and without applying its judicial mind exceeded its jurisdiction in passing the order in exercise of inherent power vide impugned judgment and orders dated 25.10.2022 which calls interference by this Division.

Accordingly, the impugned judgment and orders dated 25.10.2022 passed by a Division Bench of the High Court Division in the aforementioned criminal miscellaneous petitions are hereby set-aside.

However, as the convict Md. Lutful Hasan is in jail custody, it is felt that justice would be best served if he is given an opportunity to file a revisional application in the competent court of jurisdiction under Section 435 of the Code of Criminal Procedure against the impugned orders dated 26.09.2022 passed by the learned Joint Metropolitan Sessions Judge, 5th Court, Chattogram. Accordingly, the convict person i.e. Md. Lutful Hasan may file a revisional application under Section 435 of the Code of Criminal Procedure, if so advised, against the impugned orders dated 26.09.2022 within 30 (thirty) days from the date of receipt a copy of this judgment and order.

From the discussions and observations made above all the criminal petitions are disposed of.

No order as to costs.

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