In the Supreme Court of Bangladesh (High Court Division)

Criminal Misc. Case No. 8859 of 2002.

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Decided On:

The 16th February, 2005

Result:

Rule absolute.

Parties:

Mohammad Moniruzzaman & anr. V The State and another

Hon'ble Judge(s):

Syed Muhammad Dastagir Husain and Mamnoon Rahman, JJ

Counsels:

For the Petitioners:

Mr. Khan Saifur Rahman with Mr.M.M. Zulfiqur Ali Haider, Md. Abu Hanif, Md. Shakir Hossain, Lutfor Rahman, for the petitioners.

For the Opposite Party:

Mr. A.B.M. Waliur Rahman Khan, A.A.G. for the opposite party No. 1.

Subject Matter:

Code of Criminal Procedure, 1898 (V of 1898)

Sections—436 & 561-A

it appears from the order of the learned Metropolitan Sessions Judge that he has directed the Chief Metropolitan Magistrate to send the case for further investigation and also directed the Officer –in- Charge, Pahartoli police Station to hold further investigation by himself, but he can not pass such order under Section 436 of the Code of Criminal Procedure. He can only send for further inquiry by setting aside the order of discharge and such direction to hold further investigation is an abuse of the process of law. The learned Sessions Judge while passing such order ought to have directed for further inquiry but further direction to the Police Officer –in-Charge Pahartoli Police Station to hold further inquiry by himself is wholly without any jurisdiction.

(Para—7)

Jurisdiction:

Criminal Jurisdiction

Related Acts/Rules/Orders:

Code of Criminal Procedure, 1898 (V of 1898) Sections—436 & 561-A

Key words:

JUDGMENT

Syed Muhammad Dastagir Husain, J: This Rule is directed against the proceeding in G.R. Case No. 73 of 2001 corresponding to Pahartoli P.S. Case No. 13(1)2001 under Section 406/420 of the Penal Code.

2. The opposite party No. 2 as informant filed a petition of complaint on 9.1.2001 in the Court of Chief Metropolitan Magistrate, Chittagong who thereupon called for a police report under Section 173 of the Code of Criminal Procedure and after getting report it was treated as an F.I.R. The short fact as stated in the said F.I.R. is that the petitioner No.1 had been in financial crisis to run Bandargaon filling station and proposed to the informant opposite party No. 2 herein a partner in that business and the informant accepted the proposal and provided Tk. 15.00,000/- lac to the petitioner No. 1 and they have received the said amount by signing

acknowledgement and entered into an agreement with the informant on 23.4.1997 inducting him as a partner. It has been further stated that the said filling station started with effect from 27.7.1997 and the petitioners paid the informants part of profit up to December, 1999. On 1.1.2001 while the informant went to the filling station for the promised money the petitioners refused to make any payment and denied transaction between them and further prohibited him to enter into the filling station. The petitioner no. 1 also opened an account in his own name in the OR Nazim branch of Eastern Bank and the informant thereafter issued a legal notice and requested the said bank to suspend transaction of the said account the petitioners thereby committed an offence under Section 406/420 of the Penal Code.

3. The police after investigation submitted final report on 4.5.2001 as mistake of fact and the final report was accepted by the Chief Metropolitan Magistrate, Chittagong on 28.6.2001 and the petitioner were thereupon discharged. The complainant thereafter preferred Criminal Revisional application being Criminal Revision No. 85 of 2002 under Section 435/436 of the Code of Criminal Procedure before the Metropolitan Sessions Judge, Chittagong challenging the order dated 28.6.2001 passed by the Chief Metropolitan Magistrate. Metropolitan Sessions Judge by his order dated 26.6.2002 allowed the said Criminal Revision and set aside the order dated 28.6.2001 passed by the Chief Metropolitan Magistrate, Chittagong and directed him to send the case for further investigation and also directed the Officer-in-Charge of Pahartoli Police Station to hold further investigation by himself .The petitioners thereafter preferred this application under Section 561A of the Code of Criminal Procedure for quashment of the proceeding and obtained the present Rule.

4. Mr. Khan Saifur Rahman, the learned advocate appearing on behalf of the petitioner submits that admittedly there is a business transaction and it relates to partnership business. The petitioner has paid the profit of the said transaction upto December, 1999 and thereafter since January, 2000 he did not pay any profit and subsequent refusal does come within the purview of Section 436 of the Penal Code and the decision referred by the learned advocate reported in 1984 B.L.D.(A.D.)97 and also decision reported in 19 B.L.D.(A.D.)128 wherein it has been stated as follows:-

"The alleged transaction in between the complainant and the appellant is clearly and admittedly a business transaction. The appellant had already paid a part of the money under the contract to the complainant. The failure on the part of the appellant to pay the complainant the balance amount under the bill does not warrant any criminal proceeding as the obligation under the contract is of civil nature. The High Court Division were not justified in refusing to quash the proceeding in question although the transaction in question between the parties is clearly of a Civil nature."

5. He further submits that the petitioner against the said order of discharge of the petitioners complainant went to the learned Metropolitan Sessions Judge under Section 436 of the Code of Criminal Procedure where the Metropolitan Sessions Judge directed him to send the case for further investigation and also directed the Officer-in-Charge of Pahartoli Police Station to hold further investigation by himself which he can not and it is not in accordance with law. The informant must have filed a petition of naraji before the learned Metropolitan Magistrate and in case if that has been rejected he can then only come before the learned Sessions Judge under Section 436 of the Code of Criminal Procedure. He lastly submits that there is difference in between inquiry and investigation. The order passed by the learned Metropolitan Sessions Judge for further investigation by a Police Officer does not come within the purview of Section 436 of the Code of Criminal Procedure which only provides for further inquiry. Therefore the proceeding should be quashed for ends of justice.

6. Mr. A. B. M. Waliur Rahman Khan, the learned Assistant Attorney General appearing on behalf of the State opposite party No.1 by submitting counter affidavit submits that though it arises out of a partnership business but ultimately the petitioner denied the entire transaction. Therefore it comes under the purview of Section 406/420 of the Penal Code and it is a clear deception. Further

he submits that the proceeding has not yet been started as the Sessions Judge just passed an order to hold further investigation by the Police Officer. No cognizance has yet been taken and all that further investigation and further inquiry are same. Therefore the learned Metropolitan Sessions Judge did not commit any wrong by passing such order. By referring 35 D.L.R. 103, 43 D.L.R. 519 and 48 D.L.R. (A.D.) 53 submits that there is no requirement of filing any naraji petition. The informant State can invoke Section 436 of the Code of Criminal Procedure before the Sessions Judge.

7. Heard the learned advocates of both the sides. Perused the F.I.R. final report, order passed by the Metropolitan Sessions Judge and the order passed by the Chief Metropolitan Magistrate. From the very reading of the F.I.R. it appears that there is existence of partnership business and petitioner has paid profit out of said partnership business till December, 1999 and subsequently he has denied it . According to the terms and conditions of the said partnership business if it amounts to breach of contract, it does not come within the purview of Section 406 of the Code of Criminal Procedure. It appears from the police report that there are claim and counter claim of both the parties and both the parties have submitted their account. Therefore it can not be said that there is no existence of any partnership business nor it can be said that there is no another contractual obligation which can only be adjudicated by the competent civil court. Further it appears from the order of the learned Metropolitan Sessions Judge that he has directed the Chief Metropolitan Magistrate to send the case for further investigation and also directed the Officer –in- Charge, Pahartoli police Station to hold further investigation by himself, but he can not pass such order under Section 436 of the Code of Criminal Procedure. He can only send for further inquiry by setting aside the order of discharge and such direction to hold further investigation is an abuse of the process of law. Further from the impugned order it appears that the order as passed for the investigation was not intimated to the informant and as such he could not file any naraji petition against the police report and that has been accepted beyond his knowledge. The order sheet shows that the police submitted report on 4.5.2001. It appears that on 30.5.2001 the Magistrate passed the order with an information to the informant and after one month that is on 28.6.2001 the final report was accepted. So the question that he had no information can not be sustained. The learned Sessions Judge while passing such order ought to have directed for further inquiry but further direction to the Police Officer –in-Charge Pahartoli Police Station to hold further inquiry by himself is wholly without any jurisdiction. Therefore we find substance in this Rule. Accordingly the Rule is made absolute. Proceeding in G.R. Case No. 73 of 2001 corresponding to Pahartoli P.S. Case No. 13(1)2001 under Section 406/420 of the Penal Code is thereby quashed.