Present:
Mr. Justice Md. Iqbal Kabir
And
Mr. Justice Md. Riaz Uddin Khan

Criminal Miscellaneous Case No. 35815 of 2021

Nasir Uddin Khan
.....Accused-Petitioner
Versus

The State and another
….Opposite Parties

Mr. Md. Shaharia Kabir, Advocate
.....For the Accused-Petitioner

Mr. Md. Nuro Nabi, Advocate with
Ms. Most. Sharifa Sultana, Advocate
.....For the Opposite Party No. 2

Judgment on 02.06.2025.

Md. Iqbal Kabir, J:

At the instance of the petitioner, on an application under section 561A of the Code of Criminal Procedure, this Rule was issued calling upon the opposite parties to show cause as to why the judgment and order dated 11.01.2021 passed by the Sessions Judge, Mymensingh in Criminal Revision No. 04 of 2021 rejecting the said Criminal Revision summarily and thereby affirming the order dated 03.12.2020 passed by the Senior Judicial Magistrate, 2nd Court, Mymensingh in C.R Case No. 559 of 2017 rejecting an application filed by the petitioner under Sections 241A of the Code of Criminal Procedure and thereby framing charge under Sections 406 and 420 of the Penal Code, should not be quashed and/ or pass such order or further order or orders as to this Court may seem fit and proper.

Facts necessary for disposal of the Rule are briefly stated as follows that on 27-02-2017, opposite party No. 2, as complainant, filed a petition of complaint implicating the petitioner and another as accused, alleging, inter alia, that the accused have a company named Tricom Foods Limited. Accused No. 1 is the Managing Director, and Accused No. 2 is the Director. However, the Accused No. 1 disclosed that the company requires two more directors. The complainant, upon depositing Tk. 05 lacs can be a director of the company, and if a person is a Director, s/he would get remuneration. On good faith, the complainant gave such an amount on 30.01.2001 to the accused No. 1, and accused No. 2 received the same. Subsequently, the accused lured the complainant for more investment; being allured so, on 30.01.2006, the complainant gave a loan of taka 16 lacs to the accused persons. However, time and often accused of calling the complainant at their house in Dhaka and Mymensingh, took the signature on documents in the name of a board meeting, and gave remuneration to the complainant for few months, and the complainant acted according to the wishes of the accused. However, the accused did not provide any documents to the complainant regarding her directorship of the company. The accused allured the complainant and other Directors about more remuneration and entered into an agreement on 12.08.2003 with a financial institution, namely, MIDAS FINANCE LIMITED on behalf of the company for availing equity and entrepreneurship (EEF) fund from the Bangladesh Bank; that being the Managing Director i.e accused no. 1 on behalf of the company executed an agreement. By such execution, accused No. 1 received a credit facility of taka 1, 47, 85000/-, which was withdrawn from 23.01.2004 to 09.04.2005; the accused did not produce a book of accounts, and without investing the EE fund and repaying the same, the creditor misappropriated the fund. The authority issued several letters of reminder to repay the

same, but the accused did not pay any heed to them. Therefore, finding no other alternative, issued a legal notice, but the accused did not receive the same. The complainant, along with some witnesses, went to the house of the accused and asked for the money; however, the accused persons, instead of repaying the same, threatened her with life. Hence, the complainant filed this petition of complaint under Sections 406 and 420 of the Penal Code along with Sections 397 and 147 of the Companies Act, 1994.

The petition of complaint was examined, and upon examination, instead of taking cognizance, the Court below sent the complainant's petition for inquiry. Thereafter, on 17.07.2017, cognizance was taken against the accused persons under section 406 and 420 of the Penal Code along with section 147 of the Companies Act, 1994.

Knowing such facts accused voluntarily surrendered to the Court of Chief Judicial Magistrate, Mymensingh, and obtained bail.

The case record was transmitted to the Senior Judicial Magistrate, 2nd Court, Mymensingh being ready for trial. However, the accused jointly filed an application under section 241A of the Code of Criminal Procedure to get an order of discharge. Upon hearing the parties, eventually the Court below framed a charge under sections 406 and 420 of the Penal Code along with section 147 of the Companies Act, 1994.

Being aggrieved, the petitioner and his wife filed Criminal Revision No. 485 of 2018 before the Sessions Court, Mymensingh. The court, by its order dated 04-09-2019, allowed the revision and thereby set aside the order of farming charge dated 16-09-2018.

The matter was fixed for a charge hearing, and on the alleged date for a charge hearing, the petitioner, along with his wife, filed an application under section 241/A of the Code of Criminal Procedure. Upon hearing the parties, the court was pleased to discharge the co-

accused and framed charges against the petitioner under sections 406 and 420 of the Penal Code.

Being aggrieved petitioner filed Criminal Revision No. 4 of 2021 before the Session Judge, Mymensingh, for setting aside the order of framing of charge. However, the said revision was rejected summarily vide its order dated 11.01.2021.

However, after the farming charge, the accused-petitioner approached this court with an application under section 561A of the Code of Criminal Procedure for quashing the case. Upon hearing, this Court issued a Rule and passed an order of stay of the proceedings.

Mr. Md. Shaharia Kabir, learned Advocate for the petitioner submits that the accused petitioner is the Managing Director and the complainant is one of the Director of the Company. According to him spending money by the petitioner/Managing Director of the Company cannot be termed as misappropriation or breach of trust of fund of the company, criminal prosecution under sections 406 and 420 of the Penal Code and remedy of the complainant, if any, is one of accounting and mesne profit for which civil suit is appropriate remedy, hence the prosecution of the petitioner is not maintainable and accordingly is liable to be quashed.

Mr. Md. Nuro Nabi, learned Advocate for the Opposite Party No. 2, brings notice that the inquiry report clearly states that, without disclosing the fact, the accused obtained a loan and expended such amount. According to him, the details about the breach of trust and misappropriation of money have been described in the petition of complaint, and breach of trust and misappropriation of funds have been committed by the accused in connivance with others. He claims the allegation contained in the prosecution materials prima-facie disclosed the offences against the accused petitioner under the sections 406 and 420 of the Penal Code thus the charged was

framed against the accused under the above noted sections therefore, this Court sitting in a jurisdiction under section 561A of the Code of Criminal Procedure is not in a position to determine the factual aspects of the case unless the evidence is recorded and considered. According to him, the truth may come out in the trial after the adducing of the evidence by the parties, so that there is no scope to quash the proceedings.

Mr. Md. Nuro Nabi, learned Advocate for the Opposite Party No. 2, cited decisions, namely Major Md. Nazmul Haque and others vs. the State and another, reported in 13 SCOB (2020) HCD-47, Khorshed Alam vs. Azizur Rahman and another, reported in 48 DLR (1996)-36, and Yunus (Md) vs. State and another, reported in 67 DLR (2015)-97.

However, he finally submits, this court may give an opportunity to the opposite parties to agitate their grievances, if any, in an appropriate forum under law.

This Court has gone through the application filed under section 561A of the Code of Criminal Procedure and the materials appended to this application. This Court also considered the submissions and cited decisions referred to by the parties.

It is pertinent to note that after examining the complainant, instead of taking cognizance, the learned Magistrate sent the complaint petition for inquiry. However, the inquiry report dated 14-05-2017 revealed that the complainant is one of the directors of the company, namely Tricom Foods Limited, in which the petitioner is the Managing Director, and record shows that the dispute among the parties relates to the misappropriation of the funds of the company by the Managing Director.

Indeed, it has alleged in the course of official business the fund has been used which was allegedly misappropriated by the petitioner, could not be legally termed as misappropriation or breach

of trust of the fund of the company for a criminal prosecution under section 406/420 of the penal code and the remedy, if there be any, is one of accounting and mesne profit for which a civil suit for accounts is the appropriate remedy and hence the case is not maintainable and being not maintainable is liable to be quashed.

Mr. Md. Shaharia Kabir, the learned Advocate in the above context, cited a decision wherein the appeal was allowed and thereby quashed the proceeding reported in 58 DLR (AD) 76. Relying upon such a decision submits that the relationship between the complainant and the accused, being of the Director of a private Limited Company, principles of partnership shall apply. As such, spending of money by the petitioner as Managing Director cannot be termed misappropriation or breach of trust of the fund of the company. Remedy of the complainant, if any, is by way of suit for accounts.

Further, on going through, it revealed in the case of Nasiruddin Mahmud and others vs. Momtazuddin Ahmed and another, reported in 1984 BLD (AD) 97, the question arose as to whether the partner can be charged by his co-partner with an offence for the breach of trust and cheating under Sections 406/420 of the Penal Code in respect of partnership business entrusting the money for the purpose, wherein it was held reviewing the decisions on the subject that a partner could not be alleged to be misappropriated or cheated when an amount was entrusted to the accused for the partnership business.

Similar view was taken in the case Md Yameen and another vs. KA Bashar and others, reported in 1986 BLD (AD) 305 and the issue was as to whether the Managing Director and Chairman of a company, the trustees of the fund of the company, could be prosecuted for misappropriation of the fund of the company and as to whether the principle of law applicable to the members of the

partnership shall apply to the private limited company for the proposition that the directors of the company are trustees of the money of the business in their hands and control and they could not be prosecuted for misappropriation of fund and cheating the other directors and accordingly, the prosecution against one director by another for alleged misappropriation and cheating was quashed.

In the above context, it can be said that the facts and circumstances of the above decision cited by the petitioner will apply with all force in the instant case at hand, and there is no room to differ from the same. Accordingly, this court finds merit in the Rule.

In light of the above, the Rule is made absolute, the impugned order dated 11.01.2021 passed by the Sessions Judge, Mymensingh, in Criminal Revision No. 04 of 2021 is hereby set aside, and the impugned proceedings of C.R Case No. 559 of 2017 is hereby quashed.

The order of stay granted at the time of issuance of the Rule is hereby recalled and vacated.

The complainant party shall have the liberty to proceed against the accused petitioner for the allegation made in the petition of complaint in the appropriate forum, if so advised, in accordance with the law.

Communicate the judgment and order at once.

Md. Riaz Uddin Khan, J:

I agree.