

LEX/BDHC/0144/2008

Equivalent Citation: 2008 28 BLD 367

**IN THE SUPREME COURT OF BANGLADESH
(HIGH COURT DIVISION)**

Writ Petition No. 2280 of 2008, with Writ Petition No. 8254 of 2007, -with-Writ Petition No. 3972 of 2007, A.H.M.. Mustafa Kamal @ Lotus Kamal.-with-Writ Petition No. 10536 of 2007, - with-Writ Petition No. 10569 of 2007. -with-Writ Petition No. 10570 of 2007,-with-Writ Petition No. 10790 of 2007, -with-Writ Petition No. 1571 of 2008., Md. Mosaddek Ali Falu, -with-Writ Petition No. 10549 of 2007, Ruhul Quddus Talukder Dulu, -with- Writ Petition No. 3597 of 2008, Sheikh Hasina Wazed alias Sheikh Hasina

Decided On: 01.06.2008

Appellants: **A.H.M. MUSTAFA KAMAL @ LOTUS KAMAL**

Vs.

Respondent: **BANGLADESH, REPRESENTED BY THE SECRETARY, MINISTRY OF HOME AFFAIRS, BANGLADESH SECRETARIAT, RAMNA, DHAKA AND OTHERS**

And

Appellants: **MD. MOSADDEK ALI FALU**

Vs.

Respondent: **BANGLADESH, REPRESENTED BY THE SECRETARY, MINISTRY OF HOME AFFAIRS, BANGLADESH SECRETARIAT, RAMNA, DHAKA AND OTHERS**

And

Appellants: **RUHUL QUDDUS TALUKDER DULU and Ors.**

Vs.

Respondent: **BANGLADESH, REPRESENTED BY THE SECRETARY, MINISTRY OF HOME AFFAIRS, BANGLADESH SECRETARIAT, RAMNA, DHAKA AND OTHERS**

Hon'ble Judges:

Mohammad Abdur Rashid and Md. Ashfaqu Islam, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Rafiq-UI Huq with Ahsanul Karim, Faheemul Hoque, Sheikh Fazle Noor Taposh, Shah Monjurul Hoque and Mahbubur Rahman with Ziauddin Quasem (In respect of their writ petition), Khan Saifur Rahman and Habibul Islam Bhuiyan and M.A. Aziz Khan and Md. Khorshid Alam Khan, ACC, (In respect of all writ petitions)

JUDGMENT

Mohammad Abdur Rashid, J.

1. The above Rules NISI were obtained by the petitioners challenging continuation of their respective cases before the Special Judges at Sher-E-Bangla Nagar after the expiry of the time limit as prescribed by section 6A of the Criminal Law (Amendment) Act, 1958 except that in Writ Petition No. 3972 of 2007. The Rules were issued in Writ Petition No. 3972 of 2007 and No. 8254 of 2007 and No. 2280 of 2008 at the instance of the same petitioner. In the first one, a direction was issued for acceptance of the statements of income and assets of the petitioner. While last two Rules were

issued in respect of Special Case No. 11 of 2007 arising out of Gulshan PS Case No. 86 dated 22.03.07 and corresponding to ACC GR Case No. 17 of 2007.

2. Rules were issued in Writ Petition No. 10536 of 2007; No. 10569 of 2007; No. 10790 of 2007 and No. 10570 of 2007 in respect of Special Case No. 113, 113(K), 113(L) and 113(M) of 2007, which arose out of Tejgaon PS Case No. 02 dated 02.03.07 corresponding to ACC GR No. 43 of 2007.

3. As the issues that were raised in the above Rules are the same, we heard them together and now, dispose of them by this common order. Salient facts of the cases that would be relevant for disposal of the issues are as hereunder.

4. In Writ Petition No. 8254 of 2007 and Writ Petition No. 2280 of 2008, it is stated that FIR was lodged on 22.03.07 against the petitioner and his wife under section 26(2) and 27(1) of the Anti-Commission Act, 2004, hereinafter referred to as the ACC Act, section 109 of the Penal Code and rule 15(N)(5) of the Emergency Powers Rules, 2007 hereinafter referred to as the EP Rules, 2007.

5. Upon receipt of a charge sheet, on 10.09.07 cognizance were taken of offences against the petitioner and 3 others and on 02.10.07 the case was transferred to the Special Judge for trial. Charge was framed on 22.10.07 and deposition commenced on 20.08.07. Thereafter, 218 days expired after the date of cognizance on 10.09.07 but the trial of the Case could not be completed under section 6A of the Criminal Law (Amendment) Act, 1958.

6. An affidavit-in-opposition was filed on behalf of respondent no. 2, Chairman, ACC. In the affidavit, how much time according to respondent no. 2 actually elapsed from the date of cognizance or date of charge is not stated. However Mr. Khan Saifur Rahman on behalf of said respondent submitted that the time limit for trial of the case expired on 09.04.08 if counted from date of cognizance and on 27.05.08 if counted from the date of charge.

7. In Writ Petition No. 1Q536, No. 10569, No. 10790 and 10570 of 2007, it is stated that F.I.R was lodged on 02.03.07 against the petitioner and others under section 406/409 and 402 read with section 109 of the Penal Code. Police after investigation submitted a charge sheet on 16.09.07 against the petitioner and others under aforesaid sections of the Penal Code and also under rule 19T(1) and 19T(5) of the EP Rules, 2007. On 19.09.07 cognizance of offences under section 409 read with section 109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 was taken by the Metropolitan Senior Special Judge against the petitioner and others in four cases, namely, Special Case No. 113, 113(K), 113(L) and 113(M) of 2007. 60 days already expired on 17.11.07 but the trial could not be completed.

8. Respondent no. 1, Chairman, ACC appeared but no affidavit-in-opposition was filed on his behalf. Mr. M.A. Aziz Khan, learned advocate on behalf of said respondent by filing copy of the entire order-sheet of the cases submitted that due to the intervention of this Division by way of granting stay, charge could not have yet been framed, and the trial did not commence.

9. In Writ Petition No. 10549 of 2007, it is stated that FIR was lodged on 19.04.07 against the petitioner and his wife under section 26(2) and 27(1) of the ACC Act, 2007; section 5(2) of the Prevention Corruption Act, 1974 and rule 15N(5) of the EP Rules, 2007 read with section 109 of the Penal Code.

10. On 25.07.07 cognizance was taken and on 29.08.07 charge was framed against the petitioner and his wife. Accordingly, 60 days expired on 19.06.07 from the date

of cognizance on 19.04.07 and on 28.10.07 from the date of framing charge on 29.08.07.

11. An affidavit-in-opposition was on behalf of respondent no. 1, Chairman, ACC was filed. But how much time according to respondent no. 1 expired from the date of Cognizance and from the date of charge has not been specifically stated.

12. In Writ Petition No. 1571 of 2008, it is stated that FIR was lodged on 10.02.07 under section 406, 420 and 409 read with section 109 of the Penal Code. After completion of the investigation, the police submitted a charge sheet under section 409/406/420 and 471 read with section 109 of the Penal Code, section 5(2) of the Prevention and Corruption Act, 1947 and rule 15, 19T(5) of the EP Rules, 2007. On 02.12.07 cognizance was taken against the petitioner and another and charge was framed on 07.02.08. According to the calculation of the petitioner, 102 days elapsed from the date of cognizance on 02.12.07.

13. No affidavit-in-opposition was filed on behalf of respondent no. 1, Chairman, ACC. Mr. M.A. Aziz Khan on behalf of said respondent submitted a copy of the entire order-sheet and claimed that only 51 days elapsed after date of charge on 07.02.08 and next 02.06.08 is fixed for judgment, after completion of the trial.

14. In Writ Petition No. 3597 of 2008, it is stated that FIR was lodged on 02.09.07 against the petitioner and others under section 161, 163, 164, 165, 165A read with section 109 of the Penal Code, section 5(2) of the Prevention of Corruption Act, 1947 and rule 15 and 19T of the EP Rules, 2007. After completion of the investigation, the police on 10.01.08 submitted a charge sheet. On 13.01.08 cognizance was taken of the offences under section 161 and 165A read with section 109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 and same date the case was transferred to the First Court of Special Judge for Trial. 60 days expired on 13.03.08. On 18.05.08 charge was framed. According to the calculation of the petitioner 130 days elapsed from the date of cognizance on 13.01.08.

15. An affidavit-in-opposition on behalf of the respondent no. 2. Chairman, ACC was filed. According to the calculation of this respondent, 89 days only elapsed from the date of cognizance and 9 days only from date of charge.

16. Mr. Rafiq-Ul Huq, learned senior advocate for the petitioner in Writ Petition No. 2280, No. 3597 and NO. 1571 of 2008; No. 10536, No. 10549, No. 10569, No. 10570 and No. 10790 of 2007 took us through the Criminal Law Amendment Act. 1958 (Act No. XL of 1958) hereinafter referred to as the Act particularly section 6A of the said Act as well as the EP Rules, 2007 and submitted that after expiry of the specified period of 45 days and extended period of 15 days that is $(45+15)=60$ days from the date of cognizance for completion of the trials, the trial Court that is respective Special Judge has become functus officio. In elaborating his arguments, he also submitted that after being such functus officio, particular judge who was holding the trial can no more continue with the trial of the case but trial of the case could be held by another judge.

17. He further submitted that as section 6A was inserted on 17 April, 2007 with clear mandate for conclusion of trial of a case within the specified and extended period of sixty days from the date of cognizance and after expiry of such period, the Judge could have no jurisdiction to continue with the trial. In support, he cited Niamat Ali Sheikh and others v. Begum Enayetur Noor: (1993) 13 BLD (AD) 11; Master Giasuddin and others v. the State: (1997) 17 BLD (AD) 35 and an unreported decision dated 23.04.08 of the Appellate Division in Civil Appeal No. 65 of 2007 in the case of the State v. Moyezuddin Sikder and others.

18. Mr. Khan Saifur Rahman, learned senior advocate who appeared on behalf of respondent, ACC in Writ petition No. 3972 of 2007 and No. 8254 and No. 2289 of 2008; submitted that the provision of 6A of the Act was not intended to be made mandatory rather directory and even after the expiry of the period of sixty days, the trial Court would not lose jurisdiction as the Court was enjoined to complete the trial.

19. He further submitted that the time limit as prescribed by section 6A of the Act would not govern the trial of the case rather rule 19K of the EP Rules, 2007 will control the trials and under rule 19K the time limit for conclusion of a trial would run from the date of charge, and even the period specified for conclusion of the trial under section 19K cannot be said to be mandatory and after the expiry of said period, the Court would not lose the jurisdiction. He also relied upon the case of Niamat Ali Sheikh and others v. the State: 13 BLD (AD) 11.

20. Mr. M.A. Aziz Khan appeared on behalf of respondent, ACC in Writ Petition No. 10536, No. 10569, No. 10790 and No. 10570 of 2007 and No. 1571 of 2008 took us through various provisions of the EP Rules, 2007 and submitted that said Rules would govern the trial of the cases not section 6A of the Act.

21. He submitted that rule 19K of the EP Rules, 2007 and not section 6A of the Act would be relevant for the purpose of calculation of the period for conclusion of the trial of a case and under section 19K the time limit would run from the date of charge and not from the date of cognizance and as no charge could be framed in the cases, there was no question for expiry of the period as mentioned in rule 19K. In support, he cited VC Shukla v the State: MANU/SC/0284/1979 : AIR 1980 SC 962 wherein it was held that trial of the case shall deem to commence from the date of charge framed.

22. Mr. Habibul Islam Bhuiyan, learned senior advocate also appeared for said respondent, ACC in Writ Petition No. 3597 of 2007 practically adopted the submissions of learned advocates who already appeared on behalf of said respondent and submitted that in the absence of any penal provision or consequence prescribed on the failure of the Court to conclude the trial within the specified and/or extended period of time, the Court would not lose its jurisdiction. He also relied upon the case of S.M Mozammel Hoque v The State: (2008) 13 BLC 237 and Md. Delwar Hossain v. the State: (2006)26 BLD AD 109.

23. In Writ Petition No. 8254 of 2007, the Rule was obtained challenging the proceedings of Metropolitan Special Case No. 102 of 2007 arising out of Gulshan PS Case No. 86 dated 22.03.07 corresponding to GR Case No. 223 of 2007. Mr. Md. Mahbubur Rahman, learned senior counsel for the petitioner in Writ Petition No. 8254 of 2007 and Writ Petition No. 3972 of 2007 adopted the submissions of Mr. Rafiq-ul Huq and submitted that a definite period is allowed to conclude the trial. On the expiry of such time limit, it would be against the spirit, purpose and meaning of the emergency and in the name of emergency starting a case and prolonging the trial of the case may be tantamount to practicing fraud on the statute.

24. He submitted that after expiry of the period of the time prescribed by section 6A of the Act and also rule 19K and 19L of the EP Rules, 2007, the Special Judge has become functus officio and quorum non-judice.

25. Lastly, he also submitted that Rule 11(3), 11(4), 11(5), 11(6), 15, 15A, 11A(I) (2)(4) and 15A(I), 15A(1)(2)(3)(4)(5) and 16(2), 19A, 19B, 19C. and 19D of the EP Rules, 2007 are ultra vires of article 27, 31, 32, 35 and 26 of the Constitution. But he did not however elaborate his submissions regarding the constitutionality of aforesaid rules of EP Rules, 2007. Nor did he cite any authority in support of his last

contention.

26. In respect of Writ Petition No. 3972 of 2007, he submitted that he does not want to press the Rule after acceptance of the statement of assets in pursuance of the direction of this Division.

27. In reply, Mr. Rafiq-UI Hoque took us through the case of ACC v Barrister Mir Mohammad Helaluddin: (2008) 60 DLR AD 57 and read paragraph 38 in order to make his point clear that the legislature intended speedy trial and effective disposal by insertion of the clause, 'দ্রুত ও কার্যকরভাবে সম্পন্ন করিবার জন্য'। He also relied upon the following view of the Appellate Division in the aforesaid unreported case, namely, the State v. Moyez Uddin that,

When certain provisions started with non-obstantive clause like 'notwithstanding anything contained' that would indicate the provision should be construed as mandatory.

28. He read paragraph 53 and 165 from the Hulsbury Law of England, 4th Addition and tried to impress upon us that in view of such clear provision for conclusion of the trial, the Court cannot proceed further with the trial after the expiry of specified and extended time.

29. We have perused the facts of each case to understand the issue which relates to the time-limit prescribed for conclusion of the trial of the cases by the Special Judges in the Parliament Building at Sher-E-Bangla Nagar, Dhaka. The Special Judges are holding trial of the cases under the Act, 1958, Section 6A of the Act, which was inserted by Ordinance VIII of 2007 on 17.04.07 reads as follow:

Section 6A. Time-limit for trial -

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 in respect of time-limit for trial of offences, the Special Judge shall subject to the provision of subsection(2), conclude the trial, of an offence within forty five days from the date of taking of cognizance.

(2) If the trial cannot be concluded, within the time-limit mentioned in subsection (1), the Special Judge shall, after recording appropriate reasons in writing, conclude the trial within fifteen days next thereafter.

30. Plain meaning of such provision is that a Special Judge is required to conclude the trial of an offense within a period of 45 days from the date of cognizance. If he fails to conclude the trial within said time-limit, he shall, after recording the reasons in writing, conclude the trial within fifteen days next thereafter.

31. On behalf of the Commission, the learned advocates in one voice submitted that the time-limit prescribed by section 6A of the Act, 1958 would not apply to the conclusion of a trial of a case during the emergency. They pressed that the Special Judge is obliged to conclude the trial of such case within the time-limit prescribed by rule 19^ক of the EP Rules, 2007.

32. Rule 19^ক of the EP Rules, 2007 prescribes a time-limit of 45 days for conclusion of the trial of a case notwithstanding any provision in any law during the continuance of emergency. If the trial could not be completed within said 45 days, the Court or Tribunal shall, after recording the reasons, complete the trial within 30 days next thereafter with information in writing to the Supreme Court of Bangladesh and sending a copy thereof to the Government. If the trial could not be completed within

said (45+30=) 75 days then the Court or Tribunal shall, after recording the reasons, complete the trial within 15 days next thereafter with information to the Supreme Court of Bangladesh and a copy thereof to the Government.

33. Under rule 19^A of the EP Rules, 2007, during the continuance of the emergency after commencement of a trial of a case under the Rules or under any law mentioned in rule 14 and 15, the trial shall proceed continuously without any adjournment. If, upon an application of any party, the Court or Tribunal is satisfied that the trial of a case should be adjourned in the interest of justice, then, it could adjourn the trial for three days only. But the Court or Tribunal shall not adjourn the hearing of a case, if conclusion of the trial under rule 19^A becomes impossible.

34. 19^A of the EP Rules, 2007 however provides for accountability of the Commission, authority, police officials or others concerned with the trial if the trial could not be completed under rule 19^A of the EP Rules, 2007 under section 15 of the Druto Bichar Tribunal Act, 2002. But nothing is provided in case of failure of the Court or Tribunal in concluding the trial within said time-limit as a consequence for an accused.

35. Rule 10 provides inter alia that notwithstanding anything in any law or rules the offenses under said Rules, 2007 shall be tried by a Druto Bichar Adalat, Druto Bichar Tribunal, Court of Metropolitan Magistrate Court and 1st Class Magistrate, as the case may be. And such offenses are non-cognizable, non-compoundable and non-bailable.

36. Rule 18 empowers the Government to transfer at any stage of any case if the offense under any law as mentioned in rule 14 and 15 of the EP Rules, 2007 or any other law appears to be grave to the Druto Bichar Tribunal from the Court of Sessions Judge, Special Judge, Magistrate or Special Tribunal during the continuance of the emergency.

37. On the other hand rule 18^A, which was inserted by a notification being SRO No. 220 dated 10 September, 2007 with effect from 12 January, 2007, empowers the Government or the Commission, as the case may be, by notification in the government gazette, to transfer at any stage of the trial any pending case of any offense under any law as mentioned in rule 14 and 15 of the EP Rules, 2007 in the public interest, notwithstanding anything contrary in such Rules or any other law for the time being in force during the continuance of the emergency from the Court of Sessions Judge, Magistrate Court, Special Judge or Tribunal to the Court of any special Judge established under the Act, 1958. After transfer of such case, subsequent proceedings of the trial of such case shall have to be concluded following the procedure laid down by such Act subject however to the EP Rules, 2007.

38. Rule 18^A of the EP Rules, 2007 further provides that notwithstanding anything contrary/repugnant in such Rules or any other law for the time being in force, during the continuance of the emergency, the trial of any offense under any law as mentioned in rule 14, which was approved under rule 19T and any offense under any law as mentioned in rule 15 could be held by any Special Judge established by the Act, 1958. After receipt of such a case by such Special Judge, the trial of the case shall have to be held following the procedure of the Act, 1958 however subject to the EP Rules, 2007.

39. We have considered the above rules in order to understand which of the provisions prescribing the time-limit for conclusion of a case shall apply to a Special Judge is established by the Act, 1958. The Court of Special Judge established by the Act, 1958 with the sole objective to exclusively try the offenses which are specified in the schedule to such Act. Besides, such Special Judge shall hold trial of any case

transferred to him under subsection (3) of section 4 of the Act, 1958. The time-limit prescribed by section 6A shall therefore apply to such Special Judge to conclude the trial of such offense.

40. Unless an offense under the Emergency Powers Act or the Rules made thereunder is included or specified in the schedule of the Act, 1958, we are afraid, such offense could be exclusively tried by such Special Judge. Moreover, no rules of the EP Rules, 2007 could be intended to or could override any provisions of a law say the Act. 1958.

41. Rule 19⁹ was inserted in the EP Rules, 2007 by a notification being SRO No. 30 dated 21.03.07 with effect from 13.02.07 while section 6A was inserted in the Act. 1958 by section 3 of the Ordinance VIII of 2007 on 17.04.07. Close reading of above provisions does not support the contentions of the learned advocates of the Commission that rule 19⁹ prescribing the time-limit for conclusion of the trial of a case shall apply to a Special Judge holding trial under the Act, 1958, We therefore do not have any hesitation to say that under section 6A of the Act. 1958 a Special Judge shall conclude the trial of a special case within the time-limit of 45 days from the date of cognizance of the offense. If the trial could not be concluded within said time-limit, then he shall after recording appropriate reasons in writing conclude the trial within fifteen days next thereafter.

42. Now, the question that was raised for decision, if such Special Judge could not conclude the trial within such specified time and extended time of 60 days, what would happen. Unlike the provisions in some special laws prescribing certain consequences in the event of failure in the conclusion of a trial within the specified and extended, no consequence is provided for in the Act, 1958.

43. Mr. Rafiq-Ul Huq submitted that if the trial could not be concluded within the specified time and extended time of sixty days, then, such Special Judge would become functus officio. Case would of course not end there but has to be tried by some other judge.

44. 'Functus officio' is a Latin term, which means a task performed. In Osborn's Concise Law Dictionary, 7th Edition, the term is defined as 'having discharged his duty'. Thus, once a Magistrate has convicted a person charged with an offense before him, he is functus officio, and cannot rescind the sentence and re-try the case. Similarly, when an agent has completed the business with which he was entrusted, his agency is functus officio. In the cases at the hand, Special Judges entrusted with the trial of such cases could not be said to have discharged their duty by disposing of such cases, when they could not conclude the trial within the specified time and extended time of sixty days. So, they cannot be termed to have become functus officio simply for the reason they could not conclude the trial within the time-limit. Moreover, this Division cannot supply any consequence which is not there in section 6A of the Act, 1958. Nor any authority could be cited to arrive at such a conclusion that after the expiry of the specified time or extended time such Special Judge would become functus officio.

45. It was also pressed on behalf of the petitioners that such Special Judge was entrusted with the trial of a special case and his jurisdiction was limited in the sense that he shall conclude the trial within the specified time or extended time after which time-limit he would lose the jurisdiction to continue sitting over the case. No authority could either be cited even for such view that after the expiry of the specified time or extended time, such Special Judge would lose the jurisdiction to conclude the trial. The authorities cited at the Bar are not exactly on the issue that we

are facing and we, therefore, refrain from considering any of them.

46. For the reasons aforesaid, submissions of learned advocates for the petitioners that after the expiry of specified period and extended period of time for conclusion of the trial, the Special Judge either becomes functus officio and/or lose his jurisdiction to try the case have got no substance.

47. In the result, all the Rules except that in Writ Petition no. 3972 of 2007 are discharged with cost.

48. Rule in Writ Petition no. 3972 of 2007 is discharged for non-prosecution as prayed for.

49. Orders of stay granted at the time of issuance of the Rules are recalled and vacated. Communicate at once.

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