

**In the Supreme Court of Bangladesh  
High Court Division  
(Criminal Appellate Jurisdiction)**

**Present:**

**Mr. Justice Mustafa Zaman Islam**

**And**

**Mr. Justice Md. Aminul Islam**

**Criminal Appeal No. 7233 of 2014.**

Md. Sarwar Hossain

.....Convict-Appellant.

-Versus-

The State and another

.....Respondents.

Mr. Md. Muslem Uddin Bhuiyan, Advocate

.....For the Appellant.

Mr. Shaheen Ahmed Khan, DAG with

Mr. Md. Asaduzzaman, A.A.G

Mr. Md. Mizanur Rahman, AAG and

Mr. Md. Akbor Hossain, A.A.G

.....For the respondent No.1

Mr. Shaheen Ahmed, Advocate

.....For the respondent No.2

**Heard On 01.12.2022 and 05.01.2023**

**Judgment on 12.01.2023.**

**Md. Aminul Islam, J:**

This Criminal Appeal is directed against the judgment and order of conviction and sentence dated 20.10.2014 passed by the learned Special Judge, Court No. 02, Dhaka in Special Case No. 06 of 2012 arising out of Dhanmondi Police Station

Case No. 53 dated 30.06.2004 corresponding to G.R. No. 104 of 2004 convicting and sentencing the convict appellant and sentencing him to suffer rigorous imprisonment for 3 (three) years with a fine of Taka 18,78,000/-(eighteen lakh seventy eight thousands) under section 409 and read with section 109 of the Penal Code.

The prosecution case, in short, is that one Mr. Md. Abu Bakar Siddique, Inspector, Anti Corruption Commission, Dhaka Anchal, Dhaka as informant lodged an First Information Report (FIR) with Dhanondi Police Station on 30.06.2004. It was stated that the accused persons including accused-appellant who are serving in Agrani Bank Limited, Green Road Branch, Dhaka created a false loan in collusion with each other under fraudulent and misusing their power with a view to obtain illegal gain and having withdrawn the amount of Tk. 18,78,000/-(eighteen lakh seventy eight thousands) embezzled the said amount of money for which the said FIR was lodged under sections 406/409/420/34 of the Penal Code and read with section 5(2) of the Prevention of Corruption Act, 1947 noted that the appellant was the Jamader (MLSS) of the said Branch of the Agrani Bank. Hence, the prosecution case.

Ram Mohon Nath, Deputy Director of Anti Corruption Commission, Main Branch, Dhaka (P.W.6) was assigned with the investigation and investigated the case. Thereafter completing the investigation submitted charge sheet being No. 88 dated 19.06.2011 against the accused appellant and others under section 409/109 of the Penal Code and read with section 5(2) of the Prevention of Corruption Act, 1947. The learned Judge of Senior Special Court, Dhaka upon taking cognizance and the case was ready for trial, then the case was sent to the learned Judge of Special Court No. 02, Dhaka for trial and disposal. The learned Judge of Special Court No. 02, Dhaka was framed charge on 19.06.2012 under section 409/109 and read with section 5(2) of the Prevention of Corruption Act, 1947 against the accused appellant and others and the charge was read over him, he pleaded not guilty and claimed to be tried.

The prosecution examined as many as 6 (six) witnesses out of 8 (eight) charge sheet witnesses, which the defence examined none.

Having gone through the impugned Judgment and order of conviction and sentence, it finds that the prosecution

witnesses along with Exhibits and material Exhibits to prove the case in hand and the defense has also cross-examined the witnesses thoroughly to ascertain veracity and credibility. Now let us discuss the evidence of the aforesaid prosecution witnesses in order to ascertain how far the prosecution has succeeded in proving the charge leveled against the appellant.

**During trial P.W.1** Shafiuddin Ahmed deposed that, while he was working as an officer in Agrani Bank, Green Road Branch, Abu Bakar Siddique, the investigating officer of this case, on behalf of the then Anti-Corruption Bureau on 22.10.2003 at 15.00 hours from Zulfikar Ali, Assistant General Manager, seizure list Ka to Umma prepared seizure list in front of him and his signature on it which was marked as Exhibit “1” and his signature marked as Exhibit “1/1”. The investigation officer took out set of photocopies and handed over the original documents to the Bank Manager Zulfikar Ali. Seized documents were filed before the Court of learned Assistant Judge, 1<sup>st</sup> Court, Dhaka in money Suit No. 13 of 2004.

In cross examination he stated that, the seized documents are not in the Court. No personal knowledge about the money Suit.

On recall he had given a statement earlier and could not submit it as there was a different case in the seizure list. But the above documents have been submitted in the name of Mrs. Rabeya Rahman of 10 Cheques are material Exhibit-I-series, signatures of the account opening card material Exhibit-II account opening Form material Exhibit-III, 02 (two) deposit voucher material Exhibit-IV, Check Requisition Slip material Exhibit-V, Statement of Accounts material Exhibit-VI and Legal Notice material Exhibit-VII.

**In cross examination- Declined:**

**P.W.2**- MD. Harun or Rashid Khan deposed that on 22.10.2003 Investigating Officer Abu Bakar Siddique went to Agrani Bank, Green Road Branch and seized some papers and documents. The investigation officer prepared seizure list in his presence which was marked as Exhibit-1 and his signature as Exhibit-1/2.

In Cross Examination, he replied that he had no knowledge about the seized documents in the seizure list.

**P.W. 3** - Abu Bakar Siddique was working as Assistant Director of Anti Corruption Commission, Head Office, Dhaka. On 02.10.2003, he was assigned to investigate

the File No. 508/2003 of Dhaka Region. During investigation he saw that (1) Rabeya Rahman opened a current account on 17.09.1998 at Agrani Bank, Green Road Branch being account No. 33009632. She withdrew TK. 10,98,000/- (ten lakh ninety eight thousands by 06(six) cheques but it is found at that particular time there was no such amount of money deposited in her account. The accused Salim Ullah as an Officer and Amjad Hossain as a Senior Principal Officer jointly passed the said cheques without verifying the position of the account despite there was no such loan application in this regard. The accused Zulfikar Ali, Assistant General Manager and Head of the Branch was illegally abated to withdraw Tk. 10,98,000/-(ten lakh ninty eight thousands) in excess to her deposited amount. Secondly: on 16.01.2001 the accused Mohammad Ullah, Principal Officer prepared a debit voucher of TK. 4,00,000/- (four lakh). The Accused Mohammad Ullah and Salim Ullah jointly passed the said debit voucher. Then the accused Rabeya Rahman withdrew Tk. 4,00,000/-(four lakh) on the same day. The accused Mohammad Ullah and Salim Ullah passed the cheques jointly. The accused, Zulfikar Ali, Branch Manager, abated in creation and withdrawing of loans in illegal way.

3rdly: on 25.10.2001 the accused Mohammad Ullah personally prepared a debit voucher of Tk. 3,80,000/-(three lakh eighty thousands) in favour of the name of Naima Islam without address. The said debit voucher was jointly passed by the accused Mohammad Ullah and Salimullah. On the same day without any application of the accused namely Ziaul Alam out of forgery showing loan of Tk. 4,00,000/- (four lakh) transferred the same to the current account of accused Rabeya Rahman. The accused Sarwar Hossain showed the transfer of the forged loan of Tk. 4,00,000/- (four lakh) to the current account of the accused Rabeya Rahman without the sanction of the authority and without any application of the borrower. The Accused Mohammad Ullah and Salimullah passed the said credit voucher. Then accused Rabeya Rahman withdrew a total amount of Tk. 3,80,000/- (three lakh eighty thousands) by 3 (three) cheques from 25.10.2001 to 01.11.2001. The Accused Mohammad Ullah and Solimullah jointly passed the said 03 (three) cheques. Thus from 20.12.2000 to 01.11.2001 total amount of Tk. 18,78,000/- (eighteen lakh seventy eight thousands) was withdrawn from Agrani Bank, Green Road Branch by 10 (ten) cheques by way of fraud and criminal

breach of trust and abuse of power with malafide intention to obtain illegal gain. The offence was committed under Sections 406/409/420/34 of the Penal Code and read with Section 5(2) of the Prevention of Corruption Act of 1947 and he submitted a report to the higher authority and after obtaining approval, he lodged an Ejahar with Dhanmondi Police Station. The FIR and his signature were marked as Exhibit-2 and signature marked as Exhibit- 2/1 respectively. At the time of inquiry he seized the documents and prepared seizure list. The seizure list and his signature were marked as Exhibit -1 and 1/3 respectively. On 30.06.2004 he received the approval being Memo No. 508/2003/dha: A/1620. which was marked as Exhibit -3

In cross examination- the accused Zulfikar Ali stated that he lodged a G.D. being No. 1767 dated 22.09.2003 with Dhanmondi Police Station against the Mohammad Ullah regarding Bank forgery. It is true that Mohammad Ullah has undertaken that he was found guilty and involved in the Bank forgery. He further stated that he did not know the designation of the person who posted the Bank.

In corss examination he also stated that he had no knowledge regarding the person who posted the amount in the



ledger. It is the responsibility of another officer to see that the alleged cheque is correct and that there is money in it.

**P.W. 4** - Abu Bakar Siddique - He was in service of Agrani Bank Ltd, Green Road Branch. At the time of the incident he was in working the payment division as a cashier. Firstly a token was issued when the cheque was presented to the Bank and the posting was done to the ledger. Mohammad Ullah was Head of the Credit/Management and Executive. Secondly the cheque was verified by Mohammad Ullah then Salimullah. The aforesaid token was presented him as a Cashier. He would pay to the recipient but he did not know who is the account holder.

**In Cross examination Declined.**

**P.W. 5** : Md. Abu Sayed Miah stated that he is in service of Agrani Bank, Green Road Branch from 1998 to 2002 and was a Manager, A. K. M. Julfiqar Ali, Principal officer, Advance, Mohammad Ullah, P,O, Amzad Hossain, Officer, Salimullah and a Cashier Md. Nazim Uddin. They were received money and pay to the recipient. He paid the recipient by 2 (two) cheques in the instant case. One cheque's number is 0236773 dated 29.10.2001 an amount of Taka/- 2,20,000/-(two

lakh twenty thousands) another cheque No. is 0236774 dated 31.10.2001 for an amount of Taka/- 60,000/- (sixty thousands). The cheques were signed by Rabeya Rahman and also signed by Salimullah and Mohammad Ullah as per Banking Rules, when the cheques came to the counter then he paid money to the same payee. But Rabeya Rahman received money by the aforesaid 2 (two) cheques. The aforesaid 2(two) cheques were seized by the investigation officer on 22.10.2003.

Accused Sorwar Hossain declined the cross examined him.

For accused A. K. M. Julfikur Ali : Declined.

**P.W. 6** Ram Mohan Nath stated that he is an investigating officer of the case. He is in working as a Deputy Director from 16.05.2010 to 26.12.2010. He received the case for investigation from the Anti Corruption Commission. He visited the place of occurrence on 27.12.2010 and 23.03.2011. His previous investigating officer, Abu Bakar Siddiqui seized the record of the case. He recorded the statements of the witnesses under section 161 of the Code of Criminal Procedure and completing the investigation submitted charge sheet being No. 88 dated 19.06.2011 against the accused and others under

sections 409/109 of the Penal Code and read with section 5(2) of the Prevention of Corruption Act, 1947.

**In cross examination-** It is not a fact that he did not hold proper investigation of the case and falsely implicated the accused Sarwar Hossain. It is not true that the accused is totally innocent and he did not involve in this case.

On closure of the prosecution evidence the accused appellant present in the Court was examined under section 342 of the Code of Criminal Procedure. Wherein the incriminating evidence were brought to his notice and consequence thereof was explained to him. The accused person present in the Court pleaded him innocence and declined to adduce any evidence in his favour through defense witness. The defense plea as he is quite innocent having been falsely implicated in the case and he further prayer was for being acquitted.

After conclusion of the trial the learned Judge of the Special Court No. 02, Dhaka found guilty of offence under section 409 and read with section 109 of the Penal Code and accordingly convicted and sentenced the accused to suffer rigorous imprisonment for 03 (three) years with a fine of Taka

18,78,000/-(eighteen lakh seventy eight thousands) by the judgment and order dated 20.10.2014.

Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence dated 20.10.2014 passed by the learned Judge of the Special Court No. 02, Dhaka convicted person Md. Sarwar Hossain as appellant presented Criminal Appeal No. 7233 of 2014.

Mr. Md. Muslim Uddin Bhuiyan, the learned Advocate appearing on behalf of the appellant submits that the prosecution has totally failed to prove his case beyond any reasonable shadow of doubt which is liable to be set aside and the convict appellant be acquitted from the case. He further submits that the learned Trial Court miserably failed to consider that there is no any single evidence against the convict appellant and those evidences are quite contradictory and thus the impugned judgment and order of conviction and sentence is liable to be set aside and the convict appellant be acquitted from the liability of the case. He further submits that the conviction and sentence against the appellant is out and out bad in law in the light of the facts and circumstances and on relevant law and

thus the impugned judgment and order of conviction and sentence is not at all sustainable which is liable to be set aside.

He further submits that there is no ingredients of sections 409/109 of the Penal Code against the convict appellant which is clearly evident from the whole case in question and thus the impugned judgment and order of conviction and sentence is not at all sustainable in law which is liable to be set aside. He also further submits that the convict appellant is a quite innocent and he never involved in the instant case and the learned trial Court arriving at an erroneous decision passed by the impugned judgment and order of conviction and sentence and thus the convict appellant will be acquitted from the liability of the case. He further submits that the accused appellant never posting the cheque money. He is an only Jamadar (MLSS) of the Bank. It is not possible for him to operate the computer and any send to the posting money. There is no scope to argue that the case was concocted and the appellant was falsely implicated there. He further submits that the Anti Corruption Commission lodged another two cases against this convict appellant and the convict appellant contested the said cases but the aforesaid two cases have already been acquitted. The learned Advocate for the

appellant is referred to the case of Shamsul Haque Chowdhury Vs. The State reported in 39 DLR (1987) page-393

Mr. Shaheen Ahmed, the learned Advocate appearing on behalf of the respondent No. 2, Anti corruption Commission submits that the trial Court after considering the evidences on record has been rightly convicted under section 409 and read with section 109 of the Penal Code and sentenced thereto and proper appreciation and facts and circumstances of the case the prosecution has able to prove his case without any reasonable doubt, The learned Trial Court passed by the judgment and order of conviction and sentence no interference with this appeal.

In order to arrive at a correct decision in the appeal let us scrutinize the evidences of the aforesaid prosecution witnesses: P.W. 1 is a seizure list witness, it appears from his evidences that the investigation officer seized the documents from Zulfiqar Ali, Assistant General Manager and prepared seizure list in his presence which was marked as Exhibit 1 and 1/1 respectively. Other documents were seized and prepared seizure list, account opening Form, signatures of the account opening card, 02(two) deposit vouchers, Cheque requisition slip,

statement of accounts and legal notice which were marked as material Exhibits-I series, II, III, IV, V, VI and VII respectively. In those exhibits, there was no signature of the appellant.

**P.W.2** is also seizure list witness, in whose presence some papers and documents were seized by the investigation officer which was marked as Exhibit-1 and 1/2 respectively. In those Exhibit, there was no signature of the appellant.

**P.W.3** is the informant of the case. He narrated the case version while he was deposited on oath and he also narrated the names of the persons who were involved with the occurrence.

**P.W.4** is a formal witness of the Bank. He stated nothing against the appellant.

**P.W.5** Is in service of Agrani Bank and he narrated the Bank officers duty and 2 (two) cheques were signed by Rabeya Rahman and also signed by Salimullah and Mohammad Ullah. But Rabeya Rahman received money by 2(two) cheques and the said cheques were seized by the investigating officer. This P.W has failed to show any involvement of the appellant.

**P.W.6** is the investigating officer who examined witnesses under section 161 of the Code of Criminal Procedure and visited the place of occurrence and seized the alamot of

papers and documents from the alleged Agrani Bank, Green Road Branch, Dhaka. The prosecution failed to produce any document of the Bank bearing the appellant's signature.

Heard the learned Advocate on behalf of the appellant and the learned Advocate for the Anti Corruption Commission at length, perused the impugned judgment and order along with other materials on record and also considered the facts and circumstances of the case.

It appears that the alleged allegations against the appellant that without prayer of loanee and sanction of the authority transferred TK. 4,00,000/- (four lakh) to the accused Rabeya Rahman as a forged loan. But the learned Judge of the Trial Court without apply his judicial mind and total misconception of law and facts arrived at conclusion that the appellant was responsible for such loan transaction but the convict appellant is an ordinary Jamadar (MLSS) of the Bank. He had no access to the accounts of the bank. The duty and responsibility of Jamadar is like a function of a M.L.S.S or Office Assistant and having no clerical function. There is one more important factual aspect to be noted which creates serious doubt about the prosecution's case in respect of appellant as



because the appellant was not desk rather he was a barred done non clerical work.

On consideration of the evidences and materials on record, we find that none of the witnesses specifically disclosed anything against the appellant and the prosecution has failed to produce any concrete evidence against the appellant regarding the misappropriation embezzlement of the Bank. The prosecution has failed to produce any document before the learned trial Court which bears the signature of this appellant. The appellant as a Jamader (MLSS) had no responsibility of cash transaction as it appears from the evidences of the P.W.3. After submission of cheque to the counter for encashment on officer endorsed the cheque and thereafter cash officer delivered the cash to the concerned person. The prosecution has failed to produce an iota of evidences showing involvement of the appellant with the alleged transaction. Even he had no access to handle the accounts of the Bank and the prosecution could not produce any document to prove where the appellant put his signature.

After careful scrutinizing evidences it is found from the evidences of the P.W. 04 and P.W. 05 that P.W4 issued a token

when a cheque was presented to the Bank and the posting was done to the ledger Book. Thereafter, the cheque was verified by Mohammad Ullah and Salim Ullah then the aforesaid token was presented him and he would pay the money to the recipient. Moreover, the P.W. 05 was responsible for receiving and paying money. He paid the money to the accused Rabeya Rahman. The money of the said cheques were received by Rabeya Rahman. The Cheques were signed by Salim Ullah and Mohammad Ullah. As per usual Banking Rules after verification the cheque is forwarded to the cash counter then cash officer or clerk pays the money. The appellant had neither any access nor given any responsibility to do any clerical job. None of the P.W.3 stated anything involving the appellant with the alleged occurrence.

The learned Advocate for the appellant referred to the the case of Shamsul Haque Chowdhury vs The State reported in 39 DLR 393 wherein it has been observed that:

*“In order to convict an accused under section 409 of the Penal Code, It is essential that three ingredients of the said section must be proved before convicting an accused. Firstly, the*

*entrustment in question or dominion over the property must be proved by the prosecution, secondly, the person having dominion over or entrustment over the property must dishonestly misappropriate the same for his personal gain or for the gain of somebody else. Thirdly, the direction, rule or regulation prescribing the mode in which such trust should be discharged need also to be violated. Here in the instant case, although the prosecution has proved the first ingredient, namely entrustment, the section and third ingredients have not been proved or established at all. That the accused dishonestly misappropriated the money for his own gain or for the gain of somebody else has not been proved at all. Thirdly, the prosecution also totally failed in proving that the postal peon in instant case has violated the provision of postal Manual in any manner. In the absence of fulfillment of the three ingredients of section 409 of the Penal Code.*

From the above pronouncement of this Court we find that there was no entrustment on the appellant regarding the transaction and he had no domain over the property and as such it can not be held he had any liability over the property. Hence, the appellant can not be made liable for any misappropriation of money.

There is no evidence establishing the misappropriation money by the appellant and since there is no materials on record showing any violation of the Banking Rules by the appellant. The conviction and sentence passed by the learned Special Judge is not sustainable in the eye of law. The prosecution has failed to prove the charge under section 409 and read with section 109 of the Penal Code against the appellant. The order of conviction and sentence as passed by the learned Special Judge appears to be not sustainable in the eye of law.

Having considered the facts and circumstances of the case and foregoing narrative we are led to the conclusion that the prosecution has been miserably failed to prove the charge brought against the appellant beyond any shadow of doubt.

The learned Special Judge has totally misconceived and wrongly held that the prosecution has proved the case against the appellant. Thus the appeal having merit succeed and the impugned judgment and order of conviction and sentence call for interference by this court.

In the result, the appeal is allowed. The impugned Judgment and order of conviction and sentence dated 20.10.2014 passed by the learned Judge of Special Court No. 02, Dhaka, in special Case No. 06 of 2012 against the appellant is hereby set aside. The convict appellant namely Md. Sarwar Hossain is acquitted of the charge leveled against him. The bail bond furnished by the appellant, Md. Sarwar Hossain in connection with this appeal, stands discharged.

Communicate the judgment and order at once.

**Mustafa Zaman Islam, J:**

I agree.