Present:
Mr. Justice Md. Nazrul Islam Talukder
And
Mr. Justice K.M. Hafizul Alam

Criminal Revision No.263 of 2011

Begum Anar Kali and another

..... Accused-petitioners.

-Versus-

The state and another

..... Opposite-parties.

Mr. Md. Zahirul Islam, Advocate

..... For the Accused-petitioner

Mr.Pannu Khan, Advocate,

..... For the Opposite-party No.2.

Mr. A.K.M. Amin Uddin, D.A.G with

Ms. Helena Begum (Chaina), A.A.G.

..... For the State-opposite party

Mr.Md. Khurshid Alam Khan, Advocate

..... For the Anti-Corruption Commission

(With the leave of Court)

Heard and Judgment on: 27.01.2019.

Md. Nazrul Islam Talukder, J:

On an application under Section 439 of the Code of Criminal Procedure read with Section 435 of the Code of Criminal Procedure, this Rule, at the instance of

the accused-petitioner, was issued calling upon the opposite-parties to show cause as to why the order dated 26.01.2011 passed by the learned Special Judge, Dinajpur in Special Case No.02 of 2004 (Thakurgaon) arising out of Thakurgaon Police Station Case No.03 dated 02.02.2001 corresponding to G.R. No.64 of 2001 under Sections 406/409/380/34 of the Penal Code altering the charge and thereby framing the charge against the accused-petitioners which was earlier framed on 31.05.2009, now pending in the Court of learned Special Judge, Dinajpur, should not be set aside and/or

pass such other or further order or orders as to this Court may seem fit and proper.

The prosecution case, in short, is that the accused-petitioner No. 1 (F.I.R named accused No. 3) is a loan borrower of Sonali Bank, Thakurgaon Branch. She took loan of Taka 5,00,000/- as cash credit and taka 18,00,000/- as pledge from the said Bank. The accused-petitioner No. 2 Mr. Farid Alam (F.I.R named accused No. 4) who is the husband of accused-petitioner No. 1, is a guarantor of the said loan. On 23.11.2000, the accused-petitioner No. 1 Anar Kali took the loan amount through Cheque No.8027616 and loaded 3218

bags of T.S.P. fertilizer to the godown of the Bank which was received by the godown keeper (F.I.R named accused No. 1) who noted about the said fertilizer in the register book. The F.I.R named accused No.2 was appointed as custodian of the said pledged godown. On 11.01.2001, on the ground of sickness and with dishonest intention, the accused-petitioner No.3 wrote a letter of request to the ex- Manager through lawyer. The Manager replied to the letter through Bank's lawyer as well. Subsequently, having received the letter, on 22.01.2001, the lawyer of accused No.3 gave a written reply to the same.

Being suspected of the conduct of accused-petitioner No. 1, on 25.01.2001, godown keeper (F.I.R named accused No.1) was verbally directed to inspect the godown. Being ordered, the F.I.R named accused No. 1 along with F.I.R named accused No.2 made inspection into the said godown. Having seen the lock and seal of the godown, they became doubtful about the goods kept in the godown and that being the reason, they made inspection into the godown in presence of one Mr. Bipul and found 2400 bags of fertilizer out of 3218 bags of fertilizer with S.S.P seal instead of T.S.P. seal. Following the aforesaid incident, ex-Manager of the

Bank suspended the F.I.R named accused Nos. 1 and 2 and made a inquiry committee. The inquiry committee after making inquiry made a report to the effect that the F.I.R named accused Nos. 1 and 2 with the help and abetment of F.I.R named accused Nos. 3 and 4 misappropriated 3218 bags of T.S.P fertilizer keeping bags of sand and rice husk therein. By this way, the accused in collaboration with each other misappropriated an amount of Tk. 34,31,285/-. Hence, the F.I.R against the accused-petitioners and others under Sections 406/409/380/34 of the Penal Code.

The investigating officer after holding investigation having found prima facie case submitted charge-sheet being charge-sheet No. 503 dated 14.11.2001 under Sections 406/409/380/34 of the Penal Code against the accused-petitioners and others.

After submission of the charge-sheet, the case was transferred to the court of the learned Special Judge, Thakurgaon and subsequently the case was again transferred to the court of learned Special Judge, Dinajpur for trial and thereafter, the learned Special Judge, Dinajpur registered the case as Special Case No. 02 of 2004 (Thakurgaon).

It is stated in the application that on 1.07.2008, the accused-petitioners submitted an application under Section 265C of the Code of Criminal Procedure for discharging them from the case and after hearing the learned Advocates for both the parties, the learned Special Judge, Dinajpur, by his order dated 31.05.2009, framed charge against the FIR named accused Nos. 1 and 2 under Sections 406/409/380/34 of the Penal Code while he framed charged against the FIR named accused Nos. 3 and 4 that is the present accused-petitioners under Sections 406/380/34 of the Penal Code and also framed charged under section

5(2) of the Prevention of Corruption Act, 1947 against all the F.I.R named accused and the said charge was read over to them in which they pleaded not guilty and prayed for trial.

Out of 17 charge-sheet named witnesses, the prosecution in order to prove the case examined 10 witnesses and the defence examined none.

After recording evidence from the prosecution witnesses, the accused-petitioners were examined under Section 342 of the Code of Criminal Procedure and the accused-petitioners again claimed that they are innocent and they will not adduce any defence witness.

It is stated in the application that the accused-petitioners submitted an application for bail before the learned Special Judge, Dinajpur and after hearing the learned Advocates for both the parties, the learned Special Judge, Dinajpur enlarged the accused-petitioners on bail.

After examining the accused-petitioners under Section 342 of the Code of Criminal Procedure, the prosecution filed an application before the learned Special Judge, Dinajpur for altering the charge framed earlier against the accused-petitioners on 31.05.2009. Thereafter, upon hearing the parties, the

learned Special Judge, Dinajpur, by an order dated 26.01.2011, allowed the application and altered the charge. It is stated in the order that the occurrence took place from 07.12.2000-31.12.2000. Anyway, the learned Special Judge, Dinajpur, altered the charge and thereby framed charge against the F.I.R named accused Nos. 1 and 2 under Sections 406/409/380/34 of the Penal Code, framed charge against the accused-petitioners under Sections 406/380/34 of the Penal Code, and also framed charge against all the FIR named accused under sections 5(2) of the Prevention of Corruption Act,1947. Thereafter, the

learned Special Judge, Dinajpur withdrew the case from the arguments and fixed the date on 14.02.2011 for further examination of the prosecution witness Nos. 1 and 2. The learned Special Judge, Dinajpur, by his order dated 23.03.2008, maintained the bail order since they did not misuse the privilege of bail which was granted earlier.

It is stated in the application that after altering the charge by the learned Special Judge, Dinajpur, the accused-petitioners prayed to recall the prosecution witness Nos. 1, 2, 3, 4, 7 and 10, but the learned Special Judge, Dinajpur only recalled the prosecution

witnesses Nos. 1 and 2 by his order dated 26.01.2011.

It is stated in the application that before filing of the case, on the selfsame matter, the informant earlier filed Civil Suit No. 57 of 2004 before the learned Joint District Judge, 2nd Court. Thakurgaon which was dismissed on 07.02.2006 and thereafter the informant preferred Civil Appeal No. 01/2006 before the learned District Judge, Thakurgaon who upon hearing the parties sent the matter on remand which is still pending for hearing before the court of learned Joint District Judge, 2nd Court, Thakurgaon.

Being aggrieved by the impugned order dated 26.01.2011 passed by the learned Special Judge, Dinajpur altering charge, the accused-petitioner approached this court with an application under Section 439 of the Code of Criminal Procedure read with Section 435 of the Code of Criminal Procedure and obtained this Rule along with an order of stay of the proceeding.

At the very outset, Mr. Md. Idrisur Rahman, the learned Adovcate along with Mr. Zahirul Islam, the learned Advocate appearing on behalf of the accused-petitioners, submits that there are no specific allegations nor any overt acts

against the accused-petitioners since the informant did not specifically mention the date and time of the alleged offence and he mentioned that the occurrence took place at any time from 07.12.2000 to 25.01.2001 though the learned trial Judge in the charge altering order stated that the occurrence took place from 07.12.2000 to 31.12.2000 and as such, the order dated 26.01.2011 passed by the learned Special Judge, Dinajpur altering charge is liable to be set aside.

He next submits that the accused-petitioner No. 1 took loan from the informant's Bank and loaded bags of T.S.P fertilizer in the godown of the said

Bank on 23.11.2000; after loading the fertilizer, the Bank authority kept the fertilizer in their custody; the informant in the First Information Report mentioned that key, ledger book and register book were kept with the custody of Bank and as such, the accused-petitioners are not liable for the alleged offence as per section 151 of the Contract Act, 1872 and hence, the order dated 26.01.2011 passed by the learned Judge, Dinajpur altering charge is liable to be set aside.

He further submits that the learned Special Judge, Dinajpur framed charge under Sections 406/380/34 of the Penal Code against the accused-petitioners

which is very much illegal since the learned trial Judge ought to have framed separate charge under Sections 406/380 of the Penal Code since offence of both the sections is separate and distinct and as such, the order dated 26.01.2011 passed by the learned Special Judge, Dinajpur altering charge is liable to be set aside.

He categorically submits that on 26.01.2011, the learned Special Judge, Dinajpur framed the charge afresh by altering the earlier charge mentioning the date of occurrence between 07.12.2000 to 31.12.2000 but the informant did not mention the date of occurrence in between 07.12.2000 to 31.12.2000 and

this issue is to be decided by examining the prosecution witnesses but the learned trial Judge rejected the application for recalling the prosecution witness Nos. 1, 2, 4, 7, 9 and 10 filed by the accused-petitioners and as such, in consideration of the above facts, the order dated 26.11.2011 altering the charge by the learned trial Judge is liable to be set aside.

He lastly submits that a civil suit is pending before the learned Joint District Judge, 2nd Court, Thakurgaon which was filed by the informant on the selfsame occurrence; it is now well settled principle of law that the accused should not be

tried twice for the same offence and as such the order dated 26.01.2011 passed by the learned Special Judge, Dinajpur altering charge is liable to be set aside.

On the other hand, Mr. Pannu Khan, the learned Advocate appearing on behalf of Sonali Bank-opposite party No.2, submits that since there is specific allegation against the accused-petitioners in the FIR and the charge-sheet, the learned Special Judge rightly framed charge against the accused-petitioners and others and as such, the Rule should be discharged.

He lastly submits that the learned trial Judge altered the charge following

the facts and circumstances of the case and the propositions of laws and that being the reason, the Rule should be discharged.

At the time of hearing of the Rule, A.K.M Amin Uddin, the learned Deputy Attorney-General appearing for the State, submits that the allegations that have been brought against the accused-petitioners and others are all disputed questions of facts which are required to be proved on taking evidence from the witnesses of the respective parties and for that reason, the learned trial Judge rightly framed charge against the accused-petitioners and others.

He lastly submits that there is no bar to alter the charge as per provisions of section 227 of the Code of Criminal Procedure and as such, the Rule should be discharged.

Mr. Khurshid Alam Khan, the learned Advocate for the Anti-Corruption Commission (with the leave of court), submits that the court under section 227 of the Code of Criminal Procedure is competent to alter or amend or add the charge at any stage of the proceeding before pronouncement of judgment and as such, the Rule should be discharged.

Mr. Khan in support of his submission has referred to a decision in

the case of Nasim (Md) and another Vs. State, reported in 57 DLR (HC)546 wherein it was held that “The court under Section 227 of the Code of Criminal Procedure is competent to alter or amend the charge at any stage of the proceeding before pronouncement of Judgment”.

He next submits that a criminal proceeding because of framing charge under a wrong section would not be vitiated and/or quashed inasmuch as the charge can be altered at any stage of the proceeding under section 227 of the Code of Criminal Procedure before pronouncement of judgment.

Mr. Khan in support of his contention has referred to a decision taken in the case of Gias Uddin Al-Mamun Vs. the State reported in 23 BLC 537 wherein it was decided that “In a proceeding charge is always framed under a penal provision. Section 12 of the Ain, 2012 being not a penal provision, the order of framing charge so far it relates to that particular section appears to be misconceived. Besides, there is no scope of awarding punishment under any penal provision of the Ain, 2012 inasmuch as the offence was allegedly committed before enactment of the Ain, 2012 when another law of the same nature was in force with the penal

provision of lesser sentence. The offence as well as its punishment, if any, in the case would he dealt with under the provisions of the Ain, 2002. The defect in the charge framing order as would not vitiate the proceedings".

We have gone through the application under Section 439 of the Code of Criminal Procedure along with the prosecution materials annexed therewith. We have also heard the learned Advocates for the respective parties at length and considered their submissions to the best of our wit and wisdom.

It appears from the FIR that the accused-petitioner No. 1 (F.I.R named

accused No. 3) is a loan borrower of Sonali Bank, Thakurgaon Branch. She took loan of Taka 5,00,000/- as cash credit and taka 18,00,000/- as pledge from the said Bank. The accused-petitioner No. 2 Mr. Farid Alam (F.I.R named accused No. 4) who is the husband of accused-petitioner No. 1, is a guarantor of the said loan. On 23.11.2000, the accused-petitioner No. 1 Anar Kali took the loan amount through Cheque No.8027616 and loaded 3218 bags of T.S.P. fertilizer to the godown of the Bank which was received by the godown keeper (F.I.R named accused No. 1) who noted about the said fertilizer in

the register book. The F.I.R named accused No.2 was appointed as custodian of the said pledged godown. On 11.01.2001, on the ground of sickness and with dishonest intention, the accused-petitioner No.3 wrote a letter of request to the ex- Manager through lawyer. The Manager replied to the letter through Bank's lawyer as well. Subsequently, having received the letter, on 22.01.2001, the lawyer of accused No.3 gave a written reply to the same. Being suspected with the conduct of accused-petitioner No. 1, on 25.01.2001, godown keeper (F.I.R named accused No.1) was verbally directed to inspect the

godown. Being ordered, the F.I.R named accused No. 1 along with F.I.R named accused No.2 made inspection into the said godown. Having seen the lock and seal of the godown, they became doubtful about the goods kept in the godown and that being the reason, they made inspection into the godown in presence of one Mr. Bipul and found 2400 bags of fertilizer out of 3218 bags of fertilizer with S.S.P seal instead of T.S.P seal. Following the aforesaid incident, ex-Manager of the Bank suspended the F.I.R named accused Nos. 1 and 2 and made a inquiry committee. The inquiry committee after making inquiry made a report to the effect

that the F.I.R named accused Nos. 3 and 4 with the help of F.I.R named accused Nos. 1 and 2 misappropriated 3218 bags of T.S.P fertilizer worth Tk. 34,31,285/- keeping bags of sand and rice husk therein. By this way, the accused-petitioners in collaboration with other accused misappropriated an amount of Tk. 34,31,285/-.

It is evident that the allegations that have been brought against the accused-petitioners and others have been found prima facie truthful by the investigating officer who upon holding investigation submitted charge-sheet against the

accused-petitioners and others under the aforesaid Sections.

Following the charge-sheet, the learned Special Judge, Dinajpur, by an order dated 31.5.2009, framed charge against the FIR named accused Nos. 1 and 2 under Sections 406/409/380/34 of the Penal Code while he framed charge against the FIR named accused Nos. 3 and 4 that is the present accused-petitioners under Sections 406/380/34 of the Penal Code and also framed charge under section 5(2) of the Prevention of Corruption Act, 1947 against all the F.I.R named accused including the present accused-petitioners.

After recording evidence from the prosecution witnesses, the accused-petitioners were examined under Section 342 of the Code of Criminal Procedure.

On 26.01.2011, following an application filed by the prosecution, the learned Special Judge altered the charge and framed charge against the F.I.R named accused Nos. 1 and 2 under Sections 406/409/380/34 of the Penal Code, framed charge against the accused-petitioners under Sections 406/380/34 of the Penal Code and also framed charge against all the FIR named accused under section 5(2) of the Prevention of Corruption Act,1947.

Now question arises as to whether charge can be altered by the learned Special Judge after examining the accused-petitioners under Section 342 of the Code of Criminal Procedure.

In this regard, we may refer to Section 227 of the Code of Criminal Procedure, which reads as follows:

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

In view of the above proposition of law, charge can be altered and/or added any time before delivery of judgment.

Firstly, under the literal proposition of law, there is no illegality in altering the charge by the learned Special Judge.

Now, we want to take up other issues for discussions and decisions.

It is evident from the record that the F.I.R named accused Nos. 1 and 2 are the public servants as they are employees of Sonali Bank, Thakurgaon Branch. The F.I.R named accused Nos. 3 and 4 that is the present accused-petitioners are the private persons. It is alleged in the F.I.R that the accused in collaboration with

each other committed the aforesaid offences. It appears from the record that as per F.I.R the alleged occurrence took place in between 07.12.2000 to 25.01.2001. The informant lodged the F.I.R. on 02.02.2001 against the accused of the case under Sections 406/409/380/34 of Penal Code and the Police after holding investigation into the case submitted charge-sheet on 14.11.2001 against the accused of the case under Sections 406/409/380/34 of the Penal Code.

It is worthwhile to mention that the Anti-Corruption Commission Act, 2004 (in short the ACC Act, 2004) came into

force on the 9th day of May, 2004 vide Notification No. SRO 126-law/2004 dated 09.05.2004, published in Bangladesh Gazette Extraordinary dated 09.05.2001. In the ACC Act, 2004, the offences under Sections 409, 420, 467, 468 471 and 477 of the Penal Code have been made schedule offences of the said Act, where the offences are related only with public property or committed by any Public Servant or officers and employees of a Bank or a Financial Institution during discharging official duty.

Sub-section 3 of Section 38 of the Anti-Corruption Commission Act, 2004 provides that investigation into any

allegation pending under the Anti-Corruption Commission Act, 1957 shall be performed by the Anti-Corruption Commission. Similarly, sub-section 4 of Section 38 of the Anti-Corruption Commission Act, 2004 indicates that if any case pending before the tribunal for disposal under the Anti-Corruption (Tribunal) Ordinance, 1960, that case would be transferred and disposed of by the Special Judge of the concerned jurisdiction.

It is true that the offences under sections 406/409 of the Penal Code were not the schedule offences under the Anti-Corruption Act, 1957 and the Criminal

Law Amendment Act, 1958 but section 380 of the Penal Code was the schedule offence of the Anti-Corruption Act, 1957 as well as the Criminal Law Amendment Act, 1958.

Sub-section 7 of section 5 of the Criminal Law Amendment Act, 1958 prescribes that “when trying an offence under this Act, a Special Judge may also charge with and try other offences not so triable with which the accused may, under the provisions of the Code of Criminal Procedure, 1898, relating to the joinder of charges, be charged at the same trial”.

It may be mentioned here that the offences that have been disclosed against the accused-petitioners and others fall within the ambit of offences under the Anti-Corruption Commission Act, 2004.

Having received the charge-sheet and considering the facts and circumstances of the case and the propositions of laws, the learned Special Judge, Dinajpur, by an order dated 31.5.2009, framed charge against the FIR named accused Nos. 1 and 2 under Sections 406/409/380/34 of the Penal Code while he framed charge against the FIR named accused Nos. 3 and 4 that is the present accused-petitioners under Sections 406/380/34 of

the Penal Code and also framed charge under section 5(2) of the Prevention of Corruption Act, 1947 against all the F.I.R named accused.

Subsequently, after recording evidence and examining the accused-petitioners under Section 342 of the Code of Criminal Procedure, on 26.01.2011, the learned Special Judge altered the charge and framed charge afresh under Sections 406/409/380/34 of the Penal Code against the F.I.R named Nos.1 and 2 and framed charge under Sections 406/380/34 of the Penal Code and also framed charge against all the F.I.R named

accused under Section 5(2) of the prevention of Corruption Act, 1947.

On perusal of the impugned order dated 26.01.2011, we do not find any substantive alteration/modification of the charge framed earlier on 31.05.2009 by the learned trial Judge save and except a date about the period of cause of action mentioning as “31.12.200” instead of “25.01.2001” which, in our view, is a typical mistake which may be corrected/modified/altered by the learned trial Judge any time before delivery of judgment if brought to the notice of the learned Judge or Suo Moto at the

instance of the learned Judge of the concerned court.

It is evident from the impugned order that charge have been framed against the accused-petitioners and others under Sections 406/34 of the Penal Code. It may be noted that punishment for Criminal breach of trust has been described in section 406 of the Penal Code while the definition of Criminal breach of trust has been given in section 405 of the Penal Code.

Section 405 of the Penal Code runs as follows :

405. Criminal breach of trust- Whoever, being in any manner entrusted

with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonesty uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust.”

Section 406 of the Penal Code reads as under :

406. Punishment for criminal breach of trust- whoever commits

criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Since sections 405/406 of the Penal Code at present, are not the schedule offences of the ACC Act, 2004, those sections are not applicable to public servants, rather they would be applicable to the private persons.

In the instant case at hand, two public servants as well as two private persons are involved in the commission of offence of misappropriation of money.

From the prosecution materials, it appears that the private persons abetted

the public servants to commit the offences as alleged in the prosecution materials. Under the circumstances, the private persons may implicated in this case by dint of sections 107/109 of the Penal Code.

Further, it is evident from the impugned order that charge has also been under section 34 of the Penal Code.

Section 34 of the Penal Code runs as follows :

34. Acts done by several persons in furtherance of common intention- When a criminal Act is done by several persons, in furtherance of the common intention of all, each of such persons is

liable for that act in the same manner as it were done by him alone.

Common intention implies a pre-arranged plan and it must be proved that a criminal act was done in concert pursuant to the pre-arranged plan. It may be noted that section 34 of the Penal Code is not applicable to this case since common intention is not the issue/subject-matter of this case and the same has not been included in the schedule of the Criminal Law Amendment Act, 1958 and in the ACC Act, 2004 rather section 109 for the offence of abetment is the schedule offence of the Criminal Law Amendment Act, 1958 and

subsequently it has been incorporated in the schedule of the ACC Act, 2004.

If any person abets any public servant to commit any schedule offence of the ACC Act, 2004 and in consequence of the said abetment, a public servant commits the said schedule offence of the ACC Act, 2004, he or she would be punished for the selfsame penal offences that are committed by the public servants.

Section 107 of the Penal Code runs as follows :

107. Abetment of a thing- A person abets the doing of a thing, who-

Firstly- Instigates any person to do that thing; or,

Secondly- Engages with one or more other persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or,

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure,

a thing to be done, is said to instigate the doing of that thing.

Explanation-2 Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Section 109 of the Penal Code reads as under :

109. Punishment of abetment if the act abetted is committed in consequence and where no express provision is made for its punishment- Whoever abets any offence shall, if the act abetted is committed in consequence of

the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation- An act or offence is said to be committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Accordingly, we are of the view that there is no bar in law to convict a person who abets the public servants to commit the schedule offences of the ACC Act, 2004 under the selfsame penal offences which are allegedly committed by the

public servants, without a distinct and separate charge against the abettor/s.

In view of the above discussions, it would have been enough to frame charge against all the accused including the present accused-petitioners under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 since the two public servants allegedly Committed Criminal misconduct as enshrined in section 5 of the Criminal Law Amendment Act, 1958 and the private person allegedly abetted them to commit the same. Anyway, the charge may be altered or modified at any time before delivery of Judgment.

It is profitable to note that criminal misconduct has been defined in section 5(1) of the Prevention of Corruption Act, 1947. To constitute an offence under this law, one of the ingredients is that the offenders must be public servants and they used corrupt or illegal means or otherwise abused their official position as public servants and they obtained for themselves or for any other person/s any valuable thing or pecuniary advantage. Criminal misconducts are of 5 categories mentioned in section 5(1) (a) to (e) and all these categories of misconducts have been made punishable under section 5(2) of the Prevention of Corruption Act, 1947. The public servants are said to be guilty

of misconduct/s if they fall in one of the categories mentioned in section 5(1) of the Prevention of Corruption Act, 1947 punishable under section 5(2) of the Prevention Corruption Act, 1947. From the prosecution materials, it appears that during the period from 07.12.2000 to 25.01.2001, the F.I.R named accused Nos. 1 and 2 at the instigation and abetment of the present accused-petitioners misappropriated 3218 bags of TSP fertilizer worth Tk. 34,31,285/- and basically committed the offences under sections 409/109 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947.

Article 35(1) of the Constitution runs as under:

“35(1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.”

It is now well interpreted and thereby settled that a criminal offence never abates or never be destroyed even after the repeal of the law under which the offence is alleged to have been committed.

In the case of **Mofizur Rahman Khan Vs Government of Bangladesh, reported in 34 DLR(AD) (1982)321,** it was held that "parliament being the supreme legislative authority subject to the constitutional limitations has the plenary power under Article 65 of the Constitution to pass any law on any subject both prospectively and retrospectively. But the parliament cannot pass a law to create a new offence which is not in existence at the time of commission of the act charged as an offence nor can it increase penal liability with retrospective effect."

In the case of **government of Bangladesh and another Vs Sheikh**

Hasina and another, reported in 60 DLR(AD) (2008)90, it was decided that "a person accused of the commission of an offence has no fundamental right to a trial by a particular court or by a particular procedure except insofar as any Constitutional objection by way of discrimination or violation of any other fundamental right may be involved. In other words, the prohibition under this clause does not extend to merely procedural laws and procedural law would not contravene Article 35(1) merely because retrospective effect is given to it."

In the case of **Tarique Rahman Vs Bangladesh, reported in 63 DLR(AD)**

(2011)18, it was laid down that “the offence of money laundering under the Money Laundering Protirodh Ain, 2002 was alleged to have been committed from 01-01-2003 to 31-05-2007 and the procedure in respect of lodging complaint, holding investigation, trial and other related matters shall be initiated or continued under the ACC Act of 2004 and the ACC Rules, 2007. By incorporating the Ain of 2002 in the schedule to the ACC Act of 2004, the offence of money laundering was brought within the purview of the ACC Act of 2004 and no new offence was created nor any penalty was increased retrospectively rather the

offence of money laundering under the Ain of 2002 was made triable under the ACC Act of 2004 and the ACC Rules, 2007. It has not in any way created a new offence or increased penal liability retrospectively. Article 35(1) of the Constitution envisages the prohibition on conviction or sentence under an “ex post facto law” not trial of the offence alleged to have been committed or the procedure to be followed in the investigation, inquiry in respect of an offence alleged to have been committed.”

Under the aforesaid facts and circumstances and the discussions made above, our considered view is that the

procedural law is always retrospective while the substantive law is always prospective.

Considering the facts and circumstances, the submissions of the learned Advocates for the respective parties and the propositions of law, we do not find any incorrectness, illegality and impropriety in the impugned order of framing charge. Since the charge framed by the learned Special Judge is not groundless, we do not find any merit in this Rule.

Accordingly, the Rule is discharged.

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

The learned trial Judge is directed to proceed with the case in accordance with law and conclude the trial of the case as early as possible preferably within 06 (six) months from the date of receipt of this judgment and order.

Communicate this judgment and order to the learned judge of the concerned court below at once.

K.M. Hafizul Alam, J:

I agree.