8 SCOB [2016] HCD 40

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 8557 of 2007
With
Writ Petition No. 5054 of 2008

An application under Article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh

Begum Khaleda Zia
…Petitioner

Versus

Anti-Corruption Commission and others
…Respondents

Mr. Khandker Mahbub Hossain, Advocate with
Mr. A.J. Mohammad Ali with
Mr. Zainul Abedin with
Mr. A.M. Mahbub Uddin with
Mr. Md. Bodruddoza with
Mr. Raghib Rouf Chowdhury and
Mr. Md. Zakir Hossain Bhuiyan
…For the petitioner

Mr. Md. Khurshid Alam Khan, Advocate with
Mr. Rafiqul Islam Sohel, Advocate
…For the Respondent No. 01

MS. Anwara Shahjahan, D.A.G with
Ms. Yesmin Begum Bithi, A.A.G and
Mr. Abdur Rokib (Montu), A.A.G
…For the Respondent No. 6

Heard on: 19.04.2015, 29.04.2015, 20.05.2015, 26.05.2015, 14.06.2015, 15.06.2015, 16.06.2015 and 17.06.2015 (in writ petition No. 8557 of 2007)
Heard on: 19.04.2015, 30.04.2015, 06.05.2015, 07.05.2015, 20.05.2015, 21.05.2015, 14.06.2015, 15.06.2015, 16.06.2015 and 17.06.2015 (in writ petition No. 5054 of 2008)
Judgment on: The 05th August, 2015

Present:
Mr. Justice Md. Nuruzzaman
And
Mr. Justice Abdur Rob

If in any case the question of laws and facts are involved, in such case law point regarding maintainability should be decided first. … (Para 48)

Where the tribunal had no jurisdiction to try the case and passed any judgment in that case the writ petition can be maintainable. … (Para 58)

Applicability of Emergency Power Rules-2007 in the case after lifting of State emergency:
After lifting the state of emergency there is no scope of Judicial review regarding applicability of the Emergency Power Rules in the instant case because after lifting the state emergency the trial court would not be able to try the case under Emergency Power Rules, and as such, this writ petition has become in-fructuous. More-so, the

learned Advocate for the respondent No. 1 has already admitted that at the trial the prosecution will not propose to frame charge under the emergency power Rules as it would not be applicable after lifting the state emergency. Moreover our considered view that mere inclusion the Emergency Power Rules-2007 in the case of the accused petitioner's is not illegal as the said case has not been tried under the said Rules and before the trial of the said case the applicability of the said Emergency powers has lost it force. … (Para 84)

The Anti Corruption Commission Act, 2004
Section 17:
The Constitution has not given any immunity to the prime Minister or Cabinet in respect of any criminal offence. There is neither any constitutional nor any statutory or legal bar on A.C.C to conduct any enquiry in respect of allegation of Commission of offences mentioned to the schedule of the A.C.C Act, 2004 and schedule to the Criminal Law Amendment Act-1958. Therefore, we are of the view that not only on the basis of any complaint but A.C.C itself is legally empowered under section 17 of the A.C.C. Act-2004 to conduct any inquiry or investigation. … (Para 92)

Judgment

Md. Nuruzzaman, J.

1. In both the writ petitions, the petitioner has challenged the legality and propriety of the initiation and continuation of the proceedings of Special Case No. 4 of 2008 arising out of A.C.C. G.R. No. 88 of 2007 corresponding to Tejgaon Police Station Case No. 05 dated 02.09.2007 under section 5(2) of the Prevention of Corruption Act, 1947 read with sections 409 and 109 of the Penal Code, and also applying the provisions of the Emergency Power Rules, 2007 to the instant case vide Memo No. ¢p-/93-2007 (ac¿-2)/8323/1(4) dated 18.09.2007 issued by the respondent No. 3 (Secretary, Anti-Corruption Commission) now pending in the Court of Special Judge, Special Court No. 03, Dhaka so far as it relates to the petitioner.

2. The Writ Petition No. 8557 of 2007 and Writ Petition No. 5054 of 2008 have been heard together and are being disposed of by this common Judgment as the parties are same and they do involve common question of laws and facts.

3. It has been stated in the application that the petitioner is the former Prime Minister of the Government of Bangladesh. She was elected thrice as the Prime Minister. She was the leader of the opposition of the Parliament. She is also the Chairperson of Bangladesh Nationalist Party (B.N.P.)

4. The prosecution case, in brief, is that on 02.09.2007 a Deputy Director of Anti-Corruption Commission, Head Office, Dhaka as an informant lodged an F.I.R., with Tejgaon Police Station being Tejgaon Police Station Case No. 05, dated 02.09.2007 under section 5(2) of the Prevention of Corruption Act, 1947 read with sections 409 and 109 of Penal Code implicating 13 (thirteen) persons including the accused-petitioner stating, inter alia, that in connection with the Nathi No. DUDOK/197-2007 (Anu-2); the Commission conducted an enquiry and it was revealed through enquiry that the government had decided to handle the containers at ICD, Dhaka and Chittagong Port through a single contractor. For this purpose the Chittagong Port Authority invited a tender on 01.03.2003. The main conditions of the tender were that only the experienced equipment owners, equipment suppliers, equipment users and equipment handling firms and port users experienced in

container handling shall be eligible for participating in the said tender. The interested firms must also submit their documents relating to technical experience. 25 (Twenty five) bidders participated in the tender. The Technical Evaluation Committee in its report having stated that Global Agro Trade (Pvt.) Company Limited (hereinafter referred as to in short) GATCO which was evaluated as the lowest bidder, however did not have any experience in container handling, yet, the committee declared GATCO as responsive bidder. The Evaluation Committee recommended to the Chittagong Port Authority to award the contract to GATCO. The said recommendation was placed before the Ministry of Shipping, which sent it to the Ministerial Committee on 12.11.2003. But the said Ministerial committee refused to accept the proposal and recommended to cancel the same and invite re-tender; the recommendation of the Ministerial Committee was sent to the Prime Minister's Office. The Prime Minister (present petitioner) on 06.12.2003 without considering the recommendation of the Ministerial Committee sent the matter back to the Ministerial Committee for re-consideration. So far as the present petitioner is concerned it has been stated in the F.I.R. that Lt. Col. (Rtd.) Akber Hossain, who was present in the Ministerial Committee, informed the recommendations of the Committee to his son namely Ismail Hossain (Saimon) who is the F.I.R. named accused no. 7. At this stage Saimon contacted the petitioner's son namely Arafat Rahman (Coco), F.I.R. accused no. 8 and sought his assistance. Coco was informed of the details and after getting all information he demanded half of the money that Saimon would receive, if he *i.e.* Coco helps GATCO to get the work by influencing his mother (the petitioner). Saimon had agreed to that proposal and accordingly Arafat Rahman Coco influenced his mother the then Prime Minister in the matter. The relevant F.I.R version is quoted below:-

> "সায়মন এ পর্যায়ে তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়ার অনুকুল্য লাভের উদ্দেশ্যে তার পুত্র আরাফাত রহমান (কোকো)-র সাথে যোগাযোগ করে তার সহায়তা কামনা করে। কোকো সবকিছু অবগত হন এবং তার মাকে প্রভাবিত করার বিনিময়ে গ্যাটকো কাজটি পেলে সায়মনের প্রাপ্তব্য A¯hd অর্থের অর্ধেক দাবী করে সায়মন এতে রাজী হলে আরাফাত রহমান তার মা তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়াকে এ বিষয়ে প্রভাবিত করে।"

Thereafter, the Ministerial Committee for Purchase being influenced by the owners of the GATCO approved the proposal of the Shipping Ministry and recommended to give the work to GATCO, which was later approved by the Prime Minister. Thus, the accused petitioner collusively helped to give the work to the inexperienced company namely GATCO, for which the container handling operations at Chittagong Port and ICD, Dhaka were greatly hampered and the exporters, importers and C&F agents and Bangladesh Railway suffered a great loss. The government also suffered about one thousand crore Taka for the aforesaid act. During the enquiry a Director of GATCO admitted that he paid Tk. 2,19,45,091/- to the accused No. 7 for influencing the other accused for obtaining the work. Thus, the accused petitioner including the former Shipping Minister Lt. Col. (Retd.) Akber Hossain and others collusively awarded the work to an inexperienced and non-qualified firm namely Global Agro Trade (Pvt.) Company Ltd. (GATCO). On the basis of such allegations the instant case was lodged by the Anti-Corruption Commission (hereinafter referred as to Commission).

5. The provisions of Emergency Power Rules, 2007 were made applicable to the instant case vide memo No. ¢p-/93-2007 (ac¿-2)/8323/1(4) dated 18.09.2007 issued by the respondent no. 6 under the authority of the respondent no. 1.

6. The petitioner challenging the inclusion of Emergency Power Rules-2007 in her case filed the writ petition No. 8557 of 2007.

7. The Commission vide memo No. ¢p-/93-2007(ac¿ -2)/7626 dated 02.09.2007 through a Deputy Director of the Commission investigated the case. Thereafter, vide memo No. ¢p-/93-2007(ac¿ -2)/7236 dated 11.05.2008 the Commissioner (Investigation) of the Commission issued a sanction letter to submit the charge sheet in the case. Accordingly, Charge Sheet No. 169 dated 13.05.2008 was submitted against the petitioner and others under section 5(2) of the Prevention of Corruption Act, 1947 read with sections 409 and 109 of the Penal Code and the Emergency Power Rules, 2007.

8. The learned Additional Chief Metropolitan Magistrate, Dhaka upon receipt the charge-sheet with sanction letter vide order dated 14.05.2008 sent the case records to the learned Chief Metropolitan Magistrate, Dhaka who on the same day sent the case records to the Court of learned Metropolitan Sessions Judge, Dhaka for disposal.

9. The learned Metropolitan Sessions Judge, Dhaka on 07.05.2008 received the case records and the case was registered as Metropolitan Special Case No. 62 of 2008 and took cognizance of the offence. Eventually, the case was sent to the Court of learned Special Judge, Special Court No. 03, Dhaka and 20.07.2008 was fixed for charge hearing.

10. At this stage of the proceeding although charged has not yet been framed in this case the petitioner preferred the instant writ petition No. 5054 of 2008.

11. Mr. Md. Bodruddoza, learned Counsel appearing for the accused petitioner in Writ Petition No. 8557 of 2007 has submitted that the impugned Memo No. ¢p/93-2007(ac¿ -2)/8323/1(4) dated 18.09.2007 (the impugned Memo) issued by respondent No. 3 under the authority of respondent No.1 applying the Emergency Power Rules, 2007 (hereinafter referred to as the said Rules) in A.C.C. G.R. Case No. 88 of 2007 corresponding to Tejgaon P.S. Case No. 05(09)07 for the offences occurred during the period between 01.03.2003 and 31.12.2006 is contrary to Section 3 (3L) of the Emergency Power Ordinance, 2007 (hereinafter referred to as the said Ordinance) and, as such, the issuance of the impugned Memo and the initiation and continuation of the said Case under Rule 15 of the said Rules is without lawful authority and is of no legal effect.

12. He has further submitted that the said Case having been filed in clear violation of section 17 M of the said A.C.C. Act without conducting any investigation, the same has been initiated without lawful authority and is of no legal effect.

13. He has also submitted that the said case being a scheduled offence under the said Act, before filling of the said Case the same was required to be enquired and investigated into by two different persons under Rule 24 of the Anti-Corruption Commission Rules, 2007 (the ACC Rules) but no such enquiry or investigation having been made as required in the said Rules, the said case has been initiated without lawful authority.

14. He has further added that the said Ordinance authorizes the Government to exercise its power and delegate the authority to its subordinate whereas the said Commission being an independent, neutral and statutory body is not subordinate to the Government, and as such, the framing of the said Rules by way of excessive delegated legislation empowering the said Commission to exercise various powers under the said Rules 15, 15L, 15M(1), 15M(2), 15M(4), 15N(1), 15O, 16(2), 19O, 19P and 19Q is ultra vires the said Ordinance, and as such, the said Notice and the proceeding in the instant Case is void and has been issued without lawful authority.

15. He has lastly argued that the respondent No. 3 issued the impugned Memo dated 18.09.2007 without sanction of law, and as such, the said Memo has been issued without lawful authority and is of no legal effect.

16. Mr. Md. Khurshid Alam Khan in reply of Mr. Badrudozza has submitted that, so far prayer made in Writ Petition No. 8557 of 2007 as to inclusion of Emergency Power Rules 2007 vide Memo No. C/93-2007 (ac¿ -2/8323/1(4) dated 18.9.2007 (the impugned Memo) in the instant Case has already become in-fructuous because the emergency declared by the then President has already been lifted. Thereafter an elected government has taken over the charge. In that view of the matter the Rule of the Writ Petition No. 8557 of 2007 is liable to be discharged as being in-fructuous.

17. He has further argued that though in the charge sheet the emergency Rule has been included against all the accused persons but charge has not yet been framed in the instant case and, as such, at the time of framing of charge the accused is liable be discharged from the charge of emergency power Rules 2007. Therefore, continuation of the instant Rule is superfluous.

18. Mr. Raghib Rouf Chowdhury, has placed the writ petition No. 5054 of 2008 before us and Mr. A. J. Mohammad Ali finally argued the case and submitted that the present case has been lodged and initiated without sanction as required to lodge the FIR and for taking cognizance of the Case as provided in section 32(1) of the Anti-Corruption Commission Act, 2004 (as amended) and further, the sanction which was obtained for filing the charge sheet is no sanction in the eye of law, because it is a mechanical sanction and ex-facie the said sanction dose not disclose any application of mind and satisfaction of the commission in giving the sanction relating to offences alleged to have been committed by the petitioner.

19. Mr. Ali has further alleged that sanction accorded by the prosecution is no sanction in the eye of law because it has been given under the signature of a Commissioner and not by the Commission as stipulated in the said Rules, and as such, the same has been given without lawful authority.

20. Mr. Ali has further added that the Anti-Corruption Commission has acted grossly in violation of its authority as well as the section 17 of the said A.C.C. Act. He has elaborated the point by arguing that the functions of the Anti-Corruption Commission are enumerated in section 17 of the Anti-Corruption Commission Act, 2004 and the said functions of the Commission does not authorize it to scrutinize the acts of the Prime Minister or the Cabinet in taking an executive decision in the performance of their function of the Republic and, as such, cannot be called in question by the Anti-Corruption Commission, and hence, the lodging of the instant case has been done without lawful authority and is of no legal effect.

21. He has also asserted that no prior sanction (অনুমোদন) for lodging the said case against the petitioner was issued by the commission in accordance with and in compliance with the mandatory provisions of law and, as such, the lodging of the case against the petitioner by the informant has no sanction of law and is ex-facie illegal and, is a malice in law and hence, the initiation and continuation of the proceeding of the said case is without jurisdiction and is of no legal effect.

22. Mr. Ali has argued that no complaint (অভিযোগ) was lodged by any person or quarter against the petitioner under rules 3 and 4 of the Ant-Corruption Commission Rules, 2007 and the said case not being lodged by the Commission on the basis of any complaint (অভিযোগ), the lodgment of the case against the petitioner is malafide and ex-facie illegal;

23. Mr. Ali also added that the proceeding and trial of the said case is a nullity for want of a proper and valid sanction and, as such, the continuation of the proceeding of the said case is liable to be quashed. Moreover, such purported sanctions dated 02.09.2007 and 11.05.2008 do not show that those related to the acts in respect of which the prosecution was launched and, therefore, the said Sanctions are invalid and the Court below has no jurisdiction to proceed with the trial of the said case.

24. Mr. Ali reiterating the submission of Mr. Badruddoza submitted that the said Case having been filed in clear violation of section 17M of the Anti-Corruption Commission Act, 2004 (the said Act) without conducting any investigation, the same has been initiated without lawful authority and is of no legal effect.

25. Mr. Ali further reiterating the submission of Mr. Badruddoza further argued that said Case being a scheduled offence under the said Act, before lodging of the said Case the same was required to be enquired and investigated into by two different persons under Rule 24 of the Anti-Corruption Commission Rules, 2007 (the ACC Rules) but no such enquiry or investigation having been made as required in the said Rules, the said Case has been initiated without lawful authority.

26. In support of his submissions the learned Advocates referred to the case of Sheikh Hasina Wazed alias Sheikh Hasina vs. State and another, reported in 63 DLR (2011) 40, Begum Khaleda Zia vs. State, reported in 55 DLR (2003)596, Nesar Ahmed also known as Babul vs. Government of Bangladesh, represented by the Deputy Commissioner, Noakhali and another, reported in 49 DLR (AD) (1997) 111, Sheikh Mujibur Rahman and another vs. The State reported in 15 DLR (1963) 549.

27. In both the writ petitions the Government as respondent contested without filing any affidavit-in-opposition. However, the learned Deputy Attorney General has opposed the Rules and prayed for discharging the same.

28. The respondent No. 1 contested in both the Rules by filing affidavit-in-oppositions whereof it does not opposes the facts of the case, however, it denied all legal proposition as alleged in the writ petitions by the petitioner that the lodging of the F.I.R, charge-sheet and according the sanction for trial etc are without lawful authority.

29. Mr. Khurshid Alam Khan, the learned Advocate appearing on behalf of the respondent No. 1 referred the Rule issuing order and submitted that the instant Rules were issued under Article 102 (2) of the Constitution for declaring that initiation and continuation of a criminal case and **inclusion of the Emergency Power Rules – 2007** is void, illegal, without lawful authority and is of no legal effect and hits under Articles 35 and 93 (1) of the Constitution therefore, crux of the argument of his was that the Rules are not maintainable in the present facts and circumstances of the case as the apex Court enunciating the principle has well settled that a Criminal Case can not be quashed invoking the writ Jurisdiction under Article 102 (2) of the Constitution unless the vires of the law is challenged.

30. He by referring some portion from the First Information Report of the Case submitted that it is a case of corruption and the petitioner is involved in the case as per averment of the F.I.R which are as follows:

> সায়মন এ পর্যায়ে তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়ার অনুকুল্য লাভের উদ্দেশ্যে তার পুত্র আরাফাত রহমান (কোকো)-র সাথে যোগাযোগ করে তার সহায়তা কামনা করে। কোকো সবকিছু অবগত হন এবং তার মাকে প্রভাবিত করার বিনিময়ে গ্যাটকো কাজটি

পেলে সায়মনের প্রাপ্তব্য অবৈধ অর্থের অর্ধেক দাবী করে সায়মন এতে রাজী হলে আরাফাত রহমান তার মা তৎকালীন প্রধানমন্ত্রী বেগম খালেদা জিয়াকে এ বিষয়ে প্রভাবিত করে।

31. Mr. Khan further referring to annexure '**D'** the charge-sheet submitted that it has been clearly depicted in the charge-sheet that Mr. Saimon in his confessional statement made under section 164 of the Code of Criminal Procedure before the Judicial Magistrate confessed the guilt implicating himself and other accused. He has also submitted that other two co-accused namely Syed Tanvir Ahmed and Syed Galib Ahmed also made confessional statement under section 164 of the Code of Criminal Procedure confessing guilt to themselves and implicating other accused persons.

32. According to him from the averment of the F.I.R, charge-sheet and confessional statements the prosecution has made out a clear case of corruption against the accused petitioner and others and, as such, it needs scrutiny upon taking evidence. Therefore, the Rules are liable to be discharged.

33. Mr. Khan has elaborated his submissions referring some precedents placing reliance to those in support of his submissions which are to the case of ***Government of Bangladesh and another Vs. Sheikh Hasina and another*** 60 DLR (AD) (2008) 90, in which the High Court Division quashed the proceeding of Metropolitan Sessions Case No. 2576 of 2007 under Sections 385/109 of the Penal Code in exercise of its power under Article 102 of the Constitution in a writ petition filed by Sheikh Hasina who was an accused in the Case. However, on appeal the appellate Division *vide Judgment dated 08.05.2008 allowed the appeal and set aside the Judgment of High Court Division.*

34. He further referring to the case of ***Government of the People's Republic of Bangladesh and others vs. Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku*** 60 DLR (AD) (2008) 147 argued that the Senior Special Judge, Dhaka took cognizance of the offence against the accused namely Iqbal Hasan Mahmood under sections 165 and 166 of the Income Tax Ordinance, 1984 read with rule 15 of the Emergency Power Rules, 2007. The High Court Division quashed the entire proceedings of the case in a writ petition filed by the accused Iqbal Hasan Mahmood. On appeal, the Appellate Division vide judgment dated 20.05.2008 allowed the appeal.

35. In this connection Mr. Khan further referred the precedent to the case of ***Anti Corruption Commission and another vs. Md. Enayetur Rahman and others*** 16 MLR (AD) (2011) 297 and argued that in that case Charge was framed against the accused Enayetur Rahman and two others under sections 409/420 of the Penal Code read with section 5(2) of the Prevention of Corruption Act, 1947 read with section 156 of the Customs Act. At this stage the accused Enayetur Rahman challenged the proceedings of the case before the High Court Division by filing a writ petition and the High Court Division quashed the proceedings. Anti Corruption Commission and another preferred appeal to the Appellate Division. The Appellate Division vide judgment dated 28.02.2011 set aside the judgment of the High Court Division.

36. Mr. Khan rebutted the argument advanced by the learned Advocate for the petitioner regarding the sanction of the instant case and referred to the provision of law regarding sanction as contemplated in section 32 of the Anti Corruption Commission Act, 2004 which has already been settled by the Appellate Division on a Judicial pronouncement to the Case of ***Anti-Corruption Commission vs. Dr Mohiuddin Khan Alamgir*** 62 DLR (AD) 290.

37. He further referred to the Case of ***SM Zafarullah vs. Durniti Daman Commission and others*** 20 BLC (2015) 311. wherein, the petitioner filed separate writ petitions challenging the proceedings of three cases, all under sections 409/109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 read with Rule 15 of the Emergency Power Rules, 2007 and also the memo dated 20.09.2007 according sanction to submit the charge sheets.

38. The High Court Division applied the ratio laid down in the case of ***Dr Mohiuddin Khan Alamgir*** 62 DLR (AD) 290 (supra) and held that since a sanction is required under section 32 of the Act, 2004 read with Rule 15(2) of the Durniti Daman Commission Bidhimala, 2007 was given before submitting the charge sheets, the impugned proceedings initiated against the petitioner cannot be declared to have been initiated and proceeded without lawful authority.

39. In respect of the issue of maintainability of writ petition challenging the preceding of criminal case, the High Court Division also applied the ratio laid down by the Appellate Division in the case of ***Enayetur Rahman and others*** 16 MLR(AD) (2011) 297 (supra) and thereby observed that the criminal proceeding can not be quashed under Article 102 of the Constitution invoking the writ jurisdiction.

40. He lastly referred to the case of ***Anti-Corruption Commission vs. Mehedi Hasan and another*** 67 DLR (AD) (2015) 137 wherein the Appellate Division vide judgment dated 11.02.2015 disposed of five appeals setting aside the Judgment of the High Court Division out of which one arises against the judgment passed by the High Court Division in a writ petition quashing the proceedings of Special Cases under Sections 409 and 109 of the Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 read with Rule 15 of the Emergency Power Rules, 2007. The rest four appeals were preferred against judgments passed by the High Court Division quashing the proceedings of cases on applications made under section 561A of the Code of Criminal Procedure in exercise of its inherent power.

41. Mr. Khan in reply of Mr. Ali in respect of maintainability of the writs submitted that the principle enunciated in the Nesar Ahmed's case by the apex Court is not applicable in the instant case, rather, the decisions referred above by him are applicable in the present case as per latest pronouncement of the apex Court.

42. Mr. Khan has argued that in the instant writ petitions, the vires of the law has not been challenged by the petitioner and therefore, the writ petitions, in which the petitioner seeks to quash the criminal proceeding is not maintainable, and as such, the Rules are liable to be discharged.

43. Mr. Khan has lastly submitted that according to F.I.R, charge-sheet and confessional statements made under section 164 of the Code of Criminal Procedure by some other co-accused there are prima-facie involvement of the petitioner in the transaction is apparent which discloses the Criminal offence. Therefore, the case should be disposed of by taking evidence.

44. The learned Advocate of the petitioner by filing two affidavit-in-reply denied the some statements of the affidavit-in-oppositions filed by the respondent No. 1. It has been asserted in the said two reply that some statements of the affidavit-in-oppositions are misleading and false. In the reply of the affidavit-in-opposition of the writ petition No. 8557 of 2007 the petitioner also annexed a certificate copy of the Judgment of the writ petition No. 7250 of 2008 which was delivered by a Division Bench of this Division. It has also been

stated in the reply of affidavit-in-opposition that at the time of filing the instant case the Rules and Ordinance challenged in the instant writ petition was very much exist and the said proceeding was initiated and continued under the said Rules and Ordinance. If the impugned Rules and Ordinance are found illegal, the proceeding initiated and continued under the said Rules and Ordinance should be declared illegal as well.

45. Further it has been mentioned in one of the reply that implicating petitioner alleging corruption due to approving the recommendation of the concern Ministry to give work to concern company is a clear violation of Article 55 and 145(2) of the Constitution for which interpretation of law is required which can only be adjudicated under writ jurisdiction and, as such, the writ petition is maintainable.

46. We have anxiously considered the submissions of the learned Advocates of both sides.

47. From the submissions of the learned Advocates of both sides and facts and circumstances of the case it appear that the pertinent question of laws and facts are involved in the writ petitions.

48. Therefore, according to the settle maxim of law as has been laid down by the apex Court that if in any case the question of laws and facts are involved in such case law point regarding maintainability should be decided first.

49. We shall first deal with the question of laws.

50. So far as maintainability of the writ petitions Mr. Ali the learned Advocate for the petitioner, placed reliance to the case of Neser Ahmed Vs- Bangladesh and another 49 DLR (AD)111. He relying upon the principle, enunciated in that case, submitted that the instant writ petitions are maintainable.

51. In that case the appellant Neser Ahmed and another were convicted under section 19(f) of Arms Act read with section 26 of the Special Powers Act. The convict appellant had no reasonable opportunity to avail the statutory remedy by way of filing appeal under section 30 of the Special Powers Act. Challenging the judgment and order of conviction and sentence he filed an application under section 561A of the Code of Criminal Procedure in the High Court Division wherein this court observed that the application is not maintainable and the same was taken back. Therefore, the convict appellant filed a writ petition before this Division which was rejected in limine. Then the appellant preferred leave to appeal before the Appellate Division and leave was granted. Ultimately, the appeal was allowed and judgment and order of conviction was set aside on the ground that the special tribunal had no jurisdiction to try the case.

52. It appears form the precedents of the case of chairman, Anti-corruption Commission and another –vs- Enayetur Rahman and others, reported in 64 DLR (AD) 14, the Appellate Division set aside the Judgment of the High Court Division. The Judgment of the High Court Division while setting aside by the Appellate Division the author Judge was Mr. Justice S.K. Sinha, now the Hon'ble Chief Justice in that case his lordship has clearly observed:

> "This Court on repeated occasions argued that Article 102(2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extra ordinary jurisdiction to the converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill suite to meet the demands of extra ordinary situations that is to say where vires of a statute is in

> question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is *intra vires* but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102(2) of the Constitution."

53. From the above observation of the apex Court it further clearly divulged that the accused petitioner elsewhere in the instant applications do not make out the case in the light of the above observation of the appellate Division.

54. We have very closely gone through the precedent to the case of Anti-Corruption Commission –vs- Mehedi Hasan and another for dispensing the proper and fair Justice to the instant Case.

55. It also appears that the Hon'ble appellate Division has been further observed to the Case of Anti-Corruption Commission –vs- Mehedi Hasan and another reported in 67 DLR (AD) 137 that:

> There is no scope for quashing a criminal proceeding under the writ jurisdiction unless the vires of the law involved is challenged. The vires of the law involved in the case has not been challenged. Therefore, there is no scope for aggrandizement of jurisdiction of the High Court Division in quashing a criminal proceeding. Consequently, the High Court Division was not justified in quashing criminal cases in exercise of its power under Article 102 of the Constitution.

56. From the aforementioned principle as pronounced by the apex Court we are of the considered view that the cases in hand do not come within the scope of the above settle principles.

57. From the discussions and the decisions referred herein above regarding maintainability of the instant writ petitions it is our further view that the case of 49 DLR (AD) 111 and the facts and question of laws involve in the instant case is quite distinguishable. However, on the other hand the precedents referred as above on behalf of the respondents it is clearly divulged that the principles enunciated to the referred case of the **Anti Corruption Commission –vs- Enayetur Rahman and another 64(AD) 14,** and to the case of **Anti Corruption Commission –vs- Mehedi Hasan 67 DLR (AD) 137** would be applicable in the instant Case.

58. On a meticulous scrutiny the above referred decision we are of the considered view that the principle laid down in the referred case regarding maintainability is that where the tribunal had no jurisdiction to try the case and passed any judgment in that case the writ petition can be maintainable. But in the instant writs neither Rule nisi were issued challenging the Jurisdiction of the Special Judge nor argued to that effect. Apart from that there are some other observations in the Nesar Ahmed's case and if we look into that observations it would be crystal clear that those do not come to play any vital role in the present case in hand. Rather, those observations are quite nugatory to the facts and laws of the instant writ petitions. Hence, we are unable to accept the referred principle in the instant case.

59. For better understanding and clarification the jurisdiction of the Special Judge, we shall refer and discuss the relevant laws as well as jurisdiction of the Special Judge in the Judgment later on.

60. Next, it has also contended by the learned Advocate for the petitioner that the sanction accorded in the instant case is not a valid sanction in the eye of law as it was issued by one of the Commissioner not by the Anti Corruption Commission.

61. It has further contended by the learned Advocate for the petitioner that in the instant case no valid sanctions were accorded to file the case as well as submitting the charge sheet for prosecuting the accused petitioner in accordance with law and in support of his submission he relied to the case of **Sheikh Hasina Wazed alias Sheikh Hasina –vs- state reported in 63 DLR (HCD) 40** and to the case of **Begum Khaleda Zia –vs- state reported in 55 DLR (HCD) 596.**

62. Before we enter, upon the discussion regarding the question of sanction in the instant case, we think that it would be proper to deal with the relevant law and settle judicial pronouncement of our jurisdiction as well as other jurisdiction.

63. It appears that section 32 was amended by Ordinance No. VII of 2007, which came to effect on 18th April 2007. After amendment of the said A.C.C. Act it has been enacted in the section 32 of the said A.C.C. Act that one sanction is required to proceed with the case at the time of filing of the charge-sheet in the Court of Special Judge.

64. Moreover in this connection we can profitably refer the following precedent of the apex Court i.e. to the case of **Government of the people's Republic of Bangladesh and other –vs- Iqbal Hasan Mahmud alias Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku** reported in 60 DLR (AD) 147 wherein it has held that:

> "Sanction for prosecution – The process of sanction is an administrative act and is not subject to any judicial scrutiny. Since the chairman of the NBR is an inseparable and essential constituent part for the Board to function. The sanction given by it cannot be taken to be in any way tainted for his presence on the Board. The principle of coram-non-judice has no application in the instant case."

65. More-so, in the Case of Dr. Mohiuddin Khan Alamgir reported in 62 DLR (AD) 290 wherein it has been held by the apex Court that as per Section 32 of A.C.C Act one sanction is required to proceed with the case which are as follows:-

> No sanction is required to file a complaint (A¢i-k¡N) and the unamended as well as the amended section 32 requires only one sanction from the Commission.

66. The High Court Division, however, misinterpreted section 32 of the Act, the original as well as the amended one, in holding that a sanction by the Commission is required before lodging a first information report. The High Court Division, further misconceived the amended section 32 and wrongly held that a further sanction is required to take cognizance of the offence by the Court inspite of the sanction given earlier under sub-section (2) of section 32 of the Act.

67. It has been further held that:-

> Sanction from the Commission will be required when the charge sheet is filed under sub-section (2) and on receipt of the charge sheet along with a copy of the letter of sanction the Court takes cognizance of the offence for trial, either under the original section 32 or the amended section 32. As a matter of fact, only one sanction will be required under section 32, unamended or amended.

After completion of the investigation, the investigating officer, under sub-section (2) of section 32, on obtaining the sanction from the Commission, would submit the police report before the Court along with a copy of the letter of sanction. The Court, under sub-section (1), would take cognizance, only when there is such sanction from the Commission. Both the sub-section (1) and sub-section (2) of the section 32 envisages only one sanction, not two. Sub-section (1) does not spell out or even envisage filling of any fresh sanction when the sanction to prosecute has already been filed along with the charge sheet of the investigating officer. It only envisages that without such sanction from the Commission (কমিশনের অনুমোদন ব্যতিরেকে) as spelt out in sub-section (2), no Court shall take cognizance of the offence (®L¡e Bc¡ma HC BCe¡l Ad£e ®L¡e Afl¡d¢hQ¡l¡b Bjm NËZ L¢lch e¡) under sub-section (1) of section 32.

68. Upon a close scrutiny of the reported cases on the question of sanction, as referred above, it appears to us that during the period when the cases of *Sheikh Hasina* (both NAIKO and Barge Mounted Cases) were decided, the High Court Division, except the view took in the case of H*abibur Rahman Molla*, that two sanction are required under section 32 of the ACC Act, 2004, and that the sanction before submitting the charge sheet has to be a speaking one based on reason, not mere mechanical. This was the prevailing view and *Sheikh Hasina's* cases were decided accordingly. We have already noted that subsequently, law on point of sanction has been settled by the Appellate Division in series of cases to the effect that under the amended section 32 of the ACC Act, 2004 one sanction is required before submitting the charge sheet and it will be given 'Form-3' of the schedule to the ACC Rules, 2007. It need not be a speaking one. In the facts and circumstances of the instant case we find no reason to deviate from the settled principle on the issue of sanction. In view of the legal proposition of law we hold that the sanction given in the instant case does not suffer from any legal infirmity and has been given in accordance with law.

69. We are therefore, of the view that the precedents referred in 63 DLR(HCD)40, 55 DLR (HCD)596 and 63 DLR(HCD)162 would not be applicable in the instant case as regard the sanction matter rather, the principles enunciated to the case of *Dr. Mohiuddin Khan Alamgir* reported in 62 DLR (AD) 290 was decided on 04.07.2010. Therefore, it will prevail over all other decisions as the latest decision of the apex Court.

70. It has contended on behalf of the petitioner that earlier the proceedings of the case of Begum Khaleda Zia and the case of Sheikh Hasina Wazed alias Sheikh Hasina were also quashed although those cases were filed by the Anti-Corruption Commission which have been reported in 55 DLR (HCD) 596 and 63 DLR (HCD) 162 respectively.

71. On a close scrutiny of the above referred cases however, it appears that the case of Begum Khaleda Zia-Vs-State reported 55 DLR 593 and the case of Sheikh Hasina Wazed alias Sheikh Hasina reported 63 DLR 40 were filed as Criminal Miscellaneous cases under Section 561A of the Code of Criminal Procedure for quashing the proceeding of the relevant cases but in the instant case the petitioner invoked the writ Jurisdiction under Article 102(2) of the Constitution for quashing the Criminal Case. It is, therefore, appears that the facts and circumstances as well legal proposition of those cases and case in hand is quite distinguishable. We are, therefore, disagreeing to accept those principles in the present case. The argument of the learned Advocate for the petitioner on point of sanction in the light of the reported cases of 63 DLR,40 and 63 DLR, 162 is devoid any substance.

72. More-so, it is our considered view that two sanctions are not required for filing and trial the case respectively as per provision of law because the section 32 of the A.C.C Act, 2004 was amended by Ordinance No. VII of 2007 which came into effect on 18th April, 2007. In support of our above view we can place reliance upon the decision of the appellate Division held to the case of Anti-Corruption Commission-Vs- Md. Bayazid and others reported 65 DLR (AD) 97 wherein it has been held that:

> Therefore, under the amended provision no prior sanction of the Commission for filing a case is necessary in accordance with Form-3. The High Court Division was confused by the use of the words "sanction for filing case' which were deleted by Ordinance No. VII of 2007 and by overlooking this aspect of the matter quashed the proceeding."

73. Further it would be noteworthy to discuss the case of Nasar Ahmed's which was referred by Mr. Ali.

74. In the case of Nasar Ahmed another –vs- state it has also held:

> ''It is free from any doubt that when an equally efficacious alternative statutory remedy is provided for in section 30 of the Special powers Act enabling the accused to prefer an appeal to the High Court Division the question of invoking the jurisdiction of the High Court Division under Article 102 of the Constitution normally does not arise.''

75. It has further been held in this case that,

> ''Upon satisfying itself that the accused person had no reasonable opportunity to avail of the statutory remedy, the High Court Division however, in exercise of jurisdiction under Article 102 of the Constitution, will not sit on appeal over the judgment of the Special Tribunal and will not convert itself into a Court of Appeal under section 30 of the Special Powers Act. It will confine itself to the jurisdictional issues that are usually associated with judgments of inferior Tribunals and quasi-judicial bodies.''

76. So, if we revisit the Rules issuing orders of both the writ petitions, it appears that the vires of the law has not been challenged by the writ petitioner in any of the writ petitions. More so, there is no assertion in the writ petitions that the petitioner has ever sought to agitate the grievances under section 561A for the statutory relief as has been done to the case of Nesar Ahmed reported in 49 DLR (AD)111.

77. Upon a meticulous scrutiny of the writ petitions we do not find any statement in the writ petitions to the effect that the petitioner was constrained to file the writ petition because of either the absence of or inadequacy of equally efficacious alternative statutory remedy.

78. However, in Writ Petition No. 8557 of 2007 it has been stated that the normal courts can not decide the aspect as to applying the Emergency Rules which only can be judicially reviewed by writ court. So, this writ is maintainable. It is pertinent to mention here that in the Rule issuing order of the aforesaid writ it was mentioned inclusion of the case under Emergency Rules 2007 is bad since the alleged offence took place between 01.03.2003 and 31.12.2006 thus hits the provision of section 3 (3Ka) of the Emergency Power Ordinance 2007.

79. In this context it would be noteworthy to refer to the case of Government of Bangladesh and another –vs- Sheikh Hasina and another 60 DLR (AD) 90. The writ

petitioner in that writ the legality of the approval given in her case by the Additional Secretary, Law section 1, Ministry of Home Affairs under Rule 19U (1) and (2) of the Emergency Power Rules, 2007 as amended by SRO No. 39-Ain/2007 on 08.04.2007 was challenged as being illegal, malafide and ex-facie void because the case does not come within the scope of the said SRO and High Court Division quashed the proceeding. On appeal, the appellate Division observed that vires of the Rules of the Emergency Power Rules, 2007 was not challenged in the writ petition. After elaborate discussions and intense scrutiny of various provisions of law and authorities of our jurisdiction and others, the Appellate Division vide judgment dated 08.05.2008 allowed the appeal and set aside the judgment of the High Court Division.

80. In that case it has been held that:

> That the sanction given by the respondent No. 2, Additional Secretary, Ministry of Home Affairs, Government of Bangladesh vide Memo No. üxü (BCe-1)/Srh-1/07/(Awn-5)/712 dated 16-7-2007 purportedly under Rule-19U (2) of the Emergency Power Rules, 2007, for proceeding with Gulshan Police Station Case No. 34 dated 13-6-2007 filed under sections 385/109 of the Penal Code, 1860, under the Emergency Power Rules, 2007, treating the offence to be of public importance, evidenced by the Annexure C to the writ petition, does not suffer from any illegality or infirmity and is a valid sanction in the eye of law.

81. It has been further held that:

> What is prohibited under Article 35(1) is only conviction or sentence under an expost facto law and not the trial thereof. A trial under a procedure different from what obtained at the time of the commission of the offence or a trial by a Court different from that which had competence at that time cannot *ipso facto* be held to be unconstitutional. A person accused of the commission of an offence has no fundamental right to 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.

82. It has been also held in that case that:

> There is nothing in the Emergency Power Ordinance or Emergency Power Rules, 2007 which contravened the provisions of Article 35(1) of the Constitution.

83. In the present facts and circumstances of the case it is our considered view that in the instant writs the petitioner neither challenged virse of the Emergency Power Ordinance nor its Rules 2007 therefore, the writs are not maintainable.

84. It is the cardinal principle of law that while a law and Rules framed there under not in force and under the provisions of that law or Rules no punitive action can be done in accordance with that law or Rules in such situation earlier mere inclusion of the same law and Rules do not require to interpretate regarding applicability. In the case in hand, therefore, we can not but to the view that after lifting the state of emergency there is no scope of Judicial review regarding applicability of the Emergency Power Rules in the instant case because after lifting the state emergency the trial court would not be able to try the case under Emergency Power Rules, and as such, this writ petition has become in-fructuous. More-so, the learned Advocate for the respondent No. 1 has already admitted that at the trial the prosecution will not propose to frame charge under the emergency power Rules as it would

not be applicable after lifting the state emergency. Moreover our considered view that mere inclusion the Emergency Power Rules-2007 in the case of the accused petitioner's is not illegal as the said case has not been tried under the said Rules and before the trial of the said case the applicability of the said Emergency powers has lost it force. Therefore, we are of the view that it is nugatory to further discuss aforesaid point to decide in the instant writ petitions as the Rule of writ petition No. 8557 of 2007 being in-fructuous on this point.

85. If we further look at the case of Nesar Ahmed reported in 49 DLR (AD) 111 wherein their lordships allowed the appeal only one ground that the special Tribunal had no jurisdiction to try the case. Had it been the same episode in the instant case in that case the petitioner obviously has got the same remedy.

86. Since Mr. Ali, the learned Advocate for the petitioner referred the above case and argued that the petitioner is entitled to have the same relief therefore; it is pertinent to examine the jurisdiction of the Special Judge, Special Court No. 3, Dhaka wherein the instant case is pending.

87. It is a case under section 5(2) of the prevention of corruption Act, 1947, read with section 409 and 109 of the Penal Code implicating 13 persons including the petitioner. Upon perusal of section 5 of the Criminal Law amendment Act, 1958 (in short 'Act'1958) and the schedule to the Act. It appears that the law enacted with the following provision which runs thus: Section 5(1) of the Act, 1958 states ''Notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law, the offences specified in the schedule shall be triable exclusively by a Special Judge"

88. The relevant portion of the schedule to the Act, 1958 runs thus:

"Schedule

(See section 5)

"(a) Offences punishable under ce£¢a cje L¢jne BCe, 2004;

(aa) .....

(b) Offences punishable under the Prevention of Corruption Act, 1947;

(c) .....

(d) Abetment described in section 109 including other abetments, conspiracies described in 120B, and attempts described in section 511, of the Penal Code, 1860 related to or connected with the offences mentioned in clause (a) to (c) above."]

89. Again if we see the section 28 of the A.C.C. Act-2004 then it would be further divulged that the schedule offence under this law only tryable by special Judge which has been enacted in the section 28 of the A.C.C Act. Thus the section 28 and schedule of the Act is quoted herein below:-

28z **অপরাধের বিচার, ইত্যাদি।** - (১) আপাতত বলবৎ অন্য কোন আইনে ভিন্নরুপ যাহা কিছুই থাকুক না কেন, এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহ কেবলমাত্র স্পেশাল জজ কর্তৃক বিচারযোগ্য হইবে।

(2) এই আইনের অধীন ও উহার তফসিলে বর্ণিত অপরাধসমূহের বিচ¡l J B f£m নিষ্পত্তির ক্ষেত্রে The Criminal Law Amendment Act, 1958 Hl section 6 Hl sub-section (5) Hhw sub-section (6) এর বিধান ব্যতীত অন্যান্য বিধানাবলি প্রয়োজ্য হইবে।

(3) The Criminal Law Amendment Act, 1958 এর কোন বিধান এই আইনের কোন বিধানের সহিত অসঙ্গতিপূর্ণ হইলে এই আইনের বিধান কার্যকর হইবে।

ag¢pm

[(d¡l¡ 17(L) âøhÉ]

(L) এই আইনের অধীন অপরাধসমূহ;

(M) the Prevention of Corruption Act, 1947 (Act II of 1947) এর অধীন শাস্তিযোগ্য Afl¡dpjq;

(MM) .....

(N) the Penal Code, 1860 (Act XLV of 1860) Hl sections 161 -169, 217, 218, 408, 409 and 477A এর অধীন শাস্তিযোগ্য অপরাধসমূহ :

(0) অনুচেছদ (ক) হইতে (গ) তে বর্ণিত অপরাধসমূহের সহিত সংশ্লিষ্ট বা সম্পৃক্ত the Penal Code, 1860 (act XLV of 1860) Hl section 109 H h¢Za pq¡ua¡pq Aeé¡eé pq¡ua¡, H h¢Za osk¿ Hhw section 120B H h¢Za osk¿ Hhw section 511 H বর্ণিত প্রচেষ্টার Afl¡dpjqz

90. From the referred laws and schedules as discussed above we have no hesitation to opined that none else but only Special Judge has the exclusive jurisdiction to try the instant case.

91. It has contended on behalf of the petitioner that Anti-Corruption Commission has no authority to scrutinize the function of Prime Minister and Cabinet according to section 17 of the A.C.C Act, and as such, grossly violated its authority. Therefore, it is necessary to examine the section 17 of the A.C.C Act to address the pertinent question of law which runs thus:-

(a) to enquire into and conduct investigation of offences mentioned in the schedule;

(b) to file cases on the basis of enquiry or investigation under clause (a) and conduct cases under this Act;

(c) to hold enquiry into allegations of corruption on its own motion on the application of aggrieved person or any person on his behalf;

(d) to perform any function assigned to Commission by any act in respect of corruption;

(e) to review any recognized provisions of any law for preventing of corruption and submit recommendation to the President for their effective implementation;

(f) to undertake research, prepare plan for prevention of corruption and submit to the President, the recommendation for the action based on in the result of such search;

(g) to raise awareness and create felling of honesty and integrity among people with a view two prevent corruption;

(h) to organize seminar, symposium, workshop etc. on the subjects falling with in the functions and duties of the Commission;

(i) to identify the various causes of corruption in the context of socio-economic conditions of Bangladesh and make recommendation to the President for taking necessary steps;

(j) to determine the procedure of enquiry, investigation, filing of cases and also the procedure of according sanction of the Commission for filing case against corruption and;

(k) to perform any other duty as may be considered necessary for prevention of corruption.

92. On perusal of the above section it appears that clauses (a) (b) (c) of the section 17 of the A.C.C Act clearly empowers the Commission to enquire or investigate any offences mention in the schedule and conduct case under this Act. From the F.I.R of the present case we find that the prosecution allegedly has made out a prima facie criminal case within the ambit of section 5(2) of the Prevention of Corruption Act, 1947 read with section 409 and 109 of the Penal Code. Therefore, we are of the view that there is no legal bar under the law to inquire or investigate the present case by the A.C.C. Hence, the argument put forward by the learned Advocate on behalf of the petitioner has no substance. It is very pertinent to mention here that the Constitution has not given any immunity to the Prime Minister or Cabinet in respect of any Criminal offence. There is neither any constitutional nor any statutory or legal bar on A.C.C to conduct any enquiry in respect of allegation of Commission of offences mentioned to the schedule of the A.C.C Act, 2004 and schedule to the criminal law amendment Act-1958. Therefore, we are of the view that not only on the basis of any complaint but A.C.C itself is legally empowered under section 17 of the A.C.C. Act-2004 to conduct any inquiry or investigation. So, long as it attracts the Criminal liability of A.C.C and within the ambit of law.

93. From the discussions, legal proposition of law, facts and circumstances of the case, as mentioned hereinabove it transpires that in the instant case the prosecution alleged that the petitioner otherwise abused her office or abetted others to use the office for illegal gain within the meaning of the criminal misconduct as defined in section 5(1) of the Act, 1947 as her alleged involvement as an abettor under section 109 of the Penal Code which cannot be determined in a separate Criminal Proceeding and the same must be adjudicated in the instant proceeding by the Special Judge as a competent Court as empowered by the section 5 of the Act, 1958 and section 28 of the A.C.C Act-2004. More-so 3 co-accused namely Ismail Hossain Saimon, Syed Galib Ahmed and Syed Tanvir Ahmed, son of Minister Akber Hossain, the Managing Director and Director of GATCO respectively made confessional statements under section 164 of the Code of Criminal Procedure wherefrom it is divulged that there is a illegal transaction of crores of money and share of TK. 2,03,31,500/-. In this connection we can place reliance to the case of ***Hossain Mohammed Ershad, former President and others vs. State*** 45 DLR (AD) 48 wherein it has been held that:

> "Though the offence of abetment was not mentioned in Act II of 1947 it was mentioned as an item in the schedule 'C' to the Criminal Law Amendment Act, 1958. Under section 5 of the Act that the special Judge, appointed under the Act, has

> jurisdiction to try that offence. Besides where the prosecution case is that the offences were committed in the course of the same transaction all the accused who were alleged to have committed the offence as principals and abettors in the course of the alleged transaction can be tried under section 239 of the Code of Criminal Procedure."

94. Therefore, the argument on behalf of the petitioner regarding authority of A.C.C and the question of lack of Jurisdiction of the Court cannot be sustained in law.

95. In the reply of affidavit-in-opposition the learned Advocate referred the Judgment of the writ petition No. 7250 of 2008 and strongly submitted that this writ petition is maintainable and the petitioner is entitled to have the same remedy under the law.

96. We have gone through the Judgment of the writ petition No. 7250 of 2008. Upon scrutiny of the referred Judgment it appears that it has been preferred against the order of framing of charge in absence of the accused petitioner. The same Court earlier allowed the application of the accused dispensing with her appearance and to be represented through her lawyer. Ultimately, the trial Court without asking her to appear in Court in-spite of prayer for time rejected the application of the accused petitioner and thereby framed the charged. In such circumstances the Court interfere under the writ Jurisdiction. However, by the lapse of time there are several decisions pronounced by the Appellate Division on the same point of law settling the legal principles regarding the Jurisdiction of the writ Court which have already been referred herein above of this Judgment. Since those are the latest decisions and the Judgment of writ petition No. 7258 of 2008 was passed earlier on 09.03.2010. So, those latest decisions will prevail to earlier decisions of the either Division.

97. Moreover, under Article 111 of the Constitution the law declared by the Appellate Division is binding on the High Court Division, and as such, this Division has nothing but to abide by the law declared by the Appellate Division. Therefore, the referred decision could not be any way helpful in this case for the petitioner.

98. Although in the Rules issuing orders of the instant writ petitions nothing have been mentioned or challenged regarding the applicability of the Article 55 and 145 (2) of the Constitution in the facts and circumstances of the writs. However, in reply of affidavit-in-opposition on behalf of the accused petitioner the learned Advocate for the petitioner has raised the question of power of A.C.C regarding inquiry and investigation of the case referring Article 55 and 145(2) of the Constitution. In this regard our considered view is that the petitioner since did not raise aforementioned question of law in the substantive application and the Rules were not issued on those Constitutional point, the petitioner has no right to have any legal remedy beyond the Rule issuing orders. We find support of our above view to the case of Secretary, Ministry of Establishment and others –vs- Amzad Hossain and others reported 18 BLC (AD)16 wherein it has held by the apex court that

> "Jurisdiction on the writ Court – The prayer to the effect "*and/or such other of further order or orders as your Lordships may deem fit and proper"* do not authorise a writ Court to give relief beyond the Rule issuing order, such prayer authorises the writ Court to give any incidental relief or reliefs which may follow from the main relief according the Rule issuing order."

99. Therefore, it is not a fit case to discuss the above constitutional point raised by the petitioner in the reply to affidavit-in-opposition, rather, in an appropriate case this constitutional point may be discussed elaborately.

100. The petitioner in the reply of the affidavit-in-opposition referred the decision reported in 64 DLR (AD) 14 stating that writ Court can interfere in Criminal Proceeding. However, for the convenient of discussions and ready reference the cardinal principle decided in the referred case is quoted below:

> "This Court on repeated occasions argued that Article 102(2) of the Constitution is not meant to circumvent the statutory procedures. The High Court Division will not allow a litigant to invoke the extra ordinary jurisdiction to be converted into Courts of appeal or revision. It is only where statutory remedies are entirely ill suited to meet the demands of extra ordinary situations that is to say where vires of a statute is in question or where the determination is malafide or where any action is taken by the executives in contravention of the principles of natural justice or where the fundamental right of a citizen has been affected by an act or where the statute is intra vires but the action taken is without jurisdiction and the vindication of public justice require that recourse may be had to Article 102(2) of the Constitution".

101. Upon meticulous scrutiny of the above decision it is divulged that the instant case neither come within the purview of the principles of above decision nor it is a case of malafide. Rather, it is suggestive from F.I.R facts and the discussions made herein above allegedly criminal offences disclose in the case and the prosecution allegedly made out a prima facie criminal case.

102. Upon further a close scrutiny the averment of the writ petition No. 5054 of 2008 and 8557 of 2007 and Rule issuing orders it is divulged that the petitioner do not challenged the any vires of the law, rather, both the Rules were issued as to why the proceeding of the aforesaid case should not be declared unlawful, without jurisdiction and quashed on the basis of the some factual grounds without challenging vires of any law which are disputed question of facts. It is our considered view that in exercising the Jurisdiction under Article 102(2) of the Constitution the High Court Division is not empowered to embark an inquiry as to whether the allegation made in the F.I.R. and charge sheet against the accused are false or true as those are disputed question of facts which needs inquiry and such inquiry requires appreciation of evidences. Therefore it would not be open to any party to invoke the writ Jurisdiction of the High Court Division to ascertain as to whether the facts are false or true as has been claimed in the instant case.

103. Thus, upon discussions and the preponderant judicial views of the authorities referred to above. We are of view that both the writ petitions are not maintainable.

104. Thus, the Rules having no merit, it fail.

105. In the result, both the Rules are discharged, however, without any order as to cost.

106. The order of stay granted earlier by this Court is hereby recalled and vacated. The accused petitioner is directed to surrender to the concern Court within 2(two) months from the date of receipt of this Judgment.

107. The trial Court is further directed to consider the bail application of the accused petitioner, if any, as she did not misuse the privilege of bail.

108. Communicate this Judgment to the Court below at once.