IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

Writ Petition No. 2480 of 2019.

In the matter of:

An application under article 102 (1) and (2) (a) (i) read with article 44 of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of:

Dr. Shahidul Alam

..... Petitioner

-Versus-

Bangladesh represented by the Secretary, Ministry of Home Affairs and others.

..... Respondents

Mr. A. F Hassan Ariff, Senior Advocate with
Ms. Sara Hossain with
Mr. Chowdhury Mazdus Sultan, Advocates
..... For the petitioner

Mr. A. M Aminuddin, Attorney General with
Mr. Tushar Kanti Roy, DAG with
Mr. Kalipada Mridha, AAG and
Mr. Mohammed Rezaul Hoque, AAG and
Mr. Mohammad Abul Hasan, AAG
. . . For the respondents

Present:
Mr. Justice J. B. M. Hassan
and
Mr. Justice Razik Al Jalil

Heard on 18.11.2021, 09.12.2021 and
Judgment on 13.12.2021.

J. B. M. Hassan, J.

By filing an application under article 102 (1) and (2) (a) (i) read with article 44 of the Constitution of the People's Republic of Bangladesh the petitioner obtained the Rule Nisi in the following terms:

> "Let a Rule Nis be issued calling upon the respondents to show cause as to why the continuation of the investigation in Ramna Model PS Case No. 12(8)2018 dated 06.08.2018 corresponding

> to G.R. Case No. 433/18 under section 57 of the Totthyo-O-Jogagoj Projukti Ain, 2006 (Amended 2013), should not be declared to be without lawful authority and is of no legal effect being ultra vires the Digital Security Act, 2019 and /or in violation of Articles 31, 32, 35 and 39 of the Constitution and/or such other or further order or orders passed as to this Court may seem fit and proper".

Relevant facts leading to issuance of the Rule Nisi, *inter alia,* are that the petitioner is a photographer and academician being founder of the Drik Picture Library. He is also founder of the Pathshala South Asian Media Institute in Dhaka, which has trained hundreds of photographers. He is a founder organizer of the biennial 'Chobi Mela' festival and has received multiple awards including highest honour in Bangladesh for cultural figures, the Shilpakala Padak, which was awarded to him by the Hon'ble President of Bangladesh in 2015.

A First Information Report (FIR) was lodged with the Ramna Model Police Station on 06.08.2018 against the petitioner bringing certain allegations, precisely, are that the petitioner made comments and statements through live video to instigate on going student movement in connection with the death of two students on 29.07.2018. Thereby, he spread false information and provocative statements in the electronic media to create instability and anarchy in the country and to harm the image of the state and thus provocing the sentiment of school children, the petitioner has created social instability and thereby committed offence under section 57(2) of the "তথ্য ও যোগাযোগ প্রযুক্তি আইন, ২০০৬ (সংশোধিত ২০১৩)" (shortly, the ICT Act, 2006). On the basis of the aforesaid FIR, Ramna Model Police Station Case No. 12

dated 06.08.2018 corresponding to G. R. No. 433 of 2018 was initiated under section 57 (2) of the ICT Act, 2006. The case is now under investigation by the Investigation Officer (Police Inspector), Uttara Zonal Team, Detective Branch (North), Dhaka Metropolitan Police, Dhaka (respondent No.5) and the police report is yet to be submitted.

During investigation, "ডিজিটাল নিরাপত্তা আইন, ২০১৮" (shortly, the Act, 2018) was enacted on 08.10.2018 with immediate effect and that by section 61 of the said Act certain provisions including section 57 of the ICT Act, 2006 were repealed. However, sub-section (2) of section 61 saved the cases and proceedings under those mentioned provisions of the ICT Act, 2006 initiated before enactment and were pending for trial. In the circumstances, the petitioner filed this writ petition challenging continuation of investigation of the criminal case brought against him on the ground that the investigating authority did not have jurisdiction to investigate the case under the repealed provision of section 57 of the ICT Act, 2006 and that the impugned proceeding being at the stage of investigation, was not saved under section 61 (2) of the Act, 2018.

In this backdrop, the petitioner obtained this Rule Nisi and the ad-interim order of stay relating to further investigation of the Ramna Model Police Station Case No. 12 dated 06.08.2018.

Mr. A. F Hassan Ariff, the learned Senior Advocate with Ms. Sara Hossain and Mr. Chowdhury Mazdus Sultan, the learned Advocates appearing for the petitioner submits that the petitioner has been entangled in a criminal case with certain false allegations aiming to harass and humiliate

out of malafide intention by lodging an FIR under section 57 of the ICT Act, 2006 and still the case is under investigation. He further submits that incorporating section 61 of the Act, 2018, provisions of section 57 of the ICT Act, 2006 has been repealed and so the impugned proceeding against the petitioner is no more in existence and thereby the investigating agency has no jurisdiction to investigate the proceeding under the repealed provision. He also submits that sub-section (2) of section 61 incorporates the saving clause intending only to save the proceedings which are pending for trial on completion of investigation. Since the proceeding against the petitioner did not reach to that stage, at the time of repealing section 57 of the Act, 2006 it has not been saved by the section 61(2) of the Act, 2018. To substantiate his submissions, Mr. Hassan Ariff refers to the case of Mir Mosharraf Hussain and another Vs The State reported in 30 DLR (SC) 112, the case of Makbul Hossain and others Vs The State and another reported in 40 DLR (HCD) 326, the case of Solicitor, Government of Bangladesh Vs. A. T Mridha reported in 26 DLR (AD) 17, the case of Nasiruddin Mahmud and others Vs. Momtazuddin Ahmed and another reported in 36 DLR (AD) 14 and the case of TaeHung Packaging (BD) Ltd. and ors Vs. Bangladesh and Ors reported in 33 BLD (AD) 359.

On the other hand, Mr. A. M. Aminuddin, the learned Attorney General appearing for the respondents at the very out set has raised the question of maintainability of the writ petition. He contends that since the petitioner has simply challenged the criminal proceeding questioning the authority of investigation, the writ petition is not maintainable having

alternative forum. In support of his contention the learned Attorney General has referred to the case of Anti Corruption Commission Vs. Mehedi Hasan and another reported in 67 DLR (AD) 137, the case of Anti Corruption Commission Vs. Md. Shahidul Islam reported in 68 DLR (AD) 257, three cases of Begum Khaleda Zia Vs. Anti Corruption Commission reported in 69 DLR (AD) 181, 69 DLR (AD) 291 and 70 DLR (AD) 50. Referring to those cases, learned Attorney General contends that the consistent view of our apex Court is, not to entertain the writ petition challenging criminal proceeding unless the vires of law is challenged alongwith the proceeding. He, however, contends on merit of the Rule, in that although incorporating section 61 (1) of the Act, 2018 section 57 of the ICT Act has been repealed, but the impugned proceeding was initiated before repealing the said provision and so, there is no bar in continuation of impugned proceeding against the petitioner which was initiated under section 57 of the ICT Act, 2006. Learned Attorney General has also drawn our attention to section 6 of the General Clauses Act and submits that it has given the authority to the prosecuting agency to continue with the proceeding inspite of repealing the relevant provision.

In reply, Mr. Hassan Ariff again submits that section 6 of the General Clauses Act incorporates a condition i.e “unless a different intention appears” and that here section 61(2) having been provided an expressed intention saving certain cases under certain stages that will prevail.

However, regarding maintainability, Mr. Hassan Ariff has again drawn our attention to his referred cases i.e the cases reported in 30 DLR

(SC) 112, 40 DLR (HCD) 526, 26 DLR (AD) 17, 36 DLR (AD) 14, 33 DLR (AD) 359 and also the case of Government of the People's Republic of Bangladesh and others Vs. Iqbal Hasan Mahmood alias Tuku reported in 60 DLR (AD) 147. He submits that police report having not yet been submitted, the petitioner cannot challenge the proceeding for quashing under section 561A of the Code of Criminal Procedure (the Code) and so, there is no alternative remedy to the petitioner which led him to file this writ petition for judicial review of this Court under article 102 of the Constitution. Referring to the Rule issuing order, Mr. Hassan Ariff again submits that the petitioner has not come before this Court for quashing the proceeding rather the petitioner has challenged the very jurisdiction of the investigating officer to investigate the case which has already become infructuous due to repealing the relevant provision of section 57 of the ICT Act, 2006 and so, the writ petition is quite maintainable.

To assail this submission, learned Attorney General again contends that the well settled jurisprudence regarding the stage of criminal proceeding to challenge under section 561A of the Code, has been out lined by our apex Court, in particular, it has been cleared in the case of Ali Akkas Vs Enayet Hossain and others reported in 17 BLD (AD) 44 and the case of Syed Mohammad Hashem alias Hashim Vs State reported in 48 DLR (AD) 87. In these cases their Lordships relying upon the case reported in 28 DLR (AD) 38 (Abdul Kader Chowdhury's case) and 36 DLR (AD) 14 have drawn out five categories of criminal proceedings which can be challenged under

section 561A of the Code and that considering those categories of cases, it can not be said that the petitioner does not have the alternative remedy.

We have gone through the writ petition, the relevant provisions of laws and the cited cases as referred to by both the contending parties.

Question of maintainability of the writ petition having been raised by the respondents, let us first decide the said issue as to whether the present writ petition is maintainable.

It is on record that the petitioner has been entangled in a criminal case on the basis of certain allegations constituting offence under section 57 of the ICT Act, 2006 and the case was initiated as the Ramna Model Police Station No. 12 dated 6.8.2018. When the case was under investigation, Legislature enacted "ডিজিটাল নিরাপত্তা আইন, ২০১৮ (shortly, DS Act, 2018)" and it came into effect from 8.10.2018. The new enactment i.e the DS Act, 2018 incorporated section 61 repealing section 57 and certain other provisions of the ICT Act, 2006. For better understanding, section 61 of the Digital Security Act, 2018 is quoted herein below:

> "৬১। **২০০৬ সনের ৩৯ নং আইনের সংশোধন ও হেফাজত**।-(১) এই আইন কার্যকর হইবার সঙ্গে সঙ্গে তথ্য ও যোগাযোগ প্রযুক্তি আইন, ২০০৬ (২০০৬ সনের ৩৯ নং আইন) এর ধারা ৫৪, ৫৫, ৫৬, ৫৭ ও ৬৬ বিলুপ্ত, অতঃপর এই ধারায় বিলুপ্ত ধারা বলিয়া উল্লিখিত, হইবে।
> (২) উপ-ধারা (১) এ উল্লিখিত বিলুপ্ত ধারাসমূহের অধীন ট্রাইব্যুনালে সূচীত বা গৃহীত কোনো কার্যধারা (proceedings) বা কোনো মামলা যে কোনো পর্যায়ে বিচারাধীন থাকিলে উহা এমনভাবে চলমান থাকিবে যেন উক্ত ধারাসমূহ বিলুপ্ত হয় নাই।"

On a plain reading of the provision, it appears that sub-section (1) of the provision although repealed section 57 alongwith 4 (four) other sections of the ICT Act 2006 but at the same time the Legislature enacted sub-section

(2) saving certain proceedings under the aforementioned repealed provisions mentioning particular stage of those relevant proceedings. In the circumstances, the petitioner has come before this Court for its judicial review under writ jurisdiction taking the ground that the impugned proceeding against him having not been reached at the stage of trial by submitting charge sheet and taking cognizance, it has not been saved under 61 (2) of the Act, 2018 and so, the investigation officer does not have legal sanction to investigate the case and thereby to continue with the proceeding under repealed provision in view of section 61 (2) of the Act, 2018.

On the above context, maintainability of writ petition being questioned by the respondents we are to answer determining the forum before the petitioner to challenge the impugned criminal proceeding raising the above legal argument. In other words, whether the criminal proceeding or the investigation therein, can be challenged under writ jurisdiction in accordance with article 102 of the Constitution.

In this regard, petitioner's arguments are that before submission of charge sheet a criminal proceeding can not be quashed or challenged under section 561 A of the Code and hence, having no alternative and efficacious remedy judicial review of this Court has been invoked under article 102 of the Constitution. To strengthen the argument, Mr. Hassan Ariff refers to the case of Tae Hung Packaging (BD) Ltd and others Vs Bangladesh and others reported in 33 BLD (AD) 2013 page 359 and the case of Makbul Hossain and others Vs The State and another reported in 40 DLR (HCD) 326 (referred to the cases of 26 DLR (AD) 17 and 36 DLR (AD) 14). In

particular, he has drawn our attention to paragraphs No. 52 and 53 of 33 BLD (AD) 2013 page 359 and paragraph No. 6 of 40 DLR (HCD) 326 which run as follows:

33 BLD (AD) 2013 Page-359

> "52. We find from the above discussions that the views expressed by the judicial committee in Nazir Ahmed (AIR 1945 PC18) hold the field till now and the apex Courts of India, Pakistan and Bangladesh have been following the said opinions to great respect. The functions of the judiciary and the police are complementary, not overlapping and the combination of individual's liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function-the Court's function begins when a charge is preferred before it and not until then and, therefore, the High Court Division can interfere under section 561A only when a charge has been preferred and not before. The interference in exercise of powers under Article 102 has been deprecated on repeated occasions and such exercise of powers is justified only in exceptional cases as observed above.
>
> 53. Where the allegations in the FIR or complaint even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any office, or where in the opinion of the Court chances of the ultimate conviction are bleak and no useful purpose is likely to be served by allowing the criminal prosecution, or when the power would advance the cause of justice or it would be an abuse of the process of the Court, interference in such exceptional cases may be justified. This power of the Court does not confer any arbitrary jurisdiction to act according to its whims. The High Court Division would be loath and circumspect to exercise its extra ordinary power at an initial stage or the proceeding. The Court will not be justified in embarking upon an inquiry as to the reliability or genuiness of the allegations made in the FIR or complaint."
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> (Underlines supplied)

40 DLR (HCD) page 326

> "6. In the present case in the eye of law no proceeding is pending before the Magistrate because the Police after recording of the F.I.R has not yet submitted charge sheet and the competent court had not yet taken cognizance of the case either on the basis of the charge sheet or on any other basis. It is well settled that proceedings before a Court starts when the competent Court takes cognizance of an offence on police report or on receipt of complaint or when any District Magistrate, Metropolitan Magistrate or any specially empowered Magistrate takes cognizance upon his own knowledge. Before such cognizance, there is no proceeding which may be quashed under section 561A Cr.PC. This view taken by the Appellate Division in the case of Govt. of Bangladesh Vs. A.T. Mridha, 26 DLR (AD) 17 has not yet been over-ruled by any other decision including the majority view taken in the case of Nasiruddin Mahmud and others vs. Momtazuddin Ahmed and another, 36 DLR (AD) 14."

In the light of above referred cases, to appreciate the submission of Mr. Hassan Ariff, we have again examined the issue as to the proper stage of criminal proceeding for challenging the same under section 561 A of the Code.

In the case reported in 33 BLD (AD) 2013 page 359, his Lordship, S. K. Sinha, J observed that the High Court Division can interfere with a criminal proceeding under section 561A of the Code only when a charge having been preferred and not before. As we have understood by reading the forgoing paragraphs, here by the words "charge having been preferred" have been meant by submission of charge sheet. It was an observation and view of his Lordship alone and 5 (five) other learned Judges of the Full Bench did not agree with the judgment of S. K. Sinha, J. But at the same breath, in whole judgment his Lordship, S. K. Sinha, J repeatedly deprecated the

entertainment of writ jurisdiction to challenge a criminal proceeding unless vires of law is challenged alongwith the relevant proceeding. Finally, by majority view of their Lordships, in the said judgment the ratio was laid down to the effect that criminal proceeding should not be challenged for judicial review under writ jurisdiction unless the vires of statute is challenged and it was also view of the author of minority dissenting judgment, his Lordship S. K. Sinha, J.

Further, we find that the cited decision of petitioner, reported in 40 DLR (HCD) 326 as to scope of filing application under section 561A of the Code was founded, relying on the case of Govt. of Bangladesh Vs AT Mridha reported in 26 DLR (AD) 17 and the case of Nasiruddin Mahmud and others Vs Momtazuddin Ahmed and others reported in 36 DLR (AD) 14.

But subsequently discussing those cases, the ratio of the apex Court was settled through the case of Syed Mahmad Hashem alias Hashim Vs The State reported in 48 DLR (AD) 87 wherein their Lordships held as under:

> "7. It may be mentioned that the Privy Council in the case of **Emperor Vs. Nazir Ahmed AIR (32) 1945 PC 18** approved the view taken in a Madras case that the High Court Division may interfere under section 561A even during Police investigation if no cognizable offence is disclosed and still more if no offence of any kind is disclosed because in that case the Police would have no authority to undertake an investigation. In the case of **N Mahmud vs. M Ahmed, 1984 BLD (AD) 97=36 DLR (AD) 14,** Badrul Haider Chowdhury, j. referred to an earlier case **Abdul Quader chowdhury vs. State 28 DLR (AD) 39** and took it to be a settled provision of law that there may be cases where allegation in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute

> the offence alleged and in such cases it would be legitimate for the High Court Division to hold that it would be manifestly unjust to allow process of the Criminal Court to be issued against an accused person. In that case Masud J. observed that proceeding before a Court starts when the Magistrate takes cognizance of an offence on Police report or on complaint. Before such cognizance, there is no proceeding that may be quashed under section 561A CrPC. Process is issued only after taking of cognizance. We are leaving this matter presently by pointing out that ordinarily the view taken by Masud J. is correct and the same is being followed in our Court since long. But that is not to say that the view expressed in 28 DLR (AD) 39, and referred to by Badrul Haider Chowdhury, J, is not correct. There may be one case out of a thousand where the High Court Division will be justified in interfering even at the initial stage before taking of cognizance. But the usual and well-settled practice is that a criminal proceeding can only be quashed after cognizance has been taken and process issued thereupon subject to the fundamental principle that the power of quashing is and should be very sparingly exercised and only to prevent the abuse of the process of the Court."
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> (Underlines supplied)

Quashing of criminal proceding exercising inherent power of Court under section 561A of the Code was discussed in details in the case of Emperor Vs Khawaja Nazir Ahmed reported in AIR 1945 PC page 18. Subsequently, in different cases, our Apex Court discussed regarding the stages of the criminal proceedings for challenging the same under section 561A of the Code. In the development of the route of jurisprudence regarding the scope of exercising inherent power of the Court under section 561A of the Code, the case of Abdul Quader Chowdhury and others Vs the State reported in 28 DLR (AD) 38 laid down a detail picture of different stages of a criminal proceeding to challenge under section 561A of the Code. Agreeing with this ratio, the apex Court subsequently, with an unambiguous

expression drew out a perimeter of criminal proceedings with regard to its different stages in order to challenge the same under section 561A of the Code, in particular, in the case of Syed Mohammad Hashem alias Hashem Vs. the state reported in 48 DLR (AD) 87 (Supra) and in the case of Ali Akkas Vs. Enayet Hossain and others reported in 17 BLD (AD) (1997) page 44. In the case reported in 17 BLD (AD) (1997) page 44 their Lordships held as under:

> "In the case of Abdul Quader Chowdhury and others vs. The State reported in 28 DLR (AD) 38, this Division has clearly spelt out the categories of cases where the High Court Division should interfere to quash a criminal proceeding. In that decision this Division observed as follows:
>
> (1) Interference even at an initial stage may be justified where the facts are so preposterous that even on the admitted facts no case can stands against the accused.
>
> (2) Where institution or continuance of criminal proceedings against an accused person may amount to an abuse of the process of the court or when the quashing of the impugned proceedings would secure the ends of justice.
>
> (3) Where there is a legal bar against the institution or continuance of a criminal case against an accused person.
>
> (4) In a case where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged and in such cases no question of weighing and appreciating evidence arises.
>
> (5) The allegations made against the accused persons do constitute an office alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge.

This refers to a case at a trial stage and thereafter."

Thus, by the aforementioned ratio mentioning (05) categories of criminal cases in terms of their different stages, the apex Court makes it clear that a criminal proceeding can be challenged under section 561A of the Code at every stage subject to consideration of its own facts and merit. Moreover, if we read carefully, section 561A of the Code clearly spells out that nothing under the Code shall limit or affect the inherent power of the High Court Division to make any order as may be necessary to prevent abuse of the process of the any Court or otherwise to secure the ends of justice. Therefore, in view of ratio laid down by our apex Court and the legal proposition incorporated in section 561A of the Code, we are led to hold that at any stage, a criminal proceeding can be interferred by the High Court Division under this provision considering its own facts and circumstances to secure ends of justice and/or to prevent abuse of process of any Court. Hence, we are unable to accept the submission of Mr. Hassan Ariff that the petitioner does not have alternative forum to agitate his grievances in view of enactment of section 61 of the Act, 2018 and due to noncompletion of investigation of the proceeding in question.

On the other hand, from legal proposition and our jurisprudence settled in series of cases, we find that the apex Court has been discouraging and disapproving consistently in entertainment of writ jurisdiction for challenging criminal proceeding. Particularly, in the case of Anti-Corruption Commission Vs Mehedi Hasan and another reported in 67 DLR (AD) 137 their Lordships held as follows:

> "As regards Civil Petition for Leave to Appeal No. 652 of 2013 arising out of Writ Petition No. 7242 of 2008, we are of the view that there is no scope for quashing a criminal proceeding under the writ jurisdiction unless the vires of the law involved is challenged. Having gone through the Rule issuing order, we find that the vires of the law involved in the present 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 15 criminal cases (Special case No. 12-26 of 2007) in exercise of its power under Article 102 of the Constitution".
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> (Underlines supplied)

In the case of Anti Corruption Commission Vs Shahidul Islam reported in 68 DLR (AD) 242 their Lordships held as under:

> "Another important aspect is that challenging the proceedings of special case Writ Petition No. 9905 of 2007 and 8578 of 2007 are not maintainable inasmuch as Code of Criminal Procedure provides efficacious remedy to get redress if one feels himself aggrieved due to initiation of such criminal proceedings. In such view of the matter those two writ petitions were not maintainable."

Again considering the ratio laid down in 67 DLR (AD) 137, the Apex Court passed the judgment in the case of Begum Khaleda Zia Vs Anti Corruption Commission reported in 70 DLR (AD) 50 wherein it has been held as under:

> "13.In proceedings under Article 102 of the Constitution it is not open to the High Court Division to hold an elaborate enquiry into disputed and complicated questions of fact. The High Court Division would only interfere with the proceeding of a criminal Court if it is found that such proceeding is without jurisdiction and if there is no other efficacious relief provided in law against such proceeding or the vires of the law basing on which the proceeding initiated is challenged. Where a person has an equally efficacious remedy, the High Court Division would not interfere with criminal proceeding in exercising extra-ordinary jurisdiction. Such powers are to be

> exercised in rare and exceptional cases. It is true that existence of alternative remedy is not an absolute bar to entertain writ petition by the High Court Division but to declare a criminal proceeding illegal it is to be established that the Court acted without jurisdiction or the vires of the law is in question. In this case no such strong ground has been made out."
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> (Underlines supplied)

In the aforesaid cases, we find that the consistent view of our apex Court is that unless the Court acted without jurisdiction or the vires of law is challenged, the criminal proceeding can not be challenged in writ jurisdiction for judicial review.

In this Context, Mr. Hassan Ariff submits that the cases, cited by the learned Attorney General are all challenging criminal proceedings at the stage of trial i.e after submission of charge sheet and so those cases are not applicable in this particular case. In the present case in hand, there being no charge sheet as yet, the petitioner has filed this writ petition relying on the case of Government of the People's Republic of Bangladesh and others Vs Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku reported in 60 DLR (AD) 147. To appreciate the submission of Mr. Ariff, we have also gone through the cited case reported in 60 DLR (AD) 147 (Tuku's case) and the relevant portions of the said case are as follows:

> "On the other hand, the contention raised by the learned Attorney General that the writ petition filed by the respondent challenging the proceeding in the aforesaid special case now pending against him before the Special Judge is not maintainable for not having exhausted the otherwise efficacious alternative remedy by way of a petition under section 561A of the Code of Criminal Procedure is also not acceptable, inasmuch as the instant writ petition has raised question of law and interpretation of statute. Further, the respondent has not other efficacious alternative remedy under the Income Tax

> Ordinance to challenge the criminal case now pending against him. It is pertinent to point out that a Division Bench of the High Court Divison has already held in the case of Jahangir Hossain Howlader 52 DLR 106 that filing of an application under section 561A of the Code of Criminal Procedure is not an adequate alternative remedy as contemplated under Article 102(2) of the Constitution. Further, in the case of MA Hai Vs TCB, 40 DLR (AD) 206 it is held that availability of alternative remedy by way of appeal or revision will not stand on the way when the question of law and interpretation of statute is involved. It is also decided in the case of Nesar Ahmed Vs. Government of Bangladesh 49 DLR (AD) 111 that when it becomes impossible to avail of the alternative remedy, relief by way of writ petition under article 102 of the Constitution is competent. The instant writ petition is therefore maintainable."
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> (Underlines supplied)

On perusal of the aforesaid ratio, it appears that in this particular case the criminal proceeding was under the Income Tax Ordinance and that question of law and interpretion of statute being involved, and also relying upon two other cases, the writ jurisdiction was entertained. The judgment was pronounced on 20.05.2008. But subsequently, this very decision of Tuku's case was discarded in the case of TaeHung Packaging (BD) Ltd. and ors. Vs. Bangladesh and ors reported in 33 BLD (AD) (2013) page 359 wherein their Lordships again discussed the case of 60 DLR (AD) 147 (Tuku's case) and the other reference cases.

Relevant portions of the ratio laid down in 33 BLD (AD) (2013) page-359 are as follows:

> "19. In Bangladesh vs Iqbal Hasan Mahmud alias Iqbal Hasan Mahmood Tuku, 60 DLR (AD) 147, this Division approved the view taken in MA Hai vs Trading Corporation of Bangladesh, 40 DLR (AD) 206 and Nasir Ahmed vs Bangladesh, 49 DLR (AD) 111 observing, "the contention raised by the learned

Attorney-General that writ petition filed by the respondent challenging the proceeding in the aforesaid special case is not maintainable for not having exhausted the otherwise efficacious alternative remedy under section 561A of the Code of Criminal Procedure is not acceptable, inasmuch as, the instant writ petition has raised question of law and interpretation of statute". This Division though noticed the arguments made by the High Court Division in Jahangir Hossain Howlader vs CMM, Dhaka, 58 DLR 106, did not express any opinion as to the correctness of the opinion expressed by the High Court Division but from the latter observations, such as, "availability of alternative remedy by way of appeal or revision will not stand on the way when the question of law and interpretation of statute is involved" there is no doubt that this Division did not approve the said opinion of the High Court Division and approved the views taken in Mujibur Rahman (Supra). The consistent view of this Division is that even in presence of alternative remedy, the High Court Division can invoke the power of writ jurisdiction if the aggrieved person challenges the vires of a statute which requires interpretation of such statute. The appellants did not challenge the vires of any statute in any of the writ petitions.

. . . . . .

30. The consistent views of this Division are that if any alternative remedy is available, the judicial review by the High Court Division in writ jurisdiction is not available with the exception that where the vires of a statutory provision is challenged or where the alternative remedy is not efficacious exercise of such power may be justified. The High Court Division in Jahangir Hossain observed that before moving a petition under section 561A of the Code, the petitioner is required to surrender before the Court below and thus the filing of a petition under section 561A is not an adequate remedy. There is fallacy in the arguments for, the High Court Division failed to address the point in the light of the decisions of this Division. If a process has already been issued against an accused, the High Court Division shall not exercise its power either in writ or revisional or miscellaneous jurisdiction unless the surrenders to the jurisdiction of the Court. Article 102 does not confer any wider power to circumvent the statutory procedure."

(View of S.K. Sinha, J)

> "121. Mr. Amir-ul-Islam, in support of his contention that, inspite of the availability of the statutory alternative forum under the Code, the High Court Division could really exercise its power of judicial review and quash/set-aside the impugned proceedings challenged in the respective writ petition, tried to rely upon the cases of Dhaka Warehouse Ltd vs Assistant Collector of Customs reported in 11 BLD (AD) 227, Nesar Ahmed also known as Babul vs Government of Bangladesh, represented by the Deputy Commission, Noakhali reported in 49 DLR (AD) 111, the Government of the Peoples' Republic of Bangladesh vs Iqbal Hasan Mahmood alias Iqbal Hasan Mahmood Tuku reported in 60 DLR (AD) 147 and State of Haryana vs Ch. Bhajal Lal reported in AIR 1992 (SC) 604. But in the context of the respective criminal proceeding challenged in the respective writ petition as discussed above, the principles of law enunciated in the said reported cases have got no manner of application and those do not at all help Mr. Islam to substantiate his argument that the respective writ petition was maintainable and we do not consider it at all necessary to discuss the facts and circumstances of those cases in detail under which the principles of law were enunciated in those cases.
>
> 122. In conclusion, we hold that the writ petitions giving rise to the appeals and the leave petition were not maintainable. As we have already held that the writ petitions were not maintainable, the observations made by the High Court Division in the impugned judgments touching the merit of the respective case cannot stand and accordingly those are expunged."
>
> (Majority view)
> (Underlines supplied)

Although the cases cited by the learned Attorney General are relating to proceedings at the stage of trial, but as we held earlier that at any stage an appropriate criminal proceeding can be challenged under section 561A of the Code considering its own facts and involved laws. Moreover, in the case reported in 33 BLD (AD) 2013 page 359 the criminal proceeding was at the stage of investigation where apex court held that to challenge criminal proceeding writ petition was not maintainable. Besides, under section 561A

of the Code question of law and interpretation of statute can be settled. But law or statute can not be declared ultra vires, considering which the apex Court has decided that a criminal proceeding involving question of vires of law, can be challenged under writ jurisdiction.

Therefore, taking consideration of all the aforesaid cited cases and in the light of ratio enunciated by our apex Court, we hold that the authority of investigation of the criminal proceeding against the petitioner can not be challenged under writ jurisdiction inasmuch as the vires of law has not been challenged in the writ petition. Although, Mr. Hassan Ariff tried to distinguish this particular case from the cited cases in that he has challenged the jurisdiction of investigating authority in investigating the case and so it will not be cover within the view of the apex Court as to maintainability of writ petition challenging criminal proceeding.

From all the submissions, we find that the basic contention of the petitioner is that the criminal case against him which is now under investigation, can not continue in view of section 61(1) and (2) of the Act, 2018. In other words, it is the contention as to maintainability of the criminal proceeding in question due to subsequent enactment of law and so the question involved is whether continuation of the proceeding is proper or not. It is not the question of jurisdiction.

In view of above discussions and the legal principles laid down by our apex Court, we are led to hold that the present writ petition is not maintainable for our judicial review under article 102 of the Constitution.

Since, we are deciding the writ petition on point of maintainability, we refrain ourselves from entering into the merit of the Rule.

In the result, the Rule is discharged without any order as to costs.

Communicate a copy of the judgment and order to the respondents at once.

Razik Al Jalil, J

I agree.