IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
Present
Mr. Justice Md. Salim
And
Mr. Justice Md. Riaz Uddin Khan

CRIMINAL MISCELLANEOUS CASE NO.64210 OF 2019

Md. Nayaz Ahmed
.....Convict-Petitioner
-VERSUS-
The State and another
.....Opposite Parties

Mr. A.F. Hassan Arif, Senior Advocate with
Ms. Monera Haque Mone, Advocate
------- For the convict-petitioner

Mr. Md. Towfiqul Islam Khan, Advocate
-------For the opposite party No.2

Mr. Tushar Kanti Roy, DAG with
Mr. Md. Azizul Hoque, A.A.G
Mr. Sheikh Muhammed Maju Miah, AAG.
Ms. Lily Rani Saha, A.A.G.
.....For the State

Heard on 10.08.2023, 16.08.2023 and 11.10.2023

Judgment on 18.10.2023.

Md. Salim, J:

By this Rule, the opposite parties were asked to show cause as to why the judgment and order of conviction and sentence dated 31.10.2007 passed by the learned Assistant Metropolitan Sessions Judge, 5th Court, Dhaka in Metro Sessions Case No.339 of 2007

arising out of C.R. Case No.3547 of 2006 convicting the petitioner under Section 138 of the Negotiable Instruments Act, 1881 and sentencing him to suffer simple imprisonment for 1(one) year with a fine of Tk.12,88,17,229.62 should not be quashed and/or pass such other or further order or orders as to this Court may deem fit and proper.

Material facts leading to this Rule are that, The accused petitioner took various credit facilities from the complainant bank, and in order to discharge the loan liability he issued a cheque in favour of the complainant opposite party No.2 bank which on presentation to the bank for encashment was dishonored on the ground of insufficiency of funds. Following the procedure and in compliance with statutory provisions laid down in section 138 of the Negotiable Instruments Act of 1881 the complainant filed the instant case.

On the above allegation, the learned Metropolitan Magistrate, Dhaka after examining the complainant under Section 200 of the Code of Criminal Procedure took cognizance of the case. Subsequently, the learned Assistant Metropolitan Sessions Judge, 5th Court,

Dhaka framed the charge against the convict-petitioner under Section 138 of the Negotiable Instruments Act, 1881 which could not be read over and explained to him because of his absence before the Court.

In the course of the trial, the prosecution side examined 1(one) witness and also produced several documents i.e. power of attorney marked as exhibit-1, alleged cheque marked as exhibit-2, dishonour slip marked as exhibit-3, legal notice marked as exhibit-4, postal receipt marked as exhibit-5, postal acknowledgment slip marked as exhibit-6, petition of complaint marked as exhibit No.7 and signature thereon as exhibit-7/1.

After the conclusion of taking evidence, the accused petitioner could not be examined under section 342 of the Code of Criminal Procedure because of his absence.

Eventually, the learned Assistant Metropolitan Sessions Judge, 5th Court, Dhaka by the judgment and order dated 31.10.2007 convicted the petitioner under Section 138 of the Negotiable Instruments Act, 1881

and sentenced him to suffer simple imprisonment for 1(one) year with a fine to TK. 12,88,17,229.62.

Feeling aggrieved by and dissatisfied with the said judgment and order of conviction and sentence, the convict as petitioner filed the instant application under Section 561A of the Code of Criminal Procedure and obtained the present Rule, order of stay of the impugned judgment, and bail.

Mr. A.F. Hassan Ariff, the learned Senior Advocate appearing on behalf of the convict petitioner submitted that none of the pronouncements of the Supreme Courts beginning with the Emperor Vs Nazir Ahmed case to date has independently dealt with the scope of "otherwise to secure ends of justice". The case in hand calls for such intervention on the ground of "otherwise to secure the ends of justice" as a distinct circumstance and situation falling within the category of "otherwise". This legal and factual scenario calls for revisiting the scope of inherent power preferred under Section 561A of the Code of Criminal Procedure. The most important aspect of the pronouncement of the Privy Council in hand is that there is a para that throws light on the

inherent power, emphasized under section 561A is reproduced below:-

> "It has sometimes been thought that Section 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordships think, lest it should be considered that the only powers possessed by the Court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of that Act."

This para succinctly encompasses the scope of inherent power. The wording in the margin of section 561A, "savings of the inherent power" ----- is the key to unlocking the vast judicious unfettered inherent power to secure ends of justice. The substantive part of the section ----- "Nothing in this code shall be deemed to limit or affect the inherent power of the High Court Division -----" again reemphasis and reminds us about

the scope and sweep of the inherent power. The High Court Division envisaged in section 561A of the Criminal Procedure Code of 1898 has now merged with the High Court Division, Supreme Court of Bangladesh rooted in our constitution. Powerwise it is a new horizon and needs to be explored. This inherent power of the Court coupled with the wordings of the third ground for intervention "or otherwise to secure" -----"compels one to hold that the inherent power has been unshackled from the periphery of other two grounds for intervention such as to be more precise

(a) to give effect to any order

(b) prevent abuse of the process of the court --------

The Court is empowered with unfettered judicious discretion to intervene coming within the purview of "otherwise". So no limitation within the Code of Criminal Procedure has been expressly spelled out in section 561A or by the two other grounds for intervention. Such intervention in the exercise of inherent power is undefined and the circumstance for intervention is not exhaustive nor can it be exhaustive.

He then submits that the cheque in question is not drawn for payment to another person. In the instant scenario, the blank cheque is being abused by the bank itself on the account with the bank/banker. In order to apply section 138 of the Negotiable Instrument Act, 1881 and to constitute an offence under the said section, the drawer, the banker, and the drawee are three distinct juristic persons. The bank/banker is not another person in the transaction. The banker is not competent to lodge any complaint under section 138 of the Negotiable Instrument Act, 1881. It is apparent that the ingredients of section 138 of the Negotiable Instrument Act,1881 to constitute an offence there must be three juristic entities. The aggrieved person is the drawee that is “another person”, the banker not being itself another person and drawee, under section 138 of the Negotiable Instrument Act, the bank can not initiate proceeding section 138 of the Act. It may be summed up

(I) that the loan/consideration is advanced against the mortgage.

(II) there is no distinct, independent, and separate loan consideration against collateral security blank cheque.

(III) the ingredients of section 138 of the Negotiable Instrument Act,1881 are absent.

In that bank cannot be drawee another person which is the third juristic person in the section, the first being the drawer/account holder and the second the banker. Firstly, the initiation of the case under section 138 of the Negotiable Instrument Act by the bank is a nullity and void *abinitio* being not legally competent to file. Secondly, the proceeding under a cheque without consideration is not a proceeding in accordance with law and in the eye of law and therefore the proceeding is null and void and liable to be quashed. Thirdly, the conviction based on incompetent complaint, void proceeding is equally not founded in law and due process of law and therefore null and void and liable to be quashed. Our legal system is based on common law. The courts under our legal system based on common law, are inherently courts of equity. The exercise of inherent power under clause of section 561A of the

Code of Criminal Procedure is founded on equity which transcends law. The case in hand is a glaring instance of grave injustice and wrong as there cannot be wrong without remedy or every wrong has to have a remedy to address the injustice to secure justice. Thus intervention by the High Court Division in the exercise of inherent power is the requirement of Law and Justice.

Whether the conviction under section 138 of the Act for dishonour of collateral security cheque is lawful and is an abuse of the process of the court even after the decree satisfied from the mortgaged property under section 33(7) and section 33(9) of the Artha Rin Adalat Ain. The conviction under section 138 of the Act against the collateral security cheque deposited by the bank is without legal foundation. The proceeding under section 138 of the Act was not maintainable, because the collateral security cheque was admittedly without consideration as evident from the section letter. As per the provision of section 43 of the Negotiable Instrument Act a cheque without consideration creates no

obligation of payment between the parties to the transaction.

The learned advocate for the petitioner further submits that the borrower mortgaged property to secure the money advanced by the bank. The money is considered transacted under this mortgage. The said secured amount is not transected under this “collateral security cheque”. In other words, the bank did not transact any money/consideration against this cheque. The cheque is without consideration. The very term “collateral security” admits that the security instrument is not against any consideration or any money advanced as a loan. Section 3(b) defines “banker” means a person transacting the business of accepting, for the purpose of lending or investment, deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise and includes any post office savings bank. The bank does not withdraw itself from the account deposited by the public (borrower).

On the contrary, Mr. Md. Towfiqul Islam Khan, learned Counsel appearing for the opposite party No.2

opposes the contention so made by the learned counsel for the petitioner and submits that the right of appeal is not a fundamental right but is a statutory right. The petitioner's right has not been curtailed for such pre-condition provided in section 138A of the Act to deposit 50% of the cheque amount at the time preferring appeal.

We have given our anxious consideration to the above submissions made by learned counsel for both parties, perused the impugned Judgment and order of conviction and sentence, and other materials on record. To appreciate the legal aspect entangled in the case it would be useful if we trace the scheme and purpose of the amendment of the Negotiable Instruments Act. Section 138 of the Act provides for a special forum for the realization of dishonored/unpaid cheque amounts from the drawer by a special method. The law is by now well settled that the appeal is a continuation of the case and the borrowers or drawers in taking shelter of this principle of law ponderously used to grip the appeal for an indefinite period to handle the process of realization of the unpaid cheque money for an indefinite period in which the holder of the cheque not only endure a lot but also the process of realization of the cheque amount descends into

tenebrous. Keeping the said view in mind the legislature in applying their wisdom amended Section 138 of the Negotiable Instruments Act on 09.02.2006 providing to deposit not less than 50% of the dishonoured cheque at the time of filing an appeal in the Court which awarded the sentence.

Section 138A of the Negotiable Instruments (Amendment) Act, 2006 provided that 'Restriction in respect of appeal- Notwithstanding anything contained in the Code of Criminal Procedure,1898, no appeal against any order of sentence under sub-section (1) of Section 138 shall lie, unless an amount of not less than fifty percent of the amount of the dishonoured cheque is deposited before filing the appeal in the Court which awarded the sentence". Earlier the question of depositing 50% of the dues in filing an appeal had been challenged unsuccessfully before the High Court Division and the Appellate Division of the Supreme Court of Bangladesh.

Now, whether the condition of payment of fifty percent amount of dishonoured cheque in filing an appeal is a violation of the fundamental right of the petitioner. The law is by now well settled that the appeal is a continuation of the case and there is no dispute that in society a class of borrowers or drawers in taking shelter of this principle of law

deliberately used to drag the appeal for an indefinite period to handle the process of realization of the loan amount or unpaid cheque money for an indefinite period in which the payee or the holder of the cheque not only suffers a lot but also the process of realization of cheque amount or loan money falls into dark. Keeping the said view in mind the legislature in applying their wisdom amended Section 138 of the Negotiable Instrument Act on 09.02.2006 providing to deposit not less than 50% of the dishonoured cheque at the time of filing an appeal in the Court which awarded the sentence.

In this context, we can rely upon the case of Md. Nur Islam vs. Islami Bank reported in 1 MLR (AD) 373, though decided in an Artharin suit, wherein it is held that-

> "It is either by an application or by an appeal, but in both cases a deposit of 50% of the decretal amount is necessary. To avoid this, it appears, the petitioner has sought a shortcut by invoking section 151 C. P. C which is not applicable in such a situation. The application under section 151 is found to have rightly dismissed".

In the case of Gazi M Towfic Vs. Agrani Bank and others reported In 54 DLR (AD) 6, the appellate Division

observed that as the Artha Rin Adalat Ain is a special law and special provision having been provided in the Ain, the question of entertaining an application under Article 102 of the constitution against the Judgment and Decree of the Artha Rin Adalat is not maintainable and held that-

> ‘’The law is now settled that since special provision for appeal has been made against Judgment and Decree passed by the Artha Rin Adalat no application under Article 102 lies against such Judgment and Decree. The High Court Division therefore rightly rejected the application summarily.”

In several cases especially in the case of Zahirul Islam vs National Bank Limited and others, reported in 46 DLR (AD) 191 this question of the depositing 50% of the decretal dues was agitated before the Appellate Division. In the case the learned Advocate for the petitioner citing the case of Nagina Silk Mills, Lyallpur vs Income Tax Officer reported in 15 DLR (SC) 181, submitted that such deposit is not an efficacious remedy and as such, the petitioner’s right to prefer an appeal is shut down. But their Lordships categorically held in that case that the deposit of half of the decretal dues at the time of preferring appeal is a condition in preferring the appeal in a regular suit with which the Income Tax Appeal or Customs Appeal cannot be equated

and accordingly, it was held that any question including the ouster of jurisdiction or limitation or non-consideration of the evidence, it is a matter to be looked into in appeal not under the Writ Jurisdiction of the High Court Division which is special original jurisdiction.

In the case of AHN Kabir vs. Government of Bangladesh and others reported in 13 BLC 686 held that-

> "The petitioner also took serious exception to deposit 50% of the face value of the dishonoured cheque. As soon as the appeal is filed against the judgment and order of conviction and sentence, the appellate Court is required to stay the operation of the judgment passed by the trial Court. Mere filing of an appeal does not operate as stay of the judgment of conviction and sentence passed by the trial Court. The appellate Court may or may not stay the operation of judgment of conviction and sentence and may not enlarge the accused on bail. In that event, the accused will have to pay the entire amount of the dishonoured cheque(s). Therefore, depositing 50% of the face value of the dishonoured cheque cannot be said to be illegal in case of a pending case ended up in conviction and sentence."

It transpired from the above-cited case that two cheques for payment of dues and some odd were issued by the convict petitioner and the respondent filed a case against the accused petitioner under section 138 of the Negotiable Instrument Act as both cheques were dishonured for insufficient funds. Subsequently, the trial court below convicted the accused petitioner and sentenced him to suffer simple imprisonment for 1(one) year with a fine challenging the same the convict-petitioner filed a Writ Petition without preferring any appeal. This Division discharged the Rule with a finding that depositing 50% of the face value of the dishonoured cheque cannot be said to be illegal.

A similar view was taken in the case of AJM Helal Vs Bangladesh and others, reported in the 61 DLR (HCD) 479 held that- the precondition of depositing 50% of the decretal amount at the time of preferring appeal was first introduced in Artha Rin Ain, 1990 which has also been challenged in various writ petition unsuccessfully. The proposition of law is clear if the appellant success in appeal he will get back his entire amount and in that view of the matter we find no merit in such an argument that a deposit of 50% cheque amount at the time of preferring appeal after losing the case is one kind of punishment or taken away the statutory right of the convict petitioner in preferrer appeal.

Undoubtedly, the Negotiable Instruments Act is a special law. Section 138 of the Act provides certain pre-conditions for bringing prosecution against the drawer of the unpaid cheque. Under Section 138(c) of the Act, 30 days are given for payment of the amount due under the cheque from the date of receipt of notice regarding dishonour of cheque issued by the payee. The payee has to wait for 30 days anticipating payment of the amount by the drawer. After the expiry of 30 days, if the drawer does not pay the amount, the cause of action stands 31st day onwards. The limitation to file a complaint as prescribed under section 141(b) of the Act is one month. On trial, both parties are entitled to adduce evidence both oral and documentary. The trial Judge in deciding the case under the Act has to consider first, whether the cheque in question is dishonoured and whether after fulfilling the legal requirement of section 138(b) and (c) of the Negotiable Instruments Act, the case was filed or not. It is notable that usually, a convicted person on various pretexts used to take adjournment to hang the process of realization of the cheque amount. To meet such a situation, the legislature in applying their wisdom inserted Section 138A providing the provision for depositing not less than 50% of the unpaid cheque amount as a pre-condition in the case of an appeal.

There is no doubt that the Negotiable Instruments Act under which the trial of the case took place is a special law enacted for special cases in special circumstances. So, the requirement of a 50% deposit of the cheque amount at the time of filing an appeal before the Court under the provision of Section 138A of the Act is not unconstitutional.

In view of the above-settled provisions of law and our discussion made in the foregoing paragraph vis-a-vis the decision as cited above, we have no hesitation to hold that since a special provision for appeal has been made against the judgment and order of conviction and sentence passed under the Negotiable Instruments Act, 1881, no application against such judgment and order of conviction and sentence under section 561A of the Code of Criminal Procedure is maintainable at all except that the convicted person makes out a case of coram non-judice or facts alleged do not constitute any offence or conviction based on no legal evidence or for securing the ends of justice. In the case before us, Mr Ariff has failed to show us any such kind of violation committed by the trial court below in convicting the petitioner.

Therefore, the convict-petitioner filed this miscellaneous application before this Court with a misconceived view though there is a specific forum for

filing an appeal by depositing at least 50% of the cheque amount.

We have already observed that all the questions raised by Mr. Ariff have no legs to stand as the remedy of the convict petitioner categorically lies in preferring an appeal. However, we are restraining ourselves from deciding the case on merit as it may affect the fate of the appeal, if any, filed by the convict petitioner. In the instant case, we have dealt with only those points that are relevant for the disposal of the instant rule issued under section 561A of the Code of Criminal Procedure.

In view of the above provisions of law and our discussion made in the foregoing paragraphs vis-a-vis the decisions as cited above, we find no substance in the Rule.

Resultantly, the Rule is discharged.

The convict petitioner Md. Nayaz Ahmed is directed to surrender before the trial court and pay the cheque amount within 2(two) months from receipt of this judgment by the trial Court for serving out the remaining sentence of imprisonment failing which the court below is directed to take necessary steps to secure his arrest.

Communicate the judgment at once.

Md Riaz Uddin Khan, J:

While agreeing with the result of the judgment delivered by his Lordship Mr. Justice Md. Salim I would like to add few lines of my own on the subject.

Facts of this case have already been described and to avoid repetition those are not mentioned further. Suffice it to say, that the petitioner was convicted under section 138 of the Negotiable Instruments Act, 1881 and sentenced to suffer simple imprisonment for 1 (one) year with a fine of Tk-12,88,17,229.62/- by the trial Court. The convict petitioner was absent at the time of pronouncement of the judgment who subsequently surrendered before the trial Court with a prayer for bail to prefer appeal against the judgment of conviction and sentence and the learned trial judge by his order dated 21.10.2019 was pleased to grant him bail till 21.11.2019 in order to file appeal within that period failing which the bail shall stand cancel. However, the convict petitioner instead of filing appeal obtained

instant Rule issued under section 561A of the Code of Criminal Procedure and also order of bail.

The opposite party bank did not file any counter affidavit though entered appearance on the date fixed for judgment.

Mr. A.F. Hassan Ariff, the learned Advocate appearing for the convict petitioner submits that the petitioner as borrower secured the adequate loan against the property mortgaged. After default, bank filed suit and obtained decree. The decree was put to execution and bank obtain certificate under section 33(7) of the Artha Rin Adalat Ain for title in this mortgaged property towards satisfaction of the decree. Thereafter, the execution case stands satisfied and concluded under sub-Section 9 of Section 33 of the Artha Rin Adalat Ain.

Mr. Ariff then submits that the reading of the judgment delivered by the Privy Council on 17.10.1944 in Emperor Vs Khawja Nazir Ahmed wherein their Lordships were of the opinion:

1. “In such a case as the present the Court’s function begin when a charge is preferred before it and not until then.”
2. “But that stage like the stage at which the court may legitimately intervene has not, in their Lordships opinion, yet been reached.”
3. “No doubt, if no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation.”

The learned advocate then submits that traveling through the history of judicial pronouncement of our Superior Court (Supreme Court of Bangladesh) it appears that the Privy Council pronouncement on the issue is still occupying the field i.e. the scope of judicial intervention under section 561A of the Cr.P.C. The power of court to intervene at FIR stage if no cognizable offence is disclosed and if no offence of any kind is disclosed and that police would have no authority to undertake an investigation still stand as settled legal proposition. Another issue decided by the Privy Council is the stage at which the court may legitimately

intervene, apart from non-discloser issue, begins when a charge is preferred before it and not until then. This proposition is also consistently followed by Superior Courts of our country. Several leading decisions which are innumerable have discussed the scope of power of section 561A of the Cr.P.C and have ultimately till date settled the propositions of law quoted hereinafter relying on the judgments of Abdul Quader Chowdhury and others Vs. the State reported in 28 DLR (AD) 38. The Judicial pronouncement has clearly spelt out the categories of cases where the High Court Division should interfere to quash a criminal proceeding. In that decision, the Appellate 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 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 entirely, 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 person do constitute an offence 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.

According to Mr. Ariff from above treatment and the pronouncements of the Superior Courts beginning from the Privy Council till date the issue is that of quashing the proceeding in exercise of power under Section 561A. It is very significant that scrutiny of the judgments reveal that the Hon'ble Courts tested quashing of the proceedings in the context of "abuse of the process of the Court."

The learned advocate further submits that section 561A empowers the court to intervene on three counts i.e. (a) to give effect to any order under this Code, (b) to prevent abuse of the process of any Court, (c) otherwise to secure the ends of justice. On scrutiny of the judgments, it stands out that the Courts invariably intervened and quashed on the ground to prevent abuse of the process of any Court. According to the learned advocate, the empowerment to intervene solely and exclusively to secure the ends of justice has not been exercised. In some judgments the phrase "ends of justice" has been lumped with "to prevent abuse of the process of any Court" thereby leaving "ends of justice" out of consideration solely and exclusively, therefore, there is no judicial pronouncement on the scope of "otherwise to secure the ends of justice" and in that context Mr. Ariff canvassed the scope of Court's inherent power to intervene on account of "otherwise to secure the ends of justice".

Elaborating his submission Mr. Ariff contended that the last phrase quoted above in Section 561A is disjointed, disjunctive, distinct, separate and

independent from the other part of the Section. Under the cannons of interpretation of statue, no word is super flows or surplasage. The beginning word of third criteria “otherwise” is significant in that the last phrase to secure ends of justice has been given a distinct status apart from other condition for intervention. The word “otherwise” places this part on a different plain having the connotation and implication of wider scope empowering intervention. “Ends of Justice” has no defined parameter or is not exhaustive leaving the Court with unfettered judicious power to meet a situation and circumstance for providing a just solution warranted. None of the pronouncement of the Superior Courts beginning with the Emperor Vs Nazir Ahmed case till date has independently dealt with the scope of “otherwise to secure ends of justice”. The case in hand calls for such intervention on the ground of “otherwise to secure the ends of justice” as a distinct circumstance and situation falling within the category of “otherwise”. This legal and factual scenario calls for revisiting the scope of inherent power preferred under section 561A of the Cr.P.C.

Mr. Ariff then submits that the most important aspect of the pronouncement of the Privy Council in the said case is that there is a para which throw in light on the inherent power, emphasized under section 561A is reproduced below:-

> "It has sometimes been thought that Section 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the Court already inherently possess shall be preserved and is inserted, as their Lordship think, lest it should be considered that the only powers possessed by the court are those expressly conferred by the Criminal Procedure Code, and that no inherent power had survived the passing of that Act."

According to Mr. Ariff this para succinctly encompasses the scope of inherent power. The wordings in the margin of the section 561A, "savings of the inherent power" is the key to unlock the vast judicious unfettered inherent power to secure ends of justice. The

substantive part of the section “Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division....” again reemphasis and reminds about the scope and sweep of the inherent power. This inherent power of the court coupled with the wordings of the third ground for intervention “or otherwise to secure” compels one to hold that the inherent power has been unshackled from the periphery of other two grounds for intervention such as to be more precise (a) to give effect to any order, (b) to prevent abuse of the process of the court.

Mr. Ariff continued to submit that the Court is empowered with unfettered judicious discretion to intervene coming within the purview of “otherwise”. So no imitation within the Cr.P.C has been expressly spelt out in the section 561A or by the two other grounds for intervention. Such intervention in exercise of inherent power is undefined and the circumstance for intervention is not exhaustive nor can it be exhaustive.

Referring section 58 of the Transfer of Property Act, 1882 and section 43 of the Negotiable Instruments Act,1881 Mr. Ariff submits that the bank advances the

loan against the security of the mortgage property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Therefore, there is consideration (money advanced or to be advanced by way of loan) against the mortgage of the property. Whereas, as against the collateral security cheque admittedly, evidently and legally, there is no consideration by the bank/banker against which the borrower has drawn/issued the cheque in question. It boils down from the reading of the sanction letter that apart from the mortgage as against the security cheque under the law and established banking practice never ever there is any consideration whatsoever as against the drawing or issuing security cheque. In other words, the bank does not advance any distinct different money as loan against this particular security cheque. There is no independent consideration passing hand from banker to borrower against the security cheque. A negotiable instrument made, drawn, accepted, indorsed or transferred without consideration, or for a

consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto. It has been showed and established above that the cheque was drawn in blank without consideration and pursuant to provisions of the section 43 of the Act, the cheque that is the Negotiable Instrument without consideration create no obligation of payment between the parties to the transaction that is bank and borrower. Therefore the cheque admittedly, evidently and legally being without consideration, the drawer of the cheque that is the borrower has no obligation of payment to the bank against the cheque. There being no amount due under the law against this cheque a case under section 138 of the Act does not lie and the bank has no *locus standi* to claim amount under the cheque which (amount of money) was never advanced by the bank against the cheque.

The learned advocate then submits that the cheque in question is not drawn for payment to another person. In the instant scenario, the blank cheque is being abused by the bank itself on the account with the bank/banker. In order to apply the section 138 of the Negotiable Instruments Act and to constitute an offence under the said section, the drawer, the banker and the drawee are three distinct juristic persons. The bank/banker is not another person in the transaction. Banker is not competent to lodge any complaint under section 138 of the Negotiable Instruments Act. It is apparent that the ingredients of the section 138 the Act to constitute an offence there must be three juristic entity. The aggrieved person is the drawee that is "another person", the banker not being itself another person and drawee, under section 138 of the Act, bank can not initiate proceeding under section 138 of the Act. According to the learned advocate the loan/consideration is advanced against the mortgage; there is no distinct, independent and separate loan consideration against collateral security blank cheque and the ingredients of the section 138 of the Act are

absent in the present case. Therefore the impugned judgment and order of conviction and sentence is liable to be quashed on three counts: Firstly, the initiation of the case under section 138 of the Negotiable Instruments Act by the bank was a nullity and void *abintio* being not legally competent to file. Secondly, the proceeding under a cheque without consideration is not a proceeding in accordance with law and in the eye of law and therefore the proceeding was null and void and liable to be quashed. Thirdly, the conviction based on incompetent complaint, void proceeding is equally not founded in law and due process of law and therefore null and void and liable to be quashed.

Against the backdrop, Mr. Ariff urged upon this Court to invoke its inherent jurisdiction submitting that Courts have inherent powers apart from express provisions of law, which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine, which finds expression in the section, which merely recognizes and preserves inherent powers of the High Courts. **All courts, whether civil or criminal, possess, in the absence of**

any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae case non potest" (when the law gives a person anything, it gives him that without which it cannot exist). It is to be exercised *ex debitio justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to a prevent abuse. It would be an abuse of process of the court to allow any action, which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice, the learned advocate finally contended.

Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act) provides for a special forum for punishment by imposing imprisonment and fine upon the drawer for dishonour of cheque by following certain procedure. The case is to be tried by a court of sessions and there is appellate forum against the judgment of the trial court. The legislature in their wisdom incorporated Section 138A in the Act with effect from 9th February 2006 imposing condition of payment of an amount of not less than fifty percent of the amount of the dishonoured cheque to deposit before filing appeal in the court which awarded the sentence.

Mr. Ariff, the learned advocate for the convict petitioner in his long 11 page written submissions, nowhere stated anything why the petitioner by-passing the statutory express provision of appeal filed the instant application under section 561A of the Code of Criminal Procedure for invoking inherent jurisdiction of this Court when by his own submission **all courts, whether civil or criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice** (emphasis given by Mr. Ariff himself). The learned advocate rightly

submitted that **in the absence of any express provision,** the Court possess all such powers as are necessary to do the right and to undo a wrong invoking Courts' inherent power. In other words, where there is express provision, the inherent power of the Court should not be invoked without reasonable explanation to secure ends of justice or to prevent injustice.

In the case of Khawja Nazir Ahmed (supra) their lordships of the Privy Council opined, "it has sometimes been thought that Section 561A has given increased powers to the Court which it did not possess before that section was enacted. But this is not so." In the case of Ghulam Mohammad vs Mozammel Khan and others reported in 19 DLR(SC) 439 speaking for the Court his Lordship Hamoodur Rahman, J observed:

> The inherent jurisdiction given by section 561A is not an alternate jurisdiction or an additional jurisdiction but it is a jurisdiction preserved in the interest of justice to redress grievances for which no other procedure is available or has been provided by the Code itself. The power given by this section can

certainly not be utilized as to interrupt or divert the ordinary course of criminal procedure as laid down in the procedural statute. The High Court, as has repeatedly been pointed out in a number of decisions, should be extremely reluctant to interfere in a case where a competent Court has, after examining the evidence adduced before it, come to the view that a *prima facie* case is disclosed and has framed charges or summoned the accused to appear, unless it can be said that the charge on its face or the evidence, even if believe, does not disclose any offence.

In the case of Abdul Quader Choudhury (supra) in paragraph no.12 their lordships of the Appellate division observed five situations (though not exhaustive) when this Court can invoke inherent jurisdiction which has rightly be stated by Mr. Ariff. Following the guidelines, this Court is exercising its inherent jurisdiction from the very insertion of section 561A of Cr.P.C and by the advance of time, it has further been developed. In the

case of Sher Ali (Md) vs State reported in 46 DLR(AD) 67 our Apex Court going one step ahead by saying that even the convicted persons are also competent to invoke the jurisdiction of 561A of Cr.P.C. and observed:

> The Inherent power may be invoked independent of powers conferred by any other provisions of the Code. This power is neither appellate power, nor revisional power, nor power of review and it is to be invoked for the limited purpose such as to give effect to any order under the Code, to prevent abuse of the process of the Court or otherwise to secure ends of justice. This power may be exercised to quash a proceeding or even a conviction on conclusion of a trial if the Court concerned got no jurisdiction to hold the said trial or the facts alleged against the accused do not constitute any criminal offence, or the conviction has been based on 'no evidence' or otherwise to secure ends of justice.

Now, it is well settled that even a judgment can be quashed if it is quorum *nonjudice* or passed without jurisdiction or a case of no evidence or the facts alleged against the accused do not constitute any criminal offence. But it is also well settled that inherent power of this Court is to be exercised sparingly when there is no express provision of law. By-passing a express provision of law without reasonable explanation, exercise of inherent power is not only undesirable but also devoid of legal jurisprudence. No doubt this Court can exercise its extraordinary and magnificent inherent power to secure ends of justice in a fit case. But the question is whether the case in hand is the fit case.

It has already been noticed that nowhere in his submissions Mr. Ariff gave any explanation for filing this application avoiding the express provision of appeal. In my opinion, all the questions raised by Mr. Ariff both factual and legal can be agitated before the court of appeal. The learned advocate could not show this Court that the impugned judgment and order of conviction and sentence was passed without jurisdiction or the same was quorum *nonjudice* or it is a case of no

evidence. He also could not show that there was any express legal bar on the impugned proceeding upon which the conviction and sentence has been awarded or the acts alleged against the accused do not constitute any criminal offence. Mr. Ariff just referred some documents of a Artharin Execution Case annexed with this application for the first time which was not produced before the trial court as such not part of evidence. The learned advocate could not show that the petitioner by adducing and producing witness and evidence that the cheque in question was only a collateral security having no consideration. The sanction letter/letters was not produced before the trial court or before this Court. The complainant alleged that the petitioner availed credit facilities vide numerous sanction letters. The depositions of the parties' witnesses are not annexed with this application for which this Court could not examine whether convict petitioner by cross examining the complainant bank to admit the factual points raised by Mr. Ariff. The impugned judgment shows that the petitioner did not cross-examine the witness. The amount of the cheque is

Tk-6,44,08,614.81 while the principal amount of the Artharin execution case is Tk-7,04,14,084.91, apparently different and onus was upon the petitioner to prove his case before the trial court that both are from the same transaction and there was no consideration against the cheque in question. The convict petitioner did not adduce or produce any witness or documents before the trial court. So, the submissions of Mr. Ariff may have force but without any substance in the context of the evidence of the present case. By series of decisions of our apex Court it has been settled that the alleged Artharin Suit is for realization of loan amount while the proceeding under section 138 of the Negotiable Instruments Act is for the offence allegedly committed. The questions whether the bank is drawee or whether consideration passed against mortgaged properties also includes security cheque deposited with the mortgaged properties or whether the loan was at all realized fully or whether there is direct nexus between the loan money of Artharin case and the present case, these are all mixed question of facts and law which is to be raised at the trial court at first and if

not considered then to the court of appeal. Whether the convict petitioner at all committed any offence under section 138 of the Negotiable Instruments Act considering the provision of section 58 of the Transfer of Property Act, 1882 read with section 43 and other sections of the Negotiable Instruments Act, 1881 and whether it was at all considered by the trial court, are also to be scrutinized by the court of appeal. In fact, the appellate court has much wider power to scrutinize all the questions raised in the present case by the petitioner. So, the submissions of the learned advocate for the petitioner that the initiation of the case under section 138 of the Negotiable Instruments Act by the bank was a nullity and void *abinitio* being not legally competent to file or the proceeding under a cheque without consideration is not a proceeding in accordance with law and in the eye of law and therefore the proceeding was null and void and the conviction based on incompetent complaint, void proceeding is equally not founded in law and due process of law and therefore null and void, has no legs to stand as those legal submissions are not based on facts so far brought to

our notice in the instant application filed under section 561A of the Cr.P.C.

Mr. Ariff has given much emphasis on what is inherent power/jurisdiction of this Court and when and how it is to be exercised. It is adequately and in details dealt with by this Court in the case of Syed Ehasan Abdullah vs State and another reported in 23 BLC 270 for which I refrain myself from the same exercise as it will be mere repetition. I fully agree with the learned advocate for the petitioner that Section 561A of Cr.P.C empowers this Court to intervene on three counts i.e. (a) to give effect to any order under this Code, (b) to prevent abuse of the process of any Court, (c) otherwise to secure the ends of justice. And this Court can invoke any category of these 3(three) independently, separately and or jointly. I also agree with the proposition that "Ends of Justice" has no defined parameter or is not exhaustive leaving the Court with "unfettered judicious power" to meet a situation and circumstance for providing a just solution warranted. But this "unfettered judicious power" can only be exercised when there is no express provision of law and I am totally unable to persuade myself to convince that the present rule challenging a judgment

and order of conviction under section 138 of the Negotiable Instruments Act is at all maintainable when there is specific provision of appeal and the judgment does not suffers from any want of jurisdiction or of quorum *nonjudice* or of no evidence. In that view of the matter, I am constrained to hold that this is not a fit case for invoking our inherent jurisdiction on the ground to secure ends of justice rather if we interfere then it will frustrate the ends of justice.