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

WRIT PETITION NO. 6756 OF 2007

IN THE MATTER OF:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Ms. Parvin Akther
..... Petitioner.

-Versus-

Bangladesh represented by the Secretary, Ministry of Law, Justice and Parliamentary Affairs, Bangladesh Secretariat, Ramna, Dhaka-1000 and others
.....Respondents.

Mr. Shah Md. Munir Sharif with
Mr. A. K. M. Nurul Alam,
Mr. Delwar Hossain and
Mr. Tajul Islam, Advocates
.....For the petitioner.

Mr. Md. Motaher Hossain (Sazu), DAG with
Ms. Purabi Rani Sharma, AAG and
Ms. Purabi Saha, AAG
….For the respondent no. 1.

Mr. Mizanur Rahman with
Mr. Tanvir Parvez, Advocates
….For the respondent no. 3.

Heard on 20.07.2016 and 21.07.2016.
Judgment on 11.08.2016.

Present:
Mr. Justice Moyeenul Islam Chowdhury,
Mr. Justice Ashish Ranjan Das
-And-
Mr. Justice Md. Iqbal Kabir

MOYEENUL ISLAM CHOWDHURY, J:

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondents to show cause as to why the application of Section 138A of the Negotiable Instruments Act, 1881 inserted vide the Negotiable Instruments (Amendment) Act, 2006 (Act No. 03 of 2006) as evident from the order no. 12 dated 30.07.2007 (Annexure-'E-1' to the Writ Petition) in respect of Sessions Case No. 2607 of 2006 arising out of C. R. Case No. 2069 of 2005 and why the judgment and order of conviction and sentence dated 27.06.2007 (Annexure-'D-1' to the Writ Petition) passed by the learned Metropolitan Assistant Sessions Judge (now Metropolitan Joint Sessions Judge), 5th Court, Dhaka in Sessions Case No. 2607 of 2006 arising out of C. R. Case No. 2069 of 2005 should not be declared to be without lawful authority and of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper.

The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner is the proprietor of Expo Polymer Industries carrying on the business of producing 100% export-oriented poly bags. Anyway, on 19.07.2005, the respondent no. 3 lodged a complaint with the Chief

Metropolitan Magistrate, Dhaka being C. R. Case No. 2069 of 2005 under Section 138 of the Negotiable Instruments Act, 1881 against the accused-petitioner alleging, inter alia, that as per the request of the accused-petitioner by a letter dated 20.03.2003, the complainant-bank (respondent no. 3) sanctioned Tk. 40,00,000/- at 15% cash margin, revolving LTR limit of Tk. 25,00,000/- and revolving LDBP limit of Tk. 50,00,000/- at 10% margin (credit facilities) by a sanction letter bearing no. NCC/DIL/FEX/580/2003 dated 01.12.2003. The accused-petitioner accepted the terms and conditions of the sanction letter and agreed to adjust the credit facilities accordingly. However, the accused-petitioner failed to repay the loan as agreed upon. The complainant-bank requested the accused-petitioner to adjust the credit facilities in black and white. Afterwards the complainant-bank presented a cheque of Tk. 14,00,000/- on 16.06.2005 signed by the accused-petitioner for encashment towards liquidation of the credit facilities and it was dishonoured due to insufficiency of funds. In due course, the complainant-bank issued a legal notice upon the accused-petitioner, but he did not take any step to pay the cheque amount of Tk. 14,00,000/- to the complainant-bank. Given this scenario, the Chief Metropolitan Magistrate of Dhaka, by his order dated 19.07.2005, took cognizance of the offence under Section 138 of the Negotiable Instruments Act and thereafter the accused-petitioner surrendered before the Court and obtained bail therefrom. At one stage, the case was transferred to the Court of Metropolitan Magistrate manned by Mr. Jahangir Alam. As per the Gazette Notification dated 09.02.2006, the Metropolitan Magistrate sent the case record to the Court of Metropolitan Sessions Judge, Dhaka for trial on 19.03.2006. The learned Metropolitan

Sessions Judge of Dhaka took cognizance of the offence on 02.08.2006 and the case was registered as Metropolitan Sessions Case No. 2607 of 2006. However, the case was transferred to the 5th Court of Metropolitan Assistant Sessions Judge, Dhaka for trial. The learned Metropolitan Assistant Sessions Judge, 5th Court, Dhaka, on the basis of the evidence and materials on record, convicted the accused-petitioner under Section 138 of the Negotiable Instruments Act and sentenced her thereunder to suffer simple imprisonment for 11(eleven) months and to pay a fine of Tk. 28,00,000/-. Ultimately on 30.07.2007, the accused-petitioner preferred an application before the Metropolitan Assistant Sessions Judge, 5th Court, Dhaka and prayed for exemption from depositing fifty per cent of the amount of the dishonoured cheque stating, amongst others, that the complaint petition was lodged on 19.07.2005 and that during the continuance of the proceedings in the lower Court, the Negotiable Instruments Act, 1881 was amended vide the Negotiable Instruments (Amendment) Act, 2006 (Act No. 03 of 2006) wherein a new Section being Section 138A was inserted with effect from 09.02.2006. According to the provisions of Section 138A of the Negotiable Instruments Act, the accused-petitioner is required to deposit fifty per cent of the amount of the dishonoured cheque in order to prefer an appeal. But Section 138A is not applicable in the instant case inasmuch as the complaint petition was lodged before Section 138A came into effect. So the accused-petitioner is not required to deposit fifty per cent of the amount of the dishonoured cheque with a view to filing an appeal against the impugned order of conviction and sentence passed by the 5th Court of Metropolitan Assistant Sessions Judge, Dhaka. However, this application for exempting

the accused-petitioner from payment of fifty per cent of the amount of the dishonoured cheque was rejected by the order no. 12 dated 30.07.2007. This order dated 30.07.2007 is ex-facie illegal in view of the fact that no precondition can be attached to preferring an appeal when admittedly the case was filed prior to coming into force of the Act No. 03 of 2006. In this perspective, the accused-petitioner is entitled to prefer an appeal against the impugned order of conviction and sentence without depositing fifty per cent of the amount of the dishonoured cheque as contemplated by the newly-inserted Section 138A of the Negotiable Instruments Act.

The Rule has been contested by both the respondent nos. 1 and 3 by filing separate Affidavits-in-Opposition. The case of the respondent no. 1, as set out in the Affidavit-in-Opposition, in brief, is as follows:

Mere allegation of violation of provisions of law can not give rise to any cause of action for filing a Writ Petition when there are other fora, namely, appeal, revision and application under Section 561A of the Code of Criminal Procedure for seeking remedy against the impugned order dated 30.07.2007 and as such the Writ Petition is not maintainable. The right to prefer an appeal is neither a fundamental nor a substantive right; but this right is a creature of the statute, that is to say, the Negotiable Instruments Act. The Legislature has plenary power in making any enactment to provide or not to provide for a right to appeal or revision against any judgment and order. Even if the Legislature provides for appeal in the relevant enactment, it can also provide for extent, terms and conditions under which an appeal may be preferred to the superior Court. The right of appeal is not a substantive right; rather it is procedural in nature. It is well-settled that a

procedural law always takes effect retrospectively. Section 138A of the Negotiable Instruments Act being procedural or adjective in nature applies to all pending proceedings. Moreover, the right of appeal in the instant case accrued on the date of pronouncement of the impugned order of conviction and sentence, that is to say, on 27.06.2007 i.e. after insertion of Section 138A in the Negotiable Instruments Act. This being the position, the accused-petitioner is required to pay fifty per cent of the amount of the dishonoured cheque prior to filing of any appeal against the impugned order of conviction and sentence. If the accused-petitioner succeeds on appeal, she will receive back the deposited fifty per cent of the amount of the dishonoured cheque. By inserting Section 138A in the Negotiable Instruments Act, no principle of law including procedural and substantive due process has been violated. As such, the Rule is liable to be discharged with costs.

The case of the respondent no. 3-bank, as set out in the Affidavit-in-Opposition, in short, is as follows:

The right of appeal is not a substantive right; rather it is procedural in nature. It is a settled principle of law that the effect of any procedural law is retrospective, unless it is given a prospective effect. By introducing the requirement of deposit of fifty per cent of the amount of the dishonoured cheque, the Legislature has not curtailed the right of the petitioner to prefer any appeal; rather it has regulated the procedure for filing the same. There is no curtailment of any right of appeal in that the accused-petitioner will be entitled to receive back her money, if she wins in the Appellate Court. The respondent no. 3-bank initiated the proceeding against the accused-petitioner

under Section 138 of the Negotiable Instruments Act in accordance with law and the same is not intended to harass or victimize her in any manner. So the Rule is liable to be discharged with costs.

At the outset, Mr. Shah Md. Munir Sharif, learned Advocate appearing on behalf of the petitioner, submits that the proceeding under Section 138 of the Negotiable Instruments Act was without any consideration and that being so, it was 'non est' and in particular, he has drawn our attention to the provisions of Section 43 that 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 and as such the impugned order of conviction and sentence passed by the trial Court is fully and wholly erroneous.

Mr. Shah Md. Munir Sharif further submits that although it is true that the Amending Act (Act No. 03 of 2006) has not taken away the right of appeal of the petitioner, yet the fact remains that a condition precedent has been attached to the filing of any appeal in the Appellate Court and that precondition postulates that unless an amount of not less than fifty per cent of the amount of the dishonoured cheque is deposited before filing of the appeal in the Court which awarded the sentence, no appeal against any order of sentence shall lie before the Appellate Court and this condition precedent has altered the petitioner's right of appeal to her prejudice when admittedly the proceeding under Section 138 of the Negotiable Instruments Act was initiated on 19.07.2005, that is to say, long before coming into force of the Act No. 03 of 2006 and in this view of the matter, the petitioner can not be

deprived of her substantive right of presenting any appeal before the Appellate Court and given this situation, the petitioner is entitled to prefer an appeal against the impugned order of conviction and sentence without depositing fifty per cent of the amount of the dishonoured cheque in the trial Court as required by the newly-inserted Section 138A in the Negotiable Instruments Act.

Mr. Shah Md. Munir Sharif also submits that indisputably the Act No. 03 of 2006 does not expressly or by necessary intendment indicate that this law will take effect retrospectively and in the absence of any indication in that behalf, Section 138A of the Negotiable Instruments Act will be prospective in operation.

Mr. Shah Md. Munir Sharif next submits that a right of appeal is not a procedural right; but it is a substantive right and the right of appeal being a remedy is also a vested right and the same, by no means, is a matter of procedure and the appeal being a vested right is protected in spite of the amendment or repeal of the statute under which the accused was tried, unless a different intention appears from the amended provision and as the Act No. 03 of 2006 has not given any retrospective effect, the right of appeal of the petitioner can not be hedged in by any restriction such as requirement of deposit of fifty per cent of the amount of the dishonoured cheque and this restriction is not applicable to the case of the petitioner when undeniably the complaint petition was filed on 19.07.2005, that is, long before coming into force of the Act No. 03 of 2006.

Mr. Shah Md. Munir Sharif also submits that it is a well-settled rule of law that a right of appeal existing on a day on which a proceeding or a ‘lis’

commences is a vested right and this right is governed by the law prevailing on that day and not by the law prevailing on the date of its decision and this vested right can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment.

Mr. Shah Md. Munir Sharif further submits that it is a well-established principle of interpretation of statutes that a right of appeal is not merely a matter of procedure, but is one of substantive right and there is no vested right in procedure and alterations in the form of procedure are always retrospective; but amendment in the substantive law has no retrospective effect.

Mr. Shah Md. Munir Sharif next submits that impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment.

Mr. Shah Md. Munir Sharif lastly submits that as the 'lis' commenced in the Court below on 19.07.2005, that is to say, long before coming into force of the Act No. 03 of 2006, the petitioner is not required to deposit fifty per cent of the amount of the dishonoured cheque before filing of any appeal against the impugned order of conviction and sentence passed by the trial Court.

In support of the above submissions, Mr. Shah Md. Munir Sharif has adverted to Akhter Hossain (Md)…Vs…Hasmat Ali and the State, 60 DLR (HCD) 368; Md. Nazimuddin…Vs…The State, 30 DLR (Full Bench) 49; The Essential Industries…Vs…Central Board of Revenue, 21 DLR W.P.

(Lahore) 36 and State of Bombay…Vs…Supreme General Films Exchange Ltd., AIR 1960 SC 980.

Per contra, Mr. Md. Motaher Hossain (Sazu), learned Deputy Attorney-General appearing on behalf of the respondent no. 1, submits that the Amending Act (Act No. 03 of 2006) is procedural in nature and it shall apply retrospectively inasmuch as the newly-inserted Section 138A has regulated the procedure of filing of appeal.

Mr. Md. Motaher Hossain (Sazu) also submits that the right of appeal is not a substantive right, but a procedural or adjective matter and by that reason, the Act No. 03 of 2006 shall apply to all pending proceedings and in this perspective, the petitioner is required to deposit fifty per cent of the amount of the dishonoured cheque before filing any appeal in the Appellate Court.

Mr. Md. Motaher Hossain (Sazu) next submits that the constitutionality of Section 138A of the Negotiable Instruments Act has already been set at rest in AJM Helal…Vs…Bangladesh and others, 61 DLR (HCD) 479 and AHN Kabir…Vs…Government of Bangladesh and others, 13 BLC (HCD) 686 and as Section 138A has been found to be intra vires the Constitution in these two reported cases, no exception can be taken to the requirement of deposit of fifty per cent of the amount of the dishonoured cheque as provided by Section 138A of the Negotiable Instruments Act.

Mr. Tanvir Parvez, learned Advocate appearing on behalf of the respondent no. 3-bank, submits that as the Act No. 03 of 2006 is procedural in nature, it shall apply retrospectively and this is why, the petitioner is

required to deposit fifty per cent of the amount of the dishonoured cheque before filing of any appeal against the impugned order of sentence.

However, Mr. Tanvir Parvez has drawn our attention to the decision in the case of Attorney-General…Vs…Vernazza, (1960) A. C. 965 wherein, according to him, a slight departure has been made from the 'ratio' of the decision in the case of Colonial Sugar Refining Company Ltd…Vs… Irving, (1905) A. C. 369 and now this Court will decide as to whether the restriction imposed by Section 138A of the Negotiable Instruments Act shall apply to the case of the petitioner or not.

We have heard the submissions of the learned Advocate Mr. Shah Md. Munir Sharif and the counter-submissions of the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu) and the learned Advocate for the respondent-bank Mr. Tanvir Parvez and perused the Writ Petition, Affidavits-in-Opposition and relevant Annexures annexed thereto.

It is undisputed that Section 138A was inserted in the Negotiable Instruments Act by the Act No. 03 of 2006 and this Section (Section 138A) came into force with effect from 09.02.2006. It is further admitted that prior to 09.02.2006, there was no restriction whatsoever in respect of preferring any appeal against any order of sentence passed by the trial Court. But the Act No. 03 of 2006 has imposed a restriction in the matter of preferring any appeal against any order of sentence by the convict-drawer of any cheque.

At this juncture, it will be profitable for us if we quote the provisions of Section 138A of the Negotiable Instruments Act below verbatim:

> "138A. 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 per cent of the amount of the dishonoured cheque is deposited before filing the appeal in the Court which awarded the sentence."

The moot question in this case is whether the newly-inserted Section 138A in the Negotiable Instruments Act is retrospective or prospective in effect. For proper adjudication of the Rule, this question must be answered either in the affirmative or in the negative.

Admittedly the Amending Act (Act No. 03 of 2006) has not been given any retrospective operation either expressly or by necessary intendment. Be that as it may, if it is merely a procedural law, this will undoubtedly take effect retrospectively; but if it is found that the amendment is substantive in nature, then this amendment will be prospective in effect.

To begin with, let us deal with the decision in the case of Akhter Hossain (Md)…Vs…Hasmat Ali and the State, 60 DLR (HCD) 368. The 'ratio' of the decision is that the Act No. 03 of 2006 came into force on 09.02.2006 and as such this will have prospective effect on all cases to be filed after the amendment came into force as in the amending enactment, no intention was expressly stated about retrospective effect of the same and accordingly, there was no need for deposit of fifty per cent of the amount of the dishonoured cheque before filing of the concerned appeal. In that decision, it has further been held that the impugned order of rejection of the

Memo of Appeal being against the spirit of Section 6 of the General Clauses Act, the same can not be sustainable in law. This is a single Bench decision rendered in Criminal Revision No. 1030 of 2006. From a bare reading of the decision, we find that the learned Judge referred to the provisions of Section 6 of the General Clauses Act and interpreted its provisions. He came to the finding that the Act No. 03 of 2006 will have prospective operation with effect from 09.02.2006. But it is to be noted that the provisions of Section 6 have no manner of application in that case in that Section 6 of the General Clauses Act deals with the effect of repeal only. By way of insertion of Section 138A in the Negotiable Instruments Act by the Act No. 03 of 2006, no provision of the Negotiable Instruments Act has been repealed; rather a restriction has been imposed in respect of appeal in the newly-inserted Section 138A. By the Act No. 03 of 2006, the right of appeal of the petitioner has not been taken away and even the forum of appeal has remained unchanged. But none the less, a restriction in the form of deposit of fifty per cent of the amount of the dishonoured cheque has been attached prior to filing of any appeal against any order of sentence passed under Section 138(1) of the Negotiable Instruments Act. Now a pertinent question arises: has this restriction altered the right of appeal of the petitioner as contended by Mr. Shah Md. Munir Sharif?

In the case of Md. Nazimuddin…Vs…The State, 30 DLR (Full Bench) 49, it has been held, inter alia, in paragraph 24:

> "24. Legislature has full power to make a law retrospective so as to destroy a right or a remedy altogether, but this must be

> expressly laid down or this result must flow by necessary implication. Right of appeal being a remedy is a vested right and the same by no means is a matter of procedure. Appeal being a vested right, it is protected in spite of amendment or repeal of the statute under which the accused was tried, unless different intention appears from the amended provision."

In this connection, let us see how the authorities on interpretation of statutes have expressed their opinion. Maxwell, on the Interpretation of Statutes (Eleventh Edition) has stated at page 212:

> "In general when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights."

To quote Maxwell again from page 205:

> "Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect can not be

> avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only".

Right to appeal is not affected by the repeal or enactment of a statute as being a matter of existing right. Maxwell treats this principle at page 217 in the following manner:

> "But to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. The Appellate Court must give effect to the same law as that which was in force at the date of the earlier proceedings."

Craies on Statute Law, Seventh Edition, at page 389 states the principle that in the absence of clear language, the statute can not be presumed retrospective. "It is obviously competent for the Legislature, in its wisdom, to make the provisions of an Act of Parliament retrospective", said Lord Ashbourne in Smith…Vs…Callender, (1901) A.C. 297. Lord Ashbourne said at page 305: "Before giving such a construction to an Act of Parliament, one would require that it should either appear very clearly in the terms of the Act or arise by necessary and distinct interpretation."

As we see it, Mr. Shah Md. Munir Sharif has rightly argued that it is a well-settled rule of law that a right of appeal existing on a day on which a

proceeding or a 'lis' commences is a vested right and this right is governed by the law prevailing on that day and not by the law prevailing on the date of its decision and this vested right can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment.

We are also at one with Mr. Shah Md. Munir Sharif that it is a well-established principle of interpretation of statutes that a right of appeal is not merely a matter of procedure, but is one of substantive right and there is no vested right in procedure and alterations in the form of procedure are always retrospective; but amendment in the substantive law has no retrospective effect.

As to the question under consideration, we get substantial guidance from the celebrated judgment of the Privy Council in the case of Colonial Sugar Refining Company Ltd….Vs…Irving, (1905) A. C. 369. In that case, the Collector of Customs, acting under an Act, called the Excise Tariff, 1902, required the appellants to pay £20,100 excise duty on 6,700 tons of sugar. The appellants disputed the claim. The appellants deposited the amount with the Collector and then brought action by issuing a writ. On a special case being stated for the opinion of the Supreme Court, judgment was given for the Collector. In the meantime, the Judiciary Act of 1903 was passed and it received royal assent on 25th August, 1903. By Section 39(2) of that Act, the right of appeal from the Supreme Court to the Privy Council was taken away and the only appeal therefrom was directed to lie to the High Court of Australia. The appellants filed an appeal to the Privy Council. It was urged on behalf of the respondents that no appeal lay to the Privy Council as the right of appeal was abolished by Section 39(2) of the Act.

The appellants' contention was that as the appeal lay to the Privy Council at the time when the 'lis' commenced, the abolition of the right of appeal from the Supreme Court to the Privy Council would have no effect as it affected their vested right. This contention prevailed with the Privy Council.

In that case, the Privy Council held as follows:

> "As regards the general principles applicable to the case, there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well-founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And, therefore, the only question is, was the appeal to His Majesty-in-Council a right vested in the appellants at the date of passing of the Act, or was it a mere matter of procedure. It seems to their Lordships that the question does not admit of doubt. To

> deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as a right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

The above principles of law have been firmly established in English Jurisprudence and the soundness of this judgment has not been questioned by any authority till now. This judgment has been followed with approval by the Privy Council in its subsequent judgments. The Superior Courts of this Sub-continent and the countries following English Jurisprudence have also consistently followed this judgment with approval of all the principles enunciated by the Privy Council.

The principles of law enunciated in Colonial Sugar Refining Company Ltd...Vs… Irving have been applied by the Superior Courts of this Sub-continent to the cases where subsequent legislations did not take away the entire right of appeal, but imposed certain onerous conditions on the lodgment of appeals. The case of Nagendra Nath Bose…Vs…Mon Mohan Singh, AIR 1931 Calcutta 100 is one of such cases. This decision of the

Calcutta High Court was approved by the Supreme Court of India in Hossein Kasam Dada (India) Ltd…Vs…The State of Madhya Pradesh, AIR 1953 Supreme Court 221. In the Calcutta case, the restriction imposed on the admission of appeal in the proviso to Section 174(5) of the Bengal Tenancy Act was considered. Mitter, J. held as follows:

> "There can be no doubt that the right of appeal has not been affected by the new provision and in the absence of an express enactment, this amendment can not apply to proceedings pending at that date when the new amendment came into force. It is true that the appeal was filed after the Act came into force, but the circumstance is immaterial-for the date to be looked into for this purpose is the date of the original proceeding which eventually culminated in the appeal."

In the case of the Essential Industries…Vs…Central Board of Revenue, 21 DLR (W.P) (Lahore) 36, it was held in paragraph 12:

> "12. The sole question, therefore, for consideration in these matters is whether the provision as to the deposit of 50% of the tax demand before an appeal under Section 30(1) of the Act can be filed is in the nature of a procedural amendment or it affects the

vested right of appeal secured to the petitioners. In this connection, it will be noticed that Section 30(1), as it originally stood, imposed no condition on an assessee to deposit any tax as a condition precedent to the filing of an appeal under Section 30(1) of the Act. Under the amended provision now, no appeal lies from an order of an Income-tax Officer to the appellate Assistant Commissioner until and unless the assessee deposits 50% of the tax demand created as a liability against him. It is, therefore, quite clear that the amended provision has definitely curtailed the right of appeal enjoyed by an assessee at the time when the 'lis' in the present cases commenced, namely, on various dates in the year 1962. In our opinion, the imposition of such a condition can not be considered to be of a procedural nature or prescribing the manner in which the appeal has to be filed. In effect, it takes away the right of appeal if, for some reason or other, the assessee is unable to deposit 50% of the tax demanded. These are, therefore, the cases in which the vested

> rights of appeal of the petitioners have definitely been substantially affected. We are fortified in this view by a decision of the Indian Supreme Court in Messrs Hossein Kasam Dada (India) Ltd …Vs…The State of Madhya Pradesh and others, AIR 1953 SC 221..."

In the case of State of Bombay…Vs…Supreme General Films Exchange Ltd., AIR 1960 SC 980, the Supreme Court of India observed that a right of appeal is a substantive right which vests in a litigant on the date of filing of the suit, and can not be taken away unless the Legislature expressly or by necessary intendment says so; furthermore, an appeal is a continuation of the suit, and it is not merely that a right of appeal can not be taken away by a procedural enactment which is not made retrospective, but the right can not be impaired or imperiled nor can new conditions be attached to the filing of the appeal; nor can a condition already existing be made more onerous or more stringent so as to affect the right of appeal arising out of a suit instituted prior to the enactment. The Indian Supreme Court made this observation basing on the decision in the case of Hossein Kasam Dada (India) Ltd….Vs…The State of Madhya Pradesh and others, AIR 1953 SC 221and certain other decisions.

It was further observed in the decision reported in AIR 1960 SC 980 that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it

impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment.

Presumption against retrospectivity is available in case of substantive rights, but not against statutes or provisions which only alter the form of procedure or the admissibility of evidence or the effect which the Court gives to evidence [Blyth…Vs…Blyth, (1966) 1 All ER 524].

A law relating to forum and limitation is procedural in nature whereas law relating to right of action and right of appeal, even though remedial, are substantive in nature [Hitendra Thakur…Vs…Maharashtra, AIR 1994 SC 2623].

Presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the Courts. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament, the mode of procedure is altered, he has no other right than to proceed according to the altered mode [Maxwell-Interpretation of Statutes, 12th Ed. P. 222].

Right of appeal is a substantive right and it becomes a vested right when the original proceeding is initiated and this right is not defeated by the repeal of the statute conferring the right of appeal. But there are two exceptions to this rule, namely, when by a competent enactment, such right of appeal is taken away expressly or impliedly with retrospective effect, and when the Court or Tribunal to which appeal lay at the commencement of the original proceeding stands abolished without providing another forum. A litigant has, however, no vested right to any particular forum and where a

new forum is provided by the repealing Act, the right of appeal is to be exercised in the new forum. A change of law imposing any restriction on the right of appeal, in the absence of any contrary intention, will not affect the right of appeal as it stood at the commencement of the original proceeding. Thus an assessee's right of appeal against assessment of tax which vested in him on the date of filing of the return would remain unaffected by a subsequent change of law requiring deposit of a portion of the tax assessed to maintain the appeal [Hossein Kasam Dada (India) Ltd.…Vs…The State of Madhya Pradesh and others, AIR 1953 SC 221]. An amendment enhancing court-fees shall not be applicable in case of a memorandum of appeal against a decree passed in a suit instituted prior to the commencement of the amendment. However, the litigant has no vested right to any particular procedure and any change in the procedure without affecting the substantive right will be applicable with retrospective effect.

In AJM Helal…Vs…Bangladesh and others, 61 DLR (HCD) 479 and AHN Kabir…Vs…Government of Bangladesh and others, 13 BLC (HCD) 686 relied on by the learned Deputy Attorney-General Mr. Md. Motaher Hossain (Sazu), the 'ratios' enunciated therein can not be found fault with in the given facts and circumstances of those cases. But the core issue in the present case before us, that is to say, whether the restriction imposed on appeal in view of the newly-inserted Section 138A will be applicable in a case which was filed before coming into force of the Act No. 03 of 2006 was neither raised nor considered in the decisions reported in 61 DLR (HCD) 479 and 13 BLC (HCD) 686. So those decisions of the High Court Division

are understandably silent about the above-mentioned core issue of the instant case.

With regard to the argument of Mr. Tanvir Parvez that there has been a slight deviation from the 'ratio' of the case of Colonial Sugar Refining Company Ltd.…Vs…Irving, (1905) A. C. 369 in the decision in the case of Attorney-General…Vs…Vernazza, (1960) A.C. 965, we feel constrained to say that we do not find any deviation from the 'ratio' enunciated in the case of Colonial Sugar Refining Company Ltd. in the decision in the case of Attorney-General…Vs…Vernazza. Rather the 'ratio' enunciated in Colonial Sugar Refining Company Ltd. has been brought home to us in Attorney-General…Vs…Vernazza. In such a posture of things, we are led to hold that the argument of Mr. Tanvir Parvez is not correct and hence it stands discarded.

As to the contention of Mr. Shah Md. Munir Sharif that the case should not have been proceeded with in the trial Court because of the provisions of Section 43 of the Negotiable Instruments Act, we would like to point out that Section 118(a) is an apt reply thereto. Section 118 of the Negotiable Instruments Act provides that until the contrary is proved, the following presumptions shall be made:

> (a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration.

. . .

So as per Section 118(a) of the Negotiable Instruments Act, the presumption is that the negotiable instrument was drawn for consideration; but, of course, that presumption is a rebuttable presumption. But this presumption can only be rebutted by adducing evidence to the contrary at the trial in the trial Court. The petitioner did not discharge her onus at all in this respect in the trial Court. So the contention of Mr. Shah Md. Munir Sharif in this regard stands negatived.

From the discussions made above and regard being had to the facts and circumstances of the case, we are of the opinion that the restriction imposed in respect of appeal by the newly-inserted Section 138A in the Negotiable Instruments Act has affected the substantive/vested right of appeal of the accused-petitioner. Precisely speaking, the condition precedent attached to Section 138A by way of deposit of fifty per cent of the amount of the dishonoured cheque has restricted the right of appeal of the accused-petitioner when admittedly the 'lis' commenced in the Court of the Chief Metropolitan Magistrate, Dhaka on 19.07.2005, that is to say, long before coming into force of the Act No. 03 of 2006. As observed earlier, it is admitted that the Act No. 03 of 2006 does not indicate expressly or by necessary intendment that it will apply retrospectively. This being the panorama, we are led to hold that the right of appeal of the accused-petitioner can not be hedged in by the newly-inserted Section 138A in the Negotiable Instruments Act. So she may prefer an appeal against the impugned order of sentence without the required deposit of fifty per cent of the amount of the dishonoured cheque as contemplated by that Section (Section 138A).

In this context, we would like to clarify our position that in the event of cases filed under Section 138(1) of the Negotiable Instruments Act prior to coming into force of the Act No. 03 of 2006 (09.02.2006), the convicts would be able to file appeals against orders of sentence in the Appellate Court without depositing fifty per cent of the amount of the dishonoured cheques. But in the event of cases filed after 09.02.2006, the convicts would be required to deposit an amount of not less than fifty per cent of the amount of the dishonoured cheques in the Courts which awarded the sentences prior to filing of appeals in the Appellate Court.

In the light of the foregoing discussions and in view of the facts and circumstances of the case, we think, the Rule should be disposed of with the findings and observations made above.

Accordingly, the Rule is disposed of with the findings and observations made in the body of the judgment without any order as to costs.

ASHISH RANJAN DAS, J:

I agree.

MD. IQBAL KABIR, J:

I agree.