In the Supreme Court of Bangladesh
High Court Division
(Special Original Jurisdiction)

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

Writ Petition No. 13256 of 2018

In the matter of:
A A M Ziaur Rahman
……. Petitioner.
Vs.
Bangladesh and others.
…Respondents.
With
Writ Petition No. 14509 of 2018

In the matter of:
A A M Ziaur Rahman
……. Petitioner.
Vs.
The Court of Joint Sessions Judge, 1st Court, Chapainawabganj and others.
…Respondents.

With
Writ Petition No. 14510 of 2018.

In the matter of:
A A M Ziaur Rahman
……. Petitioner.
Vs.
The Court of Joint Sessions Judge, 1st Court, Chapainawabganj and others.

…Respondents.
With
Writ Petition No. 262 of 2019
In the matter of:
Yakub Miah
……. Petitioner.
Vs.
The Court of Joint Sessions Judge, 1st Court and Special Tribunal No.4, Brahmanbaria and others.
…Respondents.

Mr. Mohammad Humaun Kabir with
Mr. Mohammed Kawsar with
Mr. Mohammed Majedul Quader with
Mr. Md. Mozammel Haque, Advocates
…for the petitioner in Writ Petition Nos. 13256 of 2018, 14509 of 2018 and 14510 of 2018.
Mr. Saifuddin Md. Aminur Rahim (Chandan), Advocate
…For the petitioner in Writ Petition No. 262 of 2019.
Mr. Md. Mizanur Rahman Khan with
Mr. M. Mohiuddin Yousuf, Advocate
..For the respondent No.2 in Writ Petition Nos. 13256 of 2018, 14509 of 2018 and 14510 of 2018.
Mr. S.M. Arif Mondal, Advocate
…For the respondent No.03 in Writ Petition No. 262 of 2019.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Khandaker Diliruzzaman

Heard on 18.02.2020, 19.02.2020 and 08.10.2020
Judgment on: 18.10.2020.

SHEIKH HASSAN ARIF, J

1. Since the questions of law and facts involved in the aforesaid four writ petitions are almost same, they have been taken-up together for hearing and are now being disposed of by this common judgment.

1.1. Rules in the aforesaid writ petitions were issued in similar terms, namely calling upon the respondents, including the Ministry of Law, Justice and Parliamentary Affairs (respondent No.1 in Writ Petition No. 13256 of 2018), to show cause as to why the trial of the petitioners under Sections 138 and 141 (c) of the Negotiable Instruments Act, 1881 by the Joint Sessions Judges in different districts in Sessions Case No. 953 of 2017 (arising out of C.R.

Case No. 257 of 2017), Sessions Case No. 1084 of 2017 (arising out of C.R. Case No. 251 of 2017), Sessions Case No. 183 of 2018 (arising out of C.R. Case No. 325 of 2017) and Sessions Case No. 475 of 2018 [arising out of C.R. Case No. 54 of 2018 (Akhaura)], thereby creating different forums for appeals and criminal revisions under Sections 408, 410, 439 and 439A of the Code of Criminal Procedure for different accuseds in respect of same alleged offences, should not be declared to be without lawful authroity and is of no legal effect, and as to why the proceedings in the said cases, should not be declared to be without lawful authroity and are of no legal effect.

2. **Back Ground Facts:**

2.1. Facts, relevant for disposal of the Rules, are that the Islami Bank Bangladesh Limited, as Complainant, filed C.R Case No. 257 of 2017, C.R Case No. 251 of 2017 and C.R Case No. 325 of 2017 before the learned Judicial Magistrate Court, Cognizance Court, Gha Anchal, Chapainawabganj, and C.R Case No. 54 of 2018 (Akhaura) before the learned Judicial Magistrate Court, Akhaura, Brahmanbaria against the petitioners under Section 138 of the Negotiable Instrument Act, 1881 ("NI Act", in short) alleging that the petitioners issued Cheques, being Nos. IBV 7303505 dated 28.06.2017 for an amount of Tk. 33,82,500/-, IBF 9598497 dated 28.06.2017 for an amount of taka 17,69,000.00, IBV 7303510 dated 20.08.2017 for an amount of taka 10,24,088.00 (Taka Ten Lac Twenty Four Thousand Eighty Eight), Nos. IBH-6640860 &

IBH6640886 for an amount of taka 2,10,00,000/-(Taka two crore ten lac) and Tk. 6,50,000/-(Taka six lac fifty thousand) respectively in favour of said complainant. However, while the said cheques were placed for encashment, the same were returned unpaid for “Insufficient Fund”. Thereafter, the complainant filed the said complaint cases after serving required legal notices on the petitioners.

2.2. Learned Magistrate Courts concerned took cognizance of the offences thereupon and issued summons. The petitioners then surrendered and obtained bail. The cases concerned were then transferred to the learned Sessions Judge, Chapainawabganj and Sessions Judge, Brahmanbaria and, accordingly, renumbered as Sessions Case No. 953 of 2017, Sessions Case No. 1084 of 2017, Sessions Case No. 183 of 2018 and Sessions Case No. 54 of 2018 (Akhaura). Thereupon, the learned Sessions Judges took cognizance of the offences and granted bail in favour of the petitioners. The Sessions Judges then transferred the said cases to the Joint Sessions Judge, 1st Court, Chapainawabganj and Joint Sessions Judge, 1st Court, Special Tribunal No.4, Brahmanbaria for trial and, accordingly, trials of the said cases were commenced upon framing of charges against them under Section 138 of the Negotiable Instrument Act, 1881.

2.3. Being aggrieved by such proceedings, the petitioners moved this Court and obtained the aforesaid Rules mainly on the ground that

the Court of Joint Sessions Judges concerned being their trial courts, they are now bound to prefer any revision under Section 439 of the Code of Criminal Procedure ("Code") and appeal under Sections 408 and 410 of the Code before the Sessions Judges of the Districts, which, accordingly to them, has deprived them of their expectation or legal right to prefer such revisional applications and/or appeals before a higher forum, namely the High Court Division of the Supreme Court of Bangladesh.

2.4. The Rules are opposed by respondent complainant by filling affidavit-in-opposition in Writ Petition Nos. 13256 of 2018, 14509 of 2018 and 14510 of 2018 and by way of oral submissions in Writ Petition No. 262 of 2019, mainly contending that, the anomaly that has been surfaced as regards forum of appeal and revision may easily be cured by a common administrative approach by the Sessions Judges concerned in all districts in Bangladesh through allocation of the cases under Section 138 of the NI Act for trial to the Joint Sessions Judges. Therefore, according to it, merely on the ground of administrative anomaly and inconsistent approach of different Sessions Judges in different districts in distribution of the cases of this nature, the proceedings should not be quashed or declared to be without lawful authority.

3. **Submissions:**

3.1. Mr. Mohammad Humayun Kabir, learned advocate appearing for the petitioner in Writ Petition Nos. 13256 of 2018, 14509 of 2018 and 14510 of 2018, has made the following submissions:

(a) That it is apparent from record as well as relevant provisions of law that the Sessions Judges concerned are at liberty to distribute cases under Section 138 of the NI Act for trial either to themselves, or to the Additional Sessions Judges or to the Joint Sessions Judges. This being the admitted position, the accuseds in those cases have been put into an unpredictable discriminatory position in so far as their rights to prefer revisional applications and appeals are concerned;

(b) Since the revisional application from the order, or appeal from the order of conviction of Joint Sessions Judge, is preferable before the Sessions Judge in view of Section 439A and Section 408 respectively of the Code, the accuseds in the cases pending before the Joint Sessions Judge have been put into a disadvantageous position in comparison to the accuseds in the cases of same nature with same allegation pending before the Additional Sessions Judges for trial, particularly when the accuseds in those cases before the Additional Sessions Judge are allowed by the law to prefer revisional applications and appeals before

the High Court Division of the Supreme Court of Bangladesh in view of the provisions under Sections 439 and 410, respectively, of the Code.

(c) This being the position, the petitioners in the cases before us have been treated prejudicially in violation of the fundamental rights guaranteed under Articles 27 and 31 of the Constitution. In this regard, learned advocate has referred to the relevant provisions under Sections 9, 17A, 29 and 31 of the Code read with Section 141(c) of the NI Act.

(d) Learned advocate further submits that though the quantum of sentence in a case under Section 138 of the NI Act is not exceeding one year imprisonment, that quantum cannot be the only deciding factor in determining which Court should have jurisdiction to conduct trial of those cases, particularly when the Legislature has enhanced the forum of trial in those cases from the First Class Magistrates to the Court of Sessions by way of amendment in 2006;

(e) Learned advocate submits that when the Legislature has mentioned the words “no Court inferior to that of a Court of Sessions” in Sections 141(c) of the NI Act, being the trial Court for conducting trial of the cases under Section 138 of the NI Act, allocation of those cases for trial to the Court of Joint Sessions Judge, who is a judge at the lowest level of

Court of Sessions, will frustrate the intension of the Legislature for trial of those cases in a higher forum;

3.2. As against above, Mr. Md. Mizanur Rahman Khan, learned advocate appearing on behalf of the respondent No.2-complainant in Writ Petition Nos. 13256 of 2018, 14509 of 2018 and 14510 of 2018, has made the following submissions:

(a) That the Code of Criminal Procedure, in particular Section 9 of the same, has mentioned about Court of Sessions for every Sessions Division and such Court of Sessions will include the Additional Sessions Judges and Joint Sessions Judges as appointed by the Government to exercise such Jurisdiction. This being so, accordingly to him, since there is no dispute that Joint Sessions Judges have been appointed by the government for the purpose of exercising jurisdiction of the Court of Sessions, there is no illegality in trying a case under Section 138 of the NI Act if the same is allotted to them by the concerned Sessions Judges in exercise of their administrative power;

(b) That since the highest punishment in terms of imprisonment in a case under Section 138 of the NI Act is 1(one) year, the cases under NI Act under Section 138 should only be allocated to the Joint Sessions Judge for trail to avoid any potential anomaly by allocation of some

of such cases to the Additional Sessions Judges. Therefore, according to him, a mere direction from this Court to all the Sessions Judges concerned to allocate such cases only to the Joint Sessions Judges may easily cure the said anomalies created by different administrative orders of different Sessions Judges;

(c) That where the highest imprisonment is only 1(one) year, an appeal or revisional application in a criminal case should not be allowed to be preferred before the High Court Division and as such a general and common approach by the learned Sessions Judges by allocating such cases for trial to the Joint Sessions Judges only in their respective divisions will remove the said problem of discrimination between two sets of accuseds in two different cases.

(d) That since the Legislature, under Section 141(c), has specified the forum of trial in those cases being a Court not inferior to that of a Court of Sessions and since there is no dispute that the Joint Sessions Judges exercise the power of Court of Sessions, the petitioners should not have any grievance if all cases under Section 138 NI Act in Bangladesh are commonly tried by the Joint Sessions Judges in the respective Sessions Divisions.

4. **Deliberations, Findings and Orders of the Court**:

4.1. Before the amendment vide Section 4 of the Act No. 3 of 2006, the cases under Section 138 of the NI Act were being tried by the Courts of First Class Magistrates. By this amendment, the Legislature upgraded the forum of trial by substituting sub-section (c) of Section 141 of the NI Act thereby providing that no Court inferior to that of a Court of Sessions shall try any offence punishable under Section 138 of the NI Act. Therefore, after 2006, the Court of Sessions became the forum for trial of those cases.

4.2. The term 'Court of Session' has been defined in the definition clauses of the Code under Section 4(1) (hh) merely in the following terms:

*"**Court of Session**" includes a metropolitan Court of Sessions.*

4.3. However, the real purport of the term "Court of Session" may be explored from the later provisions of the Code. Section 6(1) of the Code under Part-II, Chapter II, provides that besides the Supreme Court and the Courts constituted under any law for the time being in force, other than this Code, there shall be two classes of Criminal Courts in Bangladesh, namely—(a) Courts of Sessions and (b) Courts of Magistrates. The term Court of Sessions has further been elaborated by Section 9 of the Code. According to sub-section (1) of Section 9, the government shall establish a Court of Session for every Sessions Division and appoint a Judge

of such Court, and the Court of Session for Metropolitan Area shall be called Metropolitan Court of Session. In this regard, sub-Section (3) of Section 9, being more relevant in this case, is quoted below:

> *"(3) The Government may also appoint Additional Sessions Judges and Joint Sessions Judges to exercise jurisdiction in one or more such Courts."*

4.4 This provision pre-supposes that when an Additional Sessions Judge or Joint Sessions Judge is appointed for the purpose of exercising jurisdiction of Court of Sessions, those Courts also become part of Court of Sessions in any Sessions Division. According to Section 7, on the other hand, Bangladesh shall consist of Sessions Divisions and every Sessions Division shall, for the purposes of the Code, be a district or consist of districts.

4.5 It is not disputed by the parties that the Joint Sessions Judges concerned in the instant cases have been duly appointed by the government under sub-Sections (3) and (3A) of Sections 9 of the Code to exercise jurisdiction of Court of Sessions. At the same time, it cannot go out of our sight that according to Section 17A (1) of the Code, the Joint Sessions Judges are subordinate judges to the Sessions Judges in the respective Sessions Divisions, and it is the Sessions Judge of a Sessions Division who distributes business among such Joint Sessions Judges in accordance with

the Rules made there for not inconsistent with the provisions of the Code.

4.6 In this regard, Sections 28 and 29 of the Code under Part II, Chapter III, should also be looked into which may become relevant at some aspects of the case. According to Section 28, any offences under the Penal Code may be tried (a) by the High Court Division or (b) by the Court of Sessions or (c) by any other Court by which such offence is shown in the eighth Column of the Second schedule of the Code.

4.7 Therefore, it appears that the offences under the Penal Code of any nature, irrespective of quantum of punishment, may be tried by the High Court Division, or the Court of Sessions, subject to the provisions of the Code. Such offences may also be tried by other Courts, if such other Courts are mentioned in the Eighth Column of the Second Schedule to the Code. Again, offences not punishable under the Penal Code, or the offences not defined under the Penal Code, but created by other laws, shall be tried by the Court mentioned in this behalf in such other laws. When no such Court is mentioned in such other law, it may be tried by the general Criminal Courts by which such offence is shown to be triable in the eighth Column of the Second Schedule to the Code.

4.8 Be that as it may, the problem in the instant cases may be attributable to the administrative function of the Sessions Judges

in their respective Sessions Divisions. Admittedly, the Sessions Judges concerned do not follow any particular criteria for allocation of a particular case under Section 138 of the NI Act either to the Court of Additional Sessions Judge or to the Court of Joint Sessions Judge, and in such allocation of businesses, it is alleged that the Sessions Judges take recourse to pick and choose policy in that a case of an accused may be allocated to the Joint Sessions Judge when another case of another accused may be sent for trial to the Additional Sessions Judge.

4.9 In so far as the trials are concerned, there may not be any serious allegations of discrepancies in these cases, particularly when both the Joint Sessions Judge and the Additional Sessions Judge are competent enough to try a case under Section 138 of the NI Act, the maximum punishment of which is not above one year imprisonment, given that such judges normally conduct trials in respect of cases involving much higher quantum of imprisonments. However, when an accused in such case wants to prefer a revisional application and appeal against convictions under Sections 439 or 439A and Sections 408 and 410 of the Code respectively, the revisional applications from the order, or appeals from conviction, of Joint Sessions Judges, are preferable only to the Sessions Judges. On the other hand, revisional application against order, or appeals against conviction, of an Additional Sessions Judge or Sessions Judge is preferable

directly to the High Court Division irrespective of the quantum of sentence to be imposed by such Additional Sessions Judge. Here lies the crux of grievances of the petitioners. According to them, since their cases have been picked by the concerned Sessions Judges for the purpose of trial to be conducted by the Joint Sessions Judges, they have been deprived of preferring a revisional application or appeal directly to the High Court Division under Sections 439 and 410 of the Code respectively, particularly when an accused on similar footing with similar allegations like them, who are being or have been tried by the Additional Sessions Judges because of the same pick and choose policy of the learned Sessions Judges, will be entitled to prefer revisional application and/or appeal directly to the High Court Division.

4.10 According to the learned advocate for the petitioners this anomaly, being created by the learned Sessions Judges concerned in exercise of their power of distribution of business, has deprived these particular petitioners of their legitimate expectation as well as legal entitlement to prefer revisional application and appeal before the High Court Division directly, particularly when in such revisional applications and appeals they would get an opportunity to present their cases before a set of presumably more qualified and more experienced judges of the Supreme Court. This anxiety of the petitioners cannot be ruled out so easily particularly when it is apparent from the Code that the

concerned Sessions Judges in fact have such administrative power and that there is no such particular guideline for exercising such power. This being so, there may be cases where the Sessions Judges may adopt pick and choose policy according to their sweet wills which may create discrimination among two sets of accuseds alleged to have committed same offences under Section 138 of the NI Act.

4.11 However, we are of the view that, for this anomaly only a law cannot become bad if it is found that measures may be taken for avoiding such anomalies by way of exercise of administrative power in a particular way. As suggested by the learned advocate for the respondent, there may be a direction from this Court to all the concerned Sessions Judges for allocating this nature of cases under Section 138 of the NI Act to the same grade of Courts, be it Joint Sessions Judge or Additional Sessions Judge or the Sessions Judge.

4.12 In this regard, we have examined the jurisdictional aspects of different criminal Courts established in Bangladesh by the Code, which clearly suggests that the jurisdictions of such criminal Courts have basically been based on their power to impose conviction and sentences. As for example, Additional Sessions Judges have been empowered by the Code to impose any sort of sentences including death penalty. On the other hand, the Joint Sessions Judges are empowered to impose imprisonment not

exceeding ten years only. Again, the Magistrates, in particular the first class Magistrates, have been empowered to impose imprisonment not exceeding five years.

4.13 Therefore, unlike Civil Courts, the jurisdictions of which are determined in terms of pecuniary capability to try a case under the Civil Courts Act, 1887 (see Section 19), the quantum of the cheque value, or the money involved in a criminal case, does not in any way determine the jurisdiction of any Criminal Court. Therefore, as suggested by the learned advocate for the petitioners in the course of hearing, though the cases under Section 138 of the NI Act may involve cheques worth taka 50 crore or more, such high value of a cheque cannot have any impact on determining the jurisdiction of a criminal Court. That being the intention of the Legislature in establishing different criminal Courts in our country, we are not in a position to accept the submissions of the learned advocate for the petitioners that a direction should be given by this Court for conducting trials of all cases under Section 138 of the NI Act by the Additional Sessions Judges. This suggestion cannot be accepted for other reasons, namely that the maximum punishment of imprisonment in a cheque dishonour case is one year. Though the Legislature has upgraded the forum of trial in 2006 by amendment from First Class Magistrate to the Court of Sessions, a case involving punishment of one year imprisonment only should not come to the

High Court Division directly, particularly when there is another tier of forum, namely the Sessions Judge, who is the senior most judge of the Sessions Divisions concerned in Criminal matters.

4.14 Therefore, while we accept the submissions of the learned advocates that there is in fact an anomaly being created by such administrative orders of the Sessions Judges in their respective Sessions Divisions, this anomaly may easily be cured by a common approach to be adopted by all the Sessions Judges in the said Sessions Divisions. Thus, our considered view is that all such cases under Section 138 of the NI Act should be sent to the Joint Sessions Judges for trial, and the concerned Sessions Judges of the respective Divisions should adopt this similar approach in distributing those cases.

4.15 Regard being had to the above, we do not find any reason to interfere into the proceedings concerned in the aforesaid cases. We are of the view that the practical anomaly that has been surfaced because of the inconsistent administrative orders by different Sessions Judges in different Sessions Divisions may be cured by the common approach as stated above. Thus, the Rules in these writ petitions should be discharged with such direction.

5. **Orders of the Court:**

5.1. Accordingly, the Rules are discharged. All Sessions Judges in all Sessions Divisions in Bangladesh are directed to allocate the

cases under Section 138 of the Negotiable Instrument Act, 1881 for trial to the Courts of Joint Sessions Judges only. The cases which have already been transferred or distributed to the Courts of Additional Sessions Judges, or Sessions Judges, in any Sessions Division should immediately be retransferred/ reallocated to the Joint Sessions Judges of the said Division and the concerned Joint Sessions Judges shall continue the trial of such cases from the stage reached by the said Additional Sessions Judges or Sessions Judges.

5.2. Registrar General of the Supreme Court of Bangladesh and the Registrar of the High Court Division of the Supreme Court of Bangladesh are directed to issue necessary circulars in this regard asking the concerned Sessions Judges for allocation of cases under Section 138 of the Negotiable Instruments Act for trial to the Joint Sessions Judges of divisions concerned within 15 (fifteen) days from the date of receipt of such circular. Let a copy of this Judgment be sent to the Registrar General of the Supreme Court of Bangladesh as well as the Registrar of the High Court

Division of the Supreme Court of Bangladesh for taking necessary steps in this regard.

……..
(Sheikh Hassan Arif, J)

I agree.

`…….
(Khandaker Diliruzzaman, J)