2 SCOB [2015] HCD 1

HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITIONS NO. 9366 of 2011, 9341 of 2011, 8220 of 2011, 9367 of 2011, 9368 of 2011, 9369 of 2011, 9370 of 2011, 2600 of 2012, 5076 of 2012, 5077 of 2012, 5078 of 2012 & 5818 of 2012.

Md. Shafiqul Islam. ..(Petitioner in Writ Petitions No.9366 & 9341/11).
With
Md. Asad-Ul-Amin. ..(Petitioner in Writ Petition No. 8220/11).
With
Md. Rukunuddin Mollah. ..(Petitioner in Writ Petitions No.9367-9370/11)
With
Md. Hasan Murad…Petitioner(in Writ Petition No. 2600/12).
With
Md. Mohiuddin Chowhdury .. Petitioner (in Writ Petitions No. 5076-5078 & 5818 /12).

- Versus –

Bangladesh and others
…….. Respondents in all Writ Petitions.

Mr.Shah Md. Munir Sharif,
Mr.AKM Nurul Alam, Advocates,
For the petitioners (in Writ Petitions nos.9366-9370, 9341 & 8220/ 11).
Mr. Lutfor Rahman, Advocate,
For the petitioner (in Writ Petition no. 2600/12)

Mr. Zafar Ahmed,with
Mr. Rafi Ahmed, Advocates,
For the Petitioners (in Writ Petitions no. 5076-5078 & 5818/12).
Mr. Pankaj Kumar Kundo, Advocate ,
For the respondent no. 3(In Writ Petitions No.9366 & 9341/2011).
Mr.Moudud Ahmed ,with
Mr. Rajiuddin Ahmed, Advocates,
For the Respondent No.3 (in Writ Petitions no. 5076-5078 & 5818/12).

Mr. Murad Reza, Additional Attorney General, With
Mr. Al Amin Sarker, DAG with
Mr. KM Masud Rumy and
Mr. Zakir Hossain Ripon, AAGs
For the respondent No. 1 in all writ petitions.
Mr.Ibrahim Khalil with
Ms. Bahasti Marjan Advocates
For respondent No. 3 (in Writ Petition No.2600/12.)
Mr. Meah Mohd. Kauser Alam, with
Mr. Kali Pada Mridha,Advocates,
For Respondents no. 3 (in Writ Petitions No. 9367-70/11).
Mr. Rafique ul Haque, Senior Advocate with
Mr. M Amirul Islam , Senior Advocate with
Dr. M Zahir, Senior Advocate with
Mr. Mahmudul Islam, Senior Advocate and
Mr. M I Farooqui , Senior Advocate
(as Amicus Curiae)

Heard on: 17.10.2012, 14.11.2012, & 29.11.2012.

Judgment on: 03. 12. 2012.

Present:
Mr.Justice Mirza Hussain Haider
&
Mr. Justice Kazi Md. Ejarul Haque Akondo

Negotiable Instruments Act, 1881:
Section 43 and 138:
Section 43 contains a specific word ‘consideration’. The literal meaning of the term ‘consideration’ is ‘pursuant to something’ which might be pursuant to an ‘agreement’ or pursuant to an “act” or “deed” being legally enforceable. Thus, vide section 43 when a negotiable instrument is made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. If that be so, any cheque, if dishonored by the bank, under such circumstances, will not attract section 138 of the Act. As such, the specific criteria for the purpose of filing of a case

under section 138 is whether there is consideration; which is a vital question to be looked into for trial and conviction. ...(Para 36)

Section 8, 9, 58 and 138:
Vide section 58 of the Act any cheque, which is lost or has been obtained by duress, if dishonoured, cannot / shall not constitute any offence under section 138 of the Act and any holder of such cheque, who is not a meaningful holder as defined in sections 8 and 9, shall not be entitled to invoke section 138. ...(Para 37)

Section 118 and 138:
Until the contrary is proved, it will be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated or transferred for consideration. Section 118(g), however, provides that the holder of a negotiable instrument is a holder in due course; provided that where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor by means of an offence or fraud, or for unlawful consideration, the burden of proving that the holder is a holder in due course lies upon him . ...(Para 38)

Section 4, 6, 8, 9, 43, 58 and 118:
The complaint petition should contain the circumstances of obtaining such cheque and reasons for issuing such cheque by the issuer so that the accused can take a meaningful defence/ stand at the trial under all circumstances. However, even in the absence of any such statement in the complaint petition there is no embargo under the Act, to take any defence by the accused person in the light of sections 4, 6, 8, 9, 43, 58 and 118 of the Act and that the trial court shall give the accused persons adequate opportunity to take any such defence during the course of trial. ...(Para 42)

JUDGMENT

MIRZA HUSSAIN HAIDER. J.

1. The petitioners of all these writ petitions challenged the constitutionality of amendment of Section 138 of the Negotiable Instruments Act, 1881 by Act No. XVII of 2000 published on 6.7.2000 to be void as the same is ultra vires the Constitution and, accordingly, they also challenged the proceedings of their respective sessions cases arising out of the respective complaint register cases pending before the Sessions Judge, Metropolitan Sessions Judge or Magistrates to be without lawful authority and of no legal effect .

2. Since in all these Rules the petitioners challenged the constitutionality of amendment of Section 138 of the Negotiable Instruments Act, 1881 and the proceedings of the cases initiated thereunder which are pending before the trial courts and the facts of all these cases being similar with some insignificant variations, discussions of the facts of each and every case separately are avoided. Accordingly, all these Rules are taken up together for hearing and disposed of by this single judgment.

3. Brief facts of all the cases relevant for the disposal of the same are that the Complainants-Respondents filed complaint register cases before the Magistrate courts under section 138 of the Negotiable Instrument Act, 1881 alleging that the accused-writ petitioners, issued cheques in their favour for different purposes but the same have been dishonored and returned without being encashed on different pleas. The allegations of the complainants are that the issuers of the cheques i.e. the writ petitioners have committed an offence under Section 138 of the Negotiable Instrument Act,1881 and, as such, liable to be tried and punished under the said provision of law. The writ petitioners after

appearing before the concerned trial courts obtained bail and moved these writ petitions challenging the aforesaid amendments of Section 138 of the Negotiable Instrument Act, 1881 on the ground that their right of defense has been taken away by such amendment and obtained these Rules and the orders staying the proceedings.

4. In many of the Rules the respondents, including the complainants, entered appearance and denied the material allegations of the writ petitions.

5. Common case of the complainant-respondents are that the allegation as to constitutionality of the amendment is baseless since the amendment has been made more than 12 years back and a good number of cases have already been disposed of under the said provisions of law. It is further stated that the accused-petitioners even under the present amendment are very much eligible to take appropriate defence since the issuance of the cheques has been made in respect of certain purposes and they are as such well competent to present their defense before the trial courts by cross examination of the prosecution witnesses. Hence, the Rules are liable to be discharged.

6. On these background Mr. Munir Sharif, the learned Advocate appearing on behalf of the petitioner in Writ petition No. 9366 of 2011, along with other learned advocates for other petitioners, submits that originally Section 138, under Chapter XVII of the Negotiable Instruments Act, 1881 (hereinafter referred to as the Act, 1881) was relating to appointment of "Notaries Public" which was substituted by new Chapter XVII under the heading "On penalties in case of dishonour of certain cheques for insufficiency of funds in the account" by the Negotiable Instruments (Amendment) Act, 1994 (Act No. XIX of 1994), inserting Sections 138, 139, 140 and 141. Thereafter section 138 was further amended in 2000 by the impugned amendment. The old Section 138, before the impugned amendment, reads as follows:

"138. Dishonour of cheque for insufficiency, etc. of funds in the account – *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account [for the discharge in whole or in part, of any debt or other liability] is returned by the bank unpaid, either because of the amount money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [twice] the amount of the cheque, or with both.*

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice , in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Explanation *– For the purpose of this section, "debt or other liability" means as legally enforceable debt or other liability".*

7. It is submitted on behalf of the writ petitioners that in section 138, as it was before the impugned amendment the words 'for the discharge, in whole or in part, of any debt or other liability' and the Explanation thereto with the words 'the debt or other liability means any legally enforceable debt or other liability' was there by which the legislature gave a rationale meaning of offence committed under section 138 of the Act giving immense opportunity to the accused person to take a rightful and meaningful defense as to whether the cheque was issued for the purpose of discharging any legally enforceable debt or other liability as a whole or in part. But by the impugned amendment, the term 'for discharge, in whole or in part, of any debt or other liability' and 'the Explanation' to that

Section has been deleted. As such the impugned amendment, has taken away the right of meaningful defense of any person who is alleged to be guilty under Section 138 of the Negotiable Instrument Act, 1881. Thus, in respect of issuing any cheque by the issuer even after payment of debt or liability in cash or otherwise, if the cheque, which was issued to meet or discharge the said debt or liability already paid, remains with the possessor of the said cheque and, thereafter, if the same is dishonored by the banker of the issuer of the cheque upon its presentation, such issuer/person shall be deemed to have committed offence under section 138 of the Act, 1881 and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [thrice] the amount of the cheque, or with both. Therefore, it is submitted that by repealing the words 'for the discharge in whole or in part of any debt or other liability' and also by repealing the entire "Explanation", the opportunity of meaningful defense has been taken away which is contrary to Articles 27 , 31 and 35 (3) of the Constitution, meaning that any cheque if dishonored by the bank will come within the mischief of Section 138 of the Act,1881 and any person issuing any such cheque irrespective of any transaction or consideration will be within the mischief of Section 138 of the Negotiable Instrument Act, 1881.

8. It is submitted that in the absence of the words "….. in discharge of a debt or other liability …." there remains no valuable consideration for the contract, which is violative of Section 25 of the Contract Act and if the contract itself is void, there is no valid cheque in the eye of law. Similarly, if there is no valid cheque in the eye of law, the amended provision of section 138 will be in conflict with or repugnant to section 5 of the said Act of 1881, which establishes a cheque as a negotiable instrument, as well as section 6, which clarifies that a cheque is a species of bill of exchange, both being contracts. Unless there is a contract making the cheque a negotiable instrument under the definition clause, the amended Section 138 is repugnant to Sections 5 and 6 which must be understood and interpreted along with Sections 26 and 43 which prescribes, by necessary implication, that all negotiable instruments are contracts primarily. Thus Section 138 of the Negotiable Instrument Act cannot be invoked for the purpose of punishing a person for his cheque being dishonored by the banker. To this end, the learned Advocates for the petitioners submit that unless there be a debt or liability which under the contract or transaction is liable to be met and which under the contract or transaction is liable to be met and which is pre-existing transaction between the parties, the issuer of the cheque under no circumstances can be punished for his dishonored cheque issued for any other purpose.

9. The learned Advocates for the petitioners, upon drawing our attention to a good number of decisions of the Apex Court of our jurisdiction and those of the sub-continent, submit that in numerous decisions it has been held that when the cheque is issued in discharge of a time barred debt, not preceded by valid acknowledgement of debt before expiry from the date of loan, it cannot be said that the cheque is issued for the discharge of legally enforceable debt or other liability, as such no cause of action for proceeding under Section 138 can arise in the event of such cheque being dishonored. It is further contended that the debt or other liability which was prevailing before the impugned-amendment the purpose of the old Section was required to be legally enforceable and, thus, unless any liability legally enforceable is absent, the issuer of the cheque cannot be brought under the mischief of dishonoring any cheque which was not issued for any legally enforceable debt or other liability. In this respect the learned Advocates produced the report of the Law Commission of Bangladesh wherein upon considering the impugned amendment the Commission expressed its view that the 'repealed words should be restored to its original position and the amendment should be cancelled to give a rationale meaning of Section 138 of the Negotiable Instrument Act along with present position of law in comparison to other jurisdiction of the sub-continent.' In this respect, our attention was drawn to the provision prevailing in India, from which the said provision of Section 138 of the Negotiable Instrument Act was brought in our law. Under the Indian jurisdiction the law categorically clarifies the words 'for the discharge, in whole or in part, of any debt or other liability, and the Explanation, "for the purpose of this section, the word 'debt or other liability' means a legally enforceable debt or other liability'. Thus it is submitted that to avoid the confusion about dishonoring any cheque to bring within the mischief of Section 138, understanding dishonoring of each and every cheque should not be made to the court under Section 138 within the purview of Chapter XVII as a

criminal offence, otherwise, there will be anarchy and number of criminal litigations will be high and keeping harmony in criminal dispensation of justice will be a harder one. The learned Advocates for the petitioners submit that unless a cheque is issued for the purpose of meeting any liability or debt, there remains scope to prove the contrary, resulting the offence, if any, a presumptive one and the presumption cannot be the sole basis for conviction/punishment under the criminal jurisprudence. Under Section 118 of the said Act, presumption has been made for holder of the cheque that the same was made or drawn for consideration. Once execution of the cheque is admitted, Section 118 would come into operation which would presume to be supported by a consideration and such presumption is rebuttable and in that case the accused can prove the non-existence of a consideration by raising a probable defence. If the accused discharges the initial onus of poof showing that the existence of consideration was improbable or doubtful or the same was illegal, the onus will shift upon the complainant, who is required to prove the existence of consideration and, as a matter of fact upon his failure to prove the same, he would be disentitled to get the relief on the basis of such dishonored cheque. Hence, it is very important that the court cannot insist upon the accused to disprove the existence of consideration by leading direct evidence as the existence of negative evidence is neither possible nor contemplated.

10. It is further submitted that whereas the prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is 'preponderance of probabilities' and inference of 'preponderance of probabilities' can be drawn not only form the materials brought on record by the parties but also by reference to the circumstances upon which he relies. Therefore, the standard of proof, so far as the prosecution is concerned, is proof of existence of consideration and on the accused is only mere preponderance of probability. In this respect, the learned Advocates relied on the dictum of the cases of Narendra Singh and another Vs. State of Madhya Pradesh, 2004 (10) SSC 699); Krishna Janardhan Bhat Vs. Dattatraya G. Hegde, 2008 (1) KLT 425(SC); N I Shaju, s/o N I Ippan Vs .T.K Paulose ,Thondanala House [2009(3)KHC 626];

11. The learned Advocates further submit that the leading principle of law regarding Negotiable Instruments is that they are essentially contracts which require consideration. But the amended Section 138 of the Act, 1881 negates the requirement of consideration in violation of section 43 of the said Act, which clearly provides protection to the drawer of the cheque and such protection is guaranteed under Article 31 of the Constitution and the impugned provision of law violates such guarantee and, therefore, the same is void under Article 26 of the Constitution. It is submitted that Section 138 cannot be interpreted and applied in isolation. The other provisions of the said Act of 1881 as a whole have to be taken into consideration for interpretation of Section 138 and the amended Section 138 being repugnant to other provisions of the Act as well as the object of the Act itself, the same is arbitrary and unreasonable which is liable to be struck down .In support of the submissions the learned Advocates for the petitioners relied on scores of decisions of the sub-continent, particularly form the Indian jurisdiction, and concluded that since by the impugned amendment if the cheque, which has been issued and dishonoured by the drawer of the cheque, is not an instrument under the meaning of Section 5 of the Act and if the same is not issued in respect of transaction for some consideration as provided, mere dishonoring the same by the drawer bank shall not bring the issuer/ drawer of the cheque within the mischief of Section 138 of the Act. By taking away the right of defence by the impugned amendment the fundamental rights of the accused-writ petitioners, to be treated equally under Article 27 of the Constitution and the right of protection to be given "in accordance with law and only in accordance with law" as contemplated in Article 31 of the Constitution and, that is how, the impugned amendment of Section 138 of the Negotiable Instrument Act, being in conflict with the provisions of the Part III of the Constitution and thereby the same being hit by Article 26 of the Constitution, the same is liable to be declared ultravires the Constitution and resultantly the criminal cases arising out of the operation of the impugned law are also be declared to be without lawful authority. In support of the aforesaid contentions Mr. Sharif, and other learned advocates of the petitioners relied on the retio decidendi of the cases of ***Moore Vs East cleveland, a Zoning Ordinance Limited (431 US 494) Chintaman Rao vs The State of Madhya Pradesh, reported in AIR 1951 SC118; Rattan Arya vs State of Tamil Nadu & another, reported in***

AIR 1986 Sc 1444; Pathumma and others v State of Kerala and others (AIR 1978 SC 771); State of Madras v. V.G. Row. Union of India and State (AIR 1952 SC 196); Kishan Chand Arora v. Commissioner of Police, Calcutta (AIR 1961 SC 705); Marbury v. Madison [5 U.S. 137]; in case of the case of B. Mohan Krishna Vs. Union of India, 1995(1) ALT 468]; Sankaralingam VS. Union of India and others, [(1996) 86 Comp Cas 709 (Mad)]; case of K. Kumar V. Bapsons Foot Wear, [(1995) 83 Comp Cas 172(Mad)]; case of Swastik Coaters Pvt. Ltd. V Deepak Brothers and others, [1997 (1) ALD (Cri) 370]; case of M/S. Nutech Origanic Chemicals Ltd. And another Vs. GMR Technologies & Industries Ltd. and another, [2003 (1) ALD (Cri) 296], Vempati Balagi and others Vs. D. Vijaya Gopala Reddi and andother , [1999 (2) ALD 669] B. Mohan Krishna V. Union of India [1995 (1) ALT 468 (BD)]. Kasturi Lal Lakshmi Reddy v. State of Jammu & Kashmir (AIR 1980 SC 1992); Minerva Mills Ltd. and others v. Union of India and others (AIR 1980 SC 1789).

12. Mr. Murad Reza, the learned Additional Attorney General, appearing on behalf of the Respondent No. 1 files affidavit- in-opposition denying all the material allegations of the writ petition and submits that the writ petition is not maintainable since the same has been filed in violation of the maxim, 'what could not be achieved directly cannot be achieved indirectly'. Because the petitioner of writ petition No. 9366 of 2011 earlier moved the High Court Division under section 561A of the Code of Criminal Procedure being Criminal Miscellaneous Case No. 20753 of 2009 and the Rule being discharged the petitioner has taken a different plea in the writ petition for the purpose of achieving his goal of quashing the proceeding which he could not attain by filing an application under section 561 A of the Criminal Procedure Code. Secondly, he submits that extra ordinary remedy provided under Article 102 of the Constitution is for speedy relief and the same is for the vigilant and not for the indolent ones which is required to be sought for, immediately after the grievance is caused. Hence, laches and delay disentitles the petitioner to such remedy. He submits that in these cases, the amendment has come into effect on 6.7.2000 and most of the proceedings have been initiated starting from 2000 and continuing till date. In Writ Petition No. 9366 of 2011 the proceeding was initiated on 5.5.2008 and the position of the writ petition also appears to be the same but surprisingly all the petitioners moved this Court challenging the said amendment in 2011 which is more than 11 years after the law came into effect and in most of the cases when the criminal cases in the court below were initiated against the petitioners and the same continued for considerably a long period and as such the petitioner being indolent cannot get a remedy in this Court.

13. He submits that the petitioner has failed to make out a case on the unconstitutionality of the impugned amendment of the Act 1881. He further submits that the petitioners having failed to cause any rebuttal of challenging the validity of law the presumption will be that when any law is made it is constitutionally valid until the presumption is rebutted by the person who challenges its validity. In these cases the petitioners have failed to show unconstitutionality of the amendment. It is submitted that when the words used in the law are clear and unambiguous the same cannot be declared to be unconstitutional on the ground of unreasonableness or hardship or even such unambiguous or even clear term in law becomes/ causes hardship to the people. In this respect he relied on the case of Solicitor Vs. Syed Sanwar Ali, 27 DLR (AD) 16 (Para 14). He submits that the Negotiable Instrument Act is a special law and the liability created thereunder is strict liability and slight deviation giving a different meaning of the intent of the legislature is not permissible. He next submits that Section 138 of the Negotiable Instrument Act is both penal and procedural law where if the cheque is dishonoured the presumption will be the offender has "mens rea" otherwise why the cheque should be dishonoured and the same being procedural law it cannot be said to be violative of Article 27, 31, 40 or 42 of the Constitution. Accordingly, Mr. Reza submits that the amended provision of Section 138 is a remedial legislation and the very Preamble of the Act speaks of amending the law relating to promissory Notes, Bills of Exchange and Cheques, which is an inherent power given by the statute itself. Since it is remedial law the Court must avoid a construction which would render a statute meaningless and ineffective and would adopt the rule of liberal construction so as to give meaning to all parts of the provisions and to make the whole effective and operative. In doing so, the court must resist the temptation to change the law under cover of interpretation in a liberal way. A court of law is bound to proceed with the assumption that the legislature is an ideal person that does not make any mistake. The elementary rules of construction is that the plain intention of the legislature is to be sought from

the words used and not in the wide sea of speculation and surmise but from the conjectures as are drawn from the words alone or something contained in them, as decided in the case of Doly Enterprise and Others Vs. Additional District Judge and others, reported in 59 DLR (2007) 37. Similar was the finding in the case of Jahid Faisal, reported in 14 BLC 259 and in the case of Abul Hasnat Nurul Kabir Vs. Government of Bangladesh, reported in 29 BLD 275, wherein constitutionality of section 138 of the Act was challenged. Accordingly the learned Additional Attorney General submits that the impugned amendment of section 138 cannot be held unconstitutional or violative of the right as guaranteed under Articles 27,31,40 and 42 of the Constitution.

14. On the question of presumptive value or hardship of the debt or other liability the learned Additional Attorney General submits that in the case of SM Emdadul Hossain (Bulbul) Vs. Jinnur Hossain and another, reported in 15 BLC (AD) 146 the Appellate Division held *"on plain reading of the provisions of law quoted above it appears that the very cheque itself has a 'presumptive value as to debt or liability. Whether any debt or liability, at all, exists or not, is a question to be determined in the proceeding under Section 138 of the Negotiable Instruments Act. One of the ingredients for initiating a proceeding under section 138 of the Negotiable Instrument Act is refusal to honour a cheque. It was further held the appellant has incurred a liability and such liability in the instant case is secured by the cheque given by the appellant to the complainant- respondent no.1 as security and or a performance guarantee. Hence, the question of debt or liability as a whole or in part becomes redundant because of such presumptive value of the cheque itself. Accordingly, one can incur the liability to pay against the cheque for any reason which is not necessarily limited to 'debt' whole or in part. Thus the amendment of Section 138 of the Act cannot be said to be ultra vires the Constitution".*

15. He next submits that no person has a vested right in any course of procedure. Alteration in the form of procedure are always retrospective unless there is some good reason or other way they should not be so. Relying on the case of North Bengal Sugar Mills Co. Limited Vs. Labour Appellate Tribunal and another 2 BLC 547 he submits that the Parliament can take away any vested right with retrospective effect in case of procedural law. In Jahid faisal's case (14 BLC 259) it has been held that "…… the Negotiable Instrument Act being a procedural law, there is no bar in giving its effect retrospectively." Again he submits that Section 13(1) defines Negotiable Instrument which means a promissory note, a bill of exchange or cheque payable either to order or to bearer and section 5 of the said Act defines what is a Bill of Exchange, which amongst others terms it as 'an instrument in writing containing an unconditional order' and Section 6 defines 'a cheque is a bill of exchange drawn on a specified banker and not expressed to payable otherwise than on demand'. Section 19 provides for instrument payable on demand, which includes a promissory note or bill of exchange payable on demand. It is a strict liability. Referring to the case of Syed Anowar Towhid Vs Syed Zahed Ali and another 13 BLC 428, he submits that it has been held that 'the cheque being a bill of exchange the same is covered by the provision of Section 19 of the Negotiable Instrument Act, 1881 in this respect. Thus, he submits that a dated or undated cheque, irrespective of its nature is a valid one and if the same is placed for payment with no date specified for payment, the same shall be treated as payable on demand. The cheque being a bill of exchange the same is covered by the provision of Section 19 of the Act.

16. On the question whether the right of defence is available under the present form of Section 138 he submits that the amended provision of Section 138 stands for the same test as being a remedial legislation, wherein the legislature deleted the words " for the discharge in whole or in part of any debt or other liability," with an intention to cure some defect, errors and procedures for the purpose of making the people, who are in the habit of not honouring the cheque given for whatsoever purpose and the liability of the drawer of the cheque has the presumptive value and such liability is not limited to debt or liability of the petitioners in 'whole or in part'. Thus, those words became redundant because of such presumptive value of the cheque. In that view of the matter the said amendment of Section 138 of the Act cannot be said to be ultra vires the Constitution. In this respect he relied on the cases of SM Emdadul Hossain(Bulbul) Vs. Jinnur Hossain and another, 15 BLC(AD) 146, (para 13). He further submits that no person has a vested right in any course of procedure. In

order to understand what kind of "defense", if any, is available to the accused person under the Negotiable Instruments Act, it is pertinent to know the Apex Court's view in respect of 'at what point of time ' the offense is committed' under Section 138 of the Act.' It is relevant to know that the view of the Apex Court in respect of at what point of time the offense was committed under Section 138 of the Act as reported in the case of Md. Arif Uz-Zaman Vs the State and another 8 ADC 975 (para 13), wherein the Appellate Division held that 'the moment a cheque is dishonoured for any reason whatsoever the offence under the aforesaid Section shall be committed and, in that case, the payee shall have the liberty to file a petition of complaint before the competent Magistrate against the drawer of the cheque, of course, by complying with the Proviso to sub Section (1) of Section 138 of the Act'. Therefore, he submits that the time is one of the grounds as to when the cheque was dishonoured and when the case was filed and when the proceeding of the case was challenged. He submits that the full Bench of the Appellate Division proceeded with the case to consider the defence available to the accused and observed that "*however if a holder or the payee gets hold of a dishonored cheque by fraudulent means or forgery the drawer of the cheque shall have the liberty to take such defence during the trial (8 ADC 975).*" So the submission of the petitioner that the right of defence has been taken away by the amendment, if we take into consideration as valid ground, even then the observation of the Appellate Division in 8 ADC case clearly gives the opportunity to the accused to defend himself upon taking a ground that the dishonoured cheque has been obtained fraudulently, or any such defence whatsoever the petitioner wants to take, can take in course of trial and, thus so far the submissions of the petitioner that their right of defence has been taken away by the impugned amendment is not at all sustainable in law. If the cheque is lost, seized, then he submits that steps as prescribed in the cheque itself can be resorted to. Therefore, as per him, it is a misconceived view of the petitioner that the impugned statute has destroyed the accused's right of meaningful opportunity of defending himself.

17. On the question of the recommendation or observation of the Law Commission Mr. Reza submits that the Law Commission was established by virtue of Law Commission Act, 1996 (Act No.19 of 1996). Section 6 of the said Act elaborately laid down the functions of the Commission including recommendation to the Government in respect of legislating, repealing, examining the laws of the land and modernization of the judiciary etc. But nowhere in the said Act it is provided that the recommendations made by the Commission is binding upon the Government or the legislature. It is a mere recommendation for consideration by the legislature as well as by the Government at the time of enacting any law. In continuation of his submission he contended that in the case of Sheikh Abdus Sabur Vs. Returning Officer & others, 41 DLR (AD) 30 the Appellate Division held that 'the Court has no duty to offer unsolicited advice as to what the Parliament should or should not do. As long as the law enacted by it within the bounds of the Constitution it will be upheld by this Court but if the law is otherwise open to criticism it is for the Parliament itself to respond in the manner it thinks best'. In that view of the matter he submits that the Court has hardly got any scope to make any comment or make any suggestion in respect of impugned amendment to Section 138 of the said Act.

18. In respect of the interpretation of the statute Mr. Reza relied upon the comments of different authors. The Constitutional validity of law made by the legislature is to be presumed valid unless the presumption is rebutted. Accordingly, the law cannot be struck down merely because it fails to spell out the particular objectives of a provision in the legislation itself. It is the established principle of law that where the words used in a law are clear and unambiguous Courts are bound to apply the same, even if such application causes hardship. But the court must avoid a construction which would render a statute meaningless and ineffective. It would adopt the rule of liberal construction so as to give meaning to all parts of the provision as has been held in the case of Doly Enterprise (59 DLR 37). It has been further held "every effort is necessary to make a statute workable and not to render it futile by giving a meaningless interpretation frustrating the legislative intention". That is, the intention of the legislature must be sought from the statute, taking it as a whole into consideration along with other matters and circumstances which led to the enactment of the statute. In arriving at a true meaning of any particular phrase available in the statute the same must not be viewed in an isolated manner from other context rather, it must be viewed in its whole context i.e. the title, the preamble and all other enacting parts of the statute. It is further contended by Mr. Reza that on a liberal construction of a

given statute, the legislative policy and guidance for its execution are brought out, the statute even if skeletal, will be upheld and it will not be valid argument that the legislature should have made more detail provisions, upholding the principle of law. In the case of (Dr) Haniraj L. Chulani Vs Bar Council of Maharashtra and Goa AIR (SC) 1708 (Para 17) it was held that 'it cannot be said that while regulating the entry to the legal profession the Bar Councils would find themselves without any yardstick or guidelines and would be trading an unchartered sea and consequently the rules of enrolment framed by them would fall foul on the altar of permissible delegation of legislative power'. It further held that 'any condition laid down by the state Bar Council for fortifying this laudable object of legislature would remain germane to the exercise of this power and can well be said to be logically flowing from it. Therefore, it cannot be said that any unguided and unchartered power is handed over on a altar by the legislature to the concerned Bar Councils for regulating entry to the legal profession. Any rule, which effectuates this purpose will be within the permissible field and will not fall foul on the altar of Article 14 and Article 19 (1) (g) read with Article 19(6)'. Therefore, Mr. Reza finally submits that a person who has been alleged to have committed an offence has no fundamental right to say to be tried by a particular court in a particular proceeding except in so far as any constitutional object by way of discrimination or the violation of any other fundamental right is involved and as such the Rule should be discharged.

19. Ms. Bahasti Marzan, the learned Advocate appearing on behalf of Respondent No.3(complainant) in Writ Petition No.2600 of 2012, submits that the repealed law is to be interpreted very cautiously as there may arise the question as to grammatical/ literal interpretation; liberal/logical interpretation and strict interpretation. She further submits that Rule of Interpretation gives the guideline of interpreting any law by literal interpretation; by Mischief Rule (Heydlon's Rule) and by Golden Rule. According to her, the Rule of interpretation, Literal Rule, Mischief Rule/ Hoyden's Rule and Golden Rule, is very much applicable. She submits that Mr. Mahmudul Islam in his interpretation of the statue at page 112 has observed that the Mischief Rule was enunciated in Heydon's case which has also been considered in the case of Nazir Hossain vs. State, reported in 17 DLR(SC) 26 and also in many other cases including the case of Abdul Kabir Vs. State, reported in 50 DLR 306. While interpreting the law four things are required to be found out and carried into effect that the object and purpose of the statute is very often applied in construing a statute. According to her, in applying all the four criterions if it is found that when any Act is repealed or amended then there will arise active mode in prospective this mode is followed by mischief rule and the saving clause and when prospective mode is activated then no one can challenge it.

20. On the other hand Mr. Moudud Ahmed, the learned counsel appearing on behalf of the respondent in Writ petitions No.9367 of 2011 to 9370 of 2011, submits that his cases are completely different form the other cases on the plea that the cheques, which have been dishonoured by the bank, were against the payment of house rent which from the Annexure appears that the petitioners in these Rules admitted before the board of arbitrator of local elites that they would pay off the arrear house rents by installment and accordingly issued the cheques which have been dishonoured. So he submits that whether the law is declared to be ultra vires the Constitution for taking out the issue of meeting or discharging any debt or liability as a whole or in part or whether the amendment is not declared ultra vires the Constitution, means the amendment remains as of today the petitioners of these Rules will not get any benefit out of it. Because under all circumstance the dishonoured cheques have been issued by the petitioners to discharge or to meet the debt or liability as a whole or in part, as per their own admission before the arbitration board; and those were for the purpose of discharging or meeting their financial debt or liability of paying arrear house rent, as such the petitioners will not get any benefit in case the Rules are made absolute or discharged. Under such circumstances he submits that the Rule in all these four writ petitions should be discharged so that the landlord i.e., the respondent no. 3 gets his arrear house rent paid off.

21. Another contention has been taken by some of the respondents that the petitioners in obtaining Rules challenged the amendment of law, not the amended law and, as such, even if the amendment of law (Act No. XVII of 2000) is declared to be ultra vires the Constitution but a law amended as it is now, after 12 years will not affect any person under any circumstances because the same has been

embolden in the body of the statute and there is neither any scope nor necessity, even on referring to the amending statue, because the amending statute ceased to have any useful purpose and therefore even if the Rule is made absolute and the impugned provision are declared void and ultra vires the constitution the amended provision of section 138 of the Negotiable Instruments Act, as it remains today, will remain unaffected and continue to be enforced in view of the section 6A of the General Clauses Act, 1887. In support of the aforesaid contention reliance has been made on the decision of Solicitor of Government of Bangladesh Vs Dulal alias Friduddin, reported in Bangladesh Supreme Court Digest (1978-79) at page 92.

22. Having heard all the parties it appears that the main question which has been raised by the petitioners in these writ petitions is that by the impugned amendment, the right of the petitioners' meaningful defence has been taken away and as such the fundamental right, as enshrined in Articles 27,31,32 and 35 (3) of the Constitution, of the petitioner, who issued a Cheque, has been taken away for which the petitioners' fundamental right to equality before law has been infringed.

23. Considering the graveness of the question raised in these writ petitions, we considered it necessary to hear the Senior Counsels of this Court as amicus Curiae and, accordingly, Mr. Rafique ul Haque, Mr. M Amirul Islam, Dr. M Zahir, Mr. Mahmudul Islam and Mr. M I Farooqui, were requested to assist this Court with their opinions and comments on the subject as friends of the Court.

24. Mr. Rafique ul Huq, the learned Senior Counsel contends that prima facie the impugned amendment has taken away the fundamental right of defence but on a close scrutiny of Section 138 it is not so as it does not have any non-obstante clause. He submits that in the absence of non obstante clause the accused person can take shelter of Section 43, 58 and 118 of the Negotiable Instrument Act, 1881 which are applicable in these cases and the Court, while trying such case, are duty bound to try these types of cases reading Section 138 not in an isolated manner but in accordance with Sections 43, 58 and 118 of the Act, 1881.

25. On the other hand, Mr. M Amirul Islam, the learned Senior Counsel of this Court, contended that there must be some equilibrium in enacting any law so that both side's interests are protected. He contended that third paragraph of the Preamble of the Constitution provides about the social security free from exploitation and if omnibus authority is given to show any person on account of his cheque being dishonored and the cheque being issued without any consideration or without for the purpose of meeting any debt or liability, then the person who places the cheque before the bank will have an upper hand upon the issuer and that will not protect the social security and the society shall not be free from exploitation. He next referred to Article 7(2) read with Article 26(2) of the Constitution and contended that both the said provisions provide ample power to draw the attention of this Court when any enactment is inconsistent with the Constitution. Hence, when any person/ drawer of the cheque gets an upper hand and he is not liable to explain as to how and why and/ or for what purpose he got the cheque then the inconsistency as to equality before law as well as the right to protection of law as enshrined in Articles 27 and 31 of the Constitution comes. He next submits that in Article 20(2) of the Constitution it has been provided that the State shall endeavour to create conditions in which as a general principle persons shall not be able to enjoy unearned incomes, in which human labour in every form either intellectual or physical, shall become a fuller expression of creative endeavor and of the human personality. So the impugned amendment will give rise to the attitude of enjoying unearned income. So any person under the present section 138 of the Act of 1881 can use or misuse the said provision of law by way of filing cases for which he may not deserve the said amount of money or any financial benefit which is contrary to Article 20(2) of the Constitution. He next contended that Article 31 provides, right to protection of law and that protection has to be "in accordance with law" and "only in accordance with law". But to that extent the law must be of rational meaning which upholds the spirit of the preamble of the Constitution by ensuring the equality and justice to every citizen of this Country. Otherwise the issuer of the cheque will not have the benefit of meaningful defence to the extent of whether he issued the cheque or not or even if the same is issued for a particular transaction or its consideration and if the accused is not allowed to take such

defence then he will not be protected in accordance with law and or only in accordance with law. Moreover, a law cannot be a law which does not ensure justice under the Preamble of the Constitution.

26. Lastly, he contended that section 43 of the Negotiable Instruments Act clearly shows that unless there is any transaction followed by passing of consideration there cannot be any offence under section 138. So section 138 is totally incongruous/inconsistent with section 43 of the Act. In support of his contention he relied upon several decisions of our jurisdiction as well as those of the Indian jurisdiction wherein the consistent view is that the cheque should be issued by the drawer in discharge of the full or part of the debt or liability and if the said cheque was dishonored due to insufficiency of funds etc, then only section 138 of the Act gets attracted if other conditions are complied with. When from the averment of the complaint petition there is no element that the cheque was issued by the petitioner in discharge of any legally enforceable debt or other liability, the maker of the debt is not liable to be prosecuted or punished. In this respect he relied in the case of Nutech Organic Chemicals Ltd and another Vs GMR Technologies and Industries Ltd and another, 2003 (1) ALD (Cri) 296; B Mohan Krishna Vs Union of India Manu/AP/0086/1995: 1995 (I) ALT468(DB). He also referred the case of Kasturi Lal Vs. J & K AIR 1980 SC 1992 and submitted that the principles provide the yardstick for testing the reasonableness of a legal provision challenged on the ground of violation of fundamental rights. The concept of reasonableness in fact pervades the entire constitutional scheme. The interactions of Articles 14, 19 and 21 of the Indian Constitution analyzed by the Court in the case of Maneka Gandhi Vs Union of India (AIR 1978 SC597) clearly demonstrates the requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights and as several decisions of this Court show, this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspire and animates the directive principles. He also referred the case of Minerva Mills Ltd and others Vs Union of India and others, wherein it has been held that whether directive principles of the state policy can have supremacy over fundamental rights, merely because directive principles are non-justifiable it does not mean that they are subservient to fundamental rights; destroying fundamental rights in order to achieve goals of directive principles amounts to violation of basic structures; To maintain the undisturbed harmony the goals of directive principles should be achieved without abrogating the fundamental rights; directive principles enjoy high place in constitutional scheme; both fundamental rights and directive principles to be read in harmony.

27. Dr. M. Zahir, the learned Senior Counsel, contends that Section 138 of the Negotiable Instrument Act is a “draconian” law which contravenes the fundamental right of protection of right to property. This section is as it stood before the amendment mentions that cheque would be payable for discharge of any debt or liability. This enabled somebody who has drawn a cheque to take the defence that he did not give the cheque in discharge of any debt or liability and there may be other implications, for example, if a signed cheque is obtained by coercion, under influence, fraud, intimidation, blackmail, or theft, then the drawer of the cheque might argue that such a cheque was obtained not to discharge his liability and that was the defence which the issuer of the cheque could take under the earlier law. But the amendment has taken away this right of defence which was available to the drawer of the cheque and as such the same offends the fundamental right to property. Thus he submits that a power should be given to the Court to interpret the section, so as to enable the drawer of a cheque to argue that such a cheque was obtained by illegal means, although this defence is not mentioned in the Section. However, he admits that in view of not incorporating the non-obstante Clause in Section 138 itself all other provisions of the Negotiable Instrument Act, 1881 remains the same with equal application of the same in trial.

28. Mr. Mahmudul Islam, the learned Senior Counsel in response to the request of this Court appeared and contended that unreasonable enactment cannot constitute any criminal liability. By deleting the words “for the discharge in whole or in part of any debt or other liability” or deleting the “Explanation” of Section 138 the legislature has proved and made Section 138 an unreasonable legislation which under no circumstances can constitute any criminal liability. The amendment, thus, by deleting the said portion of the legislation, has made Section 138 an arbitrary one which is contrary

to Article 27. He contends that the issuer of the cheque if does not have any "means rea" or guilty intention to shift the liability of the cheque then criminal liability, under no circumstances, can be constituted. He also contends that Section 138 in the present form though appears to be unconstitutional but such legislation in the absence of having a "non-obstante" clause should not, in any way, be declared unconstitutional. Harmonious interpretation of section 138 should be made upon reading with other provisions of the Negotiable Instrument Act, 1881 which will always give the accused a right of meaningful defence. Thus if there is better way out then law should not be generally declared ultra vires or struck down, which is actually, within the domain of legislature.

29. Mr. M. I Farooqui, the learned Senior Counsel appearing before this Court contends that amendment of law can be challenged if the same is found to be inconsistent with the Preamble or Part III of the Constitution. According to him, the Negotiable Instrument Act, 1881 is a consolidated one as spelt out in Maxwell on the Interpretation of Statutes. The law as to bill of exchange and other negotiable securities forming a branch of the general body of the "Law Merchant" is consolidated by the Act of 1881 and the consolidated statue or law presupposes an existing law which the Parliament does not intend to alter. He also contended that there may be various circumstances for absence of legally enforceable debt or liability. Sections 43 to 45 of the Act of 1881 deal with the effect or absence of consideration. Such absence or failure may be total or partial. Sections 44 and 45 deal with partial absence or failure of consideration whereas Section 43 deals with total absence or failure of consideration. So the issuer of a cheque under the Negotiable Instrument Act as a whole has a right of defence under Sections 43, 44 and 45 as well as under Section 118 of the Act. Section 118 of the Act intended to apply as between the parties to the instrument or those claiming under them. The presumption under Section 118 is a presumption based on the existing law. Therefore the initial presumption in the case of negotiable instrument is that they were made, drawn, accepted or endorsed for consideration under clause (a) of Section 118. Thus the production of the document itself, once the signature is proved or admitted, shifts the burden on the maker, as to how and for what purpose such document was issued. Thus the impugned amendments on the face of other provisions of the Negotiable Instrument Act, 1881, as a whole does not change or alter the tenor of the existing law that has been consolidated. The Parliament in their wisdom have removed certain clauses/words of Section 138 along with Section 139, but it did not override the "general provision of law" existing in Sections 43 to 45 and section 118 of the said Act. Therefore the tenor of the law remains the same as such the impugned amending law has not offended Article 31 of the Constitution.

30. Having heard the submissions of all the parties and the learned Amici Curiae and upon perusal of the writ petitions, supplementary affidavits, affidavits-in-opposition, annexures appended thereto and the decisions referred to by the respective contending parties it appears that the moot point for determination in all these Rules is whether the impugned amendment incorporated by Act No. XVII of 2000 has taken away the right of defense of the issuer of the cheque, who has been made accused in the case filed against him/them, before the concerned court below under section 138 of the Negotiable Instrument Act, 1881 (in short, the Act) and as such whether the amendment is ultra vires the Constitution and whether from a reading of the other existing provisions of the said Act, after amendment, it can be construed that the accused has any right of defense. Further question may arise as to whether on a clear reading of the amended provision under challenge it can be construed as an isolated provision of law or to be construed as a provision to be read along with other provisions of the Negotiable Instruments Act 1881. Thus we will concentrate our discussion only on this point upon brushing aside all other arguments advanced by the parties.

31. In order to appreciate the respective arguments so advanced to that effect we need to see the background of the enactment of the Negotiable Instruments Act and incorporation of section 138 therein. Section 138 of the Negotiable Instruments Act was firstly enacted in 1881 which remained in force even after the partition between Pakistan and India though time and again India amended the said provision suiting their own benefit. In 1988 India went for further amendment of the same. But till 1994 Bangladesh continued with the same provision of law which was enacted originally in 1881. In 1994 the Legislature in Bangladesh incorporated Chapter XVII in the Act in the form as it was amended by India in 1988. Consequent to the said amendment any cheque, for the purpose of

meeting/discharging any debt or liability wholly or partly, if dishonoured, was considered to be a dishonoured cheque within the purview of section 138 and the drawer of such cheque was made responsible to have committed an offence under Section 138 of the Act. However, cheque, which was obtained either by duress or coercion or by way of steeling/theft, or issued not for the purpose of meeting any debt or liability, would not come within the mischief of Section 138. Later in 2000 the Legislature came up with the impugned amendment which is under challenge in these Rules. To get a clearer picture let us see Section 138 both prior and post amendment of 2000, which reads as follows:

Prior to amendment of section 138 as it was before 2000, runs as under:

> **" 138. Dishonour of cheque for insufficiency , etc of funds in the account-** *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person form out of that account [for the discharge in whole or in part of any debt or other liability] is returned by the bank unpaid , either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to [twice] the amount of the cheque , or with both.*
>
> *Provided that nothing contained in this section shall apply unless-*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice , in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
>
> ***Explanation-*** *For the purpose of this Section, " debt or other liability" means as legally enforceable debt or other liability"*

After the impugned amendment made in 2000 section 138 reads as follows;

> **"138. Dishonour of cheque for insufficiency, etc. of funds in the account-. [1]** *Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account[…………] is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may extend to one year , or with fine which may extend to [thrice] the amount of the cheque , or with both.*"
>
> Provided that ....
>
> (a) ....
>
> (b) ....
>
> (c) ....
>
> (IA)...
>
> (a)...
>
> (b)..
>
> (c) ....
>
> (2)...
>
> (3) ...."

32. Vide the impugned amendment the Legislature having deleted the words '<u>for the discharge in whole or in part, of any debt or other liability</u>' and also having deleted the whole of the "Explanation' took away the circumstances under which a cheque issued for a particular purpose, if dishonoured, would come within the mischief of section 138 i.e. previously, the cheque which was issued only for

the purpose of discharging the debt or liability wholly or partly of any enforceable debt or liability if dishonoured it fell within the mischief of Section 138. Whereas upon deletion of the aforesaid words, vide the impugned amendment, the position of section 138 has become such that any cheque, irrespective of 'for the discharge, wholly or partly, of any debt or liability or for no purpose, if dishonoured, the issuer/drawer of the cheque would fall within the mischief of section 138. The said amendment has been made by the Legislature with clear intention to bring all dishonoured cheques vulnerable within the mischief of that Section.

33. However, section 6 of the Negotiable Instruments Act, 1881 (in short, the Act), as referred by the petitioners, provides that a cheque is *"a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."* Section 8 of the Act defines the word 'Holder' as *"the holder of a promissory note, bill of exchange or cheque means the payee or indorsee who is in possession of it or the bearer thereof but does not include a beneficial owner claiming through a benamidar."* In the explanation of the said section it has been provided that *"where the note , bill or cheque is lost and not found again , or is destroyed , the person in possession of it or the bearer thereof at the time of such loss or destruction shall be deemed to be its holder."* Again, there may be other criteria as provided for in section 9 as to "Holder in due course" – it means *"any person who for consideration becomes the possessor of a promissory note , bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before it became overdue without notice that the title of the person from whom he derived his own title was defective ."* In the explanation of that provision it has been provided that *"for the purposes of this section the title of a person to a promissory note, bill of exchange or cheque is defective when he is not entitled to receive the amount due thereon by reason of the provisions on section 58."* Relying on these three provisions of law it has been argued that all cheques are not negotiable instruments if the same does not comply with the requirements of section 6, rather the same is a promissory note under section 4 of the Act; as such all holders or possessors of the cheques are not due holders or possessors under sections 8 and 9 of the Act.

34. In many of the cases the accused petitioners tried to convince this Court that some of the cheques are undated. For such non-mentioning of any date in the cheque the same are not negotiable instruments under the Act. It has further been submitted that a person, if, without any reason, handed over a cheque as security or not in exchange in course of any transaction for the purpose of discharging/meeting any debt or liability, then he is not a holder or possessor of the same within the meaning of "holder in due course" under sections 8 and 9 of the Act. Thus, such holder of a cheque cannot, under any circumstances, fall within the mischief of section 138 of the Act. Consequently, the issuer of the cheque should not be tried under section 138 of the Act if such cheque is dishonored for having obtained the same under duress or by fraudulent means including those which are lost cheques. In support of the said contention it has been argued that the issuer of such cheque had no intention to handover those cheques to the unauthorized holder or possessor. If that be allowed then anarchy will prevail and many persons having bank account will face similar difficult situations for no fault on their part. This contention is also supported by some of the learned amici curiae who also contended that in the absence of non obstante clause in section 138 the accused persons will find their right of defence as provided in sections 43, 58 and 118 read with Sections 4, 6, 8 and 9 of the Act of 1881.

35. In order to appreciate the aforesaid arguments let us first have a look at Sections 43, 58 and 118 of the Negotiable Instruments Act, which are quoted below:

> ***"43.*** **<u>Negotiable Instrument made, etc; without consideration</u>-** *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.*

Exception I- *No party for whose accommodation a negotiable instrument has been made, drawn, accepted or indorsed can, if he has paid the amount thereof, recover thereon such amount from any person who became a party to such instrument for his accommodation.*

Exception II- *No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed.”*

Section 58. **Defective title-***“58. When a promissory note, bill of exchange or cheque has been lost or has been obtained from any maker, drawer, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, neither the person who finds or so obtains the instrument nor any possessor or indorsee who claims through such person is entitled to receive the amount due thereon from such maker, drawer, acceptor or holder unless such possessor or indorsee is, or some person through whom he claims was a holder thereof in due course.”*

Section 118. **“Presumptions as to negotiable instruments of consideration-** *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 or transferred for consideration;

as to them;

(b)that every negotiable instrument bearing a date was made or drawn on such date;

as to time of acceptance;

(c) that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity;

as to time of transfer;

(d)that every transfer of a negotiable instrument was made before its maturity;

(e) As to order of indorsement that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon;

as to stamp;

(f)that a lost promissory note, bill of exchange or cheque was duly stamped;

that holder is a holder in due course;

(g) that the holder of a negotiable instrument is a holder in due course: provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof ,by means of an offence or fraud, or has been obtained from the maker or acceptor by means of an offence or fraud, or for unlawful consideration ,the burden of proving that the holder is a holder in due course lies upon him.”

36. On a close scrutiny of the aforesaid provisions, it appears that section 43 contains a specific word ‘consideration’. The literal meaning of the term ‘consideration’ is ‘pursuant to something’ which might be pursuant to an ‘agreement’ or pursuant to an “act” or “deed” being legally enforceable. Thus, vide section 43 when a negotiable instrument is made, drawn, accepted, endorsed or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. If that be so, any cheque, if dishonored by the bank, under such circumstances, will not attract section 138 of the Act. As such, the specific criteria for the purpose of filing of a case under section 138 is whether there is consideration; which is a vital question to be looked into for trial and conviction.

37. Again, vide section 58 of the Act any cheque, which is lost or has been obtained by duress, if dishonoured, cannot / shall not constitute any offence under section 138 of the Act and any holder of such cheque, who is not a meaningful holder as defined in sections 8 and 9, shall not be entitled to invoke section 138.

38. Conversely, on perusal of section 118 of the Act of 1881, it appears that until the contrary is proved, it will be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated or transferred for consideration. Section 118(g), however, provides that the holder of a negotiable instrument is a holder in due course; provided that where the instrument has been obtained from its lawful owner, or from any person in <u>lawful custody</u> thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor by means of an offence or fraud , or <u>for unlawful consideration</u>, the burden of proving that the holder is a holder in due course lies upon him .

39. Having minutely going through all the aforesaid provisions of the Act, which have not yet been disturbed by any amendment, it appears that Negotiable Instruments Act 1881 in its various provisions have categorically spelt out what is a negotiable instrument; how the negotiable instrument is issued and such instrument, if issued, then who is the holder or possessor of it and what should be taken into consideration for the purpose of determination whether the cheque is a negotiable instrument and whether the issuer of the cheque is a lawful owner as well as the holder or possessor of the same is also a lawful possessor or holder of the cheque. Last, but not the least, the Act, as a whole, provides that under the Act one can determine whether the cheque is issued for consideration. It is clear from the aforesaid provisions that the Act itself has clearly provided the sequences to determine when and what kind of cheque, if dishonoured, will fall within the mischief of section 138 and what should be the consequences of it.

40. On a careful reading of section 138, it appears that the same has not been incorporated as a special provision in the Act. Rather the same has been incorporated as a general provision similar to other provisions of the said Act. Since it is a general provision similar to other provisions of the Act without incorporating “non-obstante” clause, it can be construed that the other provisions of the Negotiable Instruments Act 1881 shall also be applicable in construing whether any offence has been committed under section 138 of the said Act. So, it is abundantly clear that had section 138 of the Act of 1881 been started with “Notwithstanding anything contained in any other provision of this Act” then it could have placed a different scenario. Since no such ‘term’ has been provided in the said provision by the impugned amendment, the offence, alleged to have been committed under Section 138 of the said Act, is to be tried upon giving opportunity to the accused to defend himself in the light of the provisions as contained in sections 4,6,8,9,43,58 and 118 of the Negotiable Instrument Act, 1881 as a whole. Some of the learned Advocates for the petitioners, argued that the said defence is not allowed by the trial court rather on the face of a cheque being dishonored, conviction is awarded upon the issuer, which according to the above discussion is not the correct appreciation of law.

41. On a comparative reading of the pre-amended and post-amended provision of section 138 and upon hearing all the learned Amici Curiae it is apparently clear that by the impugned amendment the scope of meaningful defence, which is the fundamental right as enshrined guaranteed in Article under 27 of the Constitution providing ‘all citizens are equal before law and are entitled to equal protection of law’ has been circumscribed rather has been taken away, which is also contrary to Article 31 of the Constitution which provides that ‘ every citizen has right to enjoy the protection of law, and to be treated in accordance with law and only in accordance with law is the inalienable right of every citizen’. Similarly, Article 35(3) of the Constitution provides ‘Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law’. We have also perused Article 8 and other Articles of the Constitution and considered its scheme, as submitted by the learned Amicus Curiae Mr. M. Amirul Islam and in view of the fact that since the amendment has not provided adequate opportunity of taking defence, from that score the submissions regarding the unconstitutionality of the impugned amendment has substance.

42. Having regard to the position of law, as quoted above, and the submissions of all the learned advocates including the Amici Curiae it appears that if the trial Court does not allow the accused petitioner to take meaningful and adequate defence on a matter arising out of such cheques in the

light of sections 4,6,8,9,43,58 and 118 of the Act, as mentioned above, then the right of defence, which is a fundamental right of each and every citizen could become meaningless. However, section 138 cannot be read in an isolated manner and since the same is not an absolute provision, rather is similar to other provisions of the Negotiable Instrument Act 1881, we need to give a harmonious interpretation of the same which clearly goes to indicate that the accused person(s) is/are entitled to take any plea of meaningful defence. In view of the above observations and finding we are not inclined to declare the impugned amendment unconstitutional as section 138 is to be read with other provisions of the said Act and trial Court has ample power to allow the accused to take any defence as provided for under sections 4, 6, 8, 9, 43, 58 and 118 of the said Act. In the case of ***Md. Arif Uz Zaman, Vs. State and another,*** reported in ***8 ADC 975*** while giving sanction to the question of "right of defence" their lordships of the Appellate Division observed *" however, if a holder or the payee gets hold of a dishonoured cheque by fraudulent means or forgery, the drawer of the cheqeue shall have the liberty to take such defence during the trial".* Thus in the light of the said observation, we also hold that the complaint petition should contain the circumstances of obtaining such cheque and reasons for issuing such cheque by the issuer so that the accused can take a meaningful defence/ stand at the trial under all circumstances. However, even in the absence of any such statement in the complaint petition there is no embargo under the Act, to take any defence by the accused person in the light of sections 4, 6, 8, 9, 43, 58 and 118 of the Act and that the trial court shall give the accused persons adequate opportunity to take any such defence during the course of trial.

43. From the discussions made hereinabove, since we found that section 138 of the Negotiable Instruments Act is not an isolated enactment and since the same does not contain "*non-obstante*" clause, as such, the same is to be read along with other provisions of the said Act. In that view of the matter when the trial commences, the said Act entitles the accused person to take any defence in the light of sections 4, 6,8,9,43,58 and 118 of the said Act. Therefore, we do not find any reasons /necessity to declare the impugned amendment unconstitutional, *ultra vires* or illegal.

44. Accordingly, all the Rules are disposed of with direction upon all the learned Sessions Judges/Metropolitan Sessions Judges/Special Judges/Joint Sessions Judges/ Assistant Sessions Judges and Judicial Magistrates, to commence and /or to continue with the trial of all the cases filed or pending before them under section 138 of the Act of 1881 and dispose of the same in accordance with law upon giving adequate opportunity of meaningful defence to the accused persons, in the light of the provisions as contained in sections 4, 6, 8, 9, 43, 58 and 118 of the Negotiable Instrument Act, 1881. In this respect, all the aforesaid Courts are hereby directed to enable the accused person to adduce evidence, if any, in the light of his defence, if taken, pursuant to the above provisions of the Act.

45. Stay granted earlier stands vacated.

46. Before parting with this judgment we express our gratitude to all the Senior Advocates, who appeared as Amici Curiae in these cases and rendered their services which has led us to come to the above conclusion.

47. Office is directed to communicate this judgment and order in advance to all the Sessions Judges, Metropolitan Sessions Judges, Special Judges, Joint Sessions Judges, Assistant Sessions Judges and Judicial Magistrates to do the needful accordingly in all the cases under section 138 of the Negotiable Instrument Act, 1881.

48. However, there will be no order as to costs.