

Case Review:

Extension of the Limitation for Legal Proceedings by the Appellate Division in *Fazlul Hoque v. Grameen Phone Limited*.

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The COVID-19 lockdown put legal systems around the world under a lot of strain. In Bangladesh, pursuant to a notification issued by the Registrar General of the Supreme Court, all courts in the country were closed from 29 March 2020. The backlog of cases already large, began to increase. However, like courts in most countries, the courts of Bangladesh quickly moved on to an online platform. Initially “Microsoft Meetings” was used, but then the courts chose to operate on “Zoom” which although more user friendly was less secure. To facilitate online court proceedings, the President promulgated the “Use of Information and Communication Technology by Courts Ordinance, 2020”. This Ordinance not only allowed the courts to operate on online platforms but by a deeming clause included virtual presence within the definition of physical presence. This had important implications, particularly in cases of anticipatory bail, where the accused is required to surrender before the High Court Division and be physically present before the judges.

By the middle of 2020, it became apparent that COVID-19 had begun to affect legal proceedings in another major way. With limited opportunities for filing during the lockdown, the limitation for initiating legal proceedings were running out. Whilst section 5 of the Limitation Act, 1908, provided scope for condoning the delay if sufficient cause could be shown, there were many other legal remedies under special laws such as the Administrative Tribunals Act, 1980, where the delay could not be condoned by the courts (see *Giasuddin Ahmed v. Serajul Islam* 6 Mainstream Law Reports (Appellate Division) 173). Many litigants had been non-suited and there was a looming possibility that many more would be prevented from raising their grievances before the courts. Thus, by an interim order passed on 6 August 2020 in *Fazlul Haque Sarder v. Grameen Phone Limited* (reported in 74 Dhaka Law reports (Appellate Division) page 63), the Appellate Division ordered that “any period of limitation in filing petitions/applications/suits/appeals/revisions/all other proceedings, civil, criminal or administrative, under general or special laws, which expired on or after 26 March 2020 stands extended till 31 August 2020.” This order was purportedly passed under the Appellate Division’s power to do complete justice under Article 104 of the Constitution. The short two-page order was later incorporated into the main judgment passed on 17 December 2020.

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When the lockdown was reintroduced in April 2021, the Appellate Division by another order dated 17 August 2021 in Civil Petition No 2151 of 2020 extended the limitation for proceedings which expired on or after 5 April 2021 up to 31 August 2021. These orders were passed relying on a similar order of the Supreme Court of India passed on 23 March 2020 in *Suo Motu Writ Petition (Civil) No. 3 of 2020*. The orders extending the period of limitation were no doubt beneficial pieces of judicial legislation. It preserved the litigants right to proceed with legal action, which would otherwise have expired during the lockdown. Yet, it violated a number of legal principles that the Supreme Court has developed over the years.

Firstly, the Appellate Division misconstrued its powers to do complete justice under Article 104 of the Constitution. The power under Article 104 has been granted for “doing complete justice in any cause or matter *pending before it*”. Thus, the Appellate Division did not have the jurisdiction under Article 104 to extend the limitation period of legal proceedings in causes or matters which were not pending before it or which had not yet been initiated. It had exceeded its jurisdiction by passing a general order affecting all proceedings irrespective of whether they were being litigated before the Appellate Division. Moreover, the power to do complete justice granted under Article 104 does not confer any new jurisdiction to the Appellate Division, but only gives the power to the Appellate Division, where it already has such jurisdiction (*Naziruddin v. Hamida Banu*, 45 Dhaka Law reports (Appellate Division) 38). Only if “substantial justice under the law and on undisputed facts can be made out” such power may be exercised. The Appellate Division, nor any court in Bangladesh has the authority to extend statutory limitation periods provided for under special laws. Yet, this is exactly what it did in *Fazlul Hoque v. Grameen Phone Limited*. It was not that the Appellate Division was not aware that it lacked the powers to extend the limitation periods of legal proceedings in a wholesale manner. In fact, it was very much conscious of the fact that “the existing laws do not give any Court or Tribunal the authority to extend the period of limitation provided under any special law.” And yet it chose to “overlook the niceties of the existing laws for the sake of justice.” The Appellate Division was also not developing the law or laying down a judicial principle, it was responding to an emergent situation in a manner that was not legally sound.

Secondly, the order of the Appellate Division violated the doctrine of separation of powers, which arguably constitutes one of the basic features of the Constitution. Where the period of limitation has been fixed by legislation by Parliament, the Appellate Division does not have the authority to change this period unless empowered by Parliament (as in section 5 of the Limitation Act, 1908). However, the Appellate Division by its judgment amended and extended the period of limitation set by Parliament in a number of special laws, although no such powers were granted to the Appellate Division. This was a clear usurpation of the jurisdiction of Parliament. Article 104 should not be seen as a source of power for amending legislation passed by Parliament. What is most concerning is that the Appellate Division was aware that it was usurping the power of the legislature. This is apparent when it observes that “the law makers did

not and could not have foreseen such calamitous act of God. Our laws on limitation cannot be expected to cover this kind of uncertainty.” Thus, the Appellate Division legislated, because in its opinion our legislature had failed to do so because of lack of foresight.

Thirdly, and perhaps more worryingly, no legal reasons or justifications are offered on basis of previous judicial precedents to justify the judgment in *Fazlul Haque Sarder v. Grameen Phone Limited*. There is only a reliance on the order of the Indian Supreme Court which too is devoid of reasons and legal precedents. Earlier, when the Appellate Division applied its powers to do complete justice it relied on established equitable principles to grant relief to the parties. However, here the Appellate Division made no attempt to identify or discover whether any past precedents exist that could justify the position adopted by it.

So, what should have been the correct approach? As already noted above, very little legal research seems to have been done into the matter. Also, the order is another example of our Supreme Court’s overreliance on Indian jurisprudence (even when it is not well-reasoned). The Appellate Division noted that it was furnished with details of how the UK, the USA, Canada, India, Sri Lanka, Spain and Italy had dealt with the issue. But there is no discussion in the judgment of their methods. A number of states in the United States had enacted legislation to extend the period of limitation. The Province of Ontario too had enacted legislation to deal with expiry of limitation period during the lockdown. And this should have been the approach in Bangladesh. There is precedent for this in Bangladesh. During the liberation war, many claims and legal rights had become time-barred. Thus, after liberation, the Bangladesh (Legal Proceedings) Order, 1972 (President’s Order No. 12 of 1972) was promulgated on 6 February 1972 to exclude the period between the 1 March 1971 and 1 March 1972 in computing the period of limitation in all legal proceedings. This was necessary as the recital to the President’s Order notes because of the “reign of terror perpetrated by the Pakistan occupation Army people were not able to go to Court or Tribunals either to institute legal proceedings or to defend them.” Unfortunately, this piece of legislation was neither put forward by the Bar, nor considered by the Appellate Division. Had it been considered by the Appellate Division, it may have adopted a different course of action. The Appellate Division could have indicated to the legislature that an emergency legislation in this regard was necessary. This would have been a legally sound approach, and one rooted in past precedent.

The Appellate Division failed to realise that the institution was not capable of dealing with emergent situations. Courts rely heavily on judicial precedents for their legitimacy. And judicial precedents will not be able to deal with rapid changes in society. Further as the constitutional commentator, Mahmudul Islam notes that while interpreting law “the judiciary cannot create a new law or amend an existing law, which will be offensive as a judicial legislation.” Unfortunately, the judgment in *Fazlul Haque Sarder v. Grameen Phone Limited*, though beneficial, is a piece of judicial legislation. If not limited strictly to the circumstances in which it was passed, it may have far reaching consequences.