

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Nuruzzaman
Mr. Justice Borhanuddin
Ms. Justice Krishna Debnath

CIVIL APPEAL NO. 123 OF 2008

(From the order dated 05.08.2007 passed by the Appellate Division in Civil Petition for Leave to Appeal No.1615 of 2004)

People's Republic of
Bangladesh represented by the
Deputy Commissioner, Gazipur
and others : Appellant

=VERSUS=

Md. Idris Ali and others Respondents

For the appellants :Mr. Md. Jahangir Alam,
Deputy Attorney General,
instructed by Mr.
Haridas Paul, Advocate-
on-Record

For the Respondents :Mr. Minal Hossain,
Advocate-on-Record

Date of hearing and :The 30th August, 2022
judgment on

J U D G M E N T

MD. NURUZZAMAN, J:

This Civil Appeal, by leave, has arisen
out of the order dated 05.08.2007 passed by the

Appellate Division in Civil Petition for Leave to Appeal No.1615 of 2004 dismissing the same being time barred.

Facts leading to filing of this civil appeal, in short, are that the Civil Rule No.187(F) of 1998 arose out of a petition filed by the petitioners under section 5 of the Limitation Act for condonation of delay of 845 days in presentation of Memorandum of appeal before the High Court Division.

The High Court Division made the Rule absolute and condoned the delay of 845 days by order dated 27.05.2003 with a direction to pay a cost of Tk.1,000/- (one thousand) only to respondents within 1(one) month and to produce before the Court the relevant receipt and other documents evidencing payment of the same. There

was, however, a default clause in the order that in the event of any default to pay the said amount within the stipulated time, the Rule would stand discharged.

Although the petitioners paid the aforesaid amount of Tk.1,000/- to the respondents by Challan No.12146 dated 07.06.2003 but due to inadvertence it was not produced before the High Court Division in time. The High Court Division, therefore, by the order dated 06.07.2003 treated the aforesaid Rule discharged for non-compliance of its order dated 27.05.2003. As a result, the aforesaid first appeal filed before the High Court Division by the petitioners could not be registered being barred by limitation.

In this background of the case, the petitioners filed a petition before the High Court Division with a prayer for recalling the aforesaid order dated 27.05.2003 stating that the petitioners in fact deposited the aforesaid amount within time by Challan No.12146 dated 07.06.2003 but inadvertently the same could not be produced in Court in time leading to discharge the Rule. But the High Court Division rejected the said petition by the order dated 22.08.2004.

Feeling aggrieved by and dissatisfied with order dated 22.08.2004 passed by the High Court Division, the petitioners preferred the Civil Petition for Leave to Appeal No.1619 of 2004 before this Division but there was a delay of 11 days in filing the same. The petitioners,

accordingly, filed a petition for condonation of delay. But this Division by the impugned order dated 05.08.2007 refused to condone the delay and dismissed the Civil Petition.

Feeling aggrieved by and dissatisfied with the order dated 05.08.2007 passed by this Division, the petitioners filed the Civil Review Petition No.15 of 2008, which gave rise to the instant Civil Appeal.

Mr. Md. Jahangir Alam, the learned Deputy Attorney General appearing on behalf of the appellants submits that the reasons of delay in preferring the Civil Petition for Leave to Appeal No.1615 of 2004 had sufficiently explained, thus, the Hon'ble Court have condoned the delay and granted leave to the appellants. He further submits that the suit

filed by the plaintiff respondents being a suit for mere declaration of title and the suit land being forest land under the possession and control of the Forest Department, a mere decree for declaration of title being in executable, the High Court Division erred in not allowing the petition for recalling the default order when in fact there was no default. He finally submits that in the background of the case as stated above, this Court erred in failing to condone the delay and consider the Civil Petition for Leave to Appeal at least for doing complete justice in exercise of its power under Article 104 of the Constitution and, as such, the impugned judgment and order of the High Court Division is liable to be set aside.

Hence, the instant appeal may kindly be allowed.

Mr. Minal Hossain, the learned Advocate-on-Record appearing on behalf of the respondents made submissions in support of the impugned order of the High Court Division.

We have considered the submissions of the learned Advocate and the learned Advocate-on-Record for the respective parties. Perused the impugned order of this Division and other materials on record.

Prior to entering into the nobility of the appeal, it would be relatable to get through the grounds, for which, leave was granted. The grounds are quoted below:

"Mr. Munsur Habib, learned Additional Attorney General submits that the reasons

for delay in preferring the petition for leave to appeal were sufficiently explained, this court ought to have condoned the delay and granted leave to the petitioners. He also submits that the suit filed by the plaintiff respondents being a suit for mere declaration of title and the suit land being forest land under the possession and control of the Forest Department, a mere decree for declaration of title being in executable, the High Court Division erred in not allowing the petition for recalling the default order when in fact there was no default. He lastly submits that in the background of the case as stated above this court erred in failing to condone the delay of 11 days

and consider the civil petition for leave to appeal at least for doing complete justice in exercise of its power under Article 104 of the Constitution."

We will weigh up the materials on record as to whether judgment and order of High Court Division is justified or erred which calls for interference by this Division.

Truly, condoning the delay of 845 days the High Court Division made the original Rule absolute by order dated 27.05.2003 with a direction to pay a cost of BDT 1,000 (one thousand) only to the respondents within 01 (one) month and to produce before the Court the related receipt and other documents evidencing payment of the same. However, there was a mandatory direction with default order in the

order that in the event of any default the Rule would stand discharged.

It'll be appreciable enough quoting the relevant portion of the order underneath:

"In the fact and circumstances of the case while allowing the petition on condonation of delay, we direct Appellant-petitioners to pay Taka 1,000/- (One Thousand) to Respondents-Opposite Parties shall produce before this court a document manifesting payment of Taka 1,000/- to Respondent-Opposite Parties within one month. In default of payment of Taka 1,000/-this Rule shall stand discharged."

As the present appellant failed to comply with the order, the Rule was discharged. Then

the present appellants herein as petitioner unsuccessfully lodged the impugned recall petition and the High Court Division rejected the same stating that-

"In the order date 27.05.2003 the word "shall" had been used. There is a distinction between the words "shall" and "will" when in an order, the word "shall" is used, the order reached to its finality and no further is required to be passed for its finality. This Court having recorded the order in the epithet that "in default of payment of Taka 1,000/- this Rule shall stand discharged" it became *functus officio* to pass any

further order like recalling the order dated 27.05.2003.

This take as to another fundamental aspect of the matter. The order had been passed on 27.05.2003 and note in respect to the discharge event and been made on 06.07.2003. But the petition for recalling the order in dated 19.06.2004, Petitioners slept and slept and rose to the occasion after a period of long one (1) year. This is the demonstration of unpardonable latches and shocking negligence on the part of the petitioners and the learned Assistant Attorney General representing the petitioners."

Under the circumstances we concur with the High Court Division that after passing the standing order it became *functus officio*, as such, cannot recall its order lawfully. At the same time we too don't find any error apparent on the face of the record or clerical mistake or mistake apparent on the face of the record that can be corrected by the leave in the impugned judgment and order of this Division as the same was dismissed as barred by limitation.

However, though there was nothing legally incorrect in the impugned judgments and orders of both of the Divisions of the Supreme Court of Bangladesh, nevertheless, it is easily understandable that justice has been defeated in this whole process.

It is found that the cost amount was paid as directed within stipulated time, however, the present appellant failed to produce before the High Court Division the documents manifesting payment of sum. It is simply a fault of the engaged Counsels of the appellant. It is an established principle of administration of justice that parties should not suffer for the laches and negligence of their engaged Advocates. In this point this Division earlier observed in the case of Swami Joytirghananda vs. Deputy Commissioner, Khulna and others reported in 28 DLR(AD) (1976) 158 that -

"No attempt was made on behalf of the respondent either before the High Court or here to controvert the truth

of the statements made by the appellant explaining the failure of the appellant's Advocate to appear before the High Court at the time when the matter was called on for hearing. The discretion appears to have been exercised by the learned Judges or an entirely extraneous consideration and as such it is manifest that the order was not lawfully passed. Learned Attorney-General has not seriously disputed the contention of the learned Advocate appearing on behalf of the appellant but has submitted that the Court should take notice of the fact that a growing lack of the sense of responsibility has become a

regrettable feature of the present day legal profession and some steps should be taken to arrest the gradual decline of the standard of this noble profession. We may only point out that it is true that no court can efficiently function except with the responsible co-operation of the Bar, but this is a matter which concerns the members of the Bar themselves more than anybody else. The Court is to give its decision on the merits of an individual case."

In the case of Government of the People's Republic of Bangladesh, Ministry of Works and others vs. Mr. Alauddin reported in 2001 21 BLD (AD) 35 this Division observed that-

"As litigant the Government stands on the same footing with ordinary litigants, yet considering the difficulties of the Government in various stages we take sympathetic and lenient view and allow condonation of delay of Government cases in many cases."

Moreover, as per submission of the learned Deputy Attorney General in this civil suit there involves some serious question of facts as well as law regarding title of the suit land between government and private parties as the suit filed by the plaintiff-respondents being a suit for mere declaration of title and the suit land being forest land under the possession and control of the Forest Department, a mere decree

for declaration of title being in executable. Though we are not inclined to go through the very merit of the original suit, however, our considered view is that parties should get a fair chance to establish their right-title-interest over the suit land at length.

In the case of A.F.M. Naziruddin vs. Mrs. Hameeda Banu reported in 1992 12 BLD (AD) 261 Appellate Division observed that-

"Considering the vagaries of legal proceedings and the technicalities involved in adjudication, Art 104 of the Constitution has invested, as a measure of abundant caution, the last Court of the country with wide power, so it may forestall a failure of justice and do complete justice in an

appropriate case. It is an extraordinary procedure for doing justice for completion of or putting an end to a cause or matter pending before this Court."

With reference to the higher public interest this Division observed in the Civil Petition For Leave To Appeal No. 1529 OF 2020 that:

"In addition, it is a revenue generating issue of the state. Public and higher State interest cannot be defeated for the sake of misleading subordinate legislation and procedural glitches. If these are the situations, as the highest court of the land, we opine that the Appellate Division

should invoke its mandate under article 104 of the Constitution of Bangladesh for doing complete justice for the national interest In this view of the matter, we are, therefore, of the considered view that if we don't allow the appeal considering the vagaries of legal proceedings and the technicalities involved in adjudication as mentioned above it will be a total fiasco of justice."

Consequently, in the backdrop avowed above, we decide to condone the delay of 11 days and consider the Civil Petition for Leave to Appeal at least for doing complete justice in exercise of its power under Article 104 of the Constitution.

Accordingly, we find merit in submissions of the learned Deputy Attorney General for the appellant.

As a result, the appeal is allowed without any order as to cost. The earlier judgment of this Division is reviewed. The impugned judgments and orders of the High Court Division dated 06-07-2003 and 22-08-2004 treating the Rule is discharged and refusing its recalled the said order respectively are hereby set aside. The High Court Division is directed to hear the motion on merit.

J.

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The 30th August, 2022
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