In the Supreme Court of Bangladesh

High Court Division

(Special Original Jurisdiction)

Writ Petition No. 4611 of 2020

In the matter of:

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

-And-

In the matter of:

A.K.M Asiful Haque

..... Petitioner [in person]

-Versus-

Secretary, Law and Justice & Division, Ministry of Law, Justice & Parliamentary Affairs, Government of the People's Republic of Bangladesh, Bangladesh Secretariat. Shahabagh, Dhaka and others

.....Respondents

Mr. A.K.M Asiful Haque, Advocate

.....for the Petitioner [in person]

Mr. A.M Amin Uddin, Attorney General with
Mr. Dr. Md. Bashir Ullah, D.A.G
Mr. Mohammad Shaheen Mirdha, A.A.G and
Ms. Farzana Rahman Shampa, A.A.G

.....for the respondents

Present:
Mr. Justice Jahangir Hossain
And
Mr. Justice Md. Badruzzaman

Order dated 25th November, 2020

The aforesaid writ petition has been presented before this Court by the petitioner under Article 102 of the Constitution of the People's Republic of Bangladesh challenging the enactment namely, **"আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০"** passed by Bangladesh Jatiya Sangsad being Act No. 11 of 2020 published in the Bangladesh Gazette on 09th July, 2020 with immediate effect.

In the writ petition, the petitioner has stated that he is a practicing lawyer of the Supreme Court of Bangladesh and conducted so many cases including public interest litigations in his past practice life. When the entire world was facing infection of COVID-19 and the pandemic situation was gradually increasing, the present government has taken some measures instantly to bring the virus under control within the country. The Government had also declared to the officials as well as students of school, colleges to remain in their respective houses so that the virus did not spread among the people of the country any more. Under such circumstances, the Supreme Court of Bangladesh along with the sub-ordinate courts including tribunals were closed by the general order of the Hon'ble Chief Justice of Bangladesh following the government's measures taken earlier.

It is further stated in the petition that during the vacation of the Supreme Court of Bangladesh as approved by the Full Court, and pandemic situation, the Hon'ble Chief Justice of Bangladesh by exercising his sole and unquestionable authority has formed one vacation bench for each Division of the Supreme Court of Bangladesh for conducting urgent matters which was informed to all connected Officials by the respondent No.06 through notification No. 204 dated 23.04.2020.

Thereafter, while the Jatiya Sangsad was not in its session the respondent No.2 [Secretary, Legislative and Drafting Division, Ministry of Law, Justice and Parliamentary Affairs] prepared an ordinance for promulgation by the Hon'ble President of the Republic which was approved by the Cabinet Meeting on 07.05.2020 and the same was

placed before the Hon'ble President under the provision of Article 93(1) of the Constitution of the People's Republic of Bangladesh [in brief, the Constitution]. The Hon'ble President promulgated the ordinance as Ordinance No. 1 of 2020 on 09.05.2020 for মামলার বিচার (trial), বিচারিক অনুসন্ধান (inquiry), বা দরখাস্ত বা আপীল শুনানী, বা সাক্ষ্য (evidence) গ্রহন, বা যুক্তিতর্ক (argument) গ্রহন, বা আদেশ (order) বা রায় (Judgment) প্রদানকালে পক্ষগনের ভার্চুয়াল উপস্থিতি নিশ্চিত করিবার উদ্দেশ্যে আদালতকে তথ্য-প্রযুক্তি ব্যবহারের ক্ষমতা প্রদানের নিমিত্ত বিধান প্রনয়নের লক্ষ্যে প্রনীত অধ্যাদেশ." The said ordinance was printed and published by the respondent Nos. 4 and 5 on the same day in Bangladesh Gazette (Extra) for information of all concerns [Annexure-A].

Pursuant to the provision under section 5 of Ordinance No.1 of 2020, the Hon'ble Chief Justice, with the approval of the Full Court meeting, on 10.5.2020 circulated some practice directions through respondent No.6, the Registrar General of the Supreme Court of Bangladesh, which was published vide Notification No. 213 dated 27th Boishakh, 1427 B.S corresponding to 10th May 2020 A.D [Annexure-D] to be followed by the High Court Division while conducting court proceedings remotely through video conferencing.

Thereafter, the Hon'ble President issued summons upon the parliament for a National Budget which began on 10.06.2020. On that date the aforesaid ordinance was placed as a Bill before the Jatiyo Sangsad without any significant change of the provisions under Ordinance No.1 of 2020 for consideration of the Hon'ble Members of the Parliament to be enacted without any recommendation of the Hon'ble President as well as without bearing any certificate under the hand of the Hon'ble Speaker to the effect that the same as a Money Bill. On the

same date, the Bill was sent to the Parliamentary Standing Committee for Law, Justice and Parliamentary Affairs by the Hon'ble Speaker of Jatiyo Sangsad for its scrutiny.

Thereafter, the Bill was placed on 09.07.2020 with the approval of the Parliamentary Standing Committee through the Hon'ble Speaker before the Jatiyo Sangsad with its object and preamble under the name and style **"মামলার বিচার (trial), বিচারিক অনুসন্ধান (inquiry), বা দরখাস্ত বা আপীল শুনানী বা সাক্ষ্য (evidence) গ্রহন, বা যুক্তিতর্ক (argument) গ্রহন, বা আদেশ (order) বা রায় (Judgment) প্রদানকালে পক্ষগনের ভার্চুয়াল উপস্থিতি নিশ্চিত করিবার উদ্দেশ্যে আদালতকে তথ্য-প্রযুক্তি ব্যবহারের ক্ষমতা প্রদানের নিমিত্ত বিধান প্রনয়নকল্পে প্রনীত আইন."** And the same was passed through "কন্ঠ ভোট" at the Jatiyo Sangsad presided over by the Hon'ble Speaker on the same day. The Hon'ble President of the Republic then assented the said enactment (Act 11 of 2020) on 9.07.2020 and the said Act was printed and published by the respondent Nos. 4 and 5 in the Bangladesh Gazette on the same day for information of all concerns [Annexure-B].

It is further stated that in the object and preamble of the impugned enactment, includes the Appellate Division and the High Court Division which does not transact its function for মামলার বিচার (trial), বিচারিক অনুসন্ধান (inquiry), বা দরখাস্ত বা আপীল শুনানী, বা সাক্ষ্য (evidence) গ্রহন বা যুক্তিতর্ক (argument) গ্রহন, বা আদেশ (order) বা রায় (judgment) প্রদান করন." and those functions are performed by the sub-ordinate courts which have been established under the provision of Civil Court Act, 1887. The court has been established under the provision of section 6 of the Code of Criminal Procedure as stated in its definition clause which is sub-ordinate to the High Court Division.

The Supreme Court's Appellate Division and the High Court Division are not considered to be included as 'adalot'. In the impugned legislation (Act 11 of 2020) the Supreme Court's Appellate Division and the High Court Division have been included as 'adalot' like all sub-ordinate courts which completely degraded the status of the highest court of the country.

The aforesaid bill was badly drafted by the respondent No.2 because of the fact that he treated the Appellate Division and the High Court Division at par with the ordinary courts as ‘adalat’ in the definition clause of section 2(i)(kha) of the impugned Act which is misconceived one and it seems that the respondent No.2 did not use his expertise while drafting the said Bill which later became the Act as mentioned above. And as such, the impugned enactment namely "আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০" being inconsistent with the provisions under Articles 94 and 152(1) of the Constitution is liable to be declared to have been made without lawful authority.

This Act as well as Practice Directions are also hit by the provisions of Article 35(3) of the Constitution. The said enactment also suffers from a lack of authority of the Legislative Parliament and is also hit by Articles 81(1)(c), 81(1)(e), Article 81(3) and Article 82 of the Constitution of the People's Republic of Bangladesh.

In support of the petition Mr. A.K.M Asiful Hoque, learned advocate has appeared in-person and contends that the enactment in question was passed without proper scrutiny of the proposed Bill by the Parliamentary Standing Committee. The said Act was passed without

any significant change of any provision of the earlier Ordinance. Mr. Asiful Hoque further submits that since it was a Money Bill there should have been recommendation by the Hon'ble President of the Republic and a certificate was also required by the Hon'ble Speaker before sending the same for the assent of the President. It is further contended that the Parliament by passing this Act degrades the status of the Supreme Court of Bangladesh having included the same in the definition of "adalat" because it runs under Article 94 of the Constitution and not by any Act passed by the Parliament. So in the definition clause of section 2(1)(kha) of the impugned Act 11 of 2020 within the meaning of 'Adalot' is totally inconsistent with the Constitution of the Peoples Republic of Bangladesh. It is further submitted that though it was purely a Money Bill but authority placed it before the Parliament as General Bill as appears in the object and preamble of the Bill. Practice Directions as circulated by the respondent No. 06 [Register General] are not consistent with the High Court Division Rules. He further contends that justice is to be done under the performance and functions of the open court but virtually it does not happen and as such, the impugned enactment in question is liable to be declared to have been made without lawful authority. In support of his arguments, Mr. A.K.M Asiful Hoque has pointed out some laws enacted earlier by submitting photocopies of Artha Rin Adalat Ain, 2003, Dewliya Bishayak Ain, 1997, The Bangladesh Telecommunication Control Act, 2001, Tattha Adhikar Ain, 2009, Pornography Niyantran Ain, 2012 and The Censorship of Films Act, 1963 thereof.

On the contrary, Mr. A.M Amin Uddin, the learned Attorney General appearing for the respondents opposes to issue Rule and submits that the Act 11 of 2020 was passed by the Parliament on 09.07.2020 as a historical one. This Act has enabled the Courts to remain in function virtually in the absence of physical appearance and the virtual present would be treated as physical presence. Intention of the legislature in making the Act in question is to help the litigants during the pandemic situation of COVID-19. This Act in question is applicable all over the country in the dispensation of judicial functions and by making this Act it brings the people to consume lesser time and money and it is nothing but an extension of regular court during any pandemic situation. Learned Attorney General further contends that the Supreme Court runs under the provision of the Constitution but by promulgating this Act the legislature has given the courts additional power to adjudicate cases of the litigants through video conferencing. There was no wrong with the Practice Directions circulated by the respondent No. 06 with the approval of the High Court Division of the Supreme Court of Bangladesh. The definition of Money Bill as provided under Article 81 of the constitution does not attract the Act in question because there is no question of spending money in the object and intention of the enactment of the law in question for adjudication of litigations and no extra money will be spent in the regular function of the court. So this Bill of enactment can never be said that it was a Money Bill. Learned Attorney General submits that High Court Division Rules cannot override the Act of Parliament because the High Court Rules is a sub-ordinate legislation and conflict, if any,

between the two, the Act of Parliament must prevail over the Rules. Mr. Amin Uddin finally submits that the people of the country including the learned Advocates should appreciate this Act passed by Parliament because the other countries including the neighboring country started to adjudicate the litigations through video conferencing even without passing any Act of Parliament prior to pandemic situation was occurred. So the writ petition filed by the petitioner should be rejected summarily. In support of his argument he has cited the case of Swapnil Tripathi vs. Supreme Court of India reported in (2018) 10 SCC 639 [judgment delivered on 26 September, 2018].

We have heard the contentions of the learned Advocate appeared in-person and the learned Attorney General for the respondents at length, perused the petition and the connected documents annexed herewith. It is not denying that **Covid 19** or the **Corona virus** as it is commonly called has not only played havoc in the lives of people all over the world but it is also going to have a profound effect and change the way how countries and communities conduct their lives and businesses henceforth. Since, the virus spreads more rapidly amongst congregation of people and, nobody could predict where the virus is being lurking around or who the carrier is, with many carriers having found to be a symptomatic, uses of masks and social distancing has become mandatory and a way of life for combating the virus with the guidance of the World Health Organization. Not only that some countries declared lock-down and banned people gathering so that the virus cannot spread out and some countries declared general holiday. In that

line the Government of Bangladesh took some measures to combat COVID-19 and declared general holiday for all private and public sectors including all educational institutions, cinema halls, markets, restaurants, parks, banned public and private transportation, all kinds of industries including readymade garments factories etc. with effect from 25th March 2020. In the same line, the Hon'ble Chief Justice of Bangladesh by his executive capacity declared full closer of the Supreme Court as well as the sub-ordinate courts including all tribunals. For the reason of such closer of all kinds of courts, no justice could be provided for the litigant public. All the learned lawyers became jobless. Precisely, the junior advocates and advocates' clerks and their family members, whose livelihoods are depended on their day to day income, were being facing serious hardship. All jails of the country became over crowded for not getting any bail due to full closer of the courts. But the courts could not reopen due to pandemic situation. In such a critical situation the Hon'ble Chief Justice vide Notification dated 23.4.2020 [Annexure-C] constituted two single Benches through physical hearing in open Courtroom, one for the High Court Division and another for the Appellate Division, in order to adjudicate most urgent matters. But due to protest from the Bar, the said Benches could not function. On the other hand, a significant number of lawyers from all over the country raised their voice for hearing of the cases without physical presence but through video conferencing.

Since there was no procedural law empowering the courts to conduct virtual hearing by using information-technology and the Parliament was not in session, the Hon'ble President by exercising

jurisdiction under Article 93(1) of the Constitution promulgated Ordinance No.1 of 2020 on 9.5.2020 [Annexure-A] with a view to empowering the courts to continue with the trial of the cases, judicial inquiry, application or appeal hearing, taking evidence, argument hearing or pronouncement of judgment or order through audio-video or using any other electronic device with virtual presence of the litigant parties or their advocates or any other person concerned or the witnesses. Pursuant to section 5 of the Ordinance, the Hon'ble Chief Justice with the approval of the High Court Division circulated the impugned 'Practice Directions' on 10.5.2020 [Annexure-D] to be followed by the High Court Division while conducting court proceedings remotely through video conferencing. The Hon'ble Chief Justice also circulated similar Practice Directions for the Appellate Division and sub-ordinate judiciary which have not been challenged by the petitioner in the writ petition. In the above backdrops, some courts of the country including some Single Benches of the High Court Division and the Chamber Court of the Appellate Division were re-opened by Order of the Hon'ble Chief Justice for dispensation of justice through video conferencing with effect from 10th June 2020 and with that end agony of all concerned lessened a bit.

Since the pandemic situation could not overcome throughout the world including Bangladesh, the Parliament [Bangladesh Jatiya Sangsad] decided to validate the said Ordinance in its budget session and promulgated the impugned Act No. 11 of 2020 after assent of the Hon'ble President, which was published in the Bangladesh Gazette on

9.7.2020. For better understanding the said Act is quoted verbatim below:

"বাংলাদেশ গেজেট

অতিরিক্ত সংখ্যা

কর্তৃপক্ষ কর্তৃক প্রকাশিত

বৃহস্পতিবার, জুলাই ৯, ২০২০

বাংলাদেশ জাতীয় সংসদ

ঢাকা, ২৫ আষাঢ়, ১৪২৭/ ০৯ জুলাই, ২০২০

সংসদ কর্তৃক গৃহীত নিম্নলিখিত আইনটি ২৫ আষাঢ়, ১৪২৭ মোতাবেক ০৯ জুলাই ২০২০ তারিখে রাষ্ট্রপতির সম্মতিলাভ করিয়াছে এবং এতদ্বারা এই আইনটি সর্বসাধারণের অবগতির জন্য প্রকাশ করা যাইতেছে ঃ-

২০২০ সনের ১১ নং আইন

মামলার বিচার (trial), বিচারিক অনুসন্ধান (inquiry), বা দরখাস্ত বা আপিল শুনানি, বা সাক্ষ্য (evidence) গ্রহণ, বা যুক্তিতর্ক (argument) গ্রহণ, বা আদেশ (order) বা রায় (judgment) প্রদানকালে পক্ষগণের ভার্চুয়াল উপস্থিতি নিশ্চিত করিবার উদ্দেশ্যে আদালতকে তথ্য-প্রযুক্তি ব্যবহারের ক্ষমতা প্রদানের নিমিত্ত বিধান প্রণয়নকল্পে প্রণীত আইন

যেহেতু মামলার বিচার (trial), বিচারিক অনুসন্ধান (inquiry), বা দরখাস্ত বা আপিল শুনানি, বা সাক্ষ্য (evidence) গ্রহণ, বা যুক্তিতর্ক (argument) গ্রহণ, বা আদেশ (order) বা রায় (judgment) প্রদানকালে দক্ষগণের ভার্চুয়াল উপস্থিতি নিশ্চিত করিবার উদ্দেশ্যে আদালতকে তথ্য-প্রযুক্তি ব্যবহারের ক্ষমতা প্রদানের নিমিত্ত বিধান প্রণয়ন করা সমীচীন ও প্রয়োজনীয়;

সেহেতু এতদ্বারা নিমরূপ আইন করা হইল ঃ -

১। সংক্ষিপ্ত শিরোনাম ও প্রবর্তন।—

(১) এই আইন আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার আইন, ২০২০ নামে অভিহিত হইবে।

(২) ইহা অবিলম্বে কার্যকর হইবে।

২। সংজ্ঞা।— (১) বিষয় বা প্রসঙ্গের পরিপন্থি কোনো কিছু না থাকিলে, এই আইনে -

(ক) "আইন" অর্থ গণপ্রজাতন্ত্রী বাংলাদেশের সংবিধানের অনুচ্ছেদ ১৫২ তে সংজ্ঞায়িত অর্থে আইন;

(খ) "আদালত" অর্থ সুপ্রীমকোর্টের আপিল বিভাগ বা হাইকোর্ট বিভাগসহ সকল অধস্তন আদালত বা ট্রাইব্যুনাল;

(গ) "দেওয়ানি কার্যবিধি" অর্থ Code of Civil Procedure, 1908 (Act No. V of 1908);

(ঘ) "ফৌজদারি কার্যবিধি" অর্থ Code of Criminal Procedure, 1898 (Act. No. V of 1898);

(ঙ) "ভার্চুয়াল উপস্থিতি" অর্থ অডিও-ভিডিও বা অনুরূপ অন্য কোনো ইলেক্ট্রনিক পদ্ধতির মাধ্যমে কোনো ব্যক্তির আদালতের বিচার বিভাগীয় কার্যধারায় উপস্থিত থাকা বা অংশগ্রহণ।

(২) এই আইনে ব্যবহৃত যে সকল শব্দ বা অভিব্যক্তির সংজ্ঞা এই আইনে প্রদান করা হয় নাই, সেই সকল শব্দ বা অভিব্যক্তি ফৌজদারি কার্যবিধি বা দেওয়ানি কার্যবিধিতে যে অর্থে ব্যবহৃত হইয়াছে সেই অর্থে প্রযোজ্য হইবে।

৩। আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহারের মাধ্যমে বিচারিক কার্যক্রম পরিচালনার ক্ষমতা। — (১) ফৌজদারি কার্যবিধি বা দেওয়ানি কার্যবিধি বা আপাতত বলবৎ অন্য কোনো আইনে ভিন্নতর যাহা কিছুই থাকুক না কেন, যে কোনো আদালত, এই আইনের ধারা ৫ এর অধীন জারীকৃত প্রাকটিস নির্দেশনা (বিশেষ বা সাধারণ) সাপেক্ষে অডিও-ভিডিও বা অন্য কোনো ইলেক্ট্রনিক পদ্ধতিতে বিচারপ্রার্থী পক্ষগণ বা তাহাদের আইনজীবী বা সংশ্লিষ্ট অন্য ব্যক্তি বা সাক্ষীগণের ভার্চুয়াল উপস্থিতি নিশ্চিতক্রমে যে কোনো মামলার বিচার (trial), বিচারিক অনুসন্ধান (inquiry), বা দরখাস্ত বা আপিল শুনানি, বা সাক্ষ্য (evidence) গ্রহণ, বা যুক্তিতর্ক (argument) গ্রহণ, বা আদেশ (order) বা রায় (judgment) প্রদান করিতে পারিবে।

(২) উপ-ধারা (১) এর অধীন অডিও-ভিডিও বা অন্য কোনো ইলেক্ট্রনিক পদ্ধতিতে বিচারপ্রার্থী পক্ষগণ বা তাহাদের আইনজীবী বা সংশ্লিষ্ট অন্য ব্যক্তি বা সাক্ষীগণের ভার্চুয়াল উপস্থিতি নিশ্চিত করা ব্যতীত অন্যান্য বিষয়ের ক্ষেত্রে ফৌজদারি কার্যবিধি বা ক্ষেত্রমত, দেওয়ানি কার্যবিধি অনুসরণ করিতে হইবে।

৪। ভার্চুয়াল উপস্থিতি স্বশরীরে আদালতে উপস্থিতি গণ্য। —ধারা ৩ অনুযায়ী কোনো ব্যক্তির ভার্চুয়াল উপস্থিতি নিশ্চিত করা হইলে ফৌজদারি কার্যবিধি বা দেওয়ানি কার্যবিধি বা অন্য কোনো আইনের অধীন আদালতে তাহার স্বশরীরে উপস্থিতির বাধ্যবাধকতার শর্ত পূরণ হইয়াছে বলিয়া গণ্য হইবে।

৫। প্রাকটিস নির্দেশনা জারির ক্ষমতা।— ধারা ৩ ও ৪ এর উদ্দেশ্য পূরণকল্পে, সুপ্রীমকোর্টের আপিল বিভাগ বা, ক্ষেত্রমত, হাইকোর্ট বিভাগ, প্রয়োজন অনুসারে, সময় সময়, প্রাকটিস নির্দেশনা (বিশেষ বা সাধারণ) জারি করিতে পারিবে।

৬। রহিতকরণ ও হেফাজত।—(১) আদালত কর্তৃক তথ্য-প্রযুক্তি ব্যবহার অধ্যাদেশ, ২০২০ (২০২০ সনের ১নং অধ্যাদেশ) এতদ্দ্বারা রহিত করা হইল।

(২) উপ-ধারা (১) এর অধীন রহিতকরণ সত্ত্বেও, রহিত অধ্যাদেশের অধীন কৃত কাজকর্ম বা গৃহীত ব্যবস্থা এই আইনের অধীন কৃত বা গৃহীত হইয়াছে বলিয়া গণ্য হইবে।

ড. জাফর আহমেদ খান

সিনিয়র সচিব।".

The Act No.11 of 2020 clearly and unambiguously suggests that the same is a procedural law and has been enacted for the purpose of empowering the adalat [court] to use information-technology for the purpose of ensuring virtual presence of the litigants, witnesses, lawyers or any other person in the court proceeding like trial of the case, inquiry, application or appeal hearing or recording evidence or argument hearing or delivering judgment or order by the court.

Now let us examine and answer the issues raised by the petitioner.

1. **Whether the definition of 'adalot' as appeared in the Ain No.11 of 2020 (the Act) is inconsistent with Articles 94 and 152 of the Constitution and whether such definition has degraded the status of the Supreme Court.**

Under section 2(1) (Kha) of the impugned Ain, all subordinate courts and tribunals including the High Court Division and the Appellate Division of the Supreme Court are 'Adalot' which is the general definition of court. Under Article 152 of the Constitution 'adalot' means 'any court of law including Supreme Court'. Article 94 of the Constitution provides that 'there shall be a Supreme Court for Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division'. A comparison of definition between 'adalot' as per definition of Act 11 of 2020 and Article 152 read with Article 94 of the Constitution it appears that nothing new has been introduced in the Ain in defining the term 'adalot' but it has reintroduced the definition of 'adalot' from the Constitution by including 'tribunals' in the said definition which is very much consistent with the Constitution and thus the question of degradation of the status of the Supreme Court does not arise at all.

2. **Whether the Ain is applicable to the Supreme Court in conducting cases by using information technology.**

It is contended by the petitioner that trial of cases, judicial inquiry, application or appeal or argument hearing or taking evidence or pronouncement of judgment or order are the functions of the sub-

ordinate judiciary and the Ain has permitted those courts only to conduct those functions and the Higher Judiciary is ousted from the scope of the Ain. This argument is fruitless because of the fact that the Ain has included the High Court Division and the Appellate Division in the definition of **adalot** and the higher judiciary is well equipped with and empowered by law to exercise all judicial functions of the lower judiciary along with its designated functions.

3. **Whether the Ain is hit by Articles 81(1)(c), 81(1)(e), 81(3) and 82 of the Constitution.**

It has been argued by the petitioner that since the Ain involves expenditure from the public money in implementing the virtual courts proceedings, the Bill should have been placed before the Parliament as 'Money Bill' with recommendation of the Hon'ble President of the Republic. Definition of a 'Money Bill' and procedure of placing such Bill before the Parliament has been described in Articles 81 and 82 of the Constitution.

Chapter II of Part V of the Constitution deals with making a law. Every proposal in Parliament for making a law shall be made in the form of a Bill. When a Bill is passed by the Parliament it shall be presented to the President for assent and after getting assent it becomes a law and is called an Act of Parliament (Art. 80). From the point of view of parliamentary procedure, the Constitution makes a distinction between Money Bill and any other Bill. Article 81 defines Money Bill and Article 82

states about the recommendation of the President. The relevant provisions of Articles 81 and 82 are quoted below:

> "81. (1) In this Part Money Bill" means a Bill containing only provisions dealing with all or any of the following matters-
>
> (a) the imposition, regulation, alteration, remission repeal of any tax;
>
> (b) .....
>
> (c) the custody of the Consolidated Fund, the payment of money into, or the issue or appropriation of moneys from, that fund;
>
> (d).....
>
> (e) the receipt of moneys on account of the Consolidated Fund or the Public Account of the Republic, or the custody or issue of such moneys, or the audit of the accounts of the Government;
>
> (f).....
>
> (2) .....
>
> (3) Every Money Bill shall, when it is presented to the President for his assent, bear a certificate under the hand of the Speaker that it is a Money Bill, and such certificate shall be conclusive for all purposes and shall not be questioned in any court.
>
> 82. No Money Bill, or any Bill which involves expenditure from public moneys, shall be introduced into Parliament except on the recommendation of the President;
>
> Provided that in any Money Bill no recommendation shall be required under this article for the money of an

amended making provision for the reduction or abolition of any tax."

A plain reading of the aforesaid provisions under Articles 81 and 82 together suggests that when provisions containing imposition of taxes etc. as spelt out in Article 81(1) and, the expenditure of public moneys in a Bill is involved the same should be placed before the Parliament with the recommendation of the President. The Government cannot make any expenditure without the sanction of Parliament. The mechanism of parliamentary control over the appropriation is the Consolidated Fund out of which all governmental expenditure is met. On perusal of the impugned Ain, it appears that there is no provision therein which imposes any tax upon the public or provides any expenditure from public moneys for the purpose of conducting the court proceeding through video conferencing. Learned Attorney General also contends that no extra-fund or public money would be required for functioning the courts through video conferencing because the United Nations Development Programme (UNDP), with the support from its a2i programme with the ICT Division of the Government, has been officially providing technical assistance in developing virtual court's applications. We find force in the contention of the learned Attorney General. So the contention of the petitioner in respect of inconsistency of the provisions under Articles 81 or 82 of the Constitution falls through.

4. **Whether section 5 of the Ain 2020 has degraded the Power of the Hon'ble Chief Justice or the Practice Direction issued under section 5 is inconsistent with the "Supreme Court of Bangladesh (High Court Division) Rules 1973.**

Section 5 of the Ordinance No.1 of 2020 provided that for implementing the purpose of sections 3 and 4 of the Ordinance, the Appellate Division or in case, the High Court Division of the Supreme Court, if necessary, may, from time to time, circulate Practice Directions [special or general]. Being empowered, the Full Court approved a Practice Direction and the same has been circulated by the Hon'ble Chief Justice through the Registrar General vide impugned Circular dated 10th May 2020 [Annexure-D]. Section 5 of the Ordinance is incorporated in the Act 11 of 2020 as section 5 therein without any change. It appears that this section does not curtail or enhance the power of the Hon'ble Chief Justice or degraded the Supreme Court. We do not see any logical philosophy as to how the dignity and power of the Chief Justice has been degraded by incorporation of section 5 of the Ordinance or the Ain. It is contended by the petitioner that this Practice Direction is inconsistent with the High Court Rules because as per Chapter XVIA of the Rules use of cell phone or similar device is prohibited in the Court-room but the Practice Direction allows the use of cell phone or other similar device. Since the present law is a new procedural law empowering the Adalat to conduct judicial proceeding by using information technology, the purpose of the Ain will be frustrated if the use of cell phone or other electronic device is prohibited. Moreover, the Practice Direction as well as the High Court Rules are delegated/subordinate legislations. It is settled by the Indian Supreme Court that a sub-ordinate legislation will not be invalid even though it is in conflict with the provisions of some general law, if it is within the scope of

the delegating statute (Ref: T.B Ibrahim vs. Regional Transport Authority, AIR 1953 SC 79). We find no ground that the Practice Direction is out of scope of the Ordinance or the Ain.

5. **Whether the Virtual hearing under the Ain is hit by Article 35(3) of the Constitution**.

Article 35 (3) of the constitution states as follows:

"35. (1).....

(2).....

(3) 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.

(4)....."

Usually we talk about "Opportunities lies in adversity". Today we all are realizing the same. After enactment of Ordinance No. 1 of 2020 and the Act 11 of 2020 the virtual court medium is now being used more than conventional courts, whereas a court room used to be crowded with its advocates, litigants, bundles of documents, files and briefs. The COVID-19 pandemic has thrust digitalization of courts upon us, without giving anyone a chance to consider the advantages or disadvantages of E-courts.

The Open Court principle, finds its genesis in the '1215 Magna Carta'. The specifically relevant reference is to clause 40, which translates to "To no one will we sell, to no one will we refuse or delay, right or justice…". This principle does not just talk about rights of litigants

but the importance of participation of public in court proceedings too. Article 35(3) of the Constitution speaks about a speedy and public trial by an independent and impartial court or tribunal.

Section 352 of the Code of Criminal Procedure 1898 stipulates as follows-

> **"The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed as open Court, to which the public generally may have access, so far the same can conveniently contain them....."**

The aforesaid section provides that the trial of an offence shall be held in open Court to which the public generally may have excess. The issue that arises from the above provisions is whether the internet [virtual space] is a "public" place within the contemplation of the Constitution or whether a virtual is an "open court" within the meaning of the Code of Criminal Procedure.

Reading the words "public place" restrictively to include only "in personal attendance" would be devoid of technological realities of the modern world. **In Arconti v. Smith, 2020 ONSC 2782,** the Ontario superior Court of Justice, while dealing with the legality of witness of examination via video-conferencing observed as follows-

"[1] This endorsement dealt with the issue of whether the plaintiffs ought to be required to conduct an examination out-of-court by video conference rather than in person.....

[19] In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back."

In **Packingham v.North carolina 137 s.ct**.1730, the US supreme Court, while holding that social media and internet belong to the word "places" in the context of the US Constitution's First Amendment Free Speech rights, observed as follows-

" A fundamental principle of the First Amendment is that all persons have access to place where they can speak and listen, and then, after the right speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights..... Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.

While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views,

today the answer is clear. It is cyberspace-the “vast democratic forums of the Internet” in general..... and social media in particular.”

According to the principles of **Arconti v.Smith** and **Packingham**(supra) “ public place” does not mean only places where public can meet in person but also include attendance via virtual means or through internet in general and social media in particular.

In the case of Naresh Shridhar Mirajkar –Versus- State of Maharashtra reported in (1966) 3 SCR 744 a nine judge bench of the Supreme Court of India has laid down that “Public trial in open court is undoubtedly essential for the healthy, objective and fair administration of justice” all cases brought before the courts, whether civil, criminal, or others, must be heard in open court. Recently, The Live Streaming of Court Proceedings Case – in the case of Swapnil Tripathi vs. Supreme Court of India, reported in (2018) 10 SCC 639, a three-judge bench of the Supreme Court has said that the principle of open justice encompasses several aspects that are central to the fair administration of justice and the rule of law.

The words “public trial” denote public access to the court proceedings. In other words, public trial reflects “open justice” and any trial that grants access to the court or the venue at which court proceedings would take place will be regarded as “public trial”. Granting virtual access to the court proceedings would satisfy the concept of “open justice” and would fulfill the requirement of a “public trial”. In

Swapnil Tripathi v. Supreme Court of India 2018, the majority judgment of the Indian Supreme Court observed on the issues of public trial, virtual technology and open justice as follows:-

"12. As aforesaid, Courts in India are ordinarily open to all members of public, who are interested in witnessing the court proceedings. However, due to logistical issues and infrastructural restrictions in courts, they may be denied the opportunity to witness live Court proceedings in propria persona. To consummate their aspirations, use of technology to relay or publicize the live court proceedings can be a way forward. By providing virtual access of live court proceedings to one and all, it will effectuate the right of access to justice or right to open justice and public trial, right to know the developments of law and including the right of justice at the doorstep of the litigants. Open justice, after all, can be more than just a physical access to the courtroom rather, it is doable even virtually in the form of live streaming of court proceedings and have the same effect."

Article 35(3) of the Constitution of the people's republic of Bangladesh mandates that the criminal proceeding of a court or tribunal shall be held in public. Public means, for the use of everyone without discrimination. Anything, gathering or audience which is not private is public. Obviously, a Judge's Chamber is not a court hall to which the public will normally have any right of access. Courtrooms are considered as public place as opposed to the Judge's Chambers for the simple reason that the Judicial Officers, the parties and their Counsels and any

interested member of the public has unrestricted 'access' to it. With all due respect, if the Judge granted unrestricted access to his chamber to the parties and their Counsels and any interested member of the public, the chamber would move from a 'private' place to a 'public place'. Same conditions when available in a remote hearing i.e access being granted to and available to Judicial Officers, the parties and their Counsels and any interested member of the public will make the venue of such remote/virtual hearing be it zoom, skype, whatsApp etc. a public place in line with the provisions of Article 35(3) of the Constitution. It is our opinion, therefore, that the apprehension whether remote hearings are in conformity with the constitutional requirement that the proceeding be in public, the answer would be that the Constitution did not say that such proceedings must be in a physical structure called a Courtroom. Once the proceeding in a remote/Virtual hearing through video conferencing is made accessible to everyone involved and any interested member of the public, then the condition as provided by Article 35(3) would be complied with.

It will not be out of context to say that as Legal Systems try and adapt the best they can, there is virtually no existing precedence for the challenge that COVID-19 has posed in the delivery of Justice. On the onset of COVID-19 the Supreme Court of India adopted virtual hearings to ensure safety of lawyers, litigants & public. Law regarding virtual court is still yet to be come into effect there. On 15th April 2020, the Supreme Court of India decided to conduct hearings through Video Conferencing meeting apps till end of June 2020 and issued new SOP, which has

become new procedural law to conduct hearing online. Apex Courts of the United Kingdom, USA, Canada, Australia, Nigeria and Brazil, among others, have started conducting hearings of 'urgent matters' through video conferencing. So promulgation of Ordinance No. 1 of 2020 and "Av`vjZ KZ…©K Z_¨-cÖhyw³ e¨envi AvBb, 2020" is a good and historical initiative of the legislature for dispensation of justice during the pandemic situation.

Before parting with, it will not be out of context to say that due to the COVID-19 pandemic, virtual court is the right step to promote excess to justice but there are some problems in this regard. Virtual court has some challenges that need to be solved:

Excess to Internet: Virtual court relies heavily on web apps such as Zoom, WebEx, Microsoft Teams, or Google Meets. A lack of access to the Internet is a barrier to justice when relying heavily and exclusively on virtual courts. It needs wider accessibilities to internet and not just accessibility to internet but speed of internet does matter a lot. To participate in online proceedings, required minimum internet speed is 2mbps/sec and this speed is available only with 4G and in Bangladesh, most of the people do not have 4G facilities and from our experience in conducting virtual hearing, we as well as the participants are regularly facing various problems due to unstable internet connection.

Digital literacy: Digital literacy looks at the capacity to use the Internet and the tools associated with it. Lawyers with a background from

their virtual happy hour, the usual participant who does not “mute” himself, or a participant who frames the camera to focus his forehead. We are witnessing similar situation regularly. Any judicial system that wants proper access to justice should provide information and resources for their users. The lack of transparency and information could result in an adverse effect on the system.

Due process: Virtual courts have to ensure fairness for all parties and the process’s integrity when courts go online. A remote hearing should not create an advantage for a firm that can pay for good lighting and stable internet connections. Virtual courts that understand how to preserve due process will provide a step forward in ensuring access to justice.

Cyber Security and Privacy: While virtual hearings can be useful, authorities have to implement adequate safeguards to ensure that the proceedings are protected. For example, in a recent incident, a lawsuit challenging Florida’s mask order took an uncomfortable turn. While the attorneys prepared to present their oral pleadings, hackers infiltrated them with bursts of music and offensive sexual depictions [Ref. *https//www.claw.com/dailybusinessreview/ 2020/08 /28/ in-picture-5-pitfalls-of-using-zoom-to-litigate*]. Any virtual court has to provide adequate cyber security measures. Both in terms of who has access and how data is stored; and how confidential information will be administered. Any virtual court must consider privacy, fairness and cyber security concerns as technology becomes more complex. Only by adopting

adequate cyber security and protocols, virtual courts will be able to enhance access to justice successfully.

However, we have to look carefully at how these procedures work in practice and improve our approach. Many issues need to be solved. We have to be creative and innovative to find better solutions that are adequate for solving the problems in dispensation of justice through virtual court system.

The situation we find ourselves at this time is unimaginable. There has to be new practices incorporated in legal systems across the country along with the need to abandon certain traditional forms of functioning which may no longer be relevant. The focus has to be on transformation and subsequent metamorphosis of the justice delivery system. We can't wait for Justice to play catch up the next time a new crisis emerges.

However, it is pertinent to mention here that the people at large including the renowned journalists and other professionals have also appreciated the Ordinance No. 01 of 2020 as well as the impugned Ain passed by the Parliament for the purpose of dispensation of justice through Audio/Video conferencing during the pandemic situation. As because, by this enactment the litigant people and their Counsels even any interested person may have the scope of access to look into the proceeding of the case from anywhere of the world through video conferencing, if so desired. This new law has brought the litigant people particularly to consume lesser time and money and it is absolutely an extension of the regular court during any pandemic situation.

Therefore, considering all the aspects and discussions made above, we do not find any substance in the writ petition filed by the petitioner to issue Rule. Hence, the said writ petition is summarily rejected without any order as to costs.

Let a copy of this order be communicated to all the respondents at once.

[Jahangir Hossain,J]

[Md. Badruzzaman,J]

Liton/B.O