

19 SCOB [2024] AD 10

APPELLATE DIVISION

Present:

Mr. Justice Hasan Foez Siddique, Chief Justice

Mr. Justice Obaidul Hassan

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaqul Islam

Mr. Justice Md. Abu Zafor Siddique

Mr. Justice Jahangir Hossain

CIVIL PETITION FOR LEAVE TO APPEAL NO. 2419 OF 2019

(From the judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019)

Md. Taherul Islam (Tawhid)

... Petitioner

Vs.

The Speaker Bangladesh Jatiya Sangsad and others

...Respondents

For the petitioner : Mr. A.M. Mahbub Uddin, Senior Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.

For the respondents : Mr. A.M. Amin Uddin, Attorney General with Mr. Sk. Md. Morshed, Additional Attorney General, Mr. Mohammad Mehedi Hasan Chowdhury, Additional Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General and Mr. Sayem Mohammad Murad, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.

Date of hearing and judgment : The 01st day of August, 2023

Editors' Note:

In this case petitioner challenged the holding of office by taking oath by the Members of Parliament who were elected for the 11th National Parliament before expiration of the term of the previous Parliament. The petitioner alleged that by taking oath before dissolution of the 10th National Parliament, the MPs had violated the Article 123(3) read with Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh. The High Court Division summarily rejected the writ petition on the ground that Article 148(3) of the Constitution had been incorporated to maintain continuity of running the government for the best interest of democracy. A "deeming clause" exists under Article 148(3) is to facilitate the continuity of the government. It was also held that though, upon taking oath, the MPs in reality had not assumed office of members of parliament, yet they had assumed office by way of legal fiction created by the Constitution. Therefore, taking oath by the MPs before dissolution of previous parliament was not illegal. The Appellate Division, concurring with the finding reached at by the High Court Division (which has been reported in 19 SCOB [2024] HCD 66) dismissed the Civil Petition.

Key Words:

Article 123(3); Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh, Deeming Clause, Parliamentary Election, Member of Parliament, Legal Fiction

Deeming provision:

It is well settled position of law that a deeming provision is an admission of the nonexistence of the fact deemed. The Legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the Courts must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which inevitably flow there from, and give effect to the same. ...(Para 20)

Correct way to interpret a “deeming” clause:

When the legislature enacts a “deeming” clause, the correct way to interpret the same is to find out for what purpose and upto what extent the legal fiction has been created. It is the function of the Court to find out the limitation of the legal fiction, to delimit its boundaries and not to extend the frontier of legal fiction beyond what has been provided in the statute. ...(Para 29)

Article 56(3) and 57 of the Constitution of the Peoples' Republic of Bangladesh:

Even if the Parliament does not sit in its first meeting, there cannot be any vacuum in the running of the government in the country and although there may be a gap between one parliament and another, the continuity of the government cannot have any break:

When the election to the Parliament was held and the names of returned candidates were declared, it was incumbent upon the Hon'ble President of Bangladesh to appoint a Prime Minister first, from among the elected members of Parliament who appears to have commanded the support of the majority members. Therefore, when an election to national Parliament takes place and the names of the returned candidates are declared, the framers of the Constitution incorporated the provision of Article 56(3) for appointment of a member of parliament as Prime Minister, to keep run the continuity of the Government so that no break takes place the running of the government. The said provision was embodied in the Constitution even if the Parliament does not sit in its first meeting, there cannot be any vacuum in the running of the government in the country. Although there may be a gap between one parliament and another, the continuity of the government cannot have any break, and even if the Prime Minister becomes disqualified to continue as Prime Minister, he or she will still continue under Article 57 unless and until the next Prime Minister takes upon the office. The tenure of other Ministers is also the same under Article 58 according to which they will also continue to hold office until their successors enter upon such office. ...(Para 35)

Article 56(3) and 148 (3) of the Constitution of the Peoples' Republic of Bangladesh:

Once the names of elected members of Parliament returned by the Election Commission in the official gazette, it becomes necessary for them to take oath and this necessity arises because of the relevant provisions of the Constitution in order to form a new government. The intention of the legislature is transparent while going through Article 56(3) of the Constitution whereby the President is to have commanded majority support of the members of parliament, as Prime Minister of the country. Therefore, for such appointment of an MP as Prime Minister, the first sitting of the Parliament is not necessary to be held. Rather, it is the discretion of the Hon'ble President to appoint a

member as Prime Minister from among the elected members of parliament commanding the support of the majority. In the given circumstances, it is clear that latent intent of the legislature for incorporating the deeming clause under Article 148(3) of the Constitution is to maintain the continuity of the government. ... (Para 39)

Article 148 (3) and 123 (3) of the Constitution of the Peoples' Republic of Bangladesh:

“Deeming clause” under Article 148(3) was incorporated just to facilitate the continuity of the government. Though, upon taking oath, the MPs in reality have not assumed office of members of parliament, yet they have assumed office by way of legal fiction created by the Constitution and that legal fiction must be interpreted restricting the same to be used for the said purpose only. The legislature deliberately created this legal fiction so that the next executive government can be formed and appointed by the President. The said intention of the legislature has been elucidated in Article 123(3) which states that member of Parliament shall not assume office as members of parliament except after the expiration of the term of the previous parliament. It denotes that the MPs who took oath even before the first meeting of the Parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament. ... (Para 40)

JUDGMENT

Obaidul Hassan, J:

1. This Civil Petition for Leave to Appeal (CPLA) is directed against the judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019 summarily rejecting the same. The petitioner filed the aforesaid Writ Petition challenging the holding of office of the Members of Parliament (MPs) by the respondents No. 5-294 having taken their oaths in violation of Article 123(3) read with Article 148(3) and 72(3) of the Constitution of the Peoples' Republic of Bangladesh.

2. The petitioner filed the aforesaid Writ Petition contending, inter alia, that 10th National Parliamentary Election was held on 05.01.2014 and the MPs elected in the said election took their oaths on 09.01.2014 after the publication of election result in the official gazette and subsequently cabinet was formed on 12.01.2014. The first meeting of the 10th National Parliament was held on 29.01.2014 and as per Article 72(3) of the Constitution, the tenure of the 10th National Parliament expired on 28.01.2019 after completion of five years term from the date of first meeting. The official website of Bangladesh Jatiya Sangshad also displays that the first meeting of the 10th National Parliament was held on 29.01.2014. The election of the 11th National Parliament was held on 30.12.2018 under the supervision of the Election Commission in 299 constituencies. In compliance with Article 19(3) of the Representation of the People's Order, 1972 the Election Commission declared the result of the returned candidates in the said election by gazette notification on 01.01.2019. Although Article 39(4) of the Constitution does not provide for any time limit to publish such gazette, the oaths of the newly elected MPs were administered at 11:00 a.m. on 03.01.2019 in a ceremonial manner and subsequently, on the same day the Hon'ble President expressed his decision to appoint Sheikh Hasina, MP as the Prime Minister of Bangladesh due to her commanding the support of the majority of members and invited her to form cabinet under her leadership. Thereafter, on 07.01.2019 the President appointed Sheikh Hasina, MP as Prime Minister by official gazette notification. On the same day another gazette was published pursuant to

Article 56(ii) of the Constitution and Rule 3(iv) of the Rules of Business, 1996 announcing the names of the Ministers, State Ministers and Deputy Ministers. Accordingly, they took oaths as Ministers, State Ministers and Deputy Ministers on 07.01.2019. The first session of the 11th National Parliament (জাতীয় সংসদ) was held on 30.01.2019.

3. According to Article 148(3) of the Constitution, the persons, who took oath on 03.01.2019 as members of Parliament, by virtue of taking oath, had already assumed office as members of Parliament. As such, they took the oath and assumed their office as MPs before expiration of the term of the previous Parliament which is set to be dissolved on 28.01.2019. Therefore, the day they took oaths, there were about six hundred members of Parliament, which is clearly in contradiction with the provisions of the Constitution and as such they cannot remain in office as members of Parliament.

4. Neither the Constitution nor the RPO put any time limit within which the publication of the returned candidates must be made. According to Article 39(4) of the Representation of the People's Order, 1972 the Election Commission shall have to publish the names of the returned candidates after holding National Parliament Election although there is no provision requiring to publish the names of the returned candidates within any specified time. But the Election Commission hurriedly published the results only two days after the election. It is also contended that since the cabinet was formed even before the first meeting of the 11th National Parliament, the MPs who took oath as ministers also committed gross illegality in violation of the Constitution. Accordingly, a Rule was sought to issue against the respondents by the High Court Division in the form of quo warranto calling upon the said MPs, as to under what capacity they are holding such office of the members of Parliament in particular, when they entered office when the previous MPs were also existing in the said office as members of Parliament being the same is violative of Article 123(3) read with Articles 148(3) and 72(3) of the Constitution.

5. Before issuing Rule the High Court Division heard the learned Attorney General since the writ petitioner raised a serious constitutional issue. Upon hearing both sides the High Court Division was pleased to reject the Writ Petition being No. 609 of 2019 summarily by impugned judgment and order dated 18.02.2019.

6. Being aggrieved with the impugned judgment and order dated 18.02.2019 the petitioner preferred the instant Civil Petition for Leave to Appeal.

7. Mr. A.M. Mahbub Uddin, learned senior Counsel appearing on behalf of the petitioner taking us through the judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019 as well as other materials on record contends that the High Court Division erred in law in totally misconceiving the case of the petitioner upon misreading the constitutional provisions enshrined in Article 148(3) in holding that a member of Parliament assumes office on the day of the first meeting of Parliament. The learned senior Counsel contends next that High Court Division relied on a misconceived understanding of the concept of 'Legal Fiction' to hold that clear language of Article 148(3) to the effect that a person assumed office after taking oath is not binding on a person by virtue of the principle of 'Legal Fiction'. The learned senior counsel submits next that according to Article 123(3) the respondents, who have been elected in the 11th National Parliamentary Election cannot assume office as MPS before expiration of the term of the previous Parliament which was scheduled to expire on 28th January 2019 but by taking oaths before the said period the respondents assumed the said office which violated the provision of Article 123(3), but the

High Court Division without considering the said issue most illegally passed the impugned judgment and order. The learned senior Counsel argues next that the High Court Division failed to appreciate that 10th Parliament first sat on 29.01.2014 and as per Article 72(3) of the Constitution the term of the 10th Parliament existed until 28.01.2019 but the respondents took oath and assumed office as MPs which was not only a nullity in law, but an absurdity as the MPs from the previous Parliament were still holding office, meaning that the number of MPs at the same time in office was higher than 345 as stipulated in Article 65(3A) of the Constitution.

8. Per contra, Mr. A.M. Amin Uddin, learned Attorney General appearing along with Mr. Sk. Md. Morshed, learned Additional Attorney General, Mr. Mohammad Mehedi Hasan Chowdhury, learned Additional Attorney General, Mr. Mohammad Saiful Alam, learned Assistant Attorney General and Mr. Sayem Mohammad Murad, learned Assistant Attorney General appearing for the respondents advance their submissions supporting the judgment of the High Court Division and vehemently oppose the prayer of the petitioners for granting of leave. The learned Attorney General along with his accompanying Counsels contend that it has not been challenged in the Writ Petition that the said MPs had been elected illegally in the 11th National Parliamentary Election or they were disqualified to become for any reason to become Members of Parliament. Therefore, in so far as the Writ Petition is concerned, it has only challenged the oath taking by the said MPs for which the said MPs had nothing to do since the oath taking ceremony is the matter of Parliament Secretariat. The learned Counsels for the respondents by referring the oath of MP stated in the 3rd Schedule of the Constitution, argue that the form of oath of MPs is quite unique and not similar to other oaths mentioned in the 3rd Schedule of the Constitution. The framers of the Constitution aptly incorporated the words “the duties upon which I am about to enter” in the form of oath of MPs. Drawing a subtle distinction between the words stated in the form of oath of MPs and those of other forms of oaths the learned Counsel for the respondents submit that the oath taken by the MPs categorically indicate that upon taking oath the MPs do not become MPs in reality rather they fictionally assume office of Members of Parliament for certain purpose. According to the provisions of the Constitution an MP will not assume office in reality until he sits in the Parliament and only when the first meeting of the Parliament takes place, an elected MP may assume office in reality. The learned Counsels submit next that the members of Parliament do not assume office in reality whenever they take oath, rather the Constitution has created a legal fiction as regards assumption of office by the Members of Parliament upon taking oath only for the purpose of forming a government or cabinet so that there is no break in the running of the government in the country.

9. We have perused the impugned judgment and order dated 18.02.2019 passed by the High Court Division in Writ Petition No. 609 of 2019, considered the submissions of the learned Counsels of the both sides and gone through the other materials on record.

10. It is admitted that the newly elected Members of Parliament in the 11th Parliamentary Election took their oaths on 03.01.2019 and the cabinet was formed on 07.01.2019 while the term of the 10th Parliament expired on 28.01.2019. The petitioner claims that taking oath during the validity period of earlier parliament by members of Parliament in the 11th Parliamentary Election is violative of proviso to Article 123(3) read with Articles 148(3) and 72(3) of the Constitution.

11. It is advantageous to know Article 123(3), Article 148(3) and 72(3) of the Constitution.

12. Article 123(3) lays down that- “(1).....
(2)..... (3) A general election of the members of Parliament shall be held- (a) in the case of a dissolution by reason of the expiration of its term, within the period of ninety days preceding such dissolution; and (b) in the case of a dissolution otherwise than by reason of such expiration, within ninety days after such dissolution: Provided that the persons elected at a general election under sub-clause (a) shall not assume office as members of Parliament except after the expiration of the term referred to therein.

13. Article 148 provides in the following- “(1).....
(2)..... (2A) If, within three days next after publication through official Gazette of the result of a general election of members of Parliament under clause (3) of article 123, the person specified under the Constitution for the purpose or such other person designated by that person for the purpose, is unable to, or does not, administer oath to the newly elected members of Parliament, on any account, the Chief Election Commissioner shall administer such oath within three days next thereafter, as if, he is the person specified under the Constitution for the purpose. (3) Where under this Constitution a person is required to make an oath before he enters upon an office he shall be deemed to have entered upon the office immediately after he makes the oath.

14. Article 72(3) states that-

“(1).....
(2).....
(3) Unless sooner dissolved by the President, Parliament shall stand dissolved on the expiration of the period of five years from the date of its first meeting:” (underlines supplied by us)

15. From the above constitutional provisions, it appears that according to Article 123(3) the general election of the members of Parliament shall be held in case of dissolution of Parliament by reason of the expiration of its term, within the period of ninety days preceding such dissolution. Proviso to Article 123(3) puts an embargo on the members of Parliament so elected to assume the office as members of Parliament before expiry of the term of earlier Parliament. Article 148(3) provides that a member of Parliament shall be deemed to have entered upon the office immediately after taking oath. Article 148(2A) lays down that the oath of the newly elected members of Parliament has to be administered within three days after the publication of the result of general election in the official gazette. Article 72(3) provides that unless dissolved earlier by the President, the Parliament shall stand dissolved after expiry of five years from the date of its first meeting.

16. Admittedly the 1st meeting of the 10th Parliament was held on 29.01.2014 and accordingly the term of the said Parliament was scheduled to expire on 28.01.2019. It reveals from the record that the newly elected members of Parliament in 11th Parliament took oath on 03.01.2019. The petitioner asserts that the members of Parliament elected in the 11th Parliament entered upon their office as members of Parliament immediately after taking oath on 03.01.2019 while the term of 10th Parliament was still in force which contravenes the constitutional provisions as enshrined in proviso to Article 123(3) of the Constitution. To ascertain whether there was illegality or not in holding the office by the members of 11th Parliament the High Court Division discussed about the ‘deeming clause’ contemplated under Article 148(3) of the Constitution. Now let us see what is ‘deeming clause’.

17. The term 'deem' is derived from the old English word 'domas' which meant 'judgment or law'. Webster's Ninth New Collegiate Dictionary provides the following meanings: 'to come to think or judge: consider; to have an opinion: believe.'

18. In Black's Law Dictionary, the word 'deem' has been defined in the following way:
'to treat (something) as if (1) it were really something else, or (2) it had qualities that it does not have.'

19. Bennion Statutory Interpretation (3rd ed. 1997, p. 735), states: 'Deeming provisions'- Acts often deem things to be what they are not. In construing a deeming provision, it is necessary to bear in mind the legislative purpose.

20. It is well settled position of law that a deeming provision is an admission of the nonexistence of the fact deemed. The Legislature is competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not even exist. It means that the Courts must assume that such a state of affairs exists as real, and should imagine as real the consequences and incidents which inevitably flow there from, and give effect to the same.

21. Mr. Mahmudul Islam in his book titled 'Interpretation of Statutes and Documents' (First edition, 2009) at pg 87 writes as under- "The legislature sometimes creates legal fiction by using words which are called 'deeming clause'. A legal fiction is one which is not at actual reality, but the legislature mandates and the courts accept it to be a reality, though in reality it does not exist. The effect of such deeming clause is that a position which otherwise would not obtain is deemed to obtain under the circumstances."

22. He further states at pg. 88 that- "The court has to determine the limits within which and the purpose for which legislature has created the fiction the court is to find out the limit of the legal fiction and not to extend the frontier of the legal fiction."

23. However, at pg. 89 he gave a clarification in the following way- "However, in construing the deeming clause, it should not be extended beyond the purpose for which it is created or beyond the language of the section by which it is created; it cannot be extended by importing another fiction."

24. The effect of such a deeming clause has been stated by Indian Supreme Court in State of Bombay Vs. Pandurang Vinayak Chaphalkar, AIR 1953 SC 244 as follows: "When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

25. In the Bengal Immunity Company Limited Vs. The State of Bihar and Ors., AIR 1955 SC 661 it has been observed by a Bench of the Indian Supreme Court comprising of seven judges headed by the then acting Chief Justice Sudhi Ranjan Das in the following- "42. Legal fictions are created only for some definite purpose.....a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field."

26. It has been also observed in the case of Prakash H. Jain Vs. Marie Fernandes, (2003)

8 SCC 431 that- “12.....it is by now well settled by innumerable judgments of various courts including this Court, that when a statute enacts that anything shall be deemed to be some other thing the only meaning possible is that whereas that the said thing is not in reality that something, the legislative enactment requires it to be treated as if it is so. Similarly, though full effect must be given to the legal fiction, it should not be extended beyond the purpose for which the fiction has been created and all the more, when the deeming clause itself confines, as in the present case, the creation of fiction for only a limited purpose as indicated therein.”

27. Lastly, in the case of Pubali Bank Vs. The Chairman, First Labour Court, Dhaka and another, reported in 44 DLR (1992) 40 this Division comprising of four judges dealt with a question whether the Labour Court, ‘deemed as a civil court’ it was decided that the Labour Court acts as a civil court for limited purpose and it will not exercise the powers like those given in Order IX or Order XXXIX Rule 1 of the Code of Civil Procedure which the civil court may exercise in a suit.

28. In the case of Pubali Bank (supra) Justice Mustafa Kamal observed in the following- “26. The language employed in sub-section (2) of Section 36 has to be closely scrutinised. A Labour Court is not a Civil Court at all. It is only by a legal fiction or a statutory hypothesis that it is to be treated as a Civil Court.

29. When the legislature enacts a “deeming” clause, the correct way to interpret the same is to find out for what purpose and upto what extent the legal fiction has-been created. It is the function of the Court to find out the limitation of the legal fiction, to delimit its boundaries and not to extend the frontier of legal fiction beyond what has been provided in the statute. As was held in the case of Radha Kissen Chamria and others Vs. Durga Prasad Chamria, AIR 1940 PC 167, “As the analogy only arises by legal fiction, it must be limited to the purposes enacted by the context and cannot be given larger effect.” Also it has been held in the case of Commissioner of Income Tax Vs. Vadilal Lallu Bhai. AIR 1973 (SC) 1016. “Legal fictions are only for definite purposes and they are limited to the purpose for which they are created and should not be extended beyond their legitimate field.”

30. In the case of Radha Kissen Chamaria vs Durga Prashad Chamaria, reported in AIR 1940 PC 167, it has been dealt with “deeming clause” mentioned in Section 19(3) of the Bengal Public Demands Recovery Act, 1913, which provided that a certificate holder shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof. While discussing about the “deeming clause” under the aforesaid Section the Privy Council observed that the legal fiction created thereby was for a limited purpose of enabling the certificate holder to execute the decree and to satisfy his own claim out of the proceeds of such execution, but he was not in a position of an assignee of the decree so as to acquire all the rights of the original decree holder in the decree.

31. From the above it is well settled that the legal fiction must be extended to its logical conclusion and at the same time it should be construed strictly. The High Court Division in the impugned judgment observed that a deeming clause in the Constitution, has to be interpreted taking into consideration of various factors depending on the backdrop due to which the same was incorporated, legislative intent for incorporation of such clause vis a vis the manner of application of such deeming clause. We endorse the above observation of the High court Division.

32. Adverting to the present case we need to examine the provisions of the Constitution to retrieve the latent intention for purpose of the incorporating the “deeming clause” under Article 148 (3) of the Constitution. Part-V of our Constitution deals with the provisions relating to legislature. Article 65 of the Constitution provides for a Parliament for Bangladesh to be known as the House of Nation whereupon the legislative functions while Article 66 enumerates the qualifications and disqualifications for being member of Parliament.

33. Article 72(2) lays down that the Parliament shall be summoned to meet within thirty days after the declaration of the results of polling at any general election of members of Parliament. Accordingly, once gazette notification is published by the Election Commission declaring the names of the returned candidates, the Parliament has to resume its meeting within thirty days from the date of publication of the result. Article 72(3) provides that the Parliament shall stand dissolved on the expiry of the period of five years from the date of its first meeting unless dissolved earlier by the President. Article 74(1) states that in the first meeting of the Parliament, it shall elect its Speaker and Deputy Speaker.

34. Now let us look into the provisions regarding the formation of the government are subsumed under Chapter II of Part-IV of the Constitution containing Articles 55-58. According to Article 55 there shall be a cabinet for Bangladesh having the Prime Minister at its head and all executive power of the republic shall be exercised by, or on the authority of the Prime Minister. Article 56, enshrines the provisions as to how the Ministers, State Ministers and Deputy Ministers are appointed. Article 56(3) lays down that the President shall appoint as Prime Minister the member of Parliament, who appears to him to command the support of the majority of the members of Parliament.

35. From the above it is abundantly clear that when the election to the Parliament was held and the names of returned candidates were declared, it was incumbent upon the Hon’ble President of Bangladesh to appoint a Prime Minister first, from among the elected members of Parliament who appears to have commanded the support of the majority members. Therefore, when an election to national Parliament takes place and the names of the returned candidates are declared, the framers of the Constitution incorporated the provision of Article 56(3) for appointment of a member of parliament as Prime Minister, to keep run the continuity of the Government so that no break takes place the running of the government. The said provision was embodied in the Constitution even if the Parliament does not sit in its first meeting, there cannot be any vacuum in the running of the government in the country. Although there may be a gap between one parliament and another, the continuity of the government cannot have any break, and even if the Prime Minister becomes disqualified to continue as Prime Minister, he or she will still continue under Article 57 unless and until the next Prime Minister takes upon the office. The tenure of other Ministers is also the same under Article 58 according to which they will also continue to hold office until their successors enter upon such office. What can be deduced from the foregoing discussion is that the architect of our Constitution arranged its various provisions with such a dexterity and placed each of its provision very neatly and coherently so that there is no break in the continuity of the government in any occasion.

36. Again, Article 123(3) enjoins the general election of the members of Parliament to be held in case of dissolution of Parliament by reason of the expiration of its term, within the

period of ninety days preceding such dissolution. Again, as per proviso to Article 123(3) the newly elected members of Parliament shall not assume the office as members of Parliament before expiry of the term of earlier Parliament. According to Article 148(1) a person elected or appointed to any office mentioned in the Third Schedule shall before entering upon the office make and subscribe an oath or affirmation in accordance with that Schedule. Article 148(2A) was incorporated in the Constitution through 14th Amendment to the Constitution which states that the taking of oath or administering of oath must be done within three days from publication of results of election in the official gazette by the Election Commission and an additional three days may be allotted to administer such oath to the members of the Parliament, by the Chief Election Commissioner if for any reason the person designated in the Constitution does not administer oath. Article 148(3) lays down that a member of Parliament shall be deemed to have entered upon the office immediately after taking oath. It reveals from the above that the framers of the Constitution in one place of the Constitution provided that the member of Parliament shall not assume his office before the expiry of the term of earlier Parliament while in another place an MP shall be deemed to have assumed his office once he takes oath even before the first meeting of parliament or before dissolution of the last Parliament. In view of the above position of law we need to have a glimpse into the form of oath taken by the member of Parliament.

37. The form of oath taken by the member of Parliament has been incorporated in the 3rd Schedule under serial No. 5. The oath is as follows- “5. Member of Parliament.— An oath (or affirmation) in the following forms shall be administered by the Speaker— “I,, having been elected a member of Parliament do solemnly swear (or affirm) that I will faithfully discharge the duties upon which I am about to enter according to law : That I will bear true faith and allegiance to Bangladesh : And that I will not allow my personal interest to influence the discharge of my duties as a member of Parliament.”

38. It divulges from the above that unlike other oaths, the MPs take oath to discharge their duties upon which they do not enter immediately rather it denotes the duties upon which they are about to enter in future.

39. That apart, petitioner in paragraph 4 of the Writ Petition stated that though the first meeting of the 10th Parliament was held on 29.01.2014, the cabinet was formed before the said meeting, i.e. on 12.01.2014, and the MPs took oath even before i.e. on 09.01.2014. The same happened in case of other parliamentary election of Bangladesh and the 11th parliamentary election is no exception to that. Inasmuch as once the names of elected members of Parliament returned by the Election Commission in the official gazette, it becomes necessary for them to take oath and this necessity arises because of the relevant provisions of the Constitution in order to form a new government. The intention of the legislature is transparent while going through Article 56(3) of the Constitution whereby the President is to have commanded majority support of the members of parliament, as Prime Minister of the country. Therefore, for such appointment of an MP as Prime Minister, the first sitting of the Parliament is not necessary to be held. Rather, it is the discretion of the Hon’ble President to appoint a member as Prime Minister from among the elected members of

parliament commanding the support of the majority. In the given circumstances, it is clear that latent intent of the legislature for incorporating the deeming clause under Article 148(3) of the Constitution is to maintain the continuity of the government.

40. Now, talking about the 11th Parliamentary election the newly elected MPs took oath on 03.01.2019 and on the same day the President realized that Sheikh Hasina, the newly elected MP in the said election, was commanding the majority support of the elected MPs and for such satisfaction of the president under the Constitution, he is not required to wait until the first meeting of Parliament. Therefore, the provision of Article 148(3) of the Constitution has been incorporated to maintain continuity of running the government for the best interest of democracy. In the 11th Parliament after being appointed Prime Minister on 03.01.2019, she determined as to who would be the Ministers, State Ministers and Deputy Ministers in her cabinet and, accordingly such MPs and some non-MPs were also appointed as Ministers, State Ministers and Deputy Ministers by the President in accordance with the Constitution. It is manifest from the above that “deeming clause” under Article 148(3) was incorporated just to facilitate the continuity of the government. Though, upon taking oath, the MPs in reality have not assumed office of members of parliament, yet they have assumed office by way of legal fiction created by the Constitution and that legal fiction must be interpreted restricting the same to be used for the said purpose only. The legislature deliberately created this legal fiction so that the next executive government can be formed and appointed by the President. The said intention of the legislature has been elucidated in Article 123(3) which states that member of Parliament shall not assume office as members of parliament except after the expiration of the term of the previous parliament. It denotes that the MPs who took oath even before the first meeting of the Parliament shall not in fact or in reality assume such office of members of parliament before expiration of the tenure of the last parliament.

41. Admittedly, the MPs elected in the 11th parliamentary election did not sit in the first meeting of the parliament before expiration of the tenure of the last parliament. They sat in the first meeting of the parliament on 30.01.2019 i.e. two days after the expiration of the tenure of the 10th Parliament. Therefore, even though by way of legal fiction they have in the meantime assumed office of members of Parliament, in reality they have not assumed such office until and unless the first meeting of the 11th Parliament was held. This being the position, we do not find any substance in the submissions of the learned advocate for the petitioner that on the day the MPs in the 11th Parliament took oath, they assumed the office of MP and as such on that day there were more than 600 MPs in the parliament. In the light of the foregoing discussions we find that the High Court Division rightly rejected the application filed under Article 102(2)(a)(ii) and (b)(ii) of the Constitution of the People’s Republic of Bangladesh by the petitioner in Writ Petition No. 609 of 2019. We do not find any reason to interfere with the observations of the High Court Division rather we are fully in agreement with the same.

42. In the premises made above, we hold that the High Court Division on proper appreciation of facts and law passed the impugned judgment and order for which it does not warrant any interference by this Division.

43. Accordingly, this Civil Petition must fail and as such the same is dismissed.