

11 SCOB [2019] AD 1**Appellate Division****PRESENT**

Mr. Justice Syed Mahmud Hossain,
Chief Justice

Mr. Justice Muhammad Imman Ali

Mr. Justice Hasan Foez Siddique

Mr. Justice Mirza Hussain Haider.

Ms. Justice Zinat Ara

Mr. Justice Abu Bakar Siddiquee

Mr. Justice Md. Nuruzzaman

CIVIL APPEAL NO. 326 OF 2017 WITH CIVIL PETITION FOR LEAVE TO APPEAL NO. 744 OF 2017

(From the judgement and order dated 7th of December, 2016 passed by the High Court Division in Writ Petition No.7307 of 2016.

The Election Commission Bangladesh and another ... Appellants

Versus

Noruzzaman Sarker and others ... Respondent

Mohammad Hasanuzzaman ...Petitioner
(In C.P.No.744 of 2017)

For the Appellants : Dr. Mohamad Yeasin Khan
Advocate-on-Record

For the Petitioner : Mr. Nozrul Islam Chowdhury, Senior
Advocate instructed by Mr. Md. Helal Amin,
Advocate on-Record

For the Respondents : Mr. Abdul Matin Khasru, Senior Advocate
with Mr. Mahbub Shafique, Advocate
instructed by Mrs. Madhumaloty Chowdhury
Barua, Advocate -on-Record

Date of hearing : The 23rd of October, 2018

Date of judgement : The 30th of October, 2018

The Local Government (Union Parishad) Act, 2009 and the Local Government (Union Parishad) Rules 2010

Where the total number of votes cast in a centre exceeds either the total number of ballot papers issued to the centre or the total number of votes enrolled for that centre, or if during the counting of ballot papers a ballot box is found missing or it is snatched away or if the Presiding Officer makes glaringly contradictory reports as to the result of the counting of votes, without reasonable explanation, then the Election Commission need not wait for determination of the dispute by the Election Tribunal. But where no such thing has happened but allegation is brought after the declaration of the result then it is always desirable that dispute, if any, should go to the Tribunal for determination.

... (Para 12)

J U D G E M E N T

MUHAMMAD IMMAN ALI, J:-

1. This civil appeal, by leave, is directed against the judgement and order dated 07.12.2016 passed by the High Court Division in Writ Petition No.7307 of 2016 making the Rule Nisi absolute.

2. The facts of the case, in brief, are that the writ-petitioner-respondent No.1 herein filed the aforesaid writ petition stating, *inter alia*, that the election for the post of Chairman of Chararalia Union Parishad, Upazila-Raypura, District-Narsingdi was held on 07.05.2016 peacefully and without any hindrance and no complaint was made to any Presiding Officer of any centre or to any other authorised person by any candidate, either at the time of holding election or after the completion of the said election. After counting votes peacefully every Presiding Officer took signatures of the Polling Agents of the candidates in the result sheets and declared the result of their own centres in presence of the Polling Agents and others. Later, the Presiding Officers sent all the papers including the result sheets to the Returning Officer and, thereafter, the Returning Officer issued notices to every contesting candidate. On 07.05.2016, writ-respondent No.10, i.e. the Returning Officer, consolidating the results in presence of the contesting candidates or their agents, declared the result of the votes of the contesting candidates and finally declared the writ-petitioner elected as Chairman. Later, the instant writ-petitioner came to know that contesting candidate Hasanuzzaman filed an application on 09.05.2016, i.e. after 2 days of the election to the Election Commission of Bangladesh, Shere-E-Bangla Nagar, Dhaka demanding re-election. On receiving the same, the Election Commission by letter dated 17.05.2016 stayed publication of the election result in the Gazette. The writ-petitioner collected the said letter dated 17.05.2016 issued under the signature of writ-respondent No.4.

3. Writ respondent Nos.2 and 3 contested the Rule by filing affidavit-in-opposition contending, *inter alia*, that the election was held on 07.05.2016. Contesting Chairman candidate Mohammad Hasanuzaman was complaining from the beginning of poll about serious illegalities and irregularities in voting of Chararalia Union Parishad Election for the post of Chairman to the concerned Returning Officer, Upazila Election Officer and District Election Officer through mobile phone and on the same day, i.e. 07.05.2016 at 1.00 p.m. he filed a written complaint to the Election Commission through the District Election Officer, Narsingdi and, on 09.05.2016, he again filed a written complaint to the Election Commission through the District Election Officer, Narsingdi. He also filed another written complaint to the Chief Election Commission for staying the election result and demanded re-election. The Election Commission took decision staying publication of the election result in the Gazette Notification and ordered Mihir Sarwar Morshed, Regional Election Officer, Dhaka to hold inquiry and to submit report by 25.05.2016 vide the letter impugned in the writ petition, who after recording statements and collecting information from the complainant, the writ-petitioner, the Returning Officer, Presiding Officers, Assistant Presiding Officers, Polling Officers, Member Candidates, Officer-in-Charge of Raipur Police Station, Officer-in-charge of law enforcing agencies of the respective election centres, Upazila Nirbahi Officer of Raipur Narsingdi, District Election Officer of Narsingdi and Upazila Election Officer of Raipur, Narsingdi, submitted his report to the Election Commission Secretariat on 01.06.2016. He stated that it was not possible to conduct a free, fair and impartial election in

accordance with the provisions of law in 4(four) centres of Chararalia Union Parishad held on 07.05.2016 and as such, the result circulated by returning officers was not a correct reflection of the scenario of the election held in the said 4(four) disputed centres of Chararalia Union Parishad, Raipura, Narsingdi.

4. Writ-respondent No.11, Mohammad Hasanuzzaman (appellant herein) contested the Rule *Nisi* by filing affidavit-in-opposition contending, *inter alia*, that the writ-petitioner by exercising coercive force entered into the voting centre on 07.05.2016 and compelled casting of votes in his favour by rigging in 4(four) polling centres. The writ-petitioner cast all votes including the votes of dead persons and of those who were out of the country.

5. After hearing the parties and considering the evidence and materials on record, by the impugned judgement and order dated 07.12.2016 the High Court Division made the Rule *Nisi* absolute.

6. Hence, writ-respondent Nos.2 and 3 as petitioners filed Civil Petition for Leave to Appeal No.787 of 2017 and writ-respondent No.11 filed Civil Petition for Leave to Appeal No.744 of 2017 before this Division and leave was granted in Civil Petition for Leave to Appeal No.787 of 2017 to consider the following submissions of the learned Advocate-on-Record for the petitioners:

“I. As per the provisions of Article 119(2) of the Constitution read with Rules 3, 77, 78, 79, 80, 81, 85 and 90 of the Local Government (Union Paishad) Election Rules, 2010, the Election Commission is empowered to conduct the Union Parishad election freely, fairly, justly and honestly which covers the entire process that starts with the publication of the notification of schedule and culminates with the publication of the result in the official gazette and therefore, before publication of the result by the Election Commission through the process of publishing in the official gazette notification, the election process continues and during this period Election Commission has ample power to stay disputed or controversial election results and to hold inquiry/investigation on the basis of serious complaints or allegations of illegalities and irregularities of voting in election centres; the High Court Division without exercising judicial mind made the Rule absolute.

II. That if it appears that there is any reasonable cause to believe that any offence as mentioned in Rules 77(2), 78, 79, 80 and 81 was committed namely, causing or helping in capturing of the polling booth by musclemen, driving away the Presiding Officers and Polling Officers or agents of the rival candidates and then stuffing ballot boxes with ballot papers and obtaining a favourable result sheet from the Presiding Officer, either by coercion, the election commission can order an investigation under the Local Government (Union Parishad) Election Rules, 2010, the High Court Division on misconception of law made the Rule absolute.

III. That rule 92(1) provides, ৯২। সরল বিশ্বাসে কৃত কাজকর্ম রক্ষণ।- (১) কমিশন বা কোন রিটার্নিং প্রিজাইডিং অফিসার বা পোলিং অফিসার কর্তৃক, বা তদকর্তৃত্বাধীন সরল বিশ্বাসে কৃত কর্ম, গৃহীত কোন ব্যবস্থা, অথবা প্রদত্ত কোন সিদ্ধান্তের বৈধতার বিষয়ে কোন আদালতে প্রশ্ন উত্থাপন করা যাইবে না। and as the commission acted *bona fide* in staying the Gazette Notification, the High Court Division erred in law in making the Rule absolute.”

7. Civil Petition for Leave to Appeal No.744 of 2017 was tagged with the aforesaid appeal for consideration at the time of hearing of the appeal.

8. Dr. Mohammad Yeasin Khan, learned Advocate-on-Record, appearing on behalf of the appellants made submissions in line with the grounds upon which leave was granted. He further submitted that if there appears any reasonable cause to believe that any offence as mentioned in Rules 77(2), 78, 79, 80 and 81 was committed then the Election Commission can order an investigation under the provision of Rule 85(2) of the Local Government (Union Parishad) Election Rules, 2010 or lodge a criminal case which also falls within the clear and express jurisdiction of the Election Commission under Article 119(2) of the Constitution read with rules 3 and 90 of the Local Government (Union Parishad) Election Rules, 2010. But the High Court Division on misconception of facts and law made the Rule *Nisi* absolute. He further submitted that under rule 92(1) of the Local Government (Union Parishad) Election Rules, 2010 the Commission acted *bona fide* in staying the Gazette Notification and in ordering an investigation in the interest of a free, fair and impartial election of Chararalia Union Parishad and therefore, the writ petition was not maintainable, and the Rule *Nisi* ought to have been discharged.

9. Mr. Abdul Matin Khasru, learned Senior Advocate appearing for the respondents made submissions in support of the impugned judgement and order of the High Court Division. He submitted that it is an established principle of law that election includes the whole election process passing through several stages and if any dispute arises in any stage of the election process, then such dispute must be adjudicated by the Election Tribunal only and, therefore, the Election Commission has no power to investigate any matter without the order of the Election Tribunal, or to stay the gazette notification, hence, the appeal is liable to be dismissed. He further submitted that from a careful reading of the law, it is evident that the Election Commission has been vested with plenary, supervisory and discretionary jurisdiction to oversee that an election is conducted honestly, justly and fairly and in accordance with the law, but it has no power to investigate any disputed matter as per rule 85(2) of the Local Government (Union Parishad) Rules 2010, and therefore, the judgement of the High Court Division is sustainable in law. He submitted that as per the Local Government (Union Parishad) Act, 2009 and the Local Government (Union Parishad) Rules 2010, there is no scope of filing any complaint to the Election Commission by any candidate either at the time of election or after declaration of the results by the Returning Officer and the Presiding Officer. He submitted that as per the Local Government (Union Parishad) Act 2009, as well as Rules 2010, the Election Commission or any other body or tribunal or Court has no authority to stay the publication of Gazette of the result of the said election. He lastly submitted that it is a well-settled principle of law that on some very limited grounds, i.e. if there was malice in law or total absence of jurisdiction in any step in the process of election by the authority, i.e. Election Commission, then article 102 of the Constitution of the People's Republic of Bangladesh can be invoked and in the instant case, the impugned Memo No.17.00.6864.035.46.093.14-215, dated 17.05.2016 signed by respondent No.4, containing an order of stay of the publication of Gazette of the result of Chararalia Union Parishad Election, held on 07.05.2016, Raypura, Narsingdi and to conduct an investigation, is *ex-facie* illegal, arbitrary, *mala fide* and without jurisdiction, which is challenged invoking article 102 of the Constitution and the same is maintainable.

10. We have considered the submissions of the learned Advocates appearing for the parties concerned, perused the impugned judgement and order of the High Court Division and other connected papers on record.

11. In the case of *Altaf Hussain vs. Abul Kashem and others* reported in *45 DLR AD 53* several appeals relating to election matter were heard and disposed of together. The sum and substance of the decision is that where allegation of disturbance at the polling centre or of vote rigging is brought after the declaration of the result then it is always desirable that dispute, if any, should go to the Election Tribunal for determination. In that decision Shahabuddin Ahmed, CJ observed as follows:

“But from the experience it is found that sometimes statutory functionaries on the spot do not make timely report as to any disturbance during poll or large-scale rigging at the time of counting of ballot papers either through coercion or from dishonest motive. So, the general rule that when election has been held peacefully and no report has been made about any disturbance or rigging by the Presiding Officer or the Returning Officer, then the Election Commission has no power to interfere, cannot be taken for universal application . . . [But] where no such thing has happened but allegation is brought after the declaration of the result then it is always desirable that dispute, if any, should go to the Tribunal for determination.”

12. And his Lordship gave examples of possible dispute where the total number of votes cast in a centre exceeds either the total number of ballot papers issued to the centre or the total number of votes enrolled for that centre, or if during the counting of ballot papers a ballot box is found missing or it is snatched away or if the Presiding Officer makes glaringly contradictory reports as to the result of the counting of votes, without reasonable explanation, then the Election Commission need not wait for determination of the dispute by the Election Tribunal. But where no such thing has happened but allegation is brought after the declaration of the result then it is always desirable that dispute, if any, should go to the Tribunal for determination.

13. The allegation by writ-petitioner-respondent No.1 in the instant case is that, the election was held peacefully on 07.05.2016 and without any hindrance from any vested quarter and no complaint was made to any Presiding Officer of any centre or to any other authorised person by any candidate, either at the time of holding election or after the completion of the election. However, it transpires from the report of the Regional Election Officer, who held inquiry into the allegations made by the appellant, that the election in 4(four) of the centres of Chararalia Union Pairshad was not held in accordance with the provisions of law and that the result circulated by Returning Officer was not a correct reflection of the scenario of the election held in the said 4(four) disputed centres. We also find from the record that the appellant filed a written complaint before the Chief Election Commissioner at 1.00 p.m. On the very date of election alleging irregularities and illegalities in the voting and that his complaints on that very day to the authorities concerned was in vain. We find from annexure-2 to the writ-petition that the said hand written complaint from Mohammad Hasanuzzaman (the appellant) was received by the Election Commission on 07.05.2016 at 1 p.m.

14. We also find from annexure-4 report of Mihir Sarwar Morshed, Regional Election Officer, Dhaka that after elaborate inquiry it was found that in 4(four) of the polling centres, namely centre Nos.6, 7, 8 and 9 there were irregularities or illegalities in the casting of votes and that the Presiding Officers were not able to carry out their duties properly.

15. In the light of complaints having been lodged on the date of election and the findings of the report mentioned above, it cannot be said that no allegation of irregularities and illegalities was made on the date of election.

16. We are of the view that the Election Commission rightly interfered and that it was within the jurisdiction of the Election Commission to take action against allegation of irregularities and illegalities which were brought to its notice on the very day of election.

17. In view of the above discussion, we find that the judgement and order of the High Court Division is not in accordance with law and accordingly the impugned judgement and order is set aside.

18. In the result the appeal is allowed, without however, any order as to costs and Civil Petition for Leave to Appeal No.744 of 2017 is accordingly disposed of in the light of this judgement.