IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

Present:
Mr. Justice Hasan Foez Siddique, Chief Justice.
Mr. Justice Md. Nuruzzaman
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.1328 of 2023.

(From the judgment and order dated 15.03.2023 passed by the High Court Division in Writ Petition No.3185 of 2023).

Advocate M.A. Aziz Khan **.....Petitioner.**

-Versus-

The Election Commission of Bangladesh, represented by the Chief Election Commissioner, Nirbachan Bhaban (7th -8th Floor), Agargaon, Dhaka-1207 and another. **.....Respondents.**

For the Petitioner (In person)	**:**	Mr. Advocate M.A. Aziz Khan, in person, instructed by Ms. Mahmuda Begum, Advocate-on-Record.
For the Respondents	**:**	Mr.A.M. Amin Uddin, Attorney General (with Mr.Mohammad Mehedi Hassan Chowdhury, Additional Attorney General and Mr. Khan Mohammad Shamim, Advocate) instructed by Mr. Haridas Paul, Advocate-on-Record.
Date of hearing	**:**	The 18th May, 2023

JUDGMENT

Hasan Foez Siddique, C. J:

The petitioner, who is a learned Advocate of this Court, filed Writ Petition No.3185 of 2023 in the High Court Division under Article 102(2)(ii) of the Constitution of the People's Republic of Bangladesh with a prayer for issuance of Rule Nisi calling upon the writ respondents to show cause as to why the scrutiny of nomination paper of the sole presidential candidate Mr. Md. Shahabuddin under Section 7 of the

Presidential Election Act, 1991 declaring him eligible and elected as single candidate and the Notification No.17.00.0000.034.34. 025.22-119 dated 13 February, 2023 (Annexure-"A" to the writ petition) should not be declared to have been made without any lawful authority and should not be regarded as null and void and is of no legal effect.

Judicial review in election dispute is not a compulsion. Since the separation of powers is a basic feature of the Constitution and, therefore, every dispute involving the adjudication of legal rights must be left to the decision of the judiciary. In the writ petition, the petitioner did not make any allegation that his any legal right has been infringed. In the writ petition, the writ petitioner took two grounds for getting relief as prayed for, which are:

> "I. For that the respondents failed to act in accordance with law while scrutinizing the nomination paper under section 7 of the Presidential Election Act, 1991 (Act 27 of 1991) read with article 119(1)(a) of the Presidential election (?) and got the election flawed for misinterpretation of law hitting the qualification of the sole candidate under section 9 of the ACC Act, 2004 read with article 66(2)(g) of the Constitution rendering the Notification No.17.00.0000.034.34.025.22-119 dated 13 February 2023 declaring Mr. Shahabuddin Ahmed(?) as president elect void and illegal,
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> II. For that the CEC fell into serious error of law and misinterpreted the law by not holding the words "appoint" and "elect" synonymous and interchangeable as means to hold a public "post" or "office" in the republic and failed to disqualify the nomination of the sole candidate Mr. Shahabuddin Ahmed(?) as required by the Constitution and other laws."

The High Court Division, by the impugned judgment and order dated 15th March, 2023, rejected the said petition along with Writ

Petition No.3144 of 2023 summarily. Thus, the writ petitioner has filed this leave petition.

Advocate M.A. Aziz Khan, appearing, in person, in support of the civil petition, submits that the Office of the President is an office of profit of the Republic and that earlier Md. Shahabuddin had been performing his duty as Commissioner of দুর্নীতি দমন কমিশন (the Commission) so he was disqualified to participate in the election for post of President of the Republic in view of the provision of Section 9 of the Durniti Domon Commission Ain, 2004 (the Ain). It has been submitted that in the absence of any legislation or constitutional provision to remove the disqualification of Md. Shahabuddin contained in section 9 of the Ain read with article 66(2) (g) of the Constitution, his election was illegal.

Some provisions of laws, relevant for the disposal of the petition, are quoted below:

Section 9 of the Ain, provides the following provision: "কর্মাবসানের পর কোন কমিশনার প্রজাতন্ত্রের কার্যে কোন লাভজনক পদে নিয়োগ লাভের যোগ্য হইবেন না"। (underlined by us)

Any person seeking to contest in the election to the Office of the President must satisfy the certain eligibility criteria stipulated in the Constitution under article 48 clause 4 which provides as follows:

"(4) A person shall not be qualified for election as President if he-

(a) is less than thirty-five years of age; or

(b) is not qualified for election as a member of Parliament; or

(c) has been removed from the office of President by impeachment under this Constitution."

Article 66 of the Constitution provides,

"66.(1) A person shall subject to the provisions of clause (2), be qualified to be elected as, and to be a member of Parliament if he is a citizen of Bangladesh and has attained the age of twenty-five years.

(2) A person shall be disqualified for election as, or for being a member of Parliament who-

(a) is declared by a competent court to be of unsound mind;

(b) is an undischarged insolvent;

© acquires the citizenship of , or affirms or acknowledges allegiance to, a foreign state;

(d) has been, on conviction for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release.

[(e) has been convicted of any offence under the Bangladesh Collaborators (Special Tribunals) Order, 1972;

(f) holds any office of profit in the service of the Republic other than an office which is declared by law not to be disqualified its holder; or

(g) is disqualified for such election by or under any law.

[(2A) Notwithstanding anything contained in sub-clause(c) of clause (2) of this article, if any person being a citizen of Bangladesh by birth acquires the citizenship of a foreign State and thereafter such person-

(i) in the case of dual citizenship, gives up the foreign citizenship; or

(ii) in other cases, again accepts the citizenship of Bangladesh-

for the purposes of this article, he shall not be deemed to acquire the citizenship of a foreign State]

[(3) For the purposes of this article, a person shall not be deemed to hold an office of profit in the service of the Republic by reason only that he is the President, the Prime Minister, the Speaker, the Deputy Speaker, a Minister, Minister of State or Deputy Minister]

(4)If any dispute arises as to whether a member of Parliament has, after his election, become subject to any of the disqualifications mentioned in clause (2) or as to whether a member of Parliament should vacate his seat pursuant to article 70, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final.

(5) Parliament may, by law, make such provision as it deems necessary for empowering the Election Commission to give full effect to the provisions of clause (4).”

The sole contention of the petitioner rests on the ground that since Mr. Md. Shahabuddin will hold the office of profit in the service of the Republic, he was not qualified to participate in the election for the post of the President of the Republic in view of the provision of section 09 of the Ain.

Now the question arises as to whether the office of the President of the People’s Republic of Bangladesh is an office of Profit in the Service of the Republic or not.

Article 66(3) of the Constitution states that for the purposes of this article, a person shall not be deemed to hold an office of profit in the service of the Republic by reason only that he is the President, the Prime

Minister, the Speaker, the Deputy Speaker, a Minister, Minister of State or Deputy Minister. As per article 66(3) of the Constitution, for the purpose of election as a member of Parliament, office of the President shall not be deemed to be office of the profit in the service of the Republic.

Like our Constitution, article 102 (1) (a) of the Constitution of India provides that a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than office declared by Parliament by law not to disqualify its holder. Article 58(1) of the Constitution of India also provides that no person shall be eligible for election as president unless (a) he is a citizen of India, (b) has completed the age of thirty-five years, and (c) is qualified for election as a member of the House of the People. Article 58(2) of the Constitution of India provides that a person shall not be eligible for election as president if he holds any office of profit under the Government of India or the Government of any state or under any local or other authority subject to the control of any of the said Governments. Explanation to article 58 of the Constitution of India provides that for the purposes of this article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice-President of the Union or the Governor of any State or is a Minister either for the Union or of any State. In Bangladesh the term office of profit has not been categorically defined in the General Clauses Act, 1897 or in the Constitution. In India the term office of profit has not got uniform definition. Therefore, this term became subject of judicial interpretation at different times. This term has been defined in various ways in

different cases depending upon the facts and circumstances of each case. Let us have an overview of cases in which this term has been explained.

In the case of Purno Agitok Sangma Vs. Pranab Mukherjee [AIR 2013 Supreme Court 372] respondent's election to the post of President was challenged for holding office of profit under government and it was held that the Office of the Chairman of the Indian Statistical Institute was not an office of profit since neither any salary nor honorarium or any other benefit attached to the holder of the said post. It was not such a post which, in fact, was capable of yielding any profit, which could make it, in fact, an office of profit. The term "office" has nowhere been expressly defined. Generally, an "office" refers to an employment which is permanent in nature. In order to be an office of profit, the office must carry various pecuniary benefits or must be capable of yielding pecuniary benefits such as providing for official accommodation or even a chauffeur driven car, which is not so in respect of the post of Chairman of the Indian Statistical Institute, Calcutta.

In the case of K. B. Rohamare Vs. Shankar Rao [AIR 1975 Supreme Court 575] first respondent's election to Maharashtra State Legislative Assembly was challenged and it was held that a member of the Wage Board, Sugar Industry, Constituted by the Maharashtra Government under section 86-B of the Bombay Industrial Relations Act, 1946, undoubtedly holds an office under the State Government. The law regarding the question whether a person holds an office of profit should be interpreted reasonably, having regard to the circumstances of the case and the times with which one is concerned, as also the class of persons whose case the court is dealing with and not divorced from reality. The

question has to be looked at in a realistic way. Merely because part of the payment made to the member is called honorarium and part of the payment daily allowance, the court cannot come to the conclusion that the daily allowance is sufficient to meet his daily expenses and the honorarium is a source of profit. We are thus satisfied that the first respondent did not hold an office of profit.

In the case of Madhukar G. E. Pankakar Vs. Jaswant Chobbildas Rajani and others [AIR 1976 Supreme Court 2283] it was held that a Medical Practitioner working as a Panel doctor appointed under the Employees' State Insurance Scheme does not hold "office of profit" under the State Government, so as to attract disqualification under section 16 (1) (g) of the Maharashtra Municipalities Act. How proximate or remote is the subjection of the doctor to the control of the Government to bring him under Government is the true issue. Indirect control, though real, is insufficient. Medical Practitioner working as a Panel doctor appointed under the Employees' State Insurance Scheme was held not to hold "office of profit" under the State Government mainly on the ground that the subjection of the aforesaid doctor to the control of the Government was remote.

In the case of Ashok Kumar Bhattacharyya Vs. Ajay Biswas and others [AIR 1985 Supreme Court page 211] election of respondent no 1 to Tripura State Legislature was challenged and it was held that the Accountant-in-Charge of Agartala Municipality does not hold office of profit under the Government of Tripura since under the Bengal Municipal Act, 1932 the State Government does not exercise any control over officers like Accountant-in-Charge respondent no 1 and that he

continues to be an employee of the Municipality though his appointment is subject to the confirmation by the Government.

In the case of Shibu Soren Vs. Dayanand Sahay [AIR 2001SC page 2583] election of the appellant to Jharkhand Rajya Sabha was challenged and it was held that the appellant (Chairman of Interim Jharkhand Area Autonomous Council) was holding an office of profit under the State Government. The State Government not only had the exclusive jurisdiction to appoint (nominate) the Chairman of Interim JAA Council but also power to remove him since under Section 23(7) of the JAAC Act, the Chairman and Vice-Chairman of the Interim JAA Council, as well as members of the Interim Executive Council, "shall hold their office during the pleasure of the State Government".

We find that in the cases of Madhukar G. E. Pankakar Vs. Jaswant Chobbildas Rajani and others [supra], Ashok Kumar Bhattacharyya Vs. Ajay Biswas and others [supra] and Shibu Soren Vs. Dayanand Sahay [supra] Supreme Court of India was of the view that whether a service was under the Central or state Government has to be determined in the light of the control the Government exercises on that service. Remote control on the service was not sufficient to bring that service under the Government.

In Shivamurthy Swami Inamdar V. Agadi Sanganna Andanappa (1971) 3 SCC 870 it was held that the tests for finding out whether an office in question is an office under the Government and whether it is an office of profit, are (1) Whether the Government makes the appointment, (2) Whether the Government has the right to remove or dismiss the holder; (3) Whether the Government pays the remuneration; (4) What

are the functions of the holder? Does he perform them for the Government and (5) Does the Government exercise any control over the performance of these functions? In the case of Madhukar G. E. Pankakar Vs. Jaswant Chobbildas Rajani and others [supra] there was also discussion about the same tests as laid down in Shivamurthy Swami Inamdar V. Agadi Sanganna Andanappa (supra) for determining office of Profit under Government.

In the case of Purno Agitok Sangma V. Pranab Mukherjee (Supra), it was observed that the expression "office of profit" had not been defined in the Constitution. It was further observed that the first question to be asked in this situation was as to whether the Government has power to appoint and remove a person on and from the office and if the answer was in the negative, no further inquiry was called for. However, if the answer was in the positive, further inquires would have to be conducted as to the control exercised by the Government over the holder of the post. Since the Government does not have the control on appointment, removal, service conditions and functioning of the President, the President does not hold an office of profit in the service of the Republic.

The term "প্রজাতন্ত্রের কার্য" has not been defined in the Ain. Since the term has not been defined in the Ain, we can look for the definition in the General Clauses Act, 1897. Section 3(50) of the General clauses act, 1897 defines that "the service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic". Service of the Republic defined in section

3(50) of the General Clauses Act, 1897 has got same connotations as in article 152 of the Constitution. We are of the view that since the term "প্রজাতন্ত্রের কার্য" has not been defined in the Ain and the same has identically been defined in the General Clauses Act, 1897 and in Article 152 of the Constitution, legislature intended that the term "প্রজাতন্ত্রের কার্য" would have the same meaning as in the General Clauses Act, 1897 and Article 152 of the Constitution. The Legislature is presumed to have been aware of the existing Law [Md. Abdus Sattar Howladar Vs. Sub-Registrar and others 29 DLR 320] and there is a presumption that the legislature does not intend to make a change in the existing law beyond what is expressly provided or which follows by necessary implication from the language of the statute in question [River Wear Commissioners Vs. Adamson, (1877) 1QBD 546; National Assistance Board Vs. Wilkinson,(1952) 2QB 648]. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended (Maxwell-Interpretation of Statutes, 12 ed., p. 116). Even if the Ain contained a different definition of "প্রজাতন্ত্রের কার্য", the definition of "প্রজাতন্ত্রের কার্য" as contained in article 152 of the Constitution would have got primacy over the definition of "প্রজাতন্ত্রের কার্য" in the Ain, the Constitution being the supreme law of the land.

In order to determine whether the office of the President is an office of profit in the Service of the Republic we meticulously need to go

through Part IX of the Constitution. Chapter I of this part deals with services of the Republic. Subject to the provision of the Constitution Parliament may by law regulate the appointment and conditions of service of persons in the service of the Republic (article 133). It shall be competent for the President to make rules regulating the appointment and the conditions of service of such persons until provision in that behalf is made by or under any law, and rules so made shall have effect subject to the provisions of any such law (proviso to article 133). This kind of rules framed by the President regulating the appointment and the conditions of service of the persons in the service of the Republic is called as special executive legislation in Constitutional Jurisprudence. The Government Servants (Conduct) Rules, 1979 and "সরকারী কর্মচারী (শৃঙ্খলা ও আপীল) বিধিমালা, ২০১৮" are the examples of such rules framed by the President. Cadre officers in the Service of the Republic are appointed through Public Service Commission (article 140). Chairman and members of the Public Service Commission are appointed by the President (article 138). Except as otherwise provided by the Constitution every person in the service of the Republic shall hold office during the pleasure of the President (article 134). As per the abovementioned Constitutional Provision President is the appointing authority of the persons in the Service of the Republic and every person in the service of the Republic holds office during the pleasure of the President except as otherwise provided by the Constitution. Hypothetically, if president of the Republic falls within the category of persons in the service of Republic, he can hold office during his own pleasure as per article 134. But it is impossible on the ground that

President can be removed by impeachment by two thirds majority of the total members of Parliament (Article 52 and 53 of the Constitution).

From the discussions made above, it appears that a president candidate of the People's Republic of Bangladesh shall have to be qualified for election as a member of parliament. A member of Parliament candidate in Bangladesh cannot simultaneously hold any office of profit in the service of the Republic other than an office which is declared by law not to be disqualified its holder. As per provision of Article 152 of the Constitution, "the service of the Republic" means any service, post or office whether in a civil or military capacity, in respect of the Government of Bangladesh, and any other service declared by law to be a service of the Republic. Sole Presidential Candidate Mr. Md. Shahabuddin does not hold any office of profit in the service of the Republic as per the definition provided in Article 152 of the Constitution. Therefore, he is qualified for election to be a member of the Parliament.

It is the authority of the Government to appoint a person to any office of profit or, to revocate his appointment at their discretion and to pay out of the Government revenues, though the source of payment was held not to be always a decisive factor. In the case of President of the People's Republic of Bangladesh, Government of Bangladesh cannot appoint President. Removal procedure of the President is also very stringent since he can be removed by impeachment by two thirds majority of the total members of Parliament (Article 52 and 53 of the Constitution). Government cannot remove president at its will since Government may be formed by simple majority of the members of

Parliament [article 56 of the Constitution]. So from the point of view of control over the President by the Government, the office of the President can in no way be termed as office of profit in the Service of the Republic in respect of the Government. This position was also recognized in the case Abu Bakkar Siddique Vs. Justice Shahabuddin Ahmed and Others reported in 49 DLR (HCD) page 1. In this case it has been categorically held that the office of the President of the Republic is not an office in the service of the Republic in respect of the Government of Bangladesh."

The question is who are parties to an election petition and who may be impleaded as parties to an election petition. In the case of Jyoti Basu and others V. Debi Ghosal and others reported in AIR 1982 SC 983 it was observed that the nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the Constitutional and statutory provisions in relation to these rights have been explained by the Court in N.P. Ponnuswami V. Returning Officer (AIR 1982 SC 983) and Jagan Nath V. Jaswant Singh (1982 SCC Vol. page 691). We proceed to state what we have gleaned from what has been said, so much as necessary for the case.

A right to elect, fundamental right is to democracy, is, anomalously enough, neither a fundamental right nor a common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, "there is no right to elect, no right to be elected and no right to dispute an election." The Supreme Court of India in the case of Dr. N. B. Khare-II V. Election Commission (AIR 1958 SC 139) held that the right to stand for the election and the right to move for setting aside the election are

not common law rights. It was further held that the right of the person to file the application for setting aside an election must be determined by the statute. In the case Charan Lal Sahu V. Shri Fakharuddin Ali Ahmed reported in AIR 1975 SC 1288 it was observed that since candidature of Mr. Lahu was rejected he had no locus-standi to file election petition.

Mr. Md. Shahabuddin was not even impleaded in the writ petition and present leave petition which seems to be a violation of the principles of natural justice. It is to be mentioned here that the election of Pranab Mutherjee, former President of India, was challenged in the Supreme Court of India in the case of Purno Agitok Sangma Vs. Pranab Mukherjee [AIR 2013 Supreme Court 372], wherein Pranab Mukherjee was impleaded as respondent. In the case reported in 49 DLR (HCD) page 1 Justice Shahabuddin Ahmed was impleaded as respondent No.1. Since in the writ petition the interest of Md. Shahabuddin was going to be affected directly, he was a necessary party.

It is regrettable that the writ petition challenging the election of the High office of the President of the People's Republic of Bangladesh should not be filed in a fashion as cavalier. It is upon the writ petitioner to make out a clear case for interference in his pleadings. Any casual negligent or cavalier approach in such serious and sensitive matter involving great public importance cannot be countenanced or glossed over too liberally as for fun.

The domain and the extent of the writ jurisdiction under article 102 of the Constitution is very limited. With a few notable exceptions when the High Court Division has considered the matter as an especially

exceptional circumstance and in the case it entertained such petition for examination. It usually declined to entertain the election matter.

Accordingly, this petition is dismissed with a cost of taka 1,00,000/- (one lac). The leave petitioner is directed to deposit cost in the relevant head of the Republic exchequer within 2(two) weeks from the date of receipt of the order.

C. J.

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The 18th May, 2023

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