

**10 SCOB [2018] HCD**

**HIGH COURT DIVISION  
(SPECIAL ORIGINAL JURISDICTION)**

WRIT PETITION NO. 10701 of 2015.

**Bangobir Kader Siddiqui, Bir Uttom, Son of late Mohhamamed Abdul Ali Siddiqui and late Lotifa Siddiqui, Kalian, Sakhipur Upazilla, District-Tangail.**

..... Petitioner.

**Vs.**

**Chief Election Commissioner, Sher-E-Banglanagar, Dhaka and others.**

..... Respondents.

Mr.Md. Habibur Rahman Sarker,  
Advocates

... For the petitioner.

Mr. Mahbubey Alam, Senior Advocate  
with Mr. Md. Abdul Hai,

Mr. A.Z.M. Fariduzzaman, Advocates

.... For the respondent No.5.

Dr. Mohammed Yeasin Khan,

Ms. Shanzana Yeasin Khan, Advocates.

... For the respondent Nos.1-2.

Mr. A.J. Mohammad Ali, Senior  
Advocate with  
Mr. Raghib Rouf Chowdhury,  
Mr. Rubaiyat Hossain,  
Mr. Raisul Islam and

Heard on 13.01.2016, 21.01.2016,  
25.01.2016 27.01.2016,, 28.01.2016,  
31.01.2016 &  
Judgment on 04.02. 2016.

**Present:**

**Mr. Justice Md. Ashfaqul Islam**

**And**

**Mr. Justice Zafar Ahmed**

**Constitution of the People's Republic of Bangladesh, Article, 102**

**Any dispute whether that relates to acceptance or non-acceptance of the candidature of the particular candidate should be brought for a decision before a election Tribunal as election dispute.** ... Para 26)

**In election matter, even when it ensues out of a pre-election dispute, this Division cannot invoke Article 102 of the Constitution, election tribunal is the only forum, except on a very limited ground of corum non-judice or malice in law. The discipline of law in this sphere that has been taken a positive shape drawing it's inspiration from the constitution and the consisting judicial pronouncements should not be disturbed in any manner.** ... (Para 36)

**Judgment**

**Md. Ashfaqul Islam, J:**

1. The Rule under adjudication, issued on 21.10.2015 was in the following terms:  
“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the order dated 18.10.2015 (Annexure-“J”) passed by the respondent No.1 and 2 dismissing the petitioner ‘s Election Appeal No.04/2015 and affirming the order dated 13.10.2015 passed by the respondent No.3 (Annexure- “C”) rejecting the nomination

papers of the petitioner should not be declared to have been issued without any lawful authority and are of no legal effect and why the respondents should not be directed to accept the nomination papers of the petitioner and allow him to participate in the By-Election-2015 of Constituency 133 Tangail-4.

2. At the time of issuance of the Rule this Division stayed the operation of the orders dated 13.10.2015 and 18.10.2015 (Annexure- “C” and “J”) respectively and also directed the respondent No.1-3 to accept the petitioner’s nomination papers in respect of By-Election-2015 of the Constituency-133, Tangail-4 and allow him to contest in the election. Against the ad-interim order of Election Commission Moved Civil Miscellaneous Petition No. 117/ 2015 before the Appellate Division wherein Appellate Division passed the following order:

“Heard the learned Advocate and perused petition and stayed filed by the chief Election Commissioner”

The order of stay passed by the learned Judge-in-Chamber shall continue till disposal of the Rule pending before the High Court Division. A Division Bench presided over by Ashfaque Islam, J, is directed to dispose of the Rule by 31.01.2016 positively.

In the meantime, the interim order passed by the High Court Division be stayed.

This petition is accordingly disposed of with the above observation and direction.”

3. Averments figure in the petition leading to the Rule are as under:-

The petitioner is one of the most famous organizers of the Bangladesh Liberation War who made an unparalleled contribution in the War Liberation and independence of Bangladesh. He was elected as the Member of Parliament on two successive occasions in the years 1996 and 2001. The petitioner is the President of Krishak Sramik Janata League. Respondent No.1 herein is the Chief Election Commissioner, Sher-E-Banglanagar, Dhaka; the respondent No.2 is the Election Commissioner of Bangladesh, represented by the Chief Election Commissioner, Sher-E-Banglanagar, Dhaka; the respondent No.3 is the Returning Officer, 133 Tangail-4 Bye-Election-2015 and the respondent No.4 is the Government of Bangladesh, represented by its Secretary, Prime Minister’s Secretariat and respondent No.5 is the Agrani Bank Limited having its Head office at Motijheel C/A, and Branch office, known as Tangail Branch, Tangail.

4. In this petition the petitioner impugns the order dated 18.10.2015 issued by the respondent No.1 and 2 dismissing the petitioner’s appeal by affirming the order dated 13.10.2015 rejecting the petitioner’s nomination papers by the respondent No.3 being illegal, arbitrary and without lawful authority. The Constituency 133 Tangail-4 fell vacant on 01.09.2015 following the resignation of the then Member of Parliament of that constituency. Following the vacancy, the Election Commissioner, by its Notification bearing No.17.00.0000.034.36.02815.302 dated 15.09.2015 declared the schedule of the Bye-Election in respect of the said constituency in the following manner:-

Last date of filing nomination papers	30.09.2015
Scrutiny of the nomination papers by the Returning Officer.	03.10.2015
Withdrawal of nomination papers	11.10.2015
Election/Poll	28.10.2015

5. The above schedule was subsequently changed by the respondents by issuing its further Notification dated 16.09.2015 in the following manner:

Last date of filing nomination papers	11.10.2015
Scrutiny of the nomination papers by the	13.10.2015

6. The petitioner in terms of the above schedule submitted his complete set of nomination paper to the respondent No.3 on 11.10.2015 enclosing the relevant documents by searing affidavit etc. and respondent No.3 granted a receipt of receiving the same. In terms of the subsequent schedule, the date fixed for scrutiny of nomination papers was on 13.10.2015. The respondent No.3 upon scrutiny of the petitioner's nomination papers rejected the same under section 12 of the representation of the People Order 1972 (hereinafter referred to as "RPO 1972") and on the holding that the Sonar Bangla Prokowsoli (Pvt.) Ltd. of which the petitioner is the Chairman was defaulter lonee (Annexure- "C").

7. The petitioner being aggrieved by and dissatisfied with the aforesaid order dated 13.10.2015 rejecting the nomination paper, preferred an appeal on 16.10.2015 before the respondent No.1 being Election Appeal No.04 of 2015 on different grounds.

- (a) That the petitioner is the Chairman of Sonar Bangla Prokowsoli Sangshta (Pvt.) Ltd. in the name of the Company availed credit facilities for running of its business. Since his company could not pay off the said loan in time, the loanee company applied to the Head Office of the proforma respondent No.5-Agrani Bank Limited on 12.08.2015 seeking reschedule of the said loan facilities. In response to the said application, the Board of Directors of Agrani Bank Limited in its 427<sup>th</sup> Meeting held on 26.08.2015 rescheduled the entire loan for repayment of the same within next 10 years at a interest of 10%. The said decision of the Board of Directors was duly communicated to the Regional Branch/Office of Agrani Bank Limited by its Memo No. BD/BMA/15/1017 dated 07.09.2015 (Annexure- "E"). Agrani Bank Limited, Head Office Motijheel, Dhaka also sent its letter dated 08.09.2015 to the CIB of Bangladesh Bank with a request to remove the name of the petitioner form the database of the loan defaulter and also to treat the said loan as declassified since the loan has been rescheduled for 10 years (Annexure-F).
- (b) In terms of the aforesaid request of the creditor Bank, the name of the petitioner's Company was removed on or after 08.09.2015 from the database of the loan defaulters. The Bangladesh Bank accordingly issued on 08.09.2015 its No objection Certificate (NOC) approving and confirming the aforesaid reschedule of the loan amounting to Taka 10,88 crore for next 10(ten) years (Annexure-G) and as a result the petitioner's company was no longer a loan defaulter as no amount was payable because of the rescheduling. As such the respondent No.3's decision was based on wrong information furnished by the Agrani Bank and CIB of Bangladesh Bank which is unlawful, arbitrary, malafide and liable to be set aside.
- (c) After rescheduling the loan and approval of the same by the Bangladesh Bank as stated above, the respondent No.5-Agrani Bank Limited issued its letter dated 13.09.2015 informing that the credit facility, availed by the company of the petitioner has been rescheduled for a period of 10 years with interest at the rate of 10% and the loan will be deemed to have been declassified since 26.08.2015. In view of the above letter of the creditor Bank, the petitioner's company is not a defaulter loanee and therefore, the respondents ought to have declared the petitioner's nomination paper as valid and pursuant to said letter dated 13.09.2015 Agrani Bank, Tangail Branch, Tangail issued its letter dated 12.10.2015 informing that they have mistakenly wrote in the letter dated 13.09.2015 regarding declassification of the loan from 26.08.2015 but in fact status of the loan remained Bad Loan (BL) although it was rescheduled for 10 years.

The impugned orders were passed basing on Agrani Bank's letter dated 12.10.2015 and without informing the petitioner about this subsequent letter dated 12.10.2015. The respondent No.5 has however, served upon the petitioner a copy of the said letter dated 12.10.2015 on 14.10.2015 and as such the petitioner was in dark on the fact of rejecting his nomination paper on 13.09.2015. Therefore, the petitioner's nomination paper dated 11.10.2015 was rejected without considering the material circumstances as to unawareness of the petitioner about the rescheduled loan (Annexure-“I”).

8. The respondent No.1 upon hearing the parties by its order dated 18.10.2015 dismissed the petitioner's appeal affirming the order rejecting the petitioner's nomination papers purely on the grounds, among others, that the petitioner is a defaulter loanee in terms of 12(m) of the Representation of the People Order, 1972 (RPO) (Annexure- “J”). It is at this stage the petitioner moved this Division and obtained the present Rule, order of stay and direction.

9. Mr. A.J. Mohammad Ali, the learned Senior Advocate appearing with Mr. Raghob Chowdhury and Mr. Rubaiyet Hossain, the learned Advocate for the petitioner after placing the petition, both the impugned orders advances the following arguments: the impugned orders have been passed without lawful authority in as much as clause 5 of the Master Circular on Loan Rescheduling, BRPD Circular No.15 of 23.09.2012 provides that a rescheduled loan will not be considered a “defaulted loan” and the borrower will not be considered a “defaulted borrower” and as such the impugned orders are liable to be declared to have been passed without lawful authority having no legal effect.

10. Next he submits that section 5(cc) of the Bank Companies Act, 1991 provides that a debtor company will be considered as a defaulter borrower after the expiry of 6 (six) months from the date of scheduled repayment and in this case, the company of the petitioner did not fail in making repayment of the rescheduled loan and thus neither the petitioner nor his aforesaid company is a loan defaulter within meaning of section 5 (cc) of the Bank Companies Act, 1991.

11. His further submission is that the impugned orders are not sustainable in as much as respondent No.1 and 2 failed to appreciate that the creditor Agrani Bank re-scheduled and declassified the loan for 10 years with effect from 26.08.2015 and hence neither the petitioner nor his aforesaid company is a defaulter within the meaning of the Bank Companies Act, 1991.

12. Finally he submits that the impugned orders have been passed without lawful authority since respondents failed to appreciate that neither the petitioner or the aforesaid loanee company is a defaulter of any loan before 7 (seven) days of filing of nomination papers as envisaged in Article 12(m) of the RPO and on that score the impugned orders should be declared to have been passed without lawful authority having no legal effect. Mr. A.J. Mohammad Ali while substantiating his arguments meticulously drawn our attention to various Annexures in the petition and tried to impress upon us that the petitioner was not at all a bank defaulter and was absolutely clean in terms of section 12(m) of RPO. Article 12(m) is as follows:-

“12 (1) any elector of a constituency may propose or second for election to that constituency the name of any person qualified to be a member under clause (1) of Article 66 of the Constituton;

Provided that a person shall be disqualified for election as or for being, a member, if he

(a) .....to.....(L)

(m) is a director of a company or a partner of a firm which has defaulted in repaying before seven days from the day of submission of nomination paper any loan or any installment thereof taken by the concerned company or firm from Bank.”

13. He has focused his arguments to establish those from different points of view.

14. Election Commission has been represented by Dr. Mohammed Yeasin Khan, the learned counsel and Respondent No.5 Agrani Bank has been represented by Senior Advocate Mr. Mahbubey Alam appearing with Mr. Md. Abdul Hai. By filing two affidavits-in-oppositions and supplementary affidavit-in-opposition they have tried to press into service the argument rebutting the petitioner’s contention that the petitioner was not competent in terms of Article 12(m) of RPO to contest in the election as candidate. Mr. Mahbubey Alam made his submissions controverting almost all the submissions of the petitioner including the maintainability of this writ petition.

15. Simplifying his contention Mr. Mahbubey Alam submitted that the petitioner did never apply for any rescheduling of his loan of Agrani Bank. By letter dated 12.08.2015 addressed to Agrani Bank (Annexure 7 series of the affidavit in opposition of Agrani Bank), he only sought for the waiver of his interest accrued upon principle amount from 1994 and to pay off the same at one time upon which the respondent Agrani Bank favoured him with an arrangement to pay it off extending over a period of ten years subject to approval of Bangladesh Bank. And this has nothing to do with rescheduling of his loan so as to attract any of the provisions of Bank Companies Act, 1991 or BRPD circular 15 of 23.09.2019 from that reason.

16. On the question of maintainability of the writ petition he submits that the question of maintainability goes at the root while deciding constitutional issue in particular. Mr. Mahbubey Alam basing on the series of decisions of our Appellate Division e.g. Mahmudul Huq Vs. Md. Hedayet Ullah reported in 48 DLR (AD) 120, A.F.M. Shah Alam vs. Mujibul Huq and others 41 DLR (AD) 68, A.K. Maidul Islam vs. Election Commission and others 48 DLR (AD) 208, Dr. Mohiuddin Khan Alamgir vs. Government of Bangladesh 62 DLR (AD) 425 and Dr. Md. Shahjahan, Advocate Vs. Election Commission and others, 63 DLR 543(where one of us was a party) submits that quite clearly the petitioner is a candidate within the definition in the RPO as he was proposed as a candidate from his constituency for the election as a Member within the definition of Article 2(II) of the RPO and therefore, he would be entitled to file any petition before the Election Tribunal under Article 49 of RPO where he may pray for a relief even to declare the whole election to be void, on the ground that the Returning Officer being person involved in the election process did not comply with the provision of RPO. He further submits that election process begins with the notification declaring the election schedule and culminate in the declaration of result of the election by Gazette Notification. Therefore, in view of the decision of Maidul Islam and also Dr. Mohiuddin Khan Alamgir case, any matter arising in relation to the election during holding of the election process may be agitate after election before election Tribunal and High Court Division should not entertain any matter relating to the election process under the writ jurisdiction. He also submits that in the decision as cited above their Lordships in the Appellate Division maintained that only on two grounds election process can be challenged in the writ jurisdiction i.e. coram non-judice or malice in law. But in the instant case, as he points out that no such allegation has been made with regard to coram non-judice or malice in law.

17. That being the situation, the only point that follows for consideration in this petition is whether under the facts and circumstances of the case together with the relevant decision and provisions of law having bearing on the issue. Both the orders impugned against can be sustained under law if the writ petition itself is maintainable.

18. Before discussing the issue it would be proper to mention that the learned Senior Advocate Mr. A.J. Mohammad Ali specifically submitted that as per Article 49 of the RPO an election petition may be filed by a candidate for that election, but since in this case the petitioner is unable to take part in the election he would not be able to file a petition under Article 49. Moreover, in terms Article 51(2) the petitioner cannot be remedied before the tribunal. Therefore, without preferring this writ petition he had no other option.

19. To address this vital aspect it required to have a gleaning upon some of the relevant Articles of the RPO. To start with Article 49 in Chapter 5 which runs thus:

“No election shall be called in question except by an election petition presented by a candidate for that election in accordance with the provisions of this Chapter:-

- (2) .....
- (3) .....
- (4) .....

20. Article 51(2) says a petitioner may claim as relief any of the following declarations, namely-

- (a) That the election of the returned candidate is void;
- (b) That the election of the returned candidate is void and that the petitioner or some other person has been duly elected; or
- (c) that the election as whole is void.

21. In Article 57(6) it is stated that the High Court Division shall try an election petition as expeditiously as possible and shall endeavour to conclude the trial within six months from the date on which the election petition is (presented) to it for trial.

22. Now let us see Article 2(ii) which defines candidate – “candidate” means a person proposed as a candidate for election as a member.

23. Further Article 2 (VI) defines : “contesting candidate” means a candidate who has been validly nominated for election as a member and whose candidature has not been either withdrawn under clause (1) or ceased under clause (2) of Article 16.

24. Then again Article 14(5) reads:- “If a candidate or any bank is aggrieved by the decision of the Returning Officer, he may prefer an appeal to the Commission within the prescribed period and any order passed on such appeal shall be final.”

25. So on a combined reading of all these provisions it can be clearly said that the election petition can be filed by a candidate. Although he may not be “contesting candidate” as it has been defined in Article 2 (VI). Therefore, let us now digress to the most vital issue of maintainability of the writ petition.

26. The decisions referred to above unequivocally maintained that any dispute whether that relates to acceptance or non-acceptance of the candidature of the particular candidate

should be brought for a decision before a election Tribunal as election dispute. To my mind drawing its inspirations from gainsaying that the petitioner will unable to file election petition under section 49 of RPO as “Candidate”. Article 125 of the Constitution the said above proposition of law have been propounded. Article 125 postulates:-

“125. Notwithstanding anything in this Constitution-

- (a) .....
- (b) No election to the offices of President or to Parliament shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by Parliament.”

27. Reflection of Article 125 has been echoed in the case of A.K.M. Maidul Islam vs. Election Commission as referred to above. His Lordship Justice Mustafa Kamal Observed:

“In the case of A.F.M. Shah Alam vs. Mujibul Huq and others, 41 DLR (AD) 68, this court in very clear terms retain that the Local Government elections process can be challenged under Article 102 of the Constitution in High Court Division unless the impugned order passed by the authority concerned is coram non judice or is afflicted with malice in law. This decision of ours is equally if not more forcefully applicable to Parliamentary and Presidential election held under Constitution. The petitioner has neither alleged coram non judice nor malice in law in the writ petition.

28. Certainly this observation has backed by Article 125 of the Constitution. Same reflection we could find in the case of Mahmudul Huq vs. Hedayetullah 48 DLR 128 (relating to acceptance of nomination paper) wherein his Justice Abdur Rob observed:

“Election connotes the process of choosing representative by electorate in democratic institutions. The election process starts from the Notification issued by competent authority (in a parliamentary election or bye election by the Election Commission) declaring election schedule and culminates in the declaration of result of election by Gazette notification”.

29. Further his lordships observed:-

“The High Court Division will not interfere with the electoral process as delineated earlier in the judgment, more so if it is an election of pertinent to parliament because it is desirable that such election should be completed within specified period under the constitution”

30. This has also a positive bearing on Article 125 of the Constitution.

31. Then again in the case of Dr. Mohiuddin Khan Alamgir vs. Bangladesh after discussing all the decisions as referred to above on the question of maintainability of a writ petition where facts and circumstances of the case is almost similar to that of the present one their Lordships of the Appellate Division held:-

“In holding against the maintainability of the writ petition in election dispute the real and larger issue of free and fair election promptitude and functioning of elective bodies like parliament is of greater importance than settlement of private disputes. Moreover, Article 125 of our Constitution provides that no election to the officers of President or to the Parliament shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by Parliament and in such view of the mater there is a complete ouster of jurisdiction, in entertaining writ petition in the matter election dispute except in case of coram non-judice and malice in law.”

32. Be it mentioned that the petitioner in the instant petition has not come up with a case of coram non-judice or that the decision of the Election Commission have been afflicted with malice in law. Mr. A.J. Mohammad Ali has not argued in that regard.

33. But in our own volition we ventured to see whether the case in hand has been afflicted with malice in law. To understand and appreciate what is malice in law or what facts and circumstances constitute malice in law or so to say how a particular case ay be tainted with that and what would be the magnitude or impact which may lead to malice in law, we have not found a better decision than that of Dr. Nurul Islam –vs- Bangladesh 33 DLR (AD) 201 on the issue. In the said decision in a well crafted manner Our Appellate Division came down heavily holding that the compulsory retirement of Dr. Nurul Islam under section 9(2) of the Public Service Retirement Act at the behest of the Government functionary was unconstitutional and violative of Articles 27 and 29 of the constitution and also suffers from malice in law. The impugned action was taken to circumvent the judgment of the High Court Division passed in favour of Dr. Nurul Islam in Writ Petition No. 571 of 1979 and it is liable to be struck down on the ground of malice in law which formed the basis of the action against Dr. Nurul Islam.

34. That’s how the conception of malice in law can be perceived and inferred into, which may however, vary from cast to case. The conceptual aspect o f malice in law rooted deep in the above cited noble decision. But the case in hand is not at all a case which can be viewed being afflicted with malice in law. It is not a case of malice in law.

35. We want to make it clear that the Rule that has been enunciated in those decision is equally applicable in case by election also. We have observed that the decision appealed against was given after considering different statements of bank justifying that the petitioner does not fulfill criteria envisaged in 12(m) in the RPO. Certainly the petitioner can go against this decision with a proper election dispute under section 49 of RPO before the High Court if so advised and he can well ventilate his grievances there. But sitting on writ certiorari this Division would be loath to interfere with a situation where there are divergences of arguments or so to say there are arguments those require to be tested on evidences both oral and documentary.

36. In election matter, even when it ensues out of a pre-election dispute, this Division cannot invoke Article 102 of the Constitution, election tribunal is the only forum, except on a very limited ground of coram non-judice or malice in law. The discipline of law in this sphere that has been taken a positive shape drawing it’s inspiration from the constitution and the consisting judicial pronouncements should not be disturbed in any manner.

37. That being the situation we find ourselves bound by the decisions of the Appellate Division as discussed above having positive bearing in the instant case and we are of the view that the writ petition is not maintainable and accordingly should be discharged on that score.

38. In the result, the Rule is discharged as being not maintainable. The order of stay granted earlier by this Court is hereby recalled and vacated. The Election Commission is directed to hold the bye-election of the constituency 133 Tongail-4 in accordance with law forthwith.

39. Communicate this order at once.