

12 SCOB [2019] HCD

**HIGH COURT DIVISION
(Special Original Jurisdiction)**

WRIT PETITION N0.4149 of 2018

Shahina Begum

..... Petitioner

-Versus-

**The Election Commission of
Bangladesh, represented by the Chief
Election Commissioner, Election
Commission Secretariat, Dhaka and
others.**

..... Respondents

Mr. Abdul Baset Majumder, Senior
Counsel with

Mr. Abdul Matin Khashru, Senior
Advocate

Mr. Md. Nurul Islam, Senior Advocate

Mr. S.M. Abul Hosain and

Mr. Nakib Saiful Islam, Advocates

...For the petitioner.

Mr. Tawhidul Islam, Advocate

.....For the respondent No.1

Mr. Md. Azahar Ullah Bhuiyan with
Mr. Sheikh Jahangir Alam, Advocates

.... For the respondent No.9.

Mr. ABM Abdullah Al Mahmud (Bashar)
DAG

Mr. Md. Saiful Alam, AAG and

Mr. Md. Asazuzzaman, AAG

.. For the respondent-government

Heard On: 22.10.2018

And

Judgment On: 31.10.2018

Present:

Mr. Justice F.R.M. Nazmul Ahasan

And

Mr. Justice K.M. Kamrul Kader

**Valid Candidate , Election Commission, Re-election, schedule of re-election, rule 37 (3)
of Local Government Pourashava Election Rules 2010;**

**That the period between the declaration of schedule of election till the publication of the
result in the official gazette has been held to be comprised in the election process. The
case in our hand it appears that the petitioner filed writ petition before this court
invoking the Article 102 of the Constitution before publication of the official gazette. As
such the writ petition is not maintainable and the rule is liable to be discharged.**

... (Para 23)

JUDGMENT

F.R.M. Nazmul Ahasan, J:

1. Upon an application under Article 102 of the Constitution of the People's Republic of Bangladesh a rule *nisi* was issued in the following terms:

“Let a Rule Nisi issue calling upon the respondents to show cause as to why the impugned decision (Annexure-L) taken by the respondent No.1 on 14.03.2018 for holding re-election Malirchar Haji Para Govt. Primary School polling centre at Bakshigonj Pouroshava, Jamalpur on 29.03.2018 ignoring inquiry report (Annexure-K) should not be declared to have been done without lawful authority and of no legal

effect and why a direction should not be given upon the Respondents to hold re-election in polling centre Nos.2,3,5,7,8 and 9 of the said Pourashava and / or pass such other or further order or orders as to this Court may seem fit and proper.”

2. Facts relevant for disposal of the rule, in short, are that on 12.11.2017 the respondent No.1 published schedule of 4 (four) Pourashava Election including Bakshigonj Pourashava under Jamalpur District fixing date of election on 28.12.2017. The petitioner being interested was nominated for the post of Mayor by the Bangladesh Awami League to participate in Bakshigonj Pourashava General Election, 2017. Accordingly, she purchases nomination paper from the respondents and submitted the same to the respondent office and accordingly she was declared valid candidate and allocation of symbol was Boat (Nouka).

3. During the election, the petitioner appointed as many as 120 agents as well as polling agent. But the other contesting candidate tried to influence the election process and accordingly, he made complain to the returning Officer on 28.12.2017 to take necessary action. But the returning officer and other officials conducted the election ignoring all the complain and allegations and prepared result sheets of the polling centre and published the total result of election for the post of Mayor of Bakshigonj on 31.12.2017 as primary result unofficially showing the highest vote and near to the highest vote. On 01.01.2018 the petitioner made a complain to the respondent No.1 to inquire about the matter and to take step to hold re-election against those polling centres but the respondent No.1 did not take any step regarding the re-election.

4. Finding no other alternative the petitioner filed a writ petition being No.519 of 2018 before the High Court Division and a Division Bench on 16.1.2018 disposed of the said petition with a direction upon the respondent No.1 to dispose of the complain dated 01.01.2018 within 15 days from date of receipt of the order and also given some observations. After receiving the order, the respondent No.1 form a two members inquiry committee and after conducting inquiry, the said committee prepared a report and the same was submitted to the Election Commission. But the respondent No.1 ignoring the inquiry report took decision on 14.3.2018 for holding re-election in polling centre No.1 wherein the election was stopped by the presiding officer and thereby the schedule of re-election was declared by the Assistant Secretary of Election Commission.

5. Being aggrieved and dissatisfied with the aforesaid order the petitioner filed this writ petition and obtained the present rule and an order of stay of the aforesaid re-election.

6. Against the said interim order the respondent No.9 filed a Civil Petition for Leave to Appeal being No.1534 of 2018 and the Appellate Division after hearing the parties passed an order as follows: *“Let the Rule be heard and disposed of by the High Court Division expeditiously. However, operation of the order dated 28.03.2018 passed by the High Court Division in Writ Petition No.4149 of 2018, so far as it relates to interim order of stay be stayed till disposal of the Rule. The leave petition is disposed of with the above observations and directions.”*

7. At the time of hearing the petitioner filed supplementary affidavit, respondent No.9 and respondent No.1 filed affidavit-in-opposition.

8. At the time of hearing Mr. Abdul Baset Majumder, Senior Counsel along with Mr. Abdul Matin Khashru and Mr. Md. Nurul Islam and Mr. Nakib Saiful Islam, the learned

Advocates appears on behalf of the petitioner. On the other hand Mr. Md. Azahar Ullah Bhuiyan with Mr. Sheikh Jahangir Alam, learned Advocate for the respondent No.9 and Mr. Tawhidul Islam, learned Advocate appears on behalf of the respondent No.1.

9. Mr. Abdul Baset Majumder, learned senior counsel submits that the impugned order has been passed by the respondent No.1 violating the provision of Rules- 24, 25, 28, 32, 38, 40, and 41 of the Local Government Pourashava Election 2010. As such the whole process of election is *coram- non-judice* and malice in law and same is liable to be declared without any lawful authority and is of no legal effect. The learned Advocate for the petitioner further submits that the respondent was very much biased upon the influence of the candidate Md. Nazrul Islam and they have done all possible action for wining him and violating the provision of election rule they declared Mayor of Bakshigonj Pourashava which is contrary to the process of free and fair election and as such the same is declared to have been done without any lawful authority and is of no legal effect. The learned Advocate for the petitioner also submits that the respondent No.1 did not consider the inquiry report which was held by the direction of this court in writ petition No.519 of 2018 in which it is clearly stated that the allegation of the petitioner so far as it relates to the irregularities in conducting the election has been proved but the Election Commission without considering the aforesaid facts and circumstance and the contents of the inquiry report took decision of the re-election in one centre which was earlier stopped by the presiding officer. Thus the impugned decision and the schedule of the election is absolutely malice in law and the same is declared to have been passed without any lawful authority and is of no legal effect. The learned Advocate for the petitioner next submits that declaring schedule of the re-election by the Election Commission is itself violation of the rule 37 (3) of Local Government Pourashava Election Rules 2010. In view of that the process of re-election is *coram-non-judice* and malice in law and as such the schedule of the re-election which is declared by the Election Commission is illegal and the same is liable to be declared without any lawful authority and is of no legal effect.

10. On the other hand Mr. Md. Azahar Ullah Bhuiyan, learned Advocate for the respondent No.9 placing the affidavit-in-opposition with the inquiry report and the result sheets submits that the petitioner did not raise any objection on the day of election on 28.12.2017 either Returning or the Presiding Officer regarding the alleged rigging. The petitioner after obtaining minimum votes lodged a fabulous complain after three days on 1.1.2018 in order to obstruct the election process and publication of the election result. He next submits that with the direction of the High Court Division the respondents made an inquiry in which they did not find any veracity in the allegation made by the petitioner. The learned Advocate further submits that the respondent No.1 duly and properly declared the election of the one polling centre and the election process should not be stopped before publishing the final result and the petitioner may agitated her grievance, if any, before the election tribunal.

11. Mr. Tawhidul Islam, learned Advocate appearing for the respondent No.1, Election Commission placing the affidavit-in-opposition and submits that the respondent No.1 after declaration of the election schedule in that pourashava conducting the election properly and after end of the election on 28.12.2017 the official result of the said election was declared and in one centre Malirchar Government Primary School, the election was stopped by the presiding officer within 12 centres and result of all the centres was declared by the returning officer on 28.12.2017. Upon direction by the High Court Division in writ petition No.519 of 2018 the respondent No.1 conducted an inquiry and accordingly the report was submitted on 28.2.2018 with the following observation.

12. “ ৩৫। পর্যবেক্ষন

- (ক) মেয়র প্রার্থী শাহীনা বেগম এর দাখিলকৃত আবেদনে উল্লিখিত বকশীগনজ পৌরসভার ২,৩,৫,৬,৭,৮, ও ৯ নং ভোট কেন্দ্রে নির্ধারিত সময় সকাল ৮.০০ টায় ভোট গ্রহণ পর্যন্ত সুষ্ঠু ও শান্তিপূর্ণভাবে সম্পন্ন হয়।
- (খ) মেয়র প্রার্থী শাহীনা বেগম এর দাখিলকৃত আবেদনে উল্লিখিত বকশীগনজ পৌরসভার ২,৩,৫,৬,৭,৮, ও ৯ নং ভোট কেন্দ্রে জোরপূর্বক অবৈধভাবে ব্যালট পেপারে সিল মারার কোনরূপ প্রমাণ পাওয়া যায়নি।
- (গ) ২ নং মালির চর হাজীপাড়া আমেনা খাতুন এতিমখানা ও হাফিজিয়া মাদ্রাসা (মালিরচর হাজীপাড়া) ভোটকেন্দ্র এবং ৫ নং বকশীগনজ এন এম উচ্চ বিদ্যালয় (বকশীগনজ মিয়াবাড়ী) ভোটকেন্দ্রের ভোটগণনা কক্ষ থেকে আবেদনকারীর পোলিং এজেন্ট বের হয়ে যাওয়ার ক্ষেত্রে দায়িত্ব প্রাপ্ত পুলিশ কর্মকর্তা এবং প্রিজাইডিং অফিসার বিধি সম্মত ও যথাযথভাবে দায়িত্ব পালন না করার প্রমাণ পাওয়া গিয়েছে। তবে উক্ত ২টি ভোটকেন্দ্রে ভোট গণনার সময় আবেদনকারীর পোলিং এজেন্ট উপস্থিত ছিলেন এবং তারা ভোট গণনার বিবরণী ফরম-এও তে স্বাক্ষর করেছেন। ফলে এ ২ টি ভোটকেন্দ্রে বন্ধ ঘোষনার মত কোন অনিয়ম, ঘটেনি।
- (ঘ) বকশীগনজ পৌরসভার ২৮.১২.২০১৭ তারিখে অনুষ্ঠিত নির্বাচন সুষ্ঠুভাবে সম্পাদনে সর্বাঙ্গিক প্রচেষ্টা গ্রহণ করেন এবং আবেদনকারীর আবেদনে উল্লিখিত ৭ টি ভোটকেন্দ্রসহ ১১ টি ভোটকেন্দ্রে শান্তিপূর্ণভাবে ভোটগ্রহণ অনুষ্ঠিত হয়। ১ নং ভোটকেন্দ্রে অনিয়মের কারণে প্রিজাইডিং অফিসার কর্তৃক বন্ধ ঘোষনা করা হয়।

13. He also submits that after considering the inquiry report the election commission decided to conduct re-elation in the No.1 Malirchar Hajeepara Government Primary on 29.3.2018. After obtaining the rule and an order of stay the election could not be held. The learned Advocate further submits that it is now well settled that the election process cannot be challenged by an application under Article 102 of the Constitution. The period between the declaration of the schedule of election and the publication of the result in the official gazette has been held to be comprised in the election process and it has been consistently viewed by our Hon’ble Supreme Court that any step comprising in the election process cannot be challenged by an application under Article 102 of the Constitution; and as such the writ petition itself is not maintainable and the rule is liable to be discharged.

14. Heard the learned Advocate for the respective parties, perused the writ petition and supplementary affidavit and affidavit-in-opposition filed by the respondent no.1 as well as the respondent No.9.

15. It appears from the aforesaid facts and circumstances that the petitioner is a contesting candidate of the election of the Bakshigonj, Pourashave, District-Jamalpur. Accordingly, election was held on 28.12.2017. The petitioner filed an application on 28.1.2017 that is on the date of election to the returning officer and district election officer, Jamalpur with the allegation that the agent of polling centre Nos.4,5,7,9,10 and 11 of the petitioner was forcefully ousted from the centre. Thereafter, she filed another application on 1.1.2018 and made allegation about centre Nos.2,3,5,6,7,8 and 9 with the similar allegation which was made earlier on 28.12.2017. But the returning officer unofficially declared result of 11 centres and stopped one centre.

16. From the aforesaid result it appears that one Md. Nazrul Islam independent candidate obtained 8599 votes and nearest candidate one Mr. Fakruzzaman obtained votes 7705. It appears that the petitioner thereafter preferred writ petition before the High Court Division being No.519 of 2018 and the same was disposed of with the findings;

“In the fitness of things we are of the view that ends of justice would be better served if we make an order directing the Election Commission to take up the application of the petitioner (Annexure-H) and dispose of it in accordance with law instead of issuing of Rule.

This petition is, thus, disposed of.

Accordingly, the Election Commission is directed to disposed of the application made by the petitioner as contained in Annexure-H of the petition within 15 days from receipt of this order.”

17. After receiving the aforesaid order of this court the respondent No.1 formed an inquiry committee and the committee after inquiry submitted a report the opinion:-

মতামতঃ

(ক) ২ নং মালিরচর হাজীপাড়া আমেনা খাতুন এতিমখানা ও হাফিজিয়া মাদ্রাসা (মালিরচর হাজীপাড়া) ভোটকেন্দ্র এবং ৫ নং বকশীগঞ্জ এন এম উচ্চ বিদ্যালয় (বকশীগঞ্জ মিয়াপাড়া) ভোটকেন্দ্রের ভোটগণনা কক্ষে থেকে আবদনকারীর নির্ধারিত পোলিং এনেজন্ট বের হয়ে যাওয়ার ক্ষেত্রে দায়িত্বপ্রাপ্ত পুলিশ কর্মকর্তা এবং প্রিজাইডিং অফিসার বিধি সম্মত ও যথাযথভাবে দায়িত্ব পালন না করার প্রমান পাওয়া গিয়েছে। এ দুটি ভোটকেন্দ্রের দায়িত্বপ্রাপ্ত প্রিজাইডিং অফিসার এবং পুলিশ কর্মকর্তার বিরুদ্ধে ব্যবস্থা গ্রহণ করা যেতে পারে। তবে উক্ত ২ টি ভোট কেন্দ্রে ভোট গণনার সময় আবেদনকারীর পোলিং এজেন্ট উপস্থিত ছিলেন এবং তারা ভোট গণনার বিবরী ফরম- এঃ তে স্বাক্ষর করেছেন। ফলে এ ২ টি ভোটকেন্দ্রে বন্ধ ঘোষণার মত কোন অনিয়ম ঘটেনি; এবং

(খ) ২৮.১২.২০১৭ তারিখে অনুষ্ঠিত জামালপুর জেলার বকশীগঞ্জ পৌরসভা নির্বাচনে মেয়র প্রার্থী শাহীনা বেগম এর দাখিলকৃত আবেদনে (Annexure-II) উল্লিখিত ২,৩,৫,৬,৭,৮ ও ৯ নং ভোটকেন্দ্রের বিষয়ে আনীত অভিযোগ সন্দেহাতীতভাবে প্রমাণিত হয়নি।

18. The above report was signed by Mr. Tajul Islam, District election Officer and Mr. Md. Forhad Hossain, Senior Assistant Secretary, Election Commission, Dhaka. Thereafter, the Election Commission after considering the report in a meeting dated 14.3.2018 decided to hold the re-election of one centre which was stopped earlier by the presiding officer. From the report and agenda No.2, it appears that the election commission recommended that;

০২। অপরদিকে রিট পিটিশন নং ৫১৯/২০১৮ এর মাননীয় হাইকোর্টের আদেশ প্রতিপালনের লক্ষ্যে রিট পিটিশনে পরিশিষ্ট হিসেবে সংযুক্ত একটি অভিযোগ / আবেদন নিষ্পত্তির জন্য অপর একটি তদন্ত কমিটি গঠন করা হয়। তদন্ত কমিটিতদন্ত প্রতিবেদনে নিম্নরূপ সুপারিশ করে (সংলাগ-২)

(ক) তদন্তকারী কর্মকর্তা ২ নং মালিরচর হাজীপাড়া আমেনা খাতুন এতিমখানা ও হাফিজিয়া মাদ্রাসা (মালিরচর হাজীপাড়া) ভোটকেন্দ্র এবং ৫ নং বকশীগঞ্জ এন এম উচ্চ বিদ্যালয় (বকশীগঞ্জ মিয়াপাড়া) ভোটকেন্দ্রের দায়িত্বপ্রাপ্ত প্রিজাইডিং অফিসার এবং পুলিশ কর্মকর্তার বিরুদ্ধে ব্যবস্থা গ্রহণ করা;

(খ) মেয়র প্রার্থী শাহীনা বেগম এর দাখিলকৃত আবেদনে বর্ণিত ৭ টি ভোট কেন্দ্রের বিষয়ে আনীত অভিযোগ প্রমাণিত হয়নি।

০৩। জামালপুর জেলার বকশীগঞ্জ পৌরসভার নির্বাচনের বিষয়ে উল্লিখিত তদন্ত প্রতিবেদন সংশ্লিষ্ট নথিতে উপস্থাপন করা হলে মাননীয় নির্বাচন কমিশন নিম্নোক্ত সিদ্ধান্ত/নির্দেশনা প্রদান করেন ;

(ক) ১ নং মালিরচর হাজীপাড়া সরকারী প্রাথমিক বিদ্যালয়ে স্থগিতকৃত কেন্দ্রে পুনরায় ভোট গ্রহণের জন্য রিটানিং অফিসারকে নির্দেশনা প্রদান করা ;

(খ) উক্ত ভোটকেন্দ্রে কেন্দ্র দখল ও ব্যালট পেপার ছিনতাই এর ঘটনায় থানার ভারপ্রাপ্ত কর্মকর্তা জনাব আসলাম হোসেনের বিরুদ্ধে বিভাগীয় ব্যবস্থা গ্রহণের জন্য মহাপুলিশ পরিদর্শক (IGP) কে নির্দেশনা প্রদান এবং তদন্তকারী কর্মকর্তা বৃন্দে অপর্যাপ্ত সুপারিশ কমিশন সভায় আলোচনা করে ব্যবস্থা গ্রহণ করা - এ প্রস্তাবের প্রেক্ষিতে পরবর্তী কমিশন সভায় উত্থাপনের সিদ্ধান্ত গ্রহীত হয়।

৪। উপরোল্লিখিত সিদ্ধান্ত মোতাবেক জামালপুর জেলার বকশীগঞ্জ পৌরসভার বন্ধঘোষিত ভোটকেন্দ্র ০১ নং মালিরচর হাজীপাড়া সরকারী প্রাথমিক বিদ্যালয়, মালিরচর হাজীপাড়া মহিলা ভোটকেন্দ্রে মেয়র, ১ নং সংরক্ষিত ওয়ার্ডের কাউন্সিলর ও ১ নং সাধারণ ওয়ার্ডের কাউন্সিলর পদে ভোট গ্রহণের জন্য আগামী ২৯ মার্চ ২০১৮ তারিখ বৃহস্পতিবার নির্ধারণ করা যেতে পারে।

19. Accordingly, a notice was issued on 14.3.2018 signed by Forhad Ahmed Khan, Joint Secretary, (Current Charge) to hold the election for No.1 Malirchar Government Primary School, Mahila polling Centre, the date was fixed on 29.3.2018 for re-election. The learned Advocate for the petitioner tried to argue that the election commission i.e. respondent No.1 violated the provision of Rule 37 (3) in declaring the re-election by the Joint Secretary (In

Charge) of the Election Commission. According to Rule 37 (3) the returning officer is the appropriate authority to declare the schedule of the pourashava election. His next argument was that the respondent no.1 did not take any consideration about the report submitted by the inquiry committee formed by the respondent no.1 which itself is contradictory and in the opinion finally made by the inquiry officer the content of the report and discussion was not reflected in the decision and the opinion of the Election Commission respondent No.1. So, the same is within the purview of malice in law and the High Court Division should interfere with the aforesaid facts and circumstances.

20. We have considered the argument advanced by the learned Advocate for the petitioner. It is admitted that the petitioner raised some allegations from the date of election to the returning officer as well as the respective respondents and thereafter upon a direction by this court an inquiry was held and with some observation and recommendation the report was submitted to the Election Commission and the respondent No.1 after considering the aforesaid report declared the schedule for re-election and it was signed by Joint Secretary (in-charge) of the election commission and this schedule was fixed on 29.3.2018 and this order was stayed by the High Court Division in the present writ petition and thereafter the interim order of the High Court Division was stayed by the Appellate Division. So, the election could not be held on 29.03.218 and the notice issued by the Election Commission, Joint Secretary (in-charge) has become infructuous and has no validity at this stage.

21. Though, the Rule 37 (3) has empowered the returning officer to declare the election scheduled in the pourashava election.

22. In the case of A.F.M. Shah Alam Vs. Mujibul Huq, reported in 41 DLR (AD) 68 it is held that “this court in very clear terms retain that the Local Government elections process cannot 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.”

23. It is also settled that the period between the declaration of schedule of election till the publication of the result in the official gazette has been held to be comprised in the election process. The case in our hand it appears that the petitioner filed writ petition before this court invoking the Article 102 of the Constitution before publication of the official gazette. As such the writ petition is not maintainable and the rule is liable to be discharged.

24. However, the allegations of the irregularities raised by the petitioner in the writ petition are election dispute which may be agitated and proved on proper evidence before the Election Tribunal constituted under the relevant law. The petitioner may file election case before the Election Tribunal, if any, in accordance with law stating all the allegations agitated before this court.

25. Thus, we do not find any merit in the Rule.

26. Accordingly, the rule is discharged.

27. Communicate the judgment and order to the respondent No.1.