

18 SCOB [2023] HCD 236**HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)****WRIT PETITION NO. 12118 OF 2021****with****WRIT PETITION NO. 12554 OF 2021****Md. Shakhawat Hossain and others****Vs.****The Election Commission and others**Mr. A. J. Mohammad Ali, Senior
Advocate with Mr. Md. Iqbal Hossain,
Advocate.....for the petitioner in Writ Petition No.
12554 of 2021Mr. A.M. Mahbub Uddin, Senior Advocate
.....for the petitioners in Writ Petition No.
12118 of 2021 and respondent Nos. 13-15
in WP No. 12554 of 2021Heard on 06.03.2022 and 07.03.2022
Judgment on 07.03.2022**Present:****Mr. Justice Zafar Ahmed****And****Ms. Justice Kazi Zinat Hoque****Editors' Note:**

Two writ petitions were filed in the High Court Division – one challenging inaction of the respondents in holding inquiry about the alleged irregularities in a Union Parishad Election and also praying for direction upon the respondents to hold re-election in two polling centres and another challenging the direction issued by the Election Commission cancelling the election of one polling centre and directing re-poll there. Two FIRs were lodged in the meantime by concerned Presiding Officers alleging that election materials in one centre and 7 lids of ballot boxes were snatched while they were returning. The Election Commission cancelled the election of one polling centre and directed re-poll. The Election Commission rejected the representation by the petitioners of first writ petition alleging irregularity in publishing the election result by stating that since the election of the Union Parishad was not completed, the Returning Officer did not send the election result to the Election Commission. The High Court Division discussing relevant provisions of the Union Parishads (Election) Rules, 1983 and the Local Government (Union Parishad) Election Rules, 2010 and case laws decided thereunder observed that, as the current law empowers the Election Commission to stop casting vote only on the Election Day and as admittedly the election was held without any interruption and disturbance, the invocation of the power by the Election Commission to cancel the election is not justifiable. The Court held that rest of the matters are disputed question of facts, which must be decided by the Election Tribunal exercising judicial authority, not by the Election Commission in exercise of its plenary and supervisory authority which is administrative in nature. Therefore, the High Court Division set aside the decision of the Election Commission to re-poll and directed it to publish the names of the elected candidates in the official Gazette forthwith.

Key Words:

Union Parishad Election; Power of Election Commission; Cancellation of election results; Circumstances for Re-poll; Local Government (Union Parishad) Ain, 2009; Rule 37(1)(2) and Rule 90 of Local Government (Union Parishad) Election Rules, 2010

The Local Government (Union Parishad) Election Rules, 2010, Rule 37(1) (2):

It is crystal clear from a plain reading of the provisions of clause (kha) of Rule 37(1) that election in a centre cannot be stopped on grounds that any used ballot box is illegally removed from the custody of the Presiding Officer or is damaged accidentally or destroyed intentionally or lost unless the interference in the election is of such extent that the election result of the centre cannot be determined. Rule 37(2) further states that if the election is stopped in a centre, the EC shall not direct re-poll in that centre unless it is satisfied that the result of the election concerned cannot be determined by election result of other centres. ... (Para 22)

It is apparent that the power to adjourn poll by the Presiding Officer and to hold fresh poll by the EC under new Rule 37 is subject to specific and defined circumstances which was absent in old Rule 29. ... (Para 23)

The Local Government (Union Parishad) Election Rules, 2010, Rule 90(Ka), (Kha):

The powers of the EC under Rule 90(Ka) and (Kha) were absent in the old Rule 70. The languages used in Rule 90 (Ka) “ভোটগ্রহণের দিন....ভোটগ্রহণ বন্ধসহ” (to stop casting votes on the election day) and in Rule 90(Kha) “যে কোন ভোটকেন্দ্রের ভোটগ্রহণ বন্ধ করিতে” (to stop casting vote in any centre) denote that this power to stop casting vote has to be exercised on the election day during the polling hours. This power to stop poll under Rule 90 (ka) and (kha) is in addition to that of under Rule 37. ... (Para 26)

The Local Government (Union Parishad) Election Rules, 2010, Rule 37, 90(ga), (gha):

The power of the EC to cancel election result and directing re-poll, which is post election matter, is deemed to be exercised under Rule 90 (ga) or (gha), but in so doing the EC has to consider facts in light of its powers under Rule 37 and Rule 90 and the circumstances envisaged therein. The power of the EC under the old Rule 70 was plenary in that no specific circumstances were envisaged under the old Rules, but the situation is different under the new legal regime. From that point of view, the plenary power to cancel election result and directing re-poll under the new Rules is more specific and hence, more defined. However, it does not mean that the EC cannot exercise this power at all. It depends on facts and circumstance of each case. Since the EC, while exercising its supervisory and plenary powers under Rule 90, acts as the highest administrative authority, not as a judicial authority the EC must consider whether it is stepping out of the parameters set by the law for that the election disputes are adjudicable under the law by the Election Tribunal. ... (Para 28)

The Local Government (Union Parishad) Election Rules, 2010, Rule 90:

In the instant cases facts are not of such type that justify the invocation of the power of the EC under Rule 90 of Rules, 2010 to cancel the election because, firstly, the complaints by the defeated candidates were made on the following day of election and secondly, the election was held without any interruption and disturbance. It is admitted that the election result in form-da and the consolidated election result were sent to the

EC. The rest of the matters are disputed question of facts which are essentially matters to be decided by the Election Tribunal exercising judicial authority, not by the EC in exercise of its plenary and supervisory authority which is administrative in nature. To decide otherwise would amount to giving the scheme of the law a 'go-bye'. Under Section 22(1) of the Ain, 2009 read with Rule 53(1) of the Rules, 2010 a candidate can raise question or objection in the matter before the Election Tribunal by presenting election petition.

(Para 37)

JUDGMENT

Zafar Ahmed, J:

1. Both the writ petitions involve determination of common question of facts and laws. They are heard together and disposed of by this single judgment.

2. In Writ Petition (WP) No. 12118 of 2021, the petitioners have challenged the inaction of the respondent Nos. 1, 2 and 6 in disposing of the complaints dated 29.11.2021 and 06.12.2021 (Annexures-G and H-1) lodged by the petitioners for holding an inquiry about the alleged irregularities in accordance with Rule 90 (gha) of the Local Government (Union Parishad) Election Rules, 2010 in the election of the Jatrapur Union Parishad, Kurigram Sadar Upazilla held on 28.11.2021. The petitioners have also prayed for direction upon the respondents to hold re-election in centre No. 90 Jhunkar Char Government Primary School polling centre and Moddhyo Garuhara Rashidia Karimia Kawmia Madrasa polling centre of Jatrapur Union Parishad.

3. This Court on 08.12.2021 issued a Rule Nisi in WP No. 12118 of 2021 and passed an interim order directing the respondent Nos. 1 and 6 to dispose of the representations dated 29.11.2021 and 06.12.2021 (Annexures-G and H1) within 15 working days.

4. In WP No. 12554 of 2021, the petitioner has challenged the memo No. 17.00.4952.035.46.115.21-77 dated 08.12.2021 issued by the Election Commission cancelling the election of Jhunkarchar Government Primary School, Bhagabatipur polling centre (centre No. 90) of Ward No. 6 of Jatrapur Union, Sadar Upazilla, Kurigram and directing re-poll in the said centre (Annexure-E).

5. This Court on 14.12.2021 issued a Rule Nisi in WP No. 12554 of 2021 and passed an interim order staying operation of the memo dated 08.12.2021 (Annexure-E).

6. The crux of the issue in these 2 writ petitions is whether the Election Commission (in short, the 'EC') acted within the jurisdiction of law and with lawful authority in cancelling the election and directing re-poll in the polling centre in question.

7. Discussion on the relevant case laws and statutory law/rules would be fruitful for better understanding of the issue prior to dwelling upon the facts.

8. In *A. F. M. Shah Alam vs. Mujibul Huq and other*, 41 DLR (AD) 68 it was held, inter alia, that under Rule 70 of the Union Parishads (Election) Rules, 1983 read with Section 24 of the Local Government (Union Parishads) Ordinance, 1983 the EC 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 provisions of the Ordinance and the Rules. In so doing it may pass any order, unless specifically barred, including an order for re-poll, acceptance/consolidation of result, review etc. on the basis of materials before it.

9. The nine appeals in *Shah Alam* were decided essentially on the question of nature and extent of the power of the EC under the Rule 70. On consideration of facts of the cases, the apex Court did not interfere with the direction for re-poll given by the EC.

10. In *Abdur Rouf Miah vs. Fazlur Rahman and others*, 43 DLR (AD) 23 the election result was declared. However, on an application filed by a candidate the Chief Election Commissioner directed the Returning Officer to re-open and recount the ballot papers in presence of the parties. In four centres the Returning Officer found marks of tampering and a substantial number of ballot papers missing. The recounting was not completed and the same was reported to the Chief Election Commissioner. He, then, vacated his order of re-counting observing that he had no authority under the law to direct re-poll and accordingly, accepted the election result. The EC's order refusing to hold re-poll in four centres was unsuccessfully challenged a writ petition. The apex Court dismissed the petition for leave to appeal. It was observed,

“In such circumstances the Election Commission should not have directed re-counting without hearing both the parties. In the course of re-counting, some ballot papers in respect of 4 Centres were found missing. The pertinent question is who had done it and when? ... This a question which cannot be determined except by recording evidence, given on oath. This is a job of the Tribunal and not of the Election Commission. The view of the Chief Election Commissioner that he is powerless in the absence of Rule 68 is not correct. The Election Commission has got power and jurisdiction to organise, hold and conduct election and it also his duty to see that election is held in a fair and honest manner. But he is also subject to the Election Rules”. (*emphasis supplied*)

11. In *Altaf Hussain vs. Abul Kashem and others*, 45 DLR (AD) 53 ten appeals arising out of six writ petitions were decided by the Appellate Division. In eight out of ten appeals, the apex Court affirmed the judgment and order of the High Court Division setting aside the direction for re-poll by the EC. It was held that the post facto allegation by the defeated candidate can be agitated in the Election Tribunal. It was further held by the apex Court,

“In our legal system relating to elections also the Election Commission's inherent power under the provision of 'superintendence, control and direction' should be construed to mean the power to supplement the statutory rules with

the sole purpose of ensuring free and fair elections. This power is to be exercised with utmost restraint, for frequent use of it is likely to render the other statutory functionaries ineffective. It is rather difficult to draw a line of demarcation of the field where this power should be exercised and where should not". (*emphasis added*)

12. The factual matrix that formed the very basis of the decision of the apex Court in *Altaf Hussain* in setting aside the decisions of the EC for re-poll in 8 appeals are as follows:

- a) The Presiding Officer counted ballot papers on the spot in presence of the candidates or their agents and reported the results to the Returning Officer on the following day. The Returning Officer consolidated the results, declared the respondent No. 1 duly elected and sent the same to the EC for notification in the Gazette. Meanwhile, the EC, on receipt of allegation after the declaration was made, got the matter enquired which was done by the Nirbahi Officer. It was stated in the report that in one centre a high number of votes was cast in favour of only one candidate. The EC cancelled the election in that centre and directed re-poll. It was held, high number of votes cast in favour of only one candidate is a dispute to be resolved by the Election Tribunal, not by the EC. Consequently, the EC's action was declared illegal.
- b) 30 votes were cast in the names of dead persons, 58 votes were cast for absentee voters, 98% of votes were cast in one centre and 99% of votes went in favour of one candidate cannot be grounds for directing re-poll by the EC unless it is clearly proved that spurious votes were cast by capturing the polling booth.
- c) According to the UNO's report, gigantic rigging in respect of one centre where 94% of the votes were cast and out of that number 99% of votes went in favour of only one candidate is no ground for re-poll.
- d) According to the reports of the Deputy Commissioner and other officers in connection with the election, 90% to 99% of the votes were cast for dead voters and absentee voters. It was held, the question as to the votes of absentee or dead voters and the alleged high percentage of votes cast are matters to be determined by the Tribunal on evidence, not by the EC.
- e) Difference between the highest and the next to the highest number of votes obtained was only one cannot be a ground for re-poll.

13. However, in the following scenario, the apex Court in *Altaf Hussian* upheld the EC's decision directing re-poll

On the basis of admitted records, the EC found that the Presiding Officer, after counting of the ballot papers in presence of the parties, gave two

contradictory reports on the result of counting. The anomaly was not explained satisfactorily. It was held, since on the face of the records, the election result was found manipulated, the EC rightly directed re-poll.

14. In *Md. Abul Bashar vs. Kamrul Hasan and others*, 19 BLD (AD) 125 the petitioner was declared elected by the Returning Officer. The respondent No.1 (defeated candidate) made a representation to the Returning Officer alleging rigging of votes in a centre. The matter was inquired into by the Returning Officer and then by the District Election Officer. Both of them reported that the election was held peacefully and there was no irregularity in the said election. Later on, being instructed by the Chief Election Commissioner the Deputy Election Commissioner inquired into the matter and reported that during polling at a particular centre disturbance took place as result of which polling was stopped from 03.05 to 03.40 p.m. and the centre was attacked before counting ballot papers and relevant documents were taken away by miscreants. The EC cancelled the election of the centre and directed for holding fresh election at that centre. The order of the EC was unsuccessfully challenged before the High Court Division. The apex Court dismissed the petition for leave to appeal. In so doing, it observed that in the facts and circumstances of the case the power of superintendence and control exercised by the EC was lawful and in accordance with the Union Parishads ordinance, 1983. Referring to the case of *Altaf Hussain*, it was further held that the power of the EC to investigate is supplemental to the statutory Rules with the sole purpose of ensuring free and fair election. (*emphasis added*)

15. In *AKM Abdullah vs. Election Commission and others*, 3 BLC 375 the election was held peacefully. Counting of ballot papers was complete and the consolidated result sheet was also prepared. At this stage a group of miscreants rushed to a polling centre and snatched away the ballot papers and other connected materials. This Division held that Rule 29(1) of the Union Parishads Rules, 1983, which provided that if at any time, the poll at the polling station is interrupted or obstructed for the reason beyond the control of the Presiding Officer he shall stop the poll and inform the Returning Officer that he has done so, was not applicable to the case and that the EC was not justified to recommend a fresh election.

The above discussed cases were decided under the Local Government (Union Parishads) Ordinance, 1983 and the Union Parishads (Election) Rules, 1983.

16. The following three cases have been decided under the Local Government (Union Parishad) Ain, 2009 and the Local Government (Union Parishad) Election Rules, 2010 which have replaced the earlier Ordinance and Rules.

17. In *Md. Deloar Hossain vs. Election Commission and others*, 15 ADC 582 admittedly, the election was suspended for a while. The Appellate Division held that in such a situation, the presiding Officer was palpably wrong in declaring the result of the election and the EC rightly cancelled the election for that polling centre.

18. In *Syed Shariful Islam vs. Md. Toufiqul Islam Toufiq and others*, 14 ALR (AD) 54 the apex Court approved the observation of the High Court Division to the effect that,

“Since neither any allegation of irregularity, nor any corrupt practices were brought in the polling hours either to the Presiding Officer, or to the Returning Officer by any of the candidates or any voters, nor any disturbance during polling hours were reported, the Election Commission in exercise of power under Rule 90 of the Rules have/had no authority to act upon any complaint after the poll. Any such allegations after declaration of result unofficially by the Returning officer being election dispute has to be resolved by the Election Tribunal on a competent election petition”(emphasis supplied)

19. In *Election Commission Bangladesh and another vs. Noruzzaman Sarker and others*, 15 ALR (AD) 114 = 71 DLR (AD) 355, the Returning Officer declared the writ petitioner elected as Chairman. However, the EC stayed publication of the election result in the Gazette. The apex Court found that the Regional Election Officer, who held inquiry into the allegations made by the rival candidate, who filed a written complaint before the Chief Election Commissioner at 1:00 p.m. on the election day, reported that the election in four centres was not held in accordance with the provisions of law and that the result circulated by the Returning Officer was not a correct reflection of the scenario of the election in the said four disputed centres. The apex Court also considered the fact that it was stated in the said inquiry report that the Presiding Officers were not able to carry out their duties properly in those centres. The apex Court held that the EC rightly interfered and that it was within the jurisdiction of the EC to take action against allegation of irregularities and illegalities which were brought to its notice on the very day of election.(emphasis supplied)

20. It appears from the above discussed reported cases that in some cases this Division and the Appellate Division upheld the EC’s decision to cancel the election result and to hold re-poll. In other cases, decisions of the EC cancelling election result and directing re-poll were struck down. In so doing, both the Divisions have clearly and unequivocally settled the principles in what circumstances and under what authority of law the EC can invoke its plenary and supervisory power after declaration of election result. There is no ambiguity in the matter.

21. For better understanding of the case laws decided under the old Rules and the new Rules and facts of the instant cases, a comparative study of Rule 29 and Rule 70 of Rules, 1983 and Rule 37(1)(2) and Rule 90 of Rules, 2010 is relevant,

Rule 29 of Rules, 1983:

29. Adjourned poll– (1) If at any time, the poll at the polling station is interrupted or obstructed for reasons beyond the control of the Presiding Officer he shall stop the poll and inform the Returning Officer that he has done so.

(2) Where a poll has been stopped under sub-rule (1), the Returning Officer shall–

- (a) immediately report the circumstances to the Election Commission;
 - (b) appoint, as soon as may be, with the approval of the Election Commission, a day for a fresh poll; and
 - (c) fix a place or places at which and the hours during which such fresh poll shall be taken.
- (3) All voters shall be allowed to vote at the fresh poll taken under sub-rule (2) and no vote cast at the poll stopped under sub-rule (1) shall be counted.

Rule 37 (1) (2) of Rules 2010:

৩৭। কতিপয় পরিস্থিতিতে প্রিজাইডিং অফিসার কর্তৃক নির্বাচন বন্ধ রাখিবার ক্ষমতা।-

(১) নিম্নলিখিত পরিস্থিতিতে কোন ভোটকেন্দ্রের প্রিজাইডিং অফিসার উক্ত কেন্দ্রে ভোটগ্রহণ বন্ধ করিয়া উহা রিটার্নিং অফিসারকে অবহিত করিবেন, যথাঃ-

(ক) প্রিজাইডিং অফিসারের নিয়ন্ত্রণ বহির্ভূত কোন কারণে ভোটগ্রহণ এমনভাবে বাধাগ্রস্ত বা ব্যাহত হয় যে, উহা বিধি ২৭ এর অধীন ধার্যকৃত ভোটগ্রহণের সময়ে পুনরায় আরম্ভ করা সম্ভব নহে; বা

(খ) ভোটকেন্দ্রে ব্যবহৃত কোন ব্যালট বাক্স প্রিজাইডিং অফিসারের হেফাজত হইতে বেআইনীভাবে অপসারণ করা হইলে বা দুর্ঘটনাক্রমে ক্ষতিগ্রস্ত হইলে বা ইচ্ছাকৃতভাবে নষ্ট করা হইলে বা হারাইয়া গেলে বা এই পরিমাণ হস্তক্ষেপ করা হইয়াছে যে, সেই ভোটকেন্দ্রের ভোটের ফলাফল নির্ধারণ করা যাইবে না।

(২) উপ-বিধি (১) এর অধীন ভোটগ্রহণ বন্ধ করিয়া দেওয়া হইলে, রিটার্নিং অফিসার অবিলম্বে উক্ত ঘটনা সম্পর্কে কমিশনকে অবহিত করিবেন এবং কমিশন একই নির্বাচনী এলাকার অন্যান্য ভোটকেন্দ্রের ভোটের ফলাফলের দ্বারা সংশ্লিষ্ট নির্বাচনের ফলাফল নির্ধারিত হইয়া গিয়াছে মর্মে সন্মুখ না হইলে উক্ত ভোটকেন্দ্রে নূতনভাবে ভোট গ্রহণের নির্দেশ প্রদান করিবে।(emphasis added)

22. It is crystal clear from a plain reading of the provisions of clause (kha) of Rule 37(1) that election in a centre cannot be stopped on grounds that any used ballot box is illegally removed from the custody of the Presiding Officer or is damaged accidentally or destroyed intentionally or lost unless the interference in the election is of such extent that the election result of the centre cannot be determined. Rule 37(2) further states that if the election is stopped in a centre, the EC shall not direct re-poll in that centre unless it is satisfied that the result of the election concerned cannot be determined by election result of other centres.

23. It is apparent that the power to adjourn poll by the Presiding Officer and to hold fresh poll by the EC under new Rule 37 is subject to specific and defined circumstances which was absent in old Rule 29.

24. Rule 70 of Rules, 1983:

Rule-70: Powers of Election Commission to issue order-

Save as otherwise provided, the Election Commission may issue such instructions and exercise such powers, including the power to review an order passed by any officer under these rules and make such consequential orders as may, in its opinion, be necessary for ensuring that an election is conducted

honestly, justly and fairly and in accordance with the provisions of the Ordinance and these rules.

25. Rule 90 of Rules, 2010:

৯০। কতিপয় ক্ষেত্রে কমিশনের বিশেষ ক্ষমতা।- ভিন্নরূপ কোন বিধান ব্যতীত, কমিশন-

(ক) ভোটগ্রহণের দিন যে কোন অথবা সকল ভোটকেন্দ্রের ভোটগ্রহণ বন্ধসহ নির্বাচনের যে কোন পর্যায়ে সামগ্রিক নির্বাচন বন্ধ করিতে পারিবে, যদি উহার নিকট সন্তোষজনকভাবে প্রতীয়মান হয় যে, নির্বাচনের বলপ্রয়োগ, ভীতি প্রদর্শন, ভোটকেন্দ্র অবৈধ দখল, ব্যালট পেপার ছিনতাই, ব্যালট পেপার ভর্তি ব্যালট বাক্স ছিনতাই, জোরপূর্বক অন্যের ভোট প্রদান, চাপ সৃষ্টিসহ বিধি বহির্ভূত বিভিন্ন অপকর্মের কারণে বা উহার বিবেচনায় অন্য যে কোন কারণে ন্যায়সংগত ও নিরপেক্ষভাবে এবং আইন অনুযায়ী নির্বাচন পরিচালনা করিতে সক্ষম হইবে না;

(খ) নির্বাচনের যে কোন পর্যায়ে যে কোন ভোটকেন্দ্রের ভোটগ্রহণ বন্ধ করিতে পারিবে, যদি উহার নিকট সন্তোষজনকভাবে প্রতীয়মান হয় যে, নির্বাচনে বলপ্রয়োগ, ভীতিপ্রদর্শন, চাপ সৃষ্টি, বিভিন্ন বিরাজমান অপকর্মের কারণে ন্যায়সংগত ও নিরপেক্ষভাবে এবং আইন অনুযায়ী নির্বাচন পরিচালনা নিশ্চিত করিতে সক্ষম হইবে না;

(গ) কোন ব্যালট পেপার বাতিল বা গ্রহণসহ, এই বিধিমালার অধীন কোন কর্মকর্তা কর্তৃক প্রদত্ত কোন আদেশ পুনর্বিবেচনা করিতে পারিবে; এবং

(ঘ) আইন ও এই বিধিমালার বিধান অনুযায়ী ভোটকেন্দ্রের নির্বাচন নিরপেক্ষ, ন্যায়সংগত ও সুষ্ঠুভাবে পরিচালনা নিশ্চিতকরণের জন্য, উহার মতে, প্রয়োজনীয় নির্দেশাবলী জারী করিতে, ক্ষমতা প্রয়োগ করিতে এবং প্রাসঙ্গিক অন্যান্য আদেশ প্রদান করিতে পারিবে। (*emphasis supplied*)

26. The power of the EC to review an order passed by any officer under the old Rule 70 has been preserved in the new Rule 90 (ga). The rest of the powers of the EC under the old Rule 70 have been preserved under the new Rule 90 (gha). The powers of the EC under Rule 90(Ka) and (Kha) were absent in the old Rule 70. The languages used in Rule 90 (Ka) “ভোটগ্রহণের দিন....ভোটগ্রহণ বন্ধসহ”(to stop casting votes on the election day) and in Rule 90(Kha) “যে কোন ভোটকেন্দ্রের ভোটগ্রহণ বন্ধ করিতে” (to stop casting vote in any centre) denote that this power to stop casting vote has to be exercised on the election day during the polling hours. This power to stop poll under Rule 90 (ka) and (kha) is in addition to that of under Rule 37.

27. Section 20 of the Ain, 2009 states that the EC shall organise, hold and conduct the election of Chairman and Member of the Union Parishad according to the Rules made by it. Section 21 provides that the EC shall publish the names of the elected Chairman and Member in the Official Gazette as quickly as possible. Rule 43 provides that after declaration of the election result, the Returning Officer shall prepare a list of elected candidates with names and addresses in form-‘X’[da] and shall forward the same to the EC who shall cause it to be published in official Gazette. The statutory obligation of the EC under Section 21 read with Rule 43 to publish the election result as quickly as possible in the Gazette is subject to its intervention in the election under the power conferred upon it by Rule 90.

28. The power of the EC to cancel election result and directing re-poll, which is post election matter, is deemed to be exercised under Rule 90 (ga) or (gha), but in so doing the EC has to consider facts in light of its powers under Rule 37 and Rule 90 and the circumstances envisaged therein. The power of the EC under the old Rule 70 was plenary in that no specific circumstances were envisaged under the old Rules, but the situation is different under the new legal regime. From that point of view, the plenary power to cancel election result and directing re-poll under the new Rules is more specific and hence, more defined. However, it does not mean that the EC cannot exercise this power at all. It depends on facts and circumstance of each case. Since the EC, while exercising its supervisory and plenary powers under Rule 90, acts as the highest administrative authority, not as a judicial authority the EC must consider whether it is stepping out of the parameters set by the law for that the election disputes are adjudiciable under the law by the Election Tribunal.

29. In the instant cases, the election was held on 28.11.2021. On 29.11.2021, the petitioners of WP No. 12118 of 2021, who were candidates for the post of Chairman, made a written complaint to the Returning Officer regarding matters which relate to the alleged irregularity in publishing the election result. They also made two separate representations to the EC on the self-same subject matter.

30. Meanwhile, on 29.11.2021, the Presiding Officer of centre No. 90 lodged an FIR under different Sections of the Penal Code stating that after declaration of the election result on 28.11.2021, while they were returning, they were attacked and connected election materials were snatched away, but the ballot box and the election sheet were kept with the informant.

31. On 29.11.2021, the Presiding Officer of centre No. 84 also lodged an FIR stating that after declaration of the election result on 28.11.2021 they were attacked and 7 lids of the ballot boxes were snatched away.

32. On 01.12.2021, the petitioner of WP No. 12554 of 2021 made a representation to the EC for final publication of the election result.

33. On 02.12.2021, the Returning Officer prepared and signed the form-da under Rule 43 of the names of the elected candidates and sent the primary unofficial result and the names of the elected candidates to the EC.

34. On 08.12.2021 without assigning any reason, the EC cancelled the election of Jhunkarchar Government Primary School, Bhagabatipur polling centre (centre No. 90) and directed re-poll (Annexure-E to WP No. 12554 of 2021).

35. Subsequently, on 12.01.2022, the Returning Officer rejected the application dated 29.11.2021 of the petitioners of WP No. 12118 of 2021 regarding re-count of ballots in 3 centres.

36. On 23.01.2022, the EC rejected the representation dated 29.12.2021 of the petitioners of WP No. 12118 of 2021 stating that since the election of Jatrapur Union Parishad was not completed the Returning Officer did not send the election result to the EC. Be that as it may, it is already noted that the Returning Officer had already sent the unofficial election result of Jatrapur Union Parishad to the EC on 02.12.2021. The Deputy Commissioner, Kurigram, in memo dated 10.02.2022 (Annexure-L to WP No. 12554 of 2021) categorically stated in paragraph No. 7 of the same that the concerned Returning Officer sent the election result to the EC, vide memo dated 02.12.2021. Therefore, the veracity of the statements made in the EC's memo dated 23.01.2022 to the effect that the Returning Officer did not send the election result of Jatrapur Union Parishad to the EC cannot be determined in the instant writ petitions. Moreover, materials on record suggest that form-da under Rule 43 was prepared and signed and the same along with the consolidated primary result was sent to the EC.

37. In view of the facts and circumstances of the decided cases, the general principles laid down therein on election matter and considering the Rules, 2010 we are constrained to hold that in the instant cases facts are not of such type that justify the invocation of the power of the EC under Rule 90 of Rules, 2010 to cancel the election because, firstly, the complaints by the defeated candidates were made on the following day of election and secondly, the election was held without any interruption and disturbance. It is admitted that the election result in form-da and the consolidated election result were sent to the EC. The rest of the matters are disputed question of facts which are essentially matters to be decided by the Election Tribunal exercising judicial authority, not by the EC in exercise of its plenary and supervisory authority which is administrative in nature. To decide otherwise would amount to giving the scheme of the law a 'go-bye'. Under Section 22(1) of the Ain, 2009 read with Rule 53(1) of the Rules, 2010 a candidate can raise question or objection in the matter before the Election Tribunal by presenting election petition.

38. In the backdrop of facts and circumstances of the cases in hand as well as the relevant provisions of law and principles laid down by the apex Court in the reported cases, the learned Advocates of both sides advanced arguments in support of their respective cases. We note that those arguments were more or less made in the reported cases. Therefore, we do not find it necessary to record arguments advanced by the learned Advocates since those are already on record.

39. In the result, the Rule issued in WP No. 12118 of 2021 is discharged.

40. Rule issued in WP No. 12554 of 2021 is made absolute. The memo dated 08.12.2021 issued by the EC cancelling the election of centre No. 90 and directing re-poll (Annexure- E to WP No. 12554 of 2021) is set aside. The EC is directed to publish the names of the elected candidates in the official Gazette forthwith.

41. Communicate the judgment to the respondents.