

2 SCOB [2015] AD 5

APPELLATE DIVISION

PRESENT:

Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Hasan Foez Siddique

CIVIL PETITION FOR LEAVE TO APPEAL NOS.1428 AND 1429 OF 2014
(From the judgment and order dated the 24th day of April, 2014 passed by the High Court Division in Election Petition Nos.8 and 9 of 2014)

Major General Abdus Salam (Retd) . . . Petitioner
(in both the cases)

-Versus-

Bangladesh Election Commission and another . . . Respondents
(in both the cases)

For the Petitioner
(in both the cases)

Mr. Mahbubar Rahman, Senior Advocate instructed by Mr. Mohammad Abdul Hai, Advocate-on-Record

For the Respondent
(in both the cases)

Mr. Shafique Ahmed, Senior Advocate instructed by Mr. Md. Habibur Rahman, Advocate-on-Record

Date of Hearing The 13th day of August, 2015

The most significant thing is that for the purpose of filing an election petition under article 49(1) of the RPO only the phraseology “candidate” has been used. In other words, a proposed “candidate” has been given the *locus standi* to file an application raising an election dispute. Admittedly the candidature of the election-petitioner was rejected by the Election Commission on the ground of being a defaulter, he is surely a person who was proposed as a candidate for election as a member of the Parliament of the Constituency in question. But the High Court Division failed to comprehend the proper meaning of “candidate” given in section 2(ii) of the RPO vis-à-vis article 49(1) thereof in observing that “*the petitioner being a candidate of the 10th National Parliamentary Election did not act rather he was an intending candidate and wanted to become a candidate.*” And we hold that the petitioner being a proposed “candidate” for election as a Member of the Parliament for the Constituency in question, he had every *locus standi* to file the election petitions and those were maintainable in law. . . .(Para 9)

JUDGMENT

Md. Abdul Wahhab Miah, J:

1. These petitions for leave to appeal have been filed against the common order dated the 24th day of April, 2014 passed by a Division Bench of the High Court Division in Election Petition Nos.8 and 9 of 2014 rejecting both the election petitions.

2. Facts necessary for disposal of these petitions are that the petitioner herein filed two election petitions before the High Court Division under article 49(2) of the Representation of the People Order, 1972 (in short, RPO) being Nos.8 and 9 of 2014 for the reliefs mentioned therein. In the election petitions, respondent No.2 (hereinafter referred to as the respondent) filed two applications under Order VII, rule 11 of the Code of Civil Procedure (the Code) for rejection of the election petitions on two grounds viz (i) that the election-petitioner not being a candidate would not be able to file the election petition within the meaning of article 49(2) of the RPO and (ii) that the nomination paper of the election-petitioner was rejected by the Election Commission, which was final, he, therefore, would not be able to file the election petitions challenging the said final order of the Election Commission.

3. The applications were contested by the petitioner by filing separate written objection contending, *inter alia*, that the election petitions were very much maintainable in law. The applications for rejection of the election petitions were filed under misconception of law. There was cause of action to file the election petitions, so the applications for rejection of the election petitions were liable to be rejected.

4. The High Court Division by the common impugned order rejected both the election petitions.

5. Heard Mr. Mahbubar Rahman, learned Counsel for the petitioner and Mr. Shafique Ahmed, learned Counsel for the respondent.

6. We have perused the impugned order. The election petitions have been rejected on the view that those were barred by law without mentioning under what provision of law. But from the discussions made in the body of the order, it appears that the Tribunal found the reliefs prayed in the respective election petition barred under articles 14(5) and 51(2) of the RPO. The High Court Division observed that the election-petitioner *“being a candidate of the 10th National Parliamentary Election did not act rather he was an intending candidate and wanted to become a candidate but having been failed to become a candidate for redress of his grievance he instituted the Writ Petition No.12439 of 2013 and 12440 of 2013 under Article 102 of the Constitution of the People’s Republic of Bangladesh and the Writ Petitions having been rejected on 26.12.2013, the petitioner allegedly preferred civil miscellaneous petition before the Hon’ble Appellate Division of the Supreme Court of Bangladesh and from the submission of the learned counsel for the petitioner it appears that the civil miscellaneous petitions are still awaiting for disposal.”*

7. Let us see whether the High Court Division was correct in taking the above view in rejecting the election petitions.

8. Sub-article (1) of article 49 of the RPO has provided that no election shall be called in question except by an election petition presented by a “candidate” (emphasis supplied) for that election in accordance with the provisions of Chapter-‘V’(Chapter-‘V’ has dealt with election disputes). In article 2 of the RPO: “Candidate” has been defined in clause-(ii) “Candidate” means a person proposed as a candidate for election as a member. Besides the definition of “candidate”, two other definitions of the article are relevant viz “contesting candidate” and “returned candidate”. According to clauses (VI) of article 2

““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 and according to clause (XX) “returned candidate” means a candidate who has been declared elected as a member under this Order.”

9. The most significant thing is that for the purpose of filing an election petition under article 49(1) of the RPO only the phraseology “candidate” has been used. In other words, a proposed “candidate” has been given the *locus standi* to file an application raising an election dispute. Admittedly the candidature of the election-petitioner was rejected by the Election Commission on the ground of being a defaulter, he is surely a person who was proposed as a candidate for election as a

member of the Parliament of the Constituency in question. But the High Court Division failed to comprehend the proper meaning of “candidate” given in section 2(ii) of the RPO vis-à-vis article 49(1) thereof in observing that “*the petitioner being a candidate of the 10th National Parliamentary Election did not act rather he was an intending candidate and wanted to become a candidate.*” And we hold that the petitioner being a proposed “candidate” for election as a Member of the Parliament for the Constituency in question, he had every *locus standi* to file the election petitions and those were maintainable in law.

10. The High Court Division found the election petitions non maintainable on the ground that the reliefs sought in the petitions were barred under articles 14(5) and 51(2) of the RPO; reason for holding so is that the nomination of the election-petitioner was cancelled by the Election Commission in the appeals being Election Appeal No.87 of 2003 and Election Appeal No.79 of 2013 filed by the Bank and the respondent respectively which were final. He, therefore, could not make any prayer in the election petitions for setting aside the “Judgment and Order” dated 11.12.2013 passed by the Election Commission in the respective appeal cancelling his nomination paper for the election of the constituency in question. According to the High Court Division, such prayer has not been contemplated in sub-article (2) of article 51 of the RPO. In finding the election petitions barred under article 51(2) of the RPO, the High Court Division totally failed to consider that besides the above prayer, there were other prayers in the election petitions and prayer (ii) was quite in conformity with the said sub-article. Prayer (ii) reads as follows:

“(ii) Declaration to the effect that the Election of returned candidate Md. Anwarul Abedin Khan, respondent No.2 as Member of Parliament from the Parliament Constituency No.154, Mymensingh-9 in the 10th Parliament Election held on 05.01.2014, is void.”

11. In the context, we may look into sub-article (2) of article 51 of the RPO which reads as under:

“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 a whole is void.”

12. Since the respondent was declared as member of the Parliament in the parliamentary seat in question unopposed, no other prayer as contemplated in the sub-rule was necessary. In the RPO, there is no provision of rejection of the election petition. Article 58 of the RPO has provided that the High Court Division shall dismiss an election petition, if (a) the provisions of article 49 or article 50 or article 51 have not been complied with or (b) the petitioner fails to make the further deposit required under clause (4) of article 57, but in the instant case, no complaint was made by the respondent that the election petitions were filed without complying with those provisions of the RPO. However, it is the provisions of Order VII, rule 11 of the Code under which the applications were filed for rejection of the election petitions and that provision of the Code has not contemplated rejection of a plaint (here the election petitions) for addition of a prayer than the law requires. However, that point, if agitated, can very well be decided along with the other issues involved in the election petitions at the trial of the election petitions.

13. For the discussions made above, we are constrained to hold that the High Court Division erred in law rejecting the election petitions. Therefore, the impugned order calls for interference by this Court. Since we have heard the learned Counsel of both the parties and the petitions have arisen out of an election dispute, which need to be disposed of expeditiously, we are not inclined to give any leave, as that would cause delay in the disposal of the election petitions. Moreso, this Court has been informed that the election petitions are ready for peremptory hearing.

14. In view of the above, these petitions are disposed of in the following terms:

The impugned order rejecting the election petitions is set aside. The High Court Division is directed to proceed with the trial of the election petitions and dispose of the same in accordance with law expeditiously keeping in view the observations made hereinbefore in this judgment.