

**IN THE SUPREME COURT OF BANGLADESH  
HIGH COURT DIVISION  
(SPECIAL ORIGINAL JURISDICTION)**

**Writ Petition No.4161 of 2017**

IN THE MATTER OF:

An application under Article 102 of the  
Constitution of the People's Republic of  
Bangladesh.

-And-

IN THE MATTER OF :

Rezaul Haque Chowdhury

.....Petitioner

-Versus-

Government of Bangladesh, represented by  
the Secretary, Local Government Division,  
Ministry of Local Government and  
Engineering Division, Bangladesh  
Secretariat, Ramna, Dhaka and others

.....Respondents.

Mr. Shafique Ahmed, Senior Advocate with  
Mr. Aminul Haque, Senior Advocate and  
Mr. Iftekher Ahmed, Advocate

.....for the petitioner

Mr. Mahbubay Alam, Senior Advocate with  
Mr. Md. Ekmarul Haque, Advocate,

.....for the respondent no.8.

Mr. Murad Reza, Additional Attorney General with  
Mr. Sk. Saifuzzaman, Assistant Attorney General

.....for the respondent no. 1

**Heard on 22.11.2017, 27.11.2017, 03.12.2017,  
05.12.2017 and Judgment on 11.12.2017**

**Present:**

**Mr. Justice Bhabani Prasad Singha**

**And**

**Mr. Justice Mustafa Zaman Islam**

**Mustafa Zaman Islam, J;**

Upon an application under Article 102 of the Constitution of the  
People's Republic of Bangladesh, a Rule Nisi was issued calling upon

the respondents to show cause as to why the Judgment and decree dated 19.03.2017 passed by the learned Election Appellate Tribunal, Bhola in Election Tribunal Appeal no. 01 of 2017 dismissing the appeal and thereby affirming the judgment and decree dated 01.12.2016 passed by the Election Tribunal and Senior Assistant Judge, Sadar Court, Bhola in Election Case no. 10 of 2016 cancelling the Gazette should not be declared without lawful authority and is of no legal effect.

The facts necessary for disposal of the Rule, in brief, are that the petitioner is a renowned social worker and elected Chairman of Rajapur Union Parishad, Bhola. The election was held on 31.03.2016 and present petitioner was declared elected by the Returning Officer with a majority of 148 votes and Gazette notification was published by the respondent no.3, Election Commissioner and accordingly, the petitioner took oath. It is noted that 6 (six) candidates have contested for the post of Chairman in the said election. Here, election petitioner-respondent no.8 challenged the said election as candidate by filing an election petition on 18.05.2016 being Election Case No. 10 of 2016 against the petitioner as defendant no.1 and 32 others before Election Tribunal and Senior Assistant Judge, Sadar Bhola, praying for cancellation and re-election of ward no. 6 of said Rajapur Union and recounting the unused ballots, counter foil of the used ballots and cast ballots of ward nos. 5 and 7 and for cancelling the election result of the instant petitioner and to declare the respondent no. 8 as the elected Chairman of Rajapur Union Parishad, Bhola. The Petitioner before us is a elected candidate

for the election to the office of chairman of Rajapur Union Parishad, Bhola.

The case of the respondent no. 8, is that he took part in the election held on 31.03.2016 and his symbol was Nouka(boat). Before the election he noticed that the defendants are propagating their election propogonda by violating the Election Rules and he complained before the Returning Officer against it. But the Returning Officer did not take any action against them, rather, he being biased supported them and prevented the election petitionener, the respondent no. 8 in many ways. At the time of election, election-petitioner respondent no. 8 noticed that in the ward no. 6, the defendant no.1-petitioner forcibly entered into the centre, took illegal possession of the centre, a collision took place with police and a lot of fake votes were cast in the said centre in favour of the defendant petitioner. Thereafter, police took control of the centre and votes were taken on usual basis. He further claimed that in the result a total of 600 to 700 fake votes were cast in favour of symbol Motor Cycle of the petitioner and accordingly it was, shown in the result sheet. He also claimed that in ward nos. 5 and 7 in the said Rajapur Union Parishad, Presiding Officer wilfully made an illegal correction in the list and shown the defendant-petitioner to be the declared winner in the election.

The present petitioner as the defendant no. 1 contested the Election case by filing written statements denying all the material allegations made in the election petition and has stated that nothing

happened as per the allegation made by the election-petitioner-respondent no. 8. He was not in a position to run undue influence in the area. Rather, a free, fair and credible election was held on 31.03.2016. Neither there was any conspiracy nor any forgery took place and as such the election petition is to be dismissed and that the election-petitioner is not entitled to get any relief as prayed for by him. It is to be noted that at the time of trial the respondent no. 8 made an application under order 6 Rule 17 of the code of Civil Procedure code for correction of the plaint and that was allowed the application and as a result, it changed the nature and character of the whole case.

During trial, the election petitioner-respondent no.8 examined 7 PWs on his behalf while the defendant-petitioner examined 5 DWs in support of his case. Thereafter, the respondent no.8 filed an application for recounting the ballot papers of ward nos. 5,6 and 7 before the Election Tribunal, but the Tribunal by his order dated 29.11.2016 allowed the same. The petitioner, being aggrieved, by the said order of recounting of ward nos. 5, 6 and 7 preferred an appeal before Election Appellate Tribunal, but the trial court hurriedly recounted the ballots on 01.12.2016 though objection was raised by the learned Advocate for the petitioner but the trial court did not pay heed to it. When the ballot papers were sent to the Tribunal for recounting, it was seen that the seal of the sack was broken and the petitioner before recounting the said ballots, made an application before the Election Tribunal bringing up the matter of unsealed sacks of ballots to the notice of the Election

Tribunal but that was kept with record vide order dated 01.12.2016. Verbal objection was raised by the learned Advocate for the petitioner but the learned Tribunal rejected his prayer for stopping the recounting of unsealed sack of the ballots and recounted those ballot papers and on the same day the Election Tribunal also pronounced the judgment and decree dated 01.12.2016.

Being aggrieved, by and dissatisfied with the judgment and decree dated 1.12.2016, the defendant petitioner preferred an appeal being Election Tribunal Appeal Case No. 01 of 2017 and also made an application under order 39 Rule 1 of the Code of Civil Procedure for staying the operation of the judgment of the Election Tribunal till disposal of the appeal. The Appellate Tribunal fixed date for hearing of the appeal and the application was rejected and the Appellate Tribunal dismissed the appeal.

As against the said judgment and decree of the learned Appellant Tribunal, the petitioner has come to this Division under article 102 of the Constitution and obtained the present Rule.

It is to be noted that another Division Bench of this Court after hearing the said writ petition was pleased to dispose of the same and sent the election case back on remand to the Appellate Tribunal by setting aside the judgment and decree of both the Tribunal below passed by the judgment dated 16.07.2017. As against the aforesaid Judgment, respondent nos. 1 and 8, being aggrieved, preferred Civil Petition for Leave to Appeal being nos. 2910, 2965 and 3496 of 2017

respectively before the Appellate Division and after hearing, the said petitions before the Judge-in-Chamber of the Appellant Division and the Honorable Judge-in-Chamber was pleased to pass an order of stay on 09.08.2017, staying the operation of the judgment and order dated 16.07.2017 passed by a Division Bench of the High Court Division. Pursuant to that order of the Appellate Division, the Election Commission published gazette notification dated 05.09.2017 declaring the respondent no. 8 as elected Chairman of No. 01, Rajapur Union parishad, Bhola and also cancelled the petitioner's Gazette notification dated 24.04.2016 and pursuant to that notification, the Deputy Commissioner, Bhola on 10.09.2017 administered oath to the respondent no. 8 and after taking oath on the same day on 10.09.2017, he already assumed the office of the Rajapur Union Parishad, Bhola and took charge as elected Chairman of the said Union Parishad and he has been functioning as Chairman of the said Union Parishad.

The Civil Petition for Leave to Appeal was heard by the full bench of the Appellate Division and after hearing, this court was pleased to set aside the judgment and order of the High Court Division vide order dated 16.07.2017 directing the High Court Division to hear this matter on merit afresh. The Honorable Appellate Division vide order dated 26.10.2017 passed in the Civil Petition for leave to appeal nos. 2910, 2965 and 3496 of 2017 respectively directed this Division to disposed of the Writ Petition being No. 4161 of 2017, expeditiously by 14.12.2017. Hence, the writ petition before us.

Mr. Shafique Ahmed with Mr. Md. Aminul Hoque, the learned Senior Advocates appearing on behalf of the petitioner submits that the findings of the Election Tribunal with regard to 200 ballots is based on no evidence. Neither in the election petition nor in the application for recounting nor in the evidence of pws, there is mention of non-counting of 200 votes of respondent no. 8. He submits that if 1309 votes were cast, 200 votes will remain uncounted is unthinkable as because all the machineries of Government were in favour of the election petitioner-respondent no.8. He submits that without disposing of the application regarding unsealed conditions of the gunny bag as filed by the writ petitioner, passing of the judgment of the Election Tribunal is totally malafide and is beyond law and against the judgment of the Appellate Division. He submits that Appellate Tribunal did not discuss any evidence on record which is non-consideration of the evidence on record. Moreover, the Appellate Tribunal did not touch the ground as taken by the writ petitioner. Advocate Aminul Hoque, submits that no legal evidence has been recorded in the election case and no foundation for recounting could be established and as such, the order for recounting of votes of the ward no. 6 is not sustainable in the eye of law. He further submits that the respondent no. 8 or his representative did not request the Presiding Officer for recounting of the ballot papers stating that 200 votes of the respondent no. 8 were not counted and no such objection was raised on the spot and as such the election was held peacefully in a very congenial atmosphere, therefore, the counting at

the centre was correct and valid. Mr. Haque further submits that 1309 votes were cast in ward no. 6 of the said Union Parishad for Chairman, member and female member, but on recount the tribunal found 1509 votes were cast for the post of chairman. At this stage, the learned Advocate for the defendant-petitioner though have objected verbally against recounting by filing an application to stop recounting of votes as the sacks as brought from treasury was unsealed but the tribunal rejected his objection and kept the application with record, and the Tribunal pronounced the judgment on the same day which is illegal, malafide and without jurisdiction. In support of his submissions, he referred the decisions in the case of Md. Sahjahan vs Md. Sadeq and another reported in 38 DLR (AD) 275, in the case of National Engineers Limited and others vs Jubak housing and Real State Ltd and others reported in 67 DLR (AD) 176, 3 BLT 236 and 46 DLR (AD)96.

On the other hand, Mr. Mahabubey Alam, the learned Senior Advocate with Mr. Ekramul Hoque, the learned Advocate appearing on behalf of the respondent no. 8 and Mr. Murad Reza, the learned Additional Attorney General with Mr. Sk. Saifuzzaman, the learned Assistant Attorney General appearing on behalf of the respondent no. 1, by filing affidavit-in-opposition opposed the Rule. The writ petitioner also filed supplementary Affidavit, Affidavit-in-reply to the Affidavit-in-opposition and respondent nos. 1 and 8 also filed supplementary Affidavit-in-opposition.



Mr. Mahbubey Alam submits that after considering the evidence on record the learned Election Tribunal passed the order of recounting ballots papers of election of ward nos. 5, 6 and 7 of Rajapur Union Parishad a fair disposal of the election dispute and hence, there is no illegality on the part of the Election Tribunal as well as the Appellate Tribunal and as such the Rule is liable to be discharged. By referring to sections 39-40 and 61 of the (local government) Union Parishad Rules, 2010, he submits that admittedly on the day of election there was some irregularity and violence by the writ petitioner and his supporters and looted the ballots papers which was published in the local newspapers. He submits that as per the Rule 61 of the Election Parishad Rules 2010, the tribunal has the power to pass appropriate order after hearing both the parties and in the present case, on considering the evidence on materials on record, the learned Tribunal passed orders for a proper and fair disposal of the election dispute by way of recounting of the ballots of the ward nos. 5,6 and 7. Accordingly, the learned Tribunal rightly passed the order dated 29.11.2016 for recounting the votes of the said wards of the said union parishad.

Per-contra, Mr. Murad Reza, the learned Additional Attorney General, submits that the writ petitioner failed to prove his case and thus the election tribunal as well as Appellate tribunal rightly passed the impugned judgment and order dated 01.12.2016 and 19.03.2017 respectively. He submits that the petitioner raised the questions in the instant writ petition which are dispute question of facts. It has already

been decided by the Election Tribunal, which cannot be decided under article 102 of the constitution as such the writ petition is not maintainable in its present form. He submits that both the Election Tribunal below concurrently found that admittedly during recounting 200 votes were cast in favour of the respondent no. 8 i.e symbol 'boat' were found uncounted, after adding the said 200 uncounted votes with the previously declared votes, the tribunal found that the respondent no. 8 was leading of the writ petitioner by 77 votes, as such, the Election Tribunal as well as the Appellate Tribunal found nothing wrong or legality declaring the respondent no. 8 as the elected chairman of said Rajapur Union Parishad, therefore, the rule is liable to be discharged. In support of his submission he has referred to two decisions, the case of Government of Bangladesh vs Md. Jalil and others reported in 48 DLR (AD) 10 and the case of Government and others Vs. Mrs. Rowshon Ara Begum and others reported in 17 BLT (AD) 65.

We have heard the learned Advocates for both the parties and have gone through the evidence on record and perused the judgments both the Election Tribunal and the Election Appellate Tribunal below carefully.

Now the point for determination is whether the Election and the Appellate Tribunal below had erroneously refused to admit admissible and martial evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned findings. Similarly, if a finding of fact is based on no evidence, that would be regarded as an

error of law which can be corrected by a writ of certiorari as judicial review and before exercising the power of judicial review, in the nature of writ of certiorari, this court is to consider the following circumstances:-

- a. the decision violates fundamental right .
- b. the decision violates the law or without jurisdiction.
- c. the decision is void.
- d. the decision is against natural justice, malafide, perverse or based on non –application of mind and no evidence

For proper disposal of the Rule, let us examine the relevant laws.

Relevant part of section 40 and 61 of the local government (Union Parishad) Rules, 2010 runs thus:-

৪০ প্যাকেটে রক্ষণীয় কাগজপত্র, ইত্যাদি। (১) প্রিজাইডিং অফিসার-

(ক) প্রত্যেক প্রতিদ্বন্দ্বী প্রার্থীর অনুকূলে প্রদত্ত বৈধ ভোটগুলি পৃথক প্যাকেটে সংরক্ষণ করিবেন।

(খ) দফা (ক) -তে উল্লেখিত প্রতিটি প্যাকেট সীলমোহর করিয়া মুখ বন্ধ করিবেন এবং প্রতিটি প্যাকেটে রক্ষিত বৈধ ভোটের সংখ্যা এবং যে প্রার্থীর অনুকূলে ভোট প্রদত্ত হইয়াছে তাহার নাম ও নির্বাচনী প্রতীকের নাম প্যাকেটের উপর লিপিবদ্ধ করিয়া স্বাক্ষর করিবেন।

(গ) চেয়ারম্যান পদের জন্য প্রত্যেক প্রতিদ্বন্দ্বী প্রার্থীর অনুকূলে প্রদত্ত বৈধ ভোট সম্বলিত প্যাকেটগুলি একটি প্রধান প্যাকেটে সংরক্ষণ করিবেন।

(ঘ) সংরক্ষিত আসনের সদস্য পদের জন্য প্রত্যেক প্রতিদ্বন্দ্বী প্রার্থীর অনুকূলে প্রদত্ত বৈধ ভোট সম্বলিত প্যাকেটগুলি অন্য একটি প্রধান প্যাকেটে সংরক্ষণ করিবেন।

(ঙ) সাধারণ আসনের সদস্য পদের জন্য প্রত্যেক প্রতিদ্বন্দ্বী প্রার্থীর অনুকূলে প্রদত্ত বৈধ ভোট সম্বলিত প্যাকেটগুলি অন্য একটি প্রধান প্যাকেটে সংরক্ষণ করিবেন এবং

(চ) দফ (গ),(ঘ) এবং (ঙ) -তে বর্ণিত প্রধান প্যাকেটগুলি সরকারি সীলমোহর দ্বারা বন্ধ করিবেন এবং উহাতে রক্ষিত ছোট প্যাকেটের সংখ্যা উল্লেখ করিয়া প্রধান প্যাকেটের উপরে স্বাক্ষর করিবেন।

(২).....

(৩) প্রিজাইডিং অফিসার নিম্নবর্ণিত কাগজপত্র ও দ্রব্যাদি পৃথক প্যাকেটে রাখিয়া উক্ত কাগজপত্র ও দ্রব্যাদির বিবরণী লিপিবদ্ধ করিবেন এবং প্যাকেটগুলি সীলমোহর করিবেন, যথাঃ-

(ক) ইস্যুকৃত নহে এইরূপ ব্যালট পেপারসমূহ (মুড়িপত্রসহ) ;

(খ) বৈধ ও অবৈধ (বাতিল) ব্যালট পেপারসমূহ;

(গ)নষ্ট এবং বাতিলকৃত ব্যালট পেপারসমূহ;

(ঘ) চিহ্ন প্রদত্ত ভোটার তালিকার অনুলিপিসমূহ;

(ঙ) ইস্যুকৃত ব্যালট পেপারের মুড়িপত্রসমূহ;

(চ) সরকারি সীলমোহর ও ভোট মার্কিং সীল, এবং

(ছ) রিটানিং অফিসারের নির্দেশ অনুসারে অন্যান্য কাগজপত্র ও দ্রব্যাদি।

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(৫)-----

(৬২) সংরক্ষিত দলিল দস্তাবেজ এর প্যাকেট খুলিবার আদেশ। (১) নির্বাচনী ট্রাইব্যুনাল বা নির্বাচনী আপীল ট্রাইব্যুনাল গণনাকৃত ব্যালট পেপার পরিদর্শনের জন্য উহার মুড়িপত্র এবং দলিল দস্তাবেজ সম্বলিত প্যাকেট খুলিবার আদেশ প্রদান করিতে পারিবেন।

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(৩)-----

(৪)-----

On perusal of the above rules, 2010 it is seen that the election Tribunal has the power to pass an order directing to open ballot box subject to observation of some guideline. But the election Tribunal did not follow the same.

Suffice it to mention here that this Court in the instant writ petition can only interfere with the findings of fact arrived at by the Tribunal below only if it can be shown that the same is based on no

evidence or based on non-consideration of martial evidence on record. It appears from the record of both the Tribunal below that there was no prayer of recounting of votes of center no.6 by the petitioner of the Election case. The election petitioner-respondent no.8 prayed for cancellation of the result of the said vote center. Despite that, the Election Tribunal re-counted the votes of centre no. 6. The petitioner-respondent no.8 (of the election petition) only sought for recounting of votes of center nos. 5 and 7 from the Judgment of the Tribunal. It is seen that the Election Tribunal itself found the gunny bags containing the ballot papers to be in unsealed condition. In such a situation, the Election Tribunal should not have recounted the ballot papers and then and there should have stopped re-counting of votes. As per the finding of the Election Tribunal, the learned Advocate for the opposite party no. 1(the petitioner of the writ petition) was not present at the time of recounting of votes. So, it appears that in absence of the opposite party no.1 (the writ petitioner) the vote was recounted which was unfair. It is a necessary to state that 3 (three) petitions regarding unsealed sacks of ballot papers and for stay of the proceeding for filing appeal against the order dated 29.11.2016 in the Court of Appellate Tribunal were filed by the opposite party no.1 (writ petitioner) which were not disposed of by the Election Tribunal, rather, kept with the record. No particular date for pronouncement of judgment was fixed by the Election Tribunal, rather, on the very date of recounting of votes judgment was delivered. It further appears that 1309 votes were cast in ward no.6, and that after

re-counting by the Election Tribunal 1509 votes were found to be cast. But the votes of other candidates did not increase proportionately with respondent no. 8. So, finding of 1509 votes to have been cast by the Election Tribunal is impossible. Further, there is no trace of counterfoil of increased votes of 200 in respect of the candidates. It is profitable to mention as evident from annexure H to the writ petition which runs thus:-

চেয়ারম্যান পদে নির্বাচনে প্রতিদ্বন্দ্বী প্রার্থীগণের ভোট গননার বিবরণী।

১২১ নং উওরচর সিতারামপুর সরকারী প্রাথমিক বিদ্যালয়

গোলাম সরদার-ধানের শীষ-	১৫ ভোট
জসিম উদ্দিন - আনারস -	১১ ভোট
মোসারেফ হোসেন - ঘোড়া-	০০ ভোট
মোঃ বসির উল্লাহ - হাতপাখা	৩৮ ভোট
মোঃ মিজানুর রহমান - নৌকা	৩৮৬ ভোট
রেজাউল হক চৌধুরী - মোটর সাইকেল- ৮০০ ভোট	
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মোট-	১২৫০ ভোট
অবৈধ (বাতিল) ভোটের সংখ্যা -	৫৯ ভোট
বৈধ, অবৈধ(বাতিল) ভোটের সংখ্যা -	১৩০৯ ভোট
উপস্থিত ভোটারের সংখ্যা	-১৩০৯ ভোট
অনুপস্থিত ভোটারের সংখ্যা	১৮৯১ ভোট

It is found that agents of the candidates Viz Abdul Malek Matabar for respondent no. 8 (boat), Abdul Wahab for Motor Cycle of present petitioner were present at the time of counting votes which

means that in presence of the contesting candidates the votes were counted without objection from any of the candidates. There is nothing on the record to show that the agent of the respondent no. 8 raised any objection to the effect that counting of vote was not proper or that 200 votes of the respondent no. 8 was not counted to the presiding officer. It further appears that in para no. 8 of affidavit in opposition by respondent no. 8, it is stated that the seal of the sack was broken is not correct- But the Election Tribunal itself found the seal of the sack to be broken. As against the said findings of Election Tribunal, the respondent no. 8 did not file any cross appeal meaning thereby that the respondent no. 8 has accepted the said findings of the Election Tribunal to be correct.

We would like to say that order dated 02.04.2017 by the High Court Division in the writ petition to the effect that pending hearing of the Rule the operation of the judgment and decree dated 19.03.2017 passed by the Election Appellate Tribunal, Bhola in Election Tribunal Appeal no. 01 of 2017 was stayed for a period of 06(six) months from date. So, in view of the said interim order of the High Court Division, the Election Commission can not publish new gazette as per judgment of the Election Appellate Tribunal. In para-15 of the affidavit in opposition by the respondent no. 1 it is stated that “both the Election Tribunal and the Election Appellate Tribunal concurrently found that admittedly during recounting 200 votes were cast in favour of symble Boat ( নৌকা ) is not stated clearly by the both Tribunals.”

By the way, from the record, it appears that the voters have been allowed to vote in a peaceful atmosphere without coercion and influence. There was proper counting of votes, the polling agent were present at the time of counting of votes and that there was an impartial counting of votes. It is noted that the allegations as to the not proper counting of votes is not correct. Both the candidates i.e parties produced witnesses before the Election Tribunal. Election Petitioner respondent no.8 produced 7 witnesses on his behalf while the writ petitioner-defendant produced 5 witnesses in favour of him. Out of 7 witnesses, none of the witnesses stated in their chief or cross examination that at the time of counting of votes, 200 votes as cast in favour of the respondent no.8 (boat) were uncounted. But during recounting, 200 votes were found to be uncounted by the Election Tribunal.

Suffice it to say that pursuant to the order of stay dated 09.08.2017 passed by the Appellate Division, the Election Commission on 06.09.2017 published gazette notification dated 05.09.2017 declaring respondent no.8 as elected Chairman of no.1, Rajapur Union Parishad, Bhola and also cancelled the Gazette notification dated 24.04.2016 in the name of the writ petitioner. In the said facts and circumstances, the respondent no.8 has entered into the office of the said union parishad and has been performing function of the said union parishad. But the Appellate Division did not approve the gazette notification of respondent no.8, the way, it has been published by the



Judgment dated 26.10.2017 in Civil Petition for Leave to Appeal nos. 2910, 2965 and 3496 of 2017 respectively. This sort of exercise should not be approved in any manner being beyond the scope of jurisprudence. Therefore, we deprecate such sort of conduct by the Election Commission and it should be stopped in future. Further it appears from the finding of the Tribunal that:-

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From the evidence on records, it appears that no witnesses have ever said in his chief or cross examination that in ward no.6, they found 200 uncounted ballots and it requires recounting. But the election Tribunal has found 200 uncounted ballot papers which is very unusual. Moreover, the learned Appellate Tribunal did not state any thing with regard to the deposition of witnesses nor the Appellate Tribunal has stated about the counter foil of the ballot papers and about recounting while it was found that gunny bag containing the election materials was without any seal.

After analyzing all the relevant materials on record, it is seen that both Tribunals i.e the Election Tribunal and the Election Appellate Tribunal had acted without jurisdiction and without considering any materials evidence of the case.

In the present case, we do not find any such foundation available for recounting of votes. The above findings of the Election Tribunal

with regard to 200 uncounted ballots is without any basis or on the basis of any evidence on record. It is profitable to mention here that in the case of Md. Shajahan vs. Md. Sadek and another reported in 38 DLR (AD) 275 referred by the petitioner, wherein observed that-

“Ballot papers have special sanctity of their own and their secrecy should not be infringed by reopening the sealed packet unless the recounting becomes indispensably necessary to determine the dispute. When recounting would become so necessary depends on circumstances in each case. In the absence of clear justifications no recounting should be ordered or made. Some finally must attach to counting of votes. Ground work for recounting must be prepared; recounting should be refused if no prayer for recounting had been made to the Presiding Officer who is alone empowered to recount on the spot either on his own motion or on requests of any candidate. Recounting of ballot-papers by the Tribunal is not specifically provided in the Election Rules, but it falls within the inherent powers of the Tribunal to decide the election dispute. In the instant case, the appellant or his representative did not request the Presiding Officer for recounting the ballot-papers. The Tribunal found that the election was held and the ballot-papers were counted in an orderly manner all through and no objection was raised on the spot before the Presiding Officer as to the counting of the ballot papers. In the circumstances, the learned Single Judge rightly relied upon the decision in the case of Nurul Islam V. Munsif. Election Tribunal 28 DLR (Dhaka) 375. In that decision it was observed, among other things, that a ballot box containing ballot-papers must be regarded as a

sacred thing whose secrecy should not be disturbed on a mere prayer of a defeated candidate when he has failed to prove any of its allegations of mal-practices against his opponent or the election officials.”

We are in respectful agreement with the above decision passed by our Apex court. This principle was also applied in the case of 46 DLR (AD) 96 in which case it has been clearly found that:-

“That before recounting of ballot papers evidence should be led for foundation for re-opening of the ballot papers.”

From facts and circumstances of the cases referred to above, we are of the view that the instant Rule deserves consideration and is bound to succeed.

In the result, the Rule is made absolute without any order as to costs. The judgment and decree dated 19.03.2017 passed by the Election Appellate Tribunal, Bhola in election Tribunal Appeal No. 1 of 2017 and the Judgment and decree dated 01.12.2016 passed by the Election Tribunal and Senior Assistant Judge, Sadar court, Bhola in Election Case No. 10 of 2016 are hereby declared to have been passed without lawful authority and are of no legal effect and also here by set aside.

Let the lower Court records along with a copy of this judgment be sent down at once.

**Bhabani Prasad Singha, J**

I agree