

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

WRIT PETITION No. 9798 OF 2020

In the matter of:

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

AND

In the matter of:

Md. Kawsar

.....Petitioner

-Versus-

The Election Commission of Bangladesh and others

..... Respondents

Mr. M.K. Rahman, Advocate with

Mr. Anil Chandra Debnath, Advocate

..... For the

Petitioner

Mr. Tawhidul Islam, Advocate

..... For the Respondent No. 1

Judgment on: 08.09.2021

Present:

Mr. Justice Md. Khasruzzaman

and

Mr. Justice Md. Mahmud Hassan Talukder

Md. Khasruzzaman, J:

In the application under article 102 of the Constitution, on
15.12.2020 the *Rule Nisi* was issued calling upon the respondents to
show cause as to why the impugned notification vide Memo No.
17.00.0000.079.40.018.19-269 dated 06.12.2020 issued by the
respondent No. 1 under the signature of the respondent No. 3 cancelling

the election result of the Chairman of Charbhadrashan Upazila Parishad Election, District-Faridpur (Annexure-F) should not be declared to have been passed without lawful authority and is of no legal effect and as to why a direction should not be given upon the respondents to publish the gazette notification in favour of the petitioner and/or pass such other or further order or orders as to this Court may seem fit and proper.

Facts as stated in the writ petition, in short, are as follows:

According to the provision of Upazila Parishad (Amended) Ain, 2011 the election of Charbhadrashan Upazila Parishad was held on 18.03.2019 and one Mosharof Hossain was elected as Chairman in the said election and after his death the post of Chairman of the said Upazila Parishad became vacant. Thereafter, the Election Commission declared the election schedule of Charbhadrashan Upazila Parishad of Faridpur District on 16.02.2020 (Annexure- A). The petitioner submitted nomination paper and became a valid candidate for the said post of Chairman and he was allocated the symbol 'Boat' as the nominee of Bangladesh Awami League. Due to Covit-19 the election was stayed for a while and on 13.09.2020 the Bangladesh Election Commission vide Memo No. 17.00.0000.079.41.001-20.75 dated 13.09.2020 decided to hold the election of the said Upazila Parishad on 10.10.2020. Accordingly, on 10.10.2020 polling of the Upazila Chairman Election was held at all the 22 polling centers and one center namely- Charbhadrasan Government Primary School (Polling Center No. 13) was suspended and the number of voters of this polling center

is only 2500. After completion of the election, the Returning Officer received the result of the 21 centers out of 22 polling centers and the petitioner got 16528 votes and his nearest candidate K.M. Obaidul Bari (Dipu) got 5346 votes. Thus the petitioner got 11182 votes more than the nearest candidate. Considering the margin of votes between the petitioner and the nearest candidate, the Returning Officer declared the petitioner as returned candidate of the said Upazila election and filled up the result under form- Thha(১) as per rule 44(1) of the Upazila Parishad Election Rules, 2013 on 10.10.2020 (Annexure-D). Thus the result of the Upazila Chairman was declared from the office of the Returning Officer that the petitioner has been elected as a Chairman of the Charbhadrashan Upazila Parishad under Faridpur District unofficially. But the Election Commission did not publish the said election result in the official gazette. Thereafter, the petitioner filed an application before the Election Commission to publish and declare him as an elected Chairman of the said Upazila Parishad. In the meantime, one of the candidate filed an application before the Election Commission narrating some irregularities alleged to have been committed in holding election and after receiving the same the Election Commission formed 3 members committee to investigate into the matter. After holding investigation, the investigation committee submitted its report on 01.11.2020 and found some irregularities in the process of the election. The petitioner was informed to appear before the investigation committee but the petitioner filed an application

before the investigation committee as he was affected with Covid-19 as such he was not present before the investigation committee, accordingly, he was not heard. Thereafter, the Election Commission decided to cancel the election for the post of Chairman of the said Upazila Parishad and issued a letter on 01.12.2020 as per rule 88 of the Upazila Parishad Election Rules, 2013 and the election for the post of Chairman of the said Upazila Parishad was cancelled. Against which the petitioner filed this writ petition and obtained the present Rule Nisi and an order of stay of the impugned notification.

The respondent No. 1 contested the *Rule Nisi* by filing an affidavit-in-opposition contending *inter alia* that the Election Commission declared the election schedule for the post of Chairman in 2(two) Upazila Parishad including Charbhadrashan Upazila Parishad on 16.02.2020. and the said by-election was held on 10.10.2020. The Election Commission constituted a 3 member investigation committee to investigate into the irregularities in conducting of the election and the investigation committee after thorough investigation submitted its report to the Secretary of the Election Commission on 01.11.2020 and the said committee opined that:

“এ সকল বিষয় বিশ্লেষণ করলে দেখা যায় যে, চরভদ্রাসন উপজেলা পরিষদের চেয়ারম্যানের শূণ্য পদে গত ১০ অক্টোবর ২০২০ তারিখের উপনির্বাচনে অনিয়ম হয়েছে এবং নির্বাচন অবাধ ও সুষ্ঠু ছিল না”

Thereafter, the Election Commission accepted the report of the investigation committee in its meeting dated 01.12.2020 and decided to

cancel the by-election for the post of Chairman of the said Upazila Parishad and to hold a fresh election and it was notified on 06.12.2020. It is also stated that the Election Commission as per rule 88 (ga) of the Rules, 2013 has the authority to cancel the election before publication of the result. Thus the *Rule Nisi* should be discharged.

Mr. M.K. Rahman, the learned Advocate for the petitioner appearing with Mr. Anil Chandra Debnath, the learned Advocate submits that after holding election the Returning Officer declared result of the election in form- Thha (১) and thereafter the Election Commission has nothing to do except the publication of result of the election and any dispute raises by any aggrieved person will be treated as a election dispute and this election dispute will be resolved by the election tribunal on the basis of an application. Mr. Rahman further submits that after publication the result of the election under form- 'Thha' forming an investigation committee was not proper and it was done purposely which needs to be interfered by this Court. He also submits that on the day of election no allegation was brought against any irregularities of the election process before the Presiding Officer or Returning Officer, subsequently one of the defeated candidate who is 5th in position filed an application before the Election Commission and the Election Commission has no authority to investigate the matter after polling is over as per rule 88 of the Upzila Parishad Election Rules, 2013 in the name of free, fair, honest and impartial election. He lastly submits that he was declared elected Chairman of the Upazila

unofficially but without any show cause notice the result of the election of the said Upazila Parishad was cancelled and as such natural justice has been violated. Moreover, the impugned order is all entirely vitiated by malafide and malice in law as the Election Commission acted all entirely malafide and with a clear malice towards the petitioner.

On the other hand, Mr. Tawhidul Islam, the learned Advocate for the respondent No. 1 submits that after receiving a written allegation filed by one of the candidates about irregularities and mal practice in conducting election, the Election Commission formed a 3 member investigation committee who after thorough investigation filed their report which was accepted by the Commission and thereafter, they cancelled the election and decided for holding a fresh election. As per rule 88 (ga) of the Upazila Election Rules, 2013 the Election Commission has plenary, supervisory and discretionary power to hold free, fair and impartial election. In support of his submissions he cited a case of A.F.M. Shah Alam Vs. Mujibul Huq and other, 41 DLR (AD) 68. He further submits that the Election Commission was established under 118 of the Constitution and it has been vested with the plenary, supervisory and discretionary power to conduct election justly, fairly and in accordance with the Ain and the Rules there under and the powers and functions of the Election Commission should not be interfered. He also submits that the period between the declaration of the schedule of election till the publication of the result in the official

gazette has been held to be comprised in the election process and it has been settled in the case reported in 41 DLR (AD) 68.

Heard the learned Advocates for both the sides, perused the application, affidavit-in-opposition and the annexures annexed thereto.

It appears from Annexure-D that the Returning Officer declared the result of election for the post of Chairman of Charbhadrashan Upazila Parishad under Faridpur District unofficially under form- Thha (১) wherein the petitioner secured 16528 votes from 21 polling centers out of 22 polling centers and his nearest candidate got 5346 votes and the center namely Charbhadrashan Government Primary School was suspended and the number of the votes of the said polling center was 2500 and thus as per rule 39 of the Election Rules, the Returning Officer sought an opinion from the Election Commission. In the meantime one Md. Faysal Hossain who secured only 344 votes filed an application before the Election Commission which has been revealed from the investigation report. On the basis of his application, an enquiry was conducted by the investigation committee and they found irregularities in conducting the election and gave their opinion that some irregularities were committed in the election process and thereafter the Election Commission decided to cancel the election of the said Upazila Parishad by the impugned notice dated 06.12.2020.

It appears that Returning Officer unofficially declared the result of the said election and it was sent to the Election Commission for its publication but the Election Commission without publishing the same

conducted an enquiry. It is on record that candidate who secured 2nd highest vote did not raise any objection before the Presiding Officer or Returning Officer on the day of election. After declaration of the result of the election unofficially under Form- 'Thha', one of the defeated candidates filed an application before the Returning Officer just after completion of the counting of votes. It is admitted that before cancellation of the result of the election for the post of Chairman of Charbhadrashan Upazila Parishad, the Election Commission did not notify to the candidates and the petitioner raised this point before us and the learned Advocate for the respondent in its reply submits that in the Ain as well as in the Rules there is no provision to notify any candidate before cancellation of the result of the election. But now it has been settled that no one should be punished without being heard. For this the Election Commission should have notified and heard the person who would be most effected by its order. There is no doubt that the Election Commission has plenary, supervisory and discretionary power under rule 88 of the Rules to ensure free, fair, independent and transparent election but any order passed by the Election Commission is under judicial review.

In the present case, none of the candidates raised any objection before the Presiding Officer or Returning Officer against any irregularities of the election on the day of polling hour. So, after holding election and counting votes the Presiding Officer of the respective center sent the result to the Returning Officer who prepared

unofficial result and the same was sent to the Election Commission for publication gazette. The Election Commission without publication the gazette cancelled the result of the election of the said Upazila Parishad. Since neither any allegation of irregularities nor any corrupt practise were brought in the polling hour either before the Presiding Officer or Returning Officer by any of the candidates or by any voters, the Election Commission had little scope to exercise his power under rule 88 (ga) of the Rules. Moreover, the vote of one center was suspended and after 2 or 3 days one of the candidates filed an application before the Election Commission instead of filing any application before the Presiding Officer or Returning Officer. Thus any allegation raised by the contesting party after unofficial declaration of the result to be treated as “election dispute”, has to be resolved by the Election Tribunal.

Thus the Election Commission was under legal obligation to publish the result of the said election in the officially gazette. The decision reported in 41 DLR(AD) 68 cited by the learned Advocate for the respondent No. 1 is not applicable in the present case as in the present case unofficially result of the election was sent to the Election Commission under Form “Thha” for publication in the officially gazette.

Considering the facts and circumstances of the case and the relevant laws, we find substance in the submissions of the learned Advocate for the petitioner.

In the result, the *Rule Nisi* is made absolute without any order as to costs.

The impugned notification vide Memo No. 17.00.0000.079.40.018.19-269 dated 06.12.2020 issued by the respondent No. 1 under the signature of the respondent No. 3 is hereby declared to have been issued without lawful authority and is of no legal effect and set aside.

The Election Commission is directed to publish the result of the election for the Post of Chairman of Charbhadrashan Upazila under Faridpur District in the gazette notification.

The order of stay granted at the time of issuance of the *Rule Nisi* on 15.12.2020 is hereby re-called and vacated.

Communicate the order.

Md. Mahmud Hassan Talukder, J:

I agree.