

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

Writ Petition No. 10412 of 2020

In the matter of :

An application under Article 102(2) of the Constitution of the People's Republic of Bangladesh.

-And-

In the matter of :

Md. Mojammal Hoque

..... Petitioner

-Versus-

Bangladesh Election Commission, represented by the Secretary, Election Commission Secretariat, Dhaka and others.

..... Respondents

Mr. Rafiqul Islam Sohel, Advocate

.... For the Petitioner

Mr. Mohammad Abul Hasan, AAG

.... For Respondent No. 3

Ms. Rani Akter, Advocate

..... For Respondent No. 8

Present:

Mr. Justice Zubayer Rahman Chowdhury

And

Mr. Justice Kazi Ebadoth Hossain

Date of Hearing : 24.05.2023, 08.06.2023
& 07.11.2023

Date of Judgment : 12.12.2023

Zubayer Rahman Chowdhury, J :

The instant Rule was issued on 31.01.2021 in the following terms :

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why inaction of the respondents in not holding the election of Chanpur Union Parishad, under Upazila Raipura, District- Narsingdi for last 09 (nine) years should not be declared to have been done without lawful authority and/or to pass such other or further order or orders as to this Court may seem fit and proper.”

At the same time, respondent no. 2 was directed to dispose of the application dated 21.11.2020 filed by the petitioner within a “reasonable time”. On 12.09.2021, a supplementary Rule was issued in the following terms :

“Let a supplementary Rule Nisi be issued calling upon the respondents to show cause as to why the respondents shall not be directed to publish the election schedule and to hold election accordingly of the Chandpur Union Parishad under Raipura Upazila, District-Narsingdi and/or such other or further order or orders be passed as to this Court may seem fit and proper.”

By order dated 22.09.2021, the Secretary, Local Government Division, Ministry of Local Government and Rural Development was impleaded as respondent no. 7. Thereafter, by order dated 16.07.2023, one Md. Momen Sarker, the present Chairman of Chanpur Union Parishad, Upazila Raipura, District Narshingdi was impleaded as respondent no. 8.

Briefly stated, facts relevant for disposal of the Rule are that the petitioner is a voter of Chanpur Union Parishad and he had exercised his right of franchise in both the Parliamentary election held in 2018 and the Upazila election held in 2019. Md. Momen Sarker, the incumbent Chairman of the Chanpur Union Parishad, filed Writ Petition No. 4037 of 2016 praying for issuance of a direction upon the respondents to declare Ward Nos. 4, 7 and 8 of Chanpur Union Parishad as ‘river eroded areas’

and reconstitute the said Wards in accordance with law and also to finalize the delimitation process of the said Wards. Consequently, a Rule Nisi was issued and the election of the Chanpur Union Parishad, which was scheduled to be held shortly, was stayed for a period of 3 (three) months by order dated 12.04.2016, which was subsequently extended from time to time. After a lapse of over three years, the said Writ Petition No. 4037 of 2016 was disposed of by judgment dated 12.03.2017 directing the concerned respondents to undertake and complete the delimitation process. However, for the reasons best known to them, the concerned respondents sat over the matter and remained silent and ignored the directive passed by this Court in Writ Petition No. 4037 of 2016.

It has been further stated by the petitioner in the instant application that although the election of Chanpur Union Parishad has not been held since 2011, the Parliamentary election was held in 2018 and the Upazila election was held in 2019 and both in the elections, the petitioner and the other inhabitants of Chanpur Union Parishad duly cast their votes without any hindrance from any quarter. However, it is only election of the Chanpur Union Parishad that has remained stalled since 2011, although the Union Parishad election of the adjacent Union Parishads were held in 2016. It is the failure/inaction of the respondents in holding the election of Chanpur Union Parishad, which was last held in 2011, that is now being challenged before this Court.

Mr. Rafiqul Islam Sohel, the learned Advocate appears in support of the Rule, while the same is being opposed by both respondent nos. 3 and 8 by filing two separate affidavits-in-opposition.

The learned Advocate for the petitioner, having placed the application along with the annexures appended thereto, submits that the incumbent Chairman has continued to hold hold the office of Chanpur Union Parishad in an unlawful manner. Elaborating his submission, Mr. Sohel submits forcefully that although the election of a Union Parishad is required to be held after every five years, no election has been held in Chanpur Union Parishad since 2011. Referring to section 29(1) and section 29(5) of the স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯ (hereinafter referred to as the Ain), Mr. Sohel submits that it has been clearly stipulated therein that the Chairman and other Members of the Union Parishad shall hold office for a period of five years from the date of holding of the first meeting of the said Union Parishad.

Referring to section 29(5), he submits that in the event of the election not being held after the expiry of five years, the Government shall, by a written order, extend the tenure of the Office bearers of the Union Parishad for a maximum period of 90 (ninety) days. He submits that on a combined reading of the provisions enumerated in sections 29(1) and 29(5) of the Ain, it abundantly clear that under no circumstances can the Office bearers of the Union Parishad continue to hold office beyond a maximum period of 63 months. He submits that in the instant case, the petitioner has continued to discharge his function as Chairman of the

Union Parishad for almost 12 years, which is well beyond the prescribed period of 63 months, i.e. five years and three months.

Referring to the observation passed by this Court in Writ Petition No. 4037 of 2016, the learned Advocate submits that despite a clear directive passed by this Court to complete the delimitation process within a reasonable time, the concerned respondents sat over the matter. He submits that for all practical purposes, this was a delaying tactics in that although in the aforesaid Writ Petition, a prayer was made for reconstitution of certain Wards on account of erosion of River Meghna, yet the election of the adjacent Union Parishad was held in 2016, the National Parliamentary Election was held in 2018 and lastly, the Upazila election was held in 2019. The learned Advocate submits that from the three aforesaid instances, it is evident that there is no practical impediment in holding the election in Chanpur Union Parishad. However, despite the legal and factual position noted above, the petitioner, in connivance with some of the concerned respondents, has continued to discharge his function as Chairman of Chanpur Union Parishad, which is palpably without lawful authority.

Referring Annexure I-1 of the supplementary affidavit dated 05.06.2023 filed by the petitioner, Mr. Sohel submits that it is evident that the concerned respondent has opined that there is no necessity for reconstitution of Ward Nos. 4, 7 and 8 of Chanpur Union Parishad. He submits forcefully that despite such categorical observation, no further step has been taken in this matter, thereby allowing the petitioner to hold

office of the Chairman of the said Union Parishad in a completely unauthorized and unlawful manner.

On the other hand, Ms. Rani Akter, the learned Advocate appearing on behalf of respondent no. 8 by filing an affidavit-in-opposition as well as a supplementary affidavit-in-opposition submits that the issue of delimitation became necessary on account of displacement of a large number of persons owing the erosion of Meghna river. She further submits that being the Chairman of the Union Parishad, it was necessary for the petitioner to take steps for reorganizing the voter list through delimitation of the concerned Wards. She acknowledges that no further election has been held since 2011, but as the Government has not issued any notification, added respondent no. 8 has continued to function as Chairman of the Union Parishad till date. However, with regard to the stipulation contained in section 29(5) of the Ain, Ms. Rani Akter was unable to come up with any satisfactory explanation.

As noted earlier, the Rule is also being opposed by respondent no. 3 by filing an affidavit-in-opposition, wherein it has been stated that on account of the erosion of the Meghna River and because of alluviation on the western side of the river, which is located within Brahmanbaria District, the process of delimitation became necessary. However, in the said affidavit-in-opposition (at paragraph 17), the very same respondent has also stated that the delimitation process relating to inter divisional boundary affairs is beyond the jurisdiction of the instant respondent i.e. Deputy Commissioner, Narshingdi. Despite making such a statement, the

concerned respondent has ventured to oppose the instant Rule and file this affidavit-in-opposition.

In the instant case, the petitioner, who was elected as the Chairman of Chanpur Union Parishad in 2011, has continued to discharge his function as Chairman of the said Union Parishad till date. Although he filed Writ Petition No. 4037 of 2016 seeking delimitation of Ward Nos. 4, 7 and 8, the said writ petition was disposed by judgment dated 12.03.2017 directing the concerned Authority to complete the process of delimitation in accordance with law. However, no further development has taken place in that regard.

Let us now refer to the relevant legal provisions.

Section 29 of the Ain, 2009, which relates to the tenure of the Chairman and Members of the Union Parishad, reads as under :

“২৯। (১) কোন পরিষদের চেয়ারম্যান ও সদস্যগণ, এই আইনের বিধানাবলী সাপেক্ষে, সংশ্লিষ্ট পরিষদের প্রথম সভা অনুষ্ঠানের তারিখ হইতে ৫(পাঁচ) বৎসর সময়ের জন্য উক্ত পদে অধিষ্ঠিত থাকিবেন।

(২) চেয়ারম্যান ও সদস্যদের নাম সরকারি গেজেটে প্রকাশিত হওয়ার তারিখ হইতে পরবর্তী ৩০ (ত্রিশ) কার্যদিবসের মধ্যে ইউনিয়ন পরিষদের প্রথম সভা অনুষ্ঠিত হইতে হইবেঃ

তবে শর্ত থাকে যে, নির্ধারিত সময়ের মধ্যে নবগঠিত পরিষদের প্রথম সভা অনুষ্ঠিত না হইলে সরকার উপযুক্ত কর্তৃপক্ষকে সভা আহ্বানের জন্য দায়িত্ব অর্পণ করিতে পারিবে এবং অনুরূপভাবে অনুষ্ঠিত সভা পরিষদের প্রথম সভা হিসাবে গণ্য হইবে।

(৩) পরিষদ গঠনের জন্য কোন সাধারণ নির্বাচন ঐ পরিষদের জন্য অনুষ্ঠিত পূর্ববর্তী সাধারণ নির্বাচনের তারিখ হইতে ৫ (পাঁচ) বৎসর পূর্ণ হইবার ১৮০ (এক শত আশি) দিনের মধ্যে অনুষ্ঠিত হইবে।

(৪) এই আইনে যাহা কিছুই থাকুক না কেন, ইউনিয়ন পরিষদের মেয়াদ শেষে নির্বাচনের পর উহার তিন-চতুর্থাংশ সদস্য শপথ গ্রহণ করিলে ইউনিয়নটি যথাযথভাবে গঠিত হইয়াছে বলিয়া গণ্য হইবে।

(৫) দৈব দুর্বিপাকজনিত বা অন্যবিধ কোন কারণে নির্ধারিত ৫(পাঁচ) বৎসর মেয়াদের মধ্যে নির্বাচন অনুষ্ঠান সম্ভব না হইলে, সরকার লিখিত আদেশ দ্বারা,

নির্বাচন না হওয়া পর্যন্ত কিংবা অনধিক ৯০ (নব্বই) দিন পর্যন্ত, যাহা আগে ঘটিবে, সংশ্লিষ্ট পরিষদকে কার্যক্রম পরিচালনার জন্য ক্ষমতা প্রদান করিতে পারিবে।”

On a careful perusal of the provisions quoted above, it is apparent that the Chairman and Members of the Union Parishad shall hold office for a period of five years from the date of holding of the first meeting of the elected Union Parishad. It is also evident from section 29(5) of the Ain that if, for some unforeseen reasons, the election cannot be held upon the expiry of five years, the Government, by a written order (“সরকার লিখিত আদেশ দ্বারা”) can extend the tenure of the incumbent Union Parishad until holding of the election or for 90 days, whichever is earlier. It is therefore apparent that the law clearly stipulates that the elected Chairman can hold office and discharge his function as Chairman of the concerned Union Parishad for a maximum period of 63 months (5x12=60+3=63) months. However, in the instant case, added respondent no. 8, having been elected in 2011, has continued to hold the office and discharge his function as Chairman of Union Parishad till date, thereby covering a period of over 12 years.

It appears from Annexure I-1 of the supplementary affidavit dated 05.06.2023 filed by the petitioner that an investigation was carried out with regard to the delimitation of Ward nos. 4, 7 and 8 of Chanpur Union Parishad and a report was filed with the following opinion :

“উক্ত ইউনিয়নের ৪, ৭, ও ৮ নং ওয়ার্ডসমূহের পুনঃগঠন প্রয়োজন নেই। জনগণের ব্যাপক উৎসাহ উদ্দীপনার প্রেক্ষিতে চাঁনপুর ইউনিয়ন পরিষদ নির্মাচন অনুষ্ঠান করা যেতে পারে।”

It is therefore obvious that the Authority had passed a clear opinion with regard to the issue of delimitation way back in December 2016. Yet,

no further step was taken by the concerned respondents in holding the election of the concerned Union Parishad.

From Annexure 9 of the supplementary affidavit dated 03.12.2023 filed on behalf of added respondent no. 8, it appears that respondent no. 8 (Md. Momen Sarker) has received his salary as Chairman of Chanpur Union Parishad from October, 2016 till date, totaling a sum of Tk. 3,40,050/-, which is evident from the statement was issued by the Upazila Nirbahi Officer, Raipura, Narshingdi on 27.11.2023. It is pertinent to note that holding of any public office beyond the tenure prescribed in the Rules or relevant laws is strictly without any lawful authority as the person concerned becomes 'functus officio' upon expiry of the prescribed tenure. Consequently, the salary and/or other financial benefits received by the incumbent beyond the tenure of his term is also without lawful authority and hence, it is liable to be refunded to the national Exchequer.

Be that as it may, having regard to the foregoing discussion and having taking into account the relevant provisions of the law, particularly the provisions of sections 29(1) and 29(5) of the স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯, we are inclined to hold that the present Rule merits positive consideration.

In the result, the Rule is made absolute.

The inaction of the respondents in not holding the election of Raipura Union Parishad since 2011 is declared to be without lawful authority.

The continuation and holding of office of the Chairman of Chanpur Union Parishad by added respondent no. 8 upon expiry of the period of 63

months is hereby declared to be without lawful authority. Consequently, the salary and other remunerations received by added respondent no. 8 for the aforesaid period beyond the tenure of his elected term is also declared to have been received by him without lawful authority and therefore, the amount of money so received by him is liable to refunded to the National exchequer.

The concerned respondents are hereby directed to take positive steps to hold the election of Chanpur Union Parishad, in accordance with law, within a period of 90 (ninety) days from the date of receipt of certified copy of the judgment passed today.

The concerned respondents are further directed to take positive steps to recover the money received by added respondent no. 8 as Chairman of Chanpur Union Parishad beyond the tenure of his elected term.

There will be no order as to cost.

Kazi Ebadoth Hossain, J :

I agree.