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

WRIT PETITION NO.10921 of 2022

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. Abdur Rahim Bhuaya Petitioner

The Government of the Peoples Republic of Bangladesh, represented by the Secretary, Ministry of Local Government and Rural Development, Bangladesh Secretariat, Ramna, Dhaka and others.

...... Respondents.

And

Mr. Mohammad Roqunuzzaman, Advocate

..... For the Petitioner.

Mr. Khondaker Iqbal Ahmed, Advocate

...... For the respondent No.9

Mr. Samarendra Nath Biswas, D.A.G. with

Mr. Md. Abul Kalam Khan (Daud), A.A.G. with

Mr. Md. Modersher Ali Khan (Dipu), A.A.G.with

Mr. Md. Taufiq Sajawar (Partho), A.A.G.

....For the Respondents-government.

<u>Heard on: 14.06.2023 and</u> <u>Judgment on: 15.06.2023</u>

Present:

Mrs. Justice Farah Mahbub. And Mr. Justice Muhammad Mahbub Ul Islam

Farah Mahbub, J:

This Rule Nisi was issued under Article 102 of the Constitution of the People's Republic of Bangladesh, calling upon the respondents to show cause

as to why the impugned judgment and order dated 24.08.2022 passed by the Election Appellate Tribunal, Jamalpur in Election Appeal Tribunal Case No.24 of 2022 affirming the judgment and order dated 20.06.2022 passed by the Election Tribunal, Jamalpur in Election Tribunal Case No.62 of 2022 and thereby declaring that the petitioner had lost in the election held on 26.12.2021 and 07.02.2022 respectively of 8 No. Mohadan Union Parishad Election, 4 No. Ward for the post of Member, Police Station-Sharishabari, District-Jamalpur (Annexures-E and E-1 respectively), should not be declared to have been passed without lawful authority and hence, of no legal effect.

At the time of issuance of the Rule the operation of the impugned judgment and order dated 24.08.2022 passed by the Election Appellate Tribunal, Jamalpur in Election Appeal Tribunal Case No.24 of 2022 affirming the judgment and order dated 20.06.2022 passed by the Election Tribunal, Jamalpur in Election Tribunal Case No.62 of 2022 (Annexure-F), was stayed by this Court for a prescribed period.

However, challenging the ad-interim order of stay the respondent concerned moved the Appellate Division by filing Civil Petition to Leave to Appeal No.2891 of 2022. The Appellate Division upon hearing the respective contending parties ultimately disposed of the application vide order dated 22.05.2023 without interfering into the ad-interim order with direction upon this Court to hear and dispose of the Rule on merit.

Facts, in brief, are that the petitioner as being the aspiring candidate to contest the election for the post of Member of 8 No.

Mohadan Union Parishad, Police Station-Sharishabari, District-Jamalpur submitted nomination paper to the authority concerned upon fulfilling all necessary requirements as per law. Upon scrutiny of the respective documents the Returning officer concerned duly found the petitioner as qualified candidate. Election was duly held on 26.12.2021 and 07.02.2022 respectively. However, in one of the polling centers namely Borosora Govt. Primary School, Borosara (Male Vote Centre) the petitioner scored 498 votes with symbol 'Football' and in Sengua Purba Govt. Primary School, Sengua (Female Vote Booth) he scored 741 votes respectively. The respondent No.9, the other contesting candidate with symbol 'Tubewell', scored 494 and 720 votes respectively. Accordingly, the Returning Officer concerned declared the election result showing the petitioner as the successful candidate scoring 1239 votes in total.

Pursuant to the final publication of the election result gazette was duly published by the Election Commission for the post of Member for 4 No. Ward, 8 No. Mohadan Union Parishad, Police Station-Sharishabari, District-Jamalpur. The petitioner accordingly took oath in due compliance of law (Annexures- B and B-1 respectively).

The defeated candidate, the respondent No.9, however, being aggrieved filed Election Tribunal Case No.62 of 2022 before the learned Senior Assistant Judge and Election Tribunal, Jamalpur (Annexure-C).

The petitioner contested the said election case by filing written objection. However, after conclusion of deposition of the respective witnesses a prayer was made by the said respondent before the Election Tribunal concerned for re-counting of ballot paper, which was duly allowed vide order No.9 dated 08.06.2022. Ultimately, on 20.06.2022 in the presence of both the respective contending parties and the officers of the court concerned ballot papers were re-counted. After re-counting it was found that the petitioner scored 1167 votes and respondent No.9 scored 1192 votes respectively. Accordingly, upon allowing the election petition, the Election Tribunal declared the respondent No.9 as the successful candidate in the respective election for the post of Member vide judgment and order dated 20.06.2022.

Challenging the same the petitioner preferred appeal bearing No.24 of 2022 before the Election Appellate Tribunal and Joint District Judge, 1st Court, Jamalpur. During the course of hearing of the said appeal the respective contending parties made prayers for recounting of ballot papers, which was duly allowed by the said Tribunal. Ballot papers were re-counted and again, the respondent No.9 was found to have scored highest votes i.e., 1179 votes and the petitioner scored 1204 votes. Ultimately, the appeal was dismissed affirming the judgment and order dated 24.08.2022 passed by the Election Tribunal. Hence, the application.

Mohammad Roqunuzzaman, the learned Advocate appearing for the petitioner submits that the election in question was held in due compliance of law without any hindrance from any quarter whatever. Moreover, the law enforcing agency duly discharged their respective duties for the purpose of making the said election successful. Ultimately the petitioner came out successful in said the election. But the Election Tribunal and the Election Appellate Tribunal vide their respective judgments and orders dated 20.06.2022 and 24.08.2022 respectively reversed the said election result upon declaring the petitioner as the defeated candidate basing on contradictory counting of ballot papers. In support of the said contention he submits that the Election Tribunal vide judgment and order dated 20.06.2022 found on re-count of ballot papers that 64 (sixty four) votes, so were cast on the symbol "Football", were cancelled. Conversely, the Election Appellate Tribunal while passing the impugned judgment and order dated 24.08.2022 found that 48 (forty eight) votes which were given for the symbol "Football", were cancelled and as such, total valid votes stood at 1156. Basing on the said contradictory counting of ballot papers the petitioner has been declared by the Election Appellate Tribunal as the defeated candidate while passing the impugned judgment and order.

Accordingly, he submits that the impugned judgment and order dated 24.08.2022 is liable to be declared to have been passed without any lawful authority and hence, of no legal effect.

Mr. Khondaker Iqbal Ahmed, the learned Advocate appearing on behalf of the respondent No.9 by filing affidavit-in-opposition submits that the petitioner filed the instant writ petition basing on disputed question of facts on re-counting of ballot papers; which has been decided finally by the Election Appellate Tribunal, Jamalpur upon re-counting of ballot papers in the presence of the respective contesting candidates. As such, he submits that challenging the judgment and order dated 24.08.2022 passed by the Election Appeal Tribunal, Jamalpur on the issue of re-counting on ballot papers is not maintainable being based purely on facts.

In this regard, he also submits that no where within the four corners of the instant writ petition the petitioner has mentioned any provision of law which has allegedly been violated by the Election Appellate Tribunal, Jamalpur as well as Election Tribunal, Jamalpur. In the given context, he submits that since the petitioner cannot be said to have been elected in accordance with law; hence, occupation of the post of Member by him goes to violate Article 59 read with Article 11 of the Constitution.

Accordingly, he submits that this Rule being devoid of any substance it is liable to be discharged.

In this instant Rule Nisi, the petitioner as being an eligible candidate contested the election for the post of Member held on 26.12.2021 and 07.02.2022 respectively of 8 No. Mohadan Union Parishad Election, 4 No. Ward, Police Station-Sharishabari, District-

Jamalpur, with the symbol "Football". Ultimately, he was declared elected by the Election Commission with publication of election result in the gazette. However, he has challenged the impugned judgment and order dated 24.08.2022 passed by the Election Appellate Tribunal, Jamalpur in Election Appeal Tribunal Case No.24 of 2022 dismissing the appeal and thereby affirming the judgment and order dated 20.06.2022 passed by the Election Tribunal, Jamalpur in Election Tribunal Case No.62 of 2022 on the contention that Election Tribunal vide its judgment and order dated 20.06.2022 has shown that total 64 votes which were cast against the symbol "Football" were invalid. The Election Appellate Tribunal on the other hand vide its judgment and order dated 24.08.2022 shown total 48 invalid votes which were cast against the symbol "Football" and that total valid vote cast against the said symbol was 1156, which is contradictory; hence, unlawful. Relevant part of the judgment and order dated 20.06.2022 passed by the Election Tribunal, quoted below, being relevant for disposal of the instant Rule.

"উভ্য়পক্ষের সাফ্ষ্য গ্রহণ সমাস্ত হলে বিগত ০৮/০৬/২২ খ্রিস্টান্দে উভ্য়পক্ষের বিক্ত কৌসুলীদের ক্তান গর্ভ উপস্থাপনার প্রেফিতে যুক্তিতর্ক সমাস্ত করা হয় এবং বিগত ০৮/০৬/২২ খ্রিস্টান্দে ০৮ নং আদেশ মূলে উভ্য়পক্ষের প্রার্থী এবং প্রতিপক্ষের সাফ্ষীদের জবানবন্দী সহ নথি এবং নথিতে সামিল কাগজপত্রাদি পর্যালোচনা করে ভোট গণনার জন্য আদেশ প্রদান করা হয় এবং প্রার্থীপক্ষের ভোট গণনার আবেদন মন্ত্রুর করা হয়। পরবর্তীতে বিগত ২০/০৬/২০২২ খ্রিস্টান্দে আদালতের নির্দেশ মতে, সেরেস্ত্রাদার উভ্য়পক্ষের বিক্ত আইনজীবী সহ ও প্রতিপক্ষের উপস্থিতিতে আইনশৃংখলা বাহিনীর সহায়তায় আদালত সহায়ক । কর্মচারীদেকে নিয়ে ভোট গণনা সম্পন্ন করেন এবং সেই আলোকে সেরোদার প্রতিবেদন দাখিল করে। উক্ত প্রতিবেদনে উল্লেখ করা হয়, জামালপুর জেলার সরিমাবাড়ী খানাধীন কেন্দ্রের সীল গালাকৃত একটি বস্তা প্রার্থী ও প্রতিপক্ষের উপস্থিতিতে আদালতের সম্মুখে বিক্ত বিচারকের সামনে খোলা হয় এবং সহায়ক কর্মচারীদের সহায়তায় সেরেস্ত্রাদারের তত্তাবধানে ভোটপুনঃগণনা সম্পূর্ণ । করা হয় এবং ভোট পুনঃগণনায় প্রার্থী মাঃ পুলতান ভূঁইয়া টিউবগ্রমেল মার্কা প্রতীক বৈধ ভোট ১১৯২ টি এবং ৩২ টি

ভোট বাতিল ভোট প্রাপ্ত হয়। অপরদিকে, ১নং প্রতিশক্ষ মোঃ আব্দুর রহিম ভূইয়া ফুটবল প্রতীকের বৈধ ভোট ১১৬৭ টি এবং ৬৪ টি বাতিল ভোট পাওয়া গিয়াছে। সেরেস্তাদারের প্রতিবেদন পর্যালোচনা করালাম। পর্যালোচনায় দেখা যায় যে, প্রার্থী ভোট গণনার ফলাফল মতে ১নং প্রতিশক্ষ খেকে (১১৯২-১১৬৭)= ২৫টি ভোট বেশী প্রাপ্ত হয়েছেন। ফলে ভোট পুনঃগণনার পর দেখা যায় প্রার্থী ২৫টি বেশী পেয়েছেন এবং ফলে প্রার্থী প্রার্থীত মতে প্রতিকার পাওয়ার হকদার। এমতাবস্থায় ১, ২ ও ৩নং বিবেচ্য বিষয়ের সিদ্ধান্ত প্রার্থীপক্ষের অনুকূলে নিম্পত্তি করা হলো।

The Election Appellate Tribunal, while passing the impugned judgment and order dated 24.08.2022 observed as under:

সার্বিক বিবেচনায় দেখা याऱ्य यिन्छ विक निर्वाहन छोहेनू।नान এর ভোট গণনায় সামান্য किছু গরমিল পরিলক্ষিত হয় তথাপিও টাইনু।নাল কর্তৃক যে রায় ঘোষিত হয়েছে তাই অপরিবর্তীত থেকে যাচ্ছে। ফলে বিক্ত নির্বাচন টাইনু।নাল যথাযথ ভাবে উভয় পক্ষের দাখিলী কাগজাদি ও সাক্ষ্য বিশ্লেষন এবং ভোট গণনা করে যে রায় প্রদান করেছেন তা সঠিক আছে। ফলে বিক্ত নির্বাচন টাইনু।নাল এর আদেশে হস্তক্ষেপ করার মত যুক্তিযুক্ত কারণ না থাকায় অত্র আপীলটি না-মঞ্জুর যোগ্য।"

The assertion of the petitioner while challenging the judgment and order of the Election Appellate Tribunal, Jamalpur is rooted in re-counting of ballot papers, which were done on 2(two) occasions, one, before the Election Tribunal and other, before the Election Appellate Tribunal and on both the occasion re-counting of ballot papers had been done in the presence of the respective contending parties.

Under the stated circumstances, the petitioner having failed to show violation of any provision of law being allegedly committed by the Election Appellate Tribunal, Jamalpur while passing the impugned judgment and order dated 24.08.2022 as such, he is not entitled to seek equitable relief under Article 102 of the Constitution on the issue of contradiction in counting votes by the Election Tribunal and Election Appellate Tribunal concerned respectively, for being based squarely on disputed question of facts.

Accordingly, having found no substance for interference this Rule is liable to be discharged.

In the result, this Rule is accordingly discharged without any order as costs.

The ad-interim order granted earlier by this Court is hereby vacated.

Communicate the judgment and order to the respondents concerned at once.

Muhammad Mahbub Ul Islam, J:

I agree.