

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

**Writ Petition No. 3185 of 2023**

**with**

**Writ Petition No. 3144 of 2023**

**In the matter of:**

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

**AND**

**In the matter of**

Advocate M. A. Aziz Khan

...Petitioner (In W.P. No. 3185 of 2023)

And

Abdul Momen Chowdhury and others

...Petitioners (In W.P. No. 3144 of 2023)

-Versus-

The Election Commission of Bangladesh  
and others

.... Respondents (In both writ petitions)

Mr. M. A. Aziz Khan, Advocate

..... Petitioner (in person)

(In W.P. No. 3185 of 2023)

Mr. Abdul Momen Chowdhury, Advocate

For the Petitioners

(In W.P. No. 3144 of 2023)

Mr. A.M. Amin Uddin, Attorney General

with

Mr. Mohammad Mehedi Hasan  
Chowdhury, Addl. Attorney General

and

Mr. Bepul Bagmar, Deputy Attorney General

... For the Respondents (In both writ petitions)

**The 15<sup>th</sup> March 2023.**

**Present:**

**Mr. Justice Md. Khasruzzaman**

**and**

**Mr. Justice Md. Iqbal Kabir**

**Md. Khasruzzaman, J:**

1. Mr. M. A. Aziz Khan, the learned Advocate as petitioner, filed Writ Petition No. 3185 of 2023 under article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh, hereinafter referred to as "the Constitution", praying for a declaration with a Rule Nisi that the scrutiny of nomination paper of the sole presidential candidate Mr. Md. Shahabuddin under section 7 of the Presidential Election Act, (Act No. 27 of 1991) 1991 declaring him eligible and elected as single candidate and the Notification No. 17.00.0000.034.34.025.22-119 dated 13.02.2023 (Annexure- A) without any lawful authority and is of no legal effect.

Mr. Abdul Momen Chowdhury and others, the learned Advocates as petitioners, filed another Writ Petition being No. 3144 of 2023 under article 102(2)(a)(ii) of the Constitution praying for a declaration with a Rule Nisi that the impugned Gazette Notification dated 13.02.2023 made by the respondent No. 1 (Annexure-B) and also to declare section 7 of the Presidential Election Act, (Act No. 27 of 1991) 1991 is illegal, void and ultravires to the constitution (Annexure-C).

On 12.03.2023 the Hon'ble Chief Justice of Bangladesh sent Writ Petition No. 3185 of 2023 to this Bench for hearing and disposal the same. As the subject matter, relevant laws, and prayers in the aforementioned two writ petitions are similar, we are disposing the same by this single order.

2. The facts of Writ Petition No. 3185 of 2023, in short, are that the present incumbent, the Hon'ble President of Bangladesh, is scheduled to end his term of office on April 2023 put upon the Election Commission of Bangladesh a duty to arrange the election of a new President for the country who will assume the office of President immediate next. The Election Commission, hereinafter referred to as “the EC”, represented by the Chief Election Commissioner, hereinafter referred to as “the CEC”, as per the Presidential Election Act, 1991 read with article 119(1)(a) of the Constitution, declared the schedule and got the sole candidate for the office of President. The Election Commission, represented by the Chief Election Commissioner, is responsible to scrutinize the nomination paper of the sole candidate under section 7 of the Presidential Election Act, 1991 and declaring it correct and qualified, having taken into consideration of section 9 of the Anti-corruption Commission Act, 2004, hereinafter referred to as “the ACC Act” read with article 66(2)(g) of the Constitution that hit the eligibility and qualification for holding the post. The CEC declared Mr. Md. Shahabuddin President-elect under section 7 of the Presidential Election Act, 1991 and accordingly under rule 12(6) of the Presidential Election Rules, 1991, Gazette Notification being No. 17.00.0000.034.34.025.22-119 dated 13.02.2023 was published.

On 15 February 2023, the CEC, in his press briefing, termed the controversy over the election of the Supreme Post of the State as

unexpected and declared that there is no legal bar for Mr. Md. Shahabuddin to become the President of the Country pointing the difference between election and appointment, indicating none has the authority to appoint the President as the Head of the State can only be elected, and Mr. Md. Shahabuddin has been elected in line with the existing laws referring to former Chief Justice Shahabuddin Ahmed's presidential election. Referring to section 9 of the ACC Act, the CEC also said although the post of President is an 'office of profit', that is not an office of profit in the service of the Republic and requested all not to create any confusion in this regard. The CEC asserted that as personal responsibility under section 7 of the Presidential Election Act, 1991, he scrutinized the nomination paper received from Mr. Md. Shahabuddin as the sole candidate against disqualification under section 9 of the ACC Act, 2004 and found him eligible for the post of President. He also explained reasons by equating with the erstwhile election of Chief Justice Shahabuddin Ahmed as President like the ACC Commissioner relying on a final Judgment of the High Court Division of the Supreme Court of Bangladesh.

The CEC has misinterpreted the law by not considering the bar imposed by the ACC Act, 2004 read with article 66(2)(g) of the Constitution. Without referring the matter involving the interpretation of the Constitution to the Supreme Court of Bangladesh for having legal interpretation, the CEC misconstrued the laws regarding

eligibility and passed the scrutiny test of the nomination paper of the President, Mr. Md. Shahabuddin, to hold an office of profit through the election. However, section 9 of the ACC Act, 2004 is a bar for being appointed in the service of the Republic. Had the President been appointed to the post instead of elected, he would have been hit by said law as a disqualification for the office of President of the Republic. The interpretation of the ACC Act, 2004 and the Constitution pivoted on the words "elected" to the post or "appointed" or "nominated" to the post solely lies to the Supreme Court of Bangladesh, not to the CEC as he has no authority to interpret his own choice when the matter is already embroiled in serious debate all around. The action of the CEC has suffered from the vice of gross impropriety leading to an illegal decision while carrying out his constitutional and legal duty resulting in the erroneous scrutiny of the nomination paper that leads to a void and illegal Notification.

3. The facts of Writ Petition No. 3144 of 2023, in short, are that the term of the incumbent President, Mr. Md. Abdul Hamid is going to expire in the latter part of April 2023, respondent No. 1, the Election Commission, was needed to announce the schedule for holding the election of the President of the Republic. Accordingly, the Election Commission announced an election schedule notification dated 25th January of the year 2023. Respondent No. 3, Mr. Md. Shahabuddin, is barred from being President of the Republic due to his prior

appointment as Commissioner of the Anti-Corruption Commission, which is an office of profit under the Republic but largely ignoring his disqualification and giving an untrue statement that he is not disqualified from being a President of Bangladesh and accordingly filed nomination paper for the post of President of the People's Republic of Bangladesh. Respondent No. 1, the Election Commission, upon erroneous scrutiny and evading responsibility of proper scrutiny, has declared the nomination paper valid though respondent No. 3, Mr. Md. Shahabuddin lacks the qualification to be the President of the Republic. On 13th February 2023, the date of scrutiny of the nomination paper, the Election Commission, as respondent No. 1, declared respondent No. 3, Mr. Md. Shahabuddin, as the President elect of the Republic by largely ignoring and making the election schedule infructuous, which is also illegal and violative of article 48 (1) of the Constitution. Respondent No. 1, the Election Commission has negated its schedule. It has made its own schedule infructuous and inoperative. By impugned gazette notification declaring respondent No. 3, Mr. Md. Shahabuddin as President of the Republic is illegal, ultra-vires, and of no legal effect. The departure from the schedule made by the Election Commission has rendered the election of the President illegal, inoperative, and of no legal effect. As Mr. Md. Shahabuddin is barred from being the member of the Parliament since he admittedly served as Commissioner of the ACC, his candidacy for the President of Bangladesh is clearly barred by article 48(4)(b) of the Constitution for he is not eligible to be the

member of the parliament due to his holding office of profit as commissioner of the Anti-Corruption Commission under the Government of Bangladesh and the election of Mr. Md. Shahabuddin is violative article 48(4)(b) of the Constitution. Moreover, it is submitted that this case is quite distinguishable from the case reported in 49 DLR 1 for in that case the issue was whether Mr. Justice Shahabuddin Ahmed held a post of profit under the government of Bangladesh and it was held that Mr. Justice Shahabuddin Ahmed held the Constitutional post of the Chief Justice of Bangladesh but the respondent No. 3 held office of profit under the Government of Bangladesh which has disqualified him from being member of the Parliament which is made applicable for becoming the President of Bangladesh by article 48(4)(b) of the Constitution. As section 7 of Act No. 27 of 1991 is illegal and ultra-vires to the Constitution, the such declaration has made the provision of article 48(1) of the Constitution nugatory and inoperative, and hence the petitioners prayed for declaring the impugned gazette notification and section 7 of Act No. 27 of 1991 illegal, void and ultra-vires to the Constitution of the People's Republic of Bangladesh.

4. The constitutional and legal questions those are mainly involved with these writ petitions are:

- i. Whether the CEC acted in accordance with the Constitution and law in conducting the election of the President of Bangladesh by correctly interpreting the statutory provision

of section 9 of the ACC Act, 2004 read with the provisions of article 66(2)(g) and 48(4)(b) of the Constitution; and

- ii. Whether section 7 of the Presidential Election Act, 1991 is *ultra-vires* to the Constitution, and if so, whether the gazette notification declaring the President-elect is liable to be declared as void, unlawful and without any legal effect.

5. In Writ Petition No. 3185 of 2023, the learned Advocate for the petitioner, Mr. M. A. Aziz Khan submits that the President of the Republic is indirectly elected by the members of parliament under article 48(1) of the Constitution and in line with the existing law of the land. The EC represented by the CEC conducts the election for the office of President in accordance with the Presidential Election Act, 1991 read with article 119(1)(a) of the Constitution, where the CEC is personally responsible for reviewing the nomination papers and determining whether the candidates are eligible or not for the said office in accordance with article 66(2)(g) of the Constitution and section 9 of the ACC Act, 2004, to be elected as the President of Bangladesh, one must meet that he/she is qualified to be elected as an MP. Unless the disqualification is lifted by legislation passed by the parliament, or despite holding posts or profitable positions listed in the Constitution, including the office of President, the disqualification is still in effect. According to article 147 of the Constitution, the positions of President and members of Parliament (MPs) are public offices of the



Republic with responsibilities and remuneration for performing public activities within the framework of the Constitution. Although the CEC held the correct legal position that the position of President is an office of profit when examining the eligibility test to overcome the disqualifications outlined in section 9 of the ACC Act, 2004 read with article 66(2)(g) of the Constitution, the CEC incorrectly construed or interpreted the words "appoint" and "elect" on his own without any support from law and removed the disqualification and declared the sole nomination paper of Mr. Md. Shahabuddin as President-elect culminating into a void Notification. Differentiating the words "elect" and "appoint," and at his own construction, the CEC committed a grave error by giving an interpretation contrary to law vide decision in the case of *ACC vs. Mr. Shahidul Islam*, 68 DLR (AD) 242 paras.16, 20, 22, 29, and thus did not act according to the Constitution and laws rendering said Notification No.17.00.0000.034.34 .025.22-119 dated 13 February 2023 without lawful authority and is of no legal effect and thus it is void and liable to be cancelled.

6. In Writ Petition No.3144 of 2023, the learned Advocate for the petitioner, Abdul Momen Chowdhury submits that respondent No. 3, Mr. Md. Shahabuddin, is barred from being the member of Parliament since he admittedly was a commissioner of the Anti-Corruption Commission of Bangladesh which is an office of profit under the Government of the People's Republic of Bangladesh. Holding of office

of profit in any service of the Republic will stand as an impediment and be considered disqualification by article 48(4)(b) of the Constitution to be the President of Bangladesh. He also submits that section 7 of the Presidential Election Act, 1991 has given absolute power to the CEC to declare the President as elect, which has buried and abridged the rights of the members of Parliament for such declaration, which is also illegal and ultra-vires to the Constitution as it has also made the provision of article 48(1) of the Constitution useless and inoperative.

7. The submissions of the learned Attorney General in both the writ petitions are the same except the Writ Petition No. 3144 of 2023 wherein he replied why section 7 of Act No. 27 of 1991 shall not be declared *ultra-vires* to the constitution. Mr. A.M. Aminuddin, the learned Attorney General submits that all we know that the President of Bangladesh is the symbol of unity of the entire country. Although the office of President is an office of profit, it is not the post, position, or office in the service of the Republic. According to article 134 of the Constitution, in the service of the Republic, all employees hold their post, position, or office during the President's pleasure. Here the President himself is the supreme employer and frames rules to regulate the appointment and the conditions of service of such persons employed in the service of the Republic until provision on that behalf is made by or under any law and rules made by the Parliament. President does not work under any authority of the State. Instead, he is the Head

of the State who exercises supreme powers and performs the duties conferred and imposed on him by the Constitution as per article 48(2) of the Constitution and any relevant laws of the land. Nobody in the Republic appoints him; instead, he is elected by the members of Parliament. Elected and appointed are not the same things. As Head of the State, the President holds the supreme power to regulate the persons employed in the service of the Republic. In no way, his position can be termed as the service of the Republic. Rather the functions or services of the President can be termed the functions of the State.

It may seem that the office of President is an office of profit, so no one can hold any new office of profit in the service of the Republic after cessation of their service from another office of profit in the service of the Republic. Although the office of President is an office of Profit, it is not in the service of the Republic as mentioned in Part IX of the Constitution. The Anti-Corruption Commission Act, 2004, section 9 creates a barrier to assuming that offices of profit are in the service of the Republic, not the office of President, as the office of President is not under the service of the Republic according to language and spirit of the meaning enshrined in the articles 133-136 in Part IX of the constitution. Those articles deal with the terms, conditions, appointment, and reorganization procedures of the employee employed in the service of the Republic, which does not indicate anything regarding the office and service of the Honourable President.

The Election Commission, as per the Presidential Election Act, 1991 read with article 119(1)(a) of the Constitution, declared the schedule and got the sole candidate for the office of President. The Chief Election Commissioner is responsible for scrutinizing the sole candidate's nomination paper under section 7 of the Presidential Election Act, 1991 and declared correct and qualified, considering section 9 of the ACC Act, 2004 read with article 66(2)(g) of the Constitution. In this case, the CEC did everything correctly. If there is no misconstruction of the law of the land where there is a sole candidate how the CEC will arrange the election. This is an absurd idea, and nowhere in the world to hold election when there a single candidate for a post, position, or office. The EC represented by the CEC did not make any irregularities or misinterpretations under section 7 of the Presidential Election Act and the Constitutional provisions under article 48(1).

The learned Attorney General also submits that according to article 66 (2) (f) of the Constitution, a person shall be disqualified for election as, or for being, a member of Parliament who holds any office of profit in the service of the Republic, that is, the President-elect Mr. Md. Shahabuddin is currently not holding any office of profit. He was a Commissioner of the ACC from 2011 to 2016 for a fixed term. Like the article 96 regarding the tenure of the office of Judges, article 66(2)(f) of the Constitution also indicates the present status, not the past or the

future status. That is, it tells the status during the submission period of the nomination paper for election. Mr. Md. Shahabuddin, the President-elect, did not hold any office of profit in the service of the Republic at the time of submission of the nomination paper. So, this article does not create any barrier for him to be elected as the President of Bangladesh.

8. Mr. Mohammad Mehedi Hasan Chowdhury, the learned Additional Attorney General, submits that article 26(1) under Part III of the Constitution specifically mentions that any law inconsistent with fundamental rights is void and any existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution. However, the petitioners in both the writ petitions did not specifically mention which rights have been infringed and under which article of this very Part III of the Constitution was infringed. So, both the writ petitions should be summarily rejected. Moreover, he submits that article 66(3) of the Constitution provides special provisions to the President, the Prime Minister, the Speaker, the Deputy Speaker, a Minister, Minister of State, or Deputy Minister regarding election to the member of Parliament. They shall not be disqualified to be a member of Parliament as they are holding an office of profit. So, the Chief Election Commissioner did correctly by declaring the sole candidate for the

office of President under section 7 of the Presidential Election Act, 1991.

9. In Writ Petition Nos. 3185 of 2023 and 3144 of 2023 some constitutional issues have been raised those need explanation and clarification. The raised issues can be summarized as:

- i. Whether the office of President is an office of profit ?
- ii. If so, then whether the procedures for assuming the office of President and the functions done by the President come under the definition and meaning of the service of the Republic?
- iii. Whether the election and appointment carries the same meaning as per Constitution?
- iv. Whether the rules and regulations, like the other service holders/employees in the service of the Republic, regulate the functions of the President?
- v. Whether the declaration made by the CEC at the Nirbachan Bhaban, Agargaon, Dhaka, under section 7 of the Presidential Election Act, 1991 is illegal and *ultra-vires* to the Constitution which made the provision of article 48(1) of the Constitution nugatory and inoperative and abridges the power of the members of the Parliament?

- vi. Whether section 9 of the Anti-Corruption Commission Act, 2004 creates a bar to be elected as the President of the People's Republic of Bangladesh and assumes the office of President as a profitable one?
- vii. Is there any bar to assuming the office of President as an office of profit after the cessation of a profitable position as a Commissioner of the ACC?

10. Although the aforementioned writ petitions did not address the questions of whether the petitioners are the aggrieved persons and have locus-standi to file these present writ petitions or whether the petitioners have any other efficacious alternative remedies for challenging the election of the President-elect, Mr. Md. Shahabuddin, it is still necessary for the sake of justice to first determine whether the applicants have these kinds of rights or not.

11. It is not necessary that a person should be personally aggrieved to file a writ petition under article 102(2) of the Constitution. Anyone can file this writ petition who is affected by even psychologically as a conscious citizen of Bangladesh. The same view was taken in *Abu Bakar Siddique vs. Justice Shahabuddin Ahmed and others*, 49 DLR (1997) 1 para 18: “Article 102 of the Constitution provides that an aggrieved person may file an application under Article 102(2) of the Constitution. But it does not provide that a person should

*be personally aggrieved. If the Constitution provides personal aggrievement, then the scope of Article 102 would be narrower. But in both the writ petitions, the scope of interpretation of this provision of Article 102(2)(a)(ii) of the Constitution should be wider. A person may be personally aggrieved or mentally aggrieved or constitutionally or economically or politically or socially aggrieved and this aggrievement of any kind for a citizen has given him the right to take shelter under Article 102 of the Constitution.”* In the present cases, the petitioners are the Advocates of the Supreme Court of Bangladesh. Since the petitioners are conscious people and have not received any response for their inquiries included in the legal notice from the Election Commission represented by the Chief Election Commissioner, they have the *locus-standi* to file these writ petitions as aggrieved persons.

12. The learned Advocate Mr. Abdul Momen Chowdhury in the Writ Petition No. 3144 of 2023 submits that the President-elect Mr. Md. Shahabuddin is barred to be the President of the Republic due to his prior appointment as a Commissioner of the Anti-Corruption Commission, which is an office of profit in the service of the Republic but largely ignoring his disqualification and giving untrue statement that বাংলাদেশের রাষ্ট্রপতি হওয়ার জন্য আমি অযোগ্য নহি he filed nomination paper for the post of President of Bangladesh. He also submits that the Constitution of Bangladesh itself creates barrier to hold any office of



profit in the service of the Republic even after having held another office of profit in the service of the Republic.

On the other hand, the learned Attorney General submits before the Court that although the office of President is an office of profit, but it is not an office of profit in the service of the Republic as the Honourable President is not an employee in the service of the Republic as per Part IX of the Constitution. The President makes rules to regulate the appointment and the conditions of service of such persons who are employed in the service of Republic. The Anti-Corruption Commission and its Commissioners are regulated and appointed by the President according to the Anti-Corruption Commission Act, 2004. Section 9 of the Anti-Corruption Commission Act, 2004 shall create a barrier to assume those offices of profit which are in the service of the Republic, not the office of President, as the office of President is not an office of profit in the service of the Republic according to language and spirit of the meaning enshrined in articles 133-136 in Part IX of the Constitution. Like the other service holders in the Republic, the Commissioners of the ACC are doing their service during the pleasure of the President. The President-elect Mr. Md. Shahabuddin did not commit any irregularities by declaring “বাংলাদেশের রাষ্ট্রপতি হওয়ার জন্য আমি অযোগ্য নহি” and by submitting nomination paper for the post of President of Bangladesh.

The main contentious issue that we find from the submissions of both parties is that whether there is any bar to assuming the office of President as an office of profit after the cessation of a office of profit in the service of the Republic as Commissioner of the ACC ? So, for arriving at a just decision, we should firstly identify the meaning of office of profit.

13. The term "office of profit" is not defined in the constitution of Bangladesh. Generically, the term "office of profit," refers to all posts, positions and offices within the Republic. This is so that we can abide by article 152(1), which specifies that we must take generic sense into account when the subject or context otherwise requires us to interpret a constitutional term or phrase.

14. Bangladesh does not have a great number of decisions passed by the Supreme Court of Bangladesh that define the term "office of profit," but we do have a subsidiary legislation called "The Representation of People Order, 1972" that lists all relevant disqualifications, including a definition of "office of profit." Holding an "office of profit" is defined as holding any office, post, or position in the Republic's full-time service as well as any statutory public authority or company in which the government holds more than 50% (fifty percent) of the shares, according to the Explanation I, Article 12 of the RPO.

The similar view was taken by this Court in *Shamsul Huq Chowdhury v. Mr. Justice Mohammad Abdur Rouf* (Writ Petition No. 1269 of 1995), and their lordships held that anyone who performs services for the Republic and receives pay or other benefits from the Public Exchequer is regarded as holding an office of profit in the service of the Republic. The service of the Republic will be regulated and guided by the provisions of the Constitution under Part IX Chapter I of the Constitution.

In this context, the Supreme Court of India in *Jaya Bachchan v. Union of India & Others*, AIR 2006 SC 2119: (2006) 5 SCC 266, has defined the term of "office of profit" as a position that offers the holder a financial advantage, benefit, or gain. If it offers remuneration, a financial advantage, a benefit, etc. it can be an office or a place of profit.

15. Office of profit also implies to a position with the central or state governments that comes with salary, perks, and other benefits. The Supreme Court invalidated her membership in the aforementioned case because she received government perks and allowances in addition to a monthly stipend of Rs 5,000, entertainment costs of Rs 10,000, and other privileges. In *Shibu Soren v. Dayanand Sahaya and others*, (2001) 7 SCC 425, the Supreme Court of India underlined that "*If there is really some gain, its label – 'honorarium' – 'remuneration' – 'salary' is not material – it is the substance and not the form which*

*matters and even the quantum or amount of “pecuniary gain” is not relevant— what needs to be found out is whether the amount of money receivable by the concerned person in connection with the office he holds, gives to him some pecuniary gain”.*

16. The Supreme Court of India, in *Guru Gobindo Basu Vs. Sankari Proshad Ghosal*, AIR 1964 (SC) 254, ruled in 1964 that several factors, including: “i) whether the government is the appointing authority, (ii) whether the government has the power to terminate the appointment, (iii) whether the government determines the remuneration, (iv) what is the source of remuneration, and (v) the power that comes with the position, are considered for determining whether a person holds an office of profit or not.” *UP MLAs Bajrang Bahadur (BJP) and Uma Shankar Singh (BSP)* were disqualified from the parliament in 2015 when it was discovered that they had abused their positions to get government construction contracts. The similar view was also taken in the Writ Petition No. 3067 of 1996 in *Abu Bakar Siddique vs. Justice Shahabuddin Ahmed and others*, 49 DLR (1997) 1.

17. It is clear from the submissions of the learned Advocate for the petitioners and the learned Attorney General for Bangladesh as well as the decisions of the highest Court of Bangladesh and India that the office of President is an office of profit. The same view was taken earlier in Writ Petition No. 3067 of 1996 in *Abu Bakar Siddique vs.*

*Justice Shahabuddin Ahmed and others*, 49 DLR (1997) 1, wherein their lordships held that the office of President of Bangladesh is an office of profit but it is not an office of profit in the service of the Republic as contemplated under the provisions of the Constitution.

18. As the learned Attorney General submitted in agreeing with the fact that the office of President is an office of profit as well as the consonant views have also been exposed in the aforementioned decisions and discussions, so after going through the Part IX of the Constitution regarding Services of Bangladesh, we hold that the office of President is an office of profit. In the same way, as the Commissioner of the ACC is appointed by the President for a fixed term and receives pay or other benefits from the Public Exchequer, that office can also be regarded as an office of profit in the service of the Republic. The Commissioner of the ACC is appointed by the Government, terms and conditions of his services are regulated by the incumbent laws, and receives financial advantage, benefit, or gain from his service, his office can be termed as an office of profit in the service of the Republic.

19. It has already been held in Writ Petition No. 3067 of 1996 in *Abu Bakar Siddique vs. Justice Shahabuddin Ahmed and others*, 49 DLR (1997) 1, that the office of President of Bangladesh is an office of profit but it is not an office of profit in the service of the Republic as contemplated under the provisions of the Constitution. Those who hold

constitutional offices and posts, either being elected or being appointed including the President, cannot be called to hold office of profit in the service of the Republic. Now the question arises as to who hold the offices of profit in the service of the Republic and whether the functions and the office of Commissioner of ACC comes within the purview of the definition of the service of the Republic or not.

20. According to Part IX, Chapter I of the Constitution, which runs from articles 133 to 140, the President will determine the rules until Parliament makes law governing the appointment and terms of employment of those working for the Republic. Every employee of the Republic is required to serve during the President's pleasure, and the Public Service Commission is designated to be the method of appointment for all employees. Some government employees are appointed directly by various government authorities, while others are hired through the Public Service Commission. Who are those employees classified as either servants or employees of the Republic? Generally, they include from the Secretaries of the different ministries of the Government of Bangladesh to the peons who work in service of the Republic.

21. In Writ Petition No. 3067 of 1996 in *Abu Bakar Siddique vs. Justice Shahabuddin Ahmed and others*, 49 DLR (1997) 1, para 51, their lordships have given a clear-cut definition regarding “public servant”, “service of the Republic” and “the office of profit”. In para

51, their lordships have discussed, “*Secretaries, other gazetted officers, non-gazetted officers and other classes of employees of different Ministries serving in the Secretariat, different departments, Directorates, etc. officers and staff of all other Government offices like President's office, the Supreme Court's office, Speaker's and Parliament's office, Election Commission office, Public Service Commission's office, Attorney-General's office and all other offices of the constitutional post-holders, Commissioner's office, Deputy Commissioner's office, and all other offices of the Government in different parts of the country running under different Ministries are collectively known to us as Government servants. They are holders of posts in the permanent structure of administration and thereby they are rendering their services to the State. For their appointments, retirement, disciplinary actions for misconduct and other offences and for other terms and conditions of service for smooth running of the administration of the Government separate Rules and Regulations including Public Servant Conduct Rules, Government Servants (Appeal and Discipline) Rules, etc. have been made. Those officers and employees of the Government are directly controlled and guided under the supervision of the different Ministries of the Government. They enter into the service at certain age and retire from service at certain later stage of life. They all get their remunerations, salaries, retirement benefit and other benefits directly from the public exchequer during their life time and even after their death, their wives and children also*

*get some benefits from the Government. Government officers and employees as described above, in our opinion, are collectively called and known as Government servants, who hold actually the office of profit in the service of the Republic.”*

22. Although the office of President is an office of profit, it is not the post, position, or office in the service of the Republic. As per article 134, in the service of the Republic, each service holder holds their post, position, or office during the President's pleasure. Here President himself is the employer and frames rules to regulate the appointment and the conditions of service of such persons employed in the service of the Republic until provision on that behalf is made by or under any law and rules made by the Parliament. The President does not work under any authority of the State. Instead, he is the Head of the State who exercises supreme powers and performs the duties conferred and imposed on him by the Constitution and any other laws. Nobody in the Republic appoints him; instead, he is elected by the members of Parliament.

23. In the appointment process, someone has to be above as an employer, and the employer regulates everything according to the rules framed therein. As Head of the State, the President holds the supreme power to frame rules and regulate the persons employed in the service of the Republic, in no way his position can be termed under and within



the service of the Republic. Rather the functions or services of the President can be termed the functions of the State.

24. It may appear that since the office of President is an office of profit, no one can hold an office of profit after leaving a position of profit in the service of the republic. Even while serving as President is a profitable position, it is not like the office of the profit of the Commissioner of the ACC. The Anti-Corruption Commission Act, 2004, section 9 shall establish a barrier to assuming that offices of profit are in the service of the Republic, as opposed to the office of President, as the office of President is not within the meaning of the language and spirit of the articles 133–136 in Part IX. These articles discuss the terms, conditions, appointment, and reorganization processes for employees working for the Republic; they make no mention of the terms, conditions, appointment processes, etc. for the President.

25. The President-elect Mr. Md. Shahabuddin was the commissioner of Anti-Corruption Commission for the period of 2011-2016 after his retirement as a District and Sessions Judge from the Bangladesh Judicial Service. The Representation of People Order, 1972, section 12(f) says that in order to be eligible for election in parliament, 3 years need to pass after resigning or retiring from the service of the Republic or of any statutory public authority or of the defence service. As the President-elect Mr. Md. Shahabuddin was the

commissioner of Anti-Corruption Commission for the period of 2011-2016, which was almost 7 years earlier, it will not create any barrier to him or disqualify him to be elected as the President of the Republic although both the positions are profitable.

26. The Anti-Corruption Commission is an independent statutory public body regulated by the ACC Act, 2004. It has already been discussed in Writ Petition No. 3067 of 1996 in *Abu Bakar Siddique vs. Justice Shahabuddin Ahmed and others*, 49 DLR (1997) 1, para 51 that “the officers and employees of the Statutory Public Authorities may be treated to hold office of profit in the service of the Republic if their services are declared by law to be the service of the Republic under article 152 of the Constitution in its definition clause "the service of the Republic". As the Commissioner of ACC render his service for the Republic and receives financial advantage, benefit, or gain from his service, his service can be termed as the service of the Republic and office can be regarded as an office of profit. So, now it can be held that his declaration for “বাংলাদেশের রাষ্ট্রপতি হওয়ার জন্য আমি অযোগ্য নহি” while submitting his nomination paper does not touch any irregularities for the post of President of the People's Republic of Bangladesh.

27. There is no definition of 'office of profit' in the constitution of Bangladesh, but there is a definition of the term 'the service of the Republic'. According to article 152 of the Constitution, 'the service of the Republic' means any function, employment or position in relation

to the Government of Bangladesh in a civil or military capacity and any service which may be declared by law to be a service of the Republic. Articles 133-135 of Part IX of the Constitution have to be taken for a clear understanding of the meaning of the definition of the service of the Republic in article 152. The title of the part IX of the constitution is the Services of Bangladesh. According to article 133, the appointment and conditions of service of persons employed in the Republic shall be regulated by an Act made by the Parliament or in the absence thereof by a rule made by the President subject to the provisions of the Constitution. Article 134 of the Constitution, every person employed in the functions of the Republic for such period as may be at the pleasure of the President.

28. Again according to article 135, no person employed in the service of the Republic shall be dismissed or removed or demoted without giving reasonable opportunity to show cause. It is apparent from the above provisions that the service of the Republic shall mean all offices, services, duties etc. to which Part IX of the Constitution applies. Accordingly, “office of profit” in the service of the Republic shall mean any office of profit to which Part IX of the Constitution applies. Part IX of the Constitution does not apply to the President or the members of Parliament. As a result, there is no opportunity to interpret the office of member of Parliament or President as an office of profit in the service of the Republic. As described in section 9 of the

Anti- Corruption Commission Act, 2004, that is, serving as an ACC Commissioner in the past cannot be considered as a direct or indirect disqualification for being elected to the post of President as per the Constitution.

29. In Justice Shahabuddin Ahmed case, it was already decided that individuals serving for the Republic have the right to file a claim with the Administrative Tribunal established by article 117 of the Constitution for the enforcement of their employment contracts and other issues related to their employment. Nevertheless, individual holding a constitutional post or office, including the President of Bangladesh, is not required to seek remedy from the Administrative Tribunal. Instead, the Constitution itself and Parliament have created distinct laws, rules, and regulations for them. As a result, we hold that while the office of President of Bangladesh is an office of profit, it is not a profitable office in the service of the Republic in respect to the Government of Bangladesh as contemplated by the Constitution's provisions. As a result, Mr. Md. Shahabuddin a former ACC Commissioner is not barred from being elected to and holding the office of the President of Bangladesh under Article 48(1) of the Constitution. We do not find any infraction of the Constitution or any other legislation pertaining to holding the election of the President in the election of Mr. Md. Shahabuddin and the declaration of him as President of the People's Republic of Bangladesh. We thus hold that the

election of Mr. Md. Shahabuddin to the office of the President and qualifications to hold the office of the President of Bangladesh by him cannot be called in question in the instant writ petition.

30. The procedure of election of the President is discussed in Part IV, Chapter I, in the article 48 of the Constitution. According to article 48(1), “there shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law.” As the Head of the State, the President is elected by the members of Parliament, and he should not be disqualified for election as a member of Parliament, and to be a member of Parliament an eligible citizen of Bangladesh must not hold any office of profit in the service of the Republic other than an office which is declared by law not to be disqualified its holder, and must not be disqualified for such election by or under any law. Now, the questions arise whether the President-elect was elected following the article 48(1) read with article 66 (2) (f) and (g) of the Constitution, and whether the President-elect possess any disqualification in any law of the land to be elected as a member of the Parliament. The learned Attorney General submits that the Election Commission represented by the Chief Election Commissioner after having found the sole candidate for the post eligible, declared Mr. Md. Shahabuddin as elected under rule 12(6) of Presidential Election Rules, 1991 and accordingly Gazette Notification No.17.00.0000. 034.34.025.22-119 dated 13 February 2023 was published. On the other hand, the learned Advocate for the

petitioner submits that the CEC by misinterpretation of section 9 of the ACC Act, 2004 and the Constitution pivoted on the words "elected" to the post or "appointed" to the post declared Mr. Md. Shahabuddin as President-elect. He further submits that the CEC ought to have referred the same for having legal interpretation of the Constitution and the statute to the Supreme Court of Bangladesh under article 106 of the Constitution instead of misconstruing the laws. His action has suffered from the vice of gross impropriety leading to an illegal decision that itself is void while carrying out his constitutional and legal duty.

31. As we already held that Mr. Md. Shahabuddin worked for the ACC as a Commissioner from 2011-2016, which is no doubt a profitable post in the service of the Republic. Section 9 of the ACC Act, 2004, stipulates as “কর্মাবসানের পর কোন কমিশনার প্রজাতন্ত্রের কার্যে কোন লাভজনক পদে নিয়োগ লাভের যোগ্য হইবেন না”। The english translation of the said section can be labeled as “At the end of the tenure, a commissioner shall not be eligible to be appointed in any profitable office in the service of the Republic”. As the office of the President is not regarded as in the service of the Republic, it does not create any barrier to the former Commissioner of ACC being elected as the President of the Republic. Moreover, as the members of Parliament are the elected representatives of the Republic and are not appointed employees like the other employees in the service of the Republic, working as a Commissioner of ACC will not create any barrier to be elected as

members of the Parliament. It will only create a bar to be appointed in the service of the Republic according to the Part IX of the Constitution. The members of Parliament and the President of the Republic are elected representative in the Republic, whereas the employees or service holders who are employed in service of the Republic are generally appointed. So, the election and the appointment are two different ways and procedures of resuming the office in the Republic.

32. The President-elect Mr. Md. Shahabuddin was the sole candidate for the election of the President. The Election Commission represented by the CEC on 13th February, 2023, after scrutinizing the nomination paper declared the sole candidate Mr. Md. Shahabuddin as President-elect. Now the question is whether such declaration is contradictory to the article 48 (1) of the Constitution. In the article 48(1), “there shall be a President of Bangladesh who shall be elected by members of Parliament in accordance with law.” It has already been admitted by the learned Advocate Mr. M. A. Aziz Khan that the President is indirectly elected by the members of the Parliament and the members of the Parliament are elected directly through voting of the eligible citizens of the People’s Republic of Bangladesh. How can a voting process be set up when there will only be one candidate for the position? Doing election for the single candidate is absurd idea and nowhere in the world, the learned Attorney General emphasized. We find the basis of the submission of the learned Attorney General.

According to section 7 of the Presidential Election Act, 1991, “the Election Officer shall examine the nomination papers on the day, within the time and at the place specified by the notification under subsection (1) of section 5, and the Election Commissioner shall, if after scrutiny only one person remains as validly nominated, declare such person to be elected; but he shall, if more than one person remains validly nominated, proclaim on the day of the scrutiny of the nomination papers the names of the validly nominated persons (hereinafter called candidates). The plain reading of the aforementioned section, it is clear that where there is single valid candidate for the office of President, the Election Commissioner declare him/her as the President-elect. But, where there will be more valid candidates for the same position then the Election Commission will only declare the names of validly nominated persons for the office of President, and then the election can be held by the members of the Parliament at the House of Parliament. Article 48 (1) of the Constitution does not indicate the manner of declaration for the office of President, rather it says, “...who shall be elected by members of Parliament in accordance with law”. Here, according to law means the Presidential Election Act, 1991 and the relevant procedures for doing election. The section 7 of the Presidential Election Act, 1991, states the process of declaration when there will be sole candidate for the office of President. So, only declaration by the EC represented by CEC does not violate or *ultra-vires* the spirit of the meaning of article 48(1) of the Constitution.



33. According to the submissions of the petitioners that the post of President is a 'profitable post' and Mr. Md. Shahabuddin should be considered ineligible to be elected to the post of President because of his past service as an ACC Commissioner. While the controversy surrounding the office of President revolves around the definition of the term of office of profit, it is primarily related to the qualifications applicable to be elected to the office. And in this regard, we are of the view that section 9 of the Anti-Corruption Commission Act does not create any disqualification for being elected to the post of President, because, the said section is not applicable for the post of President. Besides, any inconsistency or conflict with the constitution will render section 9 of the Anti-Corruption Commission Act unconstitutional.

34. Article 48(4) of the Constitution mentions the qualifications and disqualifications of presidential candidates. A person shall not be qualified for election as President if he –

(a) is less than thirty five years of age ; or

(b) is not qualified for election as a member of Parliament ;

or

(c) has been removed from the office of President by impeachment under this Constitution.

That is, the election of a person to the office of President in violation of the above conditions will be treated as disqualification by

the Constitution. Now the question is, whether section 9 of the Anti-Corruption Commission Act, 2004, which is an Act of Parliament, can impose any condition in addition to the disqualifications prescribed by the Constitution for the office of President? The answer is — No. Condition beyond the qualifications or disqualifications prescribed by the Constitution for any post specified in the Constitution cannot be imposed by an Act of Parliament, unless the Constitution itself authorizes it. Because, the Constitution is the supreme law of the land and if any law is inconsistent with this constitution, then that law shall be null and void as far as it is inconsistent. However, it is to be mentioned that the conditions mentioned in article 48(4) of the Constitution cannot be changed directly by an Act of Parliament, but the conditions for the office of President can be imposed indirectly by an Act of Parliament through its sub-clause 'b'. The provisions relating to disqualification for election as member of Parliament as per Article 48(4) (b) of the Constitution shall apply to the office of President. Again, according to article 66(2) (g), disqualification for parliamentary elections can be determined by law. That is, if any disqualification for election to Parliament is prescribed by a law made by Parliament, the same shall apply equally to presidential candidates. Now the question is whether section 9 of the Anti-Corruption Commission Act, 2004 will be considered as a disqualification for the candidate for the post of member of Parliament? If so, it will also apply to presidential candidates. For this reason, we have to see whether the term "office of

profit in the service of the Republic" as described in section 9 of the Anti-Corruption Commission Act, refers to the position of member of Parliament? Arguably, the post of member of Parliament is not a 'post of profit in the affairs of the Republic', therefore section 9 of the Anti-Corruption Commission Act is not an Act enacted to serve the purpose of article 66(2) (g) of the Constitution and therefore the aforesaid section of the Anti-Corruption Commission Act does not apply to the election of the President.

35. In Writ Petition No. 3144 of 2023 Mr. Abdul Momen Chowdhury, the learned Advocate submits that the declaration of the respondent No. 3 Mr. Md. Shahabuddin as President of the Republic on 13th February is illegal and violative of article 48 (1) of the Constitution. He further submits that the respondent No. 1, the Election Commission has negated its own schedule and has made its own schedule infructuous and inoperative and under the circumstances the impugned gazette notification declaring Mr. Md. Shahabuddin as President of the Republic is illegal, ultravires and is of no legal effect. He also submits that the departure from the schedule by the Election Commission has rendered the election of the President illegal, inoperative, and is of no legal effect. On the contrary, the learned Attorney General submits that it is absurd to think of holding an election where there is a sole candidate for a post or position. Mr. Md. Shahabuddin was the sole candidate for the election to the office of

President of the Republic. So, the learned Attorney general further submits that there is no contradiction between section 7 of the Presidential Election Act, 1991 and article 48(1) of the Constitution. He emphasizes that as per the mentioned Act, the EC represented by the CEC did not commit any irregularities by declaring Mr. Md. Shahabuddin as the sole candidate for the office of President.

36. We have considered the submissions of the learned Attorney General and the learned Advocate Mr. Abdul Momen Chowdhury and noticed that Mr. Md. Shahabuddin was the sole Presidential candidate. We do not see any abridgement or cut of power of the members of Parliament. If there were more than one valid candidates for the same office, then the issue could be raised that this election could be held in the House of Parliament and the declaration should come thereafter. In case of sole candidate, then holding election for the same would be the abuse of process. So, we do not find any substance of the submissions of the petitioners.

37. We find the substance of the submissions of the learned Additional Attorney General Mohammad Mehedi Hasan Chowdhury, as this very provision provides special provision for the positions mentioned above by mentioning that to determine qualifications and disqualifications to be elected as a member of Parliament, they shall not be deemed to hold an office of profit in the service of the Republic, so as the Act of Parliament, section 9

of the Anti-Corruption Commission Act, 2004 cannot create any barrier in terms of holding the office of President declared by the Constitution as because, as the supreme law of the Republic, Constitution shall get priority over the Act of Parliament.

38. This is not the first time that the election of the President of Bangladesh has been contested in writ petitions. The presidential election of Justice Shahabuddin Ahmed was also contested earlier in Writ Petition No. 3067 of 1996 in *Abu Bakar Siddique v. Justice Shahabuddin Ahmed and others*, 49 DLR (1997) 1. In India, 18 members of the Indian parliament challenged the election of President Dr. Zakir Hossain on the grounds of a constitutional disability in the case of *Baburao Patel vs. Dr. Jakir Hosain*, AIR 1968 (SC) 904. But in the end, the case was rejected by the Indian Supreme Court.

However, finally, we may sum up our findings in the following manner:

- (a) We hold that as the Head of the State, the President of the People's Republic of Bangladesh holds 'the office of profit', but 'it is not an office of profit in the service of the Republic' and the procedures of assuming his office of the President is not like the same who serves in the service of the Republic. Moreover, the rules and regulations like the other service holders/employees in the service of the Republic regarding

regulating the functions are not similar to those of the President.

- (b) We hold that the ‘election’ and ‘appointment’ do not carry the same meaning as per the Constitution. The President of the People’s Republic of Bangladesh is the elected representative and the ‘symbol of the unity’ of Bangladesh, and the individuals who serves in the Republic according to the Part IX of the Constitution are the appointed employees in the service of the Republic.
- (c) We hold that the declaration made by the Election Commission represented by the Chief Election Commissioner at the Nirbachan Bhaban, Agargaon, Dhaka, under section 7 of the Presidential Election Act, 1991 is not illegal and *ultra-vires* to the Constitution for such declaration has not made the provision of article 48(1) of the Constitution nugatory and inoperative, and abridges the power of the members of Parliament.
- (d) We hold that section 9 of the Anti-Corruption Commission Act, 2004 does not create any bar to the former Commissioner of ACC, Mr. Md. Shahabuddin, to be elected as the President of the People’s Republic of Bangladesh and assumes the office of President as a Profitable one.

(e) We hold that though as a former Commissioner of ACC, the President-elect, Mr. Md. Shahabuddin, also held an office of profit in the service of the Republic, this in no way disqualifying him from being elected to or holding the office of President, which is not an office of profit in the service of the Republic.

39. Accordingly, we do not find any merit in Writ Petition No. 3185 of 2023 and Writ Petition No.3144 of 2023, and thus both the writ petitions are hereby rejected summarily. The petitioners have prayed for granting a certificate as per article 103(2)(a) of the Constitution for preferring appeal before the Appellate Division against this order. Since the aforementioned writ petitions have been rejected summarily, the prayer for granting certificate to prefer appeal before the Appellate Division is hereby also rejected.

There will be no order as to cost.

**Md. Iqbal Kabir, J:**

I agree.