

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

WRIT PETITION NO.2967 of 2023

IN THE MATTER OF:

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

And

IN THE MATTER OF:

Al Amin

... Petitioner.

-vs-

Election Appellate Tribunal and others.

... Respondents.

And

Mr. Md. Helal Uddin Mollah, Advocate
.... For the Petitioner.

Ms. Syeda Nasrin, Advocate with
Mr. Md. Razu Hawlader, Advocate with
Mr. Bibek Chandra, Advocate with
Ms. Jannatul Islam Peya, Advocate with
Mr. Farhad Hossain, Advocate with
Mr. Golam Kibria, Advocate with
Mr. Md. Murad Hossain, Advocate and
Mr. Khandaker Sultan Ahmed, Advocate
..... for the respondent No.1

Mr. Samarendra Nath Biswas, D.A.G. with
Mr. Md. Abul Kalam Khan (Daud), A.A.G. and
Mr. Md. Modersher Ali Khan (Dipu), A.A.G.
....For the Respondents-government.

Heard on:15.01.2024 and
Judgment on:16.01.2024

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 order dated 23.02.2023 passed by the Election Appellate Tribunal, Barguna in Election Appeal No.01 of 2023 (Annexure-E) dismissing the appeal and thereby upholding the order dated 26.01.2023 passed by the Election Tribunal, Barguna in Election Tribunal Case No.03 of 2021 (Annexure-C) fixing the respective date for recounting of votes, 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 order dated 26.01.2023 passed by the Election Tribunal, Barguna in Election Tribunal Case No.03 of 2021 (Annexure-C) was stayed by this Court for a prescribed period. Being aggrieved the respondent No.1 filed Civil Petition for Leave to Appeal No. 833 of 2023 before the Hon'ble Appellate Division. The learned Judge-in Chamber of the Appellate Division after hearing the respective contending parties vide order dated 20.03.2023 stayed operation of the ad-interim order passed by this Court. Ultimately, the Appellate Division vide order dated 09.08.2023 disposed of the said petition with direction upon this Bench to hear and dispose of the Rule on merit within a prescribed period.

Facts, in brief, are that the petitioner as being the citizen of Bangladesh and being eligible contested Paurashava Election, 2021 for the post of Councilor of Ward No.3 of Barguna Municipality. Ultimately, he came out successful in the said election held on 30.01.2021 securing highest vote. Subsequently, his name was duly published in gazette on 07.02.2021. However, on taking oath he has been discharging his respective duties and functions without any objection from any quarter.

On 23.02.2021, the respondent No.1, the other contesting candidate filed Election Application No.3 of 2021 before the Election Tribunal No.1 and Joint District and Sessions Judge, Barguna impleading the petitioner as defendant challenging the said election held on 30.01.2021 with a prayer, *inter alia*, “প্রতিবাদের নির্বাচন বাতিলের দরখাস্তকারীকে বরগুনা পৌরসভার বিগত ৩০/০১/২০২১ তারিখের ৩নং ওয়ার্ডের সাধারণ কাউন্সিলর পদে যথাযথভাবে নির্বাচিত হইয়াছেন মর্মে ঘোষণা দিবার।” Accordingly, summons was served and the petitioner duly entered appearance by filing written statement. Deposition of PWs. 1, 2 and 3 and DWs. 1 and 2 were duly recorded by the Tribunal. Subsequently, the matter was fixed on 26.01.2023 for final hearing.

Fact remains that at the time of filing election case the respondent No.1 also filed an application before the Tribunal concerned with a prayer for recounting of ballot papers. The Tribunal, however, at this juncture allowed the said prayer vide order dated 26.01.2023 on being satisfied *prima facie* from the evidence so have been adduced by the respective contending parties by observing, *inter alia*, “অতঃপর মোকদ্দমাটি যুক্তিতর্ক শুনানীর জন্য পেশ করা হইল। উভয় পক্ষের বিজ্ঞ যুক্তিতর্ক শ্রবণ করা হইলো। প্রার্থীর আবেদনপত্র ১নং প্রতিপক্ষের আপত্তি উভয়ের দাখিলকৃত কাগজপত্র PW-1,2,3, এবং DW-1, 2 এর জবানবন্দি, জেরা প্রাথমিক পর্যবেক্ষণ বিশ্লেষণে আদালতের নিকট প্রার্থী তার দাবীর সমর্থনে যে সাক্ষ্য উপস্থাপন করেন তাহার ভোট গণনার পক্ষে প্রাইমাফেসী কেইস এবং আর্গুয়েরল কেইস পরিলক্ষিত হয়েছে। প্রার্থী পক্ষের কজ অব এ্যাকশন পূর্ণ গণনার দাবীকে তার সাক্ষীগণের জবানবন্দী সমর্থন করেছে, কোন প্রকার প্রকট সাংঘর্ষিকতা তাদের জবানবন্দীতে বিদ্যমান নাই। আগামী ১৯/০২/২০২৩ ইং তারিখ ভোট গণনার জন্য আমার কতিথ মতে লিখিত।”

Being aggrieved the petitioner filed Election Appeal No. 01 of 2023 before the Election Appellate Tribunal, Barguna. Upon hearing the respective contending parties the Appellate Tribunal ultimately dismissed

the appeal vide the impugned order dated 23.02.2023 (Annexure-E) observing, *inter-alia*, “.....যেহেতু প্রকাশ্যে ভোট গননা করা হইলে অতি সহজে প্রার্থী নির্বাচন করা যাইবে। সেহেতু বিজ্ঞ নির্বাচনী ট্রাইব্যুনালের আদেশ যথাযথ হইয়াছে। বিজ্ঞ নির্বাচনী ট্রাইব্যুনালের উক্ত আদেশ দ্বারা অত্র নির্বাচনী আপিল দায়েরের কোন গ্রাউন্ট সৃষ্টি হয় নাই এবং অত্র নির্বাচনী আপিলটি গ্রহন করা হইলে নির্বাচনী দরখাস্ত ০৩/২০২১ নং মামলাটির বিচারে অধিক বিলম্বের সৃষ্টি হইবে বলিয়া অত্র ট্রাইব্যুনালের নিকট প্রতীয়মান হয়। ফলে অত্র নির্বাচনী আপিলটি গ্রহনের সুযোগ না থাকায় খারিজ হইবে।.....”

Challenging the same the petitioner has filed the instant application and obtained the present Rule Nisi.

Mr. Md. Helal Uddin Mollah, the learned Advocate appearing for the petitioner goes to contend that the order dated 26.01.2023 passed by the Election Tribunal No.1, Barguna is flawed with procedural illegality for having not specified the respective date, time and place for re-counting of ballot papers in compliance of Rule 62 of the “স্বাধীন সরকার পৌরসভা নির্বাচন বিধিমালা, ২০১০” (in short, the Rules, 2010). The Appellate Tribunal while dismissing the appeal did not at all consider the said legal aspect; hence, it is liable to be declared to have been passed without lawful authority and as such, is of no legal effect.

Conversely, Ms. Syeda Nasrin, the learned Advocate by filing affidavit-in-opposition on behalf of the respondent No.1 submits that compliance of Rule 62(2) is an administrative order which the Tribunal would have had passed on the next date so was fixed following the order for recounting of ballot paper. The Tribunal in the instant case could not do so, for, challenging the said order dated 26.01.2023 the petitioner preferred appeal on 16.02.2023 before the Election Appellate Tribunal, Barguna. In the given context, she submits that since the petitioner does not challenge the order of re-counting of ballot paper as such, upon discharging the Rule a direction be given upon the Tribunal to take

immediate necessary steps for recounting of ballot paper in accordance with law.

In order to challenge the order of re-counting of ballot papers of the respective election for the post of Counselor of the Poursava in question the only contention being placed by the petitioner is non-compliance of Rule 62(2) which is merely a procedural compliance to be made by the Tribunal by passing necessary order to that effect. Rule 62(2) of the Rules, 2010 runs as under:

“ ৬২। সংরক্ষিত দলিল দস্তাবেজ এর প্যাকেট খুলিবার আদেশ।—

(১) নির্বাচনী ট্রাইব্যুনাল বা নির্বাচনী আপীল ট্রাইব্যুনাল গণনাকৃত ব্যালট পেম্পার পরিদর্শনের জন্য উহার মুডিপত্র এবং দলিল দস্তাবেজ সম্বলিত প্যাকেট খুলিবার আদেশ দিতে পারিবেন।

(২) নির্বাচনী ট্রাইব্যুনাল বা নির্বাচনী আপীল ট্রাইব্যুনাল উপ-বিধি (১) এর অধীন প্রদত্ত আদেশে ব্যক্তি, সময়, তারিখ, স্থান এবং পরিদর্শনের পন্থা নির্ধারণ করিয়া দিবেন ”

Taking cognizance of the said contention of the petitioner the impugned order of re-counting of ballot papers passed by the Election Tribunal, Barguna being affirmed by the Election Appellate Tribunal, Barguna cannot be declared to be an order passed without lawful authority.

Accordingly, having found no substance in the instant Rule it is liable to be discharged.

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

The Election Tribunal, Barguna is hereby directed to take immediate necessary steps preferably within 2(two) weeks from the date of receipt of the copy of this judgment and order for re-counting of ballot papers in the presence of both the respective contending parties subject to compliance of Rule 62(2) of the Rules, 2010.

There will be no order as to costs.

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

Muhammad Mahbub Ul Islam, J:

I agree.

Montu (B.O.)