

In the Supreme Court of Bangladesh
High Court Division
(Statutory Civil Jurisdiction)

Present

Mr. Justice Md. Zakir Hossain

Election Petition No. 03 of 2024

Nazrul Islam

..... Petitioner

-Versus-

The Election Commission and others

..... Respondents

Mr. Syed Mamun Mahbub, with

Mrs. Ainun Nahar

Mr. M. Ashraful Islam and

Mr. Md. Manir Hossain, Advocates

... For the petitioner

Mr. Muhammad Khalequzzaman Bhuiyan with

Mr. Md. Abul Hasan, Advocates

... For the respondent No. 7

Order on: 06.05.2024

Md. Zakir Hossain, J:

This is an application filed by the petitioner for staying by-election schedule of Constituency No. 81, Jenaidah-1, Shailkupa till disposal of the Election Petition No. 03 of 2024.

The contention of the petitioner is that the petitioner participated in the 12th National Parliament Election in Constituency No. 81, Jenaidah-1, Shailkupa. The respondent Nos. 1-5 contested in the aforesaid election held on 07.01.2024. The Election Commission by gazette notification dated 09.01.2024 declared the respondent No. 1 as elected Member of the Parliament of the aforesaid constituency and he eventually took oath as a Member of the Parliament. During the

pendency of the Election Application, the respondent No. 1, Mr. Md. Abdul Hye, MP left this transitory world on 16.03.2024. After that the respondent No. 3, the Chief Election Commissioner was pleased to declare the seat of the constituency as vacant and declared the schedule of by-election on 23.04.2024 to be held on 05.06.2024. Thereafter the petitioner filed the aforesaid petition for staying the Election Schedule alleging *inter alia* that due to the sad demise of the elected candidate, the respondent No. 1, the Election Petition has not been abated in view of the provisions as spelt out under Article 70 of the RPO, 1972. It is also stated that if the election is held, the Election Petition shall become infructuous.

The learned Advocate for the petitioner took me through the Election Petition, Affidavit, Supplementary Affidavit, Affidavit-in-Reply and relevant provision of law embroiled in this case and submits that the Election Petition has not been abated by operation of law due to the death of the respondent No. 1 in pursuance of the provision as embodied under Article 70 of the RPO, 1972. He further submits that though the petitioner got the highest vote, unfortunately, the Returning Officer by manipulation of the result declared the Respondent No. 1 as elected.

He further submits that the Returning Officer and Deputy Commissioner, Jhenaidah on 07.01.2024 at 04.30 PM published a report showing casting rate of votes as 49% till 04.30 PM and later on, he

published final result showing casting rate 58.27% which is preposterous to believe and the allegation of manipulation in the Election cannot be ignored forthwith.

He next submits that the stay order of the Appellate Division dated 05.02.2024 has got no *nexus* with the Election Petition, because by that order further proceeding of the Election Petition has not been stayed by the Appellate Division.

He finally submits that the Election Petition should be disposed of on merit, otherwise, it will entail irreparable loss and injury to the petitioner.

He also submits that the Election Commission without considering the intricate legal position involved in this case most illegally and arbitrarily declared the schedule of by-election which is absolutely repugnant to the provisions of the RPO, 1972.

He strenuously submits that if the election is held, the purpose of the Election Petition will be frustrated causing immense prejudice to the petitioner; therefore, the by-election schedule is liable to be stayed till disposal of the Election Application.

Mr. Muhammad Khalequzzaman Bhuiyan, the learned Advocate along with Mr. Md. Abul Hasan appearing on behalf of the respondent No. 7, the Election Commission for Bangladesh submits that as per relevant laws and rules the respondent No. 7 was compelled to declare

the seat of the constituency vacant after the death of the Member of Parliament of that constituency as per the mandate of the constitution; therefore, the application for staying the schedule of the by-election is liable to be rejected for the ends of justice.

He further submits that neither the RPO, 1972 nor any other laws or rules can obstruct the Election Commission from declaring the seat vacant and publish the Election Schedule. He further adds that the provision of the RPO, 1972 in no way supersedes the provision of the constitution, the supreme law of the land. He next submits that there is no valid ground to stay the schedule to the by-election and as such the stay petition is liable to be turned down.

Heard the submission advanced by the learned Advocate for the applicant-petitioner and the respondents at length and perused the materials on record with great care and attention and seriousness as they deserve. The convoluted question of law pertaining to this case has meticulously been waded through in order to have a just decision.

The RPO, 1972 has clearly spelt out the legal ramification of the Election Petition, if the parties to the same leave the transitory world during the pendency of the Election Petition. For better appreciation and understanding, the relevant provisions of Article 69 and 70 of the RPO, 1972 are reproduced below:

“69. (1) An election petition shall abate on the death of a sole petitioner or of the sole survivor of several petitioners.

(2) Where an election petition abates under clause (1), notice of the abatement shall be given by the High Court Division to the Commission.

70. If, before the conclusion of the trial of an election petition, a respondent dies or gives notice in the prescribed form that he does not intend to contest the petition, and no respondent remains to contest the petition, the High Court Division shall, without any further hearing, or after giving such persons as it may think fit an opportunity of being heard, decide the case ex parte.”

Article 67 of the Constitution of the People’s Republic of Bangladesh has spelt out under what circumstances vacation of a seat of a Member of Parliament may occur, which runs as follows:

“67. (1) A member of Parliament shall vacate his seat –

(a) if he fails, within the period of ninety days from the date of the first meeting of Parliament after his election, to make and subscribe the oath or affirmation prescribed for a member of Parliament in the Third Schedule:

Provided that the Speaker may, before the expiration of that period, for good cause extend it;

(b) if he is absent from Parliament, without the leave of Parliament, for ninety consecutive sitting days;

(c) upon a dissolution of Parliament;

(d) if he has incurred a disqualification under clause (2) of article 66; or

(e) in the circumstances specified in article 70.

(2) A member of Parliament may resign his seat by writing under his hand addressed to the Speaker, and the seat shall become vacant when the writing is received by the Speaker or, if the office of Speaker is vacant or the Speaker is for any reason unable to perform his functions, by the Deputy Speaker.

Article 123(4) of the Constitution reads as follows:

(4) An election to fill the seat of a member of Parliament which falls vacant otherwise than by reason of the dissolution of Parliament shall be held within ninety days of the occurrence of the vacancy.

Provided that in a case where, in the opinion of the Chief Election Commissioner, it is not possible, for reasons of an act of God, to hold such election within the period specified in this clause, such election shall be held within ninety days following next after the last day of such period."

On meaningful reading of the aforesaid provisions, it transpires that the Election Petition did not *ipso facto* abate upon the demise of the

respondent who had been declared elected MP of the aforesaid constituency by way of gazette notification. Therefore, the Election Petition is still breathing and it has to be disposed of on merit. If during the pendency of the Election Petition, the Election is held and after conclusion of the hearing, the Election Petition is allowed, it shall entail serious prejudice to the petitioner and as such, the purpose of instituting the Election Petition shall be frustrated and, therefore, it must be held that the balance of convenience and inconvenience is in favour of the petitioner and against the other respondents including the Election Commission.

Upon thorough perusal of the materials on record, it transpires that the petitioner has a good arguable case and he will suffer irreparable loss and injury, if the Election is held and eventually, the petitioner obtains his cherished result after conclusion of trial of the Election Case.

The learned Advocate for the Election Commission submits that the Article 70 of the RPO is repugnant to the provisions of the Article 123(4) of the Constitution; and therefore, the Election Commission is bound to follow the procedure enshrined therein.

It is settled principle of law that the Court should presume the statutes enacted by the legislature to be constitutional unless it is declared by the competent Court as unconstitutional. The presumption of constitutionality of any law cannot readily be turned down.

Now let us see whether Article 70 of the RPO is repugnant to the provisions of the Article 123(4) of the Constitution. Article 123(4) of the Constitution of Bangladesh says “(4) *An election to fill the seat of a member of Parliament which falls vacant otherwise than by reason of the dissolution of Parliament shall be held within ninety days of the occurrence of the vacancy*”.

Article 70 of the RPO reproduced below:

“70. If, before the conclusion of the trial of an election petition, a respondent dies or gives notice in the prescribed form that he does not intend to contest the petition, and no respondent remains to contest the petition, the High Court Division shall, without any further hearing, or after giving such persons as it may think fit an opportunity of being heard, decide the case ex parte.”

Similar provision is available in India. Section 116 of the Indian Representation of the People Act, 1951 runs as follows:

“If before the conclusion of the trial of an election petition, the sole respondent dies or gives notice that he does not intend to oppose the petition or any of the respondents dies or gives such notice and there is no other respondent who is opposing the petition, the High Court shall cause notice of such event to be published in the Official Gazette, and thereupon any person who might have been a petitioner may, within fourteen days of such publication, apply to be substituted in place of such respondent to oppose the petition, and shall

be entitled to continue the proceedings upon such terms as the High Court may think fit.”

(Underlines supplied)

It may be noticed that both in Bangladesh and in India even if the sole respondent dies, the Election Petition does not abate.

The Supreme Court of India in ***Sheo Sadan Singh Vs. Mohan Lal Gautam, AIR 1969 SC 1024***, observed:

“From the above provisions it is seen that in an election petition, the contest is really between the constituency on the one side and the person or persons complained of on the other. Once the machinery of the Act is moved by a candidate or an elector, the carriage of the case does not entirely rest with the petitioner. The reason for the elaborate provisions noticed by us earlier is to ensure to the extent possible that the persons who offend the election law are not allowed to avoid the consequences of their misdeeds.”

I also believe that one of the reasons for which Article 70 of the RPO, 1972 exists, is to ensure that the persons who offend the election law must not avoid the consequences of their wrongdoings.

Now, if we read Article 123(4) of the Constitution together with Article 70 of the RPO, 1972 it will be clear that in the constituency where there is no dispute regarding the elected member of the parliament, if that seat falls vacant because of death of the MP or for any other reasons provided by the Constitution or existing laws of the

country, only then Election Commission is required to hold election in that constituency within ninety days of such vacancy. If there is dispute about the elected member of the constituency and to resolve the dispute any of the parties to the election has filed an Election Petition, that constituency does not fall vacant on the death of the disputed returned candidate. Because, the election process is not complete yet. The High Court Division may declare the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected. This power of the High Court Division clearly suggests that the election process does not become complete when an election petition is pending in the High Court Division and nowhere in the Constitution it has been ordained to the Election Commission to hold election in a constituency, where the previous election process is yet to be completed. In this connection power of the High Court Division under Article 62, 64 and 66 of the RPO, 1972 may profitably be mentioned below:

“62. (1) The High Court Division may, upon the conclusion of the trial of an election petition, make an order-

(a) dismissing the petition;

(b) declaring the election of the returned candidate to be void;

(c) declaring the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected; or

(d) declaring the election as a whole to be void.

(2) *Save as provided in clause (3), the decision of High Court Division on an election petition shall be final.*

(3) *Any person aggrieved by a decision of the High Court Division may, within thirty days of the announcement of the decision, appeal to the Appellate Division, if it grants leave to appeal.*

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64. The High Court Division shall declare the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected, if it is so claimed by the petitioner or any of the respondents and the High Court Division is satisfied that the petitioner or such other contesting candidate was entitled to be declared elected.

65. *The High Court Division shall declare the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reason of-*

(a) the failure of any person to comply with the provisions of this Order and the rules; or

(b) the prevalence of extensive corrupt or illegal practice at the election.”

(Underlines supplied)

From the above discussion I am constrained to hold that Article 70 of the RPO is not repugnant to the provisions of the Article 123(4) of the Constitution.

Article 123(4) of the Constitution is applicable to a seat where there is no dispute about the elected member of the constituency and where after conclusion of an election petition, if any, the High Court Division declares someone the elected member of the parliament from that constituency and after such declaration, the person takes oath and then dies.

In the above backdrop, if the Election is held afresh during the pendency of the Election Petition, it shall be meaningless and thereby the provisions of the Article 70 of the RPO, 1972 shall be fruitless and nugatory.

In the result, the by-election schedule of Constituency No. 81, Jenaidah-1, Shailkupa be stayed for a period of 21(twenty one) days.

To 12.05.2024 for submission of the written statement.

Let a copy of this order be transmitted to the Chief Election Commissioner for taking necessary measures.

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Md. Zakir Hossain, J