

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

WRIT PETITION NO. 5055 of 2024

IN THE MATTER OF:

An Application under Article 102 of the
Constitution of the Peoples' Republic of
Bangladesh.

AND

IN THE MATTER OF:

Md. Tajul Islam Taj

...Petitioner

-Versus-

Government of the People's Republic of
Bangladesh, represented by the Secretary,
Ministry of Local Government, Rural
Development and Co-operatives, Bangladesh
Secretariat, Ramna, Dhaka and others

...Respondents

Mr. Ahsanul Karim, Senior Advocate with
Mr. Kabir Iqbal Hossain, Advocate with
Mr. Md. Mustafizur Rahman, Advocate

...For the Petitioner

Mr. Md. Asaduzzaman, A.G with
Mr. Md. Akhtaruzzaman, D.A.G with
Mr. Md. Anichur Rahman Khan, D.A.G with
Mr. Sultan Mahmood Banna, A.A.G with
Mr. Mir Moniruzzaman, A.A.G with
Ms. Farhana Abedin, A.A.G with
Mr. Md. Kaium, A.A.G with
Mr. Md. Sarwar Alam Khan, A.A.G with
Ms. Nargis Parvin (Alija), A.A.G

...For the Respondent No. 1

Mr. Muhammad Khalequzzaman Bhuiyan, Advocate

...For the Respondent No. 2

Mr. Md. Khurshid Alam Khan, Senior Advocate with
Mr. Nurul Alam, Advocate

...For the Respondent No. 7

Heard on 29.01.2025, 04.02.2025, 05.02.2025, 09.02.2025,
16.02.2025, 29.04.2025 and 25.05.2025

Judgment delivered on 03.03.2026

Present:

Mr. Justice Md. Shohrowardi

The Hon'ble Chief Justice, by order dated 13.01.2025, sent the dissenting judgment for hearing and disposal, and accordingly, this Bench heard the matter and disposed of the Rule by this judgment.

The dictum, we will see at the end of the decision, relates to a pervasive philosophy of democratic election of local government to be held under the উপজেলা পরিষদ আইন, ১৯৯৮. Sir Winston Churchill inspired with unique words:

"At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper-no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point."

Benjamin Disraeli, statesman and former Prime Minister of the United Kingdom, said:

"I repeat...that all power is a trust that we are accountable for its exercise that, from the people and for the people all springs, and all must exist" (Vivien Grey, Bk.VI, ch.7).

"Be you ever so high, the Law is above you." The phrase "hands of the court are tight with handcuffs of law" implies that the court is bound by law and cannot deviate from it, just as someone restrained by handcuffs cannot freely move.

On an application filed by the petitioner Md Tajul Islam Taj, Rule was issued calling upon the respondents in the following terms:-

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned order dated 28.04.2024 (Annexure-F) passed by the 'Deputy Commissioner, Moulovibazar and Appeal Authority (respondent No. 4), 6th Upazilla Parishad General Election, 2024 in Appeal No. 01 of 2024 allowing the same and thereby setting aside the order dated 23.04.2024 (Annexure-D) passed by the Additional Deputy Commissioner (General), Moulovibazar and Returning Officer (Respondent No. 5), 6th Upazilla Parishad Election, 2024 (Moulovibazar Sadar) accepting the nomination paper of the petitioner for the post of Chairman of Moulovibazar Sadar Upazilla Parishad, Moulovibazar and thereafter publication of Public Notice being No. 05. 46. 5800 005. 13. 001. 24-310 dated 02.05.2024 (Annexure-H to the supplementary affidavit) published under the signature of Additional Deputy Commissioner (General) and Returning Officer, 6th Upazilla Parishad Election, 2024 (Rajnar, Moulovibazar Sadar), Moulovibazar declaring Mr. Md. Kamal Hossain (respondent No. 7) elected treating him uncontested should not be declared to have been done without any lawful authority and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Conspectus of fact.

The petitioner was the Chairman of No. 11 Mostafapur Union Parishad, Moulovibazar. He resigned from the post of Chairman of the said Union Parishad to contest the election for the post of Chairman of Moulovibazar Sadar Upazilla Parishad, Moulovibazar. He submitted his nomination paper through an online server for the post of Chairman of Moulovibazar Sadar Upazilla Parishad, following the notification contained in memo dated 02.04.2024 declaring the election schedule of the Moulovibazar Sadar Upazilla Parishad scheduled to be held on 21.05.2024. The petitioner had given a detailed description of four cases in the nomination paper. Out of four cases, he was acquitted in two cases and was discharged in one case. He also stated that Criminal Revision No. 1046 of 2011 is pending in the High Court Division regarding the case under Sections 392/411 of the Penal Code, 1860, as the case is not ready for hearing. As per the election schedule, 23.04.2024 was fixed for scrutiny of the nomination paper by the Returning Officer. After scrutiny of the nomination paper, the Additional Deputy Commissioner (General), Moulovibazar and Returning Officer, Moulovibazar Sadar, 6th Upazilla Election, 2024 (respondent No. 5) accepted the nomination paper of the petitioner holding that the information furnished in the online application, all original documents, reports submitted by the bank, and the information regarding the cases sent by the concerned police station have been verified and there is no other objection.

Respondent No. 7, Md. Kamal Hossain, another contesting candidate, for the same post, filed an appeal to the Deputy Commissioner, Moulovibazar, respondent No. 4, against the acceptance of the nomination paper of the petitioner, alleging that he was convicted in G.R Case No 122 of 2005 and sentenced to suffer imprisonment for 05(five) years by the Additional Chief Judicial Magistrate, Moulovibazar and the Additional Sessions Judge, Moulovibazar by judgment and order dated 13.04.2011 passed in Criminal Appeal No. 34 of 2011 affirmed the judgment and order of conviction and sentence passed by the trial Court against which the petitioner filed Criminal Revision No. 1046 of 2011 but the conviction was not stayed by the High Court Division for which he is disqualified to contest in the said election. He did not give any information regarding his conviction affirmed by the appellate Court. It has been further alleged that due to violation of the election rules, on 17.10.2022 from 1.00 pm to 5.00 pm, he was detained in the custody of the law-enforcing agencies, and the mobile Court awarded fine of Tk. 10,000(ten thousand).

The appeal filed by Md. Kamal Hossain, respondent No. 7, was heard by the appeal authority, which, by order dated 28.04.2024, allowed the appeal, setting aside the order of the Returning Officer holding that the petitioner, Md. Tajul Islam Taj although had given detailed information of the cases pending against him but he did not give any information regarding his conviction passed by Chief Judicial Magistrate, Moulovibazar in G.R No. 122 of 2005 and the judgment and order dated 13.04.2011

passed by Additional Sessions Judge, Moulovibazar in Criminal Appeal No. 34 of 2011 affirming the judgment and order of conviction and sentence passed by the trial Court. Although the fine has been stayed by the High Court Division in Criminal Revision No. 1046 of 2011 but the conviction was not stayed. Under Section 8(2)(gha) of the উপজেলা পরিষদ আইন, ১৯৯৮ if anyone is convicted for a minimum period of two years for the commission of the offenses of moral turpitude and unless five years have elapsed from the date of release, he is not eligible to be elected as Chairman.

The respondent No. 7 filed affidavit-in-opposition stating that the petitioner was convicted and sentenced to suffer imprisonment for five years under Section 392 of the Penal Code, 1860 which has been upheld by the appellate Court and Criminal Revision No. 1046 of 2011 is pending before High Court Division and the returning officer accepted the nomination paper of the petitioner violating the provision made in Section 8(2)(gha) of the উপজেলা পরিষদ আইন, ১৯৯৮. The offense under Section 392 of the Penal Code, 1860, attracts the definition of moral turpitude defined in Section 13 of the said Act. The High Court Division granted bail to the petitioner, but his conviction was not stayed. Therefore, the petitioner is disqualified under Section 8(2)(gha) of the said Act to be elected as Chairman of the Upazilla Parishad.

Respondent No. 2 filed affidavit-in-opposition stating that in the online nomination paper, the petitioner had given false and fabricated statements about the criminal cases pending against him, and respondent No. 7, a contesting candidate, also applied to the Returning Officer, Moulovibazar Sadar Upazilla, Moulovibazar stating that the criminal cases are pending against him and he is disqualified to contest in the 6th Upazilla Parishad General Election-2024 from Moulovibazar Sadar Upazilla, Moulovibazar under Sub-Section 2 of Section 8 of the উপজেলা পরিষদ আইন, ১৯৯৮ and the appeal authority legally passed the impugned order setting aside the order passed by the Returning Officer accepting the nomination paper of the petitioner.

Learned Senior Advocate Mr. Ahsanul Karim appearing along with learned Advocates Mr. Kabir Iqbal Hossain and Mr. Md. Mustafizur Rahman on behalf of the petitioner having placed the writ petition submits that under Rule 18 of the Upazilla Parishad Election Rule, 2013 candidate himself may prefer an appeal against the order of his cancellation of nomination paper or any Officer of the Bank or Financial Institution concerned may prefer an appeal challenging the order of acceptance of nomination paper, and another contesting candidate is not legally entitled to prefer an appeal against the acceptance of the nomination paper of another contesting candidate. The appeal filed by respondent No. 7 is non-est, and respondent No. 4 acted in bad faith, and the impugned order suffered from coram non-judice. The appeal authority illegally passed the impugned order, setting aside the order passed by the returning officer. He prayed for making the Rule absolute. He relied on the decisions made in the case of Pir Muhammad Farid Jan and others vs Colonisation Officer, reported in

17 DLR (SC) 18, BREB vs BERC reported in 29 BLC (AD) 1, Nur Muhammad & others vs. Moulvi Mainuddin Ahmed & others reported in 39 DLR (AD) 1.

Learned Senior Advocate Mr. Md. Khurshid Alam Khan appearing along with learned Advocate Mr. Nurul Alam on behalf of respondent No. 7 submits that by notification dated 02.04.2024 the Election Commission declared the Election Schedule of the Moulvibazar Sadar Upazilla Parishad for the post of Chairman, Vice Chairman and the Woman Vice Chairman to be held on 21.05.2024 and in the meantime, the date of election expired for which the writ petition has become infructuous. However, he conceded that the appeal filed by the contesting candidate against the acceptance of the nomination paper of another contesting candidate to the appeal authority is not maintainable in law. Because of the judgment passed by our Apex Court in the case of AKM Mayedul Islam vs Bangladesh Election Commission and others reported in 48 DLR (AD) 208, the petitioner is not disqualified to contest in the election for the post of Chairman of Upazilla Parishad since the criminal revision filed against the judgment and order of conviction passed by the appellate Court is pending in the High Court Division.

Learned Advocate Mr. Muhammad Khalequzzaman Bhuiyan, appearing on behalf of respondent No. 2 (Election Commission), submits that a contesting candidate is not entitled to file an appeal against the acceptance of the nomination paper of another contesting candidate to the appeal authority under the law. He conceded that the appeal filed by respondent No. 7 is not maintainable. However, he submits that a person convicted and sentenced to two years involving the offence of moral turpitude is disqualified to contest in the election for the post of Chairman of Upazilla Parishad. Since the petitioner was convicted under Section 392/411 of the Penal Code for 5(five) years, he is disqualified to contest in the election for the said post because of the provision made in Section 8 of the উপজেলা পরিষদ আইন, ১৯৯৮.

Learned Attorney General Mr. Md. Asaduzzaman, appearing on behalf of respondent No. 1, submits that the petitioner was convicted by the trial Court and he was sentenced to suffer rigorous imprisonment for five years, and the appeal filed by the petitioner against the judgment and order passed by the trial Court was dismissed, and he is a convict. Therefore, the petitioner is disqualified under Section 8(2)(gha) of the Upazila Parishad Ain, 1998 to be elected as Chairman of Upazila Parishad. He further submits that a candidate may prefer an appeal under Rule 18(1) of the উপজেলা পরিষদ নির্বাচন বিধিমালা, ২০১৩ against the order rejecting his nomination paper, and any Officer of the Bank or Financial Institution concerned may prefer an appeal challenging the order of acceptance of the nomination paper of a candidate to the appeal authority as defined in Rule 18(3) of the said Rules. He conceded that the appeal filed by a contesting candidate, respondent No. 7, against the acceptance of the

nomination paper of the petitioner, another contesting candidate, before the appeal authority is not maintainable. He relied on the decisions made in the case of Hussain Mohammad Ershad V. Zahedul Islam Khan and others reported in 21 BLD (AD) 142 and the case of Begum Khaleda Zia vs Bangladesh Election Commission and others reported in 25 BLC (2020) 196.

I have considered the submissions of the learned Senior Advocate Mr. Ahsanul Karim who appeared on behalf of the petitioner, the learned Senior Advocate Mr. Md. Khurshid Alam Khan who appeared on behalf of respondent No. 7, the learned Advocate Mr. Muhammad Khalequzzaman Bhuiyan who appeared on behalf of the respondent No. 2 (Election Commission) and the learned Attorney General Mr. Md. Asaduzzaman who appeared on behalf of the respondent No. 1. I have perused the orders passed by the respondent Nos. 4 and 5, the writ petition, affidavit-in-opposition filed on behalf of the respondents Nos. 2 and 7 and the records.

I have gone through the dissenting judgments passed by my brothers Mr. Md. Iqbal Kabir, J, and Mr. Md. Akhtaruzzaman, J. A careful reading of the judgment passed by both learned Judges reveals that there is a consensus regarding the maintainability of the appeal before the appeal authority. Learned brother Mr. Md. Iqbal Kabir, J held that.

“respondent No. 7, one of the contestants of the election, cannot challenge such acceptance in an appeal; therefore, the appeal was coram non-judice.”

Learned brother Mr. Md. Akhtaruzzaman, J held that;

“On consideration of the case laws cited by the learned Advocate of the petitioner as well as the materials on record, I am of the opinion that Election Appeal No. 01 of 2024 was preferred by a contesting candidate who does not have the mandate to prefer an appeal under the law, as such, the appeal is void and non-est. Since the appeal was void, all subsequent proceedings, including the impugned order passed by the Respondent No.4 appears to nullity and void ab initio.”

Although learned brother Mr. Md. Iqbal Kabir, J opined that the appeal was ‘coram non-judice’, but finally held that;

“Indeed the Revision shall not qualify the candidature of a person to contest in an election who is disqualified for the reason of conviction.”

Learned brother Mr. Md. Akhtaruzzaman, J held that;

“The petitioner was never convicted for an offence of moral turpitude. ... the appeal is the continuation of the original case. In our country, the provision of filing second appeal is not permitted. As such, an aggrieved party may prefer criminal revision against the order passed in first appeal. Criminal Revision No. 1046 of 2011 is not an exception to

this general rule. It is yet to finalize. The matter is pending before this Court.”

When dissenting judgments or opinions of two judges are referred to a third judge for consideration, he is completely free in resolving the differences as he thinks fit. He would consider those two opinions, and the judgment would follow the opinion of the third judge. After considering the opinions of both judges, the third judge shall express his view. He is under no obligation to accept the view of either of the judges.

The pivotal issues involves in the instant Rule, whether a convict whose revision is pending in the High Court Division against the judgment and order of conviction and sentence passed by the appellate Court affirming the judgment and order of conviction and sentence passed by the trial Court is qualified to be elected as Chairman of the Moulovibazar Sadar Upazilla Parishad, Moulovibazar under Section 8(2)(gha) of the উপজেলা পরিষদ আইন, ১৯৯৮ and whether a contesting candidate is legally competent to file appeal against the acceptance of nomination paper of another contesting candidate for the post of Chairman of the Upazilla Parishad.

At the time of hearing, so many micro points have been argued by both parties, and I have decided to adjudicate only the macro points relevant to the issues involved in the Rule.

It is an admitted fact that the petitioner, Md. Tajul Islam Taj, was convicted by the judgment and order dated 13.04.2011 passed by the Additional Chief Judicial Magistrate, Moulovibazar in G.R Case No 122 of 2005 under Section 392 of the Penal Code, 1860 and he was sentenced thereunder to suffer imprisonment for five years which has been affirmed by Additional Sessions Judge, Moulovibazar by the judgment and order dated 19.06.2011 passed in Criminal Appeal No. 34 of 2011 and Criminal Revision No. 1046 of 2011 filed by the petitioner against the said judgment is now pending in the High Court Division.

On perusal of the order dated 23.04.2024 (Annexure-D) passed by the Additional Deputy Commissioner (General), Moulovibazar and Returning Officer, Moulovibazar Sadar, 6th Upazilla Parishad Election, 2024, respondent No. 5, reveals that before acceptance of the nomination paper, the Returning Officer had scrutinized the original documents, report submitted by the bank and the information sent by local police station regarding the pendency of the cases. In the said order, it has been specifically stated that no one filed any objection regarding the nomination paper of the petitioner.

On perusal of the affidavit-in-opposition filed by respondent No. 2 (Annexure-2), it appears that after passing the order dated 23.04.2024 accepting the nomination of the petitioner, respondent No. 7 filed an objection on 09.05.2024 to the Returning Officer, 6th Upazilla Parishad General Election, 2024, Moulovibazar Sadar, Moulovibazar regarding the pendency of the cases against the petitioner. No objection

has been filed by respondent No. 7 to the returning officer before the acceptance of the nomination paper of the petitioner. Nothing has been stated by the respondent No. 7, Md. Kamal Hossain, in the affidavit-in-opposition as regards the said objection dated 09.05.2024 filed before the returning officer (respondent No. 5). The statement made by respondent No. 7 in the appeal dated 25.04.2024 to the effect that he filed an objection to the returning officer for cancellation of the nomination paper of the petitioner on the grounds of his conviction is an afterthought. Before the acceptance of the nomination paper of the petitioner, no one filed any objection to the returning officer, respondent No. 5, to reject the nomination paper of the petitioner.

At the time of filing nomination paper, in the affidavit sworn in by the petitioner, (Annexure-C), it has been stated that he was acquitted from two cases and was discharged from one case, and the Criminal Revision No. 1046 of 2011 is pending in the High Court Division. In the prescribed form of affidavit to be sworn by the intending candidate, there are five columns. Column No. 1 is the serial number, column No. 2 relates to the section of the Act under which the case has been filed, column No. 3 relates to the name of the Court which took the cognizance of the offence, column No. 4 relates to the case number, and column No. 5 relates to the stage of the pending case. There is no specific column in the prescribed form of affidavit whether the intending candidate is convicted in a criminal case. There is also no column in the form of affidavit regarding the result of the pending case, although, there is a column regarding the result of cases already disposed of against a candidate. No allegation has been made to the effect that the petitioner suppressed any case number in the affidavit sworn by him. The allegation against the petitioner is that he suppressed his conviction which is now pending before the High Court Division. Since there is no column in the said prescribed form of affidavit regarding the pending conviction of an intending candidate, I am of the view that nothing has been suppressed by the petitioner at the time of filing the nomination paper for the post of Chairman of Moulovibazar Sadar Upazilla, Moulovibazar.

Furthermore, it has been clearly stated in the affidavit (Annexure-C) sworn in by the petitioner that the Criminal Revision No. 1046 of 2011 is pending before the High Court Division. A prudent man ought to know that the pendency of a criminal revision indicates that the revision has been filed by the petitioner against the judgment and order passed by the appellate Court affirming the judgment and order of conviction and sentence passed by the trial Court. Therefore, I am of the view that nothing has been suppressed by the petitioner at the time of filing his nomination paper.

Now a question, whether a election dispute has been arisen after accepting the nomination paper of the petitioner by the respondent No. 5. In this respect, a remarkable comment regarding "Commencement of the Election" expressed in

Halsbury's Laws of England, page 237, 2nd edition, volume 12 is relevant which is stated in the following passage:-

"Although the first formal step in every election is the issue of the writ, the election is considered for some purposes to begin at an earlier date. It is a question of fact in each case when an election begins in such a way as to make the parties concerned responsible for breaches of election law, the test being whether the contest is "reasonably imminent". Neither the issue of the writ nor the publication of the notice of election can be looked to as fixing the date when an election begins from this point of view. Nor, again, does the nomination day afford any criterion. The election will usually begin at least earlier than the issue of the writ. The question when the election begins must be carefully distinguished from that as to when "the conduct and management of" an election may be said to begin. Again, the question as to when a particular person commences to be a candidate is a question to be considered in each case."

An election is a process in which voters cast their vote to choose a person or group of people to hold an official position. In the Oxford Advanced Learner's Dictionary, "the process of choosing a person or a group of people for a position, especially a political position, by voting" has been defined as an election. An election process starts from the publication of the election schedule and continues till the declaration of the election result.

The law relating to the election of the local government and Member of Parliament has been decided by our Apex Court, the superior Courts of this subcontinent, and the UK in the same line.

In *Wolverhampton New Water Works Co vs Hawkesford* reported in 1859 Law Suit (UK Case) 434=6 C.B (N.S) 336 at page 356, judgment dated 28.4.1859, (Willes, J) it has been held that;

"The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. Strictly speaking, it is the sole right of the Legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a special tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it."

In *Wolverhampton New Water Works Co (Supra)*, Willes, J emphasized to follow the statutory provision regarding disposal of election dispute and held that;

"There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it...The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

In the case of *A.V. Srinivaslu Reddy and others. vs. S. Kuppaswami Goundar* judgment dated 13.9.1927 reported in AIR 1928 Madras 253, it has been held that;

"the term 'election' may be taken to embrace the whole procedure whereby an 'elected member' is returned, whether or not it be found necessary to take a poll. This is the view taken by Jackson J. in the case above cited, and by Wallace J in *Sarvothama Rao v. Chairman, Municipal Council, Saidapet* A.I.R. 1923 Mad. 475 and I respectfully concur in it."

In *Mohinder Sing Gill and another vs the Chief Election Commission* reported in AIR 1978 (SC) 851 para 131, judgment dated 02.12.1977, the Supreme Court of India defined the term 'election' in the following terms;

"As already pointed out, it is well-settled that election covers the entire process from the issue of the notification under Section 14 to the declaration of the result under Section 66 of the Act. When a poll that has already taken place has been canceled and a fresh poll has been ordered, the order, therefore, with the amended date, is passed as an integral part of the electoral process. We are not concerned with the question whether the impugned order is right or wrong or invalid on any account. Even if it is a wrong order, it does not cease to be an order passed by a competent authority charged with the conduct of elections with the aim and object of completing the elections. Although that is not always decisive, the impugned order itself shows that it has been passed in the exercise of power under Article 324(1) and Section 153 of the Act. That is also the correct position. Such an order, relating, as it

does, to election within the width of the expression as interpreted by this Court, cannot be questioned except by an election petition under the Act.”

In the case of A.F.M Shah Alam vs. Mujibur Haq & others reported in 41 DLR (AD) (1989) 68 para 40 judgment dated 19.2.1989, our Apex Court (Badrul Haider Chowdhury, J.), defined the term “election” in the following language;

“The Court considered that 'Election covers the entire process from the issue of notification under Section 14 of the Representation of the People Act to the declaration of the result under Section 66 of the Act. When a poll that has already taken place has been canceled and a fresh poll has been ordered, the order, therefore, with the amended date, is passed as an integral part of the electoral process. It is an order during the course of the process of the election.”

In the case of N.P. Ponnuswami vs Returning Officer, Namakkal Constituency and others reported in 1952 SCR 218 judgment dated 21.1.1952(Fazle Ali, J), the Supreme Court of India made an elaborate discussion as to the jurisdiction of the Court regarding interfere with the order of the Returning Officer. The High Court dismissed the application on the ground that it had no jurisdiction to interfere with the order of the Returning Officer, and the Supreme Court affirmed the order of the High Court, holding that;

“it (is) clear that the word 'election' can be and has been appropriately used with reference to the entire process, which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article, would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court, at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.”

The rule laid down in Wolverhampton New Water Works (supra) was approved by the House of Lords in Neville v. London Express Newspaper Limited reported in [1919] AC 368 and has been reaffirmed by the Privy Council in Attorney-

General of Trinidad and Tobago vs. Gordon Grant & Co reported in 1935 AC 532 judgment dated 30.05.1935 (Sir Lancelot Sanderson, J). Considering the above decisions in S.P. Ponnuswami (Supra) it has been further held that;

“It will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.”

In N. Ponnuswami (Supra), the Supreme Court of India expressed the view to conclude the election process without interference and held that;

“(1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

(2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any court while the election is in progress.”

In N. Ponnuswami (Supra), it has been also held that;

“It is now well-recognised that the right or liability is created by a statute which gives a special remedy for enforcing it; the remedy provided by that statute only must be availed of.”

In Imtiaz Ahmed vs Ghulam Ali Khushi Mohammad reported in 15 D.L.R. (SC) 283, para 5 judgment dated 13.5.1963 (Fazle Akbar J.), the Supreme Court of Pakistan took the view that;

“Hence, ordinarily the Court in exercise of its writ jurisdiction declines to interfere in cases of election because it is desirable that decision on a matter of disputed election should as soon as possible become final and conclusive so that the Constitution of the Council or Legislature may be

distinctly and speedily known. There is another reason why the Court declines to enter into these questions because in such cases there are bound to be serious disputes on questions of facts which can not be properly decided in the writ jurisdictions. If it was to do so, it would enter into a field of investigation which is more appropriate for a Tribunal rather than for a Court exercising the prerogative of issuing writ. The Court has, therefore, avoided interfering with election disputes, although it cannot be said that the writ jurisdiction of the Court cannot at all be attracted in such cases. For instance, where actions are characterized as being done in bad faith, the exercise of public power may thus be called in question”.

In the case of Mohinder Singh Gill and another vs the Chief Election Commission reported in AIR 1978(SC) 851 para 122, judgment dated 02.12.1977, it has been further held that;

"If during the process of election, at an intermediate or final stage, the entire poll has been wrongly canceled and fresh poll has been wrongly ordered that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The petitioner, then, will have a remedy to question every step in the electoral process and every order that has been passed in the process of the election, including the countermanding of the earlier poll."

At the time of the hearing, the learned Advocates of the contending parties conceded that under Rule 18(1) of the উপজেলা পরিষদ নির্বাচন বিধিমালা, ২০১৩ only a candidate is legally entitled to file an appeal against the cancelation of his nomination paper, and another contesting candidate is not entitled to file an appeal against the acceptance of a nomination paper of another contesting candidate. In the affidavit-in-opposition filed by the respondent No. 2, it has been asserted that the petitioner is not qualified to contest in the election of Moulovibazar Sadar Upazilla election for the post of Chairman because of his conviction.

There are several decisions passed by our Apex Court as to the right of a candidate who is convicted by the Court regarding participating in the election. In the case of AFM Shah Alam vs Mujibul Haq and other reported in 41 DLR (AD) 68, judgment dated 19.02.1989, (Badrul Haider Chowdhury, J, as his Lordship was then), in which the election of Union Parishad held under the Local Government (Union Parishads) Ordinance, 1983 was considered. In the case of A.K.M. Mayeedul Islam Vs. Bangladesh Election Commission and others reported in 48 DLR (AD) 208, judgment dated 05.06.1996, our Apex Court (Mustafa Kamal, J, as his Lordship was then), considering the decisions made in the AFM Shah Alam (Supra) addressed the

issue ‘qualification of a candidate’ to participate in the general election of members of parliament. In the case of Hussain Mohammad Ershad V. Zahedul Islam Khan and others reported in 21 BLD(AD) 142, judgment dated 22.08.2001, the Hon’ble Appellate Division decided the issue ‘right of a convict whose sentence has been finally decided by our Apex Court’.

In the case of AFM Shah Alam vs Mujibul Haq reported in 41 DLR (AD) 68, para 49 judgment dated 19.2.1989 (Mr. Badrul Haider Chowdhury, J.) on consideration of all aspects of the election matter, the Hon’ble Appellate Division has held that;

“(1) Under rule 70 read with Section 24 of the Ordinance, the Election Commission has been vested with plenary, supervisory and discretionary jurisdiction to oversee that an election is conducted honestly, justly and fairly and in accordance with the provisions of the Ordinance and the Rules.

(2) In so doing it may pass any order, unless specifically barred, including an order for re-poll, acceptance/ consolidation of result, review, etc. on the basis of materials before it. The observance of the rule of audi alteram partem, though desirable in some circumstances, is not an invariable pre-condition for the validity of such order.

(3) The jurisdiction of the High Court Division under Article 102 of the Constitution cannot be invoked except on the very limited ground of total absence of jurisdiction (coram non-judice) or malice in law to challenge any step in the process of the election, including an order passed by the Election Commission under Rule 70 because:

(a) the real and larger issue of completion of free and fair election with rigorous promptitude for timely emergence and functioning of elective bodies must take precedence over settlement of private disputes.

(b) all election disputes must wait pending completion of the election and be taken to the special forum created under the Election Law itself for their resolution.

(c) almost invariably there will arise dispute over facts which cannot and should not be decided in an extraordinary and summary jurisdiction of the writ.”

In the case of A K M Mayeedul Islam vs Bangladesh Election Commission and others reported in 48 DLR (AD) (1996) page 208 para 7 judgment dated 05.06.1996 Hon’ble Appellate Division (Mr. Mustafa Kamal J. as his Lordship was then)

considering the case of AFM Shah Alam vs. Majibul Huq and others, reported in 41 DLR (AD) 68 reiterated the view that;

“this Court has in very clear terms laid down that in local government elections no step in the election process can be challenged under Article 102 of the Constitution in the High Court Division unless the impugned order passed by the authority concerned is coram non-judice or is afflicted with malice in law. This decision of ours is equally, if not more forcefully applicable to parliamentary and Presidential elections held under the Constitution. The petitioner has neither alleged coram non-judice nor malice in law in the writ petition. Apparently, the Returning Officer, acting within his jurisdiction, took the view that because of the pendency of appeals against several orders of conviction and sentence, respondent No. 3 will not be disqualified from contesting the ensuing election, because the orders of conviction have not attained finality. It cannot be said that he had no authority to so decide, and it also cannot be said that his decision suffers from malice in law. If an alternative interpretation is possible with regard to the issue in question, namely, the effect of pendency of appeals against the orders of conviction and sentence, that will be an election dispute for the Election Tribunal to decide after the election if the petitioner or any affected candidate elects to prefer an election petition to the Tribunal. The High Court Division ought not to have pre-judged the issue under Article 102 of the Constitution and ought not to have expressed any opinion on the issue. It ought to have rejected the writ petition in limine on the ground of maintainability, as no question of coram non-judice or malice in law was raised in the writ petition.”

In the case of Hussain Mohammad Ershad V. Zahedul Islam Khan and others reported in 21 BLD(AD) 142 judgment dated 22.08.2001, the Appellate Division has held that;

“So after the conviction and sentence as aforesaid, which has been upheld up to the Appellate Division, there is nothing to be decided by the Election Commission. The vacation of the seat is automatic. The petitioner cannot hold the office after he has been sentenced to suffer imprisonment for over two years, which has been upheld by the Appellate Division.”

Subsequently, in the case of Begum Khaleda Zia Vs. Bangladesh Election Commission and Ors. reported in 25BLC (2020) 196, the High Court Division passed a dissenting judgment regarding the right of Begum Khaleda Zia to contest in the general election for member of parliament. In the said case, by order dated 11.12.2018, Mr. Syed Refaat Ahmed, J, as his Lordship was then, issued Rule Nisi with an order staying operation of the impugned order of the Election Commission

affirming the order passed by the returning officer cancelling the nomination paper of Begum Khaleda Zia, on the ground that;

“The moot issue arising in this case therefore is of the substantive status and effect of an order of conviction and sentence during the pendency of an appeal. The Petitioner's learned Advocate, Mr. A.J. Mohammad Ali has argued on the 48 DLR Case as authority for the view that an electoral disqualification stemming from a conviction and sentence would only mature become final either on a final disposal of an appeal or an expiration of the limitation period of filing of appeal. Mr. Mahbubey Alam appearing for the Election Commission has gone on to contradict that position. Mr. Alams assertion on the contrary has been that the 48 DLR Case remains authority instead for a limited exercise of authority in judicial review by a constitutional court in matters of election disputes. He has also cited the judgment in Zahedul Islam Khan vs. HM Ershad reported in 6 BLC 2001, 301 as upheld in Hussain Mohammad Ershad vs. Zahidul Islam Khan and others reported in 21 BLD (AD) 2001, 142 as indicative of a disqualification attaching immediately upon conviction in the context of Article 66(2) (d) of the Constitution.”

Mr. Md. Iqbal Kabir, J, summarily rejected the writ petition. After that, the matter was sent by the Hon’ble Chief Justice to the Third Judge, Mr. J.B.M. Hasan, J. After hearing, the learned Third Judge, by judgment and order dated 18.12.2018, summarily rejected the writ petition, holding that;

“Regard being had to the above so far as the conviction and sentence awarded to the petitioner in Special Case No. 17 of 2017 (3 of 2010) and affirmed by the judgment and order of the High Court Division is concerned, the petitioner has no scope even to enter into any debate relating to the effect of pendency of appeal against the orders of conviction and sentence inasmuch as in the eye of law there is no appeal against the same as yet before the Appellate Division and so petitioner's conviction and sentence remains confirmed without any appeal and as such on this score as well as the petitioner is a disqualified person in the ensuing election in accordance with article 66(2)(d) of the Constitution.”

At this stage, it is relevant here to rely on Article 111 of the Constitution of the People’s Republic of Bangladesh which states that;

“The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.”

Because of the provision made in Article 111 of the Constitution of the People's Republic of Bangladesh, the High Court Division is bound to follow the judgment law declared by our Apex Court. The Appellate Division decided the AFM Shah Alam's case (Supra), considering Section 7(2)(d) of the Local Government (Union Parishads) Ordinance, 1983. The qualification of a candidate to contest in the election for the post of Chairman of the Upazilla Parishad is stated in Section 8 of the উপজেলা পরিষদ আইন, ১৯৯৮. The Election Commission decided the candidature of the petitioner considering the provision made in Section 8(2)(gha) of the উপজেলা পরিষদ আইন, ১৯৯৮. On careful reading of both the provisions of the said Acts in juxtaposition reveals that Section 8(2)(gha) of the উপজেলা পরিষদ আইন, ১৯৯৮ is the verbatim of section 7(2)(d) of the Local Government (Union Parishads) Ordinance, 1983. In the case of A.K.M. Mayeedul Islam vs. Bangladesh Election Commission and others, reported in 48 DLR (AD) 208 our Apex Court echoes the view made in AFM Shah Alam's case (Supra). Therefore, the law declared by our Apex Court in the case of AFM Shah Alam vs Mujibul Haq, reported in 41 DLR (AD) 68 and A.K.M. Mayeedul Islam vs. Bangladesh Election Commission and others reported in 48 DLR (AD) 208 are binding on this Court and equally applicable in the instant case. There is no scope to depart from the decisions made in the case of AFM Shah Alam (Supra) and A.K.M. Mayeedul Islam (Supra).

A candidate who's conviction is finally decided by the Court affirming the judgment and order of conviction and sentence passed by the trial Court for the offence moral turpitude, for two years incurred disqualification to contest in the election for the post of Chairman of Upazilla Parishad, and his disqualification shall continue till 5(five) years from the date of serving out his sentence and a candidate who's conviction is sub-judice in any Court, is a qualified candidate under Section 8(1) of the উপজেলা পরিষদ আইন, ১৯৯৮ to contest in the election of Upazilla Parishad for the post of a Chairman. In the instant case, the criminal revision filed by the petitioner is pending in the High Court Division and has not been finally decided by the Court. Therefore, the petitioner is a qualified candidate under Section 8(1) of the said Act to contest in the election for the post of Chairman of Moulovibazar Sadar Upazilla, Moulovibazar and he is not disqualified under Section 8(2) (gha) of the said Act to be elected as Chairman of the Moulovibazar Sadar Upazilla Parishad, Moulovibazar.

In the case of Hussain Mohammad Ershad (Supra), the conviction and sentence of Hussain Mohammad Ershad was upheld by the Appellate Division. In the instant case, against the judgment and order of conviction and sentence passed by the appellate court, a criminal revision is pending before this Court. Therefore, the fact of the instant case is distinguishable from the fact of Hussain Mohammad Ershad (Supra).

Exercising jurisdiction under Article 102 of the Constitution this Court ought not to pre-judge the conviction of any candidate that has not attained finality and would not express any opinion on the pending issue. Pendency of a criminal revision filed against the judgment and order of conviction and sentence will be an election dispute for the Election Tribunal to decide after the election. Any affected candidate may prefer an election petition to the Election Tribunal constituted under Section 22(ka)(2) of the উপজেলা পরিষদ আইন, ১৯৯৮ after the election.

It is found that the respondent No. 7, another contesting candidate, filed the appeal before the appeal authority against the acceptance of the nomination paper of the petitioner, another contesting candidate, for the post of Chairman of Moulovibazar Sadar Upazilla, Moulovibazar. A candidate for the post of Chairman of the Upazilla Parishad is legally entitled to prefer appeal under Rule 18(1) of the উপজেলা পরিষদ নির্বাচন বিধিমালা, ২০১৩ against an order passed by the Returning Officer under Rule 17(4) of the said Rules cancelling his nomination paper, and an officer of any bank or financial institute if aggrieved by an order passed under Sub-Rule (4) of Rule 17 accepting the nomination paper, the said officer may prefer appeal under Rule 18(2) of the said Rules within next 3(three) days before the appeal authority. There is no provision in উপজেলা পরিষদ নির্বাচন বিধিমালা, ২০১৩ or in any other law, allowing a contesting candidate to file an appeal against the acceptance of the nomination paper of another contesting candidate. I am of the view that the respondent No. 7 was not legally entitled to file an appeal before the appeal authority against the acceptance of the nomination paper of the petitioner, and the appeal authority illegally admitted and allowed the appeal.

In this respect, reference may be made in the case of Pir Muhammad Farid Jan & others vs Colonisation Officer reported in 17 DLR (SC) 181 para 5, judgment dated 15.02.1965, in which it has been held that;

“An appeal is the creature of a statute and must be confined within the limits imposed by the relevant statute. Under section 203 of the Act, an appeal from an order passed by a “ Revenue Officer” under the Act would lie to his immediate superior, but the Revenue Officer who heard it, was clearly not in that position above the Assistant Revenue Officer, since both of them were invested with powers of a Collector. The order of the Revenue Officer being itself a nullity, it was inapt to make it the subject of an appeal, without canvassing the point of jurisdiction of the officer hearing the first appeal.”

In the case of Kh. Ehteshamuddin Ahmed @ Iqbal Vs. Bangladesh and others reported in 33 DLR (AD) 154 para 31 judgment dated 27.03.1980, the Hon'ble Appellate Division, considering the principle settled by the Judicial Committee of the Privy Council in the famous case of Secretary of State v. Mask reported in AIR 1940 PC 105, has held that;

“This is a well-known proposition of law which this Court has yet no occasion to depart from or express any disagreement with it. The point, however, is whether any bar of suit imposed by the legislature can be disregarded to make such suit, which is so barred, maintainable in order to try an issue on mala fide alleged in the plaint. It may, at least in some cases, be seen that hardship, or even injustice, may result if, in spite of evident truth in the allegation of mala fide, the suit is held to be not maintainable because there is a bar against such suit in the statute concerned. but, seeker of justice in a court of law should become aware, if not already so, that justice is done according to law. A Judge may have sympathy for a litigant's suffering due to technicalities of law made by the legislature, still, in view of the express legislative intention, he must follow the “hands-off doctrine”. Otherwise, chaos and anarchy would prevail, leading to all sorts of complexities and confusion. Whatever the legislature says, unless it is contrary to the Constitution, its mandate, either express or implied, has been obeyed by the Court.”

In the case of *Chiranjilal Shrilal Goenka v. Jasjit Singh and others* reported in (1993) 2 SCC 507, (judgment dated 18.03.1993) the Supreme Court of India dealt with the issue “jurisdiction of the Court” and decided the issue in the following language;

“We agree with Mr Chidambaram that the applicant had consented to refer the dispute for arbitration of dispute in the pending probate proceedings, but consent cannot confer jurisdiction nor an estoppel against statute. The other legatees in the will were not parties to it. In *A.R. Antulay v. R.S. Nayak* [(1988) 2 SCC 602 when a Constitution Bench directed the High Court Judge to try the offences under the Prevention of Corruption Act with which the petitioner therein was charged and the trial was being proceeded with, he questioned by way of writ petition the jurisdiction of this Court to give such a direction. A Bench of seven judges per majority construed the meaning of the word "jurisdiction. Mukharji, J. as he then was, speaking per himself, Oza and Natarajan, JJ. held that the power to create or enlarge jurisdiction is legislative in character. So also the power to confer a right of appeal or to take away a right of appeal. The Parliament alone can do it by law, and not the court, whether superior or inferior, or both combined, can enlarge the jurisdiction of a court and divest a person of his rights of appeal or revision. Ranganath Mishra, J. as he then was, held that

jurisdiction comes solely from the law of the land and cannot be exercised otherwise. In this country, jurisdiction can be exercised only when provided for either in the Constitution or in the laws made by the legislature. Jurisdiction is thus the authority or power of the court to deal with a matter and make an order carrying binding force in the facts. Oza, J., supplementing the question held that the jurisdiction to try a case could only be conferred by law enacted by the legislature. The Supreme Court could not confer jurisdiction if it does not exist in law. Ray, J. held that the Court cannot confer a jurisdiction on itself which is not provided in the law. ... Thus, this Court laid down as an authoritative proposition of law that the jurisdiction could be conferred by statute, and this Court cannot confer jurisdiction or authority on a tribunal. ... It is settled law that a decree passed by a court without jurisdiction on the subject matter or on the grounds on which the decree was made, which goes to the root of its jurisdiction or lacks inherent jurisdiction, is a *corum non jndice*. A decree passed by such a court is a nullity and is *non est*.

In the case of *Jatiya Party Versus Election Commission for Bangladesh and others* reported in 10 BLT (AD) 4 judgment dated 29.11.2000, it has been held that;

“What we find is that the Chief Election Commissioner being unwell he went on leave for treatment abroad and he verbally nominated a member to act as Acting Chief Election Commissioner. As a matter of fact this may be at best said to be a direction of the Chief Election Commissioner to perform functions of the office in his absence as Acting Chief Election Commissioner, but for exercising and performing powers or functions under this Order he must get authorisation from the Commission itself, otherwise his action under the Order will be *corum non jndice* and without jurisdiction.”

In the case of *Bangladesh Rural Electrification Board (BREB) vs Bangladesh Energy Regulatory Commission (BERC)* reported in 29 BLC (AD) 1 judgment dated 09.03.2023, the Hon’ble Appellate Division has held that;

“Thus, it is the settled principle of law laid down the Apex Court of various jurisdictions including our jurisdiction by a long line of decisions that the question of jurisdiction cannot be conferred to a court/tribunal, if it is found that the court/tribunal has no jurisdiction to try the suit/case as the case may be.”

It is settled proposition that jurisdiction conferred upon the Court by the constitution or statute, it cannot be conferred by consent or acquiescence, or waiver where there is none, nor can it be ousted where it is. Jurisdiction confer means that the

Court is legally empowered to hear and decide the case. The judgment and order or decree passed by the Court having no jurisdiction is a nullity and non-est.

The proposition discussed hereinabove clearly speaks that the appeal filed by the respondent No. 7 is non-est and the impugned order dated 28.04.2024 (Annexure-F) passed by the appeal authority suffers from coram non-judice.

I find the merit in the Rule.

In the result, the Rule is made absolute.

The impugned order dated 28.04.2024 (Annexure-F), passed by the Deputy Commissioner, Moulovibazar, and Appeal Authority, respondent No. 4, in Appeal No. 01 of 2024, setting aside the order dated 23.04.2024 (Annexure D) passed by the Additional Deputy Commissioner, Moulovibazar and Returning Officer (Respondent No. 5) is hereby set aside, and the order passed by the Respondent No. 5 accepting the nomination paper of the petitioner is affirmed. The public notice dated 02.05.2024 (Annexure-H) issued under the signature of the respondent No. 5 declaring the respondent No. 7 as elected Chairman of the Moulovibazar Sadar Upazilla uncontested is hereby set aside.

However, there will be no order as to costs.