

IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT:

Mr. Justice Syed Refaat Ahmed

Chief Justice

Mr. Justice Md. Ashfaqul Islam

Mr. Justice Zubayer Rahman Chowdhury

Mr. Justice Md. Rezaul Haque

Mr. Justice S.M. Emdadul Hoque

CIVIL APPEAL NO.91 OF 2024.

WITH

CIVIL REVIEW PETITION NOS.126-127 OF 2023

AND

CIVIL REVIEW PETITION NOS.144 AND 235 OF 2023

(From the judgment and order dated 01.09.2022 passed by the Appellate Division in Civil Appeal Nos.21-24 of 2011.)

Afroza Khanam and others	:	<u>Appellants.</u> (In C.A.No.91 of 2024)
Md. Abdul Alim and others		<u>Petitioners</u> (In C.R.P. No.126/23)
Mohammad Shahinul Islam Chowdhury		<u>Petitioners</u> (In C.R.P. No.127/23)
Md. Nurul Islam and others		<u>Petitioners</u> (In C.R.P. No.144/23)
Md. Kamal Uddin		<u>Petitioner</u> (In C.R.P. No.235/23)

=Versus=

Bangladesh, represented by the Cabinet Secretary, Government of Bangladesh and others.	:	<u>Respondents.</u> (In all the cases)
For the Appellants/ Petitioners (In all the cases)	:	Mr. Probir Neogi, Senior Advocate with Mr. Md. Salah Uddin Dolon, Senior Advocate, Mr. Ruhul Quddus, Senior Advocate, Ms. Anita Gazi Rahman, Senior Advocate and Mr. Suvro Chakravorty, Advocate instructed by Mr. Md. Zahirul Islam, Advocate-on-Record, Mr. Md.Zainul Abedin, Advocate-on-Record and Mr. Bivash Chandra Biswas, Advocate-on-Record
For the Respondent No. 1. (In all the cases)	:	Mr. Mohammad Aneek R Haque, Additional Attorney-General with Mr. Md. Zahirul Islam (Summon), Deputy Attorney-General and Ms., Fatima Akhter, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.
For the Respondent No.2: (In all the cases)		Mr. Muhammad Khalequzzaman Bhuiyan, Advocate, instructed by Mr. Mohammad Abdul Hai, Advocate-on-Record.

For the Respondent Not represented
Nos.3-6:

(In C.A. No.91/2024)

For the Respondent No.3: Not represented

(In C.R.P. No.126-127,
144 & 235/2023)

*Date of hearing : 18.02.2025, 19.02.2025 and
20.02.2025*

Date of judgment : 25.02.2025

J U D G M E N T

Zubayer Rahman Chowdhury, J: Civil Appeal No.91 of 2024, Civil Review Petition Nos.126-127 of 2023 and Civil Review Petition Nos.144 and 235, both of 2023, are directed against the judgment and order dated 01.09.2022 passed by this Division in Civil Appeal Nos.21-24 of 2011.

Briefly stated, facts relevant for disposal of this appeal and the civil review petitions are that the appellants/petitioners filed Administration Tribunal Case No. 166 of 2007 and Administration Tribunal Case No.22 of 2008 under section 4(2) of the Administrative Tribunal Act, 1980 seeking a declaration that the order of termination of their service, as contained in the order dated 06.09.2007, was issued without lawful authority and further praying that they should be deemed to have continued in service with all attending benefits, stating, inter alia, that pursuant to an advertisement published in the

daily Ittefaqe on 23.09.2003, the appellants/petitioners, having the requisite qualifications, applied for being appointed in the post of Upazilla/ Thana Election Officers and they qualified in both the written and viva voice examination.

In the notification dated 04.09.2005, issued by the Election Commission, Dhaka, it was stipulated that the appellants/petitioners shall be on probation for a period of two years and that a Foundation training would be provided to them at Bangladesh Public Administration Training Centre, Savar, Dhaka (briefly, BPATC). In addition to the Foundation training, the appellants/petitioners would also be given other training. However, on account of the urgency in holding the National Election in 2006, the appellants/petitioners were not given any Foundation training. Instead, they were asked to attend two training courses, each of three days duration, which they completed successfully and obtained certificates. Thereafter, the appellants/petitioners were posted in different Thanas/Upazillas as Election Officers in November, 2005.

During the period of probation, a test was arranged for the appellants/petitioners at the Institute of Business Administration (briefly,

IBA), University of Dhaka through the MCQ (Multiple Choice Questions) method in which they duly participated, but the result was never published. However, by notification dated 03.09.2007, the appellants/ petitioners were terminated from service on the ground that their performance during the probationary period was not satisfactory. Hence, the cases before the Administrative Tribunal.

The present respondents contested the cases by filing written statements contending that the appellants/petitioners' performance during the probationary period was unsatisfactory and, on that count, their service had been terminated by the Election Commission.

By the judgment and order dated 23.03.2009, the Administrative Tribunal No.1, Dhaka dismissed A.T. Case No.22 of 2008 and A. T. Case No.166 of 2007. Being aggrieved thereby, the appellants/ petitioners preferred A.A.T. Case Nos.134 of 2009, 139 of 2009, 143 of 2009 and 144 of 2009 before the Administrative Appellate Tribunal, Dhaka and, by judgment and order dated 12.04.2010, the appeals were allowed on contest. Being aggrieved thereby, the respondent no.1, as petitioner, preferred Civil Petition for Leave to Appeal No.1302 of 2010, 1303 of 2010, 1304 of 2010 and

1305 of 2010 before this Division and, upon hearing, all the appeals were allowed by judgment and order dated 01.09.2022, which led to the filing of Civil Review Petition no.143 of 2023, Civil Review Petition nos.126-127 of 2023 and Civil Review Petition nos. 235 and 144, both of 2023.

Leave was granted in Civil Review Petition no.143 of 2023 and subsequently Civil Review Petition nos. 126-127 of 2023, Civil Review Petition nos. 144 and 235, both of 2023, were tagged for hearing along with the instant Civil Appeal.

Mr. Probir Neogi, the learned Senior Advocate, appearing along with Mr. Md. Salah Uddin Dolon and Mr.Md. Ruhul Quddus, the learned Senior Advocates on behalf of the appellants/petitioners, submits that pursuant to the recruitment advertisement dated 13.09.2003, the appellants/petitioners were appointed in service through a rigorous selection process comprising of written and viva-voice examination and the Notification regarding their appointment was published in the Bangladesh Gazette on 15.09.2005, following which their training commenced on 09.11.2005. He further contends that after the change of Government in 2006, the Election Commission, in an unprecedented

and arbitrary manner, compelled the appellants/petitioners to sit for a test conducted by IBA on 18.05.2007, which was not only beyond the terms and conditions stipulated in the recruitment advertisement, it also lacked the backing of any Rules. However, although the result of the said examination was never published, the Election Commission terminated the services of the appellants/petitioners on 06.09.2007, just one day before completion of their probationary period.

Mr. Neogi submits that pursuant to appellants/petitioners' appeal being allowed by the Administrative Appellate Tribunal, Dhaka, the Election Commission decided not to prefer any appeal against the judgment and order dated 12.04.2010 due to absence of sufficient grounds of appeal, as evident from the Memo dated 22.06.2010, and reinstated the appellants/petitioners in service. Accordingly, a notification was published in the Bangladesh Gazette on 25.05.2010 cancelling the previous notification dated 03.09.2007 terminating their service and, consequent upon their reinstatement in service, posting them as Upazilla/Thana Election Officers in different Districts throughout the country.

The learned Senior Counsel submits that after the appellants/petitioners had been reinstated in

service, one Matiur Rahman Howlader, a total stranger, filed Writ Petition No.4081 of 2010 challenging the appellants/petitioners reinstatement in service, consequent upon which a Division Bench of the High Court Division issued Rule on 20.05.2010 along with a direction upon the Election Commission not to allow the appellants/petitioners to join in service for a period of one month. However, the said Rule was discharged for non-prosecution on 22.07.2010.

The learned Senior Counsel submits that notwithstanding the fact that the aforesaid writ petition was non-prosecuted by the said petitioner, the very entertainment of the same by the High Court Division was clearly without lawful authority in view of Article 117(2) of the Constitution which imposes an embargo upon the High Court Division from entertaining any proceeding or passing any order in respect of any matter falling within the jurisdiction of the Administrative Tribunal. Yet, in clear violation of the Constitution, the learned Judge of the High Court Division, for exceeding his jurisdiction and authority, not only issued a Rule in the matter, but also directed the Election Commission not to allow the present appellants/petitioners to join in their respective posts for a period of one

month. Taking advantage of this interim order, the Government, through the Cabinet Secretary, filed Civil Petition for Leave to Appeal Nos.1302 of 2010, 1303 of 2010, 1304 of 2010 and 1305 of 2010 before this Division.

The learned Senior Counsel contends that this Division failed to consider that neither the Government nor the Cabinet Division is an agent or supervising body of the Election Commission, which is an independent constitutional body, and hence, not competent to file the appeals in question. According to the learned Counsel, it is only the Election Commission that is competent to do so. Nevertheless, in gross violation of the Rules of Business, the Cabinet Secretary proceeded to file the appeals at the dictate of the Government.

On the other hand, the learned Additional Attorney-General appearing on behalf of respondent no.1 and Mr. Muhammad Khalequzzaman Bhuiyan, the learned Advocate appearing on behalf of respondent no.2 made their respective submissions in support of the impugned judgment and order dated 01.09.2022 passed by this Division.

Given the factual matrix discussed hereinabove, this Division is now called upon to decide two important issues; firstly, the issue of locus standi and secondly, the authority of the

Government to override the decision of an independent statutory body, namely, the Election Commission.

In the instant appeal, leave was granted on the following ground only, namely:

“Because, the Hon’ble Court failed to consider that the Election Commission, being an independent constitutional body, accepted the order of reinstatement of the petitioners in service and duly acted upon the same by issuing orders of reinstatement and did not prefer any appeal before this Hon’ble Division and therefore, the purported appeal by the Government, which is not an agent or supervising body of the Election Commission, was not a competent appeal in the eye of law and on that count, the impugned judgment and order dated 01.09.2022 is liable to be set aside.”

At the outset, let us take up the issue of locus standi. Admittedly, Civil Appeal nos.21-24 of 2011 was preferred by the Secretary, Cabinet Division, Government of Bangladesh. Under the Rules of Business, the duties and functions of the Cabinet Division have been detailed as under:

“কার্যাবলি

- ১। মন্ত্রিসভা ও কমিটিসমূহের সাচিবিক সহায়তা প্রদান।
- ২। মন্ত্রিসভা ও কমিটিসমূহের কাগজ ও দলিলপত্র এবং সিদ্ধান্তসমূহের হেফাজত।
- ৩। মন্ত্রিসভা ও কমিটির সিদ্ধান্তসমূহের অগ্রগতি ও বাস্তবায়ন পর্যালোচনা।
- ৪। রাষ্ট্রপতি, প্রধানমন্ত্রী ও অন্যান্য মন্ত্রীর পারিতোষিক ও বিশেষ অধিকার।
- ৫। রাষ্ট্রপতির দায়মুক্তি।
- ৬। রাষ্ট্রপতির শপথ গ্রহণ পরিচালনা এবং রাষ্ট্রপতির পদত্যাগ।
- ৭। কার্যবিধিমালা এবং মন্ত্রণালয় ও বিভাগসমূহের মধ্যে কার্যবন্টন।

- ৮। তোষাখানা।
- ৯। পতাকা বিধিমালা, জাতীয় সঙ্গীত বিধিমালা এবং জাতীয় প্রতীক বিধিমালা।
- ১০। প্রধানমন্ত্রী, মন্ত্রী, প্রতিমন্ত্রী ও উপমন্ত্রীগণের নিয়োগ ও পদত্যাগ এবং তাঁদের শপথ পরিচালনা।
- ১১। ভ্রমভাষা ও দৈনিক ভাষা ব্যতীত প্রধানমন্ত্রী, মন্ত্রী, প্রতিমন্ত্রী ও উপমন্ত্রীগণ সম্পর্কিত সাধারণ সেবা।
- ১১ক। দুর্নীতি দমন কমিশন সংক্রান্ত সকল বিষয়।
- ১২। যুদ্ধ ঘোষণা।
- ১৩। সচিব কমিটি ও উপ-কমিটিসমূহ।
- ১৪। উপজেলা, জেলা ও বিভাগসমূহের সাধারণ প্রশাসন।
- ১৫। পদমানক্রম।
- ১৬। ফৌজদারী বিচার পরিবীক্ষণ।
- ১৭। আন্তর্জাতিক পুরস্কারের জন্য মনোনয়ন প্রদান।
- ১৮। প্রশাসনিক সংস্কার/পুনর্গঠন সংক্রান্ত জাতীয় বাস্তবায়ন কমিটি (নিকার)।
- ১৯। এ বিভাগের আর্থিক বিষয়সহ প্রশাসন।
- ২০। এ বিভাগের অধঃস্তন দপ্তর ও সংস্থাসমূহের প্রশাসন ও তত্ত্বাবধান।
- ২১। আন্তর্জাতিক সংস্থাসমূহের সাথে লিয়াজেঁ এবং এই বিভাগে বরাদ্দকৃত বিষয়সমূহ সম্পর্কে অন্যান্য দেশ ও বিশ্বসংস্থার সাথে চুক্তি ও সমঝোতা সম্পর্কিত বিষয়সমূহ।
- ২২। এ বিভাগে বরাদ্দকৃত বিষয়ে সকল আইন।
- ২৩। এ বিভাগে বরাদ্দকৃত যে কোন বিষয়ে তদন্ত ও পরিসংখ্যান।
- ২৪। আদালতে গৃহীত ফি ব্যতীত এ বিভাগে বরাদ্দকৃত যে কোন বিষয় সম্পর্কিত ফি।
- ২৫। জাতীয় পুরস্কার এবং পুরস্কার বিতরণী অনুষ্ঠানসমূহ।
- ২৬। আন্তঃ মন্ত্রণালয় সমন্বয় সাধন।”

On a careful perusal of the tasks/duties enumerated above, it is abundantly clear that the Cabinet Secretary, acting on behalf of the Government (or in this case, at the behest of the

Government, to be precise), did not have any authority, let alone any duty, to file the Civil Appeals in question. The right to file an appeal is an important legal right conferred upon a litigant, which can neither be assumed nor inferred unless expressly provided in the concerned statute or Rules. However, in the absence of any such provision, no inference can be drawn that the Cabinet Secretary was competent to file an appeal on behalf of the Government. Regrettably, this Division, being blissfully oblivious of the Rules of Business, not only entertained the appeals filed by an appellant who had no locus standi to do so, but went one step further in allowing the same, thereby, seriously prejudicing the appellants/petitioners.

We now take up the second issue, namely, the authority of the Government to override the decision of an independent statutory body, namely, the Election Commission. We do so by referring to the decision of the Election Commission not to prefer any appeal against the decision of the Administrative Appellate Tribunal, Dhaka, as contained in Memo dated 26.06.2010, which reads as follows:

“প্রশাসনিক আপীল ট্রাইবুনালের এ.এ.টি ১০৪/২০০৯, ১৩৯/২০০৯, ১৪৩/২০০৯ ও ১৪৪/২০০৯ নং (এ.টি কেস নং ১৬৬/২০০৭ ও ২২/২০০৮ নং

হতে উদ্ধৃত), মামলার রায় কমিশন সভায় গভীরভাবে পর্যালোচনা করা হয়। আপীল ট্রাইব্যুনাল তার রায়ে যথাযথ কারণ ও যুক্তি উল্লেখপূর্বক এ.টি মামলা নং ১৬৬/২০০৭ ও ২২/২০০৮ তে ঘোষিত রায় বাতিল করেন। আপীল ট্রাইব্যুনালের রায়ের বিরুদ্ধে সুপ্রীম কোর্টের আপীল বিভাগে আপীল দায়ের করার মত শক্তিশালী উপাদান নেই। এমতাবস্থায় প্রশাসনিক আপীল ট্রাইব্যুনালের রায়ের আলোকে নির্বাচন কমিশন সচিবালয়ের ০৩ সেপ্টেম্বর ২০০৭ তারিখের নিকস/উ:স: (এ-২)/২০০৭/সেপ্টেম্বর-নিয়োগ/১৩৯ সংখ্যক প্রজ্ঞাপন বাতিল পূর্বক অবসানকৃত ৮৫ জন উপজেলা/থানা নির্বাচন কর্মকর্তাকে পূর্ববহালের সিদ্ধান্ত নেয়া যায়। রায় অনুযায়ী ৮৫ জন উপজেলা/থানা নির্বাচন কর্মকর্তা (পরিশিষ্ট-খ অনুযায়ী) বেতন-ভাতাদিসহ অন্যান্য সুযোগ-সুবিধাদি প্রাপ্য হবেন। তাদের দ্রুত পদায়ন ও সংক্ষিপ্ত প্রশিক্ষণের প্রয়োজনীয় কার্যক্রম গ্রহণ করা যেতে পারে।

২.৪ সিদ্ধান্ত: বিস্তারিত আলোচনার পর কমিশন নিম্নরূপ সিদ্ধান্ত গ্রহণ করেন।

(ক) প্রশাসনিক আপীল ট্রাইব্যুনালের রায় পর্যালোচনায় সুপ্রীম কোর্টের আপীল বিভাগে আপীল করার মত প্রয়োজনীয় গ্রাউন্ড নেই।

(খ) রায়ের আলোকে নির্বাচন কমিশন সচিবালয়ের ০৩ সেপ্টেম্বর ২০০৭ তারিখের নিকস/ভি:স:(প্র-২)/২০০৭/সেপ্টেম্বর-নিয়োগ/১৩৯ নং প্রজ্ঞাপন বাতিল পূর্বক ৮৫ জন উপজেলা/থানা নির্বাচন কর্মকর্তাকে দ্রুত পদায়ন ও সংক্ষিপ্ত প্রশিক্ষণের প্রয়োজনীয় কার্যক্রম গ্রহণ করতে হবে।

(গ) রায় অনুযায়ী ৮৫ জন উপজেলা/থানা নির্বাচন কর্মকর্তা (পরিশিষ্ট-খ অনুযায়ী) বকেয়া বেতন-ভাতাদিসহ অন্যান্য সুযোগ-সুবিধাদি প্রাপ্য হবেন।”

(emphasis added).

We have noticed that at a subsequent point of time, the Election Commission shifted from its earlier stance and took a decision to file an appeal against the judgment and order dated 10.05.2010 passed by the Administrative Appellate Tribunal, Dhaka, which, in my considered view, would not necessarily clothe the Cabinet Secretary

with the authority to file the appeals in question. However, in the impugned judgment under challenge, this Division held as under:

"It also apparent from the record that the Cabinet Secretary did not challenge the decision of the Election Commission rather he preferred the present Appeals against the judgment and order of the Administrative Appellate Tribunal involving the termination of the respondent from service. Thus, no question arises as to the interference with the functions of the Election Commission."

With respect, we are constrained to hold that this observation is misconceived. The very act of preferring the appeal by the Government, contrary to the decision of the Election Commission not to prefer any appeal against the judgment passed by the Administrative Appellate Tribunal, Dhaka is tantamount to encroaching upon the sovereign authority of a statutory body.

Article 118(4) of the Constitution stipulates as under:

"118(4) The Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law."

Article 126 of the Constitution reads as under:

"126. It shall be the duty of all executive authorities to assist the Election Commission in the discharge of its functions."

Section 3 of the Election Commission Secretariat Act, 2009 (briefly 2009 Act) stipulates as under:

“৩(১)-----

(২) নির্বাচন কমিশন সচিবালয় সরকারের কোন মন্ত্রণালয়, বিভাগ বা দপ্তরের প্রশাসনিক আওতাধীন থাকিবে না”

On a combined reading of Article 118(4) and Article 126 of the Constitution and Section 3 of the 2009 Act, it is manifest that the independence and authority of the Election Commission in the discharge of its duties and functions has been established and asserted through a constitutional mandate.

Pursuant to its decision not to prefer any appeal challenging the judgment dated 10.05.2010 passed by the Administrative Appellate Tribunal, Dhaka in A.A.T. Appeal No.139 of 2009 and 143 of 2009 and to reinstate the appellants/petitioners in service, the Election Commission published a notification in the Bangladesh Gazette on 25.05.2010 cancelling its previous notification dated 03.09.2007 terminating the services of the appellants/petitioners and further, posting them as Upazilla/ Thana Election Officers in different Districts of the country “with immediate effect” (“অবিলম্বে কার্যকর হইবে”). However, the notification dated 25.05.2010 was never challenged at any point of

time. Hence, the cancellation of the previous order of termination of the appellants/petitioners service has remained in force till date.

In the judgment and order dated 01.09.2022, while upholding the order of termination of the appellants/petitioners, this Division embarked on a detailed discussion as to the various legal aspects of 'termination'. However, in so doing, the apex Court appears to have missed the wood for the trees. Let me elaborate.

While delivering the judgment dated 01.09.2022, this Division referred to several decisions from the Supreme Court of India and concluded as under:

"In the case in hand the Election Commission terminated the service of the respondents during the probation period as they did not come out successful in the test arranged by IBA."

This Division further held:

"It transpires from record that all the 328 candidates sat for the suitability test in which all but the respondents did not come out successful and the Election Commission Secretariat terminated the appointment of the respondents based on the result of the suitability test. Thus, we find no substance in the aforesaid claim of the learned counsel for the respondents."

With respect, the aforesaid finding is not only misconceived, it is also devoid of any substance, since the result of the test, conducted by IBA, had never been published. Hence, there was

no basis for this Division to arrive at the conclusion that the candidates had been "unsuccessful in the test".

That being the factual and legal position, the appeals, namely C.A. Nos.21-24 of 2011, at the instance of the Government, was totally misconceived and, on that count, the impugned judgment and order dated 01.09.2022, passed by this Division in C.A. Nos.21-24 of 2011, is liable to be set aside.

The Appellate Division, being the apex Court of the country, comprising of the then Chief Justice and his four companion Judges, are expected to be well conversant with the laws of the country relating to the functioning of the Ministries in general and the Election Commission in particular. Nevertheless, they chose to allow the appeals preferred by the Cabinet Secretary, who had absolutely no authority to do so.

I may refer to a paragraph from an unreported judgment dated 20.02.2025 passed by this Division in Civil Appeal No.84 of 2024 (along with C.A. No.85 of 2024 and C.A.No.86 of 2024), wherein this Division observed as under:

"Of late, it has become an unfortunate episode that in certain cases, Judges tend to lean towards the Government and pass decisions which are ex-facie contrary to the Constitution being the Supreme law of the land. In my view, in addition to the concept of procedural fairness, time has now come for the Judges to act and discharge their duties in accordance with "judicial fairness" which implies that Judges must not only act according to law, they must also act fairly towards the litigants in the dispensation of justice."

In view of the discussion made hereinabove, we find force and substance in the submissions advanced by the learned Senior Counsels appearing on behalf of the appellants/petitioners.

Accordingly, all the appeals inclusive of all the Civil Review Petitions are allowed by unanimous decision. The impugned judgment and order dated 01.09.2022, passed by this Division in Civil Appeal Nos.21-24 of 2011, are hereby set aside.

The concerned respondents are directed to reinstate the appellants/ petitioners in service forthwith.

The appellants/petitioners shall be entitled to all arrear salary and benefits including seniority for the period during which they were out of service. However, the said tenure shall be treated as extra ordinary leave.

C.J.

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