

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

WRIT PETITION NO. 3652 of 2014

THE MATTER OF;

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

-And-

IN THE MATTER OF;

Muktar Gazi

.... Petitioner

-Versus-

Government of Bangladesh, represented by the
Secretary, Ministry of Local Government, Rural
Development and Co-operatives, Bangladesh
Secretariat, Secretariat Building No. 7, Dhaka &
others.

.... .. Respondents.

Mr. Mohammad Imam Hossain, Advocate

..... for the petitioner

Mr. Titus Hillol Rema, A.A.G.

.....for Respondent No.4

Present:

Ms. Justice Zinat Ara

And

Mr. Justice J.N. Deb Choudhury.

Heard on: 07.04.2015

and Judgment on: 13.04.2015.

J.N. Deb Choudhury, J :

On an application under article 102 of the Constitution of the People's Republic of Bangladesh, the petitioner has called in question the legality and propriety of the Memo No. স্মাসবি/ইপ/সাবঅ-৩৬/২০০৭ (অংশ-১ক)/১৫০, dated 02.04.2014, suspending the petitioner from the post of Chairman of No.13, Hanarchar Union Parishad (Annexure-E to the Writ Petition) issued under the signature of respondent No. 2, and after hearing of the said application this

Court on 21.04.2014 was pleased to issue Rule Nisi upon the respondents to show cause as to why the decision as mentioned above shall not be declared to have been passed without lawful authority and is of no legal effect and/or such other or further order or orders be passed as to this Court may seem fit and proper.

The petitioner in the writ petition narrated his assertions, as under:

The petitioner was elected as a Chairman of No. 13 Hanarchaur Union Parishad under Upazilla Chandpur Sadar, District-Chandpur for 5(five) years and the same was published in Bangladesh Gazette on 18.06.2011 (Annexure-D to the Writ Petition). One Mohammad Amin, Senior Assistant Officer, Revenue Branch, office of the Deputy Commissioner, Chandpur lodged a First Information Report on 06.09.2005, with the Chandpur Sadar Police Station under section 379 of the Penal Code against the petitioner and the same was registered as G.R. No. 295 of 2005 (Chandpur Sadar) for collecting sand from the river Meghna, without permission of the Government and thereby the petitioner and others illegally gained Tk. 25,00,000/- (twenty five lacs) more or less and thereafter, upon hearing the Senior Judicial Magistrate, Chandpur by the judgment and order dated 12.10.2013 convicted the petitioner and one Anwar Ullah under section 379 of the Penal Code and sentenced them to suffer rigorous imprisonment for 2(two) years. Thereafter, on 14.10.2013 the petitioner filed Criminal Appeal No. 12 of 2013 before the learned Sessions Judge, Chandpur and obtained bail on 17.02.2013 and the said appeal is still pending for hearing. The impugned Memo No. স্বাসবি/ইপ/সাবঅ-৩৬/২০০৭ (অংশ-১ক)/১৫০, dated 02.04.2014 issued under signature of respondent No. 2, suspending the petitioner from the post of Chairman of the No. 13 Hanarchaur

Union Parishad under section 34(1) of the Local Government (Union Parishad) Act, 2009 (hereinafter referred to as Act) on the ground of his conviction in G.R. Case No. 295 of 2005, was passed in violation of provisions of section 34 of the Act and as such, the same was illegal, without lawful authority and is of no legal effect.

In the backdrop of the aforesaid facts and circumstances, the petitioner filed the Writ Petition and obtained the instant Rule.

Mr. Titus Hillol Rema, the learned Assistant Attorney General though appeared on behalf of the respondent No. 4; but, respondent No.4 did not file any affidavit-in-opposition denying the statement made in the writ petition.

The petitioner also filed three supplementary affidavits and by those affidavits mainly pointed out the legal position and proposition of law.

Mr. Mohammad Imam Hossain, the learned advocate appearing with Mr. Ziaur Rahman, the learned advocate for the petitioner takes us through the Writ Petition as well as the annexures thereto, the materials on record and submits that in view of the 2nd proviso to section 34(5) of the Act before suspension prior notice was necessary; but, respondent No. 2 did not give any notice to the petitioner for affording him any opportunity of being heard. He also submits that in view of sub-section (1) of section 34 of the Act, a proceeding has to be started for suspending the petitioner, if any, offence committed under sub-section 4(kha) of section 34 of the Act, but, in the present case no such proceeding was started before suspending the petitioner from the post of the Chairman. He next submits that the conviction of the petitioner for 2(two) years in G.R. Case No. 295 of 2005 did not reach its finality as the petitioner filed Criminal Appeal No. 12 of 2013 before the learned Session Judge,

Chandpur and obtained bail and the said criminal appeal is still pending for hearing. Mr. Md. Imam Hossain, the learned advocate also draw our attention to section 34(1) and sub-section 4(kha) of section 34 of the Act and submits that though the petitioner is convicted for 2(two) years in G.R. Case No. 295 of 2005; but, against the conviction the petitioner preferred Criminal Appeal No. 12 of 2013 before the learned Session Judge, Chandpur and by Order No. 11 dated 30.04.2014 (Annexure-E to the supplementary affidavit) the operation of judgment and order of conviction dated 12.10.2013 as passed in G.R. Case No. 295 of 2005 has been stayed till disposal of the said appeal. He next submits that in view of the pendency of the Criminal Appeal No. 12 of 2013 in which the operation of the conviction has been stayed, there is no scope on the part of the respondent No. 2 to issue impugned suspension order under section 34(1) of the Act. In support of his submissions, Mr. Md. Imam Hossain cited three decisions, in the case of A.K.M. Mayeedul Islam Vs. Bangladesh Election Commission and others, reported in, 48 DLR (AD) 208, in the case of Bangladesh, Ministry of Local Government, Rural Development and Co-operatives and others Vs. Md. Fariduddin Talukder, reported in, 61 DLR (AD)111 and in the case of Sultan Mahmud Chowdhury Vs. Bangladesh and others, reported in, 14 BLC 397 and accordingly, prayed for declaring the said memo dated 02.04.2014 (Annexure-E to the Writ Petition) to have been passed without any lawful authority and is of no legal effect, on making the Rule absolute.

Mr. Titus Hillol Rema, the learned Assistant Attorney General appearing for respondent No. 4 by placing sub-section (1) and sub-section (5) to section 34 of the Act, submits that the sub-section (5) of section 34, attract only where

the Chairman was ultimately dismissed and the said provision has no manner of application in suspending any Chairman. He further submits that under sub-section (1) of section 34 of the Act, the respondent No. 2 have the authority to suspend the petitioner from the post of Chairman without drawing up any proceeding and accordingly, prayed for discharging the Rule.

In view of the arguments as advanced by the learned Advocate and the learned Assistant Attorney General for the contending parties, the only point to be decided in this writ petition is, whether the suspension order dated 02.04.2014 (Annexure-E to the Writ Petition) is lawful or not.

We have heard the learned advocates for the parties and perused the writ petition, supplementary affidavits thereto along with the annexures and the decisions cited by the learned advocate for the petitioner.

For appreciating the arguments as advanced before us, we like to quote the relevant provision of sub-section (1) & (4) of section 34 of the Act, as under:

“ চেয়ারম্যান বা সদস্যগণের সাময়িক বরখাস্তকরণ ও অপসারণ। - (১) যে ক্ষেত্রে কোন পরিষদের চেয়ারম্যান বা সদস্যের বিরুদ্ধে উপ-ধারা (৪) এ বর্ণিত অপরাধে অপসারণের জন্য কার্যক্রম আরম্ভ করা হইয়াছে অথবা তাহার বিরুদ্ধে ফৌজদারী মামলায় অভিযোগপত্র আদালত কর্তৃক গৃহীত হইয়াছে অথবা অপরাধ আদালত কর্তৃক আমলে নেওয়া হইয়াছে, সেই ক্ষেত্রে নির্ধারিত কর্তৃপক্ষের মতে চেয়ারম্যান অথবা সদস্য কর্তৃক ক্ষমতা প্রয়োগ পরিষদের স্বার্থের পরিছী অথবা প্রশাসনিক দৃষ্টিকোণে সমীচীন না হইলে সরকার লিখিত আদেশের মাধ্যমে চেয়ারম্যান অথবা সদস্যকে সাময়িকভাবে বরখাস্ত করিতে পারিবে।

(৪) চেয়ারম্যান বা সদস্য তাঁহার স্বীয় পদ হইতে অপসারণযোগ্য হইবেন, যদি তিনি

(ক) যুক্তিসঙ্গত কারণ ব্যতিরেকে পরিষদের পর পর তিনটি সভায় অনুপস্থিত থাকেন;

- (খ) পরিষদ বা রাষ্ট্রের স্বার্থের হানিকর কোন কার্যকলাপে জড়িত থাকেন অথবা দুর্নীতি বা অসদাচরণ বা নৈতিক স্থলনজনিত কোন অপরাধে দোষী সাব্যস্ত হইয়া দণ্ডপ্রাপ্ত হইয়া থাকেন;
- (গ) তাঁহার দায়িত্ব পালন করিতে অস্বীকার করেন অথবা শারীরিক বা মানসিক অসামর্থ্যের কারণে তিনি দায়িত্ব পালনে অক্ষম হন;
- (ঘ) অসদাচরণ বা ক্ষমতার অপব্যবহারের দোষে দোষী হন অথবা পরিষদের কোন অর্থ বা সম্পত্তির কোন ক্ষতি সাধন বা উহার আত্মসাতের বা অপব্যবহারের জন্য দায়ী হন;
- (ঙ) এই আইনের ধারা ২৬(২) অনুযায়ী নির্বাচনের অযোগ্য ছিলেন বলিয়া নির্বাচনের পর যদি প্রমাণিত হয়;
- (চ) বার্ষিক ১২(বার) টি মাসিক সভার স্থলে ন্যূনতম ৯(নয়) টি সভা গ্রহণযোগ্য কারণ বর্তীত অনুষ্ঠান করিতে ব্যর্থ হন;
- (ছ) নির্বাচনী ব্যয়ের হিসাব দাখিল না করেন কিংবা দাখিলকৃত হিসাবে অসত্য তথ্য প্রদান করেন; অথবা
- (জ) বিনা অনুমতিতে দেশ ত্যাগ করেন অথবা অনুমতিক্রমে দেশ ত্যাগের পর সেখানে অননুমোদিতভাবে অবস্থান করেন।
- ব্যাখ্যা: এই উপ-ধারায় ‘অসদাচরণ’ বলিতে ক্ষমতার অপব্যবহার কর্তব্যে অবহেলা, দুর্নীতি, স্বজনপ্রীতি, ও ইচ্ছাকৃত কুশাসনও বুঝাইবে।”

(underlines for giving emphasis)

On a plain reading of sub-section (1) of section 34 of the Act, it appears to us that before suspending any Chairman under any of the clauses of sub-section (4) of section 34 of the Act, a proceeding has to be initiated under sub-section (1) of section 34 of the Act; but, from the impugned Memo dated 02.04.2014 (Annexure-E to the Writ Petition), it appears that without initiating any proceeding, the petitioner was suspended by the impugned Memo on the

ground of the petitioner's being convicted in G.R. Case No. 295 of 2005, by the Senior Judicial Magistrate, Chandpur, under section 379, and sentencing him to suffer rigorous imprisonment for 2(two) years.

It appears from Annexure-B to the writ petition that the petitioner has been convicted under section 379 of the Penal Code and sentenced to suffer rigorous imprisonment for 2(two) years by the judgment and order dated 12.02.2013 passed in G.R. Case No. 295 of 2005 and the petitioner on 14.02.2013 filed Criminal Appeal No. 12 of 2013 before the learned Sessions Judge, Chandpur (Annexure-C to the Writ Petition) and on 17.02.2013 vide order No. 2 got bail from the said Court and all those took place before the impugned Memo dated 02.04.2014, regarding suspension order of the Chairman of No. 13 Hanarchar Union Parishad. Moreover, it also appears from Annexure-E to the supplementary affidavit dated 29.05.2014, that the order of conviction as stated above has already stayed by the learned Sessions Judge, Chandpur by order dated 30.04.2014 in Criminal Appeal No. 12 of 2013.

Respondent No. 4 though appeared but did not file any affidavit-in-opposition for denying the statements made in the writ petition. In the case of Government of Bangladesh and others vs. Gazi Shafiqul and others reported in 19 BLC (AD) 163, our Hon'ble Appellate Division took the view that if no affidavit-in-opposition is filed by the respondents, denying or controverting the case of the petitioner, the High Court Division has no option but to accept the case of the writ petitioner and as such, we accept the case of the petitioner.

Now, let us see the legal proposition of the decisions cited by the learned advocate for the petitioner.

In the case of Bangladesh, Ministry of Local Government, Rural Development and Co-operatives and others Vs. Md. Fariduddin Talukder, reported in 61 DLR (AD) 111, their Lordships held that,

“The petitioner was placed under suspension on the ground that he was convicted by the learned Divisional Special Judge, Khulna and sentenced to suffer rigorous imprisonment for 6(six) months. It is on record that the petitioner filed an application under section 561A of the Code of Criminal Procedure pending before the High Court Division for quashment of the order of conviction and sentence, whereupon Rule was issued and the petitioner was granted bail and the Rule is still pending for hearing. Accordingly, the matter is to be treated as pending. Thus it appears that a situation as contemplated in section 12 of the Ordinance did not exist when the petitioner was placed under suspension.”

The Hon’ble Appellate Division also took the similar view in the case of AKM Mayeedul Islam vs. Bangladesh Election Commission and others, reported in 48 DLR (AD) 208

As we have already found earlier that the order of suspension as contained in memo dated 02.04.2014 (Annexure-E to the Writ Petition) was passed without initiating any proceeding against the petitioner before suspending him from the post of Chairman and in view of pendency of the criminal appeal, for which the conviction has not yet to reached its finality and as such, the impugned memo dated 02.04.2014 (Annexure-E to the Writ Petition) has been passed without any lawful authority and is of no legal effect.

Accordingly, we find substance and force in the arguments of the learned advocate for the petitioner and find no substance in the arguments of the learned Assistant Attorney General for the respondent No. 4.

In view of the above discussions and on consideration of the facts and circumstances, we are of the view that the impugned memo dated 02.04.2014 (Annexure-E to the Writ Petition) is liable to be declared as passed without lawful authority and is of no legal effect and the same is liable to be struck down.

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

The impugned memo dated 02.04.2014 (Annexure-E to the Writ Petition) is hereby declared as done, without lawful authority and is of no legal effect.

Communicate the judgment to respondent Nos. 2 and 3 at once.

Zinat Ara, J :

I agree.

Murshedul Hasan
Bench Officer.