IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

Present:

Mr. Justice Hasan Foez Siddique, *Chief Justice*
Mr. Justice Md. Nuruzzaman
Mr. Justice Obaidul Hassan
Mr. Justice Borhanuddin
Mr. Justice M. Enayetur Rahim
Ms. Justice Krishna Debnath

CIVIL APPEALS NO.21-24 of 2011

(From the judgment and order dated 12.04.2010 passed by the Administrative Appellate Tribunal in Appeals No.134,139,143 and 144 of 2009)

Bangladesh, represented by the Cabinet Secretary, Bangladesh Secretariat, Dhaka. .....**Appellant** (In all the appeals)

-Versus-

Md. Abdul Alim and others .....**Respondents** (In C.A. No.21 of 2011)

Afroza Khanam and others .....**Respondents** (In C. A. No.22 of 2011)

Md. Nurul Islam and others .....**Respondents** (In C. A. No.23 of 2011)

Mohammad Shahinul Islam Chowdhury and others .....**Respondents** (In C. A. No.24 of 2011)

For the appellant (In C.A. Nos.21 & 24 of 2011) : Mr. A.M. Amin Uddin, Attorney General with Ms. Abanti Nurul, Assistant Attorney General, instructed by Ms. Sufia Khatun, Advocate-on-Record.

For the appellant (In C.A. No.22 of 2011) : Mr. Sk. Mohd. Murshed, Additional Attorney General, instructed by Ms. Sufia Khatun, Advocate-on-Record.

For the appellant (In C.A. No.23 of 2011) : Mr. Mehedi Hassan Chowdhury, Additional Attorney General, instructed by Ms. Sufia Khatun, Advocate-on-Record.

For the respondents No.1-21 (In C.A. No.21 of 2011) : Mr. Probir Neogi, senior Advocate with Ms. Anita Ghazi Rahman, Advocate and Mr. Suvra Chowdhury, Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record (For respondent No.1) & Mr. Zahirul Islam, Advocate-on-rerecord (For respondents No.2-21).

For the respondent No.22 (In C.A. No.21 of 2011); **For the respondent No.44** (In C.A. No.22 of 2011); **For the respondent No.21**(In C.A. : Mr. Obaidur Rahman Mostafa, Advocate instructed by Mr. Md. Abdul Hai, Advocate-on-Record.

No.23 of 2011) & **For the respondent No.21**(In C.A. No.24 of 2011);		
For the respondent No.23(In C.A. No.21 of 2011)	:	Not represented.
For the respondents No.1,8,14,29,36-37,39, 43 & 45 (In C.A. No.22 of 2011)	:	Not represented.
For the respondents No.2-7, 9-13, 15-28, 30-35, 38 & 40-42 (In C.A. No.22 of 2011)	:	Mr. Qumrul Haque Siddique, senior Advocate, instructed by Mr. Zahirul Islam, Advocate-on-Record.
For the respondents No.1-20 (In C. A. No.23 of 2011)	:	Mr. Salahuddin Dolan, senior Advocate, instructed by Mr. Bivash Chandra Biswas, Advocate-on-Record.
For the respondent No.22(In C.A. No.23 of 2011)	:	Not represented.
For the respondent No.1 (In C.A. No.24 of 2011)	:	Mr. A.F. Hassan Ariff, senior Advocate, instructed by Mr. Zainul Abedin, Advocate-on-Record.
For the respondent No.3 (In C.A. No.24 of 2011)	:	Not represented.
Date of hearing	:	23.06.2022, 25.08.2022 & 28.08.2022.
Date of judgment	:	**The 1st day of September, 2022.**

JUDGMENT

Obaidul Hassan, J. All these Civil Appeals are being disposed of by this common judgment as all of those involve common questions of law and facts as well as all appeals have arisen out of a common judgment.

These Civil Appeals by leave granting order dated 12.12.2010 by this Division in Civil Petition for Leave to Appeals No.1302-1305 of 2010 at the instance of the appellant has been directed against the judgment and order dated 12.04.2010 passed by the Administrative Appellate Tribunal, Dhaka in Administrative Appellate Tribunal Appeals No.134, 139, 143 and 144 of 2009 allowing the appeals reversing the judgment and order dated 23.03.2009 passed by the

Administrative Tribunal No.1, Dhaka in Administrative Tribunal Case Nos.166 of 2007 and 22 of 2008, disallowing the case.

The facts leading to the filing of these Civil Appeals in short are that, there was a public advertisement for recruitment of Upazilla/Thana Election Officer in the scale of Tk.4300-7740/= published in the Daily Ittefaq on 23.09.2003, in response to which the respondents having the requisite qualifications aspiring to get appointment applied for the post. Later on being successful to pass in both the written and viva voce examinations 328 candidates including the respondents finally selected for appointment with a direction to join the said posts by 7th September, 2005. Applicants in serial Nos.8,16,26,39,40,68 and 69 to the Administrative Tribunal Case No.166 of 2007 joined on 29.12.2005 and 06.12.2006 while the rest of all joined on 07.09.2005. On being posted at different Upazillas/Thanas as Election Officers the respondents joined the respective posting places as per direction of the Election Commission and all of them had been discharging their duties with sincerity and honesty. According to the notification being No.election commissioner/pra-1/1-0;/Tha:/Ni:-5/2005 533 dated 4th September, 2005 it was stipulated that the respondents would be on probation for two years subject to extension or curtailment by the authority. It was further stipulated that the probation officer would be provided with four months Foundation Training in BPATC or any other institution and the government may provide further training before or after the

Foundation Training. In addition to Foundation Training the respondents would be given other training for professional skill and special skill as Election Officer. Due to rush of work for holding election in early 2006, the respondents were not given Foundation Training to impart basic understanding of working in a government office. The respondents, however, given two courses of training each of having three days duration, one on preparation of voter lists and the other on core training courses and on completion of training they were awarded Certificate of Achievement. The respondents had been discharging their duties to the satisfaction of the authority. There was neither any complaint nor any allegation that they were not doing their job properly. For their satisfactory performance many of the respondents were given the enhanced assignment of District Election Officer. The applicants No.7 and 39 were given additional charge of District Election Officer, Bandarban and Nilphamari respectively. There was serious political agitation against the functioning of Election Commission under the then Chief Election Commissioner, Mr. Justice Aziz. The parliamentary election was scheduled for 22nd January, 2007 which was abandoned later. When State emergency was declared a new Caretaker Government took up the power and the Election Commission was thoroughly reconstituted. There was rampant allegation in the media that many Election Officers appointed in September, 2005 were selected with the grace of the leader of *Jote-Sarker.* The applicants had no political affiliation rather

were selected on the basis of competitive examination held by the Bangladesh Public Service Commission. The reconstituted Election Commission being obliged to work objectively and independently above any political affiliation, took a noble initiative to weed out the appointees got appointment through political affiliation. But instead of verifying the political background of Upazilla/Thana Election Officers through members of intelligent service of the Government, the Election Commission committed wrong in entrusting the Institute of Business Administration (IBA), University of Dhaka to determine the fitness of the Election Officer. The test held by the IBA is neither authorized by law nor had the institute any such skill or resource to verify the political background of the Election Officers. Despite the said reason the applicants were notified to attend at a fitness test by the IBA and the allocation of marks was 20% on general knowledge; 10% on general math; 30% on language and 40% on election Rules and Regulations. The aforesaid allocation of marks had nothing to do with the performance of the applicants as probationary Election Officers. The test on the MCQ (Multiple Choice Questions) method was held on 18th May, 2007. The question paper was in English and the time allotted was only two hours. For most of the applicants the method was unknown and incomprehensible. However, all the applicants had excellent performance on election related laws, but they could not do well on language and communications. The said test had no real basis nor had any nexus with the political

background of the applicants. Moreover, the IBA had neither access to Annual Confidential Reports (ACR) of the applicants nor had any scope to consult the superior officers of the applicants for their field works. Although the applicants came out successful in the fitness insofar as it relates to election laws and regulations, the Election Commission by its notification dated 03.09.2007 terminated the applicants-respondents from their service on false allegations that their performance during probation period was not satisfactory.

Being aggrieved the respondents served a notice of Demand for Justice to the Election Commission on 06.09.2007 and thereafter the order being passed by order of the President and having no appellate authority against the impugned order the petitioners-respondents filed the above applications before the Administrative Tribunal No.1, Dhaka.

The opposite parties-appellants contested both the cases by filing separate written statements contending *inter alia* that the test of competency is confidential and the test of competency of the respondents was rightly tested on English Language, General Mathematics, Election Laws and Regulations. The respondents having failed in the competency test to meet the requirement for confirmation during two years' probation period. The Election Commission was legally authorized to test the competency of the respondents in the manner it prescribed.

Upon hearing all the parties both the cases were dismissed by the judgment and order dated 23.03.2009. Being aggrieved with judgment and order dated 23.03.2009 the petitioners-appellants-respondents preferred Appeals No.134 of 2009, 139 of 2009, 143 of 2009 and 144 of 2009 before the Administrative Appellate Tribunal, Dhaka. On conclusion of hearing both sides the Administrative Appellate Tribunal allowed the appeals setting aside the termination order of the respondents from service and also directed to reinstate them in their service with arrear salary and other benefits by the impugned judgment and order dated 12.04.2010.

Feeling aggrieved with the judgment and order dated 12.04.2010 passed by the Administrative Appellate Tribunal, Dhaka in Administrative Appellate Tribunal Appeals No.134, 139, 143 and 144 of 2009 the appellant filed the Civil Petition for Leave to Appeals No.1302-1305 of 2010 before this Division. After hearing the parties this Division was pleased to grant leave by order dated 12.12.2010 and hence these Civil Appeals.

Leave was granted to consider two points such as (I) Whether the Administrative Appellate Tribunal was justified in not holding that all the Upazila Election Officers including the respondents having participated in the test conducted by the Institute of Business Administration, Dhaka University without any objection or protest and the respondents being unsuccessful in the test; (II) Whether the Administrative Appellate Tribunal was justified in not holding that

the respondents have joined in their service on 7th September, 2009 and there being a provision empowering the Election Commission terminating service of those employees if they are found lacking in efficiency and their service having been terminated on 3rd September, 2007 i.e. before completion of 2(two) years, the Election Commission committed no illegality in terminating service of the Respondents; (III) Whether the Administrative Appellate Tribunal was justified in not holding the efficiency, neutrality and impartiality of the Election Officers being necessary for holding a democratic and impartial election and allegations having been made against the respondents that they have allegiance to a certain political party and no denial having been made to the said allegations.

Mr. A.M. Amin Uddin, the learned Attorney General took the lead while producing his submissions on behalf of the appellant. Mr. Sk. Mohd. Murshid, the learned Additional Attorney General and Mr. Mehedi Hassan Chowdhury, the learned Additional Attorney General adopted the submissions produced by the learned Attorney General. The submissions on behalf of the learned Counsels for the appellant are shortly stated in the following. The learned Counsels on behalf of the appellant assailing the impugned judgment and order of the Administrative Appellate Tribunal submitted that the Administrative Appellate Tribunal committed illegality in not holding that the termination order of the respondents was termination simpliciter not stigmatic. To established their

submissions they relied on several decisions of the Indian Supreme Court in Mathew P. Thomas Vs. Kerala State Civil Supply Corporation Ltd. (2003) 3 SCC 263; Progressive Education Society Vs. Rajendra (2008) 3 SCC 310; Chaitanya Prakash Vs. H. Omkarappa (2010) 2 SCC 623 and also a decision of this Division in the Federation of Pakistan Vs. Mrs. A.V. Issacs 9 DLR (1957) SC 16.

Per contra, Mr. Probir Neogi, the learned senior Advocate, Mr. Obaidur Rahman Mostafa, the learned Advocate, Mr. Qumrul Haque Siddique, the learned senior Advocate, Mr. Salahuddin Dolan, the learned senior Advocate and Mr. A.F. Hassan Ariff, the learned senior Advocate made their submissions on behalf of the respective respondents. All the learned aforesaid Counsels for the respondents except Mr. obaidur Rahman Mostafa at one echo vehemently contended that the respondents had been terminated during the probation period maliciously and their termination order was not termination simpliciter rather stigmatic or punitive and as such said termination order was illegal and liable to be set aside. Supporting the judgment and order of the Administrative Appellate Tribunal the learned Counsel for the respondents next contended that the Administrative Appellate Tribunal was correct to set aside the said termination order. In support of their submissions the learned Counsels for the respondents put reliance on a decision of the Indian Supreme Court in the case of Ajit Singh Vs. State of Punjab AIR 1983

SC 494. The discussion of the said decision will be made at the later part of this judgment.

We have considered the submissions of the learned advocates for the both sides, perused the judgment and order dated 12.04.2010 passed by the Administrative Appellate Tribunal, Dhaka in Appeals No.134, 139, 143 and 144 of 2009 and the judgment and order dated 23.03.2009 passed by the Administrative Tribunal No.1, Dhaka in Administrative Tribunal Case Nos.166 of 2007 and 22 of 2008 and the materials on record.

It is on the record that an advertisement for the appointment in the post of Upazila/Thana Election Officers under the Election Commission Secretariat was published by Bangladesh Public Service Commission (shortly, BPSC) asking applications from the qualified candidates having either 1st class Masters degree or 1st class Masters degree along with 2nd class Honours degree. After holding both written and viva voce examinations as many as 328 candidates including the respondents were finally selected for the appointment in the said posts advertised for, by the BPSC. Accordingly the Election Commission appointed them by Gazette Notification dated 4th September, 2005 and subsequently upon their joining to the aforesaid posts their joining letters were accepted by the Election Commission through Gazette Notification dated 8th September, 2005. The respondents were appointed in the posts under certain terms and

conditions. The relevant portion of their appointment notification is extracted below:

> "(ক) নির্বাচন কমিশন সচিবালয়ের আদেশক্রমে তাঁহাকে লোক প্রশাসন প্রশিক্ষণ কেন্দ্রে অথবা অন্য কোন প্রশিক্ষণ প্রতিষ্ঠানে সরকার/কর্তৃপক্ষ কর্তৃক নির্ধারিত বিষয়ের উপর অন্যূন ৪ মাসের বুনিয়াদি প্রশিক্ষণ গ্রহণ করিতে হইবে; প্রয়োজন বোধে সরকার/কর্তৃপক্ষ এই প্রশিক্ষণের সময়কাল বাড়াইতে বা কমাইতে পারিবেন; অথবা প্রয়োজন বোধে সরকার/কর্তৃপক্ষ বুনিয়াদি প্রশিক্ষণের পূর্বে বা পরে তাঁহাকে অন্য যে কোন প্রশিক্ষণের জন্য মনোনীত করিতে পারিবে।
>
> (খ) বুনিয়াদি প্রশিক্ষণ ছাড়াও কর্তৃপক্ষের অভিপ্রায় অনুযায়ী তাঁহাকে পেশাগত ও বিশেষ ধরণের প্রশিক্ষণ গ্রহণ করিতে হইবে।
>
> (গ) তাঁহাকে ২(দুই) বৎসর শিক্ষানবিস হিসাবে কাজ করিতে হইবে। শিক্ষানবিস কালে যদি তিনি চাকুরী বহাল থাকিবার অনুপযোগী বলিয়া বিবেচিত হন, তবে কোন কারণ দর্শানো ছাড়াই এবং পাবলিক সার্ভিস কমিশনের পরামর্শ ব্যতিরেকে তাঁহাকে চাকুরী হইতে অপসারণ করা যাইবে।
>
> (ঘ) উপরের (ক) ও (খ) উপ-অনুচ্ছেদে উল্লিখিত প্রশিক্ষণ সাফল্যের সহিত সমাপনান্তে এবং যদি শিক্ষানবিসীকাল সন্তোষজনকভাবে অতিক্রান্ত হয়, তাহা হইলে তাঁহাকে চাকুরীতে স্থায়ী করা হইবে।
>
> .....
>
> (ঝ) এই প্রজ্ঞাপনে সুনির্দিষ্টভাবে বর্ণিত হয় নাই, এইরূপ ক্ষেত্রে তাঁহার চাকুরী সংক্রান্ত বিষয়ে সরকারের প্রচলিত বিধি-আদেশ এবং নির্বাচন কমিশন সচিবালয়/সরকার/কর্তৃপক্ষ কর্তৃক ভবিষ্যতে প্রণীতব্য বিধি ও বিধান দ্বারা তাঁহার চাকুরী নিয়ন্ত্রিত হইবে।"

From the above it emanates that the respondents were appointed in the aforesaid posts with condition of undergoing probation period for two years and their appointment will be permanent on satisfactory completion of their probation period. It transpires from the record that during the probation period all the appointees including the respondents had been asked by the Election Commission Secretariat to sit for the suitability test held by the

Institute of Business Administration, University of Dhaka. The test was held opting for MCQ method and the total marks of the test was allocated in the following way:

> "General Knowledge (20%); General Math (10%); Language and Communication (30%) and Election Rules and Regulations(40%)."

All the appointees sat for the said test and all of them except the respondents became successful in the test. Thereafter, the Election Commission Secretariat terminated the appointment of the respondents with effect from 6th September 2007. The pertinent portion of the said notification is as follows:

> "নির্বাচন কমিশন সচিবালয়ের অধীনস্থ মাঠ পর্যায়ের উপজেলা/ থানা নির্বাচন অফিসার পদে কর্মরত নিম্নবর্ণিত কর্মকর্তাগণের শিক্ষানবিশকালের কর্মসম্পাদন সন্তোষজনক না হওয়ায় নির্বাচন কমিশন সচিবালয়ের ২০ ভাদ্র ১৪১২ বাং/০৪ সেপ্টেম্বর তারিখের নিকস/প্র-১/১-উ/থা:নি:অ:-৫/২০০৫/৫৩৩ নং প্রজ্ঞাপনের ১(গ) নং অনুচ্ছেদে বর্ণিত শর্তানুসারে তাহাদের চাকুরীতে বহাল রাখিবার অনুপযোগী বিবেচনা পূর্বক ০৬/৯/২০০৭ তারিখ হইতে তাহাদের সরকারী চাকুরীর অবসান করা হইল"

In view of the factual matrix of the instant case it is manifested that the respondents had been terminated from their service during the probation period. The main point of controversy between the appellants and the respondents is whether the Election Commission Secretariat committed illegality terminating the service of the respondents during the probation period.

The respondents being appointed in September, 2005 the provisions of the Election Commission (Officers and Staff) Rules, 1979 (in short, the Rules 1979) including its amendment made on 25th

May 2005 is applicable regarding their appointment. The provision as to the period of probation of the respondents in their service as stated in the appointment notification shall be construed in conjunction with Rule 11 of the Rules 1979. In fact, the conditions of probation period stated in paragraph (Ga) of the appointment notification dated 4th September 2005 emanates its force from Rule 11 of the Rules 1979. For better understanding Rule 11 of the Rules 1979 is extracted below:

> "11.**Probation-(1) Persons selected for appointment to a specified post, otherwise than by transfer on deputation, against a substantive vacancy shall be on probation-**
>
> (a) **in the case of direct recruitment, for a period of two years from the date of substantive appointment**; and
>
> (b) in the case of promotion, for a period of one year from the date of such appointment:
>
> Provided that the appointing authority may, for reasons to be recorded in writing extend the period of probation by a period or periods so that the extended period does not exceed two years in the aggregate.
>
> **(2) Soon after the completion of the period of probation, including the extended period, if any, the appointing authority-**
>
> (a) if it is satisfied that the conduct and the work of the probationer during his period of probation has been satisfactory, shall confirm him; and
>
> **(b) if it is of opinion that the conduct and the work of the probationer during that period was not satisfactory, may-**

> **(i) in the case of direct recruitment, terminate his service**; and
> (ii) in the case of promotion, revert him to the post from which he was promoted."

Thus, from the above provisions of law it is amply clear that persons selected for appointment to a specified post shall be on probation for a period of two years from the date of substantive appointment or for extended period not exceeding two years in the aggregate. Regarding the purpose of probation it has been observed very succinctly in the case of ***Khazia Mohammed Muzammil vs. The State of Karnataka and Ors.*** reported in ***(2010)8 SCC 155*** at paragraph No.12 that-

> "The purpose of any probation is to ensure that before the employee attains the status of confirmed regular employee, he should satisfactorily perform his duties and functions to enable the authorities to pass appropriate orders. In other words, the scheme of probation is to judge the ability, suitability and performance of an officer under probation."

From the above discussion it can easily be understood the object and purpose underlying the concept of probationary period. Admittedly during the probation period the respondents including the other employees numbering 328 in total had been required to sit for a suitability test held by the IBA, University of Dhaka and the respondents agreeing with the decision appeared in the examination but finally they became unsuccessful. However, all other employees succeeded in the examination. In the said backdrop the authority

terminated the appointment of the respondents inasmuch as they could not pass in the suitability test during the period of probation.

From the bare reading of the termination notification as stated earlier it is evident that the respondents had been terminated from the service due to their dissatisfactory performance in the service during the probation period. But it is argued by the respondents that the said order was not termination simpliciter rather it was punitive for which the said termination order of the respondents was illegal. Mr. Salahuddin Dolon, the learned Counsel for the respondents contended that the respondents had been terminated during the probation period due to their appointment was made during the regime of another political government and as such the termination was not simpliciter rather punitive. To establish his submission he relied on the decision made in Ajit Singh vs. State of Punjab AIR 1983 SC 494 wherein it was held that if the government servants are terminated arbitrarily and not on the ground of unsuitability, unsatisfactory conduct or the like, the said termination is illegal.

At this juncture let us examine whether the termination of the Respondents from service was simpliciter or punitive. It is to be noted that the law as to the probation of an employee in our country is almost identical to that of India. The decisions of Indian Supreme Court are more categorical in this area and deals with the issue eloquently touching its every facet. More importantly, we may refer to the case of ***Chaitanya Prakash Vs. H. Omkarappa (2010)*** reported

in ***2 SCC 623*** where it has been held by the Indian Supreme Court as under:

> "It is no longer res integra that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In this connection, we make a reference to the decision of the Supreme Court in Abhijit Gupta Vs. S.N.B. National Centre, Basic Sciences (2006) 4 SCC 469 wherein also a similar letter was issued to the employee concerned intimating him that his performance was unsatisfactory and, therefore, he is not suitable for confirmation. We have considered the ratio in light of the facts of the said case and we are of the considered opinion that the basic facts of the said case are almost similar to the one in hand. There also, letters were issued to the concerned employee to improve his performance in the areas of his duties and that despite such communications the service was found to be unsatisfactory. In the result, a letter was issued to him pointing out that his service was found to be unsatisfactory and that he was not suitable for confirmation, and, therefore, his probation period was not extended and his service was terminated, which was challenged on the ground that the same was stigmatic for alleged misconduct. The Supreme Court negatived the said contention and upheld the order of termination.
>
> In Mathew P. Thomas v. Kerala State Civil Supply Corporation Ltd. (2003) 3 SCC 263 also the concerned employee was kept on probation for a period of two years. During the course of his employment he was also informed that despite being told to improve his performance time and again there is no such improvement. His shortfalls were

brought to his notice and consequently by order dated 16.01.1997 his services were terminated, wherein also a reference was made to his unsatisfactory service. In the said decision, the Supreme Court has held that on the basis of long line of decisions it appears that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case.

In Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences (2002) 1 SCC 520 this Court had the occasion to determine as to whether the impugned order therein was a letter of termination of services simpliciter or stigmatic termination. After considering various earlier decisions of this Court in paragraph 21 of the aforesaid decision it was observed by this Court as under:

"One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if any one of the three factors is missing, the termination has been upheld.

In Abhijit Gupta (Supra.), this Court considered as to what will be the real test to be applied in a situation where an employee is removed by an innocuous order of termination i.e whether he is discharged as unsuitable or he is punished for his misconduct. In order to answer the said question, the Court relied and referred to the decision of this Court in

Allahabad Bank Officers Assn. vs. Allahabad Bank (1996) 4 SCC 504 where it is stated thus:

"14.....As pointed out in this judgment, expressions like 'want of application', 'lack of potential' and 'found not dependable' when made in relation to the work of the employee would not be sufficient to attract the charge that they are stigmatic and intended to dismiss the employee from service."

Further it has been observed in the case of ***Chandra Prakash Shahi v. State of U.P. (2000)*** reported in ***5 SCC 152*** (paragraph-27) that-

"The important principles which are deducible on the concept of 'motive' and 'foundation', concerning a probationer, are that a probationer has no right to hold the post and his services can be terminated at any time during or at the end of the period of probation on account of general unsuitability for the post in question. If for the determination of suitability of the probationer for the post in question or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate his service, the order will not be punitive in nature. But, if there are allegations of misconduct and an inquiry is held to find out the truth of that misconduct and an order terminating the service is passed on the basis of that inquiry, the order would be punitive in nature as the inquiry was held not for assessing the general suitability of the employee for the post in question, but to find out the truth of allegations of misconduct against that employee. In this situation, the

> order would be founded on misconduct and it will not be a mere matter of 'motive'.
>
> 'Motive' is the moving power which impels action for a definite result, or to put it differently, 'motive' is that which incites or stimulates a person to do an act. An order terminating the services of an employee is an act done by the employer. What is that factor which impelled the employer to take this action? If it was the factor of general unsuitability of the employee for the post held by him, the action would be upheld in law. If, however, there were allegations of serious misconduct against the employee and a preliminary inquiry is held behind his back to ascertain the truth of those allegations and a termination order is passed thereafter, the order, having regard to other circumstances, would be founded on the allegations of misconduct which were found to be true in the preliminary inquiry."

Having examined the aforesaid decisions of the Indian Supreme Court it is squarely evident that the employer is legally authorized to assess the competency of an employee during the period of probation. Simultaneously, the employer is entitled to terminate the service of the employee during the probation period due to unsatisfactory performance. We are also of the view that whether a termination order is simpliciter or stigmatic will be ascertained based on the factual matrix of each case. On plain reading of the termination order of the respondents it appears that the same is ex-facie not stigmatic. It simply terminates the service of the respondents as their service was found not satisfactory.

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 a test arranged by the IBA. The said test was held to ascertain the general suitability and competence of the Respondents to remain in their service. Such test cannot be termed as 'not befitting' to examine the suitability of the employee. The said test was held through MCQ method which is a universally accepted method for suitability test. The IBA under the University of Dhaka was assigned to arrange the test. Indisputably, the IBA under the University of Dhaka is one of the top-notch educational institutions in our country and it is widely recognized for its transparency, accountability and genuineness in respect of the examination system. More so, the question pattern of the test was in commensurate with the qualifications of the respondents having either Masters degree with 1st class or 2nd class Honours with Master degree.

The respondents could not bring any materials on record from which it could be manifested that there was allegation of misconduct against them and an inquiry was held behind their back in pursuant to which they had been terminated from service during the probation period. Therefore, we are of the view that the Election Commission Secretariat was in right stand to arrange for a suitability test during the probation period of the respondents and on being unsuccessful in the suitability test the respondents had been terminated from service which we hold to termination simpliciter not stigmatic.

Again, the respondents did not challenge the decision of the Election Commission Secretariat for holding suitability test rather they accepting the decision of the Election Commission Secretariat appeared in the said test and in the said way the respondents also admitted the decision of the Election Commission Secretariat for holding the suitability test and as such they are barred by the principle of estoppel. Due to the aforesaid reason the respondents are estopped from denying that the said suitability test was not proper method of their assessment. Had the aforesaid test been unsuitable for assessing their ability during the probation period they should not have participated in the test.

The learned Advocate on behalf of the respondents argued that according to Rule 11 of the Rules 1979 the authority is entitled to terminate the service of a probationer during the probation period if it is found that the conduct and work of him is not satisfactory. In that case it was incumbent upon the Election Commission to assess the performance of the respondents on the basis of their ACR, integrity, efficiency, good conduct, character, sense of value and temperamental suitability, departmental training etc. The Election Commission assigned the responsibility of taking examination to the IBA, who has neither access to ACR nor has any report regarding the integrity and performance of the respondents. But the entire assessment was done on the basis of the result of an examination which was taken beyond the conditions stipulated in the

appointment notification. In this regard, our considered view is that holding examination for the appointees while undergoing probation period is not restricted in law to assess their suitability in service. Rather the assessment of a probationer is not confined only to good conduct and character, but also their competency for service.

During hearing the learned Counsels for the respondents further contended that the Election Commission Secretariat purportedly terminated the service of the respondents resorting to pick and choose policy. It transpires from the 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.

The learned Counsels for the respondents also contended that the Election Commission in its plenary meeting No.294/2010 held on 11.05.2010 perused the judgment and order of the Administrative Appellate Tribunal and decided to implement the said judgment and order by reinstating the respondents in service cancelling the notification dated 03.09.2007. Pursuant to the said decision of the Election Commission, reinstatement of the respondents in the service was notified on 13.05.2010 and the same was published in the official Gazette notification on 25.05.2010. The Election Commission also by an official letter dated 22.06.2010 communicated its decision not to

prefer appeal against the judgment and order of the Administrative Appellate Tribunal to the office of the Prime Minister. But the Cabinet Secretary bypassing all the aforesaid decisions filed these Civil Appeals interfering with the independent functioning of the Election Commission as enunciated in Article 118(4) of the Constitution.

To address the above issue we need to have a glance at the decision of the Election Commission which is extracted below:

> "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 উদ্ভুত), মামলার রায় কমিশন সভায় গভীরভাবে পর্যালোচনা করা হয়। আপীল ট্রাইবুনাল 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/উঃ সঃ (এ-২)/২০০৭/সেপ্টেম্বর-নিয়োগ/১৩৯ সংখ্যক প্রজ্ঞাপন বাতিল পূর্বক অবসানকৃত ৮৫ জন উপজেলা/থানা নির্বাচন কর্মকর্তাকে পূনর্বহালের 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 সিদ্ধান্তঃ 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)/২০০৭সেপ্টেম্বর-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।"

But on perusal of the record it reveals that subsequently the Election Commission decided to contest the present appeals. The decision of the Election Commission is stated below:

> "উপজেলা/থানা নির্বাচন অফিসার পদে চাকুরি অবসানকৃত ৮৫ জন কর্মকর্তার মামলার বিষয়ে প্রতিদ্ধন্দিতা না করার জন্য বিগত নির্বাচন কমিশনের ১১/৫/২০১০ তারিখের ২৯৪/২০১০তম কমিশন সভার সিদ্ধান্ত হয়। সেই সময়ের প্রেক্ষাপট আর বর্তমান প্রেক্ষাপট সম্পূর্ণ ভিন্ন বলে মাননীয় নির্বাচন কমিশনারগণ মনে করেন। বর্তমান প্রেক্ষাপটে উল্লিখিত মামলায় নির্বাচন কমিশনের পক্ষ হয়ে প্রতিদ্ধন্দিতা করার সিদ্ধান্ত যৌক্তিক বলে মাননীয় নির্বাচন কমিশনারগণ মতামত ব্যক্ত করেন।"

From the above it is transparent that the Election Commission reverted from their earlier decision of not contesting appeal and now it is contesting the appeal pursuant to its own decision, thereby there is no question of interference with the functions of the Election Commission.

The learned Counsels on behalf of the respondents referring to the provisions of Articles 118(4), 120 of the Constitution of Bangladesh, Sections 3 and 5 of the Election Commission Secretariat Act, 2009 argued that the respondents being the employees of the Election Commission only the Election Commission has the exclusive control and authority over them and the Election Commission is empowered to take decision in respect of their reinstatement in service but the Cabinet Secretary being the part of Executive Organ of the Government had no *locus standi* to file the Civil Petitions for Leave to Appeal leading to the present appeals against the judgment

and order of the Administrative Appellate Tribunal. In this regard let us examine the provisions of law.

Article 118(4) of the Constitution enunciates that-

> "The Election Commission shall be independent in the exercise of its functions and subject only to this Constitution and any other law"

Article 119 of the Constitution lays down the functions of the Election Commission which is as follows -

> "119. (1) The superintendence, direction and control of the preparation of the electoral rolls for elections to the office of President and to Parliament and the conduct of such elections shall vest in the Election Commission which shall, in accordance with this Constitution and any other law –
> (a) hold elections to the office of President;
> (b) hold elections of members of Parliament;
> (c) delimit the constituencies for the purpose of elections to Parliament ; and
> (d) prepare electoral rolls for the purpose of elections to the office of President and to Parliament."
> (2) The Election Commission shall perform such functions, in addition to those specified in the foregoing clauses, as may be prescribed by this Constitution or by any other law."

Article 120 of the Constitution provides that-

> "The President shall, when so requested by the Election Commission, make available to it such staff as may be necessary for the discharge of its functions under this part."

Article 126 of the Constitution lays down that-

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

From examination of the aforesaid provisions of the Constitution the cumulative effect is that the Election Commission is independent while exercising its power under Article 119 of the Constitution which does not include the power of appointment and terms and conditions of service of the employee under the Election Commission Secretariat. According to Article 119 during the election all Deputy Commissioners, Superintendents of Police and other concerned officials are placed under the control of the Election Commission for the purpose of holding election. Undoubtedly, none of the organs of the Government including the executive can interfere with the functions of the Election Commission. It is 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.

Now let us see what are the legal provisions regarding the appointment and service of the employees of the Election Commission. The Election Commission (Officers and Staff) Rules,

1979 were applicable to the respondents at the relevant period of their appointment.

Section 2 (a) of Rules 1979 provides that—

> "(a) "Appointing Authority" means such authority as has been specified in column 6 of Schedule IV;"

Section 8 (1) of the Rules 1979 says that-

> "appointment to a direct recruitment shall not be made except upon the recommendation of the Bangladesh Public Service Commission:"

Again, Section 3 of নির্বাচন কমিশন সচিবালয় আইন, ২০০৯ states that-

> **"নির্বাচন কমিশন সচিবালয়**
>
> ৩। (১) নির্বাচন কমিশনের একটি নিজস্ব সচিবালয় থাকিবে এবং উহা নির্বাচন কমিশন সচিবালয় নামে অভিহিত হইবে।
>
> (২) নির্বাচন কমিশন সচিবালয় সরকারের কোন মন্ত্রণালয়, বিভাগ বা দপ্তরের প্রশাসনিক আওতাধীন থাকিবে না।
>
> (৩) নির্বাচন কমিশনের পক্ষে আইন প্রণয়ন সম্পর্কিত বিষয়াদি আইন, বিচার ও সংসদ বিষয়ক মন্ত্রণালয় কর্তৃক সম্পাদিত হইবে।
>
> (৪) নির্বাচন কমিশন সচিবালয় বিধি দ্বারা নির্ধারিত পদ্ধতিতে নিযুক্ত একজন সচিব এবং অন্যান্য কর্মকর্তা ও কর্মচারীগণের সমন্বয়ে গঠিত হইবে।"

Section 5 of নির্বাচন কমিশন সচিবালয় আইন, ২০০৯ provides that-

> **"নির্বাচন কমিশন সচিবালয়ের নিয়ন্ত্রণ**
>
> ৫। (১) নির্বাচন কমিশন সচিবালয়ের সার্বিক নিয়ন্ত্রণ প্রধান নির্বাচন কমিশনারের উপর ন্যস্ত থাকিবে এবং সচিব নির্বাচন কমিশন সচিবালয়ের প্রশাসনিক প্রধান হইবেন।
>
> (২) সচিব নির্বাচন কমিশন সচিবালয়ের প্রশাসন, শৃঙ্খলা বিধান এবং সচিবালয়ের উপর অর্পিত কার্যাদি যথাযথভাবে সম্পাদন করিবেন। তিনি এই আইন এবং তদধীন প্রণীত বিধিমালার অধীন বিধানাবলীর যথাযথ প্রতিপালন নিশ্চিত করিবেন এবং প্রধান নির্বাচন কমিশনারকে সচিবালয়ের কার্যাদি সম্পর্কে সময়ে সময়ে অবহিত করিবেন।
>
> (৩) প্রধান নির্বাচন কমিশনার নির্বাচন কমিশন সচিবালয়ের দায়িত্ব বিধি বা স্থায়ী আদেশ দ্বারা নির্ধারিত পদ্ধতিতে অন্য কোন কমিশনার কিংবা নির্বাচন কমিশন সচিবালয়ের কোন কর্মকর্তাকে অর্পণ করিতে পারিবেন।"

Rule 2 of নির্বাচন কমিশন (কর্মকর্তা ও কর্মচারী) নিয়োগ বিধিমালা, ২০০৮ states that-

"(গ)"নিয়োগকারী কর্তৃপক্ষ" অর্থ সরকার বা সরকার কর্তৃক ক্ষমতাপ্রাপ্ত যে কোন কর্মকর্তা;"

Rule 11 of নির্বাচন কমিশন (কর্মকর্তা ও কর্মচারী) নিয়োগ বিধিমালা, ২০০৮

"কর্মকর্তা ও কর্মচারীগণের চাকুরীর সাধারণ শর্তাবলী-

এই আইনের বিধানাবলী সাপেক্ষে, প্রজাতন্ত্রের অসামরিক পদে নিযুক্ত সরকারী কর্মকর্তা ও কর্মচারীগণের ক্ষেত্রে প্রযোজ্য চাকুরীর শর্তাবলী নির্বাচন কমিশন সচিবালয়ে নিযুক্ত সকল কর্মকর্তা ও কর্মচারীগণের ক্ষেত্রে প্রযোজ্য হইবে।"

On scrutiny of the aforesaid provisions of law we arrive at a decision that the employees of the Election Commission Secretariat are appointed by the government and the terms and conditions of government employees are equally applicable in respect of the employees of the Election Commission. We find that both Sections 3 and 5 of নির্বাচন কমিশন সচিবালয় আইন, ২০০৯ talk about the independence of Election Commission Secretariat while Rules 2 and 11 of নির্বাচন কমিশন (কর্মকর্তা ও কর্মচারী) নিয়োগ বিধিমালা, ২০০৮ categorically states about the appointment of the employees and their terms and conditions in service. Virtually, Sections 3 and 5 of the নির্বাচন কমিশন সচিবালয় আইন, ২০০৯ do not put any embargo on the applicability of the contemporary government service laws to the employees of the Election Commission Secretariat. Therefore, we are constrained to hold that the Cabinet Secretary on behalf of the Government has *locus standi* to file the present Appeals against the judgment and order of the Administrative Appellate Tribunal since it involves the issue of termination of service of the employee of Election Commission

Secretariat. Moreover, it is seen from the record that the Cabinet Secretary was a party to the Administrative Tribunal cases.

In view of the elaborate discussion and the observations made above, we find merit in the submissions of the learned Counsels for the Appellant and therefore the impugned judgment and order dated 12.04.2010 passed by the Administrative Appellate Tribunal, Dhaka warrants interference

Accordingly, all the appeals are **allowed**.

The judgment and order dated 12.04.2010 passed by the Administrative Appellate Tribunal, Dhaka in Appeals No.134, 139, 143 and 144 of 2009 are hereby set aside.

C.J.

J.

J.

J.

J.

J.

The 1st day of September, 2022
Sarwar, RRO; Total words 6996