IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)
Present:
Mr. Justice A.H.M. Shamsuddin Choudhury
And
Mr. Justice Jahangir Hossain

WRIT PETITION NO.7694 OF 2010.

IN THE MATTER OF :

An application under Article 102(2) of the Constitution of the People's Republic of Bangladesh;

A N D

IN THE MATTER OF :

Dr. Mohiuddin Khan Alamgir

... Petitioner

-Versus-

Election Commission for Bangladesh, Sher-e-Bangla Nagar, Dhaka and others.

... Respondents

Mr. Md. Rokanuddin Mahmood, with
Mr. Shah Monjurul Hoque
Mr. Mustafizur Rahman Khan
Ms. Safayat Sultana Rume
Ms. Adita Afrose Hasan, Advocates

... For the Petitioner

Dr. Shahdeen Malik, Advocate

... For the Respondent No. 2.

Mr. A. B. M. Altaf Hossain, DAG

... For the Respondents.

Heard and Judgment on: 17th November, 2011.

A.H.M. Shamsuddin Choudhury,J:

The Rule under adjudication, issued on 26.9.2010, was in following terms:

"Let a Rule Nisi be issued calling upon the respondents to show cause as to why the notification being No. NikaSa/Ni-1/JaSa-21/2010/257, dated 22.9.2010, issued by the respondent No. 3, published in the Bangladesh Gazette on 22.9.2010 (Annexure-A), vacating the seat in Jatiya Sangsad for Constituency 260, Chandpur-1, upon cancelling the earlier

gazette notification dated 01.01.2009, and petitioner's Membership of the Parliament, shall not be declared to be without lawful authority and is of no legal effect and ultra vires the Constitution and/or such other or further order or orders passed as this Court may deem fit and proper."

The petitioner herein is a person of acclaimed notoriety of very rare pursuit, who has succeeded to thrive as a man of exquisite distinction by being a former top brass in the Republic's civil service and as a political super-duper at the later stage, and of course, by dint of his life long performance per excellence.

He is a member of the Presidium of Bangladesh Awami League. During the period between 1997 and 2001, he was the State Minister for Planning as well as State Minister in Charge for the Ministries of Civil Aviation and Tourism and Science and Technology. On completion of a brilliant academic career, the petitioner joined the erstwhile Civil Service of Pakistan in 1965 upon obtaining Honours degree and later, a Masters degree from the University of Dhaka. He voluntarily retired from the civil service while holding the post of a Secretary to the Government of Bangladesh in the year 1997. He was also the General secretary of the Bangladesh Economic Association. During his career as a civil servant, he held many coveted posts, while his international assignments include Executive Directorship of the Islamic Development Bank, Jeddah, and consultancy of the UNCDF for Reconstruction Programme of Uganda in 1980. He was honourned with the distinguished Visitor-ship of the Penn State University of the United States in 1989 at the instance of the Asia Foundation. While in the civil service, the petitioner also obtained M.A. in Political Economy and M.A. and Ph. D in Economics from Boston University, USA. He set up Jessor Shikkha Trust and Kachua Shikkha

Trust to provide financial help and support for poor, yet endowed students, in addition to being involved in many philanthropic, social and community development works in his constituency in Chandpur. He comes from a distinctively illustrious family of Chandpur, members of which family are occupying various iconic positions in the Republic. The petitioner's eldest brother was also a member of the Jatiya Sangsad from the same constituency which is now being represented by the petitioner. He himself and his family have left an indelible mark in the development of the people of Chandpur in general and Kachua in particular. His nephew Dr. Muntasir Mamun, a professor at the Department of History at the University of Dhaka is a household name in Bangladesh, while his other sibling Dr. Borhanuddin Khan Jahangir is also a recognised luminary in the realm of intellectual pageantry.

As the state Minister for Planning, the petitioner was solely responsible for authoring the fifth 5 years plan. His singular and tireless efforts were primarily attributable to the success in the negotiation and final conclusion of the Ganges Water Sharing Treaty with India and the Peace Accord with the tribal insurgents of Chittagong Hill Tracts, whereby peace in the hills was restored.

Through this writ petition he impugns the notification dated 22.09.2010 the respondent No. 3, published in the Bangladesh Gazette on 22.9.2010, declaring the seat in the Jatiya Sangsad from Constituency 260, Chandpur-1, vacant upon cancelling the petitioner's Membership of the Jatiya Sangsad in supersession/cancellation of the entries under column Nos. 2, 3, 4, 5 against Constituency 260 Chandpur-1, described in column No. 1 at page 55 of the gazette notification, dated 01.01.2009.

To ignite support for his claim, the petitioner arraigned a flock of facts, which stand figured below in summarised form.

A gazette notification, dated 01.01.2009, was published by the Election Commission, henceforth the Commission, (the respondent No. 1), in exercise of its power under Article 39(4) of the Representation of People Order, 1972, (P.O. 155 of 1972), wherein names of 300 duly elected candidates of the Jatiya Sangsad in the General Election 2008, were put in black and white.

All those three hundred elected Members, inclusive of the petitioner, whose names were published in the gazette notification dated 01.01.2009, were duly adorned as Members after the Speaker administered oath of office as prescribed in the Third Schedule, in terms of Article 148 of the Constitution.

The petitioner was elected as Member of Parliament from Constituency 260 Chandpur 1 in the General Election held on 29.12.2008. His election was duly notified in the official gazette, as mentioned herein above, by the Speaker. He was elected the Chairman of the Public Accounts Committee of the Parliament. Since his election he has been duly performing his duties as the Member of the Parliament regularly attending the sessions and participating in the deliberations therein. On a special invitation he attended a Conference of the Chairmen of the Public Accounts Committees of the Parliaments held in Quebec, Canada in August-September, 2010.

After the declaration of Emergency in January 2007, the petitioner was arrested and detained by the then Government under the Emergency Powers Rules. While in jail, he was served a notice, purportedly under Section 26 of the Anti-Corruption Commission Act, 2004, for submission of his wealth statement with a vicious intention of politically mortifying

him. He was then compelled to submit the same from the jail over his serious reservation and objection as he did not have any opportunity to consult his records and documents. Subsequently, he was unjustly and maliciously prosecuted and charged under Sections 26 and 27 of the Anti Corruption Commission Act, 2004 and was perfunctorily convicted and sentenced to 13 years imprisonment and to pay Tk. 10 lac fine on 26.07.2007, by a special court in Special Case No. 1 of 2007, arising out of Tejgaon P.S. Case No. 19(3)2007, in a trial that was commonly dubbed and referred to as a "kangaroo" trial.

Thereafter he preferred an appeal on 04.11.2007, against the aforesaid conviction and sentence, which was admitted for hearing. He was subsequently enlarged on bail by an order dated 28.08.2008, passed by the High Court Division, pending hearing of the said Criminal Appeal. By a subsequent order, dated 22.01.2009, passed in the aforesaid appeal, the High Court Division, on the application of the petitioner under Section 426(1) of the Code of Criminal Procedure, suspended the conviction and sentence of the latter. The petitioner, who had already authored several books, utilised his period of incarceration for authoring a book titled "Notes from a Prison Bangladesh" describing his ordeal during the Emergency of 2007-2008, which was simultaneously published from Bangladesh and the United States of America.

The then Army backed so-called caretaker Government and its Task Force was so vindictive against the petitioner that his wife (a retired public servant who has a Masters in Economics from Boston University) and non-resident sons (one of whom is a faculty member of the University of Massachusetts, USA and the other is the Chief Executive of a renowned of information technology in Boston), were also not spared the wrath of

vindictive prosecution and conviction in absentia by similar “kangaroo” courts. In 2002, when the then Government deployed the Army in an operation which came to be known as “Clean-Heart Operation”, the petitioner was also incarcerated for a long time and was tortured.

When the Election Schedule for the General Election to be held on 29.12.2008, was declared, the petitioner submitted nomination paper for Parliamentary election from Constituency 260 Chandpur-1, as a nominee of the Bangladesh Awami League. The Returning Officer rejected his nomination paper by an order, dated 03.12.2008, on the ground of his aforesaid conviction, observing that he had received a list of persons who got convicted under Emergency Powers Rules as sent by the Commission. The Returning Officer totally ignored the fact that the said conviction being the subject matter of the aforesaid pending appeal, had not achieved finality and hence such a conviction could not be invoked to disqualify the petitioner.

The petitioner being aggrieved by such rejection of his nomination paper, preferred an appeal to the Commission. The Commission in turn, by an order, dated 08.12.2008, dismissed the appeal upholding the order of the Returning Officer.

The petitioner being aggrieved by the aforesaid order of the Election Commission, filed an application under Article 102 of the Constitution, which was registered as Writ Petition No. 9865 of 2008. The High Court Division, by the judgment and order dated 15.12.2008, summarily rejected the said writ petition on ground of maintainability. While, however, rejecting the writ petition, this Division accepted the contention that he was not sentenced under the Emergency Power Rules, and therefore the bar of Rule 11(15) of the said Rules (which disqualified a candidate from

contesting the election pending appeal against conviction) was not applicable to him. The Emergency Power Rules were repealed vide gazette notification dated 15.12.2008 effective from 17.12.2008.

The petitioner then filed Civil Miscellaneous Petition for Leave to Appeal No. 1012 of 2008 in the Appellate Division against the aforesaid order of the High Court Division, whereupon the Hon'ble Judge in Chambers of the Appellate Division, by an order dated 18.12.2008, stayed the order, dated 08.12.2008, the Commission passed in Election Appeal No. 68 of 2008 affirming the Returning Officer's order of rejection and directed the Returning Officer to accept the petitioner's nomination paper and allow him to contest the ensuing General Election.

In the meantime, the Emergency had been withdrawn by promulgation of Emergency Powers Repeal Ordinance, 2008 on 15.12.2008 as stated above.

The Returning Officer obliged by accepting the nomination paper of the petitioner, allocated the symbol, "Boat", and allowed him to contest the election on 29.12.2008. The election was duly held on 29.12.2008, and the petitioner was elected Member of the Parliament as stated herein above with a huge margin. The election of the petitioner as a Member of the Parliament was not challenged before the High Court Division, raising any election dispute under Article 49 of P.O. No. 155 of 1972 by any of the candidates.

While the petitioner remained an incumbent Member of the Parliament (MP), and kept performing his duties and responsibilities as such, the aforesaid appeal filed by the petitioner against his conviction and sentence was allowed by a Division Bench of the High Court Division, upon hearing the same at length, by order dated 13.07.2009, whereon the

conviction was set aside. The Anti Corruption Commission preferred Criminal Petition for Leave to Appeal No. 398 of 2009 in the Appellate Division against the aforesaid judgment of the High Court Division, but the Appellate Division, upon hearing the parties, by its judgment and order dated 04.07.2010, dismissed the criminal petition for leave to appeal upholding the judgment of the High Court Division with a finding that the notice under Section 26 of the Anti Corruption Commission Act, 2004 served upon the petitioner was without jurisdiction and was no notice in the eye of law, the same not being a fair bona fide exercise of power, and as such all proceedings based on such void notice was a nullity in the eye of law.

Thereafter, the Civil Petition for leave to Appeal No. 311 of 2009 which sprang out of Civil Miscellaneous Petition for Leave to Appeal No. 1012 of 2008, came up for hearing on 15.07.2010, and the Appellate Division upon hearing the parties dismissed the same, observing that High Court Division correctly decided the issue of maintainability of the writ petition.

The Appellate Division in the said judgment, did not give any finding or direction vacating the petitioner's seat nor did the Appellate Division express or even imply that his election was void.

Respondent No. 3 upon obtaining a certified copy of the Appellate Division's Judgment, issued the impugned notification in the Bangladesh Gazette with the heading of "Election Commission Sachibalaya", declaring the seat in the Parliament for Constituency 260 Chandpur 1, vacant upon cancelling the petitioner's Membership of the Parliament and also cancelling the earlier gazette notification dated 01.01.2009, insofar as it related to the election of the petitioner.

The aforesaid notification has neither been issued by the Commission nor on the order of the Commission. It is apparent from a reading of the notification that it has been issued by a joint Secretary of the Commission, who has not been vested with any authority either by P.O. No. 155 of 1972 or by any other provision of law or the Constitution to issue such a notification, vacating the seat of any Constituency upon cancelling anyone's Membership of Parliament and cancelling a notification published in an official gazette under Article 39(4) of P.O. No. 155 of 1972. Therefore, the impugned Annexure-"A", contains an error apparent on the face of the record, making it liable to be struck down upon a judicial review of the same by this Hon'ble Court.

The impugned notification is premised upon references to various orders passed by various authorities, namely, the Returning Officer, the Commission, the High Court Division, the Judge in Chamber and the Appellate Division, leading to his erroneous assumption that the High Court Division by its judgment, dated 15.12.2008, in Writ Petition No. 9865 of 2008, vacated the petitioner's Parliamentary Membership. A reading of the first paragraph of the impugned Annexure-"A", which is the basis for second paragraph, leads one to conclude that the respondent No. 3 got totally carried away to obfuscation by misreading, misunderstanding and misinterpreting the judgments of the High Court Division and that of the Appellate Division.

Once a gazette notification of an election result has been published by the Commission in exercise of its powers under Article 39(4) of P.O. 155 of 1972, and based on such notification, oath is administered upon a Member of the Parliament in accordance with Article 148 of the Constitution, such gazette notification or the election result cannot be

revoked by any authority except by raising an election dispute upon an election petition under Article 49 of P.O. 155 of 1972 by a candidate. Only the High Court Division in exercise of its powers under Chapter V of P.O. 155 of 1972, can declare a seat vacant or an election of a returned candidate void. Other than Chapter V of P.O. 155 of 1972, there is no power vested in any person or authority to cancel the election of a returned candidate or his Membership of Parliament or to declare a seat vacant. Not even the Commission has been equipped with such a power or authority either under P.O. 155 of 1972 or the Constitution, not to speak of a mere Joint Secretary of the Commission.

The petitioner's conviction was set aside in appeal by the High Court Division, which was upheld by the Appellate Division, and as such his conviction became void ab initio and a nullity as if he had no conviction at all at any point of time. The judgment of the High Court and the Appellate Divisions means retroactively converting the conviction into an acquittal, in view of the fact that the acquittal by the High Court Division dates back from the date of conviction by the trial court. The judgments of both the Divisions have the consequence of wiping out the disqualification, if any, as completely and effectively as if it did not exist at any time, including the date of scrutiny of the nomination paper, meaning that his nomination paper was properly accepted by the Returning Officer. In the Premises, the impugned Annexure-"A" is mala fide, arbitrary, without lawful authority and is geared for a collateral purpose.

Article 66 of the Constitution, amongst others, ordains that in the event of any dispute arising as to whether a Member of the Parliament has become subject to any disqualification, such dispute shall be referred to the Commission to hear and determine it, and the decision of the Commission

on such reference shall be final. Therefore, it is manifestly evident that the Commission cannot decide a question as to disqualification or vacation of seat of a member unless the same has been referred to it. In the instant case, there has been no referral to the Commission for any such decision. On the other hand, there has not been any such finding of disqualification or vacation of seat of the petitioner by the High Court Division or the Appellate Division. Therefore, the Commission, far less the respondent No. 3, has no authority under the law and the Constitution to declare the seat in question vacant or rescind the Membership of the petitioner or his election result.

Rule 178 (1) of the Rules of Procedure of the Parliament envisages a reference to the Commission in respect of a dispute regarding disqualification or vacation under Article 66, but no such reference has been made to the Commission. Therefore, the latter has no authority under the law to issue any gazette notification vacating the Membership of the petitioner upon cancelling his election.

The Members of Parliament (Determination of Dispute) Act, 1980 (Act I of 1981) makes a provision for giving effect to Article 66(4) of the Constitution. Section 3 of the Act provides for a reference to the Election Commission. Sections 4, 5 and 6 lay down the procedure for hearing by the Commission, Powers of the Commission and for the transmission of its decision to the Speaker. In the instant case, not only that no reference has been made by the Speaker to the Commission under Section 3 of the said Act, but also that the Commission, while deciding the issue, has not followed the procedure laid down in Section 5 and 6 laid of the said Act. In the premises, the aforesaid notification, Annexure-“A”, is ultra vires the provisions of Article 66(4) of the Constitution and Section 3,4,5 and 6 of

the Members of Parliament (Determination of Dispute) Act, 1980, besides being violative of the principles of natural justice, malice in law, mala fide, arbitrary, without lawful authority and violative of the Constitution.

The respondent No. 2 has filed an affidavit in Opposition refuting the accuracy of the claim that the impugned Notification dated 22/09/2010 was issued without legal authority and without the order of the Commission, and that the respondent failed to understand the Judgments and Orders pronounced by the Hon'ble Supreme Court; it claims that the impugned Notification contains an election dispute, falling under Chapter V of the P.O. No. 155 of 1972, for adjudication by the Hon'ble High Court Division of the Supreme Court of Bangladesh. This respondent did not agree with the petitioner's contention that the Judgement of the High Court Division and the Appellate Division upon the conviction of the petitioner have the effect of wiping out the petitioners disqualification ab-initio i.e. going backward to the time of scrutiny of the nomination paper.

It averred that the Returning Officer rejected the petitioner's nomination paper by his order dated 03/12/2008 on the ground of his conviction under Sections 26(2) and 27(1) of the Anti Corruption Commission Act, 2004.

The petitioner filed Writ Petition No. 9865 of 2008 assailing the order dated 08/12/2008 the Commission passed and the Hon'ble High Court Division by its Judgement and Order, pronounced on 15/12/2008, summarily rejected the Writ Petition.

The petitioner thereafter filed Civil Miscellaneous Petition for Leave to Appeal No. 1012 of 2008 before the Hon'ble Appellate Division and the Hon'ble Judge in Chamber by his Order, dated 18/12/2008, stayed the said

Judgement of the High Court Division and passed order upon the relevant Returning Officer to accept the nomination paper of the petitioner.

By dint of the said direction, passed by the Hon'ble Judge in Chamber in Civil Miscellaneous Petition for Leave to Appeal No. 1012 of 2008, the petitioner contested in the 9th Parliamentary Election, 2008 from constituency No. 260, Chanpur-1.

The petitioner thereafter filed regular Civil Petition for Leave to Appeal No. 311 of 2009, against the afore-said Judgment of the Hon'ble High Court Division, which was heard by the Hon'ble Appellate Division on 15/12/2010 and the Hon'ble Court was pleased to uphold the Judgement and Order of the Hon'ble High Court Division, pronounced in Writ Petition No. 9865 of 2008.

From the text of the Judgment and Order the Hon'ble Appellate Division in Civil Petition for Leave to Appeal No. 311 of 2009, passed, it is abundantly clear that the Returning Officer correctly rejected the nomination paper of the petitioner by his order dated 03/12/2008 and the Commission was also correct in rejecting the appeal of the petitioner and upholding the decision of the Returning Officer by its order dated 08/12/2008.

From the above facts and circumstances and legal position, it is clear that the petitioner could not have legally participated in the 9th Parliamentary Election, 2008 for election as Member of Parliament since his nomination paper was legally rejected.

On the date and time of the submission of the nomination paper, the petitioner was clearly not qualified to be elected as a Member of Parliament and it is immaterial whether such disqualification was later removed or corrected. It being settled by the Judgement and Order of the Hon'ble

Appellate Division in CP No. 311 of 2009, that the petitioner not being qualified at the time of the submission of the nomination paper to be a candidate to contest the Parliamentary election and this disqualification now having been finally settled, the Commission correctly issued the impugned Notification.

It has been a long settled principle that it is the duty and within the plenary power of the Commission to oversee that every election is conducted honestly, justly and fairly; and considering the facts and circumstances and after the pronouncement of the afore-said Judgment and Order of the Hon'ble Appellate Division in Civil Petition for Leave to Appeal No. 311 of 2009, the Commission came to the conclusion that the 9th Parliamentary Election, 2008 in Constituency No. 260, Chanpur-1 for election of a Member of Parliament was not held and conducted honestly, justly and fairly while the petitioner, a disqualified candidate, participated and got elected in the said election.

After getting the copy of the Judgment and Order of the Hon'ble Appellate Division in Civil Petition for Leave to Appeal No. 311 of 2009, the same was taken up for discussion by the Commission on its meeting dated 22.09.2010 to determine its legal obligation in the light and spirit of the said Judgement and Order; and the Election Commission, after considering the facts in the round, and the circumstances as summarized herein-above, decided to vacate the seat of the Parliamentary Constituency No. 260, Chandpur-1, which is an essential consequence of cancelling the election held on 29/12/2008 in the Parliamentary Constituency No. 260, Chandpur-1, through gazette notification.

In pursuance to the said decision of the Commission, the said Notification dated 22/09/2010 was issued which contains the background

for which the Notification was issued, expressly evidencing the reasons for issuing the Notification.

Disqualification of the petitioner, as aforesaid, existed at the time and stage of submission of his nomination paper, a stage which is held to be comprised in the election process' and within the domain and jurisdiction of the Commission; therefore, the latter correctly issued the said Notification.

The Members of Parliament (Determination of Dispute) Act, 1980 (Act No. 1 of 1981) were enacted to give full effect to the provisions of Article 66(4), which Article only envisages a situation where a Member of Parliament embroils disqualifications after his election; but the disqualification complained of against the petitioner is not a disqualification which arose subsequent to his election, rather it existed at the time of his submission of nomination paper and also at the time of his election: his disqualification remained in abeyance by virtue of the interim order the Hon'ble Judge in the Chamber of the Hon'ble Appellate Division passed and the disqualification was never wiped off; therefore, the procedure as contemplated in Article 66(4) of the Constitution and the Members of Parliament (Determination of Dispute) Act, 1980 (Act No. 1 of 1981) is altogether inapplicable, not attracted and without relevance for determination of the disqualification of the petitioner.

The decision of the Returning Officer, dated 03/12/2008, rejecting the petitioner's nomination paper and the appellate decision of the Commission, dated 08/12/2008, are still valid orders and very much effective since those have never been declared illegal or without lawful authority in any court, though the order was contested all the way upto the

Appellate Division. The Commission gave effect to the said Orders by issuing the said Notification which is within its power and jurisdiction.

As the Rule attained maturity for adjudication, Mr. Rokanuddin Mahmud unyieldingly proffered that the impugned action is bound to end in fiasco as it stands miles away from what the law ordains.

His stentorian submissions revolved round the theme that the complained disqualification can by no stretch of imagination be **labelled** as a pre-entry disqualification for the simple reason that as on the dates of the submission of nomination papers, poll, declaration of result and administering of oath, the petitioner remained qualified, because, although previously an order of conviction was passed against him, his conviction was subsequently set aside and he came out with an absolutely clean **slade** as an acquitted person, which necessarily connote that he was, at no point of time, a convict. According to him text featured in Article 66 (2) can not be invoked to disqualify him. He went on to insist that this is a case where Article 66(4) is apposite because after a person gains an entry into the roll of the Parliament's Member, his situation can only be governed by the provisions as lettered in Article 66(4), which in other words means that question of his disqualification can not be determined by the Commission unless the Speaker refers the matter to the earlier in concord with the provisions laid down in Act 1 of 1981 and the Rule 178 of the Rules of Procedure. He also engaged the doctrines audi alteram partem.

He argued quite strenuously that the Commission transgressed upon the realm of grave error of fact and law in arriving at the culmination that the Appellate Division declared the election result void or the seat vacant or ordered the Commission to do so.

He also vehemently posited that it is beyond the competence of the Commission to declare a seat vacant and to efface a gazette notification.

Mr. Abdul Matin Khashru, who also represented the petitioner, submitted that as the petitioner's conviction was eventually buried by the Apex Court, it is too late to argue that he was disqualified at any stage.

Dr. Shahdin Malik, representing the Commission, on the other hand, remained bent to **sticle** to the theme that as on the dates the petitioner filed his nomination, the polling took place, oath was administered and the petitioner purported to assume office as a Member of the Parliament, his conviction and, therefore disqualification persisted.

According to him, although the Appellate Division paved way for the petitioner to file nomination paper, he was nevertheless, disqualified for election as he was subject to a conviction order on those dates: its only that the disqualification was put on hibernation. Dr. Malik could not agree with the enunciations that eventual outcome of the petitioner's appeal did erase his disqualification as on those dates because the appellate order could not have any retrospectivity.

He retained his oration to insist that it is Article 66 (2) of the Constitution, not Article 66(4) that is engaged in this case because it is a pre-election disqualification that the petitioner is swamped by, accepting, nevertheless, that the Commission would end up with a non-starter situation if Article 66(2) does not apply. He reckoned that we are treading through a hitherto grey area, and hence a comprehensibly examined judgment is deserved.

For ourselves, as we visualise it, the case is indubitably one of primordial Constitutional importance. Our decision is bound to pave a far

reaching impact and hence, we must trail with utmost precision and fastidiousness.

In our introspection the pivotal question upon which the fate of this petition rests destined, is whether liquidation of a conviction by the appellate/revisional forum on a subsequent date has prospective or retroactive effect. We would also be required to resolve three more questions; whether Article 66(4) or 66 (2) applied whether the commission was saddled with a duty to allow the petitioner a chance to be heard, (2) whether issues raised herein had already been adjudicated upon by the Appellate Division in Civil Petition for Leave to Appeal No. 113/2009.

It is a cardinal, and indeed, invariable doctrine of criminal jurisprudence that a person accused of or indicted with an offence, is to be presumed innocent unless he is proved guilty, and, the onus to so prove, is obviously, upon the prosecution.

This concept is tacitly reflected in Articles 31, 32 and 35 of Our Constitution which provide that no action detrimental to the life, liberty, body, reputation or property shall be taken except in accordance with the law and that no person shall be deprived of life personal liberty save in accordance with the law, and that (Article 35), none shall be convicted of an offence except for violation of a law in force at the time of the commission of the act charged as an offence.

Presumption of innocence of necessity connotes that the accused must be deemed and reckoned to be innocent throughout the period of trial, until that time when he is found guilty of the charge, if he is actually so found at the end of the day.

At the conclusion of the trial, the Court can acquit the accused only on consideration that there is no evidence that the accused committed the

offence (section 265 H of the Code of Criminal Procedure: 38 DLR (AD) 303). His conviction can also be quashed vide this Division inherent power.

So, what acquittal means is a judicial declaration that there is no evidence that the accused has committed the offence, whereupon the presumption of innocence gets absolution, while quashing connotes that the indictment suffered from fatal defect, which also entails same consequence as acquittal does.

Oxford Advanced learner's Dictionary defines the phrase "acquittal" as "an official decision in court that a person is not guilty of a crime".

Blacks Law Dictionary defines acquittal as the legal certification, usually by jury verdict, that an accused person is not guilty of the charged offence.

Allahabad High Court in Madho Lal-v-Harishankar (AIR 1963 ALL 547) held that "acquittal would mean acquittal from the Trial Court or if there is conviction from a Trial Court, then the order' of acquittal was passed in appeal or revision"

An Indian High Court in MK Balappachar-v-State of Mysore, 1975 1 SLR 809 (Knt) observed. "The expression acquittal of blame means acquittal of the offence with which a person is charged. Once he is acquitted, whether such acquittal is on account of lack of evidence or on account of any defect in the procedure in the trial, or an account of the court extending the benefit of doubt, so long such acquittal stands, the presumption of innocence of the accused, should be given full effect and he must also be regarded as being acquitted of the blame flowing from any of the acts or omission which formed the subject matter of the charge."

So, what is abundantly clear is that throughout the period of trail an accused must be presumed to be innocent and that presumption shall only

be reversed if, and only if, at the end of the trial, the accused is found guilty and is convicted, otherwise his slade remains as clean as ever.

This proposition necessarily begs the question as to what the phrase “trial” denotes and what stages are impregnated into “trial”.

There is a chain of unbroken preponderant authority to proclaim that trial incorporates appellate proceeding as well.

In this respect Calcutter High Court stated in Madhub Chunder Mazumder-v-Novodeep Chander Paudit (1889 ILR, Vo 116, Page 121), “In the firs place there can be no doubt, we think, that the trial of an appeal is included in the expression “shall try any person”.

The same High Court in Nistarini Devi-v-A C Ghase (ILR 1896 Volume 23, Page 44) expressed “I am of the opinion that the word “try a case” is comprehensible enough to hearing of an appeal.”

Calcutta High Court is Bansilal-v-The Emperor (12 Calcutta Weekly Notes 1908, page 138) proclaimed; “so before hearing the appeal, when he became District Magistrate, he should have fallowed the procedure laid down by section 191, because an appeal is part of the trial of an offence”.

In Green Empress-v-Subbayya, (12 OLR, 1889, Madras, page 451) the Madras High Court held, “A criminal Appeal is a continuation of the criminal case, and, except, so far as there a provision to the contrary, the appellant has the privilege of the accused.....”

The king’s Bench Division in Drover-v-Rugmon (1951 1KB 380) affirmed that an appeal is treated as a complete rehearing.

Similar view was echoed in Northern Ireland Trailers-v-Preston Corporation, 1972 1 WLR 203, and Hughes-v-Holley (1986) 86 Cr. A. R.

These authorities iterate that the presumption of innocence, which begins to apply from day one of the accusation, continues until the trial

meets finality at the appellate stage, if the accused takes recourse to the right of appeal, and if his conviction is set aside/quashed by the appellate/revisional forum, he is deemed always to have remained innocent, never to have been stigmatised as guilty, not even for a trivial period.

In fact superior authorities are quite specific and blunt in this context, as we can see from Lord Reading CJ's following **propoundment** in R-v-Barron (10 Cr. A. R 81 CCA),

"When a conviction has been quashed in the court of Appeal, without any order for re-trial, the appellant is in the same position for all purposes, as if he had actually been acquitted".

The same view also emanated from the House of Lords in Connely-v-DPP (1964 AC 1254 HL) and from the Judicial Committee of the Privy Council (1950 AC 458), in Sambasivam-v-Public Prosecutor, Malayasia, in Dhirubhan Madaribhai-v-state of Gkujrat (1998(1) Crime, 570 Guy-D B), where it has been categorically observed that an order of acquittal has retrospective effect from the date of judgment of the trial court.

The most glaring Indian authority emanates from that country's Apex Court in the case of Bidya Charam Shukla-v-Puroshottam Lal Kaushik (AIR 1971 SC 547), which, incidentally, was also a case that touched upon the question of electoral disqualification, that stemmed from criminal conviction which was eventually set aside.

In that case the Indian Supreme Court did not stop merely by pronouncing that an appellate order of acquittal takes effect retrospectively, but went far enough to say that if the Election Tribunal delivers its judgment after the appellate Court reverses the conviction, the Tribunal would be left with no choice but to hold that the postulant was not, as on

the date of the polls, disqualified. Sarkaria J, delivering the judgment of the Court, expressed; “The argument overlooks the fact that an appellate order of acquittal takes effect retrospectively and the conviction and sentence are deemed to be set aside with effect from the date they were recorded. Once an order of acquittal has been made, it has to be held that the conviction has been wiped out and did not exist at all. The disqualification which existed on 9th or 11th February 1969 as a fact, was wiped out when the conviction recorded on 11th January 1969 was set aside and that acquittal took effect from the very date. It is significant that the High Court under Section 100(1)(a) of the Act is to declare the election of a returned candidate to be void if the High Court is of opinion that on the date of his election, a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the constitution or the Act. It is true that the opinion has to be formed as to whether the successful candidate was disqualified on the date of his election: but this opinion is to be formed by the High Court at the time of pronouncing the judgment on the election petition. In this case the High Court proceeded to pronounce judgment on 27th October 1964. The High Court had before it the Order of acquittal which had taken retrospectively from 11th January 1969. It was therefore impossible for the High Court to arrive at the opinion that on 9th or 10th February 1969 the respondent no. 1 was disqualified. The conviction and sentence had been retrospectively wiped out, so that the opinion required to be formed by the High Court to declare the election void could not be formed.”

Although in the above cited case it was the decision of an Election Tribunal which was assailed, there is no reason why the principle engraved therein should not apply to the case before us equally well. In this case also it can be said with equal force that since on the date of the pronouncement

of our judgment, we had before us evidence that the petitioner's appeal saw the face of success, he came out with a clean bill of acquittal, it is impossible on our part to say that the petitioner was ever disqualified at any point of time. To say so would be tantamount not only to ignore the congruous ratio expounded by the Indian Supreme Court but also to give in to a mundane fallacy and to declare a statutory right of appeal as irrelevant and vacuous. If the acquittal was not before the date mentioned, that could give rise to a different scenario. That could not have happened, anyway, because it is with an interlocutory order of the Appellate Division that the petitioner found it possible to put forward his candidature.

There is also no paucity of authorities from our own jurisdiction to marshal support for the above stated proposition.

The more recent one emanates from the case of H M Ershad-v-Abdul Muqtadir Chowdhury, 53 DLR 569.

Following the ratio in the cases of Serajul Huq Chowdhury-v-Nur Ahmed Chowdhury and Waliur Rahman Chowdhury, (19 DLR 766) as well as that in Mayeedul Islam-v-Bangladesh Election Commission, (1996 BLD AD 204) the presiding judge of a Division Bench of this Division came out in support of the view that the appeal courts verdict operate retrospectively to undo any disqualification on the date of the filing of nomination paper on account of an order of conviction passed earlier by the court of first instance.

In Serajul Haque Chowdhury-v-Nur Ahmed Chowdhury, supra, this Division unequivocally held that disqualification would operate only after the conviction and sentence become final either on appeal or on the expiration of the limitation prescribed for appeal with the result that the execution of the sentence became inevitable.

In Mayeedul Islam-v-Bangladesh Election commission, ante, this Division summarily rejected a petition through which the decision of the Returning Officer, was challenged, which officer, notwithstanding conviction passed by a court of first instance, accepted a rival candidate's nomination on the ground that although that candidate was convicted, those convictions had been challenged by filing appeal which were pending and, hence there was no disqualification. On appeal, the Appellate Division, however, though refused to grant leave on maintainability ground, did, nevertheless tacitly accord recognition to the High Courts Division view, as is evident from Mustafa Kamal J's, observation. His Lordship expressed that apparently the Returning Officer, acting within his Jurisdiction, expressed the view that because of the pendency of appeals against orders of convection, the respondent will not be disqualified, because the orders of conviction have not attained finality.

It is important to note that Mostafa Kamal J's expression that the Returning Office committed no malice in law, goes a long way to implicitly endorse the Returning Officer's finding on the consequence of the lodging of appeal.

There can not, hence, be any qualm on the following propositions;

(a) an accused is presumed innocent through the period of trial

(b) trial embraces appellate proceeding as well and hence, the accused, as appellant, remains endowed with the same presumption throughout the appellate process too;

(c) if at the conclusion of the final appeal the same is dismissed the presumption is reversed and he is deemed guilty from day one, but it his appeal is allowed and an order of acquittal is passed, the reverse become true i.e., then he is deemed never to have been

guilty, not even for a moment, during the entire proceedings in the court of first instance as well as in the appeal Court. In other word, as the Indian Supreme Court Bidya Charan Sukla and the Gujarat High Court observed, acquittal reigns supreme with retrospective effect.

Now, in the instant case, the petitioner, soon after facing an order of conviction, exercised his statutory right of appeal with a successful conclusion. Order of reversal of conviction passed by this Division also received approbation from the Apex Court.

So, the authorities discussed above enjoin that the petitioner was never guilty of any offence, a fortiori, he was never de-jure disqualified to seek election for Parliamentary Membership. Contrary to the Commission's averment, it is not a case of subsequent removal of disqualification: it really is that the alleged disqualification was always a **res non**.

As such it is really irrelevant whether the applicable Article was 66(2) or 66(4).

Mr. Mahmud submitted that Article 66(4) alone shall apply to a person who had already been adorned as a Member of Parliament, which means that if question of any disqualification is raised against him while he is already an incumbent Member because of the dictation in Act 1 of 1981 and Rule 178(1) of the Rules of Procedure of the Parliament, the Commission can not assume jurisdiction unless the same is referred to it by the Speaker.

Dr. Malik, however, could not be accommodative to such a **profferment**. According to him provisions in Act 1 of 1981 and Rule 178 (1) of the Rules of Procedure shall apply only if a Member gets infested

with a disqualification after he becomes a member i.e. if he faces conviction afterwards. If his disqualification pre-dates acquisition of Membership, the Article 66(2) would apply and the question of Speaker's referral would be, in Dr. Malik's view, otiose.

Dr. Malik, however, conceded that if Article 66(2) does not apply, he has no case.

Although in view of our finding that the petitioner was never disqualified, if is unnecessary to address this issue, and any observation we may record shall be obiter, as Mr. Mahmud has raised the point we should say that we are unable to accept the interpretation he has advanced.

One of the cannons of interpretation is that so far as ordinary meaning can be attributed to a statute, that must be done.

As we detect no ambiguity or scope for more than one kind of interpretation in Article 66(4), we can apply "ordinary meaning" cannon of interpretation.

Article 66(4) reads;

> "If any dispute arises as to whether a Member of Parliament has, after his election, become subject to any disqualifications mentioned in clause (2) . . . . . , the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final."

Article 67 (d) says that a Member shall vacate his seat (d) if he has incurred a disqualification under clause (2) of Article 66.

We find no ambiguity whatsoever either in the Bengali or the English version. The Constituent Assembly has used very lucid and discernable language to say "if any dispute arises as to whether a member

of Parliament has after his election, become subject to any disqualification . . . . .”

So, disqualification referred to in clause 4 of Article 66 is nothing but the one that has taken place “after his election”, not a pre-existing one.

This is our view can only indicate something that has happened after, not before, the postulant’s election. In other word clause 4 shall apply if a Member faces a criminal conviction for an offence involving moral **turptitude** on a date after he is elected. This can also happen if the appellate forum finally affirms the court of first instances guilty verdict or reverses the earlier courts not guilty verdict, on a date after the member is elected. Article 66(4) in the instant case would have applied if the appellate court affirmed the court bellow’s verdict, because the appeal courts verdict was pronounced after election.

So, neither Act 1 of 1981 nor Rule 178 of the Rules of Procedure has any application in the instant case.

However, for the reasons stated above, this finding would not effect our conclusion.

Admittedly in this case there was no referral to the Commission, and indeed, there arose no question of referral because the petitioner faced no disqualification after he took his seat in Parliament.

We must register our views in no ambiguous terms that the Commission’s averment that the Appellate Division vacated the petitioners seat or that the Appellate Division endorsed the Returning Officer’s refusal, is too casuistry as not deserving any consideration whatsoever. Nowhere has either Division of the Apex Court expressed anything requiring the petitioner or has asked the Commission to do so or to bestow validity to the Returning Officer’s decision or that the petitioner was not

qualified at the time he submitted his nomination paper. It is clear even from the naked eyed reading of the Appellate Division Order, that it kept these issues at the bay. What this Division held, which was affirmed by the Appellate Division, is that an Election Tribunal rather than the Writ Bench, was the proper forum for the resolution of the dispute.

As Dr. Malik quite candidly submitted that if Article 66(2) of the Constitution has no application, **cadit quaestio**: his client would have no case to answer.

With the above finding we need proceed no further, because, as in our view, Article 66(2) has no application in this case by reason of our finding that the petitioner's successful appeal means he was never disqualified, the immutable conclusion is that the impugned decision and action were without lawful authority.

As, however, Mr. Rukonuddin Mahmud engaged audi alteram partem doctrine, we feel constrained to address that aspect as well.

It is Mr. Mahmud's contention that it was incumbent upon the Commission to allow the petitioner to lay his version before it resorted to the impugned decision.

The **sacrosanctity** of the rule audi alteram partem has quite congruously been profiled by Fortescue J in the vintage English case of R-v- University of Cambridge, the Bently's case. (1723 1 str 557), in following terms; I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam, before he was called upon to make his **defence**. Adam, says God, where art thou? Hast thou not eaten of the tree, whereof I commanded the that thou **shouldst** not eat? And the same question was put to Eve also."

Ridge-v-Baldwin is the modern English authority on this notion, through which tide turning decision, the House of Lords put an end to a period of Judicial back sliding. The squabble on the question whether audi alteram partem is confined to judicial decisions only, had been laid to rest, with a negative finding.

Since the courts have been enforcing this rule for centuries, and since it is self evidently desirable, it may not be thought that none vested with a power or discretion to take a decision having effect on a person, would overlook it, yet overlooking is one of the most common legal errors to which human nature is prone.

In Ridge-v-Baldwin, ante, Lord Morris observed, “My Lord, here is something which is so basic to our system: the importance of upholding it far transcends the significance of any particular case.

Lord Reid in his deliberation in this case, with reference to the rule as to right to be heard, expressed;

“We do not have a developed system of administrative law-perhaps because until fairly recently we did not need it..... But I see nothing in that to justify our thinking that our old methods are any less capable today than ever they were to the older types of case”.

Lord Denning in R-v-Gaming Board for Great Britain ex-parte Benain and khaida (1976 2 G B 417) pithily summed up the situation saying.

“At one time it was said that the principle only apply to a judicial proceeding and not to administrative proceeding. That heresy was scotched in Ridge-v-Baldwin,”

With Baldwin, the ratio expressed in the olden days in Cooper-v-Wardsworth Board of Works (1863 14 CB (NS) 180) that right to a hearing is of universal application and that the Justice of the Common Law will supply the omission of the legislature, has been rehabilitated to it's well deserved **cosy** place.

Lord Denning, even before Ridge-v-Baldwin, termed this rule as "elementary rules of justice, proclaiming that even in a contract, natural justice is an implied term (Abbott-v-Sullivan 1952 1 KB 184).

Indeed the right to a fair hearing has been used by the courts as a base on which to build a kind of a code of fair administrative procedure, comparable to "due process of law" under the US Constitution.

With the House of Lords pronouncement in Ridge-v-Baldwin, the intermittent dichotomy that pervaded on the basis of the distinction between a judicial and executive action, has also gracefully subsided, the "judicially" fallacy has been repudiated and coffined as Lord Read emphasized the universality of the right to a fair hearing, **surmoning** that whether the cases concerned property or tenure of an office or membership of an institution, they are all governed by one principle.

Lord Diplock in O' Reilly-v-Mackman (1983 2 AC 237) said that the right of a man to be given a fair opportunity of hearing and of presenting his own case is so fundamental to any civilized system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.

Audi alteram partem found no difficulty to sail to our part of the world, crossing seven seas from its natal home.

Almost around the same time when the House of Lords delivered its judgment in Ridge-v-Baldwin, the Pakistan Supreme Court passed the

judgment in the celebrated case of University of Dhaka-v-Zakir ahmed (1964 16 DLR SC 722,) where the Apex court held that the rule is to be adhered to, whether the decision maker be a judicial body or an administrative one, if the decision results in consequences effecting the person or the property or other rights of the parties concerned.

Pakistan Supreme Court recognised the rule as a basic principle of fair procedure, which has to be followed before a decision is taken against a man.

There have, ever since, been inundation of cases in our jurisdiction in which question of applicability of audi alteram partem played pivotal role.

Similarly, in India, Pakistan, Srilanka also the general judicial trend remains solidly behind the theme that a decision bereft of audi alteram partem, irrespective of whether the relevant legislation makes provision or not, is to end is nihility. So, in our view, in any event, the Commission was bound to give the petitioner a chance to open his mouth.

Mr. Mahmud also submitted that where Article 66(4) applies, i.e. in a case of post election disqualification, Act 1 of 1978 and clause 178 of the Rules of Procedure of Parliament would apply, wherefore the Speaker would be required to bring the subject fact to the notice of the House, whereon the Member concerned may raise a dispute on his alleged disqualification and only after that the speaker can refer a dispute to the Commission and after that event the Commission can assume jurisdiction.

While being in wholesome agreement with Mr. Mahamed on this count, we reckon it unnecessary to open this window as it is obvious that none has labelled any accusation of post election disqualification against the petitioner.

We are, however, bounden to address the last, which is by no means the least, question: Has the issue we are adjudicating upon in this case, been already covered by the Appellate Division's Order in Civil Petition for Leave to Appeal No. 311 of 2009.

To be absolutely certain on this point we invited views from Mr. Rukonuddin Mahmud as well as from Dr. Shahdin Malik and both of them quite un-equivocally said that the areas we are hovering over has not been the subject matter of the Appellate Division's consideration when it disposed of Civil Petition for leave to Appeal No. 311 of 2009 against the Order passed by this Division in Writ Petition No. 9865/2008, because the Appellate Division rejected the leave application by endorsing this Division's view that the petition was not maintainable, because the petitioner had chosen the wrong forum.

It is quite clear from the judgment in Writ Petition no 9865 of 2008 that following the Appellate Division decision in Moydul Islam-v-Bangladesh Election Commission, supra, this Division discharged the Rule on maintainability ground, entertaining the view that the issues raised in that petition revolved round an election dispute, which deserved to be adjudicated upon by an Election Tribunal.

So, the area under our adjudication is diametrically different, because, notwithstanding the **identicality** of the parties and that Parliamentary election in Chandpur constituency proliferated a common element in both the writ petitions, the realm of the two petitions are, nevertheless, conspicuously far apart because whereas in the earlier writ petition the question was whether the Commission acted within lawful authority in dismissing the petitioner's election appeal against the decision of the Returning Officer concerned, who rejected the earlier's nomination

paper on the ground that the conviction rendered him disqualified, issues in the instant petition are whether the Commission's action declaring the Parliamentary seat of the petitioner vacant and, nullifying the gazette notification, through which the petitioner was proclaimed as Member of Parliament from the said constituency, was lawful or not and whether the Appellate Division had really vacated the seat or had declared that the petitioner was disqualified on the date of the nomination paper submission.

The Appellate Division endorsed this Division's view in Writ Petition No. 9865 of 2008 that the issue as to the legality of the Commission's decision affirming the Returning Officer's finding, indeed raised an election dispute, which should be resolved by an Election Tribunal and not by this Division, exercising jurisdiction under Article 102 of the Constitution. There was, as such, no verdict on merit.

So, it can not be said that the Appellate Division has already adjudicated upon the question which is before us. It is also to be noted that nowhere did the Appellate Division say or even imply that the Parliamentary seat held by the petitioner is or is to be deemed vacant or to be vacated by the Commission or that the petitioner was disqualified when he submitted nomination paper. The Commission has, hence, tangibly misdirected itself and gave in to fallibility and gullibility in so mis-construing the Appellate Division's Order.

Although the Commission averred that the dispute we are reviewing is an "Election Dispute" as contemplated by Chapter V of P.O. 155 of 1972, such an avowal, in our view, holds no water, because issues raised herein orbit round the questions as to (1) whether the Commission is within its competence to declare the Parliamentary seat of a person, vacant, who faced a convicting order from a court of first instance, but successfully took

part in the poll, took oath as a Member and had his conviction set aside on a subsequent date on appeal, (2) whether the Appellate Division vacated the seat and (3) whether the commission is equipped with the power to efface a previously published gazette notification, projecting a given person as a Member of Parliament, representing a named constituency.

We are of the indubitable view that these issues can not be cazed within the conduit of “Election Dispute”, as illustrated in Chapter V.

Article 49 of the said Chapter reads, “No election shall be called in question except by an election petition presented by a candidate for that election in accordance with the provisions of this chapter”.

Now, axiomatically, unlike in the previous petition, it is not an election that has been called in question by the petitioner through the instant petition: he has called in question the Commission’s ambit of power to vacate a seat and erase a gazette notification.

It was obviously open to other candidates to challenge the petitioner’s election by raising an “Election Dispute” before the Election Tribunal, but none had done so.

So, as Mr. Rokanuddin Mahmud astutely posited, that the present petition does not inflate any “Election Dispute” and Dr. Shahdin Malik, with the best of his candour and forthrightness, conceded that the issues raised by the present petition belongs to a grey area and is not covered by the Appellate Division decision in CP No. 113 of 2009, which sprang from Writ Petition No. 9865 of 2008, we relish the view that the issues **progenitored** by the instant petition is not within the enclave of an “Election Dispute” and hence issues ignited in the two petitions are not only dissimilar to look at, but are also of different pedigree and character. It is as transparent as Himalayan stream that the two kinds of issues belong to

dissimilar threshold. The instant one, unlike the previous one, also invoked the question of malice in law.

To accede to the contention that the issues animated herein are also to be encompassed as “Election Dispute”, would be tantamount to stretch that theme far beyond its acceptable elasticity.

For all that we have scripted above, the rule is foreordained to be met with success, wherefor the same is made absolute.

There is, however no order on cost Resultantly the impugned orders are set aside.

Jahangir Hossain, J:

I agree.