

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

**WRIT PETITION NO.397 of 2023**

IN THE MATTER OF:

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

And

IN THE MATTER OF:

*Md. Hasan Patwary*

*... Petitioner.*

-vs-

*The Chief Election Commissioner and others.*

*... Respondents.*

And

Mr. Md. Ali Jinnah, Advocate

.... For the Petitioner.

Mr. Muhamad Khalequzzaman Bhuiyan, Advocate

..... for the respondent No.1

Mr. Md. Akhter Hossain Mojumder, Advocate

.....For the respondent No.5.

Mr. Samarendra Nath Biswas, D.A.G. with

Mr. Md. Abul Kalam Khan (Daud), A.A.G. with

Mr. Md. Modersher Ali Khan (Dipu), A.A.G.with

Mr. Md. Taufiq Sajawar (Partho), A.A.G.

....For the Respondents-government.

**Heard on:30.03.2023, 04.04.2023,**  
**07.06.2023 and Judgment on:14.06.2023**

**Present:**

*Mrs. Justice Farah Mahbub.*

*And*

*Mr. Justice Muhammad Mahbub Ul Islam*

**Farah Mahbub, J:**

This Rule Nisi was issued under Article 102 of the Constitution of the  
People's Republic of Bangladesh, calling upon the respondents to show cause

as to why the publication of subsequent gazette notification dated 06.01.2023 [Annexure-C(2)] excluding the name of the petitioner as elected Member of the respective Ward ,should not be declared to have been done without lawful authority and hence, of no legal effect as being violative of Section 22 of the Union Parishad Ain, 2009 read with Rules 43 and 53 of the “স্বাধীন সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০” and also, as to why the respondent Nos.1-3 should not be directed to take oath of the petitioner as elected Member of Ward No.6 of 2 No. Noagoan Union Parishad, Ramgonj, Lakshmpur pursuant to gazette notification dated 06.02.2022 (Annexure-B) based on the finally published election result dated 28.11.2021 by the Upazilla Nirbahi Officer and Returning Officer of 2 No. Naogoan Union Parishad, Upazilla-Ramganj, District-Lakshmpur.

Facts, in brief, are that on the respective date the office of the respondent No.2 declared election schedule to hold election of 2 No. Noagoan Union Parishad, Ramgonj, Lakshmpur. The petitioner as being an aspirant and eligible candidate submitted his nomination paper on 23.10.2021 to participate in the said election for the post of Member of 6 No. Ward of the said Union Parishad. After scrutiny of the nomination papers by the respondent No.4, the Returning Officer concerned the nomination paper of the petitioner was declared valid. Accordingly, he was allocated symbol “Morog”. However, the election for the post of Chairman and Members of the said union parishad was held on 28.11.2021. The Returning Officer, the respondent No.4 following due process of law published election result of the said union parishad on 28.11.2021 under Rule 42(1) and (6) of the “স্বাধীন সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০” (in short, the Rules, 2010) (Annexure-A) showing

that the petitioner had scored the highest vote for the post of Member of 6 No. Ward of the said union parishad.

Subsequent to publication of election result by the Returning Officer concerned the proforma respondent No.5 filed an application to the respondent No.1 on 07.12.2021 with a prayer to stay publication of election result in gazette (Annexure-B) alleging, *inter-alia*, that the petitioner was not a voter of Sharshi Village of 6 No. Ward and that his name was not included in the respective voter list of the said Ward. In response thereof the respondent No.1 formed a 2(two) members committee to enquire into the matter. Said committee accordingly issued a show cause notice on 13.01.2022 (Annexure-C) upon all concerned including the petitioner to appear on 17.01.2022 with supporting documents. On 17.01.2022, the respective members of the enquiry committee heard the respective candidates including the petitioner as well as the District Election Officer, Upazilla Election Officer and Returning Officer concerned, respondent No.4. They also scrutinised respective voter lists of Ward Nos. 5 and 6 of 2 No. Naogaon Union.

However, during the course of enquiry the District Election Officer, Lakshmipur stated, *inter-alia*:-

“উক্ত বিজয়ী প্রার্থী যে ওয়ার্ডে নির্বাচিত (০৬ নং ওয়ার্ড) সে ওয়ার্ডের ভোটার তালিকায় তার নাম নেই, কিন্তু নির্বাচন কমিশনের সার্ভারে বিজয়ী প্রার্থীর ঠিকানা সংক্রান্ত তথ্য অনুযায়ী তিনি ০৬ নং ওয়ার্ডের ভোটার।”

Further, the Upazilla Election Officer, Lakshmipur stated, *inter-alia* :-

“মনোনয়নপত্র বাচাইকালে উক্ত প্রার্থীর প্রস্তাবক ও সমর্থক একই ওয়ার্ডের হওয়ায় তিনি আর বাদ বাকী বিষয় অনাধিকৃতভাবে যা দেখে বৈধ প্রার্থী হিসেবে ০২ নং নোয়াগাঁও ইউনিয়ন পরিষদ নির্বাচনে ০৬ নং ওয়ার্ডের সাধারণ সদস্য পদে জনাব মোঃ হাসান পাটোয়ারীকে ঘোষণা দেন। তাঁর মনোনয়নপত্র গ্রহণের বিরুদ্ধে কোন প্রার্থী বা কেউ কোন আপিল করেননি। .....

উল্লিখিত অভিযোগ প্রাপ্তির পর তিনি দেখতে পান যে, ০২ নং নোয়াগাঁও ইউনিয়ন পরিষদ নির্বাচনে ০৬ নং ওয়ার্ডের সাধারণ সদস্য পদে বিজয়ী জনাব মোঃ হাসান পাটোয়ারী এর নাম ০৬ নং ওয়ার্ডের ভোটার তালিকায় নেই। তখনই ভুলটি তাঁর চোখে পড়ে। তবে নির্বাচন কমিশনের CMS তথ্য ভান্ডারে উক্ত বিজয়ী প্রার্থীকে ০৬ ওয়ার্ডের

ভোটের হিসেবে দেখা যায় মর্মে জানান। তিনি তদন্ত কমিটিকে জানান যে, এ ভুলটি তার অনিচ্ছাকৃত/  
.....”

The petitioner, however, stated *inter-alia*:

“এর পর তিনি ০৫ নং ওয়ার্ডের ভোটের তালিকার তার ভোটারের ক্রমিক ০৬নং ওয়ার্ডের ভোটের তালিকার ক্রমিক হিসেবে ব্যবহার করেন এবং মনোনয়নপত্র জমা দেন। তিনি নিজেও স্বীকার করেন ০৬নং ওয়ার্ডে প্রার্থী হলেও ০৬নং ওয়ার্ডের ভোটের তালিকায় তার নাম ছিলো না! তার নাম ০২ নং নোয়াগাঁও ইউনিয়নের ০৫ নং ওয়ার্ডের ভোটের তালিকায় ছিলো। নির্বাচনের পর তিনি সবাইকে জানান যে, ০৬ নং ওয়ার্ডের ভোটের না হয়েও তিনি ০৬ নং ওয়ার্ডে সাধারণ সদস্য পদে বিজয়ী হয়েছেন। তিনি তাঁর নিজের ভোটও নিজে দিতে পারেননি। তার মুখ থেকে এসব কথা শুনে প্রতিদ্বন্দ্বি প্রার্থীরা বিষয়টি জানতে পারে এবং অভিযোগ দেয়।.....”

Considering all the statements of the parties concerned the enquiry committee submitted its report on 20.01.2022 (Annexure-2 to the affidavit-in-opposition of the writ petition) opining, *inter-alia*-

“লক্ষীপুর জেলার রামগঞ্জ উপজেলার ০২ নং নোয়াগাঁও ইউনিয়ন পরিষদ নির্বাচনে জনাব মোঃ হাসান পাটোয়ারী ৫ নং ওয়ার্ডের ভোটের হওয়া সত্ত্বেও ০৬ নং ওয়ার্ডের সাধারণ সদস্য পদে বিজয়ী হওয়ায় বিষয়ে একই ওয়ার্ডের অপর প্রতিদ্বন্দ্বি প্রার্থী জনাব মোহাম্মদ হোসেন বাবুল এর অভিযোগের সত্যতা পাওয়া গিয়েছে। অর্থাৎ লক্ষীপুর জেলার রামগঞ্জ উপজেলার ০২ নং নোয়াগাঁও ইউনিয়ন পরিষদ নির্বাচনে ৬ নং ওয়ার্ডের ভোটের না হয়েও জনাব মোঃ হাসান পাটোয়ারী ০৬ নং ওয়ার্ডে প্রার্থী হয়েছেন এবং ০৬ নং ওয়ার্ডের সাধারণ সদস্য পদে বিজয়ী হয়েছেন।”

Meanwhile, pursuant to the result so had been declared by the Returning Officer, the respondent No.4, the Election Commission, the respondent No.1 published gazette notification on 06.02.2022 (Annexure-B). But later, it published a gazette afresh on the same date i.e., on 06.02.2022, but excluding the name of the petitioner.

Being aggrieved by and dissatisfied with the petitioner preferred the instant of the application under Article 102 of the Constitution and obtained the present Rule Nisi.

In view of the context of the case, the contention of the learned Advocate of the petitioner Mr. Md. Ali Jinnah is that after publication of gazette notification (Annexure-B) under Rule 43 of the “স্বাধীন সরকার

(ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০”, the Election Commission becomes *functus officio* under Section 22 of the “স্বাধীন সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯”, (in short, the Ain, 2009)”.

Moreso, he submits that after publication of gazette notification under Rule 43 of the Rules, 2010 the Election Tribunal becomes the sole authority to deal with the election matter. In addition, he goes to argue, the gazette notification of the successful candidates including the name of the petitioner was published on 06.02.2022 under Rule 43 of the Rules, 2010, but the respondent No.1 on the same date published the impugned gazette notification afresh but excluding the name of the petitioner in violation of Section 22 of the Ain, 2009 read with Rule 53 of the Rules, 2010, which goes to reflect the malafide intention on the part of the respondent No. 1.

Accordingly, he submits that upon making the Rule absolute the subsequent publication of gazette notification by the respondent No.1 on 06.02.2022 excluding the name of the petitioner is liable to be declared to have been passed without lawful authority and hence, of no legal effect.

Mr. Muhammad Khalequzzaman Bhuiyan, the learned Advocate appearing on behalf of the respondent No.1 by filing affidavit-in-opposition submits that as per the decision of the Election Commission, the schedule of Union Parishad Election of Ward No. 6 of 2 No. Noagoan Union Parishad, Ramgonj, Lakshampur was declared. The petitioner, amongst others, submitted nomination paper and subsequently, he was declared as a valid candidate to contest the said election. He further submits that election of the said Ward was held peacefully and after counting of ballot papers it was found that the petitioner scored highest votes; accordingly, he was declared as winner. Subsequently, the Election

Commission received a complaint from respondent No. 5, one of the contesting candidates, regarding the fact that the petitioner despite being a voter of Ward No. 5 of the said union contested the election of Ward No. 6 and as such, he should be barred from taking oath as Member of Ward No. 6. Pursuant thereto the Deputy Secretary (Songsthapan-2) directed the petitioner as well as the respondent No. 5 to appear before him with relevant documents. On the date of enquiry, he submits, both the parties appeared and placed their respective documents before the enquiry committee. However, he submits that during the course of the enquiry the petitioner himself admitted that prior to filing nomination paper for the post of Member of Ward No.6 he had knowledge that he was not a voter of the said Ward. But without taking initiatives under the respective provisions of law for correction of his voter number he filed the nomination paper to contest the union parishad election for the post of Member of the respective union parishad. Ultimately, he contends, gazette was published by the respondent No.1 on 06.01.2022. However, on the same date when said admitted fact came to the knowledge of the respondent No.1 it duly rectified the mistake by publishing a subsequent gazette on the same date pending hearing of the enquiry of the allegations so have been received against.

In this regard, he goes to argue that it is the established principle of law that he who seeks equity must come with clean hands. In the instant case, he submits that the petitioner while seeking equitable relief did not come before this Hon'ble Court with clean hands; hence, this Rule is liable to be discharged.

In support of the contentions so have been made on behalf of the respondent No.1 Mr. Md. Akhter Hossain Mojumder, the learned

Advocate appearing for the proforma-respondent No.5 by filing a separate set of affidavit-in-opposition submits that the petitioner with *malafide* intention by concealing the material fact of his disqualification submitted nomination paper to contest the election for the post of General Member of 6 No. Ward, 2 No. Noagaon Union Parishad, Ramganj, Laxmipur. In this regard he goes to submit that despite the fact that the petitioner is not a voter of 6 No. Ward the respondent No. 4 most illegally had accepted his nomination paper declaring him to be a valid candidate in the election.

He further submits that in order to be an eligible candidate the petitioner who had filed nomination paper to contest the election needed to be qualified within the framework of the Ain, 2009. At the same time, it was also the responsibility of the respondent No.4 to scrutinize the nomination paper properly in order to determine whether the informations so given in the nomination paper were correct and thereafter, to allow or disallow the nomination paper. In the instant case, he submits that both the petitioner as well as the respondent No.4 have measurably failed to discharge their respective official duties and responsibilities. Consequently, the proforma respondent No.5, who secured 2<sup>nd</sup> highest votes in the election suffered socially, politically as well as economically without any fault of his own. Accordingly, he submits that since the entire proceedings of this writ petition having been initiated with fraudulent act of the petitioner and also, since it is evident from record that he did not come before this Hon'ble Court with clean hands as such, he is not entitled to any equitable relief, as prayed for. As such, he submits that this respondent is entitled to be declared as an elected Member of Ward No.6, 2 No. Noagaon, Union Parishad, Upazilla-Ramganj, District-Lakshmipur in accordance with law.

Section 26 (1) of the “স্থানীয় সরকার (ইউনিয়ন পরিষদ) আইন, ২০০৯”, (Act No.61 of 2009) (in short, Act, 2009) prescribes the qualifications and disqualifications of a candidate to be elected as Chairman or Member of the Union Parishad. Vide clause (gha) of Section 26(1) in order to be qualified as Chairman or Member he has to be enlisted in the voter list of the respective Ward. Section 26(1) (gha) of the Ain, 2009 is quoted as under:

“২৬(১).....

(ক).....

(খ).....

(গ).....

(ঘ) সংরক্ষিত মহিলা আসনের সদস্যসহ অন্যান্য সদস্যদের, ক্ষেত্রে, সংশ্লিষ্ট ওয়ার্ডের ভোটার তালিকায় তাঁহার নাম লিপিবদ্ধ থাকে।”

However, after publication of election schedule under Rule 10 of the “স্থানীয় সরকার (ইউনিয়ন পরিষদ) নির্বাচন বিধিমালা, ২০১০” (in short, the Rules 2010) the aspiring candidate is to submit nomination paper in Form Ka-2 in order to contest election of General Member under Rule 12(3)(ka) along with documents under Rule 12(3)(ga) in particular giving declaration under Rule 12(3)(ga)(aa) that “(আ) উক্ত মনোনয়নে সংশ্লিষ্ট প্রার্থী সম্মত আছেন এবং নির্বাচনে অংশগ্রহণের ক্ষেত্রে ধারা ২৬(২) বা আপাততঃ বলবৎ অন্য কোন আইনে তিনি অযোগ্য নহেন মর্মে তাহার স্বাক্ষরিত প্রত্যয়নপত্র; [\*\*\*]”.

In the instant case, it is rather an admitted position of fact that petitioner is not a voter of Ward No.6 but Ward No.5. Despite having knowledge of the said fact he filed nomination paper in Form Ka-2 to contest the election for the post of Member giving declaration that he was a voter of Ward No.6. The petitioner has corroborated the said fact during the course of enquiry by stating, *inter alia*, that on the day of election he could not cast his vote in Ward No.6, since he was a voter of Ward No.5, as quoted above.



In view of the above admitted position of facts it can clearly be discerned that on the date of filing nomination paper the petitioner was a disqualified candidate. In this regard, the respondent No.4, the Presiding Officer has miserably failed to discharge his professional duties as has been bestowed upon him under Rule 14 of the Rules, 2010 while scrutinizing the nomination paper of the petitioner, which led to declaring the petitioner, a disqualified candidate, as the successful candidate in the said election. That being the position we have no manner of doubt to find that the entire process of election of the union parishad so far the petitioner is concerned is the result of concealment of material facts of his disqualification as a valid candidate. In this regard our apex court in the case of *Jahangir Kabir Chowdhury –Vs- Bangladesh and others* reported in **8 ALR (AD) 2016 (2) 283** has categorically found, *inter-alia*;

*“Fraud includes all acts, commissions and concealments which involve a breach of equitable duty, trust and are injurious to another or by which an undue and unconscious advantage is taken by another. If in the face of the order fraud is detected the court will not hesitate to exercise its power to nullify the action. It is a nullity in the eye of law.”*

In view of the above findings, since concealment of facts of disqualification of the petitioner tantamounts to fraud as such, it vitiates everything. In that view of the matter, seeking equitable relief by the petitioner for a declaration that publication of subsequent gazette notification dated 06.01.22 by the respondent No.1 excluding the name of the petitioner as elected Member, is not maintainable in the eye of law.

Before we part, it is pertinent to observe that every election process involves huge finance involving public money and with the publication of election schedule the officers concerned are deputed in the respective

fields to discharge their respective official designated duties faithfully with proper application of mind. But when they fail, miscarriage of justice occurs by causing injury to the concerned affected persons. Present case is a glaring instance of failure of professional duties of the respondent No.4, which in the given context is unfortunate and hence, deprecated.

In view of the facts and circumstances of the present case and the observations and findings so made above the Election Commission, respondent No.1 is hereby directed to take necessary steps on the issue in question in due compliance of law within 30 (thirty) days from the date of receipt of the copy of this judgment and order.

In the result, Rule is discharged.

There will be no order as to costs.

Communicate the judgment and order to the respondents concerned at once.

**Muhammad Mahbub Ul Islam, J:**

I agree.