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Upazila chairman and office of profit: Disqualification for parliamentary election

With the decision of the apex court that an upazila chairman holds an office of profit, a long-standing problem has come to an end

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Election Commission

Sub-clause (f) of article 66 (2) of the Constitution of the People's Republic of Bangladesh provides that a person shall be disqualified for election as or for being a Member of Parliament who holds any office of profit in the service of the Republic other than an office which is declared by law not to be disqualified its holder. Sub-clause (g) of the same article also states that a person shall be disqualified for election as or for being a Member of Parliament who- is disqualified for such election by or under any law. The sub-clause (g) is, in fact, referring to the disqualification mentioned in article 12 (1) of the Representation of People's Order, 1972 (RPO), the sub-clause (c) of which lays down that a person shall be disqualified for election or for being a member if he is a person holding any office of profit in the service of the Republic or of a statutory public authority. It seems that both the articles have been stated in the similar terms except with the addition of the expression 'statutory public authority' in sub-clause (c) of article 12 (1) of RPO. With the aforesaid provisions of law in hand and the parliamentary election approaching fast the question that comes to the fore is- whether an Upazila Chairman holds an office of profit in the service of the Republic or statutory public authority and thus disqualified? To decide this issue, four questions need to be answered affirmatively. Firstly, whether the office held by Upazila Chairman is an office at all; (ii) Secondly, whether that office is in the service of the Republic or statutory public authority; (iii) Thirdly, whether that

office is an office of profit; (iv) and finally, whether that office is one other than an office, which is declared by the law not to disqualify its holder.

The Parliament has created the post of Upazila Chairman by virtue of section 6 of Upazila Parishad Ain, 1998. If one Chairman goes away another comes in. This post, in fact, exists independently of its holder. Therefore, it may be said that the office held by Upazila Chairman is an office.

Whether the office of Upazila Parishad is an office in the service of the Republic or in statutory public authority, to ascertain that question it requires the explanation of the meaning of the words “service of the Republic” and “statutory public authority”. The expression “service of the Republic” has been defined in article 152 (1) of the Constitution as “any service, post or office whether in a civil or military capacity, in respect of the government of Bangladesh, and any other service declared by law to be service of the Republic.” The definition suggests that when a person does service or holds post or office in civil or military capacity in respect of Bangladesh Government, then that service, post or office may be called service of the Republic.

In addition, article 59 (1) of the Constitution provides that local government in every administrative unit of the Republic shall be entrusted to bodies composed of persons elected in accordance with law. Article 152 (1) of the Constitution defines “Administrative Unit” as district or other area designated by the law for the purposes of article 59.” These two articles indicate that there shall be local government divided into administrative units and the person who does service or holds post or office in any administrative unit of the local government, he is in fact doing service or holding post or office in respect of the Bangladesh Government.

More importantly, section 4 of the Upazila Parishad Ain 1998, itself provides that the Upazila is declared as an administrative unit of the Republic in accordance with article 59 read with article 152 (1) of the Constitution. Moreover, section 69 of the Upazila Parishad Ain, 1998 lays down that the Chairman, Vice-Chairman and other Members of the Parishad shall be deemed as a Public Servant in the same way as defined in section 21 of the Penal Code, 1860. All the aforesaid articles of the Constitution coupled with the other provisions of law lead to the conclusion that the post of Upazila Chairman has been created as part of the small unit of the local government (part of Republic) and the person who holds that post may arguably be called a holder of office in the service of the Republic.

Alternatively, can the office of Upazila Chairman be called an office in a statutory public authority? Like above, the expression “statutory public authority” has been defined in article 152 (1) of the Constitution as “any authority, corporation or body the activities or the principal activities of which are authorised by any Act, ordinance, order or instrument having the force of law in Bangladesh.” The Upazila Parishad is a body that consists of Upazila Chairman, two Vice Chairmen and other Members. The Upazila Parishad Ain, 1998 has not only created the post of Chairman, Vice-chairman and other Members but it has also laid down the functions of the said body in the Ain and Rules. Accordingly, this Parishad may be called a statutory public

body in line with the definition above. This view is supported by section 5 (2) of the Ain itself, which states that “Parishad is a statutory body”. Therefore, it may also be said that the Chairman of the Upazila Parishad is holding an office in a statutory public authority.

The crucial question, however, is whether the office of Upazila Parishad is an office of Profit. Explanation-1 of article 12 (1) of RPO defines “office of profit as holding any office or post or position in the full-time service of the Republic or any statutory public authority or a company in which government has more than 50% share.” It seems that the definition is focusing on the full time service of the holder and remaining silent on the word ‘profit’ that may be given to the holder of the office. Thus it is very difficult to understand with precision what actually the office of profit means and where it may apply.

It may be helpful to consider corresponding provisions of India in this respect. They can be found in articles 102 and 191 of the Indian Constitution. Article 102 (1) (a) provides that “a person shall be disqualified for being chosen as, and for being, a member of either House of Parliament- if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder.” Similarly, Article 191 (1) (a) provides that “a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State- if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder.”

Unlike Bangladesh, the definition of office of profit was settled long before in India. It was defined with precision in various case laws and was used from time to time to disqualify elected representatives unless they came within the exceptions introduced under the Parliament (Prevention of Disqualification) Act, 1959. Two of the most important cases where Indian Supreme Court applied the disqualification of “office of profit” may be noted here for sake of understanding the matter in hand. In the case of Shibu Soren vs Dayanand Sahay & ors [2001] INSC 326 (19 July 2001) seven seats of Rajya Sabha fell vacant. Nine persons, including the appellant and seven respondents filed their nomination papers, which on scrutiny were found to be valid. On the last date for withdrawal of nominations, one candidate withdrew, thus leaving 8 (eight) candidates to contest the election for seven seats. After the election the appellant along with respondents 2 to 7 was declared elected. Respondent No. 1 was defeated. Respondent No.1 thereupon filed an Election Petition before the Patna High Court under section 80 and 81 of the Representation of People Act, 1951 (R. P. Act) calling in question the election of the appellant on the ground that at the time of filing his nomination papers, the appellant was holding an office of profit under the state government as Chairman of the Interim Jharkhand Area Autonomous Council (in short JAAC) set up under the Jharkhand Area Autonomous Council Act, 1994 and was thus disqualified to contest the election to Rajya Sabha.

The Patna High Court allowed the Election Petition and set aside the election of the appellant. It was held that the office of Chairman of Interim JAAC was an office of profit under the state

Government. The appellant appealed to the Supreme Court of India against that judgment of the High Court. Firstly, the apex court of India by referring to various case laws from the past defined the expression “office of profit” in the following terms- “In common parlance, the expression ‘profit’ connotes an idea of some pecuniary gain. If there is some pecuniary gain, its label-‘honorarium’-‘remuneration’-‘salary’ is not material. It is the substance and not the form which matters and even the quantum or amount of “pecuniary gain” is not relevant-what needs to be found out is whether the amount of money receivable by the concerned person in connection with the office he holds, gives to him some “pecuniary gain”, other than as ‘compensation’ to defray his out of pocket expenses, which may have the possibility to bring that person under the influence of the executive, which is conferring that benefit on him.” This definition differentiates between a compensatory allowance and pecuniary gain. If money is given by way of compensatory allowance to meet the out of pocket expense then it is not office of profit. On the other hand, if money is given by ways of pecuniary gain then it is office of profit.

With the aforesaid definition of office of profit, the Indian Supreme Court focused on the facts of the instant case. It appeared that the Chairman of JAAC received a number of benefits namely- (i) An honorarium of Rs. 1750/- per month; (ii) Daily allowance at the rate of Rs. 150/- per day for the period spent outside his headquarters besides travelling expenses; (iii) Daily allowance at the rate of Rs. 120/- per day for attending meetings of the interim council; (iv) Furnished rent-free accommodation; and (v) a car with driver. Then the apex court applying the definition of office of profit in the facts held that daily allowance in item Nos. (ii) and (iii) were in the nature of compensation to meet out of pocket expense but in respect of the honorarium in item No. 1 it held as follows-

“The honorarium receivable by the appellant at the rate of Rs.1750/- per month, besides other allowances and perquisites was surely not in the nature of gratuitous payment, voluntary donation or compensation to meet any out of pocket expenses. It was in the nature of remuneration and was a source of pecuniary gain. The receipt of honorarium at the rate of Rs.1750/- per month, besides daily allowances, rent free accommodation and a chauffeur driven car at the state expense, to the appellant was a benefit capable of bringing about a conflict between the duty and interest of the appellant as a member of Parliament-the precise vice to which article 102 (1) (a) is attracted. We are, therefore, in the established facts and circumstances of the case, in agreement with the High Court that the appellant as Chairman of JAA Council was in receipt of pecuniary gain in the form of honorarium and he, thus, held an “office of profit”.

Subsequently, in the case of Jaya Bachchan vs Union of India And Ors 2006, the Supreme Court took the matter a step forward. In this case, Jaya Bachchan was the member of Rajya Sabha but on 14th July 2004 she was appointed as the Chairperson of the U. P. Film Development Council and the rank of a Cabinet Minister was granted to her with the facilities namely (i) Honorarium of Rs. 5,000 per month; (ii) Daily allowance at the rate of Rs. 600 per day within the State and Rs.750 outside the State. Rs. 10,000 per month towards entertainment expenditure; (iii) Staff car with driver, telephones at office and residence, one P.S., one P.A.

and two class IV employees; (iv) Body Guard and night escort; (v) Free accommodation and medical treatment facilities to her and family members and (vi) Free accommodation in government circuit houses/guest house and hospitality while on tour.

The question that fell for consideration in the above case is whether she held an office of profit. It was argued on behalf of Jaya Bachchan that the post of Chairperson of the Council, and the conferment of the rank of Cabinet Minister, were only "decorative"; that she did not receive any remuneration or monetary benefit from the State Government; that she did not seek residential accommodation, nor used telephone or medical facilities; that though she travelled several times in connection with her work as Chairperson, she never claimed any reimbursement; and that she had accepted the Chairpersonship of the Council honorarily and did not use any of the facilities. But the apex court while deciding the case held that "in fact, mere use of the word 'honorarium' cannot take the payment out of the purview of profit, if there is pecuniary gain for the recipient. If the 'pecuniary gain' is 'receivable' in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not."

In Bangladesh for the first time, the issue of disqualification for Upazila Chairman on the ground of office of profit received detailed consideration in the case of Tamiz Uddin vs Benzir Ahmed and others 2018. The two questions cropped up in the hearing of appeal before the Appellate Division. Firstly- whether an Upazila Chairman's office is an office in the service of the Republic or Statutory Public Authority? And secondly whether that office is an office of profit? The author of this article, advocate Shah Monjurul Hoque appearing for the respondents submitted that Upazila Chairman is holding an office of profit both in the service of the Republic and statutory Public authority.

He referred to various provisions of the Constitution and other laws along with the above two landmark cases of India in support of his argument.

On the contrary, the opposite side contended that an Upazila Chairman is not holding an office in the service of the Republic because he is not appointed but elected. They further submitted that even if an Upazila Chairman does hold an office, it is not an office of profit because he receives only honorarium but does not receive any remuneration. It seemed that the court did not accept the first argument because the definition of "service of the Republic" stated in article 152 (1) clearly mentioned service, post and office. This definition included both elected and appointed persons in the Upazila Parishad. Had they included only the appointed staff in Upazila, the definition would not have had those three words and it could have been confined only to the word 'service'. Their second argument also fell apart because honorarium may become pecuniary gain depending on the circumstances of the case. Since the Upazila Chairman receives honorarium of TK.20,500, travelling allowance, car with driver and accommodation, applying the ratio of the two cases above the court rejected their second argument. Lastly, they stated that section 8 (2) of the Upazila Parishad Ain, 1998 is providing that an Upazila Chairman shall be disqualified for election as or for being a member of Parliament if he becomes a member of parliament. Referring to this section they argued that

the Ain is giving them scope to contest the election and on becoming Member of Parliament their office shall fall vacant.

However, this argument also fell apart because firstly the section is self-contradictory as it mentions that an Upazila Chairman shall be disqualified ‘for election’ and secondly it also came in conflict with the provisions of the Constitution and RPO because if one had disqualification on the day of nomination paper, it could not be said that with grace he could contest the election and on becoming member of parliament his office shall become vacant.

The last question that needs to be answered is whether the office of Upazila Parishad is one other than an office, which is declared by the law not to disqualify its holder. The holder of an office of profit may still get rid of the disqualification if the law gives him protection. In India there is an Act named “The Parliament (Prevention of Disqualification) Act, 1959” which prevents disqualification of many candidates which otherwise could have been disqualified on the ground of office of profit but in Bangladesh we have article 66 (3) in our Constitution which lays down that a person shall not be deemed to hold an office of profit in the service of the Republic by reason only that he is the President, the Prime Minister, the Speaker, the Deputy Speaker, a Minister, Minister of State or Deputy Minister. One of the arguments that was placed by the petitioner in the hearing of the appeal above that if Upazila Chairman is considered to have held the office of profit, all the Members of Parliament shall be equally be disqualified along with the Upazila Chairman because they are holding office of profit likewise. However, the Members of Parliaments have received immunity by the Constitution and are entitled to prevention of disqualification. Since there is no other laws, which prevent disqualification involving Upazila Chairman they may be disqualified outright.

Finally, it may be concluded that with the decision of the apex court that an Upazila Chairman holds an office of profit, a long-standing problem has come to an end. However, we have to still wait for the formal judgment to see what observation the apex court has given in respect of office of profit. Due to the decision in the case of Tamiz Uddin vs Benzir Ahmed and others 2018 above, some other elected representatives in different tiers of the local government may be disqualified for parliamentary election on the ground of office of profit in the near future. The sooner, the better.

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