

LEX/BDAD/0043/2012

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**IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION**

Civil Review Petition No. 45 of 2012 (Arising out of in Civil Appeal No. 27 of 2011)

Decided On: 05.06.2012

Appellants: **Md. Abul Kashem**
Vs.

Respondent: **Mahmudul Hasan @ Major General Mahmudul Hasan (Rtd.) and Others**

Hon'ble Judges:

Muzammel Hossain, C.J., Surendra Kumar Sinha, Nazmun Ara Sultana, Syed Mahmud Hossain, Muhammad Imman Ali and Shamsul Huda, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mr. Rafique-Ul Huq, Mr. Anisul Haque, Senior Advocates and Mr. Shah Monjurul Hoque, Advocate instructed by Mr. Md. Wahidullah, Advocate-on-Record

For Respondents/Defendant: Mr. M. Amirul Islam, Senior Advocate instructed by Mr. Syed Mahbubar Rahman, Advocate-on-Record for Respondent No. 1

JUDGMENT

Syed Mahmud Hossain, J.

1. This petition for review arises out of the judgment and order 14.02.2012 passed by this Division in Civil Appeal No. 27 of 2011 dismissing the same and partly affirming the judgment and order dated 15.12.2009 passed by the High Court Division in Election Petition No. 8 of 2009 allowing the same on contest. The facts, leading to the filing of this petition for review, in a nutshell, are:

In the election of the 9th Parliament for Tangail-5 Constituency held on 29.12.2008, the appellant-petitioner and respondent Nos. 1-4 were the contesting candidates. At the initial stage of the election process, the Deputy Commissioner, Tangail acting as Returning Officer received objections and information about disqualification of the petitioner on two counts, namely default in paying bank loan and telephone bills.

2. The first source was a letter dated 30.11.2008 issued by the Sonali Bank Limited, Bango Bhandhu Avenue, Corporate Branch, Dhaka (Respondent No. 7) under memo No. BBA/GAD-1/14930 stating that the petitioner was a bank loan defaulter for an amount of Tk. 15,44,32,437.31 as on 30.11.2008.

3. The second source was a letter issued by the Joint Director of Credit Information Bureau (shortly, CIB) of the Bangladesh Bank, (Respondent No. 8) under Memo No. CIB-1(90)/208-30295 dated 3-12-2008 about enlistment of the petitioner in the CIB Report as a loan defaulter. However, on the following day i.e. on 04.12.2008, the petitioner, managed to have sent a fax message signed by the Joint Director, CIB to the Returning Officer to the effect that the petitioner was not a bank loan defaulter.

4 . The third source was a letter dated 02.12.2008 under memo No. T-R/mm/Nirbachan/08 sent by the Accounts Officer, Telephone Revenue, BTCL, Mymensingh (Respondent No. 10) about the non-payment of telephone bills by the petitioner for an amount of Tk. 31,110/- against telephone No. 45701 earlier taken by the appellant.

5. Respondent No. 1 also claimed that the petitioner took loan from the Pubali Bank Limited and the outstanding loan stood at Tk. 31,71,00,000/-.

6. Ignoring the information, the Returning Officer, Tangail accepted the nomination paper of the petitioner. After that, the election was held on 29.12.2008 and the petitioner was declared as the returned candidate by the gazette notification dated 01.01.2009.

7 . After publication of the election results, respondent No. 1 submitted a representation on 11.01.2009 and also on 28.01.2009 to the Chief Election Commissioner to take action against the petitioner, but to no avail. So, respondent No. 1 filed the election petition before the High Court Division.

8. The petitioner filed written statement and also an additional written statement. He has denied the allegations about his disqualification. He has contended that there is no cause of action to file this case and that the case was not maintainable as respondent No. 1 did not prefer any appeal to the Election Commission against the decision of the Returning Officer taken on 4.12.2008 accepting the nomination paper of the petitioner.

9. In respect of loan of the Sonali Bank and the relevant CIB report, his case is that he did not take any personal loan from the Sonali Bank; rather MAQ Enterprise Ltd., a public limited company, took some loan from the Sonali Bank. Corporate Branch, Bango Bandhu Avenue, Dhaka. He is the Managing Director of the said Company and also the guarantor of the loan. The shares held by him in that Company is less than 25% of the share capital. So, he is not a loan defaulter under the provision of the Bank Companies Act, 1991.

10. However, he has admitted that the said company was shown as a defaulter in the CIB report. So, the Company filed Writ Petition No. 491 of 2007 and obtained Rule Nisi and an order of injunction restraining the Bangladesh Bank and the Sonali Bank from publishing the name of the Company as a defaulter in the CIB report with a direction to delete the name of the Company from that report. Sonali Bank illegally sent the letter dated 30.11.2008 to the Returning Officer raising objection about the candidature of the petitioner in violation of the said injunction.

11. The petitioner has further stated that the Bangladesh Bank issued three letters to the Returning Officer. Tangail about the entries in the CIB Report. The first letter was dated 02.12.2008 under Memo No. সিআইবি ১(১০)/২০০৮-২৯৮৭৬ in which the name of only one candidate. Abul Hossein, was included. But by the second letter dated 03.12.2008 the said first memo was amended and the petitioner was mentioned as a defaulter. After that, in the third letter dated 04.12.2008 under Memo No. সিআইবি-১(১০)২০০৮-৩০৪০৬ Bangladesh Bank informed the Returning Officer that the letter dated 03.12.2008 stood amended and that the petitioner was not a defaulter.

12. With regard to payment of telephone bills, the petitioner has stated that he regularly paid all the bills to the concerned authority including bills for the months of March, April and May 2001. But BTTB issued three supplementary bills for the said three months for the amounts of TK. 731/-, TK. 2853/- and TK. 2256/- respectively. So, the petitioner raised objection in writing firstly on 06.02.2002 about the said

three bills. But the Telephone line was disconnected in 2002. He again raised objection about the supplementary bills on various dates for rectifying the supplementary bills and for getting reconnection. The last letter was sent on 17.05.2004. These objections were not responded to by BTTB/(BTCL).

13. With regard to the loan of Pubali Bank amounting to Tk. 31,71,00,000/-, the petitioner has stated that the allegations in this respect are vague and incorrect and no information on this account was sent by CIB to the Returning Officer.

14. The petitioner has claimed that he was duly elected Member of Parliament securing the highest number of votes with a difference of more than seventy-six thousand votes compared to that of respondent No. 1. So, the election petition is liable to be dismissed.

15. Respondent No. 8 being the Joint Director, CIB, has filed a written statement and an additional written statement. He has admitted the issuance of three letters dated 2nd, 3rd, and 4th December, 2008 by CIB to the Returning Officer. These three letters were issued on the basis of the data base and also pursuant to the order passed by the High Court Division in Writ Petition No. 491 of 2007. After election, the Bangladesh Bank caused an inquiry by a Committee in response to a letter dated 02.03.2009 issued by the Election Commission. The Inquiry Committee found that a loan was given by the Uttara Bank, Narayanganj Branch to the company, namely, M/s. Nordisk Agency Ltd. One "Abul Kashem" was recorded as the guarantor of the said loan, but his particulars were not traceable. So in the first letter dated 02.12.2008 the name of the petitioner "Md. Abul Kashem" was not included as a loan defaulter. But as a measure of precaution, the CIB issued the second letter dated 03.12.2008 wherein the name of Abul Kashem was included as a loan defaulter. But on the following day i.e. on 04.12.2008, the Uttara Bank sent a letter to the CIB stating that the information of the Database should be amended by excluding the name of M.A. Kashem as the guarantor of the said loan. Accordingly the CIB issued to the Returning Officer the third letter dated 04.12.2008 stating about the amended position.

16. With regard to the loan of Sonali Bank Ltd. it is stated in the Inquiry Report that in Writ Petition No. 491 of 2007 the High Court Division passed an order on 22.01.2007 staying operation of the CIB report initially for a period of 3 months and subsequently extended from time to time and the extension was valid till 25.12.2008.

17. Respondent No. 8 has further stated that the CIB informed the Election Commission that “কোট কর্তৃক নিষ্পত্তি না হওয়া পর্যন্ত সিআইবি থেকে টাংগাইল-৫ আসনে প্রতিদ্বন্দ্বিতাকারী জনাব মোঃ আবুল কাশেমকে স্বর্ণ খেলাপী যুক্ত দেখানোর অবকাশ নেই।”

18. Respondent No. 9, the Director (Revenue) of the Bangladesh Telecommunication Limited (BTCL) also filed a separate written statement. His case, in short, is that because of arrear of telephone bills for an amount of TK. 31,110/-, the telephone connection of the petitioner against Telephone No. 54701 was disconnected in the year 2002. The Mymensingh Telephone Revenue Office also issued supplementary bills for the months of March, April and May, 2001 demanding Tk. 731/-, Tk. 3853/- and Tk. 2256/- respectively. The petitioner filed separate applications dated 06.06.2002, 06.08.2002, 3.09.2002 and 17.5.2009 for correction and settlement of the said bills and re-connection of his telephone line. Then the Accounts Officer (Telephone Revenue), Mymensingh (Respondent No. 10) sent a reply dated 22.06.2004 to the objection of the petitioner stating that the bills could not be exempted. The said Office sent another notice dated 12.05.2004 requesting the petitioner to pay the arrear bills, failing which criminal action would be taken. But

neither the said reply nor the notice could be served because of non-availability of the petitioner. However, objection raised by the petitioner along with his reminders is still under investigation. So the information given by the Telephone Revenue Office, Mymensingh to the Returning Officer, Tangail was not correct.

19. The High Court Division allowed the Election Petition by its judgment and order dated 15.12.2009.

20. Being aggrieved by and dissatisfied with judgment and order of the High Court Division, the review petitioner filed Civil Petition for Leave to Appeal No. 1476 of 2010 before this Division. This Division granted leave on 18.08.2010 resulting in Civil Appeal No. 27 of 2011.

21. This Division dismissed the appeal after hearing both the parties by the judgment and order dated 14.02.2012.

22. Feeling aggrieved by and dissatisfied with judgment and order dated 14.02.2012 passed by this Division, the review-petitioner filed this petition for review.

23. Mr. Anisul Haque, learned Advocate, appearing on behalf of the review petitioner, submits as under:

1. The Appellate Division committed an error apparent on the face of the record to ascertain that the material question of law regarding burden of proof was upon the respondent Nos. 1 and 9 to prove their allegation against the petitioner regarding main bill of Tk. 31,110 (Tk. 32,110). Respondent No. 9 failed to produce/exhibit any documents regarding the alleged main bill and specify the month for which the bill was outstanding. No dues were outstanding against main bills of telephone and the claim regarding main bill had not been supported and proved by evidence. The Appellate Division has failed to consider the error of law committed by the High Court Division by shifting the burden of proof upon the petitioner to deny the claim regarding the main bill. The Appellate Division has erroneously observed that the petitioner had not raised any objection against the claim of main bill which is absolutely wrong and misconceived. In paragraph No. 7 of the written statement and paragraph No. 1 of the supplementary affidavit the petitioner expressly and very specifically denied the allegation regarding main bill.

2. The Appellate Division erroneously upholding the judgment and order passed by the High Court Division committed illegality in directing the Election Commission to declare the candidate who secured the second highest votes as the returned candidate in that constituency in place of the petitioner whereas the question does not relate to voting dispute. The petitioner being duly elected representing the vast majority of people of that constituency by securing more than 74,000 votes than the candidate securing second highest votes, the aforesaid direction of the High Court Division is against the basic democratic spirit where Parliament Member can only be elected by the majority electorates of a constituency. Considering this aspect this Division may kindly be pleased to review its judgment and order and pass order for fresh poll in the disputed constituency.

24. Mr. M. Amirul Islam, learned Senior Advocate, appearing on behalf of respondent No. 1, on the other hand, submits that this Division had already addressed all the issues raised in this petition for review and as such no interference is called for.

25. We have considered the submissions of the learned Advocates, the judgment

under review and the materials on record.

26. From the evidence of D.W. 4, it appears that the telephone line of the petitioner was disconnected on 23.06.2002. While deposing as D.W. 1 the petitioner admitted in cross-examination by stating "During my correspondence they have disconnected my telephone line". In view of such admission of the petitioner as D.W. 1 the question of service of notice of disconnection does not arise. D.W. 4, did not produce any document to show that respondent No. 1 ever raised any objection to the issuance of main bill of Tk. 31,110/- and that rather he verbally stated in line with the information contained in exhibits-4 and 4(A) furnished by the Accounts Officer, Mymensingh. In order to avoid disqualification for participating in the election the petitioner even stated "অমি ঢাকায় অবস্থান করি, টাঙ্গাইলে আমার কোন টেলিফোন নাই।". The petitioner stated that he did not have any telephone connection in Tangail and that no notice was served upon him intimating him about outstanding telephone bill of TK. 31,100/-. Such stand of the petitioner is self contradictory. The petitioner cannot approbate and reprobate in the same breath. In the judgment under review it has been held that the petitioner by resorting to falsehood was successful in getting his nomination paper accepted by the Returning Officer. D.W. 1 stated that the outstanding bill due from the petitioner as on 23rd June 2002 was Tk. 31,110/- and that a formal reply sent by the Mymensingh office in response to the review application of the petitioner could not be served due to his non-availability at the address written in the said reply letter. Therefore, it appears from the evidence of D.W. 4 that attempt was made to intimate the petitioner about outstanding telephone bill of TK. 31,110/- in response to his review application but that attempt failed because the petitioner was not available at his address.

27. Having considered all aspects of the case, this Division found that respondent No. 1 was no doubt disqualified because of outstanding telephone bills that remained unpaid since mid-2002.

28. With reference to Article 66(1) of the R.P.O. Mr. Anisul Haque submits that the petitioner defeated respondent No. 1 by a margin of more than 74,0000 votes and as such there is no scope for declaring respondent No. 1 elected to the Parliament and that at best a fresh poll could be ordered in order to show respect to verdict of the electorates.

29. This point has not been raised at the hearing of the appeal even then we would like to address this point.

30. While giving importance to the role of electorates, once Sir Winston Churchill stated:

At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper- no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.

31. Having considered that the provisions of the RPO in general it appears that to ensure free and fair election and also to ensure the right of the electorates the Representation of the Peoples Order, 1972, as amended till date was made. Therefore, the provisions of the RPO must be construed strictly and there is no scope for making any of its provisions redundant or meaningless.

32. Article 66(1) of the R.P.O. is quoted below:

Where, after the conclusion of the trial, it appears that there is an equality of

votes between two or more contesting candidates, and the addition of one vote for one such candidate would entitle him to be declared elected, the High Court Division shall so inform the Commission. In the event that no appeal is filed against the decision of the High Court Division, the Commission shall, after expiry of the period specified for the filing of and appeal, direct a fresh poll to be taken in respect of the said candidates, and fix a date for such poll, but otherwise, the Commission shall await the result of the appeal and shall act as above only if the decision of the High Court Division is upheld in appeal on all points.

33. Having considered this Article, it appears that when there is equality of votes between two or more contesting candidates and that the addition of one vote for one such candidate would entitle him to be elected, the High Court Division shall so inform the Commission in such a case and then the Election Commission shall after expiry of the period specified for filing appeal before this Division direct a fresh poll in respect of the said candidates.

34. The situation mentioned in Article 66(1) of the RPO is quite different from Article 63(1). Article 66(1) is independent of Article 63(1) of the RPO and there is no scope for reading Article 64 and article 66(1) of the RPO together. Article 64 is as under:

The High Court Division shall declare the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected, if it is so claimed by the petitioner or any of the respondents and the High Court Division is satisfied that the petitioner or such other contesting candidate was entitled to be declared elected.

35. The above Article provides that the High Court Division shall declare the election of the returned candidate to be void under Article 64 if any of the conditions detailed in clauses (a) to (e) are proved on evidence before the High Court Division. In addition, the High Court Division subject to its satisfaction is also authorized under this Article to declare the election-petitioner or any other contesting candidate to have been duly elected. In the case in hand, the High Court Division directed the Election Commission to declare the candidate who secured the second highest votes to have been elected to the Parliament.

36. Article 65 of the RPO provides for declaring the election as a whole to be void because of the failure of a person to comply with the provisions of this Order and the rules or the prevalence of extensive corrupt or illegal practice at the election. The situations enumerated in Article 65 of the RPO are also independent of Article 63(1). Articles 64, 65(1) and 66(1) of the RPO are to be considered independently. If Article 64 of the RPO is not given effect to for the disputes mentioned in Article 63(1) of RPO, the Article 64 becomes redundant.

37. According to Maxwell, "when possible, a construction should be adopted which will facilitate the smooth working of the scheme of legislation" - Interpretation of Statutes, 12th Edition at page 201.

38. In the case of Canada Sugar Refining Co. V.R. (1898) AC 735, Lord Davy observed as under:

Every clause of a statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter.

39. In the case of "Sultana Begum V". Prim Chand, MANU/SC/0227/1997 : AIR 1997 SC 1006 the Supreme Court of India held as under:

This rule of construction which is also spoken of as "ex visceribus actus" helps in avoiding any inconsistency either within a Section or between two different Sections or provisions of the same statute.

On a conspectus of the case law indicated above, the following principles are clearly discernible:

(1) It is the duty of the Courts to avoid a head-on clash between two Sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2) The provisions of one Section of a statute cannot be used to defeat the other provisions unless the Court, in spite of its efforts, finds it impossible to effect reconciliation between them.

(3) It has to be borne in mind by all the Courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, is possible, effect should be given to both. This is the essence of the rule of "harmonious construction".

(4) The Courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction".

(5) To harmonise is not to destroy any statutory provision or to render it otiose.

40. The principles expounded in the cases referred to above apply to the facts and circumstances of the present case.

41. From the discussion made before, it appears that the points raised by the learned Advocate for the review petitioner have already been addressed by this Division.

42. In addition to above, this petition for review does not come within the purview of Order XLVII rule I of the Code of Civil Procedure. In the light of the above, no interference is called for. Accordingly, this review petition is dismissed.

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