

VOLUME XX

2000

# BANGLADESH LEGAL DECISIONS

## Appellate Division

### Appellate Division (Civil Jurisdiction)

Mustafa Kama, C.J; Bimalendu Bikash Roy Choudhury, Mahmudul Amin Choudhury, JJ.

Civil Appeal Nos. 116 & 117 of 1997

Mustafa Kamal, Proprietor of M/s. Kamal Trading..... Appellant in C.A. 116/97  
Moqbul Ahmed Bhuiyan, Proprietor of M/S. Azmir Traders ..... Appellant in C.A. 117/97

Vs

The Commissioner of Customs and others  
... ... ... Respondents in both the appeals

Date of Judgment : The 8<sup>th</sup> of December, 1999

Result : Appeals allowed

Customs Act, 1969 (IV of 1969)

Section--25

Section 25 of the Act deals with the tariff value of imported and exported goods, not with the rate of duty. This section describes how the tariff value of imported goods and exported goods will be determined, the assumptions on the basis of which the normal price of such goods will be determined and the meaning of some words used in that sec-

tion. This is an executive power, not a legislative power.

(Para--8)

### Tariff Value

Though the Government fixes the tariff value on the recommendation of a high-powered advisory committee, the committee does not possess an unfettered, unlimited and absolutely arbitrary discretion in determining the tariff value. It must follow some guidelines which are germane to the Customs Act and not alien to it and should also pay heed to the recommendation of the Tariff Commission when protective customs duty is involved.

(Para--20)

Constitution of Bangladesh, 1972

Article--102

Evidence Act, 1872 ( I of 1872)

Section--114(e)

When a writ petition is filed on a bald assertion that the high powered committee arbitrarily and fictitiously raised tariff value without any objective material before it, the High Court Division ought not to rush into issuing a Rule Nisi and stay payment of duties and taxes. It should take notice under section 114(e) of the Evidence Act and should start with the presumption of regularity in official business. Initially, in the writ petition itself,

*the writ petitioner must include some reliable and relevant materials to show that between the last date of fixation of tariff value and the impugned date of fixation of tariff value the international market price of a particular importer item has either gone down or has gone up to an extent which is significantly higher or lower than the impugned fixation of tariff value. If there are no such materials in the writ petition itself the High Court Division should not entertain the petition and dismiss it in limine.*

*If the writ petitioner annexes relevant and reliable documents in support of its claim that the impugned fixation of tariff value is grossly inflated and is abnormally higher than the prevalent international market price the High Court Division will issue a Rule Nisi and may or may not pass an interim order keeping in view the decision reported in 50 DLR(AD) (1998)129.*

**(Paras—17 and 18)**

Dr. Kamal Hossain, Senior Advocate, (Mr. Abdul Baset Majumder, Advocate with him), instructed by Mr. Md. Aftab Hossain, Advocate-on-Record...For the Appellant in both the appeals.

Mr. Mahmudul Islam, Attorney General, instructed by Mr. B. Hossain, Advocate-on-Record.... For the Respondents in both the appeals.

## **Judgment**

**Mustafa Kamal, C.J:** These two appeals by leave are from the judgment and order dated 17.12.96 passed by a Division Bench of

the High Court Division in Writ Petition Nos. 4336 and 4337 of 1996 discharging the Rules Nisi.

2. Both the writ petitioner-appellants opened two separate letters of credit on 26.8.96 for import of Soda Ash Light from China under HS Code No. 2836.20 at the rate of US \$ 130 per metric ton. At the time of clearance of the imported goods from the vessel at Chittagong Port on 23.10.96 respondent No.1, the Commissioner of Customs, Chittagong directed the appellants to declare tariff value at US \$ 220 per metric ton for purpose of assessment of customs duty and other charges in terms of SRO No. 2/96-Cus dated 18.9.96. Previous to 18.9.96 the tariff value of Soda Ash Light was US \$ 160 per metric ton.

3. The appellants challenged the aforesaid direction in the writ petitions on the ground that the SRO was issued under section 25(1) of the Customs Act which contained an excessive delegation of power to the executive authority without giving any guideline. The High Court Division held, reading sections 25, 30 and 30A of the Customs Act together, that there are guidelines in those sections in fixing the tariff value of imported goods. The plea of excessive delegation was not accepted. The High Court Division further held that in view of the fact that a high-powered committee reviewed tariff value from time to time the fixation of tariff value at US \$ 220 per metric ton cannot be called an arbitrary decision. The Division Bench desired that the National Board of Revenue should frame rules with

regard to the provisions of section 25(1) of the Customs Act to avoid future complications.

4. Leave was granted to consider the limited submission that the very difference in the invoice value and tariff value is indicative of arbitrariness and fictitiousness in the imposition of tariff value at an unreasonably higher figure. There is no guideline for fixing tariff value in section 25 of the Customs Act and the Government has utilised the wide scope for fixing tariff value without regard to the local and international market rate of the imported goods, purely for purposes of augmenting its revenue without legislative sanction.

5. We have heard at length Dr. Kamal Hossain, learned Counsel for the appellants and Mr. Mahmudul Islam, learned Attorney General, appearing on behalf of the respondents.

6. What emerged as a common ground between the parties and what we consider to be the correct legal position is that a customs duty is levied for two purposes and for giving protection to local industries which is called protective customs duty.

7. It also emerged as a common ground that when customs duty is imposed for any purposes, the authority to do so is Parliament as Article 83 of our Constitution says, "No tax shall be leviable or collected except by or under the authority of an Act of Parliament". Under section 18 of the Customs Act, 1969 the rate of duty leviable in respect of goods described in that section is prescribed in the

First Schedule, which rate is amended by Parliament each year by either the Finance Act or by any other law. The power to change the rate of duty is an exclusive power and preserve of the Parliament and this is an illustration of the principle that the power of taxation is that of the Parliament. This power under section 18 is not delegated to the Government or to any other authority. But the Government has been given the delegated power under section 18(2) of levying (1) regulatory duty on goods specified in the First Schedule (2) countervailing duty under section 18A and (3) anti-dumping duty under section 18B. Section 19 of the Customs Act delegates to the Government the power to exempt any goods imported into or exported from Bangladesh the whole or any part of the customs duties chargeable thereon. Section 18(2), 18A, 18B, and 19 are instance of delegated legislation by an Act of Parliament in terms of the proviso to Article 65(1) of the Constitution. When the Government passes an order under those sections it has a legislative effect.

8. Section 25 of the Customs Act is concerned with the tariff value of imported and exported goods, not with the rate of duty. This section describes how the tariff value of imported goods and exported goods will be determined, the assumptions on the basis of which the normal price of such goods will be determined and the meaning of some words used in that section. This is an executive power, not a legislative power. Section 25A is also an executive power of the Government to accept as the basis of assessment a certificate

issued by an approved pre-shipment inspection agency. Section 30 then provides that both the value and the rate of duty applicable to any imported goods shall be those on the date on which bill of entry is presented under section 79 of the Customs Act. A new section 30A was added by the Finance Act, 1995 with effect from 1.7.95 wiping out the effect of some decisions of this Court notably that of Collector of Customs, Chittagong Vs. Ahmed Hossain and others 48DLR(AD)199=15 BLD (AD)116.

Section 25(7) provides as follows:

25(7) Notwithstanding anything contained in this section, the Government may by notification in the official Gazette, fix for the purpose of levying customs duties, tariff values for any goods imported or exported as chargeable with customs duty advalorem;

Provided that any imported or exported goods the declared value of which is higher than its tariff value fixed under this sub-section shall be chargeable with customs duties on the basis of its declared value.

9. The appellants raised the question in the writ petitions as to whether the afore-quoted delegated power of the Government to fix tariff values is hit by excessive delegation or not, specially when there is no guideline provided anywhere to enable the Government to follow a known route. The High Court Division held that the guidelines are provided in a combined reading of sections 25, 30 and

30A of the Customs Act. The appellants are not challenging this part of the decision of the High Court Division but are challenging the arbitrariness and fictitiousness in the imposition of tariff value at an unreasonably higher rate by the S.R.O. in question dated 18.9.96.

10. It is stated in the affidavit-in-opposition of the respondents that the tariff value is determined by a high-powered committee of the Government consisting of representative from Tariff Commission, Ministries of Commerce and Industries, Textiles and Finance, Controller of Valuation of Customs and representatives of Federation of Chamber of Commerce and Industry and National Board of Revenue. The fixation is done quarterly each year after taking into account the international market value of the commodities and the same is reflected in the Harmonised System of Coding known as HS Code and published in the Gazette notification. The tariff value is determined after due deliberation and consideration of the international market price of the goods.

11. It is here that Dr. Kamal Hossain impugns the method, manner and procedure followed by the high-powered committee in enhancing tariff value. He submits that the determination of tariff value is based on the market price and for that market information is to be collected. It is available in the Internet and when challenged the Committee, represented by the Customs Authorities, ought to be able to produce materials on the basis of which the tariff value has been increased. In determining the value the Government do not

have an unfettered, unlimited and absolutely arbitrary discretion. The high-powered committee did not have any objective information before it. Even it has not considered section 27(1). 387 items were considered in a few hours time at a meeting on 21.8.96 in a single day. Procedural fairness could not have been observed on the very face of it. The committee decided to change the tariff value in respect of 41 items, reducing tariff value in respect of 31 items and increasing tariff value in respect of 10 items, including Soda Ash Light. The tariff value of Soda Ash Light was fixed at US \$160 per metric ton in the previous Notification dated 17.6.96 but in the next meeting held on 21.8.96 the tariff value was increased to US \$ 220 per metric ton without there being any material on record that in between 17.6.96 and 21.8.96 the international market price of Soda Ash Light has gone up to that extent. The high powered committee did not have in its possession any reliable material to take such a big leap in tariff value. The high powered committee, according to paragraph 2 of the supplementary affidavit-in-opposition of the respondents, has "taken into consideration" the invoice value of a consignment of Soda Ash Light of Chinese origin valued at US \$ 375 per metric ton (Annexure-1). Annexure-1 is an invoice dated 9.3.95 showing import of 200 bags equivalent to 10 MT of Soda Ash from China. The consideration of this particular import reflects, Dr. Kamal Hossain submits, a mindless application of facts. The last Gazette Notification on the tariff value of Soda Ash Light was made on 17.6.96. Sitting next on 21.8.96 the high-

powered committee would only see whether the international market price of Soad Ash Ligh had gone up or down since 17.6.96. Instead, it has "taken into consideration" an import which has taken place 17 months earlier. The committee has thus exposed itself to a justified accusation that it had no relevant and rational materials at hand to raise the tariff value to such an abnormal and unreasonable proportion. Dr. Kamal Hossain also draws our attention to paragraph 3 of the respondents' supplementary affidavit-in-opposition wherein it is stated that the committee "also took into consideration" the representation of Narayanganj Chamber of Commerce and Industry for enhancing the tariff value of Soda Ash Light (Annexure-2) at US \$ 280 per metric ton, on the ground that Soda Ash Light imported from abroad were being smuggled out to India. Dr. Kamal Hossain submits that the high-powered committee cannot take into account extraneous matter or policy considerations while fixing tariff value. It can take only those matters into consideration which are germane to the Customs Act and not anything else. Besides, some members of the said Chamber earlier imported a huge quantity of Soda Ash Light and by lobbying for enhanced tariff value they want to make a windfall profit at the cost of the petitioner, their competitor. Dr. Kamal Hossain also submits that Soda Ash Light is not produced or manufactured in Bangladesh and therefore the Tariff Commission has nothing to do in the fixation of tariff value of this item because it does not fall under protective customs duty. Protective customs duty will be levied on the recom-

mendation of the Tariff Commission established under the Bangladesh Tariff Commission Act, 1992 (Act No. XLIII of 1992). The presence of a member of a Tariff Commission in the high-powered committee has vitiated the proceeding of the committee. Dr. Kamal Hossain relies upon the decision in the case of Phassco Hardware Company Vs. The Government of Pakistan, PLD 1989 Karachi 621 and submits that the powers under section 25 if exercised arbitrarily or capriciously may be impugned and set aside.

12. Mr. Mahmudul Islam, learned Attorney General, submits in reply that the Government do not join issue with the appellant that exercise of power under section 25(7) has to be made on a rational basis, not totally unconnected with international market price, and that some guidelines ought to be there to enable the Government to follow a chartered course. He further submits that since it is unwieldy and cumbersome to fix tariff value in each case by examining each invoice and other papers of each import it becomes necessary for the Government under section 25(7) of the Customs Act to fix the tariff value from time to time, so that a uniform tariff value governs each case of import for a period of time whatever be the invoice value. This value has necessarily to be changed and modified from time to time because of fluctuation in the international market price of each item. He submits that the report of the high-powered committee (Annexure-4 to the supplementary affidavit-in-opposition of the respondents) clearly stated the yardstick or

guidelines which the high-powered committee followed in amending the tariff value. According to the said report the said guidelines are as follows:

- (ক) পন্যের গুণগত মানের ব্যবধান, পরিবহন ব্যয় এবং উৎপাদন প্রক্রিয়ায় শ্রম নির্বিড়তার কারণে বিভিন্ন দেশ/উৎস হতে আমদানীকৃত পন্যের মূল্যের ক্ষেত্রে গুরুত্বপূর্ণ তারতম্য;
- (খ) পন্য মূল্যের ক্ষেত্রে আভার এবং ওভার ইনভেন্যুসিং;
- (গ) আমদানীকৃত পন্যের পরিবহন ব্যয়;
- (ঘ) ট্যারিফ মূল্যের ক্ষেত্রে যথাসম্ভব স্থিতাবস্থা রক্ষাকরণ; এবং
- (ঙ) অভিন্ন বা সমতুল্য পন্যের ট্যারিফ মূল্যের ক্ষেত্রে সামঞ্জস্যতা বিধান।

13. The learned Attorney General submits that none of these considerations are extraneous to the Customs Act and none of these criteria is irrelevant or superfluous in determining the tariff value under the Customs Act. Regarding disposal of 387 items containing 2228 tariff values in a single meeting, he submits that when representatives of various Ministries, Commissions and trade representatives are required to attend a particular meeting of a committee, it is not possible for these busy functionaries to meet for days together to consider each and every item exhaustively for hours together. To facilitate their work within the span of a few hours extensive paper works are made beforehand to enable the members of the committee to come to a prompt decision. In this respect the learned Attorney General has drawn our attention to paragraph 2 of the report of the

high-powered committee in which it is stated that facts were gathered from various customs houses and customs stations in respect of contemporaneous invoices, recommendations have been received from industries and chambers of commerce, specially FBCCI, comments have been received from the Industries, Textile and other Ministries, recommendations have been received from the Tariff Commission and applications have been received from various importers and manufacturers of goods. All these materials received from a broad spectrum of interests involved in import of goods have been considered in the light of the prevalent international market price. There was, therefore, no arbitrariness, fictitiousness or capriciousness in the deliberations and decisions of the high powered committee. Regarding the presence of representatives of the Tariff Commission the learned Attorney General submitted that among 387 items carrying 2228 tariff values there are many items on which protective customs duties are imposed. Therefore the presence of the representatives of the Tariff Commission is essential and their mere presence in respect of items involving non-protective customs duty will not vitiate the proceeding. In fact, their presence is essential when a subject matter under the jurisdiction of Tariff Commission is considered. He further submits that the Government of necessity has to hear the views of Chambers of Commerce and Industries. The Narayanganj Chamber of Commerce and Industries may offer many reasons for increasing tariff value including smuggling into India of imported

Soda Ash Light, but while deciding the issue the high-powered committee has not accepted the suggestion of the said Chamber to raise the tariff value from US \$ 160 per metric ton to US \$ 280 per metric ton. The appellant is a member of that very Chamber and it is not known to the Government who are his competitors. Since the high powered committee has to make an exercise which has a legislative effect it is not necessary to allow each and every importer to produce their own papers while deciding tariff value. With regard to the invoice (Annexure-1 to the supplementary affidavit-in-opposition of the respondents) the learned Attorney General submits that this invoice may not be the appropriate contemporaneous transaction for determining the current international market value of Soda Ash Light between 17.6.96 to 21.8.96, but he submits that imports relied upon by the appellant in their Annexure-X series to the writ petition containing invoices dated 18.1.96, 22.3.96, 27.4.96, 25.5.96 and 31.8.96 showing unit price of Soda Ash Light at US \$ 130 per metric ton are absolutely untenable and unacceptable documents, because those are only invoices and there are not seals of customs authorities on them to show that the value shown in the invoices was accepted by the customs authorities. These documents are, therefore, completely useless to prove that the international market price on 21.8.96 was below US \$ 160 which was the tariff value fixed in the earlier Gazette Notification dated 17.6.96.

14. The learned Attorney General has also drawn our attention to Annexure-2 to the sup-

plementary affidavit-in-reply of the appellants, which is a letter 15.3.95 containing an offer to Bangladesh Chemical Industries Corporation from a manufacturer in China to sell 4000 metric tons of Soda Ash Light at the rate of US \$ 127.80 per metric ton. The offer is in respect of a letter from the said Corporation dated 24.5.92 and the reply is dated 15.3.95. There is no evidence that this order was placed by the said Corporation at the said rate and that the consignment was duly delivered. This is also a useless paper, he submits, to determine the prevalent international market price of Soda Ash Light on 21.8.96. Referring to Annexures-Z1 and Z2 to the said supplementary affidavit-in-reply the learned Attorney General submits that these are certificates of origin from the People's Republic of China which is only an evidence of the origin of the imported goods. There is no column for stating the value of the goods exported from China. Yet unsoliciticiously the price of Soda Ash Light was mentioned on the left hand side of the certificates of origin at US \$ 102 per metric ton as on 20.7.96 and 28.9.96 respectively. These two gratuitous information are also uncalled for and not worthy of consideration, he submits, in establishing the appellants' case that the international market price was much below US \$ 160 per metric ton, the prevalent tariff value, at the time the high-powered committee met on 21.8.96.

15. On the final date of hearing the learned Attorney General filed an application for acceptance of a supplementary paper book in which two invoices dated 26.7.96 and

8.9.95 were enclosed showing that on those dates the importer M/s. Level Brothers Bangladesh Limited imported 790 bags and 1540 bags of Soda Ash Light from India at the rate of US \$ 236 per metric ton. There is, however, no assertion in the application that these invoices were considered by the high-powered committee. In any case, Dr. Kamal Hossain submits, the Lever Brother's invoices dated 26.7.96 could not have been considered by the high-powered committee in its meeting dated 21.8.96 because the invoice was certified in Bombay on 19.8.96 and the tariff value was determined by the Appraiser of Customs on 6.9.96 which is evident on the face of the invoices. The other invoice, of course, passed through the customs authorities before 21.8.96, but there is no assertion that this invoice was taken into consideration by the high-powered committee.

16. Dr. Kamal Hossain submits that the question of determination of tariff value is of utmost importance because from 1<sup>st</sup> January, 2000 Bangladesh will have to abide by its obligations under the World Trade Organisation (WTO) valuation agreement in terms of which the transacted value system will have to be followed.

17. Having heard both sides in extenso we are of the view that when a writ petition is filed on a bald assertion that the high-powered committee arbitrarily and fictitiously raised tariff value without any objective material before it, the High Court Division ought not to rush into issuing a Rule Nisi and stay pay-

ment of duties and taxes. It should take notice under section 114(e) of the Evidence Act, 1872 and should start with the presumption of regularity in official business. Initially, in the writ petition itself, the writ petitioner must include some reliable and relevant materials to show that between the last date of fixation of tariff value and the impugned date of fixation of tariff value the international market price of a particular imported item has either gone down or has gone up to an extent which is significantly higher or lower than the impugned fixation of tariff value, according as the writ petitioner's case is. If there are no such materials in the writ petition itself the High Court Division should not entertain the petition and dismiss it in limine.

18. If the writ petitioner annexes relevant and reliable documents in support of its claim that the impugned fixation of tariff value is grossly inflated and is abnormally higher than the prevalent international market price the High Court Division will issue a Rule Nisi and may or may not pass an interim order keeping in view the decision of this Court in the case of Commissioner of Customs, Chittagong Vs. Giasuddin Chowdhury, 50DLR (AD)(1998)129.

19. When the Government or the customs authority in its affidavit-in-opposition annexes rebuttal materials to show that the prevalent international market price of any particular item is approximate to the impugned tariff value, the question of onus fades into insignificance and the High Court Division is then

free to decide on the basis of documents annexed by both sides as to on whose side the scale is heavier. If the writ petitioner's documents carry more weight his case will be accepted. If the Government's documents carry better weight its case will be accepted.

20. In the light of the above principles we hold that even though the Government fixes the tariff value on the recommendation of a high-powered advisory committee, the committee does not possess an unfettered, unlimited and absolutely arbitrary discretion in determining tariff value. It must follow some guidelines which are germane to the Customs Act and not alien to it and should also pay heed to the recommendations of the Tariff Commission when protective customs duty is involved. It is not necessary for the committee to invite all the importers and exporters of all imported and exported items to consider their papers and documents. The committee, as presently constituted, is representative enough to come to an objective decision. In coming to a decision in respect of each item the committee must have in its possession contemporaneous documents to show that the international market price of a particular item of import or export has either gone up or down during the interim period between the last meeting of the committee and the impugned meeting. In the absence of any credible materials in this regard the committee will be exposed to a justified criticism that the increase or reduction of tariff value was done arbitrarily or fictitiously. So long as the increase or reduction in tariff value is done on the basis

of an objective information, it does not matter whether the committee seats for a few hours or for few days. The participation of a representative of the Tariff Commission will not vitiate the proceeding of the committee because the committee has also to consider the tariff value for the purposes of imposing protective customs duty.

21. In the present appeals, on the grounds urged by the learned Attorney General, we find that the documents relied upon by the importer appellants are not worthy of any credit to show that the international market price of Soda Ash Light was much below the tariff value fixed by the committee on 21.8.96. On the other hand for the reasons urged by Dr. Kamal Hossain we find that the documents allegedly taken into consideration by the committee in its meeting held on 21.8.96 are also unworthy of credit in determining the prevalent international market price. When both sides have led evidence in support of their respective cases the question of onus of proof fades into insignificance and the Court has to decide whether in the absence of reliable and relevant materials on the part of both sides the increase in the tariff value was arbitrary or not.

22. In this connection we uphold the contention of the learned Attorney General that the guidelines followed by the Committee as stated earlier are not extraneous and that those are germane to the Customs Act in determining tariff value. But what concerns us in these two appeals is that there were no

relevant and reliable materials in the hands of the Committee in its meeting held on 21.8.96 to show any justification for increase of tariff value from US \$ 160 per metric ton to US \$ 220 per metric ton. In the absence of any such material we are constrained to uphold the contention of Dr. Kamal Hossain that the increase in the tariff value has been made without regard to the local and international market value of the imported goods. We, however, do not subscribe to the submission of Dr. Kamal Hossain that the very difference in the invoice value and tariff value is indicative of arbitrariness and fictitiousness in the imposition of tariff value at an unreasonably higher figure. The international market price may at times behave in such a manner that it may be necessary to fix the tariff value at a disproportionately high figure than the invoice value. It all depends how the international market price has fluctuated at a given moment.

23. We, however, find that in exercise of powers under section 25(7) read with section 219(1) of the Customs Act the Government in the Finance Ministry has framed rules by a Notification published in the Bangladesh Gazette Extra-ordinary on 29.5.97, namely, the Rules governing the fixation of tariff value of imported goods. Goods imported on or after 29.5.97 will carry a tariff value determined in accordance with the said Rules. This is a welcome development, which will reduce the area of conflict between the importers and the customs authorities.

24. For the reasons stated above, we hold, on the facts of the present appeals, that the fixation of higher tariff value on Soda Ash Light in a meeting of the high-powered committee held on 21.8.96 was not based on any objective information obtained from reliable and relevant materials. We, therefore, allow the appeals and declare that the impugned orders dated 23.10.96 and the impugned notifications dated 18.9.96 have been issued without lawful authority in so far as they relate to Soda Ash Light.

In the result, the two appeals are allowed without any order as to costs.

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## Appellate Division (Civil Jurisdiction)

Mustafa Kama, C.J; Latifur Rahman, Bimalendu Bikash Roy Choudhury, A.M. Mahmudur Rahman and Mahmudul Amin Choudhury, JJ.

\*Civil Appeal Nos. 11 & 12 of 1999  
Moulana Delwar Hossain Saydee... ....  
... .... .... ....Appellant in both the appeals

Vs

Sudhangshu Shekhor Halder and others ...  
... .... .... ....Respondents in both the appeals

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\* The Judgment reported in 19BLD(HCD)(1999)85 has been reversed by the above judgment

Date of Judgment : The 26<sup>th</sup> of August, 1999

Result : Both the appeal allowed

Representation of the People Order, 1972 (PO 155 of 1972)

Article—31(2)(d)(e)

*The Tribunal was justified in not excluding the ballot papers from counting which contained a part of the official seal, because the law has not demanded in a mandatory language the presence of a full seal on the ballot paper before its exclusion from count.*

(Para—40)

Abdul Mannan Vs. Election Tribunal, 31DLR(AD)331—relied upon.

Article—36(4)(i)—(iv)

*The ballot papers that are required to be excluded from the count are fully described in Article 36(4)(i)-(iv) of the Order. Neither the Tribunal nor the High Court Division has any jurisdiction to add any other extraneous requirement other than those contained in sub-clauses (i)-(iv) of clause (4) of Article 36. These sub-clauses do not require that a ballot paper is to be excluded from the count if it does not contain the Code number or the signature or initial of the Assistant Presiding Officer. The High Court Division acted without jurisdiction in excluding the ballot papers of both the appellant and the election-petitioner containing the aforesaid omissions. Further, from the election petition it does not*

*appear that the election-petitioner made any allegation as to the illegal counting of votes by the Presiding Officer of Char Baleswar polling centre.*

(Para— 41)

**Article—65(a)**

*For failure of the Presiding Officer to take proper steps when Abdul Mannan did not show up and when Shahidul Islam acted in his place unlawfully, the voters cannot be disenfranchised and the candidates should not be penalised to go through the motion of another polling particularly when there is absolutely no finding that Shahidul Islam's participation made a difference in the voting pattern or that the appellant had a connivance in the matter or that he benefited from an illegality of which he had prior knowledge.*

*Any and every kind of failure of any person to comply with the provisions of the order and the rules will not result in the declaration of the election as a whole to be void.*

(Paras—25 and 26)

Khandaker Mahbubuddin Ahmed, Senior Advocate, (M/s. Moudud Ahmed, Senior Advocate and Abdur Razzaque, Advocate with him), instructed by Mr. Md. Nawab Ali, Advocate-on-Record... For the Appellant in both the appeals.

Mr. Rafique-ul-Huq, Senior Advocate, instructed by Mr. Md. Aftab Hossain, Advocate-on-Record.... Respondent No. 1 in both the appeals.

Respondents No. 2-19 in both the appeals  
: Not represented.

**Judgment**

**Mustafa Kamal, C,J :** These two appeals by leave at the instance of the successful candidate from constituency No. 129, Pirojpur—1 in the general election held on 12 June, 1996 arise out of the election dispute being Election Case No. 1 of 1996 filed by the runner-up candidate, respondent No. 1, under Article 49(2) of the Representation of the People's Order, 1972 (P.O. No. 155 of 1972), briefly, the Order, before the Election Tribunal (District and Sessions Judge), Pirojpur.

2. The appellant was opposite party No. 5 in the election petition. The election-petitioner alleged, inter alia, in his petition that he and opposite party Nos. 5-12 contested for the parliamentary seat from the aforesaid constituency comprising the local areas of Pirojpur, Nazirpur and Indurkani Police Stations. There were 93 polling centres. The election-petitioner was a nominee of the Bangladesh Awami League having the election symbol 'Nouka' while opposite party No. 5 was the nominee of Jamat-e-Islami, Bangladesh having election symbol "Daripalla". Opposite party No. 5 was declared elected by a margin of 280 votes securing in total 55,717 votes while the election-petitioner got the second highest vote i.e. 55,437. The election in different polling centres suffered from various illegal and corrupt practices and non-compliance of the provisions of the Order and

the rules framed thereunder. Opposite party No. 14 Abdul Mannan, Superintendent of S.M. Darussunnat Dakhili Madrasha, was appointed one of the 4 Assistant Presiding Officers of Gharghata Government Primary School Polling centre within Nazirpur P.S., but he remained absent and engaged opposite party No. 15 Shahidul Islam, an Assistant Teacher of the said Madrasha to perform the duty of Assistant Presiding Officer in his place by false personation. This was done for influencing the voters to cast their votes in favour of opposite party No. 5. The said Shahidul Islam worked as an Assistant Presiding Officer in booth No. 2 of Gharghata Government Primary School polling centre from 8:00 A.M. to 1:30 p.m. until his actual identity was disclosed and he was apprehended and handed over to the police on duty. After the polls the Presiding Officer lodged an FIR with Nazirpur P.S. against Shahidul Islam alleging false personation as aforesaid. Shahidul Islam while working falsely as an Assistant Presiding Officer in booth No. 2 issued ballot papers to the electors, directed the voters not to cast their votes in favour of the election petitioner and canvassed for casting their votes in favour of opposite party No. 5 and such unauthorised acts of Shahidul Islam vitiated the election of the polling station which materially affected the result of the election of the entire constituency. After Shahidul Islam was taken into police custody at 1:30 p.m. no Assistant Presiding Officer was employed to work in his place. The Presiding Officer of that polling station himself did not perform the function of the Assistant Presiding Officer. Thus the

election as a whole of that polling centre was void.

3. Further allegation of the election-petitioner is that the supporters and workers of opposite party No. 5 created terror at Gabgachhiya Government Primary School Polling Centre within Indurkani P.S. and as a result the situation went out of control of the Presiding Officer who stopped polling at about 10:30 a.m. The polling agents of the election petitioner were driven out from the polling booth. Polling, however, resumed at 12:00 p.m. and continued upto 4:00 p.m. In the absence of the polling agents of the election-petitioner the workers of opposite party No. 5 cast false votes.

4. The election-petitioner further alleged that the miscreants obstructed the voters of the minority community from coming to Baraibuniya High School Polling Centre and Maddhya Baniyari Governemnt Primary School Centre to cast their votes by disrupting and disconnecting the communications by pulling down the bamboo bridge over the river Baleswar and by sinking the boats by which the voters were to cross the river. They also obstructed the voters of the minority community to come to Tarabuniya Government Primary school centre by explosion of hand bombs and showing firearms. As a result most of the voters of the minority community of some villages could not come to the said polling stations to cast their votes.

5. In Bhairampur Government Primary School Polling centre 360 ballot papers without official seal on the back were illegally counted in favour of opposite Party No. 5 ignoring the objection raised by the polling agents of the election-petitioner. Opposite party No. 3 the Thana Nirbahi Officer of Pirojpur and Assistant Returning Officer unau-

thorisedly opened a control room in his office premises for receiving the election results and materials of different polling stations under Pirojpur and Indurkani Police Stations. The said Thana Nirbahi Officer in connivance with opposite party No. 5 opened the sealed packets of ballot papers, counted few hundred invalid ballot papers in favour of opposite party No. 5 and excluded few hundred valid ballot papers of the election-petitioner from counting and thus changed the election result. He detained the Presiding Officer of Char Baleswar Government Primary School Polling station with the election result and materials at Indurkani Bazar till midnight and thereafter he was brought therefrom with election materials by sending a car. The election result of the said centre was changed with the help of the Presiding Officer of that centre showing opposite party No. 5 ahead by a margin of 367 votes. The election result of all the polling centres under Pirojpur and Indurkani P.S. was manipulated. The polling at Gabgachhiya Government Primary School Polling Centre not having been held in accordance with law, the polling was void as a whole and a fresh poll was necessary to be called for in those two polling centres. The ballot papers of all the polling centres under Pirojpur and Indurkani P.S. excepting Gabgachhiya Government Primary School Centre are to be recounted. In view of the facts as stated above the election of opposite party No. 5 is to be declared void.

6. The election officials, namely, opposite party Nos. 2-4 by filing a joint written objection refuted the allegations of the election-petitioner except admitting that opposite party No. 15 Shahidul Islam who was not appointed as Assistant Presiding Officer had worked as such at the Gharghata Government Primary School Centre till 1:30 p.m. by falsely per-

sonifying Abdul Mannan, opposite party No. 14, who was actually appointed as Assistant Presiding Officer of that centre. They, however, denied that while working as an Assistant Presiding Officer Shahidul Islam had directed the voters not to cast their votes in favour of the election-petitioner or canvassed to the voters in favour of opposite party No. 5. Shahidul Islam could not exercise any influence in the neutral holding of election in that centre. The Presiding Officer of Char Baleswar Primary School Centre, opposite party No. 17, also filed a separate written objection denying the allegations of the petitioner and stating what he claimed to be correct facts regarding the said allegations.

The main contender, opposite party No. 5, in his written objection denied all the allegations made by the election-petitioner and alleged that they were all falsely made.

The Tribunal took up the following points for determination:

1. Had the election of Garghata Government Primary School polling centre as a whole been vitiated by the act of Opposite Party No. 15 who without appointment performed the function of Assistant Presiding Officer in Booth No. 2 of that centre falsely personifying himself as Abdul Mannan Opposite Party No. 14, the duly appointed Assistant Presiding Officer and for that has the election result been materially affected?

2. Did the workers and supporters of the Opposite Party No. 5 take over control of Gabgachhiya Government Primary School polling centre assaulting Humayun Kabir, a polling agent of the petitioner, and forcibly removing his all polling agents from

the booths and cast false votes in favour of Opposite Party No. 5 and resist the supporters of the petitioner to cast their votes.

3. Did the followers and supporters of opposite party No. 5 obstruct the voters of the minority community attached to Baraibuniya High School Centre, Maddhyabaniary Government Primary School centre and Tarabuniya Government Primary School centre to go to their respective polling centre to cast vote in the alleged manner?

4. Had 360 ballot papers bearing no official seal been counted in favour of the Opposite Party No. 5 at Bhairampur Government Primary School Centre?

5. Had the Opposite Party No. 5 got the result of Char Baleswar Government Primary school polling centre manipulated and changed by the Presiding Officer of that centre at the instance of O.P. No. 5 after receipt of the result in his office in the late hour of night following poll?

6. Has the election of Opposite Party No. 5 been procured or induced by any corrupt or illegal practice committed by opposite party No. 5 or by his election agent or by any other person with his connivance or consent?

7. Has the result of the election materially been affected by reasons of non-compliance of any provision of election law?

8. Is the election of the Opposite Party No. 5 liable to be declared void?

9. To what other relief, if any, is the petitioner entitled?

As regards issue Nos. 2-6 the Tribunal upon consideration of the evidence and materials on record clearly found that they were not proved. As to issue No. 1 the Tribunal clearly found that although the unauthorised participation of opposite party No. 15 as the Assistant Presiding Officer in the polling at Gharghata Government Primary School Centre had vitiated the election of that centre "there is not an iota of evidence that the returned candidate (opposite party no. 5) had any complicity in the illegal and unauthorised act of Shahidul Islam or that the unauthorised act of Shahidul Islam was done with the consent or connivance of the returned candidate. Moreover, the Opposite Party no. 5 and his election agent had no scope to take any precaution to prevent the unauthorised act done by Shahidul Islam. So requirement of Article 63 of the order has not been met up. Therefore, election of the Opposite Party No. 5 cannot be declared void on account of the unauthorised act of Shahidul Islam under Article 63 of the Order."

7. The Tribunal, however, found that the requirement of Article 65 of the Order has been fulfilled in respect of the said Gharghata Government Primary School Centre and the election result of the entire constituency will be affected with the declaration of the election of that centre as void. Finally by judgment and order dated 19 May, 1997 the Tribunal allowed the election petition in part declaring the election at the Gharghata Government Primary School Polling Centre under Nazirpur P.S. as void and further the election as a whole void. It was further ordered as follows:

"The election result of the opposite party No. 5 of Bhairampur Government Primary School Centre and Char

Baleswar Government Primary School centre be modified to the effect that the opposite party No. 5 has got 631 votes at Bhairampur Government Primary School Centre and 888 votes at Char Baleswar Government Primary School Centre and the results of other candidates including the petitioner of these two centres remain intact. The results of other 90 polling centres remain unchanged. Fresh poll is to be held at Gharghata Government Primary School Centre and thereafter consolidating the result of fresh poll of that centre with the modified results of Bhairampur Government Primary School Centre and Char Baleswar Government Primary School Centre and existing results of remaining 90 centres election result is to be declared afresh."

8. Being aggrieved by the said judgment and order both opposite party No. 5 (the appellant) and the election-petitioner (respondent No. 1) took separate appeals to the High Court Division being First Miscellaneous Appeal Nos. 109 and 144 of 1997 respectively. Both the appeals were heard together by a Division Bench and by the impugned judgment and order dated 7 December, 1998, the appeal of opposite party No. 5 (the appellant) was dismissed and that of the election-petitioner (respondent No. 1) allowed in part with modification of the order of the Election Tribunal in the following terms:

"We are of the view that the declaration of the Election Tribunal the election result of Gharghata Government Primary School as void direction of re-poll is in accordance with law and that order is hereby upheld. In respect of Baraibuniya High School polling

station we have already observed that the election in that polling station was not held peacefully and in accordance with law and accordingly we declare the election of the said polling station as void. We direct re-poll of Baraibuniya High School Polling Station. The votes which are not valid votes as per requirements of Article 3(2)(d)(e) & (f) are hereby declared as invalid votes and those votes are deducted from the total votes counted."

9. Leave was granted to consider the submission of Khandaker Mahbubuddin Ahmed, learned Advocate for the appellant, first, that the impugned judgment is legally untenable in that the decision has been made in a disjointed manner and without proper and correct perception of the issues and the law involved in the matter and ignoring the findings made by the Tribunal on facts as was required of the appellate forum. It has been specifically submitted that the main argument of the appellant that the legal effect of the unauthorised presence of Shahidul Islam at the Gharghata Government Primary School Centre was not legally and correctly construed by the Election Tribunal, in view of its own findings that the appellant had nothing to do with his presence at the centre and that it was not proved that he had in any way worked for the appellant and against the election-petitioner while acting as Assistant Presiding Officer, has not at all been adverted to by the High Court Division and as such the impugned decision upholding the finding of the Election Tribunal in respect of the said Centre is not sustainable in law.

10. Secondly, leave was granted to consider the submission that in view of the

pleading relating to illegal counting of only 360 ballots in Bhairampur polling station by the election-petitioner and in view of the fact that there was no pleading as to wrong counting of ballots in Char Baleswar polling station and the point at issue and the decision given by the learned Election Tribunal being on the question whether existence of part of the official mark on the ballot was sufficient to take it as a valid vote, the High Court Division erred in law in taking various extraneous matters into consideration and excluding hundreds of ballots of both the parties from counting on the ground of non-compliance of the provisions of Article 31(2)(d)(e)(f) of the Order.

11. Thirdly, leave was also granted to consider the submission that the High Court Division erred in law in interfering with the decision of the Tribunal as to issue No. 3 i.e., the alleged obstruction caused to the voters of the minority community from coming to the polling centre at Baraibunia High School in that neither the reasons given by the Tribunal were at all adverted to nor the elaborate findings on the point were reversed.

12. Lastly, leave was also granted to consider that there having been no pleading at all in the election petition as to illegal counting of votes by the Presiding Officer of Char Baleswar polling centre and no point for determination having been raised and taken in that behalf by the Election Tribunal and further that specific allegations in respect of that centre having been found not to have been proved the recounting of votes of that centre was wholly without jurisdiction. The High Court Division had no perception at all with regard to the case of the respondent in respect of that centre and illegally and under a misconception rejected the valid ballot papers of

the appellant at the said centre (without even seeing them).

13. Khandaker Mahbubuddin Ahmed has rightly pointed out that the impugned judgment of the High Court Division is a disjointed exercise without any systematic and orderly disposal of a first appeal and without any proper and correct perception of the issues and the law involved in the matter. It also stares in the face of the impugned judgment that the High Court Division totally ignored the findings made by the Tribunal on facts as was required of the appellate forum. Mr. Rafique-Ul-Huq, learned Advocate for respondent No.1, has not specifically replied to this general submission, but it is our view that we ought not to be carried away merely because of a poor treatment of a well-written judgment of an original Tribunal.

14. Khandaker Mahbubuddin Ahmed emphasised on the legal effect of the admittedly unauthorised presence of Shahidul Islam at Gharghata Government Primary School Centre. He submits that the Tribunal considered the evidence of P.Ws. 3-6 and 20-24, voters of that Centre and found that Shahidul Islam impersonated Abdul Mannan as Assistant Presiding Officer and issued ballot papers to those witnesses. He thus acted without any authority in booth No. 2 from the beginning of the poll at 8:00 a.m. upto 1:30 p.m. The Tribunal found that in booth No. 2 the polling agents of the contesting candidates were present and it was highly improbable and unbelievable that in their presence Shahidul Islam canvassed for the appellant. Moreover, neither the election-petitioner nor his election agent or polling agent made any complaint to any authority at the time of polling or immediately after the poll alleging that at the time of taking vote Shahidul Islam canvassed for the ap-

pellant inside the booth. In such circumstances, the Tribunal came to the finding that it had not been proved that Shahidul Islam canvassed for the appellant. The Tribunal further found that there was no evidence that Shahidul Islam was engaged by the appellant or his election agent or that he worked as a fake Assistant Presiding Officer within the knowledge of the appellant. Even in the election petition, it is not stated that the appellant inducted Shahidul Islam to work as Assistant Presiding Officer in place of Abdul Mannan to influence the voters to cast their votes in his favour. The Tribunal found that Abdul Mannan presumably owing to illness sent Shahidul Islam to work in his place. There is nothing to show that Abdul Mannan is a supporter or partyman or relation of the appellant and that he engaged Shahidul Islam, his subordinate staff of Madrasha, for the benefit of the appellant. P.Ws. 3-6 and 20-24 have not stated in their evidence that Shahidul Islam was engaged by the appellant or that he worked as an Assistant Presiding Officer at the instance of the appellant. The Tribunal noted the evidence of O.P.W.8 Rostam Ali Sk., a Polling Officer of booth No. 2, stating that in the morning of poll he informed the Presiding Officer that Abdul Mannan did not turn up and in his place Shahidul Islam impersonating himself as Abdul Mannan was working as Assistant Presiding Officer.

15. Khandaker Mahbubuddin Ahmed submits that this part of the finding of the Tribunal was completely ignored by the High Court Division and without reversing the said findings of the Tribunal suddenly gave the following finding:-

"The said Shahidul Islam acted as Assistant Presiding Officer unauthorisedly by way of his presence and also canvassed for respondent No. 1

Moulana Delwar Hossain Saydee, as a result of (sic) election has been materially affected and the Election Tribunal rightly declared the election result of Charghata Government Primary School Polling station as void and directed fresh poll and as such we find no ground to interfere with this order."

16. Khandaker Mahbubuddin Ahmed submits that this is an abrupt conclusion which is not supported by a fresh discussion of the evidence on record and by a reversal of the positive findings of the Tribunal.

17. Mr. Rafique-Ul-Huq on the other hand has relied upon the evidence of P.Ws. 3-6 and 20-24 and has submitted that their evidence supports the finding of the High Court Division.

18. We have gone through the evidence of P.Ws. 3-6 and 20-24. We do not find from their evidence that it is the appellant who managed to send Shahidul Islam in place of Abdul Mannan or that either Shahidul Islam or Abdul Mannan is a party supporter or relation of the appellant or that the appellant had anything to do with the illegal activities of Shahidul Islam. The reasoning of the Tribunal that it was highly improbable that in presence of polling agents of the candidates Shahidul Islam would canvass for the appellant, was completely ignored by the High Court Division. The finding of the High Court Division that Shahidul Islam canvassed for the appellant was an abrupt one without the support of the evidence on record and without meeting the unassailable reasoning of the Tribunal in rejecting the evidence of P.Ws. 3-6 and 20-24, that Shahidul Islam canvassed for the appellant in the booth.

19. Khandaker Mahbubuddin Ahmed further submits that after his arrest for false personation the poll in booth No. 2 continued upto 4:00 p.m. vide statement in paragraph 12 of the election petition. Therefore, there was no stoppage of the poll. There is also no evidence as to which of the candidates obtained the votes from the ballot papers issued by Shahidul Islam. In the said centre most of the votes had been cast in favour of respondent No. 1 who obtained 880 votes, whereas the appellant obtained only 379 votes in that centre. If the total votes of this polling station are excluded from count as vitiated the appellant remains elected with a much bigger margin than 280 votes. Therefore the whole election of this centre cannot be declared void for illegal participation of Shahidul Islam as Assistant Presiding Officer more so because of the provisions of Article 65 of the Order. By Shahidul Islam's participation as Assistant Presiding Officer the result of the election either of the Gharghata Government Primary School Centre or of the constituency as a whole has not been materially affected. As such the Tribunal erred in law in ordering fresh poll in Gharghata polling station and the High Court Division has erred in affirming such finding of the Tribunal. Khandaker Mahbubuddin Ahmed complains that the High Court Division did not consider at all the above points which the appellant urged in his appeal before the High Court Division in ground Nos. III and IV. The High Court Division has disposed of the appellant's appeal without considering Ground Nos. III and IV in his Memo of Appeal.

20. Mr. Rafique-Ul-Huq submits that even if it is conceded that there is no fault of the appellant or the Presiding Officer or respondent No. 1 in Shahidul Islam's act of

false personation the fact remains that he had issued ballot papers from 8:00 a.m. to 1:30 p.m. In the eye of law there was no voting whether the election result was materially affected or not. The very participation of an unauthorised person like Shahidul Islam vitiates the election procedure completely. This is conducting an election by impersonation. He submits that the Tribunal rightly observed that Article 63 of the Order is not attracted. What is attracted is Article 65(a) If the Order which is as follows:

"65. The Tribunal shall declare the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reason of ---

(a) the failure of any person to comply with the provisions of this Order and the rules; or ... . . . ."

21. In elaborating his submission Mr. Rafique-Ul-Huq refers to Article 7(4) which provides that it shall be the duty of a Returning Officer to do all such acts and things as may be necessary for effectively conducting an election in accordance with the provisions of this Order and the rules. He also draws our attention to Article 9(1B) which provides that the Returning Officer shall appoint from the panel for each polling station a Presiding Officer and such number of Assistant Presiding Officers and Polling Officers to assist the Presiding Officers as the Returning Officer may consider necessary. He also refers to Article 9(2) which provides that "a Presiding Officer shall conduct the poll in accordance with the provisions of this Order and the rules, shall be responsible for maintaining order at the polling station and shall report to the Returning Officer any fact or incident which may, in his opinion, affect the fairness of the poll;

Provided that during the course of the poll the Presiding Officer may entrust such of his functions as may be specified by him to any Assistant Presiding Officer and it shall be the duty of the Assistant Presiding Officer to perform the functions so entrusted."

22. Mr. Rafique-Ul-Huq then refers to Article 31(1) which provides that where an elector presents himself at the polling station to vote, the Presiding Officer shall, after satisfying himself about the identity of the elector issue to him a ballot paper. Mr. Rafique-Ul-Huq then refers to Article 29 which provides that the Presiding Officer shall exclude from the polling station all other persons except any person on duty in connection with the election, the contesting candidates, their election agents and polling agents, and such other persons as may be specifically permitted by the Returning Officer.

23. Such being the provisions of law, Mr. Rafique-Ul-Huq submits that both the Tribunal and the High Court Division correctly found that Article 65(a) is attracted to the facts and circumstances of the case because a complete stranger was engaged in issuing ballot papers and because it is mandatory that things are to be done in the manner specified in the Order and in the rules. He also cites several decisions in support of his submission.

24. There is no gainsaying the fact that a complete stranger entered into the scene with or without the knowledge of the Presiding Officer but without the connivance or knowledge of the appellant in booth No. 2. It is not however the provision of Article 65(a) that any or every kind of failure of either the Returning Officer or the Presiding Officer to comply with the provision of the Order and the rules will result in the declaration of the

election as a whole to be void. Article 65 adds a strong rider, namely, if the Tribunal "is satisfied that the result of the election has been materially affected by reason of" the same. That satisfaction is a sine qua non for invoking an illegality to vitiate an election.

25. When Shahidul Islam acted as Assistant Presiding Officer from 8:00 a.m. to 1:30 p.m. and the poll was admittedly continued upto 4.00 p.m. there must be some evidence that owing to Shahidul Islam's participation the result of the election in that centre was materially affected. It could be materially affected if Shahidul Islam canvassed for the appellant. It could also be materially affected if he had forbidden the voters not to vote for respondent No. 1. Equally it would have been materially affected if there was connivance of the appellant in the participation of Shahidul Islam in the election process. The Tribunal has merely found that by the unauthorised act of Shahidul Islam the whole election of this particular centre was vitiated. There is absolutely no finding by either the Tribunal or the High Court Division as to how and in what manner by the admittedly illegal participation of Shahidul Islam, the result of the election in that centre has been materially affected. There is absolutely no averment by respondent No. 1 in his election petition that had Shahidul Islam not participated in the election process he would have obtained more than 880 votes in the Centre. We agree with Khan-daker Mahbubuddin Ahmed that for failure of the Presiding Officer to take proper steps when Abdul Mannan did not show up and when Shahidul Islam acted in his place unlawfully, the voters cannot be disenfranchised and the candidates should not be penalised to go through the motion of another polling particularly when there is absolutely no finding

that Shahidul Islam's participation made a difference in the voting pattern or that the appellant had a connivance in the matter or that he benefitted from an illegality of which he had prior knowledge.

26. We are, therefore, unable to accept the submission of Mr. Rafique-Ul-Huq that Article 65(a) is attracted in the facts and circumstances of the case. Any and every kind of failure if any person to comply with the provisions of the Order and the rules will not result in the declaration of the election as a whole to be void. The Tribunal has to be satisfied that the result of the election has been materially affected thereby. From the discussions made above we do not find either the Tribunal or the High Court Division to have made out any reasonable case that the result of the election has been materially affected by the participation of Shahidul Islam in the election process. We therefore uphold the first contention of Khandaker Mahbubuddin Ahmed.

27. Khandaker Mahbubuddin Ahmed has argued the third point next on which leave was granted. We will, therefore, consider this point now. He submits that in paragraphs 24 and 25 of the election petition the election-petitioner alleged that the miscreants and supporters (without specifying whose) obstructed the voters of minority community attached to No.2 Baraibuniya High School Polling Centre and No.4 Maddhya Baniyari Government Primary School Polling Centre (which is not involved in these appeals) from proceeding to the polling station by disconnecting the communication system by breaking the bamboo bridges across the small river Baleswar and also by sinking boats carrying voters. In support of this allegation the election petitioner examined himself as P.W.1 and also examined P.Ws. 17-19 and 25-30, voters of

Baraibuniya Centre unable to reach the centre. The appellant examined O.P.W. No. 1, the election officer on behalf of opposite party Nos. 2—4, O.P.W. No. 22, his polling agent, and O.P.W. Nos. 29-33, voters of Baraibuniya centre refuting the election-petitioner's aforesaid allegations. The Tribunal considered the pleadings, oral and documentary evidence of the parties and the law to come to a negative conclusion on the basis of the following findings:

1. The allegations are vague and unspecified.
2. The material particulars of the allegations, as required under Article 51(1)(b) of the Order, have not been furnished.
3. It is not stated in the pleading that the miscreants and supporters of the appellant obstructed the aforesaid voters.
4. The names of the voters who had been allegedly obstructed have not been mentioned in the election petition.
5. At the trial a new case has been sought to be made out, namely, that Hindu voters of Samantogati village could not cast their votes due to obstructions by the 'scale' badge-holder supporters of the appellant.
6. The story that it is the appellant's supporters who prevented Hindu voters of Samantogati from coming to polling station by making threats, breaking bamboo bridges and sinking ferry boats

did not find place in the election petition.

7. Used voters' list of the concerned polling station showing the number of Hindu voters who cast their votes has not been called for and proved to show that Hindu voters of Samantogati village could not vote.
8. Names of P.Ws. 17-19, 25-28 and 30 have not been stated in the election petition as potential voters in favour of the election-petitioner, obstructed in coming to the said polling centre.
9. Those P.Ws. could not name the persons who allegedly obstructed them.
10. It is not probable that on the date of country-wide polling, unknown outsiders came to the remote village of Samantogati to obstruct casting of votes.
11. In this centre in all 1597 votes were cast which does not support the allegation that minority community voters could not cast their votes being obstructed by men of the appellant.
12. O.P.W. Nos. 29-33 have denied the allegations of the election-petitioner.

Coming now to the impugned judgment Khandaker Mahbubuddin Ahmed submits that the High Court Division did not advert to the above findings of the Tribunal and did not reverse those findings with cogent reasons based on record and evidence. The High

Court Division's decision on this point is not a proper judgment of reversal and the same is not sustainable in law and should be set aside.

28. On the contrary Mr. Rafique-Ul-Huq submits that the High Court Division has discussed afresh the evidence of P.Ws. 17-19 and 25-30 and has rightly come to the conclusion that in order to prevent 550 Hindu voters out of 700 total voters of village Samantogati the appellant naturally posted the scale badge-holders of his party throughout the east side of the river Baleswar. These workers did their job successfully in obstructing the Hindu voters from coming to the polling station by sinking ferry boats and by breaking bamboo bridges. The High Court Division correctly held that the election result of Baraibuniya centre being rigged it is liable to be declared void and there should be a fresh poll in that centre.

29. We have gone through the election petition. We find that the Tribunal's findings on the election petition are unexceptionable. We also find that the various reasons given by the Tribunal for not relying upon the evidence of P.Ws. 17-19 and P.Ws. 25-30 have not been adverted to at all by the High Court Division and therefore the impugned judgment cannot be called a proper judgment of reversal. The High Court Division also did not advert to the evidence of O.P.W. Nos. 29-33 in this regard. There is also a misreading of the evidence of P.W. 18 Shitol Chandra Biswas who never stated in his deposition, as the High Court Division observed, that he was scared by explosion of bomb and placing of rifle on his chest by the workers of the appellant. The High Court Division appears to be unaware of what is called rigging an election. Throughout, therefore, we find that the impugned judgment is an exercise in a lack of

application of mind to the facts and law involved in the appeals. The finding of the High Court Division is not sustainable in law and the submissions of Khandaker Mahbubuddin Ahmed in this regard are also upheld.

30. Before we advert to the second and fourth grounds on which leave has been granted it is necessary to state in substance the background behind these points. In paragraph 26 of the election petition the election-petitioner complained that at the time of counting of ballots after the poll of No. 5 Bhairampur Government Primary School Polling centre 360 ballot papers in which votes were cast in favour of the appellant but not having any official seal on their back were illegally counted in favour of the appellant. Without paying any heed to the objection raised by the polling agents of the election-petitioner, Mr. Bijoy Krishno Mukerjee, Presiding Officer of that centre, opposite party No. 18, counted those ballots in favour of the appellant and declared the result of that centre. Those ballots are liable to be excluded from counting in view of the provisions of Article 31(2)(d) read with Article 36(4)(c)(i) of the Order. Hence the ballots of that polling centre are required to be recounted by the Tribunal as the counting has materially affected the result of the election.

31. The Election Tribunal obtained the ballot papers of Bhairampur Government Primary School Centre, Char Baleswar Government Primary School Centre and Gharaghata Government Primary School Centre. By Order No. 35 dated 6.4.97 the Tribunal noted in the order-sheet that the bag containing the ballot papers in which votes were cast in favour of the appellant in respect of Bhairampur Government Primary School Centre was opened first and in total 659 ballot papers in

which votes were cast in favour of the appellant were found. On the back of 18 ballot papers there were no official mark or seals. 429 ballot papers contained full official round seal marks and in 202 ballot papers a part of official round seals are there while the other parts of the seals have fallen in the counterfoils.

32. Then the Tribunal opened the bag containing the ballot papers of Char Baleswar Government Primary School Centre and opened the packet containing 896 ballot papers in which votes were cast in favour of the appellant. In one ballot paper no seal was given against any symbol. In one ballot paper the major part of the seal fell on the symbol Television. 6 ballot papers do not contain any official mark or seal or any signature on the back. On the back of 382 ballot papers there was no signature, only a part of the seal but not the code number. In 67 ballot papers there are both signatures and part seals but no code number. In 284 ballot papers there are signatures and part seals with Code number on the back. In 155 ballot papers there are no signatures but there is code number and part seal on the back. As there was no allegation against counting of votes in Gharaghata Government Primary School Centre the bag of that centre was not opened.

33. By order No. 39 dated 16.4.97 the Tribunal noted that in presence of both parties it opened the remaining ballot papers of Bhairampur Primary School Centre and Char Baleswar Primary School Centre and noted the number of Ballot papers containing seals, partial seals, code number, signatures etc. in which votes were cast in favour of the election-petitioner and other candidates.

34. By its judgment the Tribunal found that the allegation of the election-petitioner

that 360 ballot papers without official seals were counted in favour of the appellant at Bhairampur polling centre is not correct and that the allegation is imaginary and without any basis. Only 18 ballot papers without official seals were counted in favour of the appellant. 202 ballot papers counted in favour of the appellant were found to have contained partial seals, but it is not the case of the election-petitioner that any ballot paper bearing partial seal was counted in favour of the appellant. It is also not claimed by him in the election petition that ballot papers bearing a part of official seal are invalid and are liable to be excluded from counting. The Tribunal, however, took up the question whether the ballot papers bearing official seals in part would be said to be ballot papers bearing no official mark.

35. The Tribunal then noticed Article 31(2)(d) of the Order which provides that the ballot paper shall on its back be stamped with the official mark before the ballot paper is issued to an elector. It is further provided in that Article that the Presiding Officer will have to stamp the counterfoil with the official mark (Article 31(2)(e)). Article 36(4)(c)(i) of the Order provides that the Presiding Officer shall count the votes excluding the ballot papers which bear "no official mark". There is no definition of "official mark" in the Order. It is there in the book issued by the Election Commission for the guidance of the election officials. The book provides that three kinds of seals are issued in the polling centre at the time of polling. These are (1) official seal (2) marking seal and (3) brass seal. In the official seal and the brass seal there is a security number (Code mark) which is used on the ballot paper for its security and to detect vote forgery. In that book in Chapter II a list of articles used in a polling centre has been

given. In this list item No. 5 is a rubber stamp to be used in each booth. The rubber stamp is termed as official mark by putting the words "official mark" within bracket. Hence the Tribunal concluded that the official seal is what is stated in the Book of Guidelines as the official mark. Each ballot paper issued must be stamped with official mark or official seal or else it would be left out of counting. It was argued before the Tribunal that each official seal bears a secret code number and the official seal containing no such confidential code number cannot be treated as official mark. The Tribunal was unable to accept this view. It opined that ballot papers bearing official seal in part without code number cannot be said to be a ballot paper without official mark. In many ballot papers the Presiding Officer irregularly affixes the official seal on the back of the ballot papers covering some portion of counterfoils. When the ballot papers were separated from the counterfoils a portion of the official seal fell on the counterfoils and the other portion remained in the ballot papers. In some cases the code number fell in the counterfoils and in other cases the code number fell in the ballot papers. The Tribunal held therefore that it would not be correct to say that the ballot papers containing a part of the official seals without code number is a ballot paper without official mark. The election-petitioner argued in favour of excluding 202 ballot papers of the appellant from the count at Bhairampur centre as those ballot papers contained official seals in part. The Tribunal rejected this contention and held that those kinds of ballot papers have also to be counted not only in favour of the appellant but also in favour of the other candidates including the election-petitioner. Therefore, the Tribunal excluded only 18 votes out of 649 votes counted in favour of the appellant at

Bhairampur centre and thus reduced the appellants votes to 631 and held that due to such deduction the whole result of the constituency was not affected.

36. The High Court Division on the other hand took the view (which is hardly intelligible) that under Article 31(2)(d)(e)(f) "the ballot papers which do not contain the stamp with official mark in its back and the number of the elector mark in writing on the counterfoil by the Presiding Officer having stamp in the counterfoil with the official mark and without signature or thumb impression on the counterfoil of the ballot papers cannot be treated and counted as valid votes". The High Court Division, therefore, declared 894 voters of the appellant and 226 votes of the election-petitioner as invalid votes in Char Baleswar Government Primary School Centre and 649 votes of the appellant and 19 votes of the election-petitioner in Bhairampur Government Primary School polling centre as invalid votes on the grounds that those ballot papers either do not contain any official mark with code number in full or contain part of official mark without code number or contain no full official mark or do not contain any signature and full official mark or no full official mark and signature or thumb impression of the voters on the counterfoils.

37. Khandaker Mahbubuddin Ahmed submits that the categorical and specific case of the election-petitioner in his election petition is that 360 ballot papers without official seals were counted in favour of the appellant in Bhairampur polling centre. The Tribunal elaborately discussed what is "official mark"

as contained in Articles 31 and 36(4) of the Order. Article 36(4)(c)(i) directs exclusion of a ballot from counting if it bears "no official mark". Khandaker Mahbubuddin Ahmed submits that Article 36(4)(c)(i) does not say "full official mark", or "initial" of the Assistant Presiding Officer or "code number". It directs exclusion only if there is no official mark at all i.e., when there is a total absence of official mark. But if there is a seal or part of a seal which the Presiding Officer considers to be the "official mark" and no objection is taken from the side of any party at the counting of votes in taking such ballot into the count, then everyone accepts the mark bearing on the ballot papers as "official mark" and as such there was no wrong or illegality in taking such ballots into counting. Khandaker Mahbubuddin Ahmed submits that this point has been considered in the case of *Abdul Matin vs. Election Tribunal*, 31DLR(AD)331 and in his submission there is no good reason to depart from the principle laid down therein. The High Court Division had no occasion to check the election material for themselves. There is, therefore, no cause or reason for the High Court Division to make some new observations on facts beyond what have been noted by the Tribunal in Order No. 35 dated 6.4.97 and order No. 39 dated 16.4.97 relating to recounting of ballots. Khandaker Mahbubuddin Ahmed submits that in view of the provisions of Article 36(4)(c)(i) and the principles laid down by this Division in the aforesaid case in 31DLR(AD)331 the aforesaid finding of the Tribunal as noted above should be upheld excluding 18 votes of Bhairampur polling station and 8 votes of Char

Baleswar polling station cast in favour of the appellant and the High Court Division's finding on this point ought to be rejected.

38. In defending the impugned judgment of the High Court Division Mr. Rafique-Ul-Huq lays stress on Article 31(2)(d) and (e) and submits that the ballot papers are mandatorily required to be stamped with full official mark on their back. The counterfoils are also mandatorily required to be stamped with the official mark not on the backside but on the front side. He has also referred to Article 31(5), Rule 22(a)(i)(ii) and Article 36(4)(i) and (ii) and submits that the High Court Division did not commit any illegality in excluding ballot papers of both parties containing partial official seals. On the question of excluding ballot papers containing no Code number or signature of the Assistant Presiding Officer Mr. Rafique-Ul-Huq submits that under Article 91(c) the Election Commission may "issue such instructions and exercise such powers and make such consequential orders as may, in its opinion be necessary for ensuring that an election of any polling station is conducted impartially, justly and fairly, and in accordance with the provisions of this Order and the rules". He therefore submits that the instructions issued by the Election Commission has the backing of law and therefore the Code mark and the signature of the Assistant Presiding Officer on the ballot papers issued are very much a part of the election rules. The High Court Division, therefore, has correctly excluded from consideration the ballot papers which did not contain the Code mark or the signature or initial of the Assistant Presiding Officer.

39. To this Khandaker Mahbubuddin Ahmed submits that Article 91 opens with the words "save as otherwise provided" which clearly indicates that the guidelines under Article 91 are not meant to override the provisions of the Order. Article 91 is only an enabling provision for issuing instructions for educating and guiding the election officials so that a fair election may be conducted smoothly. He also submits that there was no pleading at all in the election petition as to illegal counting of votes at Char Baleswar polling centre. No point for determination has been raised in that behalf by the Election Tribunal. The Tribunal found that some specific allegations in respect of that centre have been found not to have been proved. Therefore, the recounting of votes of that centre was wholly without jurisdiction. The High Court Division had no perception with regard to the case of the election-petitioner in respect of that centre and under a misconception illegally rejected hundreds of valid ballot votes of the appellant at Char Baleswar polling centre.

40. We have no hesitation in agreeing with the perfectly legal and correct argument of Mr. Rafique-ul-Huq that if Article 31(2)(d)(e) is to be followed in its full letter and spirit then a ballot paper is to be stamped on its back with full official mark and a counterfoil is to be stamped with full official mark not on the back but on the front side. This is the correct and legalistic position, but during the rush that follows a brisk polling it may not be possible for the Presiding Officer or the Assistant Presiding Officer to follow Article 31(2)(d)(e) in its full letter and spirit and they may have to opt for satisfying the

said Article in substance by putting the official mark on the back of the ballot papers leaving a part of the official mark in the ballot paper and the remaining part of the same in the back of the counterfoil. If, however, the ballot paper does not contain any official mark, either in part or in full the Presiding Officer has no option but to exclude it from count. The impression of a part of the official seal on the back of a ballot paper is a shortening of the elaborate procedure under Article 31(2)(d)(e) under pressure of circumstances. We repeat what we stated in the case of *Abdul Matin Vs. Election Tribunal*, 31DLR(AD)331, "The standard of care which is required with such strictness as in putting the official mark and initial may, due to bonafide error, fall short but that should not affect the valuable right of franchise" and further "It cannot be that the legislature requires a voter to be vigilant regarding the performance of duties by the Government functionaries". We, therefore, hold that the Tribunal was justified in not excluding the ballot papers from counting which contained a part of the official seal, because the law has not demanded in a mandatory language the presence of a full seal on the ballot paper before its exclusion from count.

41. Now coming to Code number and the signature or initial of the Assistant Presiding Officer, it must be remembered that the ballot papers that are required to be excluded from the count are fully described in Article 36(4)(i)-(iv) of the Order. Neither the Tribunal nor the High Court Division has any jurisdiction to add any other extraneous requirement other than those contained in sub-

clauses (i)-(iv) of clause (4) of Article 36. These sub-clauses do not require that a ballot paper is to be excluded from the count if it does not contain the Code number or the signature or initial of the Assistant Presiding Officer. The High Court Division acted without jurisdiction in excluding the ballot papers of both the appellant and the election-petitioner containing the aforesaid omissions. Further, from the election petition we do not find that the election-petitioner made any allegation as to the illegal counting of votes by the Presiding Officer of Char Baleswar polling centre. We have quoted the points for determination by the Election Tribunal. There is no point for determination on illegal counting of votes at Char Baleswar polling centre. The election-petitioner raised other specific allegations in connection with that centre and the Tribunal specifically found those allegations not to have been proved. In such circumstances, the recounting of votes of Char Baleswar polling centre was uncalled for and without jurisdiction and was an unnecessary roving exercise. The High Court Division did not apply its mind to the contending issues between the parties. Its rejection of the valid ballot papers of the appellant at Char Baleswar polling centre without even seeing them was wholly without jurisdiction and its rejection of valid ballot papers of the appellant at Bhairampur polling station was also without jurisdiction.

For all the above reasons, both the appeals are allowed without any order as to costs.

**KAK**

## Appellate Division

(Civil Jurisdiction)

*A.T.M. Afzal, C.J.; Mustafa Kamal, Latifur Rahman, Mohammad Abdur Rouf and Bimalendu Bikash Roy Choudhury, JJ.*

**Civil Petition For Leave To Appeal No. 239 of 1995**

**University of Dhaka and another.... .... .... Petitioners**

**Vs**

**Professor A K Monwaruddin Ahmed.... .... Respondent**

**Date of Judgment : The 5th of February, 1997**

**Result : Petition dismissed**

**Constitution of Bangladesh, 1972**

**Article—102.**

*A discretion once exercised without any opposition will not be interfered with simply on the ground of availability of alternative efficacious remedy especially when the decision sought to be appealed from does not suffer any infirmity of law.* (Para—10)

Controller of Examinations Vs. Mohammad Mahiuddin, (1992)12BLD (AD) 309—Cited.

Mr. M. Nurullah, Senior Advocate (Mr. Zakir Ahmed, Senior Advocate and Fida M. Kamal, Advocate with him), instructed by Mr. Md. Aftab Hossain, Advocate-on-Record. For the Petitioner.

Khandker Mahbubuddin Ahmed, Senior Advocate, instructed by Mr. Sharifuddin Chaklader, Advocate-on-Record, For the respondent.

## Judgment

**Mustafa Kamal, J:** This petition for leave to appeal by the respondent-petitioners is from the judgment and order dated 11.1.95 passed in Writ Petition No. 456 of 1994 by a Division Bench of the High Court Division making the Rule Nisi absolute.

2. The respondent-petitioner Professor A.K. Monwaruddin Ahmed succeeded Professor Anwarullah Chowdhury on 31.7.93 as the Dean of the Faculty of Social Science. From 1982 applications for admission into 1<sup>st</sup> year Honours Courses were divided into four groups, viz, (1) "Ka" Unit for Science and Biological Science, (2) "Kha" Unit for Arts and Social Sciences, (3) "Ga" Unit for Commerce and (4) "Gha" Unit for transfer from one branch of study to another. The Deans of the Faculties are the Chairmen of the Admission Committees which were formed each year by the Vice Chancellor. The General Admission Committee realised fees for admission and the fund so collected by each Unit was administered and operated upon by the Chairman of each Admission Committee. The fund thus collected is the fund of the Admission Committee and was never treated as the fund of the University. The fund was never reflected in the budget of the University and no audit was ever done in respect of it. The Chairman of each Faculty was responsible for operation of the fund. He used to keep account of the fund and submitted the same to the Vice Chancellor at the end of his term. Professor Anwarullah Chowdhury was the Chairman of the Admission Committee of

“Gha” Unit till he completed his term as Dean of the Faculty of Social Sciences on 29.7.93. On 30.12.93 the Vice Chancellor constituted an Admission Committee for “Gha” Unit for 1993-94 with the petitioner-respondent as Chairman. The respondent upon taking charge of the fund found irregularities in the management of the same. He requested Professor Anwarullah Chowdhury to hand over papers relating to the fund to him but he did not do so and accordingly the respondent felt the necessity of auditing the fund by a Chartered Accountant. He verbally informed his decision to the Vice-Chancellor who consented to it and also consented to pay the auditors fees from the sum of Tk. 82,000/- which Professor Anwarullah Chowdhury left with the Vice-Chancellor at the end of his tenure as Chairman of “Gha” Unit. The Chartered Accountant audited the accounts left by Professor Anwarullah Chowdhury and submitted reports yearwise. The last report was submitted on 6.12.93 with a bill for Tk. 27,500/- to the respondent which was submitted to the Vice Chancellor along with the audit report. The Vice Chancellor in his turn forwarded the bill with his signature thereon to the Director of Accounts on 26.12.93. On 27.12.93 a daily called “Ajker Kagaj” published a news under the heading “Corruption of Teacher of Dhaka University. Admission fee of students are not deposited in the fund” and contained a detailed criticism of the manner in which the fund was administered by Professor Anwarullah Chowdhury.

3. On the following day a meeting of the Deans of Faculties was held in the office of

the Vice Chancellor to consider publication of the said news item in which the Vice Chancellor stated that he gave consent to the respondent to have the accounts of the fund of “Gha” Unit audited by a Chartered Accountant and he also stated that he received the audit report. Thereafter the Chairman and members of the Admission Committee of “Gha” Unit for 1992-93 sent a letter to the Vice Chancellor and Chairman of the Syndicate of the University on 1.1.94 condemning the action of the respondent for having the fund audited, demanded his punishment and rejection of the illegal audit report and also demanding apology from the respondent to Professor Anwarullah Chowdhury and other Members of the Admission Committee. The letter was placed in the meeting of the Syndicate held on 1.1.94 and the Syndicate adopted a resolution that the audit of the fund has neither been done appropriately nor following legal procedure and as such it was not acceptable to the Syndicate and was not operative. The Syndicate also expressed its indignation at the action taken by the dean of the faculty of Social Sciences in auditing the fund and termed the same as “motivated and condemnable”. The Syndicate resolved that it would take step in respect of irregularity in admission and other matters on the basis of the report if received. The respondent wrote a letter on 4.1.94 to the Vice Chancellor who replied to the same on 17.1.94. On 6.1.94 the respondent wrote another letter to the Vice Chancellor requesting him to inform who were the Members present in the meeting of the Syndicate held on 1.1.94. On 16.1.94 the Registrar