

# AKM MAYEEDUL ISLAM VS. BANGLADESH ELECTION COMMISSION AND OTHERS

AKM Mayeedul Islam (Petitioner)

Vs.

Bangladesh Election Commission and others (Respondents)

Supreme Court

Appellate Division

(Civil)

Present:

ATM Afzal CJ

Mustafa Kamal J

Latifur Rahman J

Md. Abdur Rouf J

Bimalendu Bikash Roy Choudhury J

**Judgment**

June 5, 1996.

**Cases Referred to-**

Khagendranath Nath vs. Umesh Chandra Nath, AIR 1958 (Assam) 183; Serajul Huq Chowdhury vs. Nur Ahmed Chowdhury, 19 DLR 766; AFM Shah Alam vs. Majibul Huq and others, 41 DLR (AD) 68.

**Lawyers Involved:**

*Khandker Mahbubuddin Ahmed, Senior Advocate, instructed by Shamsul Haque Siddique, Advocate-on-Record-For the Petitioner.*

*Rafique-ul-Huq, Sr Advocate, Kazi Shahadat Hossain & Shorful Islam Khan, Advocates with him), instructed by MW. Md. Wahidullah, Advocate-on-Record-For the Respondent No. 3.*

*Respondent Nos. 1-2 & 4-10-Not represented.*

### **Petition for Leave to Appeal No. 237 of 1996.**

(From the Judgment and Order dated 1-6-96 passed by the High Court Division in Writ Petition No. 1732 of 1996).

### **Judgment**

**Mustafa Kamal J.-** In the ensuing General Election of Members of Parliament petitioner AKM Mayeedul Islam submitted nomination paper among others with respondent No. 3 Hussain Mohammad Ershad before the Returning Officer, respondent No. 2 for contesting parliamentary 27 Constituency, Kurigram-3, District Kurigram. On the date of scrutiny, i.e. on 13-5-96, respondent No. 2 accepted the nomination paper of respondent No. 3. Being aggrieved thereby the petitioner filed writ petition No. 1732 of 1996 challenging the said acceptant by judgment and order dated 19-5-96 a Division Bench of the High Court Division summarily rejected the writ petition.

2. The petitioner now seeks leave to appeal from the said judgment and order of the High Court Division.

3. It was the petitioner's case that respondent No. 3 has been convicted by various Special Tribunals for misconduct under section 5(2) of Act II of 1947 in Special Case No. 7 of 1991, Special Case No. 11 of 1992 and Special Case No. 19 of 1993 and sentenced to suffer 3 years, 7 years and 3 years simple imprisonment respectively thereunder. At the time scrutiny the petitioner filed objection before respondent No. 2 and submitted that respondent No.3 is disqualified under Article 66(2)(d) of the Constitution. He also submitted that although respondent No. 3 preferred appeals against the said judgments and orders before the High Court Division and the said appeals are still pending, no stay order or order of suspension of the sentences passed by the Special Tribunals concerned has been passed by the High Court Division and respondent No. 3 has been serving the sentences. As such, his nomination paper is liable to be rejected and he should be debarred from contesting the General Election due to be held on June 12, 1996.

4. In support of his writ petition the learned Advocate for the petitioner relied upon the case of ***Khagendranath Nails vs. Umesh Chandra Nath, AIR 1958 (Assam) 183***, in which it was held that the fact that the person had preferred an appeal against conviction and sentence and the appeal was pending at the time when his nomination papers were being considered would not remove the disqualification under section 7 (b), except in the case of a sitting Member, who has been convicted after his election, as provided under section 8 (a) of the Act. This is with reference to the Representation of the People Act of India.

5. The High Court Division opined that a foreign decision is not binding on the High Court Division and it may have only a persuasive value. It relied upon the decision in the case of ***Serajul Huq Chowdhury vs. Mar Ahmed Chowdhury, 19 DLR 766***, where an opposite view was taken. The Writ Petition was summarily dismissed upon reliance on the said decision.

6. Mr. Khandker Mahbubuddin Ahmed, learned Advocate for the petitioner, submits that the High Court Division failed to appreciate the petitioner's contention as to suspension/stay of sentence and having mixed up the issues, erred in deciding the point as to disqualification of respondent No. 3 to be a Member of Parliament as provided for in Article 66 of the Constitution. He submits that the

divergence of opinion of superior Courts in Bangladesh and India as to the effect of pendency of appeal against an order of conviction and sentence has not been correctly disposed of by the High Court Division and the point of law raised in this petition is one of general public importance.

7. In the case of ***AFM Shah Alam vs. Majibul Huq and others, 41 DLR (AD) 68***, this Court has in very clear terms laid down that in local government elections no step in the election process can be challenged under Article 102 of the Constitution in the High Court Division unless the impugned order passed by the authority concerned is *coram non judice* or is afflicted with malice in law. This decision of ours is equally if not more forcefully applicable to parliamentary and Presidential elections held under the Constitution. The petitioner has neither alleged *coram non judice* nor malice in law in the writ petition. Apparently, the Returning Officer, acting within his jurisdiction, took the view, that because of the pendency of appeals against several orders of conviction and sentence respondent No. 3 will not be disqualified from contesting the ensuing election, because the orders of conviction have not attained finality. It cannot be said that he had no authority to so decide id it also cannot be said that his decision suffers from malice in law. If an alternative interpretation is possible with regard to the issue in question, namely, the effect of pendency of appeals against the orders of conviction and sentence, that will be an election dispute for the Election Tribunal to decide after the election if the petitioner or any affected candidate elects to prefer an election petition to the Tribunal. The High Court Division ought not to have pre-judged the issue under Article 102 of the Constitution and ought not to have expressed any opinion on the issue. It ought to have rejected the writ petition *in limine* on the ground of maintainability as no question of *coram non judice* or malice in law was raised in the writ petition.

8. The decision of the High Court Division with regard to the issue in question however shall be ignored and the Election Tribunal shall be free to decide the issue on its own if such occasion arises.

The petition is dismissed, not on the grounds stated in the impugned judgment, but on the ground that the writ petition was not maintainable.

Ed.

Source: 48 DLR (AD) (1996) 208