



Star LAW report



## Judgment of the Appellate Division of the SC on the preparation of the voter list

Following is an abridged version

Syed J R Mudassar Husain, Chief Justice -- I have gone through the judgments proposed to be delivered by learned brother, Amrul Kabir Chowdhury, the author Judge and additional judgments written by my brother Md Ruhul Amin, my brother MM Ruhul Amin and my brother Md Tafazzul Islam.

Having concurred with their judgments, I would like to add only few words stating to the effect that preparation of Electoral Roll is one of the positive steps for democratic process which will ensure the right of franchise of the people and also help the stability of our democratic institutions.

Now as per our judgments, the Election Commission will prepare the electoral roll with utmost expedition.

**Mr Ruhul Amin, Justice --** I have gone through the judgment of brother Amrul Kabir Chowdhury and the addition made to the same by brother Md Tafazzul Islam. I agree with the reasons and the conclusion arrived at as to result of the appeal on modification of the judgment under appeal, but would like to add few lines in support of the judgment.

The moot point in the appeal was whether keeping in view the next parliamentary election or in other words for the ensuing parliamentary election the Election Commission would prepare a fresh voter list without having any regard to the existing voter list or the Election Commission would prepare the voter list taking into consideration of the existing voter list or in other words Election Commission upon additions, deletions and modifications of the existing voter list will prepare the voter list for the purpose of holding the ensuing parliamentary election. In the instant case the Election Commission (the Commission) in its meeting held on August 6, 2005 took the decision to prepare the voter list as the Commission felt necessity of preparing the voter list "completely error free".

The pro-cancellation and revision of voter list in Sections 10 and 11 of the Ordinance and there is provision for deletion of names from the electoral roll in Section 13 of the Ordinance. From the provisions of Sections 10, 11 and 13 of the Ordinance it is seen that there is no scope for the Commission while it goes for preparation of fresh voter list with the lapse of time between the parliament election held earlier and the period fixed for finalisation of the voter list for holding election of the next parliament. In my view when the Commission takes step for preparation of a fresh voter list it will delete from the existing voter list names of the persons who have acquired any disqualification for being enrolled as a voter and will add on following the provision of Sections 7, 8 and 9 of the Ordinance and the Rules 4-18 of the Rules framed under the Ordinance the names of the persons who have acquired qualification for being listed as voter between the period that passed from the date of preparation of the last voter list and till the date of finalisation of the voter list to be published finally as per provision of Section 7(4) of the Ordinance. If we look to the Rules prepared under the rule making power as provided in the ordinance we find Rule 19 relates to afresh electoral roll which will be prepared for an electoral area or constituency as per provision of Sub-section 7 of Section 7 of the Ordinance and Rule 20 provides for amendment and correction of the electoral roll and Rule 21 provides for revision of electoral roll. The provision of Sub-section 6 of Section 7, 10 and 11 of the Ordinance and the Rules 20 and 21 of the Electoral Rolls Rules, 1982, (The Rules) clearly show that continuity of the electoral roll is to be maintained or in other words whenever step would be taken for

preparation of a fresh voter list the Commission should prepare such list taking into consideration the existing voter list or in other words the fresh voter list would be a list already in existence with additions, deletions and modifications. To be more clear and specific in view of the provisions as mentioned hereinbefore, in my view, the fresh voter list which would be prepared by the Commission should contain the names of the voters already in the existing list, if one has not acquired disqualification for being listed as a voter, as well as the names of the persons who in between the period while the existing list was prepared and the time fixed for being listed as a voter have acquired the qualification, as are in Article 122 (2) of the Constitution and in Section 7(1) of the Ordinance, Section 10 and 11 of the Ordinance provides for amendment and correction as well as revision respectively of electoral roll. When these provisions are read with the provision as in Section 7(6), Section 7(7) of the Ordinance as well as Rules 20 and 21 of the Rules it is seen there is contemplation of maintaining existing list with necessary additions, deletions and modifications or upon revision. It has been submitted on behalf of the appellant that the provisions in Section 7, 10 and 11 are independent and there is no scope for reading the same taking together and there is no scope to take the view that the law in the Ordinance and the Rules provide for continuity of the voter list or in other words maintaining of the electoral roll and preparation of a fresh electoral roll taking into consideration of the electoral roll so maintained. In my view the submission so made is of no merit because of the provision of Section 10, 11 and 7 (6) and 7 (7) as well as Rules 20 and 21 of the Rules. It may be mentioned the Commission in its meeting held on August 6, 2005 did not take decision for cancellation of the existing roll for the reasons as in Sub-section 7 of Section 7 of the Ordinance. It is seen from the minutes of the meeting of the Commission held on August 6, 2005 that the Commission felt necessity of preparing a fresh voter list free from mistake. In that state of the matter it cannot be said that the Commission took decision to scrap the existing voter list or to discontinue the existing voter list. Provision of Section 10 and 11 read with Rule 20 and 21 provides for correction of the existing voter list by addition, deletion and modification.

It was submitted on behalf of the appellant that in the past voter lists were prepared in the manner similar to instant manner, but no exception was taken in any respect and there was not claim for continuity of the existing voter list. The submission so made, in my view, lacks substance since an act done in violation of the law or in disregard of the Rule would not be clothed with legality only because of lapse of time or for not taking exception to the act so done in disregard of the law and the Rules, rather when challenge is made to the act done in disregard of the law and the Rules then the authority which is competent to put the person or the body acting in violation of law and the Rules to put on the right track is quite competent to make direction to the person or the body that acted or is acting upon violation of the law and the Rules to do or perform its function or act in due compliance of the law and the Rules.

The provision in Section 7(7) of the Ordinance providing for preparation of an electoral roll 'afresh' by the Commission is limited to particular or specific electoral area or constituency in the status of the matters as are therein and not beyond that or in

**An authentic voter list is sine qua non for a free and fair election. Our Election Commission is in hullabaloo for the couple of months and the controversial voter list makes the whole situation unrest. For our readers' interest the abridged version of the judgment of the Appellate Division of the Supreme Court on preparation of the voter list is published here. --Law Desk**



### Facts

Civil Appeal Nos. 54 and 55 of 2006

The Election Commission represented by the Chairman (Chief Election Commissioner), Appellant (In both the cases)  
Vs  
Advocate Rahmat Ali, MP and others ..... Respondents  
M A Jalil, MP, General Secretary, Bangladesh Awami League, and others..... Respondents

Date of Judgment of the High Court: 04-01-2006  
Result: Appeal dismissed with some modifications-23.05.06

other words the said provision does not authorise the Commission to prepare a fresh electoral roll scrapping/obliterating the existing electoral roll. The Commission in its meeting held on August 6, 2005 felt necessity of preparing "completely error free" electoral roll. In my view for achieving that purpose the Commission is not required to obliterate the existing voter list or to consign the same to cold-storage and then replace the existing voter list by fresh voter list. Device for preparing "completely error free" voter list without scrapping existing voter list is very much in the Ordinance (Sections 10 and 11) and the Rules (Rules 20 and 21) framed under the Ordinance. The continuity of voter list or in other words non-scrapping of existing voter list is also seen from the provision of section 11A of the Ordinance and the Rules 22, 23 and 26. In fine, I am of the view, the Ordinance and the Rules framed under the Ordinance postulate continuation of existing electoral roll with necessary additions, deletions, revision, modifications, corrections and amendments.

I am of the view whenever the Commission will take step for preparation of electoral roll, the same will perform the said function upon taking it no consideration the list maintained under Section 7 (6) of the Ordinance in the light of the provisions of Sections 10 and 11 of the Ordinance as well as Rules 20 and 21 of the Rules and not by scrapping or obliterating the existing list.

**MM Ruhul Amin, Justice --** I have gone through the judgment proposed to be delivered by my learned brother Amrul Kabir Chowdhury, J and the reasons added by my learned brother Md Tafazzul Islam, J and I have nothing more to add.

**Md Tafazzul Islam, Justice --** I have read the proposed judgment of brother Amrul Kabir Chowdhury, J concur with the decision dismissing the appeals with some modification. However I want to add the following--

Electoral Rolls Ordinance 1982 provides for preparation of electoral rolls for the purpose of elections to different elective bodies and Electoral Rolls Rules 1982 provides details in this regard. Ordinance 1982 as well as Rules 1982 more or less envisage 5 stages i.e.

- (1) preparation of the draft electoral roll,
- (2) after making addition or modification or correction in the draft electoral roll publication of the final electoral roll
- (3) maintenance of the final electoral roll in the prescribed manner and keeping it open for public inspection
- (4) addition, modification and correction of the final electoral roll
- (5) revision of the existing electoral roll and preparation of subse-

quent electoral roll after revision

At the first stage in terms of the provision of section 7 (1) read with rules 3, 4 and 5 a draft electoral roll, has to be prepared after complying with the requirements, as laid down.

At the second stage in terms of section 7(2) read with rules 6-8 a draft electoral roll shall be published inviting claims and objections and in terms of section 7(3) read with rules 7 to 10 the registration officer shall on the basis of any decision or on the basis of claims and objection will make addition, modification or correction in the electoral roll and in terms of section 7(4) read with rules 7-17 requirements as provided therein are to be complied with before publication of the final electoral roll and in terms of section 7(5) read with rule 18 final electoral roll is to be published.

At the third stage in terms of section 7(6) read with rule 28 final electoral roll has to be maintained in the prescribed manner and also be kept open for public inspection and copies thereof are to be supplied on payment of fees.

In the fourth stage in terms of section 10 and section 15 read with rule 20 amendments and corrections may be made in the electoral roll on complying the provision as contained therein and in terms of section 15, the Election Commission may at any time include or exclude a person from the electoral roll and also correct any entry in the electoral roll.

At the fifth stage in terms of section 11 read with rule 21, unless otherwise directed by the Election Commission, before each election to an elected body, the electoral roll shall be revised and if directed by the Election Commission, the electoral roll shall also be revised in any year.

As it appears the provisions of section 7(7) providing preparation of electoral roll afresh applies only to a particular electoral area or constituency, for gross error or irregularity in the preparation of electoral roll of that area or constituency but the facts of the present appeals are different in as much as order has been passed for preparation of the electoral roll afresh for the whole country.

As it appears sub-rule (1) of Rule 21, which deals with revision of electoral roll, specifically provides that for the purpose of revision of the electoral roll, specifically provides that for the purpose of revision of the electoral roll for any electoral area, the electoral roll of the electoral area for the time being in force shall, with such additions, deletions and modifications as may be necessary, be published as draft electoral roll in the manner provided in rule 6 and thereupon the provisions of rules 7 to 18 shall apply in relation to every such roll as they apply to the first preparation of an electoral roll for an electoral area.

ment that "the preparation of a fresh voter list, the observation made by the High Court Division in paragraph III of the summing up portion of the judgment is erroneous and liable to be set aside.

Leave was granted also to consider the submission that the observation made in paragraph IV of the summing up portion of the judgment to the effect that "the persons whose names are already in the existing electoral roll can not be dropped from the roll unless they are dead or have been declared to be of unsound mind or ceased to be resident or ceased to be deemed to be resident of that area or the constituency" is erroneous and inconsistent with the provision of the law inasmuch as, in that case, the process of enumeration of voters by door to door visit to ascertain who are fit to be entered in the Electoral Roll according to Article 122 of the constitution and Section 7(1) of the Electoral Roll Ordinance, 1982 and the Rules become meaningless and that continuation of an Electoral Roll in pursuance of the provision of Section 7(6) of the Ordinance 1982 till the same becomes obsolete on the publication of a fresh voters list as per section 7(5), is necessary for holding bye-election to parliamentary constituencies between two general elections and also for holding elections to different elective bodies like the Corporations, Pourashavas and Union Parishads but Section 7(6) cannot be construed or declared to be "basis" for preparation of a fresh voters list.

Mr Khandker Mahbubuddin Ahmed, learned Counsel appearing for the appellant in both the appeals has taken us through the materials on record including the impugned judgment.

Challenging the legality of the findings and observations/directives given by the High Court Division in paragraph III and IV of its judgment Mr Ahmed refers to the minutes of the meeting dated 06.08.2005, of the Election Commission, hereinafter referred to as the Commission and the relevant portion of the said minutes

It also appears that sub rule 1 of Rule 21 refers to rules 7-18 which contain the procedure for inclusion, deletion and correction and Rule 14 provides for issuance of notice in the case of correction of an entry and Rule 15 also provides for service of such notice either personally or by post.

So the decision of High Court Division, with the observations/directives as contained in paragraphs III and IV of the judgment and order does not call

for any interference.

Amirul Kabir Chowdhury, Justice--  
..... the appellants calling in question the legality of Directives Nos. III and IV preferred the appeals.  
Leave was granted to consider the submissions made on behalf of the appellants-petitioners that in view of the provisions of section 7 to 11 of the Electoral Rolls Ordinance 1982 and rule 4 of the Electoral Rolls Rules 1982, the observations made in the judg-

ments that "the preparation of a fresh voter list, the observation made by the High Court Division in paragraph III of the summing up portion of the judgment is erroneous and liable to be set aside.

Leave was granted also to consider the submission that the observation made in paragraph IV of the summing up portion of the judgment to the effect that "the persons whose names are already in the existing electoral roll can not be dropped from the roll unless they are dead or have been declared to be of unsound mind or ceased to be resident or ceased to be deemed to be resident of that area or the constituency" is erroneous and inconsistent with the provision of the law inasmuch as, in that case, the process of enumeration of voters by door to door visit to ascertain who are fit to be entered in the Electoral Roll according to Article 122 of the constitution and Section 7(1) of the Electoral Roll Ordinance, 1982 and the Rules become meaningless and that continuation of an Electoral Roll in pursuance of the provision of Section 7(6) of the Ordinance 1982 till the same becomes obsolete on the publication of a fresh voters list as per section 7(5), is necessary for holding bye-election to parliamentary constituencies between two general elections and also for holding elections to different elective bodies like the Corporations, Pourashavas and Union Parishads but Section 7(6) cannot be construed or declared to be "basis" for preparation of a fresh voters list.

### High Court's 5-point directives

The High Court Division after hearing the parties disposed of the writ petitions as under:

In view of what has been discussed above let us sum up our findings and observations as under-

(i) It is held that the decision for preparation of Electoral Roll taken in the meeting on 6th August, 2005 was not unilateral decision of the Chief Election Commissioner rather it was a decision of the Commission for the preparation of the Electoral Roll and appointment of the Registration Officers etc.

(ii) The Election Commission of Bangladesh is a composite body and it must function enhance. That is, it must function institutionally and not individually. In case of difference of opinion all decision must be taken by majority opinion. The Chief Election Commissioner is on part with other Commissioners on all matters except that the Chief Election Commissioner is the Chairman of the Commission under Article 118(2) and can exercise his sole discretion under Article 123(4) of the Constitution.

(iii) The Commission should prepare Electoral Roll taking the existing Roll maintained under section 7 (6) of the Ordinance as a major basis. If there is a computerised database the Commission should make the best use of it and if not, a computerised Electoral Roll with database should always be maintained to avoid future controversy, costs and labour.

(iv) The persons whose names are already in the existing electoral roll cannot be dropped from that roll unless they are dead or have been declared to be of unsound mind or ceased to be residents or ceased to be deemed to be residents of that area or the constituency.

(v) The Chief Election Commissioner should immediately call a meeting of the Commission and the Commission should decide and take all appropriate steps to implement the decision of the Commission taken on 6th of August, 2005 in its meeting for preparation of the Electoral Roll in the light of this judgment".

Referring to the preparation of Electoral Roll in the years 1990, 1995 and 2000 preceding each general election Mr. Ahmed questions as to why the respondents are silent as to the fact of preparation of new Electoral Roll in those years and according to him if the Election Commission is possessed of the authority to prepare new Electoral Roll for those years why the Commission should be stopped from preparing the same in similar way for the next

submits that reasons have been considered by the Commission to come to the conclusion "that in this situation the voter list should be error free"

He then submits that upon consideration of the High Court Division concluded:

"We find from these notes that both the Commissioners (Mr AK Mohammad Ali and Mr M M Munsef Ali) are specific about their intention for preparation of a voter list."

He then submits that the High Court Division formulated points for decision as to whether the decision taken in the meeting of the 6th August 2005 was unilateral or was by the Commission and that whether a fresh or new voter list is at all permissible to be prepared under the provisions of the Electoral Rolls Ordinance, 1982 (Ordinance No LXI of 1982), in short, the Ordinance of 1982 and the Rules framed there under.

Then Mr. Ahmed refers to the following portions of the judgment of the High Court Division:-

"The expression, "unless otherwise directed by the Commission" in section 11 (1) (a) of the Ordinance is a sufficient indication that other than revision the Commission can follow the foregoing procedure as in Sections 5 and 7 for preparation of electoral rolls. We must not lose sight of the chronology of Section 7 which puts final roll in section 7 (5) and roll afresh of an area or constituency in Section 7 (7) and up dating and revision in Sections 10 and 11 respectively of the Ordinance.

It thus follows that the decision in the meeting of the 6th August, 2005 was not unilateral rather it was decision of the Commission and the Commission is required to have an electoral roll prepared as distinguished from mere corrected, amended or revised taking the list maintained under Section 7 (6) of the Ordinance as the major basis."

Mr. Ahmed further submits that "there is no controversy that the decision was taken for preparation of a list and for appointment of Registration officers etc on the 6th August 2005 but the 2 other Commissioners started disputing that the decision was taken for revision of the list and appointment of the Registration Officers for the purposes which is belied by Annexure-1 of the affidavit of compliance."

Mr. Ahmed referring to the above mentioned portion of the judgment submits that the High Court Division has correctly construed Section 7 of the Ordinance but he takes exception to the observation that the Electoral Roll is to be prepared "taking the list maintained under Section 7 (6) of the Ordinance as the major basis" and emphatically submits that this is an erroneous observation which has also been repeated in the summing up portion in paragraph (III) of the findings and observations. He further submits that such erroneous observation is followed by another erroneous observation in paragraph-IV to the effect that "the persons whose name are already in the existing electoral roll cannot be dropped from the roll unless they are dead or have been declared to be of unsound mind or ceased to be residents or ceased to be deemed to be a resident of that area or the constituency."

Referring to the preparation of Electoral Roll in the years 1990, 1995 and 2000 preceding each general election Mr. Ahmed questions as to why the respondents are silent as to the fact of preparation of new Electoral Roll in those years and according to him if the Election Commission is possessed of the authority to prepare new Electoral Roll for those years why the Commission should be stopped from preparing the same in similar way for the next

Thereafter Mr. Ahmed submits that there is nothing in the Ordinance or in the Rules framed thereunder which supports the two impugned observations (in paragraph -III and IV) in the judgment of the High Court Division. Elaborating the contention he submits that there is no reason to hold that Section 7 of the Ordinance is enacted only for the first preparation of voter list and that Section 7 in fact comes to play its role whenever a new list is being prepared as was done in the years 1990, 1995 and 2000 and every time the existing list was "maintained" under Section 7 (6) of the Ordinance for being used during by-elections of the Parliament and Elections of local bodies and that continuation of the existing voter list terminates in the final publication of a new voter list under Section 7(4) of the Ordinance.

He then submits that the concept of treating the existing voter list maintained under Section 7(6) as "basis or major basis" for preparation of new voter list is opposed to the process of preparation of voter list by visiting from door to door and enumerating the residents as required by rule 4 of the Rules.

He then submits that section 7 to 10 and 11 of the Ordinance are not independent of each other providing for preparation of voter list correcting and amending existing voter list and revising the same respectively.

He emphatically submits that preparation of electoral rolls afresh becomes necessary upon cancellation of the Electoral Roll of any electoral area or Constituency for reasons stated in Section 7 (7) of the ordinance.

Referring to the submission that the Electoral Roll is being prepared as per law and practice and the existing Electoral Roll in not at all being abandoned in the process of preparation said to have been made in his submission before the High Court Division Mr. Ahmed replies that this submission cannot be taken to be the reason for making the existing Electoral Roll as the major basis and he adds that what was submitted in fact is that the existing Electoral Roll continued for all purposes and was not abandoned in the process of preparation of a new voter list to enable any claimant to prove his case before the revising authority after publication of the draft list and that he in fact did not support the submission of the writ petitioners.

After placing the relevant provisions from the ordinance and Rules Mr. Ahmed takes exception to the observation of the High Court Division that the Commission must maintain an Electoral Roll to hold the field till the publication of Electoral Roll prepared by the Commission and the Commission cannot be oblivious of the existing list and that the voters whose names appear in the existing rolls cannot be dropped unless he is dead or otherwise earned disqualification and that the right to be voter cannot be dependent on his being present when the enumerators visited his house or his signature is obtained in particular form.

He submits that those found not available at their houses during the time of visit of the enumerator shall, in accordance with law, be excluded from the Electoral Roll but their right to file objection has not been denied and as such the above observation of the High Court Division is erroneous.

He refers to Rule 16 providing elaborate procedure for inclusion of those in the voter list who have been excluded and thus submits that they are not without any remedy.