



Star LAW report



# "Voter list should be prepared by visiting door to door"



SHARIK

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He also takes exception to the following observation of the High Court Division in the impugned judgment:

"It appears that the Commission is sharing the opinion of the political parties as to what to do creating scope for controversies which should have been avoided, and submits that this sort of observation is without any basis whatsoever and has been made unnecessarily.

Mr. Ahmed submits that new Electoral Rolls have been prepared in the years 1990, 1995 and 2000 before each parliamentary general election and that for the next election also the Election Commission has decided to prepare the Electoral Rolls as were done previously and there is nothing wrong in the said decision and as such the impugned directives in paragraphs III and IV are quite legal.

He has referred to the finding appearing at page 57 of the paper book that the decision for preparation of Electoral Roll taken in the meeting dated 6th August 2005 was not unilateral decision of the Chief Election Commissioner; rather it was a decision of the Commission for the preparation of Electoral Roll and appointment of registration officers and, according to the learned Counsel, in such view of the matter, the High Court Division ought to have rejected the writ petitions.

Lastly Mr. Ahmed submits that the impugned findings and observations in paragraphs III and IV of the judgement under the appeal are standing in the way of the Commission to prepare the Electoral Rolls and as such the same are required to be expunged upon allowing the appeal.

Dr. Kamal Hossain, learned Counsel, submits that in the matter of preparation of Electoral Rolls there being divergence of views between the Chief Election Commissioner and the two other Commissioners regarding interpretation of the law, the respondents had to take shelter of the High Court Division for proper construction of the provisions of the Ordinance of 1982 and the Rules framed thereunder.

In this connection he refers to Annexure-I, minutes of the meeting of the Commission dated 06.08.2005 and points out that in the minutes though a decision appears to have been purportedly taken to prepare the Electoral Roll in the same way as was done in 1983, 1990, 1995 and 2000 but from the notes given by the two other Commissioners, namely, Mr. A. K. M. M. Ali and Mr. M. M. M. M. Ali it appears that the decision cannot be said to be unanimous in as much as two of the Commissioners, out of three gave note of dissent and thus the decision cannot be a decision of the Commission.

He further submits that in the said meeting decision was taken to make the Electoral Roll "completely error free" and that to make it "completely error free" does not mean that the existing Electoral Roll should be obliterated.

In this connection he further refers to the notes Nos. 25 and 26 dated 07.08.2005 by the two other Commissioners opining that the

Electoral Roll may be prepared as per provision of the Ordinance of 1982 and rules framed thereunder. But in note 27 the Chief Election Commissioner appears to have taken the role of Umpire who decided that a fresh voter list shall be prepared. The word "fresh", according to the learned Counsel, appears in the scene for the first time disregarding even the decision of the meeting dated 6th of August 2005 where also the words 'fresh voters list' were not mentioned.

Be that as it may, the learned Counsel then refers to note No. 12 dated 05.10.2005 by Election Commissioner Mr. A. K. M. M. Ali who opined against preparation of fresh voter list and appointment of the officers for the purpose and on 12.10.2005 there is also note of dissent by the two other Election Commissioners but according to the learned Counsel, the Chief Election Commissioner on 05.10.2005 approved the proposal for preparation of fresh voter list. According to the learned Counsel the aforesaid circumstances compelled the writ petitioners to take shelter of the High Court Division.

He thereafter refers to Annexure-V announcing schedule of various dates for preparation of Electoral Roll and registration of voters fixing 1st January 2006 as the date for collection of information by house to house visit and 8th January 2006 for verification of the information by supervisors. He expressed surprise at the short timing i.e. about 7 days only and termed the same to be bionic speed and remarked that it smacks smear and that it has been done with oblique motive.

Thereafter he refers to paragraph 10 of the affidavit on behalf of the writ respondent No. 1 wherein Mr. S. M. Zakaria, the then Secretary of the Commission (now one of the Election Commissioners), made statement on oath on 01.01.2006 that the appointments challenged by the writ petitioner of the election officials/staff have been made under the orders of the Secretary to the Commission, according to rules of business which governs the Election Secretariat as a Division of the Prime Minister's Office.

Taking reference therefrom the learned Counsel seriously challenges the efficacy of the appointment. Thereafter placing the election laws of various countries including India and Pakistan Dr. Hossain submits that there are provisions of annual revisions of Electoral Rolls in those countries and Section 7(7) of the Ordinance of 1982 in fact envisages similar scheme and that the Election Commission may cancel the Electoral Roll of any area or constituency.

Referring to Section 5 of the Ordinance of 1982 the learned Counsel submits that for each electoral area or constituency there shall be prepared Electoral Rolls upon registration of the voters. Then he refers to Section 7(1) read with Section 7(7) of the Ordinance 1982 and submits, inter-alia, that a person being a citizen of Bangladesh, if not less than 18 years of age, not declared by competent court to be of unsound mind or is deemed to be a resident of the electoral area shall be included in the draft Electoral Roll

and in sub-section (7) of Section 7 the commission on account of any gross error or irregularity in the Electoral Roll for any electoral area or constituency may declare such roll or draft cancelled and then for that area or constituency Electoral Roll may be prepared afresh. But according to him, such interference by the Commission for preparing Electoral Roll afresh can be made only for any particular area of a constituency and that also can be done by the decision of the Commission and the Commission, according to the learned Counsel, means the Commission as a whole consisting of the members or at least according to the opinion of majority of them.

He further submits that there is no such decision by the Commission and more so even there is no opinion of the Chief Election Commissioner himself that the Electoral Rolls of all 300 constituencies contain gross error and as such the interpretation of the Chief Election Commissioner of the provision of Section 7(7) of the Ordinance of 1982 is erroneous.

The learned Counsel wonders as to why the Chief Election Commissioner has come up in this appeal challenging the findings and observations mentioned in paragraphs III and IV which are absolutely aboveboard.

He then refers to Sections 13 and 15 of the Ordinance of 1982 and submits that the observation in paragraph IV is fully endorsed and backed by aforesaid provisions of law.

Referring to the observation, given by the High Court Division in paragraph III the learned Counsel submits that there being already an Electoral Roll maintained under Section 7(6) of the Ordinance what is the harm if the same is taken into consideration at the time of preparing the Electoral Roll. It does not matter whether it should be considered as a major basis or minor basis but the prime consideration is that the name of persons already on the Electoral Roll should not be deleted wholesale.

He thereafter concludes submitting that there is no error in the aforesaid recommendations in paragraphs III and IV.

Mr. Rakanuddin Mahmud, learned Counsel in his submissions echoed the contentions of Dr. Kamal Hossain and submits, inter-alia, that except Sections 5 and 7 of the Ordinance 1982 there is no other provision for preparing the Electoral Rolls and none of the parties appear to oppose that concept of preparation of Electoral Roll. Now the problem is with the word 'fresh' or 'afresh'.

He then refers to Rule 19 of the Rules of 1982 regarding preparation of Electoral Roll for an electoral area afresh and submits that the said Rule is meant for preparation of Electoral Roll for an electoral area. He again refers to Sub Section (7) of Section 7 of the Ordinance in this connection and submits that the procedure laid down there as far as possible is to be followed and in order to make a fresh voter list as contemplated by Section 7(7) of the Ordinance of 1982, according to the learned Counsel, existing one must be cancelled first and referring to the minutes of the meeting dated 6th August 2005 he submits that the said minutes do not include any

decision for cancellation of the existing Electoral Roll and so unless there is cancellations of the existing Electoral Roll no fresh Electoral Roll can be prepared and taking recourse to Section 11 of the ordinance the learned Counsel submits that the validity of existing Electoral Roll is protected under aforesaid provision of law wherein provision of revision of the Electoral Roll has been made to make it up dated before each election to an elective body.

Mr. Mahmud placing the relevant portions from the judgment concludes contending that there is no error in the impugned judgement and as such the appeal be dismissed.

Mr. Amir-Ul Islam, learned Counsel appearing for the respondent No. 1 in Civil Appeal No. 55 of 2006, submits that right of vote is an individual right, a public right, a collective right and also a republican right. Taking up to the constitution he refers to Articles 119 (Functions of the Election Commission), 121 (provision for single Electoral Roll for each constituency) and Article 122 (2) prescribing qualifications for registration as voter and submits that the constitution has mentioned the function of the Election Commission and has made provisions as to preparation of the Electoral Rolls.

Referring to the preamble of the constitution the learned Counsel submits that it has pledged that it shall be a fundamental aim of the State to realize in a democratic process a socialist society in which justice, political, economic and social, will be secured for all citizens. He emphasised on the words 'political justice' to be ensured to the citizens.

Mr. Islam then submits that unless political justice is addressed to the citizens, this pledge shall be meaningless. In this connection he refers to the decision in the case of *Anwar Hossain Vs. Bangladesh*, as follows:-

"..... this document and the Constitution including its Preamble show the principles and ideals for which our national martyrs sacrificed their lives and our brave people dedicated themselves to the said war. Essential features of these documents are People's Sovereignty, Constitution's Supremacy, Independent Judiciary, Democratic Polity based on free election and justice. He has emphasised the fact that these fundamental principles were not followed, and the basic rights were denied to us, during the Pakistan regime and that is why the War of Independence was fought and won and consequently these rights and principles have been enshrined in the Constitution as the solemn expression of the people's will and that these objectives are intended to last for all time to come and not to be scraped by any means including amendment of the Constitution."

Thereafter he submits that the fundamental principles of the State are required to be followed and basic rights of the citizens cannot be denied to them as enshrined in the constitution and that nothing can be allowed as a result of which the objectives intended to last for all time to come can be escaped by any means.

Thereafter he submits that maintenance of Electoral Roll in a state is continuous process and that it means that the citizens above 18 years of age having no disqualification as mentioned in the constitution have got a mandate to be in the Electoral Roll of the country and it is a duty of the state to do it and to maintain it but by the impugned action the Election Commission, nay the Chief Election Commissioner, wants to break the continuity in the process. He poses a question that if the existing Electoral Roll is maintained as the basis for preparation of Electoral Roll where is the wrong and supporting the finding of the High Court Division that existing Electoral Roll should be maintained as the major basis, Mr. Islam submits that there is no error in such observation as then only a 'bench mark' shall be available i.e. the existing Electoral Roll shall be the major benchmark.

Referring to Section 11 of the Ordinance read with Rule 21 of the Rules thereunder the learned Counsel submits that there being provision for revision of Electoral Roll it is not necessary that a citizen shall have to be enrolled as a voter every time afresh.

He submits that in the whole scheme of the Ordinance of 1982 and the rules thereunder, there is no bar in keeping the Electoral Roll on the basis at the time of preparation of another Electoral Roll and the action of the Chief Election

Commissioner to prepare the Electoral Roll afresh is in violation of law and so it cannot be maintained and he submits that what is not permitted by law if done is malice in law.

Referring to the submission of the learned Counsel for the appellant made before the High Court Division appearing at page 50 of the paper book Mr. Islam submits that he also did not propose for abandoning the existing Electoral Roll and according to Mr. Islam the decisions and findings given by the High Court Division in fact were made on the basis of consensus of the parties.

Supporting the step of the Election Commission for preparation of the Electoral Roll maintaining the existing one Mr. Islam placed a comparative analysis of the Electoral Rules of Bangladesh, India, Pakistan and the United Kingdom and submits that in India and UK there is no provision for preparing a fresh electoral roll. But in Bangladesh and Pakistan there are similar provisions.

In Pakistan of course there are provisions that the electoral roll of a part of an area can be cancelled and started afresh.

Referring to the findings and observations in paragraphs III and IV challenged by the appellants the learned Counsel submits that the Electoral Roll is required to be revised from time to time and majority people are voters in the Electoral Roll and they remain there and so if the said Electoral Roll is made the basis for preparation of any further Electoral Roll there is no harm nor any illegality and as such the findings and observations in paragraph III are not erroneous. He then submits that the wisdom of law of our country is that in case of gross error in the Electoral Roll, the same may be corrected and sufficient provision has been provided in the law to maintain continuity and that efficacy of the preparation demands continuity.

Referring to Section 5 of the Ordinance of 1982 read with Rule 19A the learned Counsel emphasises that there is provision for perpetration of Electoral Roll upon registration of voters maintaining register thereof and the register so kept is the milestone of continuity.

He emphatically submits that under Rule 19(2) of the Rules it appears that if a voter is enrolled his name cannot be deleted without notice.

Referring to findings and observations in paragraph IV the learned Counsel submits that it complies with Rule 20(4) of the Rules of 1982 and therefore there is no error. Summing up his submissions Mr. Islam submits that the appellant has not filed the appeal bonafide and that due to non-compliance with the directives of the High Court Division the appeals are not entertainable and the respondent has not come to this court with clean hands and that two of the commissioners out of three expressed their desire against filing appeal and as such the appeal cannot be construed to have been filed by the Election Commission and more so the appeal being filed after long delay the appellant is not entitled to any relief.

Mr. Islam submits that political justice is to be ensured by the state to its citizens for which the country has been liberated and that political justice is the objective of our constitution.

Referring to the preamble of the constitution Mr. Islam says that the preamble is the pole star/search light to see the constitution and as already submitted by him the preamble of our constitution ensures political justice which cannot be denied to its citizens and it the names of persons appearing at the existing Electoral Roll are deleted from the so called fresh Electoral Roll then purpose of political justice shall become meaningless. In conclusion Mr. Islam submits that most important basis feature to enable the citizens of the state to exercise their right of franchise is preparation of correct electoral roll.

He then submits that Article 122 of the constitution is the basis of right of the citizens while Article 121 is the mechanism to achieve the right. He submits that political justice is required to be remedied by the judiciary.

Taking aid of the aforesaid observations Mr. Islam reiterates that the right of a Citizen to be enrolled as a voter is a birth right and in order to delete name of a person from the Electoral Roll, it cannot be done arbitrarily.

Mr. Islam concludes contending that the finding and observation in

paragraph III is the deduction of law and paragraph IV is also in conformity with the law and as such there is nothing wrong in the two findings and so the appeals may be dismissed with costs.

Mr. TH Khan appearing for the appellant in both the appeals in reply submits that there is no denial of the fact that there are provisions for revision in the Electoral Rolls. But there is no bar in the law in preparation of fresh voters list.

Regarding the submissions made on behalf of the respondents that to maintain continuity the old/existing voter list is to be retained the learned counsel puts a question as to wherefrom the continuity to remain undisturbed and where is the law?

He further submits that the High Court Division found that the decision of the Election Commission taken in the meeting on 6th August 2005 was not a unilateral decision but was a decision by the Election Commission as a whole and after making such finding how the judgment of the High Court Division giving the directives as contained in paragraphs (III) and (IV), being contrary to the aforesaid decision of the Election Commission taken on 06-08-2005 can be maintained.

Submitting on the necessity of filing the appeal the learned Counsel submits that the decisions/directives given by the High Court Division though contrary to the existing law, but are working *obiter dicta* and so are binding upon the appellant and as such the appellant felt constrained to prefer the appeals and the appeals are therefore absolutely bonafide.

"We have considered the submissions made at the Bar and perused materials on record. We have already noticed that the impugned judgment of the High Court Division have been challenged by the appellant. The whole question arises as to preparation of a fresh Electoral Roll for the next general election.

In order to ensure a fair and free election, a flawless Electoral Roll is necessary.

Holding of free and fair election at all levels postulates necessity of having Electoral Rolls prepared in accordance with law. For the forthcoming National Election, the Election Commission is required to prepare Electoral Roll. Now the dispute has arisen as to whether Electoral Roll afresh should be prepared or the existing Electoral Roll should be up dated. As revealed in the submissions of the parties it is noticed that under Article 122(2) of our Constitution any citizen of Bangladesh, being not less than 18 years of age, not declared by the competent court to be of unsound mind and being resident of the area or deemed to be so by law is entitled to be enrolled as voter in the Electoral Roll. The Ordinance of 1982 has provided in Section 7 for preparation and publication of the Electoral Rolls embodying almost similar provision. In order to hold the general election the Election Commission appears to have taken decision in its meeting held on 06.08.2005 for preparation of Electoral Roll.

Though on behalf of the respondents it has been contended persistently that the decision taken in the said meeting was not taken by the Commission but by the Chief Election Commissioner alone but considering the materials on record the High Court Division held as follows:-

"It thus follow that the decision in the meeting of 6th August 2005 was not unilateral rather it was decision of the Commission."

We have already quoted relevant decision of the aforesaid meeting which is again reproduced below:-

"Decision: activities regarding to prepare the voter list should be taken for the ninth parliamentary election following the Electoral Ordinance 1982 and Electoral Rules 1982 by visiting door to door as it did 1983, 1990, 1992, 1995, 2000 (translated form Bangla)."

From the aforesaid decision taken by the Commission it appears that the Commission decided to prepare the Electoral Roll by collecting information through house to house visit. There is therefore nothing to dispute that Electoral Rolls shall be prepared for the ensuing election to the Ninth Parliament.

On consideration of materials on record the High Court Division also found "there is no controversy that decision was taken for preparation of a list and for appointment of Registration Officers etc. on 6th August 2005". So far as preparation of Electoral Roll and appointment of

## Modified directives by Appellate Division

The modifications are as under:  
Paragraph III of the judgement of the High Court Division (in findings and observations/directives part) is modified as follows:

The Commission should prepare Electoral Roll taking into consideration of the existing Roll under Section 7(6) of the Ordinance. 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.

Paragraph IV of the judgement of the High Court Division (in findings and observations/directives part) is modified as follows:

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 less than 18 years of age or ceased to be a citizen of Bangladesh; or ceased to be deemed by law to be residents of the electoral area/constituency. The Commission, if occasion arises for dropping the name from the existing Electoral Roll then shall do the same following the procedure as laid down in Sub Rules (3) and (4) of the Rule 20 of the Electoral Rolls Rules, 1982.

Registration officers etc. there is therefore no dispute between the parties. The dispute, as we have already noticed, is whether a fresh Electoral Roll shall be prepared by collecting information through house to house visit or the Roll shall be prepared/up dated on the basis of existing Electoral Roll maintained earlier.

In order to prepare Electoral Roll we cannot be oblivious of the provisions enshrined in the constitution. Article 122(1) of the Constitution runs as follows:-

(1) The elections to Parliament shall be on the basis of adult franchise.

(2) A person shall be entitled to be enrolled on the electoral roll for a constituency delimited for the purpose of election to the Parliament, if he-

- (a) is a citizen of Bangladesh;
- (b) is not less than eighteen years of age;
- (c) does not stand declared by a competent court to be of unsound mind; and
- (d) is or is deemed by law to be a resident of that constituency."

In conformity with the aforesaid Article various provisions have been enacted in the Electoral Rolls Ordinance, 1982. Sections 5 and 7 of the aforesaid Ordinance may be referred to in this connection which are as follows:-

"5. Preparation of electoral rolls -- For the purpose of elections to different elective bodies, there until be prepared electoral rolls for each electoral area or constituency, as the case may, upon registration of the votes.

7. Preparation and publication of electoral rolls-- (1) The Registration Officer for an electoral area or constituency shall, and... the superintendent, direction and control of the Commission, prepare for that electoral area or constituency in the prescribed manner a draft electoral roll containing the name of every person who, on the qualifying date:-

- (a) is a citizen of Bangladesh;
- (b) is not less than eighteen years of age;
- (c) does not stand declared by a competent court to be of unsound mind; and
- (d) is or is deemed by law to be a resident of that electoral area.

There are also provisions for amendment and correction of the Electoral Rolls and its revision in Sections 10 and 11 of the Ordinance. Pursuant to the aforesaid Ordinance the Electoral Rolls Rules, 1982 have also been made providing Rule 4 as to supply of information by occupants of dwelling houses and Rule 10 prescribing the manner of lodging claims and objections regarding the Electoral Rolls.

On perusal of the aforesaid provisions of law we do not find any embargo in preparation of an electoral roll by the Election Commission for the ensuing election to the 9th Parliament. There is also no bar in taking into consideration of the existing Electoral Roll prepared under Section 7(6) of the Ordinance in preparing such Electoral Roll.

Regarding the direction in paragraph III, as already quoted by us herein before, we are of the view that the Election Commission may be given a direction to take into consideration the existing Electoral Roll at the time of preparation of the Electoral Roll for the ensuing election to the 9th parliament in Order to make the Electoral Roll transparent.

Both the parties advanced argument on the question of dropping of names of persons from the existing Electoral Roll while preparing the roll for the next National Election.

In this connection the parties referred to Section 13 of the Ordinance which runs as follows:-

"13. Deletion of name from Electoral Roll. If a person whose name appears on an Electoral Roll ceases to be a citizen of Bangladesh or is declared by a competent court to be of unsound mind his name shall stand deleted from the Electoral Roll."

The High Court Division considering the provision of the constitution and the Ordinance of 1982 appears to have made findings and observations mentioned in paragraph IV as to dropping of names of persons from the existing Electoral Roll which we have already quoted herein before.

Argument has been advanced that the Election Commission in the directive in paragraph IV has been given the direction for deletion of the names without any legal guideline.

We have given our consideration to this submission. In this connection sub-rules (3) and (4) of Rule 20 of the Rules of 1982 may be referred to which are as under:-

"20. Amendment and correction of the Electoral Roll--

(3) Where, at any time, any clerical, printing or other error in any entry in any Electoral Roll for the time being in force comes to the notice of the Registration Officer, he may, on his own motion and after giving notice to the person to whom the entry relates, correct such error.

(4) If at any time it appears to the Registration Officer that the name of any person who has died or is or has become disqualified for enrolment or who ceases or cannot claim himself to be a citizen under the provision of any law relating to the citizenship of Bangladesh has been included in an Electoral Roll and if he is satisfied after giving notice to the person concerned and after making such enquiry as he may consider necessary that the name should be deleted, he shall amend the Electoral Roll accordingly.

We are of the view that conditions embodied in the aforesaid Sub-rules (3) and (4) of Rule 20 are required to be complied with in case of deletion/dropping of the names of persons from the existing Electoral Roll.

In such view of the matter the directive in paragraph (IV), according to us, should be modified. In view of our decision to make the modifications mentioned hereinafter in the impugned directives we do not think that there is any necessity to allow the appeals.

## Corresponding with the Law Desk

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