

PARLIAMENT BOYCOTT CASE

Special Reference No. 01 of 1995

47 DLR (AD) 111

Introduction

This judgment is the first of its kind. The Hon'ble President of Bangladesh under Article 106 of the Constitution referred to the Supreme Court for opinion whether the seat of the members of Parliament who walked out/boycott has been vacant. The Supreme Court answered that be it boycott or walkout; the members of Parliament were absent and the speaker of the house would compute the exact period of absence for the purpose of interpretation of article 67 (1)(b) of the constitution.

Judges

Mr. Justice A.T.M. Afzal, C.J., Mr. Justice Mustafa Kamal, Mr. Justice Latifur Rahman, Mr. Justice Mohammad Abdur Rouf and Mr. Justice Muhammad Ismail Uddin Sarker, JJ.

Counsels

Since this is a reference, the Appellate Division engaged amici curie for the purpose of its assistance. The learned Attorney General, the President of the Supreme Court Bar Association, Mr. S.R. Pal, Mr. Asrarul Hossain, Mr. Syed Ishtiaq Ahmed, Mr. Dr. Kamal Hossain, Mr. Khondkar Mahbubuddin Ahmed and Mr. Rafiqul Huq, Senior Advocates were engaged as amici curie.

Interveners

Mr. Dr. Zahir, Mr. Moksudur Rahman. Mr. S.S. Haider. Mr. Yar Ahmed and Mr. A.B.M. Nurul Islam, Senior Advocates and Mr. Rowshan Ali, learned counsel.

Short Facts

On 1st March 1994 while a discussion in Parliament based on call attention notice about the killings in Hebron was in progress, pursuant to the statements made by the then Information Minister, an uproar took place in the House. The Deputy Leader of the House requested the Deputy Speaker to expunge the relevant part of the statement from the proceedings of the house and the Information Minister himself expressed his regret and also sought for expunction of the remark. All opposition members of the Parliament

including the Leader of the opposition except Mr. Suranjit Sen Gupta staged a Walkout. The Deputy Speaker announced expunction of the statement to which opposition parties have taken exception but the opposition members did not return to the House. They also did not join the House on the following day and demanded that unless the Information Minister had tendered unqualified apology they would not return to the parliament. While the opposition members were out of the Parliament, Magura bye election was held. The opposition parties filed complaint to the Election Commission. After enquiry, the Election Commission found that the allegations were not true and declared the final result. Following the result, the opposition parties declared that they would not return to the Parliament unless fresh election was held in Magura. While negotiation between the parties were going on for resolving the problem the opposition parties added a new demand that the ruling party must introduce a bill in Parliament amending the Constitution to provide for holding at least three future Parliamentary elections under a Non Party Caretaker Government. To compel the ruling party to concede to the above demand, the opposition parties started boycotting the sessions of the Parliament. The opposition parties continued boycott of the Sessions of the Parliament and on 28,12.94 the Leaders of three opposition parties, namely, the AWAMI League, the Jatiya Party and the Jamaat-e-Islami handed over three files to the Speaker purportedly containing resignation letters of members belonging to their parties. The Speaker found that all the resignation letters were on the identical ground, namely, the failure of the ruling party to introduce a bill in the Parliament for amending the Constitution to provide for holding general election under a neutral, non-partisan government comprising nominated person. On 23rd February, 1995, the Speaker informed the house that in his view en masse resignation on such ground is not contemplated under Article 67(2) of the Constitution. According to the Speaker the Constitution cannot contain any provision which will enable a member or members to frustrate the working of the Parliament and further that all the provisions of the Constitution required working in a manner to achieve the objectives following the principle of democracy as set forth in the Constitution. In the reference dates of the commencement of the sitting days of the Sessions of the Parliament and the date of prorogation have been given and it appears that the total number of boycott days are 101. As a result of the said boycott question arose about the continuation of their Parliament membership and consequently the Hon'ble President formulated four questions and referred to the Supreme Court for answer.

Four Questions for the Reference

1. Can the walkout and the consequent period of non-return by all the opposition parties taking exception to a remark of a ruling party Minister be construed as 'absent' from Parliament without leave of parliament occurring under Article 67(1)(b) of the Constitution resulting in vacation of their seats in Parliament?
2. Does boycott of the Parliament by all members of the opposition parties mean 'absent' from the Parliament without leave of Parliament within the meaning of Article 67(1)(b) of the Constitution resulting in vacation of their seats in Parliament?
3. Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the Parliament within the meaning of Article 67(1)(b) read with the definition of 'Sessions' and 'sittings' defined under Article 152(1) of the Constitution?
4. Whether the Speaker or the Parliament will compute and determine the period of absence?

Issues and Decisions

A. Scope of the Advisory Jurisdiction under Article 106 of the Constitution

Mr. Dr. Kamal Hossain, the learned Senior Advocate puts his Jurisprudential objection to the advisory Jurisdiction of Courts...mainly on the ground of inexpediency, inconvenience, embarrassment and prejudice to the rights of the future litigants [Para-12]. He relied upon precedents wherein the concerned Court declined to exercise its advisory jurisdiction. [Paras-13, 14, 15]

Mr. Sayed Ishtiaq Ahmed, the learned Senior Advocate submitted that when the Constitution provides for advisory opinion, it is not for the Court to refuse to entertain any reference on the ground of Jurisprudential inexpediency [Para-18].

Mr. Justice ATM Afzal held that the theoretical objection against Court's consultative function is today academic for us [Para-18]. Scope and ambit of the Article 106 in our Constitution It is essentially for the President to decide that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance...The discretion is entirely his which cannot be doubted or

questioned...Though it is not obligatory upon the Court to give an opinion, it will be unwilling to decline a reference except for good reasons [Para-20]. Some broad principles adopted from Indian judicial pronouncements regarding the exercise of advisory jurisdiction, which may be taken to be well established [Para-21].

Mr. Justice Latifur Rahman concluded that ...the President can very well ask under Article 106 of the Constitution and this court cannot refuse to exercise this Advisory Jurisdiction, unless it can be shown that there are so the reference should be answered and I propose to answer the questions [Para- 89, 90].

B. Maintainability of the Reference

The learned Counsels **Mr. Dr. Kamal Hossain and Syed Ishtiaq Ahmed** submitted as follows:

- 1) Their main objection is that the matter under Reference is essentially one between the Parliament and its members and the opinion asked for eminently lies within the domain of the Parliament [Para- 23].
- 2) The Reference raises a political question rather than legal which the Court generally eschews [Para-23].
- 3) Speaker didn't exhaust the provision of the rule 178 of the Rules of Procedure [Para-24].
- 4) The Court is in fact being asked to pre-empt and usurp the jurisdiction which is exclusive Jurisdiction of the Parliament [Para-24].
- 5) Mr. Ahmed relied on the doctrine of Judicial Restraint [para-25].

Upon hearing their submissions **Mr. Justice ATM Afzal** held that there is nothing in the Reference, which may be construed as encroaching upon the exclusive domain of the Parliament. It is true that the question... [Para- 29]. We think we have made enough ground to say that it is difficult to agree with the contention [Para-30].

In response to the argument of Judicial self-restraint mentioned hereinabove, **Mr. Justice Mustafa Kamal** commented that 'I know of no other principle of judicial self-restraint than the one that the Court will not interfere with the "internal proceedings" of Parliament... The role of this Court in such a situation of unparalleled nature not as a wrecker, but as a rescuer, not as an interloper but as a guide, not as a usurper but as a beacon light.' [Para-75]

C. Factual Gaps in the Reference

The learned counsel Mr. Ishtiaq Ahmed contended that there were some factual gaps and that's why the said reference is incapable of being answered by the Court [Para-31].

Factual Gap-01

The walkout presumably continued until bye-election of Magura constituency. The date of the bye-election is not mentioned, nor the date on which the walkout ended and boycott began [Para-39].

Factual Gap 02

Regarding mass resignation, the Speaker informed the House his views on 23 February 1995. But the Reference does not state the operative ruling of the Speaker on the question of resignation.

Factual Gap 03

A petition was moved on 28 June 1994 which resulted a direction upon the absent members of the Parliament to attend the Parliament and quo-warrant was allowed against the continuous absence of the respondents. As the matter is pending before this court, can the Court take notice of it?

Mr. Justice ATM Afzal held that the walk-out had continued from 1st March, 1994 [Para- 40]. The incident of Resignation must have brought to an end the walk-out/boycott episodes [Para- 41]. The Court agreed with the contention of Khandker Mahbubuddin Ahmed and Mr. Rafiqul Huq that the Reference is ill-drafted and lacks full particulars but it is not such that it cannot be answered We think there is a good deal of force in their submission...Mr. Rafiqul Huq in particular has described the situation in the above manner and we think that this analysis has the virtue of pragmatism [Para 45].

Mr. Justice Latifur Rahman held that 'by reading the reference I do not find any difficulty in answering the reference. The reference being made by the President

and this being the factual basis of all relevant facts, this court has got no power to add or subtract anything in it' [Para- 84].

D. Pendency of Appeal on the Self Same Matter

Both **Dr. Hossain and Mr. Ahmed** raised another ground for not answering the Reference and that is because of the pendency of some appeals before this Division. Civil Appeal Nos. 3, 5 and 13 of 1995 are pending before the Appellate Division and similar questions are involved and hence the Court should not answer this reference [Para-32].

Mr. Justice ATM Afzal held that 'the matters pending before us have no bearing on the Reference because they involve a question of mandate to some M.Ps. to return to the Parliament: that order has been stayed by us and it is stated in the Reference itself that the said M.Ps. have already resigned their seats in the Parliament. The question in this Reference is whether their "absence" in the meantime comes within the mischief of Article 67(l)(b) of the Constitution [Para-33].

Mr. Justice Mustafa Kamal also held that pendency of appeals can therefore be no ground for not answering the Reference..... I am, therefore, firmly of opinion that there is neither any good reason nor any weighty reason of a compelling nature for not answering the Reference. [Para 76]

E. 'Boycott' and 'Absent' from the Parliament

Mr. Justice ATM Afzal held that ...all the learned Counsel further agreed that be it boycott or walkout, the result invariably is absence which means not present, to stay away [Para- 47].

F. Jurisdiction of the Court to Declare a Seat Vacant under Article 67(1)(B)

Mr. Justice Mustafa Kamal considering the arguments advanced by the learned counsels held that 'Article 67(1) (b) of the constitution is an automation clause, the role of the Secretary of Parliament being only to maintain a register of...and the role of the Speaker being limited to bring the fact of vacancy to the notice of

the House under Rule 178(3) of the Rules [Para-72]. Parliament, therefore, has no constitutional power to declare the seats of absentee members to be vacant...[Para-73]. The calculating role, communicating role and the role of publication in official Gazette do not preclude the seizure of initiative of a member's constituency to invoke the jurisdiction of the Supreme Court if in fact a vacancy has taken place under the automation clause of Article 67 (1) (b)...I do not see why the President cannot refer an interpretation...For the advisory opinion of this Court and also why the Court will refrain from answering the same, when, under the Constitution. Parliament is not clothed with the power ...[Para-75].

Answers to the Questions

1. Can the walkout and the consequent period of non-return by all the opposition parties be construed as 'absent' from Parliament without leave of parliament occurring in Article 67(1)(b) of the Constitution resulting in vacation of their seats in Parliament?
2. Does boycott of the Parliament by all members of the opposition parties mean 'absent' from the Parliament without leave of Parliament within the meaning of Article 67(1) (b) of the Constitution resulting in vacation of their seats in Parliament?

Mr. Mahbubuddin Ahmed and Mr. Rafiqul Huq in their submission contended that 'walkout' and 'boycott' both entail absence and therefore directly attract the word 'absent' under Article 67(1)(b) of the Constitution [Para-49].

In contrast, **Mr. T.H. Khan** agrees that the result is absence, but according to him, walkout and boycott as indulged in by the opposition members they cannot come within the meaning of 'absent' as in Article 67(1)(b) [Para- 50].

Mr. Asrarul Hossain appearing for the Government seemed to agree with the views of Mr. T.H. Khan but he submitted his personal view that the word 'absent' is genus and 'walkout'/'boycott' etc. is species If member remained absent without leave of the House for ninety consecutive sitting days he may not vacate his seat because the sitting days are never consecutive in the sense of being continuous.

Mr. Justice ATM Afzal held that the Court finally decided that consequent period of non-return and boycott call it by whatever epithet, mean the same thing i.e., 'absent' as provided in Article 67(1) (b) and would result in vacation of seat in the Parliament if the other conditions are present, namely, being without the leave of Parliament, for ninety consecutive sitting days [Para- 55, 56, 57, 59].

3. Whether ninety consecutive sitting days be computed excluding or including the period between two sessions intervened by prorogation of the Parliament within the meaning of Article 67(l)(b) read with the definition of 'Sessions' and 'sittings' defined under Article 152(1) of the Constitution?

Mr. Asrarul Hossain contended that, period should be included because the member who is remaining absent between sessions remains absent on the day when the House is prorogued and also on the day when the House is next summoned and further because the word "consecutive means "continuous [Para- 60].

Mr. Justice ATM Afzal held that 'we have, therefore, no doubt in our mind that in computing the period of ninety consecutive sitting days the period between two sessions as above and even adjournments in a particular session between sitting days should be excluded. [Para-61]

4. Whether the Speaker or the Parliament will compute and determine the period of absence?

Mr. Justice ATM Afzal held that there seems to be complete unanimity among the learned Counsel that the Speaker is the authority to compute and determine the period of absence [Para-62]. Mustafa Kamal, Latifur Rahman, Mohammad Abdur Rouf, Mohammad Ismailuddin Sarker, JJ, also agreed with the view of Chief Justice.

Conclusion

Article 106 of the Constitution provides a discretionary power of the Hon'ble President to refer the question to the Appellate Division for consideration. The Appellate Division after hearing reported its opinion to the Hon'ble President that walkout or boycott results absence from the Parliament and the Speaker will compute and determine the period of

such absence. Subsequently, the next general election held and no such computation actually took place.



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Supreme Court of Bangladesh