IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 2490 of 2022
IN THE MATTER OF:
An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:
Md. Siddiqur Rahman and another
……..Petitioners
-Versus-

Secretary, Medical Education and Family Welfare Division, Ministry of Health and Family Welfare, Government of the People's Republic of Bangladesh, Bangladesh Secretariat, Ramna, Dhaka and others
.....Respondents
Mr. Md. Imam Hossain, Advocate with
Mr. Md. Selim Hasan, Advocate
……...For Petitioners
Mr. B. M. Elias Kachi, Advocate with
Mr. Dipayan Saha, Advocate
..For Respondent No. 1
Mr. Jyotirmoy Barua, Advocate with
Mr. Suprokash Datta, Advocate
...For Respondent No. 9
Mr. Fida M. Kamal, Senior Advocate with
Mr. Syed Haider Ali, Advocate, with
Mr. S. M. Quamrul Hasan, Advocate and
Mr. Md. Mashiur Rahman (Riad), Advocate
….For Respondent Nos. 13

Heard on: 14.03.2023, 15.03.2023, 27.03.2023, 29.03.2023, 03.05.2023, 10.05.2023, 11.05.2023, 23.05.2023, 30.05.2023, 31.05.2023, 07.06.2023, 11.06.2023&19.06.2023
Judgment on: 21.06.2023

Present:
Mr. Justice Mahmudul Hoque
&
Mr. Justice Md. Mahmud Hassan Talukder

Mahmudul Hoque, J:

In this application under Article 102 of the Constitution of the People's Republic of Bangladesh, a Rule Nisi under adjudication was issued on 01.03.2022 in the following terms:

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to under what authority the respondent No. 13 is holding the post of Deputy Registrar of Bangladesh Nursing and Midwifery Council (BNMC) and as to why inaction of the respondent Nos. 1 to 9 and 14 in taking necessary actions against the respondent No. 13 and the Selection Committee consisting of respondent Nos. 10 to 12 for adopting unlawful and corrupt means by abusing their positions as public servants in the recruitment process of respondent No. 13 in the post of Deputy Registrar of Bangladesh Nursing and Midwifery Council (BNMC) should not be declared to be without any lawful authority and is of no legal effect and/or such other or further order or orders passed as to this Court may seem fit and proper."*

Facts necessary for disposal of the Rule Nisi in short are that, Bangladesh Nursing and Midwifery Council ("BNMC") is the statutory body which governs and administer the responsibilities that was conferred upon it vide বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ including nursing and midwifery education and practices. BNMC has the authority to affiliate such institutions who provide the academic courses and training programmes for nursing, midwifery and allied courses like community paramedics. Therefore, the

involvement and role of BNMC is indispensable in enhancing nursing service by leading the profession towards constituting a significant force in the health care delivery system for achieving the goal‘Health for All’ congruent with national health goals of the Government.

Bangladesh Nursing Council issued an Advertisement Notice for appointment contained in memo No. বিএনসি/২০১৬/৫৬৭dated 07.09.2016 under the signature of respondent No. 11 for appointment in the posts of ‘Deputy Registrar’, ‘Assistant Programmer’ and ‘Receptionist’ (Annexure-A to the Writ Petition). In order to complete the appointment procedure a 3 (three) member committee comprising respondent Nos. 10, 11 and 12 was formed. However, from the minutes of the Selection Committee dated 07.10.2016, it transpires that only 2 (two) members i.e. respondent Nos. 11 and 12 put their signatures in the said resolution but the Convener of the said committee, respondent No. 10, did not sign the resolution which indicates that the selection of the candidates, including the ‘Deputy Registrar’, was questionable from the beginning and was not done in accordance with law. Despite the said irregularity, respondent No. 11 vide memo No. বিএনসি/প্রশাঃ-৭০(অংশ-২)/২০১৬/৬১৭dated 09.10.2016 requested respondent No. 1 for approval of the result of the examination (Annexure-B-1 to the Writ Petition). Thereafter, respondent No. 1 vide memo No. বিএনসি/২০১৬/প্রশা-৭০(অংশ-১)/৬২৯ dated 10.10.2016 appointed respondent No. 13, Mrs. Begum Rashida

Akhter, in the post of 'Deputy Registrar' of BNMC (Annexure -B-2). Subsequently, the service of the respondent No. 13 in the post of Deputy Registrar was made permanent on 07.08.2017.

Thereafter, various other reports had been published in different national dailies and online news portal of the country regarding the illegal selection and appointment of respondent No. 13. For example, it has been reported in the daily newspaper namely the 'Daily Inquilab' and online news portals like, Banglanews24.com under the headline 'তথ্য গোপন করে রেজিষ্ট্রার হওয়ার চেষ্টা এবং কাউন্সিলের ডেপুটি রেজিষ্ট্রার হচ্ছেন আলোচিত সেই রাশিদা'. The petitioners being conscious citizens of the country submitted 4 (four) applications dated 04.03.2020, 30.05.2020, 04.10.2020 and 03.01.2021 respectively, to the Hon'ble Minister, Ministry of Health and Family Welfare; Secretary, Medical Education and Family Welfare Division, Ministry of Health and Family Welfare; the Registrar of BNMC and Chairman of Anti-Corruption Commission urging them to take necessary and appropriate actions against the illegal recruitment of respondent No. 13 in the post of Deputy Registrar (Annexure-C to C-3 to the Writ Petition). After receiving the complaints regarding illegal recruitment of respondent No. 13, the Anti-Corruption Commission, without taking any action referred the matter to respondent Nos. 1 and 9 vide memo dated 01.11.2021 and 05.12.2021 consecutively, in violation of section 17 and 28(Kha) of Anti-Corruption Commission Act, 2004. Thereafter,

respondent No. 1 formed a 1 (one) member enquiry committee consisting of respondent No. 8, namely Mohammad Daudul Islam, the then Deputy Secretary (Construction Wing), Medical Education and Family Welfare Division, Ministry of Health and Family Welfare. The enquiry was conducted in accordance with law with participation of both the parties, petitioners and respondent No. 13, and the report was submitted on 03.02.2022 (Annexure-F to the Writ Petition). The said enquiry report found the allegation brought regarding appointment of respondent No. 13 in the post of 'Deputy Registrar' of BNMC in violation of several Government Service Recruitment Rules and Regulations. The inquiry report also mentioned the fact of suppression of some material facts in order to secure the job and even the appointing authority deliberately and illegally avoided to obtain the police clearance about her antecedents.

After that, petitioners sent notice demanding justice to the respondent Nos. 1 to 9 and 13, to explain as to under what authority respondent No. 13 is holding the post of Deputy Registrar of BNMC. Nonetheless, getting no response from the respondents, petitioners filed the instant Writ Petition No. 2490 of 2022 on 17.02.2022 under article 102(2) of the Constitution and obtained Rule Nisi on 01.03.2022 in the manner as quoted hereinabove.

By filing supplementary affidavit dated 07.06.2023 the petitioners have stated that the recruitment notice dated 13.02.2013

and 21.04.2013, for the post of “Deputy-Registrar”, was published in the “Daily Ittefaq” (Annexure-N and N-1 to the Supplementary Affidavit). Similarly, BNMC for recruiting in the post of “Deputy Registrar” published the advertisement for the job in well circulated daily newspapers (e.g. Daily Ittefaq etc.) even after the recruitment notice dated 07.09.20216, vide which Respondent No. 13 was appointed. For example, recruitment notice dated 31.10.2019, for the post of “Deputy-Registrar”, was published in the “Daily Ittefaq” (Annexure-N-2 to the Supplementary Affidavit) and recruitment notice dated 13.01.2020, for the post of “Deputy-Registrar”, was published on the “Daily Ittefaq” (Annexure-N-3, Supplementary Affidavit). However, only in the instant case the advertisement, vide which Respondent No. 13 was appointed, was published on 07.09.20216 only in the website of BNMC, which converted the publication of the advertisement from public to private. It is also stated that the said advertisement notice dated 07.09.2016 was found in the website of the BNMC on 05.08.2020 long after the respondent No. 13 being appointment to the post of Deputy Registrar. It is also stated that the “সরকারি চাকরিতে নিয়োগের শিক্ষাগত যোগ্যতা নির্ধারণ (বিশেষ বিধান), বিধিমালা, ২০০৩” was not complied with in case of appointment of the respondent No. 13 in the post of Deputy Registrar (Annexure – O to the Supplementary Affidavit).

Respondent Nos. 1, 9 and 13 contested the Rule Nisi issued in the instant writ petition by filing affidavit-in-opposition.

Respondent No. 1 filed affidavit-in-opposition denying the material allegations made in the writ petition contending inter-alia that the petitioners have no locus standi to file the writ petition. The allegation of appointing respondent No. 13 by adopting illegal and unfair means and violating the provision of the Service Rules is not correct and as such, the Rule Nisi is liable to be discharged.

Respondent No. 9 filed affidavit-in-opposition denying the material allegations made in the writ petition contending inter-alia that the petitioner No. 1 is a businessman and petitioner No. 2 is an Assistant Professor in Holly Family Nursing College, Dhaka, claiming themselves as conscious citizens of the country filed the instant writ petition in the form of public interest litigation challenging the authority of appointment of respondent No. 13 long after 06 (six) years of the said appointment for achieving the dubious goal. As per the decision of ***49 DLR (AD) 1***, the petitioners have no locus standi to file the writ petition and as such, the Rule Nisi is liable to be discharged. Although, the petitioners made representations in the year 2021-2022 to the Ministry and Anti-Corruption Commission for taking appropriate action against respondent No. 13 for non-disclosure of fact of pending criminal cases during her appointment, they did not come before this Court to establish any public right but only to serve

their selfish end which is not allowed in case of writ of *quo warranto*. It is also stated that the writ petition is admixture of *quo warranto* and certiorari and as such, it is not maintainable in its present form.

Respondent No. 13 filed affidavit-in-opposition denying the material allegations made in the writ petition contending inter-alia that after getting appointment in the post of Deputy Registrar, the respondent No. 13 has been serving for more than five years but none of the contesting candidates has come to challenge the appointment of respondent No. 13. The petitioner No. 1 being a businessman and petitioner No. 2 being a lecturer of a Nursing College claim themselves as public interest litigants but they did not mention any reference of their earlier activities regarding filing any such case as PIL to prove their bona fide. Therefore, the claim of the petitioner is totally baseless one and they are not in any manner aggrieved persons within the meaning of article 102 of the Constitution, rather they are busy persons and purposely filed the instant writ petition to harass respondent No. 13. It is also stated that the appointment of the respondent No. 13 in the post of Deputy Registrar, the fundamental rights of the petitioners have not been affected in any manner. Since the petitioners neither represent a section of public nor claimed that any section of public has been aggrieved by the appointment of respondent No. 13 before five years back, as such they cannot be called as aggrieved person under article 102 of the Constitution. It is

stated that since by operation of the judgment and order passed by the Appellate Division in **Civil Appeal No. 48 of 2000** the Bangladesh Nursing Council Ordinance 1983 lost its force and repealed, the Government has decided to formulate a new law for the public interest to manage and maintain the Bangladesh Nursing and Midwifery Council and as such, it promulgated Bangladesh Nursing and Midwifery Council Act, 2016 and, before promulgation of such Act and in the absence of any recruitment Rules, to meet the legal necessity of the Council and to carry out its business, the respondent No. 13 has been appointed as Deputy Registrar in accordance with practice and procedure of the council being a statutory body. Regarding educational qualification it is stated that she passed S.S.C Examination in 1989 with Second Division from Joydebpur Government Girls High School, H.S.C Examination in 1991 with Second Division from a Government College, Dhaka, Diploma in General Nursing in 1992 from Holy Family Red Crescent Nursing Institute, Diploma in Midwifery in 1993 from the said institute, B.Sc. (Public Health) Nursing in 2003 from College of Nursing Dhaka under University of Dhaka and Masters in Public Health regarding Hospital Administration and Management in 2010 from the State University of Bangladesh and at present she is attending in Ph.D Program at American University and she also got license to perform as a Nurse from Bangladesh Nursing and Midwifery Council, Dhaka

for the period from 11.11.2014 to 2025. Accordingly, it is stated that the respondent No. 13 has educational qualification for the post of Deputy Registrar. Regarding experience as stated in the recruitment notice it is stated that the respondent No. 13 started her carrier as a Medical Surgical Nursing in Holy Family Red Crescent Medical College Hospital from 1994 to 2005 and thereafter, she performed as a Guest Lecturer in United College of Nursing, Gulshan, Dhaka and she also performed as a Technical Supervisor of National Head Quarters Bangladesh and also performed as a Principal of Shahid Mansur Ali Institute, Uttara, Dhaka from 10.10.2010 to 15.11.2014. She also performed as an Assistant Professor in the International Nursing College, Gazipur from 16.11.2015 to 28.03.2016. She also performed as a Founder Chief Nursing Officer Co-ordinator of Asgor Ali Hospital, Gendaria, Dhaka from 01.04.2016 to 15.09.2016 with full satisfaction of the concerned authority. In such view of the matter, the respondent No. 13 has more than 15 years of experience to qualify to file an application for the post of Deputy Registrar of the Council.

It is also stated that the Government has approved the organogram creating different posts to carry out the business of Bangladesh Nursing Council treating the Council as Regulatory Body and such approval has been forwarded to the Registrar of the Council from the office of the respondent No. 1 by Memo dated 24.04.1994 (Annexure – 3 to the Affidavit-in-Opposition) including the post of

Deputy Registrar, though there was no appointment Rules at the relevant time and as such, to carry out the business of the Council and to fill up the vacancy, a sub-committee headed by Additional Secretary, Ministry of Health and Family Welfare (Discipline and Nursing) along with two other officers was formed who in a meeting held on 05.09.2016 decided that the appointment for the post of Deputy Registrar and other posts shall be made and accordingly, recruitment notice was published in the official website of the Bangladesh Nursing Council and also affixing on the official notice board on 07.09.2016. The respondent No. 13 having all requisite qualification applied to the authority concerned for the post of Deputy Registrar and she was issued admit card on 03.10.2016 and appeared in the written test on 07.10.2016 and stood first in the written test and viva voce, resultantly she was appointed in the post of Deputy Registrar exhausting all formalities and obtaining approval of the Executive Committee of the Council. Thereafter, the respondent No. 13 joined in the service on 16.10.2016 and her service was made permanent from 01.08.2017 vide office order dated 07.08.2027. It is also stated that the former Registrar Mrs. Suria Begum retired from the service on 19.01.2022 and the respondent No. 13 being Deputy Registrar filed application to the authority concerned for the post of Registrar by way of promotion and by order dated 18.01.2022 she was given additional charge of the Registrar until further order by the

Ministry of Health and Family Welfare Division. Accordingly, it is stated that since there is no illegality in the appointment of the respondent No. 13 the Rule Nisi is liable to be discharged.

Mr. Md. Imam Hossain along with Mr. Md. Selim Hasan, learned Advocates for the petitioners, submit that the instant writ petition is a writ of *'quo warranto'* under Article 102(2)(b)(ii) of the Constitution of the People's Republic of Bangladesh in which the legality of holding the post of Deputy Registrar of BNMC by respondent No. 13 as well as writ of certiorari under Article 102(2)(a)(ii) of the Constitution of Bangladesh for abusing the position by the authority have been challenged. The challenge is made on various grounds, including the ground that the authority abused their position and the possessor of the office in question does not fulfill the requisite qualifications rather suffers from disqualification and holding the office without valid title, which debars the respondent No. 13 to hold such office. In this regard Mr. Hossain commenced his argument by referring a decision quoted in "Constitutional Law of Bangladesh" by ***Mahmudul Islam(3rd Edn, 2012, Paragraph 5.112)*** submitting that *"The writ is used to ensure that no one can hold any public office without having a valid claim to that office* ***(University of Mysore v. Govindrao, AIR 1965 SC 491)."***

He submits that in the case of ***University of Mysore v. Govinda Rao, AIR 1965 SC 491 : [1964] 4 SCR 575*** the Supreme Court of India observed that *quo warranto* proceeding affords judicial enquiry in which any person holding independent substantive public office or franchise or liberty is called upon to show by what authority or right he holds the said office or franchise or liberty and if the enquiry leads to finding that the holder of the office has no authority or title to it, issue of the writ of *quo warranto* for ousting him/her from that office is the right remedy. In other words, the procedure of *quo warranto* confers jurisdiction and **authority on the Court to control executive action** in the matter of making an appointment to public office against relevant statutory provision, as such the petitioners have rightly filed the writ of *quo warranto* as the instant writ petition has impugned the legal stance of holding the post of Deputy-Registrar of BNMC by respondent No. 13, with additional charge of Registrar at the time of filing instant writ petition, which gave her the sovereignty to exercise her power vested by বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬. In support of his submissions he cited the reference from the book on "Constitutional Law of Bangladesh" authored by ***Mahmudul Islam (3rd Edn, 2012, Paragraph 5.113)*** in which the author opined that *"If there was any complaint about the appointment of or promotion of an officer who was not eligible under the rules to be appointed or*

promoted, the proper remedy was to make an application for quo warrant (Ghulam Hussan v. India, 1973 SC 1138).”

He pointed out by an analytical argument that, the definition of ‘public office’ as defined in *Abdur Rahman (Md) Vs. Group Captain (Retd) Shamim Hossain & ors.* **(49 DLR (1997) 628)** is not comprehensive and inconsistent with the definition of ‘public office’ evolved by other constitutional Jurists in other jurisdictions (e.g. USA, India, Pakistan etc.). He submits that, in *Abdur Rahman (Md) Vs. Group Captain (Retd) Shamim Hossain & ors.* case the Hon’ble Court clearly recognized that Article 152 of the of the Constitution of the People’s Republic of Bangladesh has not defined “public office” rather the Constitution has defined “public officer”. He argued that ‘functions’ of a body is a determining factor and the test should be applied in order to define a public office and in support of argument he referred the book “Constitutional and Administrative Law” by Hilarie Barnett (4th edn) 840, in which the author emphasized on functions as a determining test that *“In determining whether or not the body whose decision is being challenged on an application for judicial review is a public, as opposed to private, body, the court will look at its functions. The test is not whether or not the authority is a government body as such, but, rather, whether it is a body exercising powers analogous to those of government bodies.”*

He also cited the definition of 'public office' as provided in American Jurisprudence (***63c Am.Jur. 2d* Public Officers and Employees § *1 (2009)).***

Mr. Hossain submitted that though defining public office is an inherently legislative task to determine what elements are necessary to constitute a public office, nevertheless, there is no ambiguity on the definition of the 'public office' analysed above that clearly resolves the grey area. The definition of public office is being the extent of defining the office is well founded and formulated on the basis of the definition profound by constitutional jurists and by judicial activism through judicial interpretations in relevant cases.

He finally attempted to define the post of respondent No. 13 as public office in the light of definitions as he referred in his submission; because respondent No. 13 has vested with certain permanent duties assigned by the law itself and acting in pursuance of it and the right, authority, and duty vested upon respondent No. 13 has been created and conferred by law. Furthermore, the duties has been casted upon the post of respondent No. 13 is for the benefit of the public, which are continuing in their nature and not occasional, and which call for the exercise of some portion of the sovereignty of the state, or having some of the powers and duties which inhere with the executive departments of the government. He argued that, all these

criteria, as he submitted, has clearly established the office of respondent No. 13 is a public office.

In grounding the vital issue for this writ petition he submits that respondent No. 13 is illegally and unlawfully holding a public office and this is the sole cause of filing the instant writ petition in the nature of writ of *quo warranto* as well as certiorari under Article 102. In order to justify his argument, he submits that the appointment of respondent No. 13 was not made by any regular advertisement as it was done previously and post advertisement for the same post and in the instant case with an ulterior motive the publication was in website of BNMC, depriving other qualified persons to make application to hold the post and thus the whole selection and appointment process was *mala fide*, biased and unprecedented, as the purpose of the Act is to 'protect the public' by establishing a comprehensive national system equally applicable for all. This is not the case here. The post in question does not exist pursuant to section 7 of বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬.

Mr. Hossain stresses on the vital issue of non-compliance of the required qualifications for the post at the time of advertisement and appointment. Pursuant to advertisement for the post, the required qualification was *"15 years of experience of teaching (nursing) and administrative work"* (Annexure-A to the Writ Petition). The experience of Respondent No. 13 states that she resigned from the

post of “senior staff Nurse (B.Sc. & MPH)” vide letter dated 23.10.2010 (Annexure-2-E to the Affidavit in Opposition) which was accepted vide letter date 27.03.2011 (Annexure-2-R to the Affidavit in Opposition). Respondent No. 13 directly appointed in the post of ‘Principal’ (without any prior teaching experience and by breaching the hierarchy) at “Shahid Monsur Ali Nursing Institute” (Annexure-2-G to the Affidavit in Opposition). ‘সেবা পরিদপ্তর এর অধীনস্থ কর্মকর্তা ও কর্মচারীদের কার্য পরিধি' (Job Description) published in June, 2007 (page 100) describes the job responsibility of ‘Senior Staff Nurse’ which clearly shows that the responsibilities of a ‘Senior Staff Nurse’ does not include the responsibility of ‘teaching’ or ‘administrative work’. Hence, Respondent No. 13’s experience as “senior staff Nurse” cannot be considered as teaching/administrative experience. Hence, the teaching/administrative experience of Respondent No. 13 before appointment in the post of ‘Deputy-Registrar’ was in total only 6 years 7 months 7 days which clearly did not comply the required qualification in terms of teaching and administrative experience for the said post and that made the case as of non-compliance.

It is argued that in the instant writ petition, ‘sufficient information’ was available before the administrative authority to decide the compliance or non-compliance of required qualifications for the post upon which a reasonable person could have come to the conclusion that the requirement and the eligible criteria for the

appointment as advertised were not satisfied by respondent 13, so she was disqualified ab initio (from the right beginning). Despite that statutory non-compliance, the authority appointed respondent No. 13 which is a case of abuse of position and ultra vires for procedural impropriety. He brought to the notice of this Court by referring a part of the inquiry report dated 03.02.2022 against respondent No. 13 (Annexure-F to the Writ Petition) which suggests that this is illegality in the appointment process of the respondent No. 13.

He submits that, citizens' have procedural legitimate expectation to see whether the appointment of respondent no 13 is made out in accordance with law complying statutory requirements and also to see as to a substantive legitimate expectation that respondent 13 must have satisfied the fit and proper criteria for the post. A citizen has also a legitimate expectation that the public body acts fairly and thus the doctrine extends the procedural protection "duty to act fairly" should not be replaced. It is argued that the decision maker must clearly make a proper decision before dashing the expectation and that requires procedural fairness. Therefore, the instant case is procedurally frustrated for non compliance of required qualifications by the respondent no 13 and non-compliance of mandatory statutory procedure by the authority and thus substantive legitimate expectation was also not protected by the authority. This is

a clear case of abusing of position by the authority that's uphold ultra vires.

As the petitioners are acting *pro bono publico* to perform public duties and to serve the people of the Country which are their constitutional obligations under Article 21 of the Constitution of the People's Republic of Bangladesh and also to secure the provision of basic necessity of medical care for its citizens as per Article 15(a) of the Constitution of the People's Republic of Bangladesh. In effect, therefore any action taken by any citizen subject to a public cause for violation of public right should be termed as a public interest litigation, because that cause imposes a public duty and that duty may amount to a sufficient interest to confer standing. Citizens with a 'sincere concern for constitutional issues" have been able to challenge the lawfulness without their standing being called in question.

It is strongly argued that, to file a writ of *quo warranto* the requirement of being an 'aggrieved person' is irrelevant. In support of his argument he cited the relevant argument from the book of "Constitutional Law of Bangladesh" (3rdEdn, 2012, Paragraph 5.116) by **Mahmudul Islam** and submits that instant writ petition is for a public purpose in a nature of *quo warranto* and this is a 'public interest litigation', because, the result/outcome of the instant writ petition will not ensure any advantage to the petitioners. In support of

his argument he cited the case of *Babu Ram Verman v. State of UP* reported in ***1971 All LJ 653,*** *Bangladesh Sangbadpatra Parishad (BSP) v. The Government of People's Republic of Bangladesh and others* reported in ***12 BLD (AD) (1992) 153*****,** *Mustafa Kamal J. in Dr. Mohiuddin Farooque v. Bangladesh* reported in ***17 BLD (AD) (1997) 1.*** He further submits that any person pursues a public cause involving public wrong or public injury, he/she need not be personally affected, any member of the public, being a citizen, suffering from common injury can file a public interest litigation and also referred the judgment passed in the case of *Dr. Mohiuddin Farooque vs. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others* reported in ***49 DLR (AD) (1997) 1.*** He strongly argued that, even a private interest litigation can be treated as public interest litigation by the Court as observed in *Ashok Lanka v. Rishi Disxit*, reported in ***(2005) 5 SCC 598,*** *ShivajiraoNilangekar Patil v. Dr. Mahesh Madhav Gosavi* case reported in ***AIR 1987 SC 294: (1987) 1 SCC 227:*** and reported in ***1988 BLD (AD) 175***.

Mr. Hossain addressed the issue whether the writ of *quo warranto* and writ of *certiorari* can co-exist peacefully in a same prayer of a writ petition. In this regard in the case of *Golam Md. Khan Pathan v. Md. Mosharraf Hossain and others* (Civil Petition for Leave to Appeal No. 2713 of 2018), the Hon'ble Appellate Division opined

that *certiorari* and *quo-warranto* can co-exist peacefully in a prayer of a single writ petition.

Mr. Hossain finally submits that, there is no such post of 'Deputy Registrar' in বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬. Even if there were such post, respondent No. 13 should not have been appointed because she failed to comply with the required qualification for the post as mentioned in the advertisement dated 07.09.2016. Hence, the appointment of respondent No. 13 is void *ab initio* and therefore, holding the post of Deputy Registrar by respondent No. 13, which is a public office, is illegal and without lawful authority. As such, the writ of *quo warranto* is satisfied as per Article 102(2)(b)(ii) of the Constitution. Hence, the salary of respondent No. 13, from the appointment until now, should be confiscated for her illegal appointment in the post of Deputy Registrar and any subsequent appointment. In support of his argument Mr. Hossain referred the case of *R v. Andrewes (Respondent)* reported in ***[2022] UKSC 24***, which is known as CV Fraud Case, in which appointment was obtained by fraudulent misrepresentation in the application form about qualification and experience.

Mr. Fida M. Kamal, learned Senior Advocate with Mr. Syed Haider Ali, learned Advocate, Mr. S. M. Quamrul Hasan, learned Advocate and Mr. Md. Mashiur Rahman, Learned Advocate appearing on behalf of the respondent No. 13 at the very outset raised

question of maintainability of the writ petition on the ground of locus standi of the petitioners and admixture of two prayers in the nature of *quo warranto* and *certiorari*. He argued that article 102 of the Constitution does not permit admixture of relief in one petition. He submits that the respondent No. 13 has all requisite qualifications for the post of Deputy Registrar of Bangladesh Nursing Council and as such, as per the recruitment notice dated 07.09.2016 she had applied for the said post and stood first position in both the written test and the viva voce, consequently, she was appointed in the post of Deputy Registrar in which she had no hand in the recruitment process and by this time, she served the Council for more than five years long with full satisfaction of the authority. Regarding the inquiry report and the criminal cases Mr. Fida M. Kamal, submits that in all the criminal cases mentioned in the enquiry report the respondent No. 13 has been discharged/acquitted and as such, the allegation is baseless but a *mala fide* one in order to harass the respondent No. 13. Accordingly, he submits that the second part of the Rule has got no basis and consequently the respondent Nos. 1 to 9 and 14 against whom the allegation of inaction was made is of no basis and therefore, the terms of the Rule Nisi are totally groundless and the Rule Nisi is liable to be discharged.

Referring to Memo dated 24.04.1994 ***(Annexure-3 to the Affidavit-in-Opposition)***, Mr. Fida M. Kamal, submits that the

submission made by the learned Advocate for the writ petitioners to the effect that there was no such post of Deputy Registrar is not correct. He submits that at that relevant time there was no appointment rules of Bangladesh Nursing Council to carry out its business and for smooth functioning of the Council initiated appointment process by forming a sub-committee for the purpose and as per decision of the Committee, the Council published advertisement notice in the official website as well as in the official notice board of the Council and after exhausting all legal formalities the respondent No. 13 was appointed in the post of Deputy Registrar and as such, there was no illegality in the appointment process and hence, the Rule Nisi is liable to be discharged.

Mr. Kamal further submits that the petitioners are not the aggrieved persons to file the instant writ petition since, the petitioner No. 1 is the businessman and the petitioner No. 2 is a Lecturer of Nursing College and they have no reference of their earlier activities regarding filing of any such cases in the form of public interest litigation and as such, they have purposely filed the instant writ petition only to harass the writ respondent No. 13 who has in the meantime served for more than five years in the Council. Referring to a decision in the case of *Khorshed Ali (Md) v. Secretary, Ministry of Local Government Rural Development and Co-operatives and others*, reported in ***54 DLR (HCD) 381,*** he submits that, the respondent No.

13 having all requisite qualifications duly appointed by the Bangladesh Nursing Council and as such, her appointment cannot be questioned on the plea that there were some irregularities in the matter of appointment. Referring to decision in the case of *Abdur Rahman (Md) v. Group Captain (Retd) Shamim Hossain and others,* reported in ***49 DLR (HCD) 628**,* Mr. Kamal submits that Bangladesh Nursing Council being a statutory authority the respondent No. 13 is not holding the post of Public Office and as such, the writ petition in the form of *quo warranto* is not maintainable. Referring to a decision in the case of *Dr. Md. Anwarul v. Dr. M. Wahiduzzaman, Vice-Chancellor, Noakhali Science and Technology University and two others*, reported in ***71 DLR (HCD) 204***, Mr. Fida M. Kamal, submits that the writ petition both in the nature of *certiorari* as well as *quo warranto* is not maintainable and as such, the Rule Nisi having no merit as well as on the point of maintainability is liable to be discharged.

Heard the learned Advocates of the respective parties and perused the writ petition, supplementary affidavit, affidavit-in-opposition, supplementary affidavit-in-opposition and the supporting documents annexed thereto, as well as the law and decisions relied on by the parties as referred above.

On perusal of the terms of the Rule Nisi issued on 01.03.2022 the prayer of the petitioners can be divided into 2 (two) parts, the first

part is that under what authority respondent No. 13 is holding the post of Deputy Registrar of BNMC, which comes within the ambit of writ of *quo warranto*. The second part is the inaction of the respondent Nos. 1 to 9 and 14 in taking necessary steps against the respondent No. 13 and the Selection Committee, that appointed respondent No. 13, consisting of respondent Nos. 10 to 12 for adopting an illegal and corrupt means by abusing their positions as public servants in the illegal and unlawful recruitment process of respondent No. 13 in the post of Deputy Registrar of BNMC, which falls within the category of writ of *certiorari*. Before we commence the discussion of the issues of the instant writ petition we want to make it very clear that instant writ petition is not as usual service matter rather a constitutional remedies pursued under Article 102(2)(b)(ii) of the Constitution under which High Court Division can declare the person holding the public office without lawful authority as illegal and usurper in the form of *quo warranto.* On the other hand, Article 102(2)(a)(ii) of the Constitution under which the High Court Division can declare any act done by any authority, which is neither a judicial nor a quasi-judicial, to be without lawful authority in the form of writ of *certiorari*.

Thus, we can certainly say that, the instant writ petition raised constitutional debates, whether writ of *quo warranto* and *certiorari* can co-exist peacefully in a same prayer of a writ petition or petitioners could have filed two distinct writ petitions claiming two

different remedies. We are inclined, to explore the evolution of writ jurisdiction in different jurisdictions and development of constitutional jurisprudence as to *locus standi* for these two distinct natures of writ as well as the radius of public interest litigation taking into consideration of Constitutional stance of Article 102 of Bangladesh Constitution and the Judicial stance in this regard. Let's examine one by one and lead to reach in a conclusion to settle the issue and reconcile conflicting of different kinds of writ they are.

The most crucial question has come up before this bench, can *quowarranto* and *certiorari* be prayed and co-exist in a single writ petition. In the backdrop of the factual matrix noted above, we are called upon to examine the relevant legal and constitutional provisions, in order to substantiate this issue, as raised before this bench, we have explored constitutional jurisprudence developed by numerous landmark cases of this subcontinent in which points were raised and resolved on this pertinent issue. We will also explore the scholar arguments in this regard.

We will commence with a very relevant judgment of the Hon'ble Appellate Division in ***Civil Petition for Leave to Appeal No. 2713 of 2018*** (*Golam Md. Khan Pathan v. Md. Mosharraf Hossain and others*) where the Hon'ble Appellate Division relied upon the judgment of Indian Supreme Court in *The State of Haryana Vs. The*

Haryana Co-Operative Transport Ltd and others, case reported in ***AIR 1977 SC 237***, *where the Indian Supreme Court observed that;*

> *"... the Indian Supreme Court allowed to challenge the title of a holder of offices in a collateral proceeding if in that proceeding the holder of the office is impleaded as a party inasmuch as the proceeding in such a case becomes a combined proceeding of quo warranto and mandamus or certiorari."*

Agreeing to the ratio of Indian Supreme Court in the above case the Hon'ble Appellate Division has settled the issue in ***Civil Petition for Leave to Appeal No. 2713 of 2018*** by holding that;

> *"The learned Advocate for the leave petitioner put a question that in a proceeding under article 102(2)(b)(ii) of the Constitution, i.e. in a writ of quo warranto, direction cannot be sought for in the form of mandamus because in that case, the proceeding becomes a mixture of writ of quo warranto and mandamus and the Court in such circumstances should not grant such relief. Such submission is not acceptable as there is no difficulty under article 102 of the Constitution to combine reliefs and as such writ of quo warranto may be issued with writ of certiorari or mandamus."*

Thus, the prolonged argument as to whether *certiorari* and *quo warranto* can co-exist peacefully in a same prayer of a writ petition have been finally settled by the Hon'ble Appellate Division. In this regard, we also want to refer the judgment of Indian Supreme Court in the case of Gokaraju v. A.P., reported in ***AIR 1981 SC 1473***, where the Indian Supreme Court held that;

> *"...the title of a holder of office can be challenged in a collateral proceeding if in that proceeding the holder of the office is impleaded as a party inasmuch as the*

> *proceeding in such case becomes a combined proceeding of quo warranto and mandamus or certiorari."*

We want to mention the opinion of H. W. R. Wade & C. F. Forsyth as mentioned in their book 'Administrative Law' (11thedn, OUP) 509, where they opined that *"The quashing order (Certiorari) and the prohibiting order (Prohibition) are complementary remedies, based upon common principles, so that they can be classed together. The quashing order looks to the past, a prohibiting order to the future. Like private law remedies, they may be sought separately or together."* From the said quotation we can narrate that, two distinct remedies of writ can be classed together and prayed together in a single writ petition and they co-exist peacefully.

In light of the argument above, we are of the view that, though writ of *quo warranto* and *certiorari* do not run along way similar lines and both of them differ substantially in their essence but as there is no difficulty under article 102 to pray and grant combined reliefs, writ of *quo warranto* may be issued with a writ of *certiorari* or *mandamus*. Therefore, we conclude the instant writ is maintainable.

Now we move on to the next issue, whether the instant writ petition comply with the criteria to fall within the category of writ of *quo warranto* and *certiorari*.

In the instant writ petition the legality of holding the post of 'Deputy Registrar' of BNMC by respondent No. 13 has been

challenged in first part of the prayer. Therefore, we will commence our discussion by examining the mandatory criteria of writ of *quo warranto* and whether those criteria are present in the instant writ petition.

In this subcontinent one of the landmark cases regarding writ of *quo warranto* is *University of Mysore v. Govinda Rao*, reported in ***AIR 1965 SC 491*****,** where the Supreme Court of India highlighted the function of the Court in respect of *quo warranto*, in which any person holding independent substantive public office or franchise or liberty is called upon to show by what authority or right he holds the said office or franchise or liberty. It was mentioned that if the Court finds that the holder of the office has no authority or title to it, issue of the writ of *quo warranto* for ousting him/her from that office is the right remedy.

Similarly, in our jurisdiction Article 102 (2)(b)(ii) of the Constitution of the People's Republic of Bangladesh which states that on the application of any person, the High Court Division may inquire whether a person holding or purporting to hold any public office, is holding it under a legal authority. So, as per Article 102 of the constitution, writ of *quo warranto* is invoked to test a person's legal right to hold a public office, not to evaluate the person's performance in that office. However, there are certain requirements which are mandatory to establish a writ of *quo warranto*, of which the most important criteria are that the office should be a 'public office'.

One of the most well accepted definitions of 'public office' was provided in book "The law of Extraordinary Legal Remedies: habeas corpus, quo *warranto,* certiorari, mandamus, and prohibition" ***written by Forest G. Ferri*** *and* ***Forrest G. Ferris, Jr.*****,** in the following terms;

> *"The public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by the public authority for a public purpose, embracing the ideas of tenure, duration, emoluments and duties."*

Mr. Mahmudul Islam, learned Senior Advocate, in his book "Constitutional Law of Bangladesh" (3rd Edn, 2012, Paragraph 5.113), by adopting the abovementioned definition of **Ferri** and ratio of some well accepted case laws of different jurisdictions, defined public office as;

> *"In order that this writ may issue, the office must be a public office of a substantive character (R. v. Speyer, reported in **[1916] 1 KB 595)** created by the Constitution, statute or statutory power (R. V. Saint Martin's Guardians, **[1851] 7 QB 149**). "A public office is a right, authority and duty, created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law" (Ferris- Extra-ordinary Legal Remedies, Para 145) and thus it is an office in which the public have interest….But the writ will lie in respect of an office held at pleasure, provided that the office is one of a public and substantive character (Halsbury's Laws of England, 4the ed. vol. 1, Para 172)."*

In the abovementioned definition the term 'substantive character' has been explained in the judgment of Darley v. R., [1846] 12 Cl and Fin 520 = 8 ER 1513, where it was held that *"By the expression 'substantive character' is meant that the holder of the office must be an independent official."*

However, Mr. Fida M. Kamal, learned Senior Advocate for the respondent No. 13, submitted the definition of 'public office' based upon the definition provided in *Abdur Rahman (Md) Vs. Group Captain (Retd) Shamim Hossain &ors.*, reported in ***(49 DLR (1997) 628)***, in the following terms:

> *"In our view the word "public office" in the aforesaid Article 102(2)(b)(ii) means persons holding constitutional and elected offices and not the persons holding any office in the statutory authorities entrusted with the conduct and management of the business of the Government."*

We can see that although, the definition of 'public office' provided in *Abdur Rahman (Md) Vs. Group Captain (Retd) Shamim Hossain &ors.*, expressly relied upon the definition of **Ferri** but without providing any legal reasoning, has adopted a narrower approach. We expressed our distinction from the definition of 'public office' as provided in *Abdur Rahman (Md) Vs. Group Captain (Retd) Shamim Hossain &ors.* case. However, this Court has agreed with the observations that Article 152 of the Constitution of the People's Republic of Bangladesh has not defined "public office" rather it has

defined "public officer". Article 152 states that *"public officer means a person holding or acting in any office of emolument in the service of the Republic."*

In search for more pragmatic and comprehensive definition of the 'public office' we have examined the reference of American Jurisprudence (***63c Am. Jur. 2d* Public Officers and Employees § *1 (2009)*),** referred by the learned Advocate for the petitioners, where the term 'public office' has been defined in the following terms;

> *"public office' is a position in a governmental system created, or at least recognized, by applicable law, to which certain permanent duties are assigned, either by the law itself or by regulations adopted under the law by an agency created under such law and acting in pursuance of it (State ex rel. Gray v. King, **395 So. 2d 6 (Ala. 1981)**. A public office has also been defined to be the right, authority, and duty created and conferred by law (Ashe v. Clayton County Community Service Bd.; **262 Ga. App. 738, 586 S.E.ed 683 (2003)**), the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public (State ex rel. Gray v. King, **395 So. 2d 6 (Ala. 1981)**).*
>
> *A position is held to be a public office when it has been created by law and casts upon the incumbent duties which are continuing in their nature and not occasional, and which call for the exercise of some portion of the sovereignty of the state (Clark v. O'Malley, **169 Md. App. 4078, 901 A.2d 279 (2006), judgment aff'd, 404 Md. 13, 944 A.2d 1122 (2008)**. Thus, an office is a public charge, where the duties are continuing and prescribed by law, and not by contract, and the office holder is invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere with the legislative, judicial, or executive departments of the government (Stuckey v. State, **560 N.E.2d 88 (Ind. Ct. App. 1990)**).*

Now, we have to analyze whether the characteristic of the post of respondent No. 13 is compatible with the definition of public office analyzed above. Respondent No. 13 was appointed in the post of 'Deputy Registrar' subsequently she has been entrusted with the additional charge of "Registrar" of BNMC. Therefore, respondent No. 13 is holding and exercising the power of the highest post of BNMC and thus, have the sovereignty to take and execute any decision regarding the functions of BNMC empowered by বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬. The post of respondent No. 13 is a public office, because respondent No. 13 has vested with certain permanent duties assigned by the law itself and acting in pursuance of it and the right, authority, and duty has been vested upon "Registrar" of BNMC has been created and conferred by law. Furthermore, the duties those has been casted upon the post of "Registrar" is for the benefit of the public, which are continuing in their nature and not occasional, and which call for the exercise of some portion of the sovereignty of the state, or having some of the powers and duties which inhere with the executive departments of government related organization that is responsible for carrying out public duties and functions. According to supreme court of India, the holder of a public office is considered a public servant subject to certain legal responsibilities and obligations. Hence, the office of respondent No.

13 is ‘substantive character’ or ‘sovereign’ office, with a public charge, where the duties are continuing and prescribed by law, and not by contract. Taking into consideration all of the said criteria and function of respondent No. 13, and the definition analyzed, has certainly guided us to come to the conclusion that the post of respondent No. 13 is a public office.

Now we have to examine the issue of compliance and non-compliance as to whether respondent No. 13 is holding the post of Deputy Registrar and subsequently, acting as “Registrar” of BNMC as usurper, which is essential to comply with the criteria for writ of *quo warranto*. In order to analyze the illegality, we have to scrutinize the alleged inaction of the respondent Nos. 1 to 9 and 14 in taking necessary steps against the respondent No. 13, and the Selection Committee that appointed respondent No. 13, consisting of respondent Nos. 10 to 12, for adopting an alleged illegal and corrupt means by abusing their positions as public servants in the alleged illegal and unlawful recruitment process of respondent No. 13 in the post of Deputy Registrar of BNMC, which falls within the category of writ of *certiorari.* Thus, we will discuss both of the issue simultaneously.

It is admitted fact that at the time of appointment of respondent No. 13 in the post of Deputy Registrar of BNMC on ‘temporary basis’ there was no appointment rules of Bangladesh Nursing Council and the Council published advertisement notice in the official website.

However, we want to emphasize that, in absence of any appointment Rules of their own, Government Service Rules is mandatory to be followed by the Bangladesh Nursing Council in case of appointment of any officer and employee. It is to be mentioned here that in order to publish any job circular for the post of any public office or make appointment against the said post, it is mandatory that particular post must be existed in the Act, Rules or Ordinance that has been published vide Gazette Notification.

Now, we have to examine whether the post of 'Deputy Registrar' of BNMC, ever existed in the Bangladesh Nursing Council Ordinance, 1983 and even in the new Act বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬, which has been promulgated after the respondent No. 13 was appointed in the post of Deputy Registrar but before, her appointment was made permanent.

Admittedly, there was no such post of Deputy Registrar in the Ordinance of 1983 and even in the new Act বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ and according to section 4(Ta) of বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬, the post of Deputy Registrar which existed in the composition of BNMC is not the post of Deputy Registrar of BNMC rather it was the post of Deputy Registrar nominated by the Bangladesh Medical and Dental Council. বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ এর ধারা ৪(ত) states that: বাংলাদেশ

মেডিকেল ও ডেন্টাল কাউন্সিল কর্তৃক মনোনীত উক্ত কাউন্সিলের অন্যূন ডেপুটি-রেজিস্ট্রার পদমর্যাদার একজন প্রতিনিধি।. Therefore, there is no such post of Deputy Registrar to be filled in by the BNMC.

However, the respondent referring to the Memo dated 24.04.1994 ***(Annexure-3 to the Affidavit-in-Opposition)*** tried to convince this Court that the Ministry of Health and Family Welfare approved the amendment of the schedule of the Service Regulations of Statutory Body, including the post of Deputy Registrar. In Clause-2 of the said Memo it has been stated that "উপরোক্ত বিধিবদ্ধ প্রতিষ্ঠান সমূহের চাকুরী আদর্শ প্রবিধানমালা সংলগ্ন চাকুরী নিয়োগের সরকার কর্তৃক অনুমোদিত তফশীল ২(চ) গেজেট বিজ্ঞপ্তি ও বাস্তবায়নের জন্য প্রেরণ করা হল। তপশীল ২(চ) ফটোকপি অত্র সাথে সংযুক্ত". The respondent authority did not show or produce any copy of the gazette notification other than this scrap of paper. In a series of affidavit-in-opposition none of the respondents have stated that gazette notification was published as per the said amendment. So, until and unless gazette notification is published following the said amendment, the said memo can under no circumstances be accepted as document that there was a post of Deputy Registrar. The General Clauses Act, 1897 in section 23(5) provides that the publication in the official gazette of a rule or by-law purporting to have been made in exercise of a power to make rules or by-laws after previous publication shall be conclusive proof that the rule or by-law has been duly made. Moreover, admittedly, by the judgment and order passed

in ***Civil Appeal No. 48 of 2011*** by the Hon'ble Appellate Division, all Ordinance, Regulations, Orders made by the Martial Law Administrator during the period between 24.03.1982 to 10.11.1986 have met their natural death. So, that was the reason for which, the Government has promulgated the new Act named বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ wherein also the Government did not provide any such post of Deputy Registrar in the BNMC. Section 7(4) of বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ provides as follows;

> *"৭। **রেজিস্ট্রার ও কর্মচারী**। (১) কাউন্সিলের একজন রেজিস্ট্রার থাকিবে, যিনি সরকার কর্তৃক নিযুক্ত হইবেন এবং যাহার চাকরির শর্তাদি সরকার কর্তৃক স্থিরীকৃত হইবে।*
> *(২) কাউন্সিল উহার কার্যাবলী সুষ্ঠুভাবে সম্পাদনের উদ্দেশ্যে প্রয়োজনীয় সংখ্যক কর্মচারী নিয়োগ করিতে পারিবে এবং তাহাদের নিয়োগ ও চাকুরীর শর্তাবলী প্রবিধান দ্বারা নির্ধারিত হইবে।*
> *(৩) রেজিস্ট্রার, কাউন্সিল ও নির্বাহী কমিটি কর্তৃক নির্দেশিত দায়িত্ব পালন ও কার্য-সম্পাদন করিবেন।*
> *(৪) রেজিস্ট্রারের পদ শূন্য হইলে কিংবা অনুপস্থিতি, অসুস্থতা বা অন্য কোন কারণে রেজিস্ট্রার তাঁহার দায়িত্ব পালনে অসমর্থ হইলে উক্ত শূন্য পদে নব নিযুক্ত রেজিস্ট্রার কার্যভার গ্রহণ না করা পর্যন্ত, অথবা রেজিস্ট্রার পুনরায় স্বীয় দায়িত্ব পালনে সমর্থ না হওয়া পর্যন্ত সরকার কর্তৃক মনোনীত কোনো ব্যক্তি রেজিস্ট্রারের দায়িত্ব পালন করিবেন। (emphasis added)"*

Furthermore, the concerned post of the instant writ petition is 'Deputy Registrar'. In any office, whether public or private, the prime reason for appointing someone in the 'Deputy Registrar' post is to run the office with the full capacity of regular post in absence of the appointed person of that post. However, in the instant writ petition, we have observed that section 7(4) of বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ does not leave any opportunity for 'Deputy Registrar' to

run the office in absence of 'Registrar' because the section states that in absence of 'Registrar' or in case of vacancy before any new Registrar is appointed, government will nominate someone to run the operation of the office of Registrar. This clearly rules out the post of 'Deputy-Registrar', because, if the 'Deputy Register' were existed then the 'Deputy Registrar' by default would run the operation of the office of 'Registrar' and in that case section 7(4) of বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ would not be necessary. In this premise, we are of the view that the intention of the parliament/legislature was not to provide a post of 'Deputy Registrar', hence, singled out the same from the বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ at the time of enactment. Therefore, the regularization of respondent No. 13 in 2017 in the post of Deputy Registrar, even though the বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ was already came in effect before the said regularization is illegal and *mala fide*, as there is no post of Deputy Registrar in বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ and there is no option for promotion from the said post. Furthermore, the experience of respondent No. 13 during the period she has been holding the post of Deputy Registrar as a usurper is also illegal and void.

In these circumstances, the respondent authority also relied on the minutes of the 3rd Meeting held in 2007 ***(Annexure-10 to the***

Affidavit-in-Opposition) and tried to convince this Court that the executive committee of the Bangladesh Nursing Council has approved the Recruitment Rules along with the amendments. This Annexure is in one page wherein it has been stated as "সিদ্ধান্তঃ- অতঃপর এ বিষয়ে কমিটি উল্লিখিত সংশোধনসহ নিয়োগ বিধি অনুমোদন করে". On repeated asking, the learned Advocates for the respondents could not and did not produce or show any gazette notification of the same or any such recruitment rules of their own. On this score also we are of the view that this is nothing but a paper which has no force in the eye of law. So, it is already established vide evidence and by the admission of respondents in their affidavit-in-oppositions, that the Bangladesh Nursing Council had no service rules of its own while the appointment of respondent No. 13 in the post of Deputy Director was made.

Now question may arise, in view of the circumstances, what the Council will do in case of appointment of any employee for carrying out its business in absence of any rules. In this respect it would be helpful for us if we can rely upon the decision in the case of *Bangladesh Rural Development Board (BRDB) Dhaka v. Asma Sharif, Shariatpur and others*, reported in ***72 DLR (AD) 189***, wherein it has been held in paragraph 32 as follows:

> *"…… All the statutory bodies/corporations/autonomous organizations must strictly follow their respective service Rules while making any recruitment in any permanent post."*

Admittedly, there is no appointment rules at the relevant time when the respondent No. 13 was appointed as Deputy Registrar. Since, the Hon'ble Appellate Division being the Apex Court of the country, specifically held that respective service Rules must be followed we are of the view that in the absence of any appointment Rules the Bangladesh Nursing Council has no other option but to follow the Government Service Rules.

Now, we come to the point as to whether non-publication of the recruitment notice in the newspaper is illegal and without lawful authority as per Government Service Rules. In this respect, the provision of the Government Service Rules is very clear. Referring to the Circular and Guidelines of the then Ministry of Establishment vide Memo No. সম/আর-১/৮৮-৮৬(২০০) তারিখ ৪ মার্চ ১৯৯০, it has been provided in the Government Service Rules relating to direct appointment stated to the effect that "শুন্য পদে নিয়োগের বিজ্ঞপ্তি পত্রিকায় প্রকাশ বা বিভিন্ন গণমাধ্যম কর্তৃক বিজ্ঞাপন প্রচারণার মাধ্যমে বহুল প্রচার করিতে হইবে। ইহার পাশাপাশি নিয়োগ বিজ্ঞপ্তি জনশক্তি কর্মসংস্থান ও প্রশিক্ষণ ব্যুরোর অধীনস্থ জেলা কর্মসংস্থান ও জনশক্তি অফিসেও প্রেরণ করিতে হইবে।"

The question of proper advertisement or inviting applications from eligible candidates in open competition has been dealt with in accordance with law in case of *Bangladesh Rural Development Board (BRDB) Dhaka v. Asma Sharif, Shariatpur and others*, reported in ***72***

DLR (AD) 189. The Appellate Division in the said case held at paragraph 13 as follows:

> *"The object of the Article 29 is to ensure equality of opportunity for all citizens in matters relating to appointment to public offices. Any appointment made in violation of mandatory provisions of the spirit of Article 29 of the Constitution and statute would be illegal and such illegality cannot be cured by taking recourse to regulation. The appointment to any post under the Government or autonomous organizations must be made after a proper advertisement has been made inviting applications from eligible candidates and holding selection by the Public Service Commission or body of experts or specially constituted committee whose members are impartial. The constitutional principle of providing equality of opportunity to all is a fundamental right to the citizens and it mandatorily requires that vacancy must be notified in advance meaning thereby that information of the recruitment must be disseminated in a reasonable manner in the public domain ensuring maximum participation of all eligible candidates, thereby the right of equal opportunity is effectuated. Aforesaid views have been expressed by the Supreme Court of India in the case of State of Orissa Vs. Mamata Mohanty, reported in **(2011) 3 SCC 436**. Equality of opportunity in matters of employment being the constitutional mandate is always to be observed. The advertisement must specify the number of posts available for selection and recruitment. The qualification and other eligibility criteria for the posts should be explicitly mentioned and the schedule of recruitment process should be published with certainty and clarity. The advertisement should specify the Rules and procedure under which the selection should specify the Rules and procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process has commenced, thereby, unjustly benefitting someone at the cost of others. In the case of RN Nanjun-dappa Vs. T. Thimmiah, reported in **(1972) 1 SCC 409** the Supreme Court of India observed that if the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be*

> *regularized. Ratification or regularization is possible of an act which is within the power and province of the authority conferred by the statute. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."*

Furthermore, it is the norm and regular practice of 'Bangladesh Nursing and Midwifery Council' to publish any job circular in well circulated national newspaper, which has always been followed before the appointment of respondent No. 13 (e.g. 13.02.2013, 21.04.2013 ***(Annexure-N, N-1 to the Supplementary Affidavit))*** and after the appointment of respondent No. 13 (e.g. 07.09.20216, 31.10.2019 ***(Annexure-N-2, N-3 to the Supplementary Affidavit)***. However, in case of appointment of respondent No. 13 in the post of 'Deputy Registrar' the job circular dated 07.09.20216 was only published in the website of BNMC and only 3 (three) candidates participated in the examination, which clearly suggests that the job circular of such an important post was not published to the public at large. This is clear violation of Article 27 of the Constitution on the ground of discrimination because all the potential and eligible candidates were deprived of the opportunity of making an application for the said post.

In view of the decisions, quoted above, and the provision of Government Service Rules we are of the view that the non-publication of the Recruitment Notice in the newspaper for appointment in the post of Deputy Registrar is illegal and without lawful authority.

We have noticed that in case of the job circular dated 07.09.20216, in addition to the violation of non-publication of advertisement in the national newspaper, there are other violation as well. It is well settled that for the appointment in public office by direct recruitment process, one of the elementary and obligatory requirements is that the antecedents of the candidates selected is required to be verified through appropriate agencies (in case of instant writ petition 'police') and found to be such as do not render him/her unfit for appointment. This procedure is followed for appointment in the public office from top to entry level employee. But, before recruiting respondent No. 13 in a significant national level post, Government Service Recruitment Rules for 'Pre-Identity Assessment/Verification' was violated by concerned authority, as the "সরকারি চাকরিতে নিয়োগের শিক্ষাগত যোগ্যতা নির্ধারণ (বিশেষ বিধান), বিধিমালা, ২০০৩" states that,

> "*খ। অন্যান্য পদে সরাসরি নিয়োগ পদ্ধতি*
> *১। ...*
> *২। কর্মকমিশনের আওতা বহির্ভূত ১ম ও ২য় শ্রেণির পদে এবং নন গেজেটেড পদসমূহে সংশ্লিষ্ট অফিস নিয়োগ দান করিবে। এই নিয়োগে উক্ত অফিসের সরকার নির্ধারিত বিভাগীয় নির্বাচন কমিটির সুপারিশের ভিত্তিতে হইবে এবং ডাক্তারী পরীক্ষা ও* ***পুলিশ ভেরিফিকেশনস*** *সংক্রান্ত কাজ সংশ্লিষ্ট মন্ত্রণালয়/বিভাগ বা নিয়োগকারী কর্তৃপক্ষ করিবেন।* ***(emphasis added")***

In the instant writ petition Inquiry Committee, formed regarding the appointment of respondent No. 13, submitted the Inquiry Report dated 03.02.2022 by stating that in selecting and

appointing the respondent No. 13, in the post of Deputy Registrar of BNMC, this obligatory requirement, police verification, has been contravened. If the police clearance would have sought or the obligatory verification procedure would have been complied with during the appointment of respondent No. 13, her previous criminal records would have come into light. The enquiry report dated 03.02.2022 clearly shows that, among the 4 (four) criminal cases filed against respondent No. 13, one criminal case being Paikgasa P.S. Case No. 29 dated 25.09.2012, which was filed, under sections 7 and 30 of নারী ও শিশু নির্যাতন দমন আইন, ২০০০ (as amended on 2003), was pending at the time of recruiting her in the post of Deputy Registrar of BNMC. It appears from the record that respondent No. 13 has been discharged from the said case by order dated 20.11.2016. But fact remains that the recruitment notice was published in the website on 07.09.2016 and respondent No. 13 was appointed on 10.10.2016 on temporary basis. So, it is clear that by taking recourse to the suppression of fact that the respondent No. 13 filed the application for appointment which is not in accordance with law.

From the backdrop of the above discussion, in the instant case the mandatory procedure of police verification was not followed, thereby we can certainly conclude that the recruitment process of respondent No. 13 was unlawful and flawed. In this respect, the Inquiry Officer has rightly found in his report which reads as follows:

> *" তদন্তে প্রদত্ত ও সংগৃহিত সাক্ষ্য-প্রমাণ পর্যালোচনায় দেখা যায় যে, রাশিদা আক্তার ডেপুটি রেজিস্ট্রার হিসেবে বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিলে যোগদান করার সময় তার বিরুদ্ধে আদালতে ফৌজদারী মামলা বিচারাধীন ছিল। নিয়োগকালে প্রাক-পরিচয় যাচাই বা পুলিশ ভেরিফিকেশন না হওয়ায় ফৌজদারী মামলা বিচারাধীন থাকা সত্বেও রাশিদা আক্তার যোগদান করতে সক্ষম হয়েছে। এটি নিয়োগ প্রক্রিয়ার একটি ত্রুটি। জাতীয় পর্যায়ের প্রতিষ্ঠান বাংলাদেশ নার্সি ও মিডওয়াইফারি কাউন্সিলের ডেপুটি রেজিষ্ট্রারের মত গুরুত্বপূর্ণ পদে নিয়োগের বিজ্ঞপ্তি বহুল প্রচারিত জাতীয় দৈনিকে প্রকাশনা করে শুধু মাত্র কাউন্সিলের ওয়েবসাইটে প্রকাশের মাধ্যমে নিয়োগ প্রক্রিয়া সম্পন্ন করাও ছিল নিয়োগ প্রক্রিয়ার একটি বড় ত্রুটি।"*

So far, the submission of the learned Advocate for the respondent No. 13 that she has in the meantime served for more than five years and as such, her service cannot be disturbed on the plea of some irregularities in the appointment process. In *Md. Fazle Rabbi Mia v. Professor Aftab Uddin Ahmed and others* case in which the appointment made from 17.11.2003 to 31.08.2004 were challenged although the employees served for more than 10 to 12 years in the service. However, the Rule was made absolute and cancelled the appointment. On this score also the submission of the learned Advocate for the respondent No. 13 has no legal force.

Now, it is pertinent to point out at this stage the most burning issue of illegality of this appointment procedure and shady selection that is the eligible criteria for the post of Deputy Registrar. In the advertisement for recruitment notice dated 07.09.20216, among all the required qualification mentioned, one of the qualifications asked by the authority was *"15 (fifteen) years of experience of teaching (nursing) and administrative work"* ***(Annexure-A to the Writ***

Petition). It transpires from the record that before appointment in the post of 'Principal' at "Shahid Monsur Ali Nursing Institute" respondent No. 13 resigned from the post of 'Senior Staff Nurse'. According to 'সেবা পরিদপ্তর এর অধীনস্থ কর্মকর্তা ও কর্মচারীদের কার্য পরিধি '(Job Description) published in June, 2007, the post of 'Senior Staff Nurse' does not have any administrative or teaching responsibility. So, the required qualification of respondent No. 13 for the post of 'Deputy Registrar' start from her appointment in the post of 'Principal' at "Shahid Monsur Ali Nursing Institute" on 05.09.2010 ***(Annexure- 2-G to the Affidavit-in-Opposition)***. Later, respondent No. 13 worked as Assistant Professor of International Medical College from 01.11.2014 to 28.02.2016 ***(Annexure- 2-J to the Affidavit-in-Opposition).*** After that respondent No. 13 was appointed in the position of Chief Nursing Officer (CNO) from on or before 01.03.2016 ***(Annexure- 2-K to the Affidavit-in-Opposition)*** and in the same institution respondent No. 13 was transferred from the position of Chief Nursing Officer (CNO) to Coordinator, Nurse Managers ***(Annexure- 2-L to the Affidavit-in-Opposition).*** So, if we calculate the experience of respondent No. 13 until her appointment in the post of 'Deputy Registrar' and compare it against the experience required for the said post as per the Advertisement for Recruitment notice dated 07.09.20216, any reasonable person will find that respondent No. 13 miserably failed to meet the required qualification. Because, respondent No. 13 had only

6 years 7 months 7 days experience of teaching and administration as against the required 15 years of teaching and administrative experience. The qualification of respondent No. 13, as mentioned in the affidavit-in-opposition, does not match with the qualification required for the post of Deputy Registrar' of BNMC as per the Advertisement for Recruitment notice dated 07.09.20216 which is case of non-compliance. In this premise, we can conclude with confidence that, respondent No. 13 failed to meet the minimum qualification required for the appointment in the post of 'Deputy Registrar' of BNMC, which render the appointment *void ab initio* and her entitlement of holding the office without lawful authority.

In this regard Hon'ble Appellate Division in *Mostafa Hussain v. S. M. Faruque* case reported in ***40 DLR (AD) 10*****,** held that*"A person will be found to hold the public office without lawful authority if he is not qualified to hold the office".* Furthermore, taking into consideration of the decision of *University of Mysore v. Govinda Rao*, ***AIR 1965 SC 491: [1964] 4 SCR 575,*** it can certainly be said that, the issue of the instant writ petition, that is possessor (respondent No. 13) of the office (Bangladesh Nursing and Midwifery Council) does not fulfill the required qualifications rather suffers from disqualification for not having the required 15 years' experience of administration and teaching, can be a justified ground for writ of *quo warranto*. In respect of this we also want to mention the judgment in the Indian case of

Ghulam Hussan v. India, ***1973 SC 1***, where it was also held that if there was any complaint about the appointment or promotion of an officer who was not eligible under the rules to be appointed or promoted, the proper remedy was to make an application for *quo warranto*.

Furthermore, the post was advertised in the website specifying as regards qualifications and in terms of experience. By signing her application form, respondent No. 13 confirmed that the information contained in it was correct though the truth was very different because her representations as to the essential requirements were either false or inflated. Honesty and integrity were explicit requirements for the post but respondent No. 13 not disclosing the same is a fraudulent misrepresentation. It was by reason of those lies and fraudulent misrepresentations respondent no 13 secured the post and positions dishonestly and her false misrepresentations were continuing throughout the periods of employment since her appointment. We are stressing on her performing of roles as Deputy Registrar, with additional charge of Registrar, would inevitably have caused damage to the public's confidence in the public office like the office of respondent No. 13, because her appointment is not lawful and the Deputy Registrar post does not exist in the বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬.

Therefore, it is clear that the appointment of respondent No. 13 in the post of 'Deputy-Registrar' of Bangladesh Nursing and Midwifery Council is *void ab initio* because it was *mala fide*, illegal and without lawful authority and hence, any subsequent promotion based upon the experience of 'Deputy Registrar' would also be void, because the experience from the illegal appointment in a post shall not be considered as experience for promotion. Illegal appointment can't be condoned simply because the candidate was allowed to continue for a number of years of that post as held in the case of *Ghulam Hussan v. India*, reported in 1973 SC 1138.

In the backdrop of the discussion above, we are of the view that holding the post of Deputy Registrar of BNMC by the respondent No. 13 and the inaction of the respondent Nos. 1 to 9 and 14 in taking necessary steps against the respondent No. 13 and the Selection Committee, that appointed respondent No. 13, consisting of respondent Nos. 10 to 12 are also to be linked for adopting an illegal and corrupt means by abusing their positions as public servants by recruiting respondent No. 13 in the post of Deputy Registrar of BNMC, is also arbitrary, collusive, *mala fide* and *ex-facie* illegal, that falls within the category of writ of *certiorari.*

Now the crucial issue is whether the petitioners have the *locus standi for* filing a writ of *quo warranto* or *certiorari*. This issue had been settled by the Hon'ble Appellate Division long ago through the

judgment passed in *Dr. Kamal Hussain v. Serajul Islam*, reported in ***21 DLR (SC) 23*** and *Md. Mostafa Hossain v. Sikder Md. Faruque&Ano*, reported in ***1988 BLD (AD) 170***, where it was held that *"Art. 102(2) does not require that the applicant for a writ of quo warranto must be an aggrieved party"*. Hence, the petitioners have locus standi to file a petition of writ of *quo warranto*.

The next question is whether the petitioners have locus standi to file the writ of *certiorari*. We have noted that, even if the outcome of the instant writ petition does come out in favour of petitioners they will not be benefited exclusively. To discuss this issue, we have to take into consideration the impact of the outcome of this writ petition. BNMC is a statutory organization and citizens have legitimate expectation to see whether the appointment of respondent No. 13 is made in accordance with law or in this regard is there any abuse of position of public authority. In effect, therefore, any action taken by any citizen subject to public cause should be termed as public interest litigation, because that cause imposes a public duty and that public duty may amount to a sufficient interest to confer standing. Citizens with a 'sincere concern for constitutional issues' have been able to challenge the lawfulness without their standing being called in question. We have also considered the issue, whether the instant writ petition can be treated as 'public interest litigation' while determining whether the petitioners have the locus standi in respect of writ of

certiorari. In the case of *D.K. Parihar v. Union of India*, reported in ***AIR 2005 Raj 171*****,** it was held that;

> *"The Public Interest Litigation means a legal action initiated in a court of Law for the enforcement of public interest or general interest or some interest by which their legal rights or Liabilities are affected."*

In our jurisdiction the Hon'ble Appellate Division in the case of *Mustafa Kamal J. in Dr. Mohiuddin Farooque v. Bangladesh*, reported in ***17 BLD (AD) (1997) 1*****,** held that, in order to entertain a public interest litigation *"The first issue the judge needs to address is whether the matter involves a private or a public cause".* Therefore, we will first examine whether the instant writ petition involved any public cause.

In the instant writ petition the role and jurisdiction of BNMC is crucial to determine whether any public cause involved in the instant writ petition. BNMC is the statutory body with 2 (two) wings, that is 'Nursing' and 'Midwifery'. Both of the wings are related to ensure the public health of the citizen of this country. It is to be mentioned that, BNMC is the only authority in this regard and hence, all the nursing and midwifery institutes across the country comes within the jurisdiction of BNMC. We have explored the Section 5 of the বাংলাদেশ নার্সিং ও মিডওয়াইফারি কাউন্সিল আইন, ২০১৬ which does demonstrate the importance of the said Council for the health sector of Bangladesh. BNMC is also part of implementing the government policy 'Health

for All'. Although, we have already concluded that the post of 'Deputy Registrar' has never been existed in any law of this country, nevertheless, the post of 'Deputy Registrar', which is currently the second top post of the BNMC has such responsibilities that involves great public interest. It was also necessary that in such a crucial post a person with moral integrity should be appointed. But in the instant writ petition, we have observed that respondent No. 13 possesses neither the required administrative and teaching qualification, nor did she has 15 years' experience. In such circumstances, any citizen of the country could be concerned for his safety regarding health. In this premise, we are of the view that the instant writ petition involved public interest. Hence, the instant writ petition should be considered as 'public interest litigation'.

Now the question remains whether the writ petitioners have the *locus standi* to file the instant writ petition of *certiorari* in the form of public interest litigation. In the landmark case of *Bangladesh Sangbadpatra Parishad (BSP) v. The Government of People's Republic of Bangladesh and others,* reported in ***12 BLD (AD) (1992) 153*****,** the Hon'ble Appellate Division held that;

> *"If an individual cause is espoused, the petitioner needs to be a person aggrieved and his own interests require to be affected. If, however, he pursues a public cause involving public wrong or public injury, he need not be personally affected. It must be taken into consideration, as has been noted by BB Roy Chowdhury J., that the*

Constitution neither defines the term 'person aggrieved' nor requires the applicant to be personally aggrieved."

Furthermore, based upon the judgment of Hon'ble Appellate Division in the case of *Dr. Mohiuddin Farooque vs. Bangladesh, represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and others*, reported in ***49 DLR (AD) (1997)1***, *S. P. Gupta v. Union of India*, reported in ***AIR 1982 SC 149*** and *T.N. Godavarman Thirumulpad v. Union of India* reported in ***(2006) 5 SCC 28*****,** it can be said with certainty that any person pursues a public cause involving public wrong or public injury, he/she need not be personally affected, any member of the public, being a citizen, suffering the common injury can file a petition of public interest litigation.

In *Ashok Lanka v. Rishi Disxit*, reported in ***(2005) 5 SCC 598*** and *Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi*, reported in ***AIR 1987 SC 294***, the Indian Supreme Court in these two cases held that, even a private interest litigation can be treated as public interest litigation by the Court. Although, we are inclined to say that the instant writ petition does not involve private interest because, the outcome of this writ petition will only decides some constitutional grey area rather than serving any private interest, nevertheless, we have mentioned the abovementioned judgments in order to highlight the obligation of this Court to determine the issue of the instant writ petition. The said judgments also clarifies the

confusion regarding the locus standi to file a public interest litigation because, it is not necessary to be an aggrieved person to file a public interest litigation, rather the vital issue should be identified whether the litigation involved any issue that relates to public interest, which is the case of instant writ petition. It is the duty of the court to the public that the truth and the validity of the allegations may be enquired into for the benefit of the public. Therefore, we are of the view that, the instant writ petition is a public interest litigation and hence, the locus standi of the petitioners is relaxed for filing the writ of *certiorari* in the form of public interest litigation. Petitioners are acting *pro bono publico* to perform public duties and to serve the people of the Country which are their constitutional obligations under Article 21 of the Constitution of the People's Republic of Bangladesh and also to secure the provision of basic necessity of medical care for its citizens as per Article 15(a) of the Constitution of the People's Republic of Bangladesh.

We have also taken into consideration the issue of 'delay' in filing the writ of *quo warranto* that was raised by Mr. Fida M. Kamal, learned Senior Advocate for the respondent No. 13, based upon the judgment in *Dr. Md. Anwarul Basher v. Dr. M. Wahiduzzaman and others*, reported in ***71 DLR (2019) 205***. It is to be noted that, there are significant factual and legal differences between the above said case reported in ***71 DLR (2019) 205***. In the said judgment only 1 (one)

year tenure was left for respondent No. 1. On the other hand, in the instant writ petition, the current age of respondent No. 13 is 49 (forty nine) years and the retirement age for the respondent No. 13 is similar to the retirement age of any other government official. Furthermore, in the case reported in ***71 DLR (2019) 205*****,** although respondent No. 1 holds a significant post but his jurisdiction limits only to the concerned university. On the other hand, the jurisdiction of BNMC is across the country, hence, the action of respondent No. 13 will put impact on the whole country. Most importantly, the issue of delay in writ of *quo warranto*has been settled by the judgment of Md. Mostafa Hossain v. Md. Faruque&Ano, reported in ***1988 BLD (AD) 175****,* wherein as per ***Badrul Haider Chowdhury, J.****;*

> *"...mere delay in seeking a remedy in writ jurisdiction is not a ground for denying the remedy, particularly when the remedy sought relates to the very title of a person holding any public office. The contention that the writ petition was liable to be dismissed on the ground of delay got no substance."*

Furthermore, in a recent judgment of Central Electricity Supply Utility of Odisha v Dhobei Sahoo, reported in ***AIR 2014 SC 246****,* the Supreme Court of India made the following observation;

> *"The principle of doctrine of delay and laches should not be allowed to play because the person holds the public office as a usurper and such continuance is to be prevented by the court. The court is required to see that the larger public interest and the basic concept pertaining to good governance are not thrown to the winds."*

Hence, we found no substance in the argument that there is bar to file the instant writ petition on the ground of delay.

In the instant writ petition no procedural fairness was followed by the respondents and no substantive legitimate expectation was protected by the authority rather, they abused their position that's uphold ultra vires. In this premise, we are obliged to weigh 'legal certainty' (the expectation) against 'legality' (the ultra vires doctrine) of the decision of the authority not taking into account properly that the authority is under a legal duty to comply with the mandatory provision is not done (verification of police report) is abusing their position and that goes against public interest and citizen's legitimate expectation as there was no sufficient overriding public interest exists justifying the frustration of the legitimate expectation and a legitimate reason of departure from the statute and the review of legality is the primary method of enforcing rule of law under Article 102 of Bangladesh constitution.

The instant writ petition thus becomes one of ultra vires case which no court is likely to condone. The doctrine of ultra vires has emerged to safeguard the public policy and interest in one hand and citizens' rights on the other and it is caused by public authorities as they often traverse beyond the limits of their statutory power or deviate from the prescribed procedure, therefore, unless the public

authorities exercise their powers in a fair and bona fide manner within the ambit prescribed and as per procedure laid down by statute the expectation of good governance will remain pointless if they exceed their legal bounds. To what extent authority can exercise their power is defined and exercise of powers within legal bounds is an essential condition of being an authority and such exercise beyond their 'authority' becomes ultra vires.

In the instant writ petition statutory power is exercised by the authority outside those for which power was vested in the authority which makes the exercise colorable and the action *mala fide*. The Supreme Court of India held in State of Punjab v Gurdial Singh, reported in ***AIR 1980 SC 319***, the colorable exercise of power sometimes overlaps motives which goes beyond the sanctioned purpose of power and holds the action as ultra vires and misuse of power. It is to be noted that there is a distinction between the exercise of power in good faith and misuse of power in bad faith. The former arises when an authority misuses its power in contravention of law which would be fraud on power and which would render the action ultra vires; in the second case power is exercised for an improper motive which renders the act mala fide and the action is consequently ultra vires also. The instant case is also of non-application of mind as the statute required authority to be satisfied about certain conditions before the exercise of power conferred on him for the appointment of

respondent No. 13 but the authority failed owing to absence of due care and attention which is non-application of mind by the authority and action is ultra vires. The authority is also failed to comply with mandatory procedural requirement by statutes before appointment which is 'procedural *ultra vires'*.

Before we conclude these grounds decision, there is one final matter which we should address, namely confiscation of the full net earnings. In essence, these orders might have represented the best way to resolve the outstanding issues between the parties of this instant writ petition.

In our view, the answer in principle is that, at this stage in the analysis, where one is considering proportionality, the relevant benefit from the fraud, in the result, that respondent No. 13 would not have obtained had she not used fraud by giving false information about required qualification and hence had not been offered the particular job at a public office in which a public cause, benefit and confidence are involved.

We are of the view that, on the submission on confiscation of her salary we neither take the advocating the "take all" approach nor "take nothing" approach rather we take "middle way (or half way house)" as her act is a criminal conduct. However, we are not inclined to emphasise that we are suggesting that a detailed or precise evidential or accounting exercise is needed. So, leaving the issue aside

as to avoid complicating the administration of justice in the writ jurisdiction.

Therefore, the respondent No. 13, as a usurper, holding the post of Deputy Registrar of BNMC and subsequent entrustment with Additional charge of Registrar is without lawful authority. Furthermore, the actions of the respondent Nos. 1 to 9 and 14 of not taking necessary steps against respondent No. 13 and selection committee, consisting of respondent Nos. 10 to 12, for adopting unlawful and illegal means in appointing respondent No. 13 in the post of Deputy Registrar is abuse of power and thereby the selection process of respondent No. 13 is illegal, without lawful authority and is of no legal effect.

In light of the observations made above, this Court has found merit in the Rule and accordingly, the Rule is made absolute:

It is declared that the respondent No. 13, as a usurper, holding the post of Deputy Registrar of BNMC and subsequent entrustment with Additional charge of Registrar is without lawful authority. Furthermore, it is also declared that the actions of the respondent Nos. 1 to 9 and 14 in not taking necessary steps against respondent No. 13 and selection committee, consisting of respondent Nos. 10 to 12, for adopting unlawful and illegal means in appointing respondent No. 13 in the post of Deputy Registrar is abuse of power and thereby the

selection process of respondent No. 13 is hereby declared illegal, without lawful authority and is of no legal effect.

Respondent Nos. 1 to 9 is directed to terminate respondent No. 13 from the post of Deputy Registrar of BNMC as her appointment was void *ab initio*.

The Respondent No. 1 Government is directed to appoint a Registrar as per section 7(4) of the Bangladesh Nursing and Midwifery Council Act, 2016 immediately.

Md. Mahmud Hassan Talukder, J

I agree.

Md. Akteruzzaman Khan (B.O)