IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Special Original Jurisdiction)

**WRIT PETITION N0. 6366 of 2009**

IN THE MATTER OF:
An application under Article 102 (2) (a) (ii) of the Constitution of the People's Republic of Bangladesh.

AND

IN THE MATTER OF:
Md. Shafiqul Azam Khan
…………Petitioner.

-Versus-

The Election Commission for Bangladesh, represented by the Chief Election Commission, Election Commission Secretariat, Sher-E-Bangla Nagar, Dhaka and others.
…………Respondents

Mr. M. Amir-Ul Islam with
Mr. Md. Zahirul Islam Mukul, Advocates
……..For the petitioner.

Dr. Shahdeen Malik with
Mr. Towhidul Islam and
Mr. Md. Monjur Alam, Advocates
.......... For the respondent No.2.

**Heard on: 23.01.13, 30.1.13, 07.02.13, 26.2.2013 and Judgment on: 03.04.2013.**

*Present:*
*Mr. Justice M. Moazzam Husain*
*And*
*Mr. Justice Md. Habibul Gani*

***M. Moazzam Husain, J***

This rule *nisi* was issued calling in question a notice bearing Memo No.নিকস/আইন-১/ জাসনি (ঝিনাইদা)/১(১)/২০০৯/১৫৪ dated 31.8.2009 issued by the Election Commission (Respondent No.-1) whereby the petitioner was asked to show cause as to why a gazette shall not be published declaring him disqualified to remain as a Member of Parliament.

Facts of this case, briefly stated, are that the petitioner was the Mayor of Moheshpur Paurashava, Jhenidah. During his incumbency as Mayor of

Moheshpur Paurashava schedule of the election of the 9th Parliament was declared. The 29th day of December, 2008 was appointed as the date of election and 30th day of November, 2008 was appointed for submission of nomination papers. The petitioner, with a view to contesting the election from Jhenidah-3 constituency, submitted his nomination paper. One Sazzatuz Zumma, an independent candidate, raised objection to the nomination of the petitioner alleging that the petitioner, as Mayor of a Paurashava, was holding an office of profit and thus was disqualified to contest the election as per Article 12(1)(c) of the Representation of the People Order, 1972, (referred hereinafter as "the RPO"). The objection was rejected by the Returning Officer by his order dated 04.12.2008. Said Sazzatuz Zumma preferred Election Appeal No. 289 of 2008 in the Election Commission (shortly, "the Commission") which was also dismissed by the Commission on merit by an order dated 10.12.2008. The election was held on the scheduled date and the petitioner was duly elected as Member of Parliament ("MP" for short) from the aforesaid constituency. On 01.01.2009 a gazette notification was issued publishing the name of the petitioner and other returned candidates and on 03.1.2009 he, along with others, took oath as Member of Parliament.

The Commission, eight months after oath taken by the MPs, issued the impugned notice (Annex-D) on 31.8.2009 asking the petitioner to show cause as to why a gazette shall not be published declaring him disqualified to be a Member of Parliament.

The grounds assigned in the show-cause notice substantially are **a)** that the petitioner contested the parliament election from Constituency No. 63, Jhenidah-3, while he was still holding the office of Mayor, Moheshpur Paurashava, Jhenidah **b**) that according to the decision given in Writ Petition No. 9124 of 2008 and other two writ petitions of the same year High Court

Division held that the City Corporation is a 'statutory public authority' and that the office of Mayor of City Corporation is an office of profit as contemplated under Article 12(1)(c) of the RPO **c)** that in view of the decision of the High Court Division as above the Election Commission has taken decision to the effect that the Paurashava is a 'statutory public authority' and office of its Mayor is an office of profit within the meaning of Article 12(1)(c) of the RPO **d)** that according to Article 12(1)(c) of the RPO a person holding office of profit in the service of the Republic or of a statutory public authority is disqualified from being elected as , and from being, a Member of Parliament. Therefore, the petitioner, though elected, is not qualified to remain as a Member of Parliament.

The notice is challenged before us on different grounds which boil down to four basic propositions. First, the Commission has exceeded its jurisdiction in treating the office of Mayor of a Paurashava as an office of profit drawing analogy from the decision of the High Court Division wherein it as held that the office of Mayor of a City Corporation is an office of profit. Second, such analogy has usurped the power of the Legislature to legislate and of the Supreme Court to interpret the law. Third, Article 66(2) (f) of the Constitution, Article 12(1) (c) of the RPO and Section 2(58) of the Local Government (Paurashava) Ordinance, 2008 read together do not suggest that office of the Mayor of a Paurashava is an office of profit. And finally, since the office of the Paurashava Mayor does not yield any profit or pecuniary gain the same is not an office of profit by any sense of the term.

There are other attendant facts put on records required for disposal of this Rule. The facts, in brief, are that prior to the date for submission of nomination papers the Commission held a meeting on 17.11.2008 to discuss the issue as to whether the office of Mayor, Counselor, Upa Zila Chairman,

Vice Chairman and Women Vice Chairman are office of profit. In the said meeting it was decided, *inter alia*, that office of the Mayor, City Corporation, is an office of profit. It was further resolved that the offices of Counselor, Upazila Chairman, Vice Chairman and Women Vice Chairman are not office of profit and they are not disqualified from contesting the parliamentary election without resigning their respective offices.

As the petitioner maintained, the Commission in its meeting dated 17.11.2008 did not take any decision about the office of Paurashava Mayor. Shortly thereafter it came to the knowledge of the petitioner that the Commission traveled beyond its own decision taken on 17.11.2008 and was trying to disqualify all the Mayors of Paurashava and Chairman of the Union Parishad as candidates who had submitted nomination papers without resigning their offices. The petitioner, worried as he was, immediately filed on 03.12.2008 a writ petition, WP No. 9729 of 2008, in the High Court Division and obtained Rule and an order of interim stay. The writ petition was heard along with similar other writ petitions by a Division Bench of the High Court Division and disposed of by a judgment dated 04.12.2008. By the judgment High Court Division discharged the Rules issued in three writ petitions filed by Mayors of three City Corporations holding, *inter alia*, that the office of Mayor, City Corporation is an office of profit and the Mayor as a person holding office of profit is disqualified from contesting the parliamentary election. As for the other writ petitions, including the one filed by this petitioner, the Rules were discharged as being premature since no decision as to their status was still given by the Commission. Let it be mentioned that a civil miscellaneous petition, CMP No. 981 of 2008, was filed in the Appellate Division at the instance of the then Mayor, Dhaka City Corporation challenging the decision of the High Court Division. On a prayer by the

petitioner of the CMP learned Chamber Judge by an order dated 08.12.2008 stayed operation of the judgment of the High Court Division for a period of six months with a direction to file regular leave petition. As was informed, the appeal was not further pursued and thus ended in no consequence.

On 04.12.2008 ie, after the date of scrutiny of the nomination papers, the Commission issued a communiqué declaring, *inter alia*, that the Mayors of City Corporation and Paurashava, Chairman Union Parishad, District Council of Hill Districts and Parbatya Ancholic Parishad shall not be qualified to contest election to Parliament and Upazila Parishad. The communiqué, however, was not pursued and subsequently the election was held with the participation of Paurashava Mayors including the petitioner. Subsequently on 31.8.2009, ie, eight months after election, the impugned notice was issued upon the petitioner and some other MP's similarly situated.

The Commission, as Respondent No.1, contested the rule by filing an affidavit-in-opposition. The contesting respondent has basically tried to build up its case on two propositions, namely, that the Rule is premature as a proceedings is pending before it on the same issue and the petitioner has already made appearance in the proceedings by filing a written reply to the show-cause notice. Secondly, the office of Paurashava Mayor is an office of profit by any meaning and intent of law, therefore, the petitioner, as one contesting parliamentary election without resigning his office is disqualified to be a Member of Parliament.

Mr. Amirul Islam, learned Advocate appearing for the petitioner raised a number of contentions which finally tend to establish that the office of Paurashava Mayor is not an office of profit. In his bid to press home the point Mr. Islam submits that nowhere in law office of the Paurashava Mayor is defined as an office of profit. The Election Commission treated the office of

Paurashava Mayor as an office of profit by an analogy deduced from the office of Mayor, City Corporation held to be office of profit by the High Court Division. Treating an elective office, he argued, as an office of profit by analogy is beyond the jurisdiction of the Commission and virtually tantamount to usurpation of legislative power of the Parliament and of the power of the Supreme Court to interpret the law. He took pains to demonstrate by illustration that there is basic difference between the office of Mayor, City Corporation and an office of Mayor of a Paurashava and added, no logical analogy can be drawn between them. The office of Paurashava Mayor is not capable of yielding profit nor entails pecuniary gain for the holder thereof enough to justify such analogy. Rather, he insisted, Article 66(2) (f) and (3) of the Constitution read with Article 12(1) (c) of the RPO and Section 19(2) (*uma*) of the Local Government (Paurashava) Ordinance, 2008 will suggest that the office of the Mayor of a Paurashava is not an office of profit. Mr. Islam finally submitted that in view of Article 66(4) of the Constitution the Commission is not competent to address such notice to a sitting MP unless there is a reference made on that behalf by the Speaker.

Mr. Shahdeen Malik, learned Advocate, appearing for the Respondent No.1 ie, the Commission firstly raised the point of maintainability of the Rule. His contention is that the impugned show-cause notice was issued by the Commission in a proceedings initiated to settle the issue of disqualification of the petitioner to be a Member of Parliament. The petitioner, pursuant to the show-cause notice, already addressed a written reply to the Commission which means that he made appearance in the proceedings pending against him. Admittedly the proceeding is still pending before the Commission and the Commission is in seisin of the matter. The Rule, therefore, is premature and liable to be discharged.

The second limb of his argument is that as per Article 152(1) of the Constitution and Article 2(xxiiia) of the RPO the Paurashava is a statutory public authority. According to Explanation added to Article 12(1) of the RPO “office of profit” means holding any office, post or position in the full time service of the Republic or any statutory public authority or company in which government has 50% share. According to the Local Government (Paurashava) Ordinance, 2008, office of Mayor of a Paurashava can fairly be said to be an office of profit. Furthermore, the Mayor of a Paurashava, by virtue of Section 85 of the Ordinance No. 17 of 2008 is the executive head of the Paurashava and is in full-time service of the Paurashava. The Mayor of a Paurashava by virtue of SRO No. 33 dated 22nd February, 2006 issued by the Ministry of Local Government Rural Development & Cooperatives is entitled to Tk. 5000/- per month as honorarium. It is thus clear, he argued, that the petitioner, as Mayor of a Paurashava, was holding an office of profit in a statutory public authority as per Article 12(1) (c) of the RPO. The petitioner, therefore, was disqualified from being elected as or to be a Member of Parliament under Article 66(2) of the Constitution. The Commission in issuing the notice, Mr. Malik concluded, did no wrong and merely discharged its constitutional and legal duties.

This case offers a unique circumstance where the Commission chose to issue of its own a notice upon a sitting MP questioning his right to remain as a member of Parliament as he was disqualified to be elected as such by reason of the fact that he contested the election while holding an ‘office of profit’- an office, which under law, disqualifies him from being elected as or from being a member of Parliament. The language of the notice will better represent the sense.

"....যেহেতু, আপনি...ঝিনাইদহ জেলার মহেশপুর পৌরসভার মেয়র পদে অধিষ্ঠিত থাকাকালীন পদত্যাগ না করিয়া ৯ম জাতীয় সংসদ নির্বাচনে প্রতিদ্বন্দ্বিতাপূর্বক সংসদ সদস্য নির্বাচিত হইলেও আইনানুযায়ী সংসদ সদস্য থাকিবার যোগ্য নহেন; ..সেহেতু ...কেন ...সংসদ সদস্য হিসাবে আপনাকে ....অযোগ্য ঘোষনা করিয়া গেজেট প্রকাশ করা হইবে না এই মর্মে অত্র নোটিশ প্রাপ্তির ১০ (দশ) দিনের মধ্যে কারণ দর্শাইতে আপনাকে অনুরোধ করা হইল। "

What is clearly meant here is not the dispute relating to or arising out of an election but a dispute regarding the right of a person to remain as a Member of Parliament.

The Commission does not deny that validity of the petitioner's nomination was challenged specially on the ground of his holding an office of profit. The objection was rejected by the Returning Officer which means that the nomination paper was accepted as valid. An appeal was filed before the Commission against the acceptance of the nomination paper and the Commission upon hearing dismissed the same. There is no dispute about the fact that the petitioner was allowed to contest the election, he won, and his name was published in the gazette as one of the returned candidates. He subsequently took oath and ever since been performing functions of his office as a Member of Parliament.

Much of the battle of the parties was fought on the 'office-of-profit-front' ie, whether the office of Mayor of a Paurashava is an office of profit. It does not seem to us that the case depends for disposal as much on the question whether a particular office is an office of profit as on the question of jurisdiction of the Commission to issue the notice. In order to put the point in right perspective relevant clauses of Article 66 of the Constitution may be quoted:

Article 66 (1), (2) & 2(f) and (4) of the Constitution read as follows:

> **"66(1)** A person shall subject to the provisions of Clause (2), be qualified to be elected as, and to be, a member of Parliament if he is a citizen of Bangladesh and has attained the age of twenty- five years.
>
> **(2)** A person shall be disqualified for election as, or for being, a member of Parliament who-
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> * * * * * * * *
>
> (f) holds any office of profit in the service of the Republic other than an office which is declared by law not to be disqualified its holder; or
>
> (g) is disqualified for such election by or under any law.
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> * * * * * * * *
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> **(4)** If any dispute arises as to whether a member of Parliament has, after his election, become subject to any of the disqualifications mentioned in clause (2) or as to whether a member of Parliament should vacate his seat pursuant to Article 70, the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Election Commission on such reference shall be final."

A bare reading of the language of the clauses quoted above suggests that Article 66 spells out certain qualifications for being chosen as and for being a Member of Parliament. The language, by its plain meaning, says that a person wishing to be elected as MP and thereafter to remain as MP must fulfill certain conditions and must be free from some physical, social or legal disabilities, technically called 'disqualifications'. The clear constitutional scheme is to constitute a Parliament by citizens of Bangladesh attaining a minimum age of twenty five years who are free from the disqualifications enumerated in

Clause (2) of Article 66 and other disqualifications that may be prescribed by any law.

At the same time clause (4) of the Article provides procedure for removal of an MP in certain circumstances. Clause (4) says, *inter alia,* that if any dispute arises as to whether a Member of Parliament has, after his election, become subject to any of the disqualifications mentioned in clause (2) the dispute shall be referred to the Election Commission to hear and determine it and the decision of the Commission on such reference shall be final.

Article 66 (4) of the Constitution puts a clear fetter on the jurisdiction of the Commission to interfere with disputes raised about an MP having incurred disqualification, after his election. While maintaining the jurisdiction of the Commission in deciding disputes about post-election disqualification of an MP the same is subjected to a reference to be made for the power to be assumed. The Constitution is apparently silent as to who will make the reference. The answer, however, is available in Rule 178 of the Rules of Procedure which provides that the Speaker shall make the reference. The intention of the drafters of the Constitution, therefore, appears to be to draw a line between jurisdictions of the Commission to decide disputes about pre-election disqualification and to decide dispute about an MP having, after his election, incurred the disqualification, ie, post- election disqualification. It is thus clear that the Commission's jurisdiction to take cognizance of a dispute touching upon post-election disqualification of an MP is there but the jurisdiction is subjected to reference to be made by the Speaker.

Given the position that Article 66(4) of the Constitution is intended to mean reference to be made only if an MP has, after his election, become subject to disqualification, can it be said by the same token that the expression 'after his election' *ipso facto* suggests that the Commission is free to question

the competence of an MP to remain in office by reference to his pre-election disqualification? The answer must at the first instance be sought in the law.

Under the Constitution the primary duty of the Commission is to secure due constitution of Parliament through a general election of its members and to hold election to the office of the President. The phrase "securing the due constitution of Parliament" occurring in Article 124 of the Constitution connotes a Parliament constituted by members chosen in accordance with law through a free and fair general election. And it is the Commission which is responsible to ensure free and fair election in accordance with law.

In keeping with the constitutional scheme the RPO provides mechanism, amongst others, for preventing persons suffering disqualifications from getting entry into the election process. According to Article 12(2) (c) of the RPO a candidate needs to sign a declaration on the nomination paper that he is not subject to any of the disqualification for being elected as or being a member. The RPO leaves scope for objection to be raised to nomination. Article 14(2) & (3) empower the Returning Officer, either upon an inquiry made *suo motu* or upon any objection raised, to reject the nomination paper, *inter alia*, on the ground that the candidate is not qualified to be elected as member. There is also an appellate forum created under Article 14(5) for the candidates to challenge before the Commission the decision of the Returning Officer. This is a finality clause which, so far as the Commission is concerned, means that the order passed in appeal is final and cannot be reopened.

The next steps in the law comprises of publication of a list of validly nominated candidates, withdrawal of candidature then publication of the list of contesting candidates and allocation of symbols etc. Once a candidate, whose name appears in the list of contesting candidates, steps into the day of election, the whole array of disputes enters upon a new procedural regime in

which all the different allegations connected with and incidental to election, including allegations about validity of nomination of the returned candidate, his qualification or disqualification for election or for being a member, roll into one single identity ie, 'election dispute' to be presented by an 'election petition' as contemplated under Article 49 of the RPO.

Thus the mechanism set by law to prevent entry, amongst others, of the disqualified persons into Parliament, ie, power of the Returning Officer to settle objections and the appellate power of the Commission, are exhausted before election with the single exception that the Commission retains its constitutional power to question the right of an MP to his office by reference to his disqualification incurred after election subject to reference to be made by the Speaker. The Commission, therefore, is left with no power to question the right of an MP to his office by reference to his pre-election disqualification**.** Our view lends support from the case of *Election Commission v Venkata Rao, AIR 1953 SC 210* and *Lt. Col. Frazand Ali v Province of W. Pakistan, 22 DLR SC 203.*

In *Venkata Rao* the respondent desired to contest the election from a seat of Madras Legislative Assembly. Though he was a released- convict was sill disqualified to contest the election as five years had not elapsed from release as required by law. He applied to the Commission for exemption so as to enable him to contest the election. No reply to the application having been received till the last date of submission of nomination papers he submitted his own. No exception was taken to the same by the Returning Officer or any other candidates at the scrutiny of the nomination papers. Election was held on 14.6.1952 and the respondent having secured highest votes was declared elected on 16.6.1952. The result was published in the official gazette on 19.6.1952 and the respondent took his seat in the Assembly as a member on

27.6.1952. Meanwhile the Commission rejected the respondent's application for exemption and communicated such rejection to the respondent by its letter dated 13.5.1952 which, however, was not received by the respondent. On 3.7.1952 the Speaker read out to the House a communication received from the Commission bringing to his notice the fact that the respondent's application for exemption had been rejected. A question as to the respondent's disqualification having thus being raised, the Speaker referred the question to the Governor of Madras who forwarded the case to the Commission for its opinion as required by Article 192 of the Constitution.

The respondent applied to the High Court under Article 226 of the Constitution contending that Article 192 of the constitution was applicable only where a member became subject to disqualification after he was elected but not where, as here, the disqualification arose before the election. High Court of Madras took the view that Article 192 on its true construction applied only to cases of supervening disqualification and that the Commission had, therefore, no jurisdiction to deal with the respondent's disqualification which arose long before the election. On appeal by the Commission Supreme Court affirmed the view taken by the High Court and held that 'Article 190 (3) and 192(1) are applicable only to disqualification to which a member becomes subject after he is elected as such and that neither the Governor not the Commission has jurisdiction to inquire into the respondent's disqualification which arose long before the election'.

It would be pertinent to mention here that Article 191 and Article 192(1) of the Indian Constitution substantially conform Article 66(2) and 66(4) of our Constitution. Article 192 (1) of the Indian Constitution reads as follows:

> "192. (1) if any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the

> disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.

Article 192, clause (2), however, says that the Governor, before giving any decision on any such question, shall obtain the opinion of the Election Commission.

In *Col. Farzand* case (*supra*) a series of petitions were filed under Article 98(2) of the Constitution, by the Government servants challenging validity of their respective orders of retirement under Article 178 of the Constitution of 1962. All the petitions were heard and dismissed by the High Court. Appeals were filed in the Supreme Court challenging the validity of several constitutional amendments on the ground that the power assumed by the Government for retiring the appellants was not lawfully acquired because the amendments were not brought by the requisite majority of ⅔rd of the total number of members of the National Assembly. The Assembly fell short of ⅔rd members on account of the fact that many members who voted the bill were disqualified to be elected. Having deducted their votes from total votes cast the House lacked ⅔rd majority to pass the constitution amendment bill. High Court of the then West Pakistan relying, amongst others, upon *Venkata Rao* (*supra*) held that there is no provision in Pakistan Constitution or in nay other specific law for dealing with the case of such a pre-existing disqualification. The view taken by the High Court found favour with the Supreme Court. Hamoodur Rahman, CJ, (as his Lordship then was) by reference to Clause (2) of Article 104 of the Constitution, which is similar to Article 66(4) of our Constitution, observed that – 'it will be clear from the language of the Clause itself that it refers to the case of a member becoming

disqualified after his election and not to the case of pre-election disqualification'.

Despite the extent of power of the Commission delimited by law there still remains a lingering question to be answered ie, if any pre-election disqualification of a member of Parliament still continues either by oversight or, for worse, by illegal condonation of the authorities, will he be allowed to continue as MP till rest of the tenure of his office? Clear constitutional position, as expressed in Article 66(2), is that persons suffering disqualifications enumerated thereunder or disqualified by or under any other law shall not be eligible to be elected as or for being member of Parliament. It is difficult, therefore, to accept the proposition that a person should be allowed to remain as a member although Article 66(2) clearly says he cannot. Election petition is brought by a candidate in his individual capacity to settle the contesting claim of the contender's private claim to an office. There appears to be no conflict between a proceedings under a statute initiated to vindicate private interest and a proceeding for an information in the nature of *quo warranto* invoked in the public interest. We can see no reason to say that anything prevents a person from seeking *quo warranto* in the public interest challenging the member's right to sit in the Parliament, by reference to his pre-election disqualification, if the disqualification is still continuing. Again *Col. Farzand Ali* seems to be a case on point.

In a similar situation it was argued in *Col. Farzand Ali* that once the name of the person has been registered on the roll of electors, his nomination papers accepted and he has been allowed to contest the election successfully, his election cannot be challenged in any other manner save under the specific law providing for challenging election, notwithstanding the fact, that no provision has been made in the Constitution or any other law, prescribing a special

procedure to meet such a case. Hamudoor Rahman, CJ, speaking for the Court, expressed his inability to accept the contention for a number of reasons. To quote his Lordship's own words:

> "I regret my inability to accept this contention for more than one reason. Firstly, this would be allowing a person to continue to remain a member of an assembly even though Article 103 of the Constitution says that he cannot. Secondly, because, the dispute raised after an election is not a dispute relating to or arising in connection with an election but a dispute regarding the right of the person concerned from being a Member of an Assembly. An election dispute is a dispute raised by a voter or a defeated candidate in his individual capacity under the statute. It determines the private rights of two persons to the same office but a proceeding for an information in the nature of *quo warranto* is invoked in the public interest. The later seeks to determine the title to the office and not the validity of the election. These are two distinct and independent remedies for enforcement of independent rights, and the mere fact that the disqualification has been overlooked or, what is worse, illegally condoned by the authorities who were responsible for properly scrutinizing a person's right to be enrolled as a voter or his right to be validly nominated for election would not prevent a person from challenging in the public interest his right to sit in the house even after his election , if that disqualification is still continuing. Indeed a writ of quo *warranto* or a proceeding in the nature of information for a *quo warranto*, unless expressly

barred by some statute, is available precisely for such a purpose."

Having thus resolved the question of total lack of jurisdiction of the Commission in issuing the notice the next question that falls to be considered is its power to consider, amongst others, office of a Paurashava Mayor as an 'office of profit' on the basis of a decision taken in one of its meetings and a judgment of the High Court Division holding the office of Mayor of another statutory public authority, ie, City Corporation, as an 'office of profit'. Article 12(1) (c) does not say that the office of Mayor of a Paurashava is an office of profit nor does the judgment referred to say that office of Mayor of a Paurashava is an office of profit. In absence of any express provision of law or a decision of a competent court the Commission appears to have come to its own interpretation by analogical deduction and chose to issue the notice questioning the right of an MP to remain in his office. Such an interpretation of law by the Commission is not only beyond its power but also unknown to law.

We feel called upon to express out considered opinion that under our Constitution any citizen not below the age of twenty five years and not otherwise disqualified, is competent to be elected as and for being a Member of Parliament. The right of a citizen, otherwise qualified, to contest the parliamentary election and thereupon to remain as member cannot be questioned or taken away by the Commission by resort to any means save under express provision of law.

In view of what is stated above we are constrained to hold that the Commission in initiating the proceeding and issuing the notice has clearly overstepped its jurisdiction and the action taken in exercise of a power which did never belong to it. It is in the sense that the proceedings initiated and the

notice issued in connection thereto suffer from total absence of jurisdiction (*coram non- judice)* and a nullity as no proceeding and/or notice in the eye of law. There is, therefore, no reason for the petitioner to respond to the proceeding or notice and thereby allow the proceeding to be concluded to his own peril. Invocation of Article 102 of the Constitution by him, in the fitness of things, cannot be said to be premature in any sense of the term. The contention of Mr. Malik on point of maintainability of the rule before conclusion of the proceedings is, therefore, plainly unacceptable.

In the result, this Rule is made absolute. The impugned notice and the connected proceedings giving rise to the notice are declared to have been issued/initiated without any lawful authority and are of no legal effect and accordingly are quashed. There shall, however, be no order as to cost.

Communicate copies of this judgment to the Respondents at once.

*Md. Habibul Gani, J:*

*I agree*