

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

WRIT PETITION NO. 2617 OF 2015

IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

-AND-

IN THE MATTER OF:

Sarker Md. Tariqul Islam
..... Petitioner

-Versus-

Mr. Shahiduzzaman, Director-General
(Administration), Anti-Corruption Commission,
Segunbagicha, Dhaka-1000.
.....Respondent

Mr. Md. Zahurul Islam Mukul with
Mr. Md. Khairul Alam, Advocates
.....For the petitioner.

Mr. M. Qumrul Haque Siddique with
Mr. Mokarramus Shaklan, Advocates
...For the respondent.

Heard on 08.03.2016, 16.03.2016,
23.03.2016, 24.03.2016, 30.03.2016,
04.05.2016 and 16.05.2016.
Judgment on 26.05.2016.

Present:

Mr. Justice Moyeenul Islam Chowdhury

-And-

Mr. Justice Md. Iqbal Kabir

MOYEENUL ISLAM CHOWDHURY, J:

On an application under Article 102 of the Constitution of the People's Republic of Bangladesh filed by the petitioner, a Rule Nisi was issued calling upon the respondent to show cause as to under what authority he claims to hold the office of the Director-General (Administration) of the Anti-Corruption Commission, Dhaka in violation of the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 (since repealed) and the provisions of Section 5(4) of the Surplus Public Servants Absorption Ordinance, 1985 and/or such other or further order or orders passed as to this Court may seem fit and proper.

The case of the petitioner, as set out in the Writ Petition, in short, is as follows:

The petitioner is a practising lawyer of the Supreme Court of Bangladesh and as such he is interested in the rule of law. Anyway, on several occasions, many news items were published in the national dailies about internal corruption and corrupt practices in appointing responsible officers of the Anti-Corruption Commission (formerly Bureau of Anti-Corruption). Thereafter he collected some papers and documents and came to know that the respondent Mr. Shahiduzzaman was a Sub-Divisional Executive Officer of Bangladesh Jatiyo Jubo Sangstha which was subsequently abolished by the Government. The respondent passed the Secondary School Certificate (SSC) examination in the First Division, Higher Secondary Certificate (HSC) examination in the Second Division and B.Sc. (Hons.) and M.Sc. in the Third Class. After abolition of the project, the respondent was declared surplus by the Government. Subsequently the respondent was absorbed as Inspector of Taxes under the National Board of

Revenue, Dhaka on 13.09.1983 as per Section 5(1) of the Surplus Public Servants Absorption Ordinance, 1985. The post of Inspector of Taxes is a 3rd Class post of the National Board of Revenue. Because of his poor academic qualifications, the respondent was nominated for the said post and the same was accepted by him. While he was in service as Inspector of Taxes under the National Board of Revenue, another process for appointment of District Anti-Corruption Officer (DACO) was initiated by the Government and a direction was issued for immediate filling up of the vacant posts of DACO vide Office Memo No. 1E-16/CD(AC-1)/83(Pt)-28 dated 16.01.1984. However, the respondent, in connivance with some officials of the Government, managed a nomination for the post of DACO by suppressing the fact of his absorption in the post of Inspector of Taxes under the National Board of Revenue. The subsequent nomination and appointment of the respondent as DACO as a surplus public servant was in clear violation of the Surplus Public Servants Absorption Ordinance, 1985. Besides, he was not eligible for appointment as DACO under the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 (since repealed). But nevertheless, he was appointed as DACO through underhand means and backstage manoeuvres. As he was absorbed as DACO as a surplus public servant for the second time illegally and as he had not the required qualifications for appointment as DACO under the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 (since repealed), he can not hold the present position of the Director-General of the Anti-Corruption Commission. That being so, the petitioner has come up with the instant Writ Petition and obtained the Rule.

In the Supplementary Affidavit dated 24.11.2015 filed on behalf of the petitioner, it has been stated that as per Annexure-‘C’ to the Writ Petition (Office Memo dated 16.01.1984), serial nos. (a) 1-5 have been mentioned for direct recruitment wherein the post of DACO stands at serial no. 1. After issuance of Annexure-‘C’, the respondent somehow managed to get absorbed in the post of DACO on 07.02.1984 as a surplus officer of Bangladesh Jatiyo Jubo Sangstha in contravention of that Annexure-‘C’.

The Rule has been contested by the respondent by filing an Affidavit-in-Opposition. His case, as set out in the Affidavit-in-Opposition, in brief, is as follows:

Through a competitive selection process, the respondent was appointed in the service of the republic as Sub-Divisional Executive Officer (Class-1 post) of Bangladesh Jatiyo Jubo Sangstha on 03.01.1981. In 1983, Bangladesh Jatiyo Jubo Sangstha was abolished by the Government and all officers and employees of the said Sangstha were declared surplus Government employees and were assured that they would be absorbed in various Government departments in no time. However, the Government temporarily nominated the respondent to the post of Inspector of Taxes, a 3rd Class post, only for transitional phase. He was constrained to join as Inspector of Taxes under the National Board of Revenue so as to save his service lien. On 08.03.1984, the then Bureau of Anti-Corruption (BAC) issued a letter to the Ministry of Establishment and Reorganization selecting some candidates including the respondent for the post of DACO. For absorption of Surplus Government Servants in different posts including the post of DACO, a meeting of the Departmental Promotion Committee-1 was

held at the office chamber of the Cabinet Secretary on 28.03.1984. In that meeting, the Committee scrutinized the bio-data of the available candidates and accepted the nomination of the recommended candidates including that of the respondent for absorption in the post of DACO against the existing vacancies and considering the past experiences of the officers, the requisite qualifications were relaxed for absorption. On 26.04.1984, the respondent was appointed to the post of DACO provisionally by way of absorption and on 13.05.1984, he was posted as DACO in Mymensingh. Subsequently because of his meritorious service, he was promoted to the post of Deputy Director of the then Bureau of Anti-Corruption by the Memo dated 15.06.1993 and he discharged his duties as Deputy Director of the then Bureau of Anti-Corruption with sincerity, honesty, loyalty and due diligence till the abolition of the Bureau of Anti-Corruption and its replacement by the Anti-Corruption Commission in 2004. By operation of law, the respondent stood absorbed in the service of the Anti-Corruption Commission in the post of Deputy Director in 2004. Because of his satisfactory service record, he was promoted to the post of Director of the Anti-Corruption Commission in due course on 22.04.2009. Thereafter a gradation list of Directors of the Anti-Corruption Commission was prepared and regard being had to the academic qualifications and performance of the respondent, he was placed at the top of the gradation list published under Memo No. দুদক/১০-২০১৩(বিবিধ)/সংস্থাপন/৩১৯৪৩ dated 27.11.2013. On 31.12.2013, he was given current charge of the post of Director-General (Administration, Establishment and Finance). On 28.04.2014, the Anti-Corruption Commission in a meeting found him eligible for promotion to the post of

Director-General and accordingly the Commission promoted him to the post of Director-General by a Notification bearing No. দুদক/১৮-২০১১(গ)/সংস্থাপন/অংশ-১/১২৯২৬ dated 04.05.2014. He was legally and validly absorbed in the then Bureau of Anti-Corruption as DACO and subsequently he was promoted to different higher posts up to the level of Director-General of the Anti-Corruption Commission as per law. Against this backdrop, the Rule is liable to be discharged with costs.

In the Supplementary Affidavit-in-Opposition dated 25.05.2016 filed on behalf of the respondent, it has been stated that on 02.07.2015, the respondent completed his 59(fifty-nine) years and as per the relevant Rules, he was granted Post-Retirement Leave (PRL) for 1(one) year from 03.07.2015 to 02.07.2016. But due to his honest and satisfactory rendition of service to the Anti-Corruption Commission, he was again appointed as Director-General thereof on contractual basis for a period of 1(one) year. He joined the contractual post of the Director-General on 23.08.2015. Since at the moment, the respondent is a contractual appointee, no writ of quo warranto lies against him.

At the outset, Mr. Md. Zahurul Islam Mukul, learned Advocate appearing on behalf of the petitioner, submits that admittedly the respondent was first absorbed as Inspector of Taxes under the National Board of Revenue on 13.09.1983 and thereafter he was absorbed in the Bureau of Anti-Corruption as DACO for the second time on 26.04.1984 and this second absorption of the respondent as DACO in the then Bureau of Anti-Corruption on 26.04.1984 is a clear contravention of Section 5(4) of the Surplus Public Servants Absorption Ordinance, 1985.

Mr. Md. Zahurul Islam Mukul further submits that the respondent had not the required qualifications for direct recruitment as DACO under the then Bureau of Anti-Corruption in view of the fact that for direct recruitment of a person to the post of DACO, he must have First Class Master's degree or Second Class Master's degree with Second Class Honours degree from a recognized University as evidenced by the schedule of the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 (since repealed) and Annexure-'C' dated 16.01.1984 provides that the posts under sub-paragraph (a) will have to be filled up with personnel who will be required to do special type of job as done by police personnel and selection and appointment of persons for these posts including the post of DACO shall be made keeping this factor in view and as such, the Bureau of Anti-Corruption will make recruitment for these posts directly and as the respondent had 3rd Class in both the Honours and Masters examinations, he was not qualified for direct appointment as contemplated by Annexure-'C' to the Writ Petition and in that view of the matter, the appointment of the respondent as DACO under the then Bureau of Anti-Corruption was clearly without lawful authority and of no legal effect.

Mr. Md. Zahurul Islam Mukul also submits that as the appointment of the respondent as DACO under the then Bureau of Anti-Corruption was illegal on the face of it, his subsequent promotion up to the post of Director-General of the Anti-Corruption Commission must go. In support of this submission, Mr. Md. Zahurul Islam Mukul has drawn our attention to the decision dated 16th April, 2015 passed in the case of Girdhar Lal

Tripathi...Vs...Tenughat Vidyut Nigam Limited which was downloaded from the Internet.

Mr. Md. Zahurul Islam Mukul next submits that the procedure of quo warranto confers jurisdiction and authority on the Judiciary to control executive action in the matter of making appointment to public offices against the relevant statutory provisions and as the office of the Director-General of the Anti-Corruption Commission is a public office, this writ of quo warranto lies against him because of his illegal absorption as DACO in the then Bureau of Anti-Corruption and as his appointment as DACO was contrary to the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 and the provisions of Section 5(4) of the Surplus Public Servants Absorption Ordinance, 1985, this Rule is maintainable and the respondent must vacate his office of the Director-General of the Anti-Corruption Commission. In this regard, Mr. Md. Zahurul Islam Mukul relies upon the decision dated 13.08.2014 of the Delhi High Court in the case of N. Gopaldaswami...Vs...The Union of India which was also downloaded from the Internet.

Mr. Md. Zahurul Islam Mukul also submits that although the respondent being the Director-General works under the Anti-Corruption Commission headed by the Chairman of the Commission, yet the fact remains that he performs some of his functions independently and in this perspective, it can not be said that the respondent is not holding any 'public office' within the meaning of Article 102 of the Constitution and by that reason, because of his unlawful appointment as DACO, he is liable to vacate the office of the Director-General of the Anti-Corruption Commission.

Per contra, Mr. M. Qumrul Haque Siddique, learned Advocate appearing on behalf of the respondent, submits that it is true that initially the respondent was absorbed as Inspector of Taxes under the National Board of Revenue in 1983; but in 1984, he was absorbed for the second time as DACO before the promulgation of the Surplus Public Servants Absorption Ordinance, 1985 and in that view of the matter, the second absorption of the respondent as DACO under the then Bureau of Anti-Corruption is a 'fait accompli' and a past and closed transaction.

Mr. M. Qumrul Haque Siddique next submits that the Surplus Public Servants Absorption Ordinance, 1985 was given retrospective effect from the 16th day of December, 1971 except Section 3 which took effect on the 17th day of June, 1975 and as indisputably there was no existence of the Surplus Public Servants Absorption Ordinance, 1985 at the time of first absorption of the respondent as Inspector of Taxes under the National Board of Revenue and at the time of his second absorption as DACO under the then Bureau of Anti-Corruption in 1984, the retrospective effect given to the said Ordinance of 1985 should be deemed to be beneficial for the persons to be absorbed in the future and to cover up the cases of the persons already declared surplus by the Government.

Mr. M. Qumrul Haque Siddique also submits that the appointment of the respondent as Director-General (Administration, Establishment and Finance) can not be termed contrary to law or in violation of any statutory rules in view of the fact that his promotion to the post of Director-General was given, regard being had to the provisions of the Anti-Corruption Commission (Employees) Service Rules, 2008 which hold the field as of to-

day and as such the submission advanced on behalf of the petitioner that the respondent was not qualified to be appointed as DACO under the then Bureau of Anti-Corruption in accordance with the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 is of no consequence.

Mr. M. Qumrul Haque Siddique next submits that as the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 were not applicable for consideration for promotion of the respondent to the post of Director-General and as he was found to be eligible to be promoted to that post by the competent authority as per the law in force, the instant Rule is misconceived.

Mr. M. Qumrul Haque Siddique also submits that the respondent is merely an employee of the Anti-Corruption Commission and no sovereign power or function is attached to his office and as per Section 12 of the Anti-Corruption Commission Act, 2004, all powers for combating corruption is vested in the Commission headed by the Chairman of the Commission and the Commission consists of 3(three) Commissioners including the Chairman of the Commission and in such a posture of things, the post of the Director-General of the Anti-Corruption Commission is not a “public office” within the meaning of the term as used in Article 102 of the Constitution of Bangladesh and therefore the Rule is liable to be discharged.

Mr. M. Qumrul Haque Siddique next submits that the post of the Director-General (Administration, Establishment and Finance) of the Anti-Corruption Commission is not a “public office” as this office has not been created by the Constitution or by the Legislature and only the posts of the Commissioner and the Secretary have been created by the Anti-Corruption

Commission Act, 2004 and the other posts including the post of the respondent have been created by the Anti-Corruption Commission (Employees) Service Rules, 2008 and therefore the Rule is not maintainable.

Mr. M. Qumrul Haque Siddique also submits that the Anti-Corruption Commission Act, 2004 has not delegated or conferred any duties or powers upon the post of the respondent; rather as per Section 12 of the Anti-Corruption Commission Act, the Chairman is the Chief Executive of the Commission and he along with other Commissioners will exercise all powers and duties conferred upon them by the Act of 2004 and on this score also, the Rule is liable to be discharged.

Mr. M. Qumrul Haque Siddique further submits that as an employee of the Anti-Corruption Commission, the respondent is not independent in the discharge of his functions and duties and the Commissioners and the Secretary of the Commission are the superior authorities of the respondent and as the respondent has to work in accordance with the orders and decisions of the Anti-Corruption Commission, he can not exercise any sovereign power independently and that being so, he can not be said to hold any 'public office' within the meaning of Article 102 of the Constitution.

Mr. M. Qumrul Haque Siddique next submits that unlike the tenure of the Commissioners of the Anti-Corruption Commission, the tenure of the post of the respondent is not fixed and as per Rule 54(2) of the Anti-Corruption Commission (Employees) Service Rules of 2008, the competent authority, by paying 90(ninety) days salary or by sending 90 (ninety) days notice, may terminate the job of the respondent and hence the post of the respondent is not a public office.

In a last-ditch attempt, Mr. M. Qumrul Haque Siddique submits that during the pendency of the Rule, the scenario has changed and after going on Post-Retirement Leave (PRL) as Director-General of the Anti-Corruption Commission, the respondent was appointed on contractual basis to that post for a period of 1(one) year and it is a settled proposition of law that no writ of quo warranto lies against a contractual appointee and on this ground also, the Rule should be discharged.

In support of the above submissions, Mr. M. Qumrul Haque Siddique has adverted to the decisions in the cases of Abdur Rahman (Md)...Vs...Group Captain (Retd) Shamim Hossain and others, 49 DLR (HCD) 628; the King...Vs...Speyer and the King...Vs...Cassel, (1916) 1 K.B. 595; the decision dated 28.08.2006 of the Indian Supreme Court passed in the case of B. Srinivasa Reddy...Vs...Karnataka Urban Water Supply and Drainage Board Employees' Association and others downloaded from the Internet in case No. Appeal (Civil) 3719 of 2006 analogously heard with Civil Appeal No. 3722 of 2006 corresponding to (2006) 11 SCC 731 and the case of Bangladesh Institute of Planners ...Vs...Government of Bangladesh and others, 13 BLC (HCD) 494.

We have heard the submissions of the learned Advocate Mr. Md. Zahurul Islam Mukul and the counter-submissions of the learned Advocate Mr. M. Qumrul Haque Siddique and perused the Writ Petition, Supplementary Affidavit, Affidavit-in-Opposition, Supplementary Affidavit-in-Opposition and relevant Annexures annexed thereto.

Admittedly the respondent was a Sub-Divisional Executive Officer of Bangladesh Jatiyo Jubo Sangstha and that post carried the pay scale of

Class-1 Gazetted Officer. It is further admitted that the Bangladesh Jatiyo Jubo Sangstha was abolished at a subsequent stage and the respondent and others were declared surplus by the Government. It is also undisputed that in 1983, the respondent was absorbed as Inspector of Taxes under the National Board of Revenue for the first time and thereafter he was absorbed as DACO under the then Bureau of Anti-Corruption for the second time in 1984. In this regard, a crucial question has arisen as to whether the second absorption of the respondent as DACO under the then Bureau of Anti-Corruption is violative of the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983 (since repealed) and the provisions of Section 5(4) of the Surplus Public Servants Absorption Ordinance, 1985.

Indisputably the respondent had 3rd Class both in Honours and Masters examinations and by that reason, he was not qualified for direct appointment as DACO under the then Bureau of Anti-Corruption as per the schedule of the Gazetted Officers (Bureau of Anti-Corruption) Recruitment Rules, 1983, regard being had to Annexure-‘C’ to the Writ Petition which contemplates that the post of DACO along with some other posts are to be filled up by direct recruitment. So apparently we find a violation of the aforesaid Rules of 1983 in the matter of appointment of the respondent as DACO under the then Bureau of Anti-Corruption in 1984.

Section 5(4) of the Surplus Public Servants Absorption Ordinance, 1985 provides that once a surplus public servant is absorbed in a post under Sub-Section (1), it shall be final and he shall not be entitled to be re-absorbed in any other post. The provisions of Section 5(4) of the Ordinance of 1985 are clear and unambiguous. In this respect, Mr. M. Qumrul Haque

Siddique has submitted that although the Surplus Public Servants Ordinance was promulgated in 1985, it was given retrospective effect from 16th day of December, 1971 (excepting Section 3 thereof) and at the time of either first absorption of the respondent as Inspector of Taxes under the National Board of Revenue or at the time of second absorption of the respondent as DACO under the then Bureau of Anti-Corruption, this Ordinance of 1985 was not in force and that being so, at the relevant point of time, the second absorption of the respondent as DACO under the then Bureau of Anti-Corruption was not illegal and on that count, it was a past and closed transaction and this Surplus Public Servants Absorption Ordinance is basically meant for future absorption of surplus employees in the public service. This submission of Mr. M. Qumrul Haque Siddique, according to us, can not be brushed aside at all.

Coming back to the decision dated 16th April, 2015 in the case of Girdhar Lal Tripathi...Vs...Tenughat Vidyut Nigam Limited, the Jharkhand High Court expressed itself in paragraph 37 in the following manner:

“37. It is settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development can not validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a

person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin.”

Relying on the above observation of the Jharkhand High Court, Mr. Md. Zahurul Islam Mukul has asserted that since the appointment of the respondent as DACO was illegal, his subsequent promotions up to the post of the Director-General of the Anti-Corruption Commission must go. This submission of Mr. Md. Zahurul Islam Mukul will be answered at a later stage of the judgment.

In the decision dated 13.08.2014 of the Delhi High Court in the case of N. Gopaldaswami...Vs...The Union of India referred to by Mr. Md. Zahurul Islam Mukul, it was spelt out in paragraph 34:

“34. We must also notice the observations of the Supreme Court in the CVC case with regard to a writ of quo warranto. The Supreme Court observed that the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions. Before a

citizen can claim a writ of quo warranto, he must satisfy the Court, inter alia, that the office in question is a public office and it is held by a person without legal authority and that leads to the inquiry as to whether the appointment of the said person has been in accordance with law or not. The Supreme Court observed that a writ of quo warranto is issued to prevent a continued exercise of unlawful authority. With reference to R. K. Jain...Vs...Union of India: MANU/ SC/ 0291/ 1993: (1993) 4 SCC 119, the Supreme Court, in the CVC case, observed that judicial review is concerned with whether the incumbent possessed the requisite qualification for appointment and whether the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable. It was noted that when a candidate is found qualified and eligible and is accordingly appointed by the executive to hold a public office, the Court can not, in judicial review, sit over the choice of the selection. A reference was also made to the earlier Supreme Court decision

in the case of Hari Bansh Lal (supra), wherein the Supreme Court held that a writ of quo warranto lies only when the appointment is contrary to the statutory provisions. It was further noted that in Hari Bansh Lal (supra), the Supreme Court had observed that suitability of a candidate for appointment to a post is to be judged by the appointing authority and not by the Court unless the appointment is contrary to the statutory provisions or rules.”

From this decision, it is crystal clear that in a writ of quo warranto, the respondent must hold a public office without any legal authority and unless he does so, no writ of quo warranto will lie.

In the decision in the case of B. Srinivasa Reddy...Vs...Karnataka Urban Water Supply and Drainage Board Employees' Association and others, (2006) 11 SCC 731, the Supreme Court of India stated:

“Mr. Raju Ramachandran, learned Senior Counsel appearing for the Trade Union, fairly conceded that the Government has unrestricted power to make contractual appointment. Even otherwise, the Government, in our opinion, has the undoubted power to make a contractual appointment until further orders. The finding to the contrary is ex-facie erroneous.

The notification dated 31.01.2004 clearly states that the appointment is on contract basis and until further orders. While laying down the terms of appointment in its order dated 21.04.2004, the Government of Karnataka clearly stated that “term of the contractual appointment of Sri B. Srinivasa Reddy shall commence on 1st February, 2004 and will be in force until further orders of the Government and this is a temporary appointment.” Section 6(1) of the Act categorically states that the Managing Director shall hold office during the pleasure of the Government. Powers and functions of the Board are laid down in Chapter V of the Act. A reading of the Act clearly shows that neither the Board nor its Managing Director is entrusted with any sovereign function. Black’s Law Dictionary defines ‘public office’ as under:

‘Public Office: Essential characteristics of “public office” are (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of sovereign functions of Government, key element of such test is that “officer” is carrying out sovereign function.

Spring...Vs...Constantino 168 Conn. 563, 362 A. 2d 871, 875. Essential elements to establish public position as “public office” are: position must be created by Constitution, Legislature or through authority conferred by Legislature, portion of sovereign power of Government must be delegated to position, duties and powers must be delegated to position, duties and powers must be defined, directly or impliedly, by Legislature or through legislative authority, duties must be performed independently without the control of superior power other than law, and position must have some permanency and continuity, State ex rel. E. li Lilly & Co....Vs...Gaertner, Mo. App 619 S.W. 2d 6761, 764.”

In the decision in the case of Abdur Rahman (Md)...Vs...Group Captain (Retd) Shamim Hossain and others reported in 49 DLR (HCD) 628, it was held in paragraphs 7, 9 and 10 as follows:

“7. In the case of Munshi Abdul Jabbar and others...Vs...Barisal Municipal Committee and

others reported in 20 DLR 1186, a Division Bench of the Dhaka High Court held that collecting sarker of the Municipal Committee is not holding any public office. In coming to the said conclusion, learned Judges quoted the definition of ‘public office’ from Ferri’s book “Extraordinary Legal Remedies” at page 166 which is as follows:

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.

9. Though the words “public office” have not been defined in Article 152 of the Constitution of the People’s Republic of Bangladesh, there is mention of the same in Article 102(2)(b)(ii) of the

Constitution. But in Article 152 the words, “public officer” have been defined as a “person holding or acting in any office of emolument in the service of the Republic.” In the case of Abu Bakkar Siddique...Vs...Shahabuddin Ahmed reported in 49 DLR 1, a Division Bench of this Court held:

President, Prime Minister, Judges of the Supreme Court and other holders of office under the Constitution do not come within the purview of the definition clause, the service of the Republic.” Thus it appears that not only Ministers and Judges of Superior Courts but also Members of the Parliament, all other elected office-holders and holders of other constitutional offices are holding public offices.

10. In our view, the words “public office” in the aforesaid Article 102(2)(b)(ii) mean 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.”

In the King...Vs...Speyer and the King...Vs...Cassel, (1916) 1 K. B. 595, there is a reference to the Chief Justice Tindal's view in Darley...Vs...The Queen (12 Cl. & F. 542) that the information will not lie in the case of "the function or employment of a deputy or servant held at the will and pleasure of others," nor, as was pointed out in Reg...Vs...Lords Commissioners of the Treasury (L. R. 7 Q. B. 387, 394), will it lie where the party is amenable to the Crown, the reason being that if the appointment can be revoked at the will of the Crown, quo warranto is not wanted.

In the King...Vs...Speyer and the King...Vs...Cassel, it was observed:

"Many of the authorities cited to us in the course of the argument were dealt with in that case and reviewed by Tindal C.J. He expressed his conclusion in the oft-quoted words (12 Cl. & F. 541): 'After the consideration of all the cases and dicta on this subject, the result appears to be, that this proceeding by information in the nature of quo warranto will lie for usurping any office, whether created by charter alone, or by the Crown, with the consent of Parliament, provided the office be of a public nature, and a substantive office, not merely the function or employment of a deputy or servant held at the will and

pleasure of others.’ The test to be applied is whether there has been usurpation of an office of a public nature and an office substantive in character, that is, an office independent in title.”

In the case of Bangladesh Institute of Planners...Vs...Government of Bangladesh and others reported in 13 BLC (HCD) 494, the following paragraphs appear to be relevant for our purpose:

“38. Let us see, what is the meaning of public office. Under Black’s Law Dictionary the Public Office is a position whose occupant has legal authority to exercise a government’s sovereign power for a fixed period.

39. The writ petition lies against a person who claimed or usurped a public office, franchise or liberty, to inquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. Broadly stated, the quo warranto proceeding affords a judicial inquiry in which any person holding an independent, substantive, public office, or franchise, or liberty, is called upon to show by what right or authority he holds the said

office, franchise or liberty; if an enquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matters of making appointment to public offices against the relevant statutory provisions; it also protects the public/citizens from being deprived of a public office to which they may have a right.

41. In all the cases, it appears that the public office means an office which is independent, substantive public office or franchise or liberty. Let us see, what is the meaning of substantive nature of office? It has been held in the case of *Darley...Vs...R* (1846) 12 Cl. & Fin 520, HL and the case of *King...Vs...Speyer & King...Vs...Cassel* reported in (1916) 1 K. B. 595 that substantive nature of office means an office having substantive character i.e. an office independent in title, and if the holder of the office was an independent official, not one

discharging the functions of a deputy or servant at the will and pleasure of others.”

In view of the ‘ratios’ enunciated in the above-mentioned decisions of various jurisdictions, it leaves no room for doubt that for a procedure of quo warranto, the holder of office must hold a public office and that office must be substantive in character. In other words, the holder of that office must function independently and he must be mandated by law to exercise some sovereign functions of the Government.

Reverting to the case in hand, we find that unless the respondent holds any public office, no writ of quo warranto will lie. Undeniably the respondent is a deputy and that being so, he carries out the orders and decisions of the Anti-Corruption Commission. He can not perform his functions independently. Precisely speaking, he does not hold any substantive office, let alone the question of exercising any sovereign function of the Government.

What is more, Rule 54(2) of the Anti-Corruption Commission (Employees) Service Rules of 2008 runs as under:

“৫৪(২) এই বিধিমালায় ভিন্নরূপ যাহা কিছুই থাকুক না কেন,
উপযুক্ত কর্তৃপক্ষ কোন কারণ না দর্শাইয়া কোন কর্মচারীকে
নব্বই দিনের নোটিশ প্রদান করিয়া অথবা নব্বই দিনের বেতন
নগদ পরিশোধ করিয়া তাহাকে চাকুরী হইতে অপসারণ
করিতে পারিবে।”

From the provisions of Rule 54(2) of the Anti-Corruption Commission (Employees) Service Rules of 2008, it is manifestly clear that the respondent is removable from his office at the sweet will of the Anti-Corruption

Commission. What we are driving at boils down to this: his tenure of office as Director-General of the Anti-Corruption Commission is not fixed. So the office of a deputy in the Anti-Corruption Commission is not a public office, as we see it.

Assuming for the sake of argument that the respondent was illegally appointed as DACO under the then Bureau of Anti-Corruption in 1984, even then this writ of quo warranto will not lie. To begin with, his office is not a public office. Moreover, he does not perform any sovereign function of the Government. Besides, his tenure of office as Director-General of the Anti-Corruption Commission is not fixed in view of the provisions of Rule 54(2) of the Anti-Corruption Commission (Employees) Service Rules of 2008. On top of that, during the pendency of the Rule, the scenario has changed after his retirement and presently he is a contractual appointee for one year and as a contractual appointee, no writ of quo warranto lies against him. Had the respondent held any public office in the manner as detailed above, we would have accepted the submission of Mr. Md. Zahurul Islam Mukul that as the very appointment of the respondent as DACO was illegal, his subsequent promotions up to the post of the Director-General of the Anti-Corruption Commission must go.

Having considered the various aspects of the case, we are of the considered opinion that no writ of quo warranto lies against the respondent as he is not a holder of any public office and more so, when he is admittedly a contractual appointee at the moment in the post of the Director-General of the Anti-Corruption Commission.

With the above observations and findings, the Rule is disposed of without any order as to costs.

MD. IQBAL KABIR, J:

I agree.