

Chapter 2

HABEAS CORPUS

2.1 Objectives

The term 'habeas corpus' means "we have the body and we have rights to save the body". Habeas corpus is a procedure for securing the personal liberty which has been mentioned in article 32 of the Bangladesh Constitution. We have right to liberty; this is the object of habeas corpus. The law-enforcing agencies are bound to scrutinize why he/she is in prison and have to explain that his/her detention is authorized by law. Not only article 31 of the Bangladesh Constitution, but also article 3 of *Universal Declaration of Human Rights* (UDHR) 1948 upholds personal liberty. An application to the High Court Division of any person the Court may direct the person an immediate release that said detenu is wrongfully deprived of his personal liberty.

As to question about the meaning of custody has been determined in the case of *Bangladesh v. Ahmed Nazir*,¹ the Court states that expression custody is not confined to executive custody and includes any private person also. All unlawful detentions by law-enforcing agencies involve violations of fundamental rights which are guaranteed by article 31, 32 and 33 of Bangladesh Constitution and articles 2, 3, 5 and 9 of *Universal Declaration of Human Rights* (UDHR) 1948.

2.2 Development of Habeas Corpus

According to article 102 (2) (b) (i) of the Bangladesh Constitution, an aggrieved person has right to move the High Court Division for immediate release on the ground that his detention is without lawful authority and such detention is unlawful in manner.

¹ 27 DLR 1975 (AD) 41.

Now question arises, what are the judicial meanings of the term ‘without lawful authority’ and ‘in an unlawful manner’? This question has been disputed in the case of *Abdul Latif Mirza v. Bangladesh*.²

In *Abdul Latif Mirza v. Bangladesh*,³ the Appellate Division has given judgment on whether the order of detention was invalid and directed that the detenu be released forthwith on the ground that the principle of natural justice is inherent in every society aspiring for a civilized life and, according to third paragraph of the preamble of the Constitution the aim of the state is a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social shall be secured which the High Court Division failed to take into consideration. After hearing, the judges of the High Court Division held the order of detention was valid and after leave to appeal was granted the Appellate Division altered the decision of High Court Division and declared that the order of detention was invalid.

Is controversy regarding custody of a minor child maintainable by habeas corpus? Yes, controversy regarding custody is maintainable under article 102 of the Bangladesh Constitution which was established in the writ petition *Abdul Jalil v. Sharon Laily Brum*,⁴ the Appellate Division verdict that the welfare of the children which might be the determining factor in deciding the question of custody of children whether in a proceeding for guardianship under the Guardians and Wards Act, 1980.

The Appellate Division has given judgment on the ground that the custody of the minor children was given to the mother based on the principle in section 352 of Mulla Mohomedan law. Habeas Corpus is maintainable, supporting this language Dr. Kamal given reference from the case of *Dr. Mrs Veena Kapoor*.⁵ Ozair Farooq, argued that the High Court Division ought to have dismissed the writ petitions as not maintainable in as much there was no finding made by it that the appellant Abdul Jalil illegally removed the children from the custody of the mother as alleged in the writ petitions or that the appellant had been holding them without any lawful authority or in an unlawful manner. He also argued that the family court was in seisin of the matter of guardianship, the High

² 31 DLR (1979) AD1.

³ 31 DLR (1979) AD 1.

⁴ 50 DLR (1998) AD55.

⁵ AIR 1982 SC 792.

Court Division ought not to have exercised its discretionary jurisdiction and foreclosed the said proceeding.

In his support, he has given the definition of the term ‘welfare’ which is as follows: “Welfare also includes environment, namely, social, cultural and religious in which the children are likely to grow up.”⁶ Unfortunately, the High Court Division failed to exercise ‘welfare’ principle, which was incumbent upon it but merely relied on the simple rule of age as in section 152 of Mulla book for giving custody of the children to the mother. In this connection be referred to *Mohammedan Law by Syed Ameer Ali*.⁷

In *Tafur Uddin v. State*,⁸ the Court held that an order of detention is malafide if it is based on improper or irrelevant grounds and it is the duty of the officer who arrested the person to justify his action by disclosing reasonable grounds which will satisfy the judicial conscience.

In *Amaresh Chandra Chakravarty v. Bangladesh*,⁹ the detaining authority mentioned nothing in the detention order except that the detention was necessary to prevent prejudicial acts mentioned in Rule 2 (c) /5 (i) of the Emergency Power Rules and the Court struck down the order as mere mention of the numbers of the two clauses of the rules showed total lack of application of mind.

In *Abu Bakar Siddique v. State*,¹⁰ in declaring the detention illegal, the Court verdict that this boy is a student of 2nd years honors class. He is in the formative stage. He has plunged himself in it because it is immediately after social upheaval that has followed the liberation war. In this context the opinion is that a degree of consideration, care and sympathy is to be taken for such young mind and they should not be deflowered at this stage by being taken into custody.

In *Reazul Islam v. State*,¹¹ the detenu has not indulged in any prejudicial activities so as to warrant a detention nor the respondent could being record before us to show that the material existed.

⁶ *Abdul Jail v. Sharon Laily Begum*, 50DLR (1998)AD 58.

⁷ Vol. 2 (1975) 288.

⁸ 27 DLR (AD) 18.

⁹ Writ Petition No. 375 of 1977 (Unreported).

¹⁰ Writ Petition No. 375 of 1977 (Unreported).

¹¹ Writ Petition no. 398 of 1977 (Unreported).