IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(Criminal Miscellaneous Jurisdiction)

Criminal Miscellaneous Case No. 1246 of 2002 with Criminal Miscellaneous Case Nos. 218, 5291, 5115, 2844, 4584, 3236, 3540, 3541, 1627 of 2003

IN THE MATTER OF:

Anwar Hossain (Md) and others

----------**Petitioners**

-VERSUS-

State and others

----------**Respondents**

None appears- For the Petitioner in criminal Miscellaneous case No. 1246 of 2003.

Ashok Kumar Banik, Advocate—For the Petitioner in Criminal Miscellaneous Case No. 218 of 2003.

MA Wahab, Advocate—For the Petitioner in Criminal Miscellaneous Case No. 5291 of 2003.

Tapan Kanti Das, Advocate—For the Petitioners in Criminal Miscellaneous Case Nos. 5115 of 2003 and 3236 of 2003.

Abdur Rezzaque Khan, Additional Attorney-General with MA Rouf. Deputy Attorney General ABM Waliur Rahman Khan, Assistant Attorney General and Fazilatunnessa, Assistant Attorney General--- For the State-Respondent.

Judgment on: The 27th May, 2003.

Present :

Mr. Justice SK Sinha.

And

Mr. Justice S Chaklader.

SK Sinha J:

The determination of these matters involves question of law and jurisdiction including a question, of law and jurisdiction including a question, whether a District Magistrate or an Additional District Magistrate, appointed under section 10 of the Code of Criminal Procedure has powers to pass orders of detention on a person under section 3(2) of the Special Powers Act, 1974, shortly the Act, who has acted or is acting or is about to act in prejudicial activities in Metropolitan Areas.

These applications under section 491 of the Code of Criminal Procedure, in which the petitioners pray to this Court to declare that the orders made by the District Magistrate, Dhaka under Memo dated 17-12-2002 detaining Md. Anwar Hossain, under Memo dated 4-12-2002 detaining Sohel, under memo dated 1-1-2003 detaining Md. Nur Islam, under Memo dated 1-1-2003 detaining Sheikh Nizamul Huq, under Memo dated 23-12-2002 detaining A Malek, under Memo dated 21-9-2002 detaining Mahbubul Alam @ Roni and under Memo dated 4-12-2002 detaining Md. Emdadul Hoque Rana, the District Magistrate, Chittagong by order under Memo dated 26-1-2003 detaining Abdur Rahimand under Memo dated 26-12-2002 detaining Md. Masud and the District Magistrate, Khulna under Memo dated 12-4-2003 detaining Monjila Begum, have been issued without lawful authority and of no legal effect and to quash the said orders. In all the cases, the detenus are said to have indulged in prejudicial activities within the Metropolitan

Areas of Dhaka, Chittagong and Khulna for which the orders were passed for the purpose of preventing them from indulging in prejudicial activities.

The main proposition, which the learned Advocates seek to establish, is that the District Magistrates have no jurisdiction to make orders of preventive detention detaining the detenus who are said to have indulged in prejudicial activities within the Metropolitan Areas. Learned Additional Attorney General, on the other hand, contends that the powers of a District Magistrate or an Additional District Magistrate has no power to make an order of detention on a person has not been curtailed even after the amendment of section 10 of the Code of Criminal Procedure by Ordinance No. LXXXVI of 1976. He further contends that even if it is assumed that a District Magistrate has no power to make an order of detention in respect of a person in Metropolitan Area, the powers of an Additional District Magistrate has not been affected by reason of such amendment made in the Code. In support of his contention he has taken us over the various provisions of the Code and the respective Metropolitan Ordinances.

The question verily turns on the scope and the extent of the power of a District Magistrate or an Additional District Magistrate in making orders of detention within a Metropolitan Area and to determine whether they have acted within the limits of their jurisdiction in exercise of powers under section 3(2) of the Special Powers Act, which appears to us new and lucid. To decide the point, which has been debated at the Bar, depends upon some provisions of the Code of Criminal Procedure, shortly the Code. The Government appoints a Magistrate of the First Class as the District Magistrate in every district outside a Metropolitan Area under sub-section (1) of section 10 of the Code. Under sub-section (2) thereof, the Government may appoint any Magistrate, shall have <u>all or any of the powers of a District Magistrate,</u> (*Underlined by me).* Section 11 of the Code provides that whenever in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district,

such officer shall, pending the orders of the Government, exercise all the powers and perform all the duties respectively conferred and imposed by the Code on the District Magistrate. Sub-Section (1) of section 18 of the Code empowers the Government to appoint a Chief Metropolitan Magistrate in a Metropolitan Area and such other Metropolitan Magistrates as it may deem fit for the purposes of the Code. Sub-section (2) thereof empowers the Government to appoint one or more Additional Chief Metropolitan Magistrates and such Additional Chief Metropolitan Magistrates shall have all or any of the powers of the Chief Metropolitan Magistrate under the Code.

Section 20 of the Code enjoins every Metropolitan Magistrate to exercise jurisdiction in all places within a Metropolitan Area for which he is appointed. Sub-section (1) of section 21 authorises the Chief Metropolitan Magistrate to exercise within the local limits of his jurisdiction all the powers conferred on him or on a Metropolitan Magistrate under the Code or under any law for the time being in force and with the previous sanction of the Government, he may make rules consistent with the Code to regulate the conduct and distribution of business and the practice in the Courts of Metropolitan Magistrates and any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.

Learned Additional Attorney-General has produced before us the appointment of the District Magistrate, Dhaka which shows that a District Magistrate can only be appointed by a Notification to that effect under sub-section (1) of section 10 of the Code. His appointment is completely outside the Metropolitan Area. Under the Code of 1861, the words “Magistrate of the District” were defined as meaning the Chief Officer charged with the executive administration of a District in Criminal matters by whatever designation such officer was called. Under the present scheme of the Code, the Government shall appoint a district Magistrate who shall have no jurisdiction at all within a

Metropolitan Area. The object of appointment of an Additional District Magistrate under sub-section (2) of section 10 of the Code is to relieve the District Magistrate of some of his duties and not to place the former on the footing of the latter. Sub-section (2) of section 10 shows that an Additional District Magistrate need not necessarily be conferred with all the powers of the District Magistrate under the Code. He may be exercising only some of the powers of the District Magistrate. An Additional District Magistrate even if is invested with all the powers of the District Magistrate, he is an officer of below the rank of the District Magistrate for certain purposes mentioned in sub-section (3) of section 10 of the Code. Sub-section (2) of section 10 should be read along with sub-section (1) therefore. If these two sub-sections are read together, it will appear that an Additional District Magistrate cannot exercise more powers than that of a District Magistrate and he cannot exercise any power within a Metropolitan Area.

In a Metropolitan Area a Chief Metropolitan Magistrate has specified powers conferrable on him; a local area within which to exercise those powers and jurisdiction and all Metropolitan Magistrates including the Additional Chief Metropolitan Magistrate shall be subordinate to him. He shall distribute the business among the Metropolitan Magistrates. He shall exercise any other matter, which could be dealt with by a District Magistrate under his general power of control over Magistrates subordinate to him.

The Dhaka Metropolitan Police Ordinance, 1976 (Ordinance No. III of 1978) came into effect on 17th January, 1976. Expressions “Dhaka Metropolitan Area” or “Metropolitan Area” have been defined in section 2(c) which means the area mentioned in Schedule I, which comprises the boundaries of the police stations of Kotwali, Sutrapur, Ramna, Lalbagh, Tejgaon, Mohammadpur, Mirpur, Gulshan. Subsequently some other police stations have been included in the schedule. Section 4 of the Ordinance provides that notwithstanding anything contained in the Code, the Dhaka Metropolitan Area shall not, unless otherwise provided by the Ordinance,

be under the charge of the District Magistrate for any of the purposes of the said Ordinance. So, the District Magistrate is totally debarred to exercise his power within the Metropolitan Area unless he is specifically given power to act. Chapter II of the Ordinance contains the constitution and organization of the Dhaka Metropolitan Police, Chapter III of the Ordinance contains for the administration of the Metropolitan Police Force by the Police Commissioner, and Chapter IV thereof contains the powers and duties of police officers. Under this chapter, every police officer has been given power, among others, to bring the offenders to justice or to prevent the commission of cognizable offences or to prevent commission of public nuisances, to apprehend without unreasonable delay all persons who he is legally authorised to apprehend and for whose apprehension there is sufficient reason and also to discharge such duties as are imposed upon him by any law for the time being in force.

Chapter V of the Ordinance empowers the Police Commissioner to make regulations for traffic control, for regulating the conduct, behavior or action of persons constituting assemblies and processions on the streets. Under this chapter, the Police Commissioner has been given the power to prohibit certain acts for prevention of disorder, for the preservation of public peace or safety, to prohibit the individuals by notification, the carrying of arms or any other article, which is capable of being used for causing physical violence, etc Chapter VI empowers the Police Commissioner to take special measures for maintenance of public safety and order. This power includes directing any person to prevent violence and alarm or to remove him outside the Metropolitan Area if such person is engaged in the commission of an offence relating to coin and Government stamps, affecting the human body and against property or for preventing repetition of the same offence, order for removal of any person from the Metropolitan Area who has been convicted of an offence under Chapter XII, XVI, XVII of the Penal Code or of an offence under sections 74, 75, 76, 81, 86 and 88 of the said Ordinance. The Police Commissioner has also been given the power to impose curfew restricting the

movements of the residents within any area or areas by a specified order. This power was exclusively given to the District Magistrate under section 24 of Special Powers Act. Ordinance No. LXIX of 1978 has given the Police Commissioner this power by way of amendment of section 24 of the Act.

The Chittagong Metropolitan Police Ordinance, 1978 (Ordinance No. XLVIII of 1978) and the Khulna Metropolitan Police Ordinance, 1985 (Ordinance No. LII of 1985) have been promulgated on phase by phase providing similar provisions empowering similar powers to the Police Commissioners of Chittagong and Khulna Metropolitan Areas. A close look into section 4 of the said Ordinances vis-à-vis sections 10, 18, 20 and 21 of the Code, it would appear that in a Metropolitan Area some of the powers which were dealt with by the District Magistrate, have been given to the Police Commissioner, and some of them have been given to the Chief Metropolitan Magistrates and Metropolitan Magistrates, debarring the District Magistrate to exercise all or any of the powers which could be exercised by him before the promulgation of the said Ordinances and the amendments made in the code and the Special Powers Act.

A District Magistrate appointed under section 10 of the Code may exercise, besides the powers of a Thana Magistrate, the powers provided in sections 29B, 95, 96, 108, 124, 125, 196B, 260, 337, 406, 406A, 407, 435, 436, 438, 492(2), 503, 504, 505, 506, 514, 515, 516 and 552 of the Code, which are called ordinary powers of a District Magistrate, as mentioned in schedule III of the Code under the heading "V Ordinary Powers of a District Magistrate." Almost all these powers are also conferred upon a Chief Metropolitan Magistrate or a Metropolitan Magistrate by way of amendments, except that of section 407 of the Code. The Code and the Ordinances debar a District Magistrate or an Additional District Magistrate from exercising any of the powers conferred on him by the Code or the purposes, for which, the Metropolitan Ordinances have been promulgated, within a Metropolitan Area.

A District Magistrate or an Additional District Magistrate, has been given powers to make order of detention under section 3(2) of the Special Powers Act, 1974, which section provides that a District Magistrate or an Additional District Magistrate is satisfied with respect of any person that with a view to preventing him from doing any prejudicial act, such as to prejudice the security of Bangladesh or the maintenance of public order, (ii) to create or excite feelings of enmity or hatred between different communities, classes or sections of people (iii) to interfere with or encourage or incite interference with the administration of law or the maintenance of law and order, (iv) to prejudice the maintenance of supplies and services essential to the community, (v) to cause fear or alarm to the public or to any section of the public and (vi) prejudice the economic or financial interests of the state. Acts by which a person is sought to be prevented from indulging in prejudicial activities within a specified area or locality, which are found in various laws and some of them do not in true sense cover legislations. Person to be detained who has not already committed a crime is likely to commit an act to which, section 3(2) of the Act provides for detention of such a person. Unless the act or acts to be committed by such person is within the local limits, a District Magistrate or an Additional District Magistrate cannot exercise the power to make the order of detention. The District Magistrate, Narayanganj has no jurisdiction to make an order of detention in respect of a person who is said to have indulged in prejudicial activities within the jurisdiction of the District Magistrate, Manikganj or Gazipur. This was not the purpose for which a District Magistrate or an Additional District Magistrate has been given the powers to make orders of detention under section 3(2) of the Act. Section 2(a) of the Act defines the word “Code” which means the Code of Criminal Procedure, 1898. From this definition of the word “Code” it is clear that the expressions “District Magistrate” or an “Additional District Magistrate” used in section 3(2) of the Act means a District Magistrate or an Additional District Magistrate appointed under section 10 of the Code.

Section 6 of the Act provides that no detention order shall be inoperative merely by reason that the person to be detained there under is outside the territorial jurisdiction of the Government or the District Magistrate or Additional District Magistrate making the order or that the place of detention of such person is outside the said limits. This section impliedly speaks of, that the detaining authority has a territorial area in making an order of detention which can be executed outside the limits of its territorial jurisdiction and that the detenu may be kept outside the said limits if the said detaining authority makes the order in respect of a person within its territorial jurisdiction. The basis of detention is the satisfaction of the authority of a reasonable probability of the likelihood of the detenu acting in a manner similar to his past acts and preventing him by detention from doing the same. There is no law empowering the Government to appoint a District Magistrate or an Additional District Magistrate other than section 10 of the Code. A question arose in the case of *Gholam Jilani vs Government of Pakistan 19 DLR (SC) 403* whether a police officer who carried out the order of detention in another district was legal or not. In that case the order of detention was made by the Deputy Commissioner, Lahore but the detenu had left for his village in Muzaffargarh District on the following day of the order where a police officer followed him and arrested him without the intervention of the local police. It was observed in that case that the powers of the Deputy Commissioner are expressed to be exercisable only within their respective jurisdiction and as the arrest was illegally effected which being the starting point of the detention, "the whole detention was vitiated thereby." It was further observed, in that case that the further order of the Home Secretary altering the place of detention to Kohat was ineffective to remedy the defect appearing at the stage of the implementation of the Deputy Commissioner's detention order. The detention order in the said case was made under the Defence of Pakistan Ordinance, 1965 and the Rules framed thereunder. In order to overcome the said eventuality we are of the view that section 6 of the Act has been included in the Act. In view of the above discussion, the contention of the learned Additional Attorney General that the powers of a District Magistrate or an Additional District Magistrate within a

Metropolitan Area have been restricted in respect of those powers only which have been given to the Police Commissioners by section 4 of the said Ordinance, is devoid of substance.

Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the community. The safeguards against unfounded accusations and the opportunity for establishing innocence, which constitute the hallmark of an ordinary criminal trial, are not available to a detenu detained by an order of detention. A preventive detention is the deprivation of the liberty of a citizen, which right should not be taken away in an arbitrary manner and accordingly, this Court has been given power to review the actions of the detaining authority under Articles 102(2) (b) (i) of the Constitution and under section 491 of the Code. The jurisdiction of a District Magistrate or an Additional District Magistrate of making on order of detention within a Metropolitan Area was sought to be questioned on the ground that it went against the provisions of Article 32 of the Constitution which provides that no person shall be deprived of life or personal liberty save in accordance with law, i.e. the law prescribed by the Parliament, say the Special powers Act. The question here is the personal liberty of a person, the freedom from physical restraint of a person by incarceration or otherwise. This may be a right of a person to live with human dignity, which is a substantial question of law.

"Jurisdiction' according to *PG Osborn's Law Dictionary* means "(1) the power of a Court or judge to entertain an action, petition or other proceeding (ii) the district or limits within which the judgment or orders of a Court can be enforced or executed" The word "jurisdiction" does not connote from or manner in which the act is to be done but relates to the power, the scope and ambit of authority. The power or authority, which is conferred upon a tribunal by the legislature to hear and determine causes between the parties and to carry the judgments into effect. The power of a tribunal may be exercised with the defined territorial limits. A judgment

pronounced by a tribunal without jurisdiction is void, subject to well-known reservation that when jurisdiction of a tribunal is challenged, the tribunal is competent to determine the question of jurisdiction, thought the result or the enquiry may be that it has no jurisdiction to deal with the matter brought before it. Lord Hobhouse in *Malkarijum B Narhari in 27 1A 216* observed---

> "Since jurisdiction is the power to hear and determine, it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced for the power to decide necessarily carries with it the power to decide wrongly as well as rightly.

A Court has jurisdiction to decide wrong as well as right. If it is decided wrong, the wronged party can only take the course prescribe by law for setting matters right: and if that course is not taken, the decision, however wrong, cannot be disturbed. Lord Hobhouse then added that, though it was true that the Court made a said mistake in following the procedure adopted still in so doing the Court was exercising its jurisdiction: and to treat such an error as destroying the jurisdiction of the Court was calculated to introduce great confusion with the administration of the law. There is a clear distinction between the jurisdiction of the tribunal to try and determine a matter, and the erroneous action of such tribunal in the exercise of that jurisdiction. The former involves the power to act at all, while the letter involves the authority to act in the particular way in which the Court does Act. The boundary between the error of judgment and the usurpation of power is this: the former is reversible by a competent appellate Court within a certain fixed time and is therefore, only voidable, the latter is an absolute nullity. When parties are before the tribunal and present to it a controversy, which a tribunal has authority to decide, a decision not necessarily correct but appropriate to that question is an exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether a decision upon the particular question is correct or in correct. In the case of *Khuda Bux vs Panjo, AIR 1930 (Sind) 265 (FB)* Rupchand J observed---

> "It is the function of the legislature to enact the laws and the duty of the judiciary to interpret and enforce them. It is no doubt the characteristic of a good Judge to amplify his jurisdiction where the words of the statute conferring the jurisdiction can reasonably be interpreted as giving him jurisdiction. Where, however, jurisdiction can only be snatched by strained interpretation of law, I am of the opinion that the good judge becomes a bad citizen."

It is only by virtue of statutes that jurisdiction is conferred on tribunals or taken away from them. In the absence of clear provisions, the ordinary rule of interpretation that statute does not create new jurisdiction or enlarge existing one, applied. A statute conferring jurisdiction under certain particular conditions cannot be taken to confer jurisdiction also in cases which do not fall within the ambit of the conditions laid down merely on the basis of analogy. As *Maxwell* has observed "Where an Act confers jurisdiction it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution."

It has been contended by the learned Additional Attorney-General that in a Metropolitan Area, a Chief Metropolitan Magistrate or a Metropolitan Magistrate is exercising only judicial powers under the Code or under any other law as the Government may direct, and that a District Magistrate or an Additional District Magistrate while making order of detention is exercising executive/administrative powers vested in him under section 3(2) of the Special Powers Act, which is a special law, such power having not been conferred on him by the provisions of the Code, it cannot be said that he cannot exercise power of making an order of detention. In the alternative he submits that the provisions of the Code cannot curtail the said power. This contention merits no consideration, inasmuch as, the learned Additional Attorney-General fails to show any authority of the Government to appoint a District Magistrate or an Additional District Magistrate besides section

10 of the Code, which enables it to appoint them. Secondly, as observed above, in view of section 2(a) of the Act, a District Magistrate or an Additional District Magistrate used in section 3(2) of the Act means a District Magistrate or an Additional District Magistrate appointed under section 10 of the Code.

As the learned Additional Attorney-General stresses upon the powers of a District Magistrate or an Additional District Magistrate to make an order of detention, let us examine as to whether a District Magistrate or an Additional District Magistrate was acting on the supposition that as he has been given power under the authority of a special law, he can invoke the powers despite the fact that he has no territorial jurisdiction to exercise such power. Another point which requires to be considered is whether section 3(2) of the Act gives a District Magistrate or an Additional District Magistrate an unrestricted power which may be termed as arbitrary power as has been sought to contend by the learned Additional Attorney-General or that they are under an obligation to act judicially, or that they have been given an unrestricted power. The powers of the detaining authority in making an order of detention have been set at rest in the case of *Government of West Pakistan vs Begum Agha Abdul Karim Sherish Kashmiri, 21 BLR (SC) 1*, wherein it was observed that Defence of Pakistan Ordinance, 1965 did not confer "any arbitrary naked power" upon the detaining authority.

When a person is detained by an order of detention, he has a constitutional right under Article 102(2) (b) (i) as well as a statutory right under section 491 of the Code to challenge the said order of detention. *Habeas corpus* is a remedy for a person deprived of his liberty. It is addressed to him who detains another in custody and commands him who detains another in custody and commands him to produce the body, with the day and cause of his caption and detention, and to do, submit to, and receive whatever the Judge or the Court shall consider in that behalf. It is essentially a writ of enquiry and on matters in which the State itself is concerned, in aid right and liberty. The writ was directed to the person in whose custody the

detenu is detained and required the body of the detenu alleged to be unlawfully held in custody or restrained of his liberty to be brought before the Court that appropriate judgment may be rendered upon a judicial enquiry into the alleged unlawful restraint. The detention of a person being an encroachment on the liberty of the subject, an order purporting to be under section 3 of the Special Powers Act would be illegal unless the authority making the order is the authority by law to make such order. If a *habeas corpus* petition is filed, the Court may release the detenu is hardly any answer to the vice of section 3 of the Act, because the fundamental principle is that a person cannot be deprived of his liberty on the basis of an arbitrary exercise of the power conferred on the detaining authority.

Sub-section (2) of section 491 authorises the Supreme Court of frame rules to regulate procedure in cases of application to be made under section 491 of the Code. In exercise of that power, Rules 28-40 of Chapter XI, Part II of the Appellate Side Rules had been framed. Rule I, Part II, Appendix IV provides that application for the issue of writs in the nature of *habeas* corpus shall be governed by the Rules relating to applications under Section 491 of the Code. The right to obtain a direction under section 491 of the Code in the nature of a habeas *corpus* is a statutory right on the grounds recognised in the section and a part of the statutory right has become a part of the fundamental right guaranteed in Part III of the Constitution of Bangladesh after the Constitution of Bangladesh came into force in 1972. Wherever a detenu claims to be released from illegal or improper detention, he can claim his fundamental right guaranteed by Articles 27, 31, 32, 33, 36, 37 and 38 of the Constitution. There are two remedies open to a person whose right of freedom has been infringed i.e. he may move the High Court Division under Article 102(2)(b)(i) of the Constitution or he may make an application under section 491 of the Code. The only difference under said two remedies is that in case of application under section 491, a stranger can apply for the release of the detenu detained improperly or illegally or the High Court Division itself can act *suo moto* in view of

the expression used in sub-section (1) of section 491 that "whenever it thinks fit" which postulates that if it appears to the High Court Division to take appropriate action against an improper or illegal detention of any detenu, it can pass appropriate orders. A third party may also apply on behalf of the detenu. But in case of an application under Article 102(b) (i) of the Constitution, only the aggrieved person is entitled to make an application.

As regards the regards the fundamental rights guaranteed in Part III of the Constitution in an application under section 491 of the Code, it would have been open to a detenu to challenge the law under which he has been detained, was invalid and illegal. The validity of the law might also have been challenged or the mandatory provisions of law under which he has been detained, had not been complied with. The right to challenge the validity of the law that it contravenes the fundamental right of the detenu, has accrued only after the Constitution came into force. The Supreme Court of India, in the case of *Makhan Singh vs State of Punjab, AIR 1964 SC 38*1, observed:

> "If section 491 is treated as standing by itself and apart from the provisions of the Constitution, the plea raised by the detenu cannot be entertained in the proceedings taken under that section, it is only when proceedings taken under the said section are dealt with not only in the light of section 491and of the rights which were available to the citizens before 1950, but when they are considered also in the light of the fundamental rights guaranteed by the Constitution that the relevant plea can be raised. In other words, it is clear that the right of the detenu to challenge the legality of his detention which was available to him under section 491(1) (b) prior to the Constitution, has been enlarged by the fundamental rights guaranteed to the citizens by the Constitution and so, whenever a detenu relies upon his fundamental rights even in support of his petition made under section 491(1) (b) he is really enforcing these rights."

This Court in the case of *Sri Kripa Shindu Hazra vs State, 30 DLR 103* approved the views taken in the case of *Makhan Singh* and observed that "the contention that scope of 491 CrPC is limited and narrower than what it is in Article 102 of the Constitution has no force."

The position as it stands now is that a detenu's right to challenge the legality or propriety of his detention which was available to him under section 491 of the Code prior to the Constitution in operation, has been enlarged by the fundamental rights guaranteed to him by the constitution and thus, whenever he relies upon his fundamental rights in his application, he is, in fact, invoking the said rights. The proceedings of a Writ of *habeas corpus* under section 491 inevitably partake of the character of proceedings taken for enforcing the fundamental rights. This is why, the High Court Division in the case of *Sri Kripa Sindu Hazra* and in the case of *Syeda Razia Begum vs. People's Republic of Bangladehs 40 DLR 210* held that the scope of section 491 is not hedged by the Constitutional limitation and in that way its scope is wider than the Constitutional provision. We find no reason to depart from the said views. Similarly, when a detenu moves a petition on the ground that the order of detention was malafide, the exercise of a power malafide is wholly outside the scope of the law conferring the power and the same can also be challenged on an application under section 491.

Article 98(2) (b) (i) of the Constitution of Pakistan 1962, since abrogated, is analogous to Article 102(2) (b) (i) of our Constitution. The expressions "to satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner" used in Article 98(2) (b) (i) have been used in verbatim language in Article 102(2) (b) (i) of our Constitution. These two expressions "without lawful authority" and "in an unlawful manner" occurring in sub-clause (b) of Article 98(2) came for consideration in the ascertainment of its true meaning in the case of *Begum A Karim*, Hamoodur Rahman J observed:

"Within lawful authority will be comprised all questions of vires of the statute itself as also of the person or persons acting under the statute, i.e. there must be a competent law authorizing the detention and the officer issuing such an order must have been lawfully vested with the power.

(underlined by me).

As regards the expression "in an unlawful manner" used in the said Sub-Article 2(b) (i), it was observed that this expression had been used deliberately to give meaning and content of the solemn declaration under Article 2 (similar to Article 31 of our Constitution) itself that it is the inalienable right of every citizen to be treated in accordance with law. While considering as to how and in what circumstances a detention would be in an "unlawful manner", it was observed in the said case that if the action is not accordance with law, then it is an action in "lawful manner." 'Law' as observed is not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in the country including even the judicial principles laid down from time to time by superior Courts and a strict performance of all the functions and duties laid down by law. It was observed, that it might be that in this sense it is as comprehensive as the American "due process" clause in a new garb.

The expression "due process of law" has long been used in America. This term has been given a wider and more comprehensive meaning, which has been held to be synonymous with the term "law of the land." In Murry's *Lessee vs Hoboken Land Co 18 How 272, 276,* it has been observed that this expression "due process of law" is synonymous with 'law of the land' as used in the famous twenty-ninth chapter of Magna Carta which declared that "no freeman shall be taken, or imprisoned, or disseized, or outlawed, or banished, or anyways destroyed, nor will the king pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land." Therefore, it appears to us that an order of detention which was taken upon extraneous consideration or without authority of law would

also qualify as an action not in accordance with law and would, have to be struck down as being an action taken in an 'unlawful manner.' The wordings used in the said clause "without lawful authority" or "in an unlawful manner" show that not only the 'jurisdiction' but also the manner of the exercise of that jurisdiction is subject to judicial review.

In every case where case where an order has been made under section 3 of the Act, the authority making the order shall, as soon as may be but not later than fifteen days from the date of detention, communicate to the person the grounds on which the order has been made to enable him to make a representation in writing. The grounds are not only necessary to enable the detenu to make a representation in writing. The grounds are not only necessary to enable the detenu to make a representation the government shall also place the grounds before the Advisory Board on which the order has been made and the representation, if any, for consideration. The High Court Division also considers the grounds while discharging its constitutional as well as statutory obligation for examination of the material question how the mind of the detaining authority worked in making order of detention. Now, the question is, whether or not the principles of natural justice are applicable in the case of preventive detention. The authority, however, is not required for disclosing the facts, which it considers to be against public interest to disclose. In the case of *Mir Abdul Baqui Baluch vs Government of Pakistan, 20 DLR (SC) 249* it was observed that detaining authority making orders of detention purely on consideration of policy or expediency, there can be no question of being under any obligation to act judicially or even quasi-judicially and that the principles of natural justice are not attracted. The reasons given therein were that the detention orders are made in an emergency situation, wherein to insist upon the issuance of prior show cause notice may well amount to stultifying the action itself. It seems to us in arriving at such conclusion, his Lordship ignored some observations made in the case of *Gholam Jilani*, on the point. In that case their Lordships on consideration of the tenor of the language used in clause (X) of section 3(2) of the

Defence of Pakistan Ordinance, 1965 it was observed that this clause constituted excessive delegation of legislative power for restraint upon personal liberty and to gain protection for any action thereunder, the existence of reasonable grounds is essential and a mere declaration of satisfaction is not sufficient and that the ascertainment of reasonable grounds is essentially a judicial or at least quasi-judicial function.

The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the tribunal and the rules under which it functions. In *Byrne vs Kinematograph Renters Society Ltd. 1958-2 All ER 579,* Lord Harman J observed:

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made: secondly, that he should be given an opportunity to state his case; and thirdly, of course, which the tribunal should act in good faith. I do not think that there really is anything more."

In his speech in the House of Lords in *Wiseman vs Borneman, 1971 AC 297* the learned Law Lord said;

"Natural justice, it has been said, is only "fair play in action." Nor do we wait for directions from Parliament. The common law has abundant riches; there may we find what Byles J, called "the justice of the common law." Thus, the soul of natural justice is 'fair play in action' and that is why it has received the widest recognition throughout the democratic world. In the United States, the right to an administrative hearing is regared as an essential requirement of fundamental fairness. And in England too it has been held that 'fair' play in action' demands that before any prejudicial or adverse action is taken against a person, he must be given an opportunity to be heard. The Rule was stated by Lord Denning, Mr. in these terms in Schmidt B Secy. So State for Home Affairs (1969) 2 Ch D 149 "Where a public

officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without his being given an opportunity of being heard and of making representations on his own behalf."

In the case of *Maneka Gandhi vs Union of India, AIR 1978 SC 597*, PN Bhagwati J observed:

> "Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi-judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other? Can it be said that the requirement of 'fair' play in action' is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi-judicial inquiry and hence, the rules of natural justice must apply equally in an administrative inquiry, which entails civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi0judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi0judicial proceeding is that the authority concerned is required by the law under which it is functioning to act judicially."

Bhagawati J then posed a question as to what opportunity may be regarded as reasonable? His Lordship observed:

"It would necessarily depend on the practical necessities of the situation. It may be a sophisticated full-fledged hearing or it may be a hearing, which is very brief and minimal; it may be a hearing prior to the decision or it may even by a post-decisional remedial hearing *(underlined by me)*. The audi alteram partem rule is sufficiently fiexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise."

From the aforesaid pronouncements, we find that whenever any person or an authority is empowered by law to take an action or make a decision, which may operate to the prejudice of another person, such person or authority is under an obligation to act judicially in taking such action or making such decision. Such authority is to take such an action or make such a decision on the basis of certain materials and observe the principle of natural justice unless otherwise provided by the enactment creating such a power. NP Bhagawati J in the case of Maneka Gandhi was of the view that the "Opportunity" of hearing may even be a post-decisional remedial hearing.

DC Bhattachary J, in the case of *Abdul Latif Mirza vs Government of Bangladesh, 31 DLR (AD) 1*, did not endorse the view taken by Hamoodur Rahman J in the case of *Baqi Baluch* observing that "in my opinion, there seems to be no reasonable ground, as has already been observed, to exclude the case of preventive detention, where a citizen is deprived completely of his liberty on the decision of an executive functionary of the state from the purview of the principle of natural justice, in the absence of any positive law providing otherwise." Following a decision in the case of *Bangladesh Small Industries Corporation vs Mahboob Hossain Chowdhury 29 DLR (SC) 41,* in which case it was held that "a statutory body having been invested by law with the authority to dismiss an employee of the

said body is required to act judicially and to observe the rule of natural justice in the exercise of the said authority. "DC Bhattacharya J observed:

> "It can hardly be disputed that there is nothing in this principle as laid down in those decisions which keeps such an order outside its purview. I have no manner of doubt that this principle verily applies to such an order, which deprives a person completely of his freedom of movement and action. There is no reason why Government or a Government functionary being empowered by law to detain a person to prevent him from doing any prejudicial act shall not have to act in similar manner."

In the case of *Abdul Latif Mirza* a similar point was considered, whether the detaining authority in exercise of the powers conferred under the Act, had an unrestricted and arbitrary power in forming its opinion as to the necessity of a person's detention and was under an obligation to have its satisfaction and opinion based on some materials which may be subjected to judicial review. It was observed that "when such an immense power as to deprive a person of his liberty was conferred by law upon executive authority or its functionary, it is certainly necessary, if principles of natural justice is attracted in such a case, that the said authority should exercise such power judicially, which means that in arriving at the decision as to the necessity of detention of a citizen it shall have to observe the rule of natural justice." In this regard, the Supreme Court of India in the case of *Haradhan Saha vs State of WB AIR 1974 SC 2154* was of the view that elaborate rules of natural justice are excluded either expressly or by necessary implication where procedural provisions are made in the statute or where disclosure of relevant information to an interested party would be contrary to the public interest and that the detaining authority is under a duty to give fair consideration of the representation made by the detenu and Article 22 which provides for preventive detention laws down substantive limitations as well as procedural safeguards, that the principles of natural justice insofar as they are compatible with the detention laws find place in Article 22 itself and also in the Act. These observations are clear

enough to infer that the principles of natural justice are not totally excluded in matters of preventive detention. In the case of *Aminul Islam vs Bangladesh 44 DLR 1*, a Division Bench of this Court observed that since the detaining authority is curtailing the liberty of a citizen by detaining him in detention, it is exercising a quasi-judicial authority.

It has been consistently laid down by the superior Courts that when a power to do any act which will prejudicially affect the subject, then the said authority making such a decision requires a judicial approach. From the nature of the power conferred upon the detaining authority it is subject to the ascertainment of reasonable grounds, which is a quasi-judicial function. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend upon the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided, the objective criterion, if any, to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute.

It has case of *Abdul Latif Mirza*, Bhattacharya J set the controversy at rest by holding that whenever any authority is invested with a legal authority to make an order of detention to the prejudice of another person, such authority has the concomitant duty of acting judicially in making such an order on the basis of decision of consideration of some materials by observing the rule of natural justice. On the whole, it seems to us that the view taken by Bhattacharya J in the case of *Abdul Latif Mirza* is right and binding on its correctness and has not yet been questioned. We are, therefore, not much impressed by the arguments of the learned Additional Attorney-General that the detaining authority was not under any obligation to act judicially. It would thus be clear that under the scheme of the Code read with section 3(2) of the Act, a District Magistrate or an Additional District Magistrate has no power to make orders of detention in respect of a person who has acted or is acting or is about to act in a prejudicial manner within a Metropolitan Area.

In the result, these Rules are made absolute. The orders of detention of detenus Md Anwar Hossain, Md Nur Islam, Sheikh Nizamul Huq, A Malek, Mahbubul Alam alias Roni, Md Emdadul Huq Rana, Abdur Rahim and Monjila Begum are hereby declared as have been issued without lawful authority or in an unlawful manner. The orders of detention are hereby quashed and the opposite parties are directed to release the detenus forthwith.

Let a copy of the judgment be communicated to the District Magistrates, Dhaka, Chittagong and Khulna, by postal guaranteed service for their guidance and to act in accordance with law.

SK Sinha.

S Chaklader, J:

I agree.

S Chaklader.