

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

Present:

Ms. Justice Kazi Zinat Hoque

And

Ms. Justice Aynun Nahar Siddiqua

Writ Petition No. 7055 of 2025

In the matter of :

An application under Article 102(2)(b)(i) of
the Constitution of the People's Republic of
Bangladesh.

-And-

In the matter of :

Rujina Akhter

..... Petitioner

-VERSUS-

Government of the People's Republic of
Bangladesh, represented by its Secretary,
Public Security Division, Ministry of Home
Affairs, Secretariat Building, Shahbagh,
Dhaka and others

..... Respondents

Mr. Manzur-Al-Matin, Senior Advocate with
Mr. Prince-Al-Masud, Advocate

.... For the Petitioner.

Dr. Md. Golam Rahman Bhuiyan, DAG with
Mr. Nur Muhammad Azami, DAG

.... For Respondent Nos. 2 and 3

Mrs. Fawzia Karim Firoze, Senior Advocate
with Mr. Quazi Maruful Alam, Advocate

.... For the respondent Nos. 7 and 8

Mr. Md. Lutfur Rahman, Advocate

..... For the respondent No. 9

**Date of Hearing: 30.06.2025,
01.07.2025, 03.07.2025, 17.07.2025.**

Date of Judgment: 24.07.2025.

Kazi Zinat Hoque, J :

In this application under Article 102(2)(b)(i) of the Constitution, a Rule Nisi has been issued calling upon the respondents to show cause as to why the baby boy Basmin Abrar date of birth 14.07.2024 now confined in the name of custody and guardianship of the respondent Nos.7 and 8 should not be brought before this Hon'ble Court so that this Court may satisfy itself that the minor detenu is not being held in custody without lawful authority and/or such other or further order or orders passed as to this Court may seem fit and proper.

Relevant Facts:

The petitioner filed this writ petition contending that her marriage was solemnized with Md. Zasim Uddin and during their wedlock the detenu, namely Basmin Abrar, was born on 14.7.2024. She challenged the alleged confinement of the minor in the custody of respondent Nos. 7 and 8. She also contended that the biological father of the minor is Md. Zasim Uddin, husband of the petitioner.

The petitioner further contended that during their conjugal life, a baby was previously born by caesarean delivery who unfortunately died shortly after birth. The couple has been working as readymade garment workers in Hemayetpur, Savar, Dhaka.

The petitioner and her husband later had another baby boy, born by caesarean section at Nari-Shishu Hospital and Diagnostic Center on 14.07.2024. After treatment, both the newborn and the petitioner, i.e., the mother, were discharged from the hospital on 16.07.2024. After returning home, the newborn fell ill due to oxygen deficiency, and the parents admitted him to the NICU of Super Medical Hospital (Pvt.) Limited, Savar, on 17.07.2024. On the same day, the hospital authorities referred the infant to Universal Medical College and Hospital, Mohakhali, Dhaka for advanced treatment. Due to severe financial hardship and the prevailing political unrest across the country, particularly in Dhaka, and because of the lockdown at that time, the father could not immediately shift the baby to the referred hospital. After collecting money, Md.

Zasim Uddin finally admitted the infant to Universal Medical College and Hospital on 19.07.2024, depositing Tk. 3,000/- as the admission fee, Tk. 10,000/- as advance payment, and Tk. 23,138/- on 19.07.2024 to cover the remaining amount of the bill dated 19.07.2024, totaling Tk. 36,138/-.

The petitioner further contended that the father tried rigorously to collect money by engaging himself in different types of work, but due to the countrywide political turmoil and lockdown, he failed to raise the required funds for the continued treatment of his newborn baby. As the city was under lockdown, it was not possible to shift the baby to any government hospital. The petitioner's husband repeatedly communicated with the hospital authorities, but they allegedly withheld information about the baby and refused visitation without further deposit. During the student movement against the then Government, violent clashes erupted, and the father was compelled to leave the hospital premises for safety reasons.

After the new Government assumed office, the petitioner and her husband again visited the hospital on 10.08.2024 to inquire about their baby, but the hospital authorities demanded Tk. 8–9 lakhs as medical expenses. Upon learning this, the parents returned to their permanent residence to arrange funds by selling ancestral property. Suddenly, on 15.04.2025, the Officer-in-Charge of Bhola Police Station informed them by mobile phone that they must appear at the local police station. On 16.04.2025, they appeared and learned that a General Diary (GD) No.1205 dated 22.07.2024 had been lodged concerning their baby, and a copy of the GD was supplied to them. They were further directed to appear before respondent No.4, who handed them a notice dated 17.03.2025, which the petitioner alleged to be backdated and manipulated, as the notice was issued to the parents at their permanent address.

After consulting relatives, the petitioner met her lawyer on 19.04.2025. The learned lawyer communicated with Tejgaon Police Station, Dhaka regarding the GD. The Investigating Officer informed the learned lawyer that the baby

was in the custody of respondent No. 3. The petitioner's lawyer then contacted respondent No. 3, who informed that the baby was now in the custody of respondent Nos. 7 and 8, who claim to have been granted guardianship, custody, and authority to obtain a passport for the minor through Family Suit No. 884 of 2024, allegedly decreed on 30.09.2024, within only ten (10) days of filing the suit on 19.09.2024.

The petitioner repeatedly requested respondent Nos. 7 and 8 to arrange a meeting with her baby, but they ignored her pleas. The petitioner reasonably apprehends that respondent Nos. 7 and 8 may remove the child from Bangladesh within a short time. Respondent Nos. 7 and 8 are citizens of the United Kingdom, and if the minor is taken outside the jurisdiction of Bangladesh, he may never be traced, causing the petitioner to lose her baby forever. In such circumstances, finding no other equally efficacious remedy, the petitioner was constrained to file the instant writ petition under Article 102(2)(b)(i) of the Constitution of the People's Republic of Bangladesh.

Submission of the Learned Counsels

Submission of the learned counsel for the petitioner:

Mr. Manzur-Al-Matin, learned Senior Advocate with Mr. Prince-Al Masud, learned Advocate representing the petitioner, argued that the petitioner, being the biological mother of the minor detenu, Basmin Abrar (date of birth 14.07.2024), is entitled to the custody of the child. He contended that the respondent hospital authorities most illegally and arbitrarily transferred the child to Choto Moni Nivas, Azimpur, Dhaka without informing the petitioner or her husband. Thereafter, respondent Nos. 7 and 8 filed a Family Suit seeking guardianship and custody of the minor boy. He further argued that the trial court, in a hurried manner and without lawful notice to the biological parents, illegally and arbitrarily decreed the suit, following which the child was handed over to respondent Nos. 7 and 8. He submitted that since respondent Nos. 7 and 8 are citizens of the United Kingdom, the petitioner reasonably apprehends that they may, within a short period of time, remove the child beyond the jurisdiction of Bangladesh, and if they do so, the child may never be traced and the petitioner will lose her child forever. He therefore asserted that

the petitioner, as the biological mother, is entitled to custody of the child and that the child is being illegally confined by respondent Nos. 7 and 8. He further argued that it is a well-settled principle of law that fraud vitiates everything, and since the biological parents were not made parties to the aforesaid Family Suit and the trial court delivered judgment with undue haste and without lawful notice, the judgment and decree are liable to be set aside, as fraud vitiates all judicial acts. He also submitted that in determining the welfare of the minor child, the Court should not be constrained by technicalities.

The learned counsel for the petitioner referred to a decision of the Appellate Division in the case of Abdul Jalil and others vs. Sharon Laily Begum Jalil [50 DLR (AD) (1998) 55], wherein the Hon'ble Appellate Division held that:

“In a proceeding for custody of a child, it is not the rights of the parties, but the rights of the child which are at issue.”

He further referred to paragraph 33 of the judgment in Abdul Jalil and others vs. Sharon Laily Begum Jalil [50 DLR (AD) 55] wherein it was observed that, ordinarily, minor

children should remain with their mother as long as she does not incur any disqualification for such custody. He submitted that the mother suffers from no disqualification whatsoever.

He also cited the decision in Bangladesh Jatiyo Mahila Ainjibi Samity (BJMAS) vs. Ministry of Home Affairs and others [61 DLR (2009) 371], wherein it was held that:

“In a proceeding under Article 102(2)(b)(i), it is not the rights of the parties, but the rights of the children that are at issue.”

He accordingly prayed that the Rule be made absolute and the child be handed over to the petitioner, i.e., the biological mother.

Argument of the learned counsels for the respondents :

The Rule was opposed by respondent Nos. 2, 3, 7, 8, and 9 by filing separate affidavits-in-opposition. Dr. Md. Golam Rahman Bhuiyan with Mr. Nur Muhammad Azami, learned Deputy Attorney General representing respondent Nos. 2 and 3, argued that the child was admitted to the NICU of Universal Medical College and Hospital, Mohakhali, Dhaka for nearly

two months, and after providing necessary life-saving treatment, the hospital authorities, having failed to locate the biological parents, handed the child over to Choto Moni Nivas, Azimpur, Dhaka, a Government institution for the care and protection of abandoned and destitute children. He further argued that respondent Nos. 7 and 8, being a childless couple, subsequently filed Family Suit No. 884 of 2024, and through legal process, guardianship and custody were granted to them by a competent Family Court. He contended that the biological parents had abandoned the child, which is evident from their conduct, particularly as they did not lodge any General Diary regarding the child's whereabouts. He referred to section 317 of the Penal Code, submitting that abandonment of a child below twelve years is punishable with imprisonment which may extend to seven years, or fine, or both, and argued that the biological parents are liable to be prosecuted under section 317. He also referred to section 84 of the Children Act, 2013, which provides for alternative care for deprived children and children in conflict with the law. He further submitted that since the impugned custody was granted by a competent civil

court, this writ petition is not maintainable in view of the existence of an alternative remedy.

Respondent Nos. 7 and 8 also opposed the Rule. Mrs. Fawzia Karim Firoze, learned Senior Advocate with Mr. Quazi Maruful Alam, learned Advocate representing respondent Nos. 7 and 8, argued that they are dual citizens of both Bangladesh and the United Kingdom. She contended that they lawfully obtained guardianship and custody of the minor by filing the appropriate suit before the Family Court and that the decree was passed without contest after the Court was satisfied about the child's welfare. She argued that the biological parents have not visited the child since 19.07.2024, nor lodged any GD, which amounts to abandonment and constitutes disqualification for custody under personal law. She further submitted that the Police temporarily took custody of the child after issuance of the Rule, although no such order was passed by this Court, and that respondent Nos. 7 and 8 and their relatives visited the child during police custody, which demonstrates their affection and continued commitment to the child's upbringing. She

argued that despite being aware that the child was at Hatirjheel Police Station for a few days, the petitioner made no attempt to visit him. She further cited decisions from the sub-continent emphasizing that the best interest and welfare of the child must be the paramount consideration. She also relied on Sharon Laily Begum Jalil [50 DLR (AD) 55] to assert that the rights of the child prevail over claims of the parents, and submitted that the child is living a healthy, stable, and cared-for life with respondent Nos. 7 and 8, and therefore his welfare lies in remaining in their custody. She also referred to principles from D.F. Mulla's Muslim Law, arguing that a mother may lose her right to custody if disqualified, and submitted that abandonment by the petitioner and her husband constitutes such disqualification. She accordingly prayed that the Rule be discharged, as the petition is not maintainable due to the availability of an alternative forum for appeal. She also argued that the writ petition involves disputed question of fact which is not amenable to writ jurisdiction.

The Rule was further opposed by respondent No.9 (Universal Medical College and Hospital) by filing an affidavit-in-opposition. Mr. Md. Lutfor Rahman, learned Advocate representing respondent No.9, argued that the infant was admitted by the petitioner's husband on 19.07.2024 in critical condition, and that the hospital immediately placed the child on life support after conducting necessary diagnostic tests. He submitted that at around 8:30 PM on the date of admission, the hospital authorities searched for the father for counseling, but he was not present. The hospital then called the contact number provided in the admission form, and the father stated that he was away because his wife was also ill and assured that he would return soon. However, despite repeated calls, he did not return to the hospital. Having failed to trace the biological parents and finding no other alternative, the hospital lodged GD No. 1205 dated 22.07.2024 with Tejgaon Police Station, stating the following:

“ পেসেন্ট পার্টি শনিবার সকালে ফোন নাম্বারে ফোন করে
পাওয়া যাচ্ছে না। তারা আর পর্যন্ত কোন যোগাযোগ করে

নাই। হাসপিটাল কর্তৃপক্ষ বারবার চেষ্টা করে ফোনে পাই
নাই। পেসেন্ট NICU লাইফ সাপোর্টে আছে।”

He submitted that the hospital continued treatment despite non-payment of bills, and that after the child recovered, the hospital authorities formally handed him over to Choto Moni Nivas on 18.09.2024, which is evident from Annexure-Y-3, being a letter issued by the Director of Universal Medical College and Hospital addressed to the Deputy Caretaker, Choto Moni Nivas, Azimpur, Dhaka. He further contended that the hospital attempted to return the child to the biological parents without insisting on payment, but they refused to accept the child, which was clearly recorded in the letter dated 18.09.2024 (Annexure-Y-3) in the following terms:

“হাসপাতাল কর্তৃপক্ষ বকেয়া বিল পরিশোধ না করার শর্তে বাচ্চা
প্রদান করতে রাজি থাকলেও বাচ্চার গার্ডিয়ান/বাবা বাচ্চা গ্রহণ
করতে অস্বীকৃতি জানান।”

He therefore prayed that the Rule be discharged.

Finding of the Court :

Disputed Question of Fact :

In this writ petition the petitioner filed this writ petition contending that she being the biological mother is entitled to custody of the child in question. All the respondents empathically stated in their respective affidavits in opposition as well as argued that the child had been abandoned by his biological parents. Mrs. Fawzia Karim, learned Advocate for respondent Nos.7 and 8 also argued that no GD entry with regard to the child in question has been filed by the petitioner or her husband. This claim of the respondents has been denied by the petitioner. This is certainly a question of fact. It is a settled principle of law that disputed question of fact cannot be decided in writ jurisdiction [Director, H.B.R.I vs Darus Salam Co-Operative Society [2002 BLD (AD) 134 =54 DLR (AD) 111]

Maintainability of Writ Petition

Now let us examine the maintainability of this writ petition.

In the case of Dr Ruqia Skhukat vs Additional District and Sessions Judge [2003 CLC 1310] the High Court of Lahore held :

“Interference in writ jurisdiction is not warranted because the impugned orders were passed by Courts of competent jurisdiction, it was within their exclusive jurisdiction to believe or disbelieve evidence and plausible reasons are given in the impugned order and the judgment respectively passed by the Guardian Judge and the learned Additional District Judge, in support of conclusions arrived at.”

In the case of Abdul Razak vs. Ijaz Mahmood [1992 CLC 5] the High Court of Lahore held:

“Two Courts below have decided questions of pure fact in lawful exercise of their exclusive jurisdiction and, viewed from the above standards set by the precedents, there does not exist any case at all for interference being made by this Court in its a Constitution power of writs.”

JOSE ANTONIO ZALVA DIEZ DEL CORRAL ALIAS
 JOSE ANTONIO ZALVA filed a writ petition for habeas corpus in relation to his minor children. The Supreme Court of India dismissed the writ petition on the ground of maintainability. While dealing with maintainability of habeas corpus petition, the court examined various decisions of the Supreme Court of India. Paragraphs 19 and 20 of the judgment in **TEJASWINI GAUD** have been quoted. We would like to reproduce the aforesaid paragraphs 19 and 20.

“19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of

a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the [Hindu Minority and Guardianship Act](#) or the [Guardians and Wards Act](#) as the case may be. In cases arising out of the proceedings under the [Guardians and Wards Act](#), the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the [Guardians and Wards Act](#) and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed

enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.”

In that case the writ petition filed by the father was dismissed on the ground of maintainability. However, the Supreme Court of India made observation and direction that parties may seek remedy before appropriate civil court.

In the case of *Nirmala vs Kulwant Singh*¹ the father of a minor child filed a writ petition in Punjab and Haryana High Court. Punjab and Haryana High Court after hearing the parties entertained the Habeas Corpus petition. Being aggrieved by the judgment of Punjab and Haryana High Court the grandmother of the child filed petition before the Supreme Court of India. The Supreme Court of India set aside the judgment of the Punjab and Haryana High Court. In this case also the Supreme Court of India thoroughly examined various decisions of the

¹ <https://indiankanoon.org/doc/113464870>

Supreme Court of India wherein has been consistently held that in a summary proceeding court cannot go into the detail question of fact because proceeding in a writ petition are summary in nature and as such dismissed the writ petition on the ground of maintainability.

In that case the Supreme Court of India held:

“We are of the considered view that in the peculiar facts and circumstances of the case, the High Court ought not to have entertained the habeas corpus petition under article 226 of the Constitution of India. Since a detail inquiry including the welfare of the minor child and his preference will have been involved, such an exercise would be done only in a proceedings under the provisions of the Guardians and Wards Act 1890.”

The child has been given custody by the Family Court. There is forum of appeal under section 23 of the Family Courts Act 2023. Since there is alternative remedy, this writ petition is not maintainable. Moreover, this writ petition involves disputed question of fact which are not amenable to writ jurisdiction. [Director, H.B.R.I vs Darus Salam Co-Operative

Society [2002 BLD (AD) 134 =54 DLR (AD) 111]. In the case of Abdul Hamid Khan vs. Miah Nurul Islam [42 DLR (AD)49].

In the result, the Rule is discharged without any order as to cost. However, the petitioner shall be at liberty to seek remedy before the appropriate court of competent jurisdiction.

Interim order is recalled and vacated.

Transmit a copy of this judgment to the concerned respondents at once.

(Kazi Zinat Hoque, J:)

I agree

(Aynun Nahar Siddiqua, J)