

16 SCOB [2022] AD 107**APPELLATE DIVISION****PRESENT:****Mr. Justice Hasan Foez Siddique, CJ****Mr. Justice Md. Nuruzzaman****Mr. Justice Obaidul Hassan****Mr. Justice Borhanuddin****Ms. Justice Krishna Debnath****CIVIL PETITION FOR LEAVE TO APPEAL NO. 233 OF 2022 WITH CONTEMPT PETITION NO. 31 OF 2021**

(From the Judgment and order dated 21.11.2021 passed by the High Court Division in Writ Petition No. 6592 of 2021)

Eriko Nakano, Tokyo, Japan.	:Petitioner
Japanese Passport No. TS 2795566		(In both the cases)

-Versus-

Bangladesh, represented by the	:Respondents
Secretary, Ministry of Home Affairs,		(In C.P. No. 233 of 2022)
Bangladesh Secretariat, Ramna,		
Dhaka-1000 and others.		

Imran Sharif	:Respondent
		(In Contempt P. No. 31 of 2021)

For the Petitioner (In both the cases)	:	Mr. Ajmalul Hossain, Senior Advocate with Mr. Ahsan-ul-Karim, Senior Advocate instructed by Mr. Zainul Abedin, Advocate- on-Record.
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For Respondent No. 5	:	Mr. Fida M. Kamal, Senior Advocate with Mrs. Fouzia Karim, Advocate instructed by Mr. Mohammad Ali Azam, Advocate-on- Record.
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For Respondent (In Contempt Petition No. 31 of 2021)	:	Not represented.
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Respondent Nos. 1-4 & 6-8 (In C.P. No. 233 of 2022)	:	Not represented.
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Date of Hearing	:	The 13 th February, 2022
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Editors' Note

A Bangladeshi father, namely, Imran Sharif taking his two minor girl children aged about 9 and 11 years came from Japan without informing their mother with whom the father had a strained relationship. They had another girl child born in their wedlock aged about 7 years, but the father left her in her mother's custody. A case regarding custody of the children was

pending in the family Court of Japan but no prohibitive order about leaving Japan was issued by the Court. When the mother of the Children came to know that their father had taken them in Bangladesh, keeping the third child in the custody of her grandfather the mother left Japan for Bangladesh and filed a Writ Petition in the High Court Division of the Supreme Court of Bangladesh for the custody of the children. The father also filed a case before a competent Family Court of Bangladesh for custody of the Children which was pending at the time of adjudication of this petition. The High Court Division ordered that the children will remain in their father's custody and the mother shall have right to visit their children. The High Court Division further ordered that the father will have to pay a certain amount of money to the mother for coming Bangladesh and visiting her children after interval of a certain period. Against the order the mother filed this petition. The Appellate Division considering the relevant international and domestic law and decision of the apex court of this sub-continent in similar matter held that in such case the object of the Court would be to see how the best interest of the children is protected. It also held that the appropriate forum for deciding the dispute of custody of the children is the Family Court before which a case is already pending ordered the Family Court to complete the trial of the case within three months. It also set aside the order of the High Court Division and placed the children in the custody of their mother with a visitation right of their father until the suit in family court is disposed of. It also clarified that judgment in this petition will have no bearing upon the decision to be reached at by the learned Assistant Judge/Senior Assistant Judge while disposing of the family suit.

Key Words

Custody of minor children; Article 7, 12, 20 and 21 of the Convention on the Rights of Child; Guardians and Wards Act, 1890; best interest of the child; enforceability of provisions of international instruments

Enforceability of provisions of international instruments in Bangladesh:

With regard to enforceability of provisions of international instruments, we may refer to the decisions in Hossain Muhammad Ershad V. Bangladesh and others, reported in 21 BLD(AD) 69, where it was held that “the court should not ignore the international obligations which the country undertakes by signing the instruments.” ... (Para 23)

The court must look for the best interests of the minors:

The court must look for the best interests of the minors and the petitioner in the present case being the mother of these two minor daughters left each and every effort for their best interest. It was decided in the case Abu Bakar Siddique vs SMA Bakar reported in 38 DLR(AD)106 that “welfare of the child would be best served if his custody is given to a person who is entitled to such custody.” ... (Para 27)

It is the Family Court who has the jurisdiction to settle the question of custody of a minor:

Considering the aforesaid facts and circumstances we are of the view that removal of the detainees from the custody of their mother petitioner is without lawful authority and they are being held in the custody of respondent No.5 in an unlawful manner and the High Court Division passed the judgment beyond the scope of law which required to be interfered. In this case only Family Court has the jurisdiction to settle the question of custody of a minor. The Family Court will look into the cases referred by the parties and come to a finding in whose custody the welfare of the detainees will be better protected. ... (Para 28)

JUDGMENT

Krishna Debnath, J:

1. This Civil Petition for Leave to Appeal is directed against the order dated 21.11.2021 passed by the High Court Division in Writ Petition No. 6592 of 2021.

2. The Facts of the case in short, are that, Eriko Nakano, the petitioner of this case is a doctor of Oncology in St. Luke's International University, Tokyo, Japan. She is also a licensed doctor of the United States of America. On 11.07.2008 the petitioner married respondent No. 5 Imran Sharif. The marriage was solemnized both in Japanese and Muslim culture. During their wedlock three daughters were born. Nakano Jasmine Malika alias Jasmine Malika Sharif (detainee No.1) is the eldest daughter aged 11 years, Nakano Laila Lina alias Laila Lina Sharif (detainee No. 2) is the second daughter aged 9 years and the youngest daughter Nakano Sonia Hana is about 7 years old. Aforesaid three daughters were enrolled at the American School in Japan (ASIJ).

3. Since 2020, a difference of opinion got started with them due to purchase a home in the name of petitioner's father.

4. On 21.01.2021 respondent No.5 picked up the minor daughters Nakano Jasmine and Nakano Laila while they were returning from their school. On 28.01.2021 the petitioner filed a complaint before the Family Court, Tokyo, Japan for the custody of the said two minor daughters. On 09.02.2021 respondent No. 5 made an application for issuance of general passports for their two minor daughters on the false plea that the passports had accidentally been thrown out with the rubbish. On 17.02.2021 respondent No. 5 received new passports of the minor daughters (detainee Nos. 1 and 2) and on the next day respondent No. 5 left Japan for Dubai, United Arab Emirates taking the minor daughters with him. Subsequently, respondent No. 5 brought the minor daughters to Bangladesh.

5. On 31.05.2021 the Family Court, Tokyo, Japan pronounced the judgment and granted custody of the minor daughters to the petitioner and further ordered to hand over the minor daughters to the petitioner.

6. On 21.07.2021 the petitioner came to Bangladesh and made all efforts to take the detainees from the custody of respondent No. 5 but to no avail.

7. Therefore, the petitioner had to file the instant Writ Petition and a Rule Nisi was issued calling upon the respondents to show cause as to why they should not be directed to bring the minor detainees who are held in the custody of the respondent Nos. 5 and 6 before this court so that this court may satisfy itself that the minors are not being held in custody without lawful authority or in an unlawful manner and/or pass such other or further order or orders as to this court may seem fit and proper.

8. Respondent No. 5 has filed affidavit-in-opposition and so many supplementary affidavits denying all the material allegations in the Writ Petition. His case, in short, is that according to Section 2 of the Bangladesh Citizenship (Temporary Provisions) Order, 1972, (Presidents Order No. 149 of 1972) the two minors shall be deemed to be the citizens of Bangladesh. The two minors willingly and voluntarily decided to accompany their father to come into Bangladesh. They did not want to stay with the petitioner getting fear of being sent to petitioner mother's ancestral village. In 2020 the petitioner sent the minor daughters to her

ancestral village for 08(eight) months, when the respondent could not have any meaningful contact with them. In December 2020, the petitioner again wanted to send them to her ancestral village but this time Jasmine vehemently refused and as a result the petitioner demonstrated excessive anger and venom towards the children and the respondent. At a stage the respondent had realized that he could not stay in Japan as the petitioner was threatening to file a number of fraudulent cases against him. The respondent has also received eviction notice and he was also forbidden to meet his youngest daughter, Sonia by the petitioner.

9. While in Tokyo both the minor daughters were in constructive custody of their father (respondent No. 5), the first custody case was initiated against him by the petitioner. There was no order that the minor daughters cannot stay with the father, as such there was no violation of any court's order by respondent No. 5.

10. At present the minors are studying in Canadian International School, Dhaka. They had willingly accompanied their father in Bangladesh. They are old and mature enough to express their preference or opinion.

11. A Family Suit being No. 247 of 2021 is pending before the 2nd Additional Assistant Judge and the Family Court, Dhaka which has the jurisdiction to determine the welfare and best interest of the children by conducting trial with evidence as well as by listening to the opinion of the children. The minor daughters are not unlawfully or illegally kept under his custody as an interim order of custody on 28.02.2021 was passed by a competent Family Court of Bangladesh.

12. In Japan respondent No. 5 was in a vulnerable position and he realized that as a foreigner he would not have any chance to a fair trial in the Japanese Court and the Japanese Court usually does not provide custody to a foreigner and also the visitation right of the aggrieved party cannot be enforced under Japanese legal system. Having stated the above facts respondent No. 5 has sought for discharging the Rule.

13. The High Court Division upon hearing both the parties on 21.11.2021 passed the following orders:-

- i) the Rule shall remain pending;
- ii) the minors, namely Jasmine and Laila will remain in the custody of their father until further order; however, the father will not be allowed to take the minors outside of Bangladesh;
- iii) the petitioner mother shall have the visitation right always; the respondent shall have to pay the travel cost and other expenditures for 10(ten) days for staying in Bangladesh to the petitioner after each 04(four) months; in other occasions the mother will bear her own cost.
- iv) during visit and stay of the petitioner in Bangladesh the minors will be with her exclusively; however, the respondent father shall have the visitation right in those days;
- v) the respondent is directed to pay taka 10(ten) lacks to the petitioner for travel cost and her staying in Bangladesh for last 04(four) months;
- vi) Parties are at liberty to mention the matter before the court at any time if any of them violate the court's order and also wellbeing of the minors are not protected by the respondent;

vii) Deputy Directors, Social Welfare Office, Dhaka is directed to visit and meet the minors once in a month and to submit a report before this court after each three months regarding the condition of the minors;

viii) During stay of the mother in Japan; the respondent shall make arrangement for video call between the mother and the minor daughters after each 15(fifteen) days at the convenient time of the parties.

14. Being aggrieved by and dissatisfied with the order of the High Court Division dated 21.11.2021, on 05.12.2021, the petitioner filed Civil Miscellaneous Petition No. 695 of 2021 before this Court. On 12.12.2021 this Division upon hearing both the parties directed the father (respondent No.5) to handover the children to the petitioner (the mother) by 8 pm on 12.12.2021 upto 15.12.2021. At about 10 pm on 12.12.2021 the counsel of respondent No. 5 informed that they are not going to handover the minor daughters to the petitioner. On 13.12.2021 the petitioner filed a contempt petition No.31 of 2021 against respondent No. 5 before this court. On 15.12.2021 this Court passed an order in following terms:-

“The daughters will remain with the mother until 3rd January 2022. However, the father will enjoy only visitation right between 9 am to 9 pm. The children will attend school regularly”

15. On 03.01.2022 this court adjourned the matter till 23.01.2022 and directed the petitioner to file a regular Civil Petition for Leave to Appeal. Hence the present petition.

16. Mr. Ajmalul Hossain learned senior Advocate appearing for the petitioner submits that the detainees were illegally removed from the custody of their mother (the petitioner) while they were in Tokyo, Japan. He further submits that on 21.01.2021 the respondent (father of the children) picked up the minors while they were returning from their school and on 09.02.2021 he applied for new passports for them. On 17.02.2021 the respondent received new passports of the minor daughters and next day he left Japan for Bangladesh with the minor daughters. Mr. Hossain further submits that before that on 28.01.2021 the petitioner filed a complaint before the Family Court, Tokyo, Japan and on 31.05.2021 this Court granted the custody of the minor daughters to the petitioner. But during pendency of that case without the consent of the petitioner and without giving any notice to the Family Court Japan the respondent removed the detainees from the custody of the petitioner. By doing so, respondent No.5 has taken law in his own hand without waiting for adjudication of the custody and welfare of the children in an appropriate forum i.e the Family Court of Japan. The High Court Division fell into a serious error of fact and law while passed the impugned judgment and order, he submits.

17. Mr. Fida M Kamal, learned senior Advocate for respondent No.5, on the other hand submits that two minor girls willingly and voluntarily decided to come Bangladesh with their father. He further submits that while they were residing in Tokyo both the minor daughters were in constructive custody of their father and in Family Case for custody there was no order that the minors cannot stay or leave Japan with their father, so there was no violation of any courts order by respondent No. 5. He lastly submits that the minor daughters are not willing to stay with their mother (petitioner) and they are mature enough to express their preference and opinion.

18. Admittedly, the detainees are 9 & 11 year old girl children. It also appears that the father respondent No. 5 without the consent of the mother petitioner removed the girls to Bangladesh from Japan. It is also admitted that at that time a Family Case for custody was

pending among the parties but respondent No. 5 did not take any permission to bring the children in Bangladesh though there was no injunctive order against him.

19. It appears that in this case the marriage between the parties was solemnized both in Japanese and Muslim culture. The spouses lived Japan for years and during their wedlock three girl children were begotten and as such they all have the intimate ties with the concerned country as to the wellbeing of the spouses and the welfare of the three children.

20. On 28.01.2021 the petitioner filed a complaint before the Family Court, Tokyo and on 31.05.2021 the Family Court Tokyo pronounced the judgment and granted custody of the minor daughters to the petitioners and between this two dates respondent no. 5 removed two minor girls to Bangladesh. Additionally, respondent no. 5 received new passports stating that the earlier passports had accidentally been thrown out with the rubbish. Thus respondent no. 5 displayed a singular lack of respect for law and deprived the State of Japan, his matrimonial home from serving wellbeing and securing welfare of the children.

21. We find support of this contention in a case of Indian Supreme Court namely *Surinder Kaur Sandhu v. Harbax Singh Sandhu and ors.* MANU/SC/0184/1984 where it was held that “Ordinarily jurisdiction must follow upon functional lines. That is to say, for example, that in matters relating to matrimony and custody, the law of that place must govern which has the closest concern with the wellbeing of the spouses and the welfare of the offsprings of marriage.” It was also held in the aforesaid case that “the wife obtained an order of probation for him but, he abused her magnanimity by running away with the boy soon after the probationary period was over even in that act, he displayed a singular lack of respect for law by obtaining a duplicate passport for the boy on an untrue representation that the original passport was lost. The original passport was, to his knowledge, in the keeping, of his wife.”

22. If we read Article 7, 12, 20 and 21 together with other Articles of the Convention on the Rights of Child, it is seen that the best interests of the children have been given the status of paramount consideration. It has been envisaged in Article 7 of the CRC that the children shall have the right to be cared for by his or her parents. It also has been enshrined in Article 12 of the CRC that the child who is capable of forming his views shall have the right to express the views in all matters affecting his or her interests. Article 20 of the CRC enunciates that the State shall give the assistance and protection to those children who are temporarily or permanently deprived of staying in their family environment. In Article 21 of the CRC, the best interests of the children have been given the status of paramount consideration. In this connection we may refer *Mainul Islam Chowdhury and Ors vs Rumana Foiz and Ors.* LEX/BDAD/0060/2018 where it was held that “the principles of international law which guide us in case of custody of children are found in the Convention on the Rights of the Child which provides that the best interests of the child shall be a primary consideration when dealing with all matters concerning any child. The concept is not new since a similar provision exists in the Guardians and Wards Act, 1890, which provides for any order to be made under that law if the court is satisfied that it is for the welfare of the minor that an order should be made. Hence, all courts of law are bound to keep in mind these salutary provisions of law when dealing with custody, access and other matters which impact the lives of children.”

23. With regard to enforceability of provisions of international instruments, we may refer to the decisions in *Hossain Muhammad Ershad V. Bangladesh and others*, reported in 21 BLD(AD) 69, where it was held that “the court should not ignore the international obligations

which the country undertakes by signing the instruments.”

24. In the light of the decisions of the case *Queen vs Gyngall* (1893) 3 QBD 232: *Walter vs Walter* 55 Cal 730: *Saraswathi vs Dhanakoti* 48 (Mad) 299 it was decided in the case *Abdul Jalil v. Sharon* reported in 50 DLR (AD) 1998, 55 “It is now well settled that the term ‘welfare’ must be read in the largest possible sense as meaning that every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would do or ought to do. The moral and religious welfare of the child must be considered as well as its physical wellbeing. Nor can ties of affection be disregarded.”

25. The best interest of the child can only be understood well when sufficient evidences are taken. In this connection we may refer the case *Abdul Jalil v. Sharon* reported in 50 DLR (AD) 1998, 55 where it was held that “it is difficult for us in this Habeas Corpus petition to take evidence without which the question as to what is in the interest of the child cannot satisfactorily be determined”

26. In the present case the petitioner came to Bangladesh and made all the desperate efforts to take the minor daughters in her custody but failed. In the case of *Abdul Jalil vs Sharon* reported in 50 DLR(AD) 1998, 55 it was held that “Normally the minor children should be with their mother as long as she does not earn any disqualification for such custody and if there is a breach of this normal order brought about by a unilateral act of the father or anybody on his behalf, the aggrieved mother has the right to move the High Court Division under Article 102 of the Constitution for immediate custody of the children which may be ordered in the interest and for the welfare of the children.”

27. The court must look for the best interests of the minors and the petitioner in the present case being the mother of these two minor daughters left each and every effort for their best interest. It was decided in the case *Abu Bakar Siddique vs SMA Bakar* reported in 38 DLR(AD)106 that “welfare of the child would be best served if his custody is given to a person who is entitled to such custody.”

28. Considering the aforesaid facts and circumstances we are of the view that removal of the detainees from the custody of their mother petitioner is without lawful authority and they are being held in the custody of respondent No.5 in an unlawful manner and the High Court Division passed the judgment beyond the scope of law which required to be interfered. In this case only Family Court has the jurisdiction to settle the question of custody of a minor. The Family Court will look into the cases referred by the parties and come to a finding in whose custody the welfare of the detainees will be better protected.

29. It appears from the record that the custody of the minor children, particularly in this case in which the detainees are 9 & 11 year old girl children and their mother is a Japanese well settled doctor and their father being a well settled person is a Bangladeshi by birth and also a citizen of America, the paramount consideration is the welfare of the minors and not the legal right of this and that particular party.

30. In the result and for the reasons stated, we pass the following order:-

- i) 1. Nakano Jasmine Malika @ Jasmine Malika Sharif 2. Nakano Laila Lina @ Laila Lina Sharif aged about 11(eleven) years and 9(nine) years respectively in the

custody of writ respondent No. 5 Imran Sharif is declared to be unlawful and they are being held in his custody in an unlawful manner.

ii) Considering the facts and circumstances of the case and interest of the Children, the Children namely 1. Nakano Jasmine Malika @ Jasmine Malika Sharif and 2. Nakano Laila Lina @ Laila Lina Sharif will not be taken out of the jurisdiction of this Court save and except with leave of this court.

iii) It is directed that the detainees shall remain in custody of their mother-Eriko Nakano pending disposal of the Family Suit No. 247 of 2021 at present, pending in the Court of Assistant Judge, Second Additional Court, Family Court, Dhaka.

iv) The Family Court concerned is directed to conclude the Family Suit No. 247 of 2021 within 3(three) months from the date of receipt of this order.

v) It is made clear that the observations which have been made by us are only for the limited purpose of engaging summary inquiry for consideration in the petition of Habeas corpus and will be of no assistance to either party in the custody proceedings pending in the Family Court which indeed will be decided on its own merits.

vi) The impugned judgment and order of the High Court Division is hereby set aside.

vii) The father will have the right to visit the children at a convenient agreed time, place and period.

viii) The leave petition is accordingly disposed of.

ix) The Contempt Petition No. 31 of 2021 is accordingly redundant.