

Present:

Mr. Justice Md. Ruhul Quddus

Civil Revision No. 568 of 2004

Sharmin Akhter

...Petitioner

-Versus-

Major (Rtd.) Mahbub Akbar Bhuiyan

...Opposite Party

Mr. M. Shamsul Haque, Advocate

...for the petitioner

No one appears for the opposite party

Judgment on 7.10.2012

*Md. Ruhul Quddus, J:*

This Rule at the instance of respondent-petitioner Sharmin Akhter, mother of a minor boy was issued on an application under section 115 of the Code of Civil Procedure to examine the legality of order dated 1.3.2004 passed by the Additional District Judge, 5<sup>th</sup> Court, Dhaka in Miscellaneous Family Appeal No.236 of 2003 allowing an application filed by the appellant-opposite party Major (Rtd) Mahbub Akbar Bhuiyan, father of the minor directing the petitioner to produce her minor son before a doctor nominated by the Australian High Commission in Dhaka for checkup and rejecting another application filed by the petitioner for direction upon the opposite party to file an

affidavit stating whether he had filed any application to the High Commission for obtaining visa of the minor.

Facts relevant for disposal of the Rule, in brief, are that the opposite party instituted Family Suit No.362 of 2002 against the petitioner in the 2<sup>nd</sup> Court of Senior Assistant Judge and Family Court, Dhaka for custody of his minor son Afrad Saadi Bhuhyian, who was born on 15.1.1997 within their wed-lock. The family suit was decreed *exparte* on 26.11.2002. The petitioner claims that the said decree was obtained by suppressing summons and practicing fraud upon the Court. However, the petitioner being aware of the *exparte* decree filed Family Miscellaneous Case No.2 of 2003 under section 9 of the Family Court Ordinance for restoration of the family suit on setting aside the *exparte* decree. The Senior Assistant Judge allowed the miscellaneous case by judgment and order dated 1.7.2003. The opposite party preferred Family Miscellaneous Appeal No.236 of 2003 in the Court of District Judge, Dhaka against the said judgment and order. Thereafter, the said appeal was transferred to the 5<sup>th</sup> Court of Additional District Judge, Dhaka for disposal.

At one stage the opposite party decided to fly Australia on an employment-visa. For the purpose of registration of the name of his children in the record of High Commission, he filed an application under section 16A of the Family Court Ordinance, 1985 read with section 12 of the Guardians and Wards Act, 1980 before the appellate Court seeking direction upon the petitioner to produce the minor before a doctor nominated by the High Commission for checkup. It is mentioned

that the minor boy was under the custody of his mother i.e. the petitioner and was residing with her in Chittagong.

The petitioner opposed the application by filing a written objection. She also filed a separate application for direction upon the opposite party to file an affidavit stating on oath whether he had applied for visa of the minor.

Learned Additional District Judge heard both the applications and allowed the first one by his order dated 1.3.2004 directing the petitioner to produce her minor son before the doctor nominated by Australian High Commission in Dhaka for checkup within 15 days, while rejected the latter on the ground that there was nothing on record to show that the opposite party had filed any application to take the minor to Australia. The petitioner moved in this Court with the instant civil revision challenging the said order and obtained the Rule with an interim order of stay.

Mr. M. Shamsul Haque, learned Advocate appearing for the petitioner submits that from the facts and circumstances of the case it could be reasonably presumed that the opposite party was intending to take the minor abroad and for the purpose of obtaining visa, he was required to be examined medically. Therefore, the appellate Court below was not correct in saying that there was nothing on record to show that the appellant would take away the minor abroad. In response to a query made by the Court, Mr. Haque however, could not apprise whether the appeal is still pending.

The matter has been appearing in the cause list for a couple of days with the name of learned Advocate for opposite party. Today it is taken up for hearing but no one appears to oppose the Rule, although the opposite party entered appearance by filing a power through his learned Advocate Ms. Shirin A. Chowdhury.

I have considered the submission of Mr. Haque and gone through the records including the impugned order. From the facts and circumstances of the case it could be reasonably presumed that there was a possibility on the part of opposite party to file application for obtaining visa of the minor, in course of which his checkup was required. The statement made in the application to the effect that for registration of the minor's name in the record of the High Commission, his checkup was necessary, does not sound logical. Admittedly the minor boy was in custody of his mother and was residing in Chittagong. The petitioner being mother of the minor was fighting to resist the father's claim of custody. In such a position it is quite usual that she would try to ensure that her minor son would not be taken abroad before disposal of the family suit. That is why she filed the application for a direction upon the opposite party to disclose whether he was intending to do so. I fail to understand why the learned Additional District Judge rejected such an application. This is also true that there is nothing wrong if the minor boy is examined by the doctor and goes back with his mother. The petitioner should have no grievance against such an order. But if after checkup, opposite party obtains his visa and takes

the minor abroad in any manner, then the petitioner will be deprived from resisting the opposite party's claim for custody of her son.

Under the above circumstances I am of the view that justice will be met if the opposite party is restrained from taking the minor abroad until the custody of the minor is decided and if the impugned order is modified to that effect.

Accordingly, the Rule is discharged with modification. The order dated 1.3.2004 passed by the Additional District Judge, 5<sup>th</sup> Court, Dhaka in Miscellaneous Family Appeal No.236 of 2003 is modified to the effect that opposite party No.1 is restrained from taking the minor abroad until his custody is finally decided. Otherwise the operative portion of the impugned order will remain unchanged and will take effect from the next date of hearing of the appeal, if it is still pending.