

16 SCOB [2022] HCD 128

HIGH COURT DIVISION

(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 8978 OF 2021

M Nazim Uddin, son of late Md. Hafizuddin Mandal of House No. 14, Road No. 13, Sector-4, Police Station-Uttara East, Dhaka-1230 and another

... Petitioners

-Versus-

Bangladesh represented by the Secretary, Ministry of Home Affairs, Bangladesh Secretariat, Shahbag, Dhaka-1000 and others

... Respondents

Ms. Fawzia Karim Firoze with Mr. Quazi Maruful Alam and Ms. Feroza Pervin, Advocates

...For the petitioners

Ms. Sadia Tasnim, Advocate

...For the respondent no. 7

Heard on 26.05.2022

Judgment on 08.06.2022.

Present:

Mr. Justice Md. Mozibur Rahman Miah

And

Mr. Justice Khizir Hayat

Editors' Note:

The petitioners, paternal grandparents of the minor children, filed this Writ petition after death of their son (father of the minors), seeking a direction to produce them before the Court so that the High Court Division can be satisfied that the minors are not being held in their mother's custody without lawful authority. Mother of the minor children contested the Rule and it transpired that between the parties suit for custody of the minor children is pending in Family Court in which Family Court issued various orders providing visitation right to the petitioners. But the claim of the petitioners was that even after such orders by the Court the mother of the minors did not let them to visit the minor children and therefore they were compelled to file the Writ Petition. The High Court Division talking with the minor children found that the minor children enjoy the company of their mother and have very cold relationship with the petitioner no.1. The High Court Division held that in deciding such cases "welfare of the minor" has to be given paramount importance and consequently decided that welfare of the minor children will be best served in the custody of their mother until disposal of the suit for custody pending in the Family Court. But petitioners can visit her house on mutual consent and understanding with the mother of the children and can meet them at any place, date and time on agreement but having no binding effect on the mother. It also directed the Family Court to complete the trial of the family suit expeditiously.

Key Words:

Custody of minor children; visitation right; Section 25 and 17 of Guardian and Wards Act, 1890; Article 102 of the Constitution of the People's Republic of Bangladesh;

Custody of minor children:

Claiming of custody or of visitation right cannot be a matter of right and acquire by exerting force whatever the age of the minors may be. It totally depends on the welfare of the minors and that of the free wishes of the minor until and unless, the person whose custody the minor is staying loses his/her right. ... (Para 34)

Section 25 and 17 of Guardian and Wards Act, 1890:

In this aspect, we have also meticulously gone through the provision employed in section 25 of Guardian and Wards Act, 1890. The essence of such provision also denotes the welfare of a minor child in case of giving custody of his/her person or property. Section 17(2) of the Act ibid also reiterates the factors to be considered by the court in appointing guardian where in sub-section (3) has vested right upon the court to consider the issue of custody in case the minor is old enough to form an intelligent preference to stay. And that preference is to be assumed by the court considering surrounding circumstance. In both sections only “welfare of the minor” has been given paramount importance. ... (Para 36)

JUDGMENT**Md. Mozibur Rahman Miah, J.**

1. On an application under Article 102 of the Constitution of the People’s Republic of Bangladesh, this Rule Nisi was issued calling upon the respondent no. 7 (mother to the detainees) to show cause as to why she should not be directed to produce the detainees, minor girl, “Delisha Jahan Arikha” date of birth, 16.05.2011 and minor boy, “Jawad Al Zubair” date of birth, 13.09.2013 daughter and son of Most. Jannat Ara Khatun (respondent no. 7-mother) and late Niaz Mohammad Ashfaque-Ul Alam (only son of the petitioners) unlawfully detained by the said respondent no. 7 at an unknown location and bring them before this court in person directing the respondent no. 4 to assist this court by instructing the respondent no. 7 to bring the detainees so that, this court can be satisfied that the minors are not being held in custody without lawful authority or in unlawful manner and/or pass such other or further order or orders as to this court may seem fit and proper.

2. At the time of issuance the rule, this court also directed the respondent no. 7, mother of the minor children to produce them before this court in person on 21.11.2021.

3. The salient facts so have been figured in the instant writ petition are:

The petitioners are paternal grandparents of the detainees (hereinafter referred to as minor children) named, “Delisha Jahan Arikha” and “Jawad Al Zubair”. Since their only son and the father of the minors children died on 27.08.2020 getting infected with Covid-19, the petitioner no. 1 and his wife petitioner no. 2 are now the legal guardian of the minor children as per Islamic principle of guardianship and are concerned of their well-being and have sufficient interest to file this writ petition. It has been stated that, petitioner’s son, late Mr. Niaz Mohammad Ashfaque-Ul Alam (Father of the minor children) and respondent no. 7 (mother of the minor children) got married on 19.11.2009 following Islami Sharia fixing dower at taka 37,00,001/-. Thereafter, above 2(two) children were born out of the wedlock. On 29.08.2019, all of a sudden the respondent no. 7- mother went to the school of the minor children and submitted a false application stating that, both of them would be travelling abroad for medical purpose and picked up the minor children from the school and took them with her to her parents’ house without consulting the late father of the children or the petitioners or notifying the whereabouts of the two children. It is worthwhile to mention here

that, the late father of the detenués divorced the respondent no. 7 that came into effect on 08.09.2019. However, during the lifetime, the father of the minor children on 15.10.2019 had filed a suit being Family Suit No. 906 of 2019 against the respondent no. 7 in the 5th Additional Assistant Judge and the Family Court, Dhaka claiming custody of the minor children. However, on an application under section 16A of the Family Courts Ordinance, 1985, the learned Judge on 20.11.2019 passed an interim order holding that, the minor children would be staying with their late father, every week for 2 days, i.e. from Friday 9.00 a.m. to Saturday 9.00 p.m. That order was however challenged by the respondent no. 7 in Family Appeal No. 223 of 2019 and the previous order was then modified maintaining that, 2nd and 4th Friday every month, the late father will visit his two minor children from 09.00 a.m. to 06.00 p.m. at a convenient place to be chosen by both parties. However, against the said order, the late father of the children filed a Civil Revision being Civil Revision No. 979 of 2020 before this court and the order passed earlier was modified on 16.08.2020 whereby late father was allowed to keep the minor children in his custody from 9.00 a.m. to 6.00 p.m. on 2nd and 4th Friday every month but unfortunately, the late father died on 27.08.2020 from Covid-19 before enjoying the fruit of the said order. It has further been stated that, before the demise of the father of the minor children, the petitioners had requested the respondent no. 7, mother and her family to allow the minor children to meet their father one last time but it was not heeded to. Even after the death of the late father of the minor children, the petitioners kept on requesting the respondent no. 7-mother and her family to allow the minor detenués to meet the petitioners and spend some time alone but to no avail.

4. Therefore, finding no other alternative, the petitioners have compelled to file another suit being Family Suit No. 782 of 2020 before the Assistant Judge, 5th Additional Court and Family Court, Dhaka where they submitted an application under 16A of the Family Court Ordinance, 1985 praying for an interim custody of the minor children only for a day in a week. The Family Court then by order dated 26.11.2020 allowed the petitioners to stay with the minor children from Friday 10.00 a.m. to Saturday 10.00 a.m. and the said order is reproduced below:

“... পরবর্তী আদেশ না দেওয়া পর্যন্ত নাবালকদ্বয়কে সপ্তাহে ০১ দিন শুক্রবার সকাল ১০.০০ ঘটিকায় গ্রহণ ও শনিবার সকাল ১০.০০ ঘটিকায় বিবাদী মায়ের নিকট ফেরত প্রদান করবেন। ...”

5. But as the respondent no. 7 tried to avoid the said order of the Family Court, the petitioners then brought the matter to the notice of it and sought assistance of the police to enforce the order. Then, the Family Court by order dated 06.01.2021 modified its earlier order and debarred any third party except for the paternal grandparents of the minor children to be present at the time of their visitation. The said order in verbatim is as under:

“আদালতের ২৬.১১.২০২০ ইং তারিখের দাদা দাদীর সাথে দেখা করার আদেশ বলবৎ রাখা হলো। তবে শর্ত থাকে যে- দাদা দাদীর কথায় নাবালকদ্বয়ের উপস্থিতির সময় ফুপা-ফুপি বা অন্য কোনো তৃতীয় ব্যক্তি যার উপস্থিতিতে নাবালক বা নাবালিকার নিরাপত্তায় বিঘ্ন ঘটতে পারে তাদের উপস্থিত থাকা বারিত করা হলো। এ ক্ষেত্রে বিবাদী নিজে নাবালকদ্বয়কে তার দাদা দাদীর বাসায় পৌছে দিবে এবং দিয়ে নিজে নিশ্চিত হবে বাসায় দাদা দাদী ব্যতিরেকে তৃতীয় কোন ব্যক্তির উপস্থিতি নেই এবং পরবর্তীতে বাদী অর্থাৎ দাদা নাবালকদ্বয়কে তার মাতার বাসায় মাতার কাছে পৌছে দিবে।”

6. However, against the said order, the respondent no. 7 took an appeal being Family Appeal No. 08 of 2021 before the court of District Judge, Dhaka and the said Appellate Court by order dated 21.01.2021 modified the order of the Family Court holding that:

“অত্র পারিবারিক আপীলটি উভয় পক্ষের সম্মতিতে পরিবর্তীত আকারে মঞ্জুর করা হলো। বিজ্ঞ নিম্নাদালত কর্তৃক প্রদত্ত বিগত ০৬.০১.২০২১ তারিখের আদেশটি পরিবর্তীতে আকারে সংশোধন পূর্বক প্রতি সপ্তাহের শুক্রবার সকাল ১০ ঘটিকায় সময় রেসপনডেন্ট পক্ষ (নাবালকদ্বয়ের দাদা) একজন মহিলা আইনজীবীর উপস্থিতিতে আপীলকারী (মা)

এর নিকট হতে রেসপনডেন্ট (দাদা) এর বাসায় নিয়ে আসবেন এবং রাত ০৮.০০ ঘটিকার মধ্যে রেসপনডেন্ট পক্ষ (দাদা) নিজ দায়িত্বে আপীলকারী (মা) এর কাছে পৌঁছে দিবেন।”

7. It has further been stated that, though the appeal was allowed with the consent of the parties, yet the respondent no. 7, mother filed a petition for review on 16.02.2021 being Family Review No. 77 of 2021 challenging the order stating that, she did not confer any authority on her lawyer to make consent on her behalf. However, the said review is still pending. It has also been stated that, even then the petitioners in compliance with the order of the Appellate Court, went to the house of respondent no. 7, mother to see the minor children when she and her father called journalists and cameramen from different news channel and those of hooligans of that area and threatened the petitioners with dire consequences and thus created a hostile environment which cast a negative impact on the nascent mind of the minor children and ultimately returned. Thereafter, the petitioners filed a series of General Diaries (GD) and applications to the Family Court below but it served no positive outcome and hence, the petitioners have filed the instant writ petition and obtained the rule and an interim direction made upon the respondent no. 7 to produce the minor children before this court, which has been complied with.

8. Ms. Fawzia Karim Firoze along with Mr. Quazi Maruful Alam, the learned counsels appearing for the petitioner upon taking us to the writ petition at the very outset submits that, in absence of the late father of the minor children, the petitioner no. 1 is their legal guardian and as such denying their custody and visitation rights, is totally illegal, unlawful and as such, the minor children should be set at liberty to be with the petitioners.

9. The learned counsel next submits that, the late father of the minor children fought to his last breath to get the custody of his children in the subordinate court and to the Hon'ble High Court Division and got favourable order but the respondent no. 7-mother on different excuses kept on debarring access of the minor children to their late father and now grandparents just to satisfy her personal grudge and as such, the minor children should be set at liberty to be with the petitioners.

10. The learned counsel further contends that, it is an unprecedented and inhuman approach denying all human values and humanity that, the respondent-mother did not allow the minor children to see the dead body of their late father- the only son of the petitioners which raises a big question about the morality, humanity, ethics and values of the respondent-mother which manifests that, the welfare of the children cannot be secured to a person who is unable to show minimum level of humanity even to a dead person and as such, the minor children should be set at liberty to be with the petitioners.

11. The learned counsel next contends that, the welfare of the children, general, moral and that of spiritual upbringing are being materially hampered due to the unlawful detention of the minor children with respondent-mother and her family.

12. When we pose a question to the learned counsel for the petitioners to show us the authority to the effect that, in absence of the father, the paternal grandparents are entitled to the custody of the minor child. In response to that, the learned counsel has referred a decision held in the case of *Haroon Rashid-vs-Additional District Judge of the Lahore High Court reported in 2018 MLD 1793* where in paragraph no. 6, it has been observed that, the maternal grandmother can be given visitation schedule in case of mother of a minor died over their

father and then submits that, the said principle is equally applicable in the facts and circumstances of the instant case.

13. The learned counsel in that connection further adds that, under the Guardian and Wards Act, 1890 the grandparents herein the petitioners are the legal guardian of the minor children in absence of their father and thus under no circumstances, can custody of the minor children be given in favour of their mother.

14. The learned counsel lastly contends that, the petitioners' lawful custody to the minor children in absence of their father is being denied by the respondent no. 7-mother unlawfully and in that respect, the learned counsel has thus placed her reliance on the decision in the case of *Abdul Jalil and others-Vs-Sharon Laily Begum reported in 50 DLR (AD) 55*. Insofar in regard to set a third place giving visitation right to the petitioners, the learned counsel has also referred an unreported judgment dated 08.03.2021 of the Appellate Division passed in civil petition for leave to appeal no. 942 of 2020 and finally prays for make the rule absolute.

15. On the flipside, Ms. Sadia Tasnim, the learned counsel appearing for the respondent no. 7 very robustly opposes the contention of the learned counsel for the petitioners and submits that, writ itself is not maintainable as the minor children have legally been staying with their mother, respondent no. 7 which can in no way be termed as without lawful authority.

16. The learned counsel by referring to paragraph no. 21 to the writ petition has also intensified the above submission contending that, since the respondent no. 7 with her two minor children attended a birthday party at hotel 'Westin' in the evening on 13.09.2021 hosted by the petitioner no. 1 on the order of the lower court so there has been no earthly reason to find that, the custody of the minor children with the respondent no. 7 be without lawful authority.

17. The learned counsel goes on to submit that, since the late father of the minor children divorced this respondent and before that, the children went through tormented situation and endured how their mother had been subjected to torture physically and mentally by their late father even without any resistance by the petitioners rather they gave indulgence to their late son to perpetuate such inhuman act on their mother so they got fearful whenever they came across with the petitioners and therefore, there is no point to give visitation right to the petitioners.

18. The learned counsel further submits that, the female child is close to attain puberty and at this juncture, physical presence of the respondent- mother with her is indispensable to dispel fear at this age of biological changes by morally boosting her but if visitation right is given at the residence of the petitioners or to stay with them, even for a certain time against her will, she will again go through mental trauma and therefore, petitioners are not entitled to any visitation right at their place or elsewhere.

19. By refuting to the contention of the learned counsel for the petitioner that, respondent no. 7 and her father had called journalists and photographers and local hoodlums when the petitioner no. 1 went to visit the minor children at the house of respondent no. 7, the learned counsel then asserts that, rather respondent no. 7 cordially greeted him (the petitioner no. 1) at her house but the minor children got scared seeing the petitioner no. 1 as they harkened back the harrowing event perpetrated by the their father

on their mother in presence of the said petitioner and hence the minor children may not be forced to be with the petitioners which might cause permanent mental injury affecting their normal growth. In regard to the submission of the learned counsel for the petitioners to give them visitation right even in a third place and that of the decision cited in that regard of the Appellate Division passed in civil petition for leave to appeal no. 942 of 2020, the learned counsel submits that, home is the only perfect place where the bond of relation can only be deepened and since such endeavour could not be materialized at home then in the birthday party celebrated at a hotel as revealed, so certainly the children will feel uncomfortable if any third place giving visitation right to the petitioners is given by this Hon'ble court, so the contention of the learned counsel for the petitioners to allow visitation right of the petitioners in a third place cannot be any viable option and thus not sustainable.

20. The learned counsel wrapped up her submission contending that, father is the legal guardian of a minor child but in the instant case, the unfortunate children lost their father prematurely and now their only shelter in the earth are left with their loving mother who has not yet married a second husband for the sake of welfare and upbringing of her minor children and has now become the legal guardian in absence of their deceased father and hence, the petitioners cannot force to have visitation right of the minor children as they have no regard to the petitioners and literally don't feel comfortable of their presence and thus prays for discharge of the rule.

Deliberations

21. We have considered the submission so advanced by the learned counsels for the petitioners and that of the respondent no. 7.

22. There has been no denying the fact that, the family suit being Family Suit No. 782 of 2020 filed by the petitioners under section 5 of the Family Courts Ordinance, 1985 is now pending before the Assistant Judge, 5th Additional Court and Family Court, Dhaka over the custody of the minor children. It is also admitted that, in regard to interim custody (or visitation right) finally the appellate court below (in Family Appeal No. 08 of 2021) vide order dated 21.01.2021 directed to bring the minor children by the petitioners from the house of the respondent no. 7 in presence of a lady Advocate at 10.00 a.m. every Friday of the month and to return to the house of the respondent no. 7 by 08.00 in the night also by the petitioners. However, that order is now under challenge by the respondent no. 7 in Family Review No. 77 of 2021.

23. It is the contention of the learned counsel for the petitioners that, even to give effect of the said order of the appellate court below, the petitioners went to the house of respondent no. 7 but the said order could not be implemented due to non-cooperation of the respondent no. 7 and her parents who exerted threat when they went to visit their grandchildren which actually compelled them to file this writ petition. During the midst of hearing placed at the bar, we even heard the petitioner no. 1 and respondent no. 7 personally finding them in the court-who traded blame to each other in regard to the situation stemmed from the visitation of the minor children. However, from the trend of the submission placed by the learned counsel for the contending parties, we assume that, the petitioners are now asking for visitation right of the minor children only whatever manner it be which actually brings the point-in-issue in a narrow space for adjudication of the instant rule.

24. In course of hearing, we also felt it expedient to converse the minor children and then asked the respondent no. 7 to produce them by 4.00 p.m. on 26.05.2022 at our office chamber. At that, the learned counsel for the petitioners urged the court not to converse the minor children in presence of their mother-respondent no. 7. We did so and accordingly, they were produced and at first place, we talked to the children in a playful manner which were mostly revolved around their education, their hobby, their daily routine and mode of transportation and the person accompanied them to and from their school. After that, we asked the petitioner no. 1 to join the conversation at our office chamber and moment he stepped into the room and greeted the children, they did not respond and remained calm. At this, when the petitioner tried to intimate himself with the children by reminding them about the gift he presented in the last birthday, both the children even kept silent. At this, we asked the children whether they knew the petitioner no. 1 and wanted to visit his house, they just nodded their head but declined to visit him. During ten minutes of stay at our chamber, the petitioner no. 1 had tried to impress the children to stay with him at any place at their will reminiscing happy moment of last birthday party at hotel Westin, but they did not utter a single word. At this, we asked the children why they were behaving so as the petitioner no. 1 adored them too much, then the girl child retorted that, he (petitioner no. 1) misbehaved with her mother when she lived with their late father at his house. As the children did not seem to have intimate with the petitioner no.1 and rather kept on feeling uncomfortable with the presence of the petitioner no. 1 and rather turned back their face from the petitioner no. 1, we then found it ungraceful for him and requested him to leave our chamber. Then we allowed respondent no. 7 in our chamber and as soon as she stepped into the room the male child jumped into her lap and it seemed to us that, both the children heaved a sigh of relief and started chatting with each other even without our intervention. At this, we wanted to know from her, respondent no. 7, how she would afford the cost in upbringing the minor children as she seemed to be a house maker, she then replied that, she already got herself involved with the business of her father and she needed no cooperation from the petitioner no. 1 to maintain her children. At the same time, she also said that, if the petitioner no. 1 voluntarily came forward assisting the minor children for their maintenance and cost of education she will accept that. Insofar as regard to visitation right of the petitioner no. 1 of the minor children, she assured that, petitioner no. 1 can visit her children at her residence but she was not in a mental position to allow the children to go to his house reasoning that, if they go there they will be traumatized remembering past painful event perpetrated on her by her late husband in presence of the petitioners. She further pleaded that, in absence of her late husband vis-à-vis the late father of the minor children, the visitation of the children by the petitioners at that house is rather an inhuman demand.

25. Basically, going by a slew of decisions passed on the issue of custody of minor child in our jurisdiction, we find that, the case in hand is a bit different from those of the common cases over claiming custody as well as visitation right of minor children. The case in hand, not the father of the children rather their paternal grandparents are seeking visitation right. In such an exceptional circumstances, we asked the learned counsel for the petitioners to refer authority where such right has been given to grandparents over their mother but the learned counsel failed to come up with any decision of this court or Appellate Division rather frankly submitted that she tried her best but failed to find any authority over that issue. However, at the fag-end of the hearing, the learned counsel has supplied us with an unreported decision of the Appellate Division dated 08.08.2021 passed in civil petition for leave to appeal no. 942 of 2020 related to giving visitation right in a third place then at the time of passing the Judge, a decision of Lahore High Court in regard to providing custody to a maternal grandparent discussed above.

26. On going through the first judgment, we find that, father of the minor children was directed to let her mother visit to the minor children at Westin hotel- a third place which the father had violated for none but for non-cooperation of the minor children. The fact figured in the said judgment appears to be totally different with the present one. Because, in the judgment referred, the children were old enough and at an impressionable age of 15 and 13 who kept on disrespecting their mother even at the third place (in presence of a lady Advocate appointed by the Appellate Division) ostensibly for taking second husband by their mother and sometimes the children had left the venue during visitation hour which their father actually could not control.

27. In line with the above decision, the learned counsel kept on harping for selecting a third place and to give visitation right to the petitioner no. 1 in the context of failure in carrying out such right at the residence of respondent no. 7 earlier.

28. But ironically, what we experienced ourselves with the attitude of the children shown to the petitioner no. 1 at our chamber does not impel to assume, it would serve any positive outcome if any third place is set giving visitation right to the petitioners. At our official chamber, the petitioner no. 1 had to leave his grandchildren (detenues) heartbroken and during his short stay, he tried his level best to impress the minor children but went in vein. However, only for that, we don't come to any conclusion negating such right of the petitioners because such attitude of the minor children towards in petitioner no. 1 could change with time but thing is that, at this stage, we don't find any convincing ambiance to select a third place giving visitation right to the petitioner no. 1.

29. Then again, in regard to giving short custody or visitation right of the grandparents over the mother, the decision cited of Lahore High Court is found to be totally distinguishable with the present case. In the cited case, the maternal grandmother was given custody over the father considering love, affection and maximum interaction with her which is totally absent in the instant case given the foregoing discussion where we found that a hostile atmosphere in regard to relationship let alone happy one among the petitioners and the minor children are now persisting.

30. The learned counsel for the petitioners has also relied upon a decision reported in 50 DLR (AD) 55 (*Abdul Jalil and others-Vs-Sharon Laily Begum*). In the said decision, two paramount *ratios* have been set at rest in regard to giving custody of a minor child which runs as under:

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

In the circumstances, we have come to the conclusion that the custody issue be decided upon evidence as to where the interest and welfare of the children actually lie. The High Court Division has not done it and we consider it inexpedient in the facts of the present case to decide the issue merely on the basis of affidavits and submissions.”

“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.”

31. In the second part of the cited decision, our Appellate Division has already settled that writ in habeas corpus is maintainable in claiming custody of a minor child if circumstance deserves so as quoted therein and then propounded that the wellbeing of the children would be best served with the mother and since the male child (in the cited decision mentioned above) had attained an impressionable age of 12 years his custody was then given to his father and all other three female children with their mother. In the face of the said settled proposition of our apex court, we have no hesitation to conclude that, the said decision rather goes in favour of the case of the respondent no. 7 as the facts described by the petitioners in the instant writ petitioner clearly runs opposite to the observation and finding of the said decision as the petitioners is not the father of the minor children, having no nexus with the facts cited in the decision.

32. [***]¹

33. We perceive that, the petitioners’ want to forget their lost son embracing their grandchildren and look up their fond memory of their deceased son in the minor children and ready to do whatever the children require and thus pleaded for their pleasant company. We are not brushing aside the said sentiment. But in various decisions of our Appellate Division it has consistently been propounded that, to decide the custody of a minor child, it is none other than the welfare and wellbeing of the minor children which will be the determinant factor. So, the utmost priority to decide the issue of custody of a child vis-à-vis visitation right has to be determined only basing on the welfare of a child and of his/her happy upkeeping, herein the detenues.

34 . At the same time, we do not draw the line on visitation rights of the petitioners to their grandchildren. But it must be done basing on a cordial and mutual understanding among the contending parties and good wishes and free will of the minor children something we find it to be absent in the instant case at this moment. Under no circumstances, can the petitioners claim to have such visitation “as of right” and force the respondent no. 7 or the minor children to give such right against the free will of the minor children. Claiming of custody or of visitation right cannot be a matter of right and acquire by exerting force whatever the age of the minors may be. It totally depends on the welfare of the minors and that of the free wishes of the minor until and unless, the person whose custody the minor is staying loses his/her right. Even though it is presumed that their choice, desire or wishes to stay has got no basis at their tender age but both of them are found to be old enough to from an intelligent preference. (underlined by us for supplying emphasis).

35. Because, it has not been found from the record and that of the submission of the learned counsels of the parties that, the children were well-behaved with the petitioner no. 1

¹ Expunged vide order dated 25 July 2022 passed by the Appellate Division in Civil Petition for Leave to Appeal No. 1838 of 2022

and co-operate with him whenever he visited them either in the house of the respondent no. 7 or a hotel let alone at our official chamber even in absence of their mother. At this, the learned counsel for the petitioners showed us some photographs where the petitioners, respondent no. 7 and her minor children sat together. However, the photographs do not show the reality of actual relationship as found from the hearing.

36. In this aspect, we have also meticulously gone through the provision employed in section 25 of Guardian and Wards Act, 1890. The essence of such provision also denotes the welfare of a minor child in case of giving custody of his/her person or property. Section 17(2) of the Act *ibid* also reiterates the factors to be considered by the court in appointing guardian where in sub-section (3) has vested right upon the court to consider the issue of custody in case the minor is old enough to form an intelligent preference to stay. And that preference is to be assumed by the court considering surrounding circumstance. In both sections only “welfare of the minor” has been given paramount importance.

37. On top of that, centring the substantive issue, a family suit is still pending before the family court who will finally decide whose custody the welfare of the minors children will be best served in absence of their father- which is also the essence of the first part of the decision reported in 50 DLR (AD) 55.

38. With the cumulative discussion and observation made hereinabove, we are of the view that, welfare of the minor children will be best served in the custody of respondent no. 7. But petitioners can visit her house on mutual consent and understanding with the respondent no. 7 and to meet the minor children at any place, date and time on agreement but having no binding effect on the respondent no. 7.

Finding

39. In the result, the rule is disposed of with above observations.

40. It is however declared that, the detenues named, Delisha Jahan Arikha and Jawad Al Zubair are not held in custody without lawful authority or in an unlawful manner rather the custody of the minor children with respondent no. 7 stands lawful.

41. The minor children named, Delisha Jahan Arikha and Jawad Al Zubair will remain in the custody of the respondent no. 7 till disposal of Family Suit No. 782 of 2020.

42. The learned Judge, 5th Additional Assistant Judge and Family Court, Dhaka is directed to dispose of Family Suit No. 782 of 2020 as expeditiously as possible.

43. However, the respondent no. 7 is hereby directed not leave the country with the said minor children without prior permission of the said Family Court.

44. Let a copy of this judgment be communicated to the learned Judge, 5th Additional Assistant Judge and Family Court, Dhaka forthwith.