

W. P. No.6592 of 2021

Present:

**Mr. Justice M. Enayetur Rahim  
And  
Mr. Justice Md. Mostafizur Rahman**

21.11.2021

Mr. Mohammad Shishir Manir,  
Advocate

---For the Petitioner

Mr. Fida M.Kamal, Advocate with  
Ms. Fawzia Karim Firoze, Advocate  
Mr. Quzi Maruf Alam, Advocate

---For the Respondent No.5

Mr. Bepul Bagmar, DAG with  
Mr. Md. Sirajul Alam Bhuiyan, AAG  
and

Mr. Md. Delwar Hossain, AAG

--- For the Government-Respondent

Today, the date is fixed  
for pronouncement of judgment.

However, considering the  
attending facts and  
circumstances of the present  
case, we are inclined to pass  
the following orders instead of  
disposing of the Rule by  
pronouncing the final verdict.

On an application under  
Article 102 of the constitution  
of the Peoples Republic of  
Bangladesh, this Rule Nisi was  
issued calling upon the  
respondents to show cause as to  
why they should not be directed  
to bring the minor detenues  
(hereinafter referred to as

minors) 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.

In the writ petition and  
supplementary affidavits, the  
petitioner contended as  
follows:

The petitioner is a  
doctor of oncology. She has  
been working at St. Luke's  
International Hospital, St.  
Luke's International  
University, Tokyo, Japan since  
2008. At present, she is  
serving as Assistant Chief of  
Staff, Division of Medical  
Oncology of the said hospital.  
She is also a licensed doctor  
in the United States of  
America. She is a well  
educated and caring mother.

She earns standard living as well.

On 11.07.2008, the petitioner married the Respondent No.5 (hereinafter referred to as Respondent). The marriage was solemnized both in Japanese and Muslim culture. The wedding ceremonies were held both in Shinto Shrine and in Turkish Masjid (Mosque), Japan.

During their wedlock three daughters were born. Nakano Jasmine Malika alias Jasmine Malika Sharif is the eldest daughter who was born on 08.02.2010, Nakano Laila Lina alias Laila Lina Sharif is the second daughter who was born on 12.10.2011. The youngest daughter is Nakano Sonia Hana who was born on 25.06.2014.

The petitioner has always been pro-active in taking proper care and smooth upbringing of the said daughters. She has ensured their schooling and taken responsibility for their health

checkups and vaccinations. Contrarily, the Respondent has been engaged in frequent business trips overseas i.e. Romania, USA and Dubai.

The three daughters were enrolled at the American School in Japan (ASIJ) located in Chofu City, Tokyo, Japan. During summer vacation and recession of school, the said daughters used to go and stay at petitioner's parent's home in Kagawa Prefecture and attend a local elementary school there.

Since 2020, disagreement and difference of opinion deepened between the petitioner and the Respondent over the financial burden of the family due to purchase a home in the name of petitioner's father.

On 21.01.2021 the Respondent picked up the minor daughters while they were returning from school and till 22.08.2021 they had been under the custody of the Respondent.

On 18.03.2021 the American School in Japan made a statement relating to the said incident.

On 28.01.2021, the petitioner filed a complaint before the Family Court, Tokyo, Japan for the custody of the said two minor daughters. The Court ordered for their family meetings to be held on February 7, 11 and 21 of 2021. In the first meeting, the petitioner had the opportunity to see her minor daughters, for one and half hours at Imperial Hotel, Tokyo.

On 09.02.2021, the Respondent made an application for issuance of general passport for their two minor daughters on the false plea that the passports had accidentally been thrown out with the rubbish. Subsequent family meeting was cancelled by the Respondent. On 17.02.2021, the Respondent received new passports of the minor daughters and on the next day

he left Japan for Dubai, United Arab Emirates taking the minor daughters with him. On February 22, 2021, the lawyer of the Respondent resigned. Subsequently, the Respondent brought the minor daughters to Bangladesh.

On 04.04.2021, the trial of the case was concluded. 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.

On 18.07.2021 while the petitioner was coming to Bangladesh via Sri Lanka and she arrived at Sri Lanka Airport, the Respondent asked the petitioner to return Tokyo due to COVID-19 situation in Bangladesh. But the petitioner entered Bangladesh. Then the Respondent asked the petitioner to undergo COVID-19 test first before meeting the minor daughters. On

20.07.2021, the petitioner tested COVID-19 Negative at Gulshan Clinic arranged by the Hotel Westin. On being referred by the Respondent to a private Clinic, on 21.07.2021 the petitioner again got herself diagnosed there and tested COVID-19 Positive. On 22.07.2021 as per the recommendation of the Embassy of Japan she got herself diagnosed at DNA solution and tested COVID-19 Negative. Even after that, the Respondent denied the petitioner to meet the minor daughters on the ground that he did not believe the result. On 24.07.2021 the petitioner again tested COVID-19 Negative at DNA Solution. On 25.07.2021 she again got herself diagnosed at the Ever Care Hospital and tested COVID-19 Negative there. The petitioner took two doses of Pfizer-BioNTech COVID-19 vaccine. On 27.07.2021 the Respondent along with his brother-in-law Sadruddin Ahmed

Chowdhury took the petitioner into his car, switched off the GPS of mobile phone of the Petitioner and blindfolded her. Then the respondent took her in a place and allowed to see her daughters for a while and then dropped her off at the pick-up point in the aforesaid manner. The Respondent neither wanted the petitioner to meet her daughters nor he disclosed their whereabouts to the petitioner.

The Respondent suppressing all these facts on 28.02.2021 filed a family suit being No.156 of 2021 against the petitioner before the 1<sup>st</sup> Senior Judge and Family Court, Dhaka for the custody of the minor daughters which was eventually transferred to the 2<sup>nd</sup> Additional Assistant Judge and Family Court, Dhaka.

On 12.08.2021 the petitioner submitted a written statement to contest the said suit.

Since her arrival in Dhaka, the petitioner relentlessly tried to meet her daughters. Except few minutes in one occasion, the Respondent did not inform the petitioner about the whereabouts of minor daughters. The petitioner tried to find out her daughters in every address known and provided to her by the Respondent but she failed.

The Respondent left Japan with the two minor daughters on 18.02.2021. Since then the said two minor daughters have been separated from their youngest sister Sonia who is staying in Tokyo, Japan with her aunt. She is missing her two sisters and crying all the time. The three sisters used to pass their good time in Japan, went to school, study together and took pictures at different events. The Family Court, Tokyo in its judgment and order dated 31.05.2021 also made observation in this regard.

The age of the two minor daughters is 11 and 9 only and these minor daughters had been kept in unlawful custody and in unlawful manner till their rescue by the law enforcing agencies on 22.08.2021.

It is further contended by the petitioner that in the meantime the two minors are being one sided brainwashed by the Respondent and the age of the minors is not enough to make intelligent and independent choice, it would be disastrous to depend solely on the opinions of minors. The opinions of the children are greatly influenced by the Respondent.

The courts in Japan are the proper courts to adjudicate and evaluate the wellbeing of the minor daughters. They were born and brought up in Japan until their removal by Respondent in February, 2021. Their education, cultural habits and friends are all in Japan. So,

the Tokyo Family courts rightly examined the welfare of the two minor daughters and granted their custody to the petitioner.

Respondent has filed affidavit-in-opposition and so many supplementary affidavits to contest the Rule. It is contended by the Respondent, *inter-alia*, that:

Prior to marriage, the petitioner converted her religion to Islam and had also changed her name to ESMA and afterward married at a Tokyo Mosque where her Muslim Marriage was registered.

The Respondent has never decided to go and settle down in USA, rather he came to Bangladesh along with the minor daughters. 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 to Bangladesh. The Respondent was thrown out of the house by the petitioner as he failed to pay the monthly rent of the flat which in fact was the liability of loan installments of petitioner's parents and he was put in an emotionally & physically vulnerable situation; under these compelling circumstances he had to rent another flat. The two minor daughters, Jasmine and Laila on their own free will insisted to accompany their father to the said new flat. They did not want to stay with the petitioner for the fear of being sent to petitioner mother's ancestral village. In 2020 the petitioner sent the minors daughters to her ancestral village for 08(eight) months, when

Respondent could not have any meaningful contact with them. In December 2020, the petitioner again wanted to send them to her ancestral village in December 2020 but this time Jasmine vehemently refused and as a result the petitioner demonstrated excessive anger and venom towards the child and respondent. When the Respondent had realized that he couldn't stay in Japan as the petitioner was threatening to file a number of fraudulent cases against the Respondent. The Respondent had also received eviction notices and he was also forbidden to meet his youngest daughter, Sonia by the Petitioner. However, while in Tokyo both the minor daughters were in constructive custody of their father, the first custody case was initiated against him. There was no such order that the minor daughters cannot stay with the father, as such there

was no violation of any courts order by the Respondent. The Tokyo Police and Social services visited and interviewed the Respondent and the two children within a week of their move to the new flat and they were satisfied that the children were residing with their father lawfully.

At present the minors are studying in Canadian International School, Dhaka. The Respondent was thrown into a financial jeopardy by the petitioner and her family compelling the respondent to pay a substantial amount of his income as installments for the flat which is not registered in his name also. The Respondent was also taking care of the school tuition fees of the minor daughters as well. As a result, for the huge financial burden the Respondent requested the

petitioner to share the expenses, which further enraged the petitioner and her family, which resulted in forceful throwing of the Respondent out of the home by the petitioner.

The minor daughters had willingly accompanied their father to Bangladesh. The minors are old and mature enough to express their preference or opinion that need to be examined by this court to know whether the two minors were forcibly taken away from their mother or not.

The investigation report and the judgment of Tokyo Family court was not based on the statement or opinion of the minors with regard to their preference and which was also drawn in absentia of the minors and Respondent. The said judgment is based purely on the basis of petitioner's one sided story. The whole story is based on the opinion of the third child, Sonia who

is too young to understand any issues. As such this verdict of the Tokyo Family court cannot be treated as the appropriate and conclusive verdict which passed the order of the custody and the guardianship of the minors to the petitioner without determining or discussing the welfare and the best interest of the minor daughters at all. This judgment also does not reflect the best interest and welfare of the minors rather; they came out with a story blaming the Respondent on various allegations which are not true and can be verified only by examining the minor daughters by an appropriate family court. A family suit being No.247/2021 is pending before the 2<sup>nd</sup> 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 evidences 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.

The minor daughters willingly came to Bangladesh to stay with their father and they expressed no dissatisfaction in living with the Respondent even they refused to meet with the petitioner. The minor daughters fearing the vengeance of their mother over them willfully accompanied the Respondent to Bangladesh.

In Japan the Respondent 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 do not provide custody to a foreigner and also the visitation right of the aggrieved party cannot be enforced under Japanese legal system.

The Respondent being a pious Muslim married the petitioner after she converted and accepted Islam. But it is very unfortunate that the petitioner later on refused to follow and respect the Islami life style, which was one of the major reasons of their marital conflict.

The petitioner's mother always wanted to impose her decision on the Respondent and specially the two minor daughters for which their relationship deteriorated and they took their reliance upon Respondent and did not hesitate to come to Bangladesh with their father.

When the respondent-father came to Bangladesh with his minor daughters, he had the physical custody of the minor daughters. Therefore, travelling with minor daughters with their free consent cannot be termed as child abduction even under the Japanese Law. An article published in the website of Australian Embassy Tokyo, Japan states that: "Children travelling out of Japan" there are no specific legal requirements for a child to be permitted to leave Japan. A parent who has legal and/or physical custody of their children has the right to take them out of Japan. There is no judicial procedure to implement a "travel restriction" to prevent a child from leaving Japan. Moreover, it has been specifically mentioned in the guideline published by the Ministry of Foreign Affairs of Japan that a consent letter

from another parent is not required for leaving/entering/departing Japan.

The Respondent has further contended that the '**Hostage Justice**' system in Japan where only the Japanese parent gets full custody, and the non-custodial foreign parent has no ability to see his children which would permanently damage the children. There are hundreds of foreign children in Japan where the foreign father cannot have any access to the children. There are millions of Japanese children where the non-custodial Japanese's parent's right to visitation is not enforced by the authorities. Even, the French President Emmanuel Macron was in Tokyo to celebrate the Olympics but raised the issue directly with Japanese Prime Minister Yoshihide Suga when he visited in Japan. Australia's Foreign Minister

Marise Payne did the same in her May meetings with her Japanese counterpart Toshimitsu Motegi and Defence Minister Nobuo Kishi (**Sunday Morning Herald 14<sup>th</sup> August, 2021**)

In the supplementary affidavit the Respondent has reproduced some News Articles from different authoritative newspaper which are as follows:

i. Japanese parents who bring their children home after a divorce abroad can defy joint custody orders made by foreign courts. (Source: <https://www.bbc.com/news/world-asiapacific12358440>);

ii. an article has been published by the Washington Post written by Simon Denyer depicted the suffering of the parents and children who have become victims of Japanese Hostage justice system. Relevant part of the said Article is quoted below-

'The other cases just involve access-another

thorny issue in Japan, where there is no concept of joint custody. The prevailing wisdom in Japan says it is upsetting or disruptive for children to continue to see both parents after a marriage breaks down, so one parent - almost always the mother-gets full custody and the other parent usually has two hours access to the children each month. 'Visitation' is the most problematic thing with Japan. A lot of cases about return orders are actually about access, about the non-custodial parent being able to maintain a relationship with their child;

iii. an article has been published in the website Reuters on 16<sup>th</sup> January 2020 written by Chang-Ran Kim highlighted that several foreign spouses and

particularly fathers across the world are raising voices against the discrimination by the Japan's cruel and adverse legal system. The relevant part of the article is to that effect-

"This is only going to change when Japanese parents speak out as well,"

McIntyre said, adding that he had received many letters of support from local parents suffering the same plight. Children should have access to both parents-it's a fundamental human right.

Having stated the above facts the Respondent has sought for discharging the Rule.

It is pertinent to mention here that on 19.08.2021 at the time of issuance of the Rule, The Respondent Nos.5 & 6 were directed to produce the minors before this Court on 31.08.2021 at 10.30 A.M.

However, on 23.08.2021 on behalf of the Respondent an application was filed to release his minor daughters from the alleged unlawful detention at victim support center as the members of the law enforcement agency, in particular Criminal Investigation Department (**CID**) took the said minors from his custody on the basis of the alleged complaint made by the petitioner before the police authority that the Respondent came with the minors to Bangladesh from Japan without her consent.

On 23.08.2021 the said minors were produced before this Court by the Police Authority. This Court heard the learned Advocates of the respective parties as well as the learned Deputy Attorney General. The learned Deputy Attorney General had explained the circumstances for the alleged intervention of the

members of the law enforcement agency into the matter.

This Court having considered the submissions of the learned Advocates of the respective parties, attending facts and circumstances on 23.08.2021 passed the following ad-interim orders:

- i) the minors be remained in the safe custody of the law enforcing agency till 31, August 2021;
- ii) the law enforcing agency is directed to ensure the safety, security and congenial atmosphere for the said minors;
- iii) the petitioner mother is allowed to visit and meet her minor daughters at the morning, everyday (at 10.00 A.M. to 1.00 P.M.);
- iv) Respondent father is allowed to visit his minor daughters, everyday (at 3.00 P.M. to 8.00 P.M.);
- v) the law enforcing agency is directed to produce the

said minors on 31.08.2021 before this court.

On 31.08.2021 the minors were again produced before this court and having heard the respective parties as well as the minors and considered the issue of well being of the minors, the Court passed the following orders-

- i. Both, the petitioner and the Respondent will look after their minor daughters jointly for the time being at Flat No. N2, House No.35, Road No.118, Gulshan-1, Dhaka and both the petitioner and Respondent will bear the cost of the said Flat;
- ii. petitioner and Respondent are at liberty to stay in the said house;
- iii. Ms. Nasrin, the translator of the petitioner is also permitted to stay with the petitioner;
- iv. the father and mother will ensure their private time with the daughters;

- v. the Deputy Director, Department, of Social Welfare, Dhaka, Bangladesh is directed to monitor the well being of the said children continuously and to give necessary assistance to them, if requires and submit a report on 16.09.2021 before the court;
- vi. the Police Commissioner, Dhaka Metropolitan Police is directed to ensure the security and safety of the said children and their mother, writ petitioner.

Eventually, on behalf of the petitioner an application for modification of order dated 31.08.2021 was filed before this court stating, *inter alia*, that on 01.09.2021 the petitioner complying with the order of the court went to the accommodation fixed by the Respondent. However, the petitioner is facing some serious problems in that house for unwarranted activities of the Respondent. Without the

permission of the petitioner, the Respondent set up CCTV cameras in living room and kitchen and is monitoring everything there. This surveillance is destroying the petitioner's privacy and putting mental pressure upon her. As a result, the petitioner is debarred from spending private time with her minor daughters pursuant to court's order dated 31.08.2021.

It was further contended that the petitioner cannot go out with her daughters without the permission of the Respondent. On 03.09.2021, the petitioner wanted to take her daughters out for some shopping and recreational activities at Unimart but the Respondent restrained her on the plea of security reasons. For the welfare of the two daughters the petitioner conceded to live in the place fixed by the Respondent, but the Respondent shows hostile

behavior towards the petitioner and abused the petitioner verbally before the daughters. This unhealthy environment will have severe bad impact upon the psyche of the children.

In the above circumstances the two children are needed to be taken out of gadget addiction for their welfare and the petitioner being mother and a doctor is the appropriate person to do so and hence the petitioner wants to spend night with her two daughters intimately and as such court's order is required to be modified giving the petitioner sole right to stay at night with the two daughters and the Respondent having visitation right for specific period of time as determined by this court.

It is also contended by the petitioner that some YouTube channels produced and broadcast defamatory videos against the petitioner on baseless information and circulating

misleading information to the peoples. Those scathing videos are bringing excruciating harassment to the petitioner and disturbing her normal life. The list of the defamatory videos along with URL was mentioned in the application.

The Respondent had filed an affidavit-in-opposition to the said application denying the material statements made in the same.

In the said affidavit-in-opposition the Respondent further contended that the Respondent is strongly against leaving her minor daughters with the petitioner since the minor daughters are not ready to go along with the mother and the Respondent has strong apprehension that the petitioner might take shelter in Japan Embassy which given the over enthusiast interference during the earlier unlawful intervention of CID.

Having heard the learned Advocates of the respective parties and considered the allegations made by the petitioner, the Court by its order dated 08.09.2021 was inclined to modify the orders dated 31.08.2021 and passed the following orders:

- i) the petitioner mother will stay at night with her two daughters without the presence of the Respondent on 09.09.2021, 11.09.2021, 13.09.2021 and 15.09.2021 and allowed to participate outdoor activities for refreshment of the children;
- ii) the Respondent is allowed to stay in the house, except in the above mentioned nights and he was also given liberty to take his daughters outside of the house for their refreshment;
- iii) Respondent was directed to remove the interior CCTV cameras from the apartment.
- iv) the Chairman, BTRC is also directed to take all steps to

remove all the defamatory videos against the petitioner as well as against the Respondent, if any, from all online platforms.

- v) The Cyber Police Center, Criminal Investigation Department (CID) is directed to identify the persons posting/uploading defamatory contents (as stated in paragraph 12 of the application) and take necessary legal steps against the alleged perpetrators.

This court upon hearing the respective parties on 16.09.2021 again passed the following orders modifying the earlier orders:

- i) the petitioner will stay with the children from 8.00 A.M. on September, 17 of 2021 till 8.00 A.M. on September, 18 of 2021 and Respondent will stay with the children from 8.00 A.M. on September,



18 of 2021 for the next 24 hours and they will stay with their daughters in this way, alternatively, till September, 28 of 2021.

ii) the Deputy Director, Department of Social Services, Ministry of Social Welfare, Bangladesh, Dhaka is directed to monitor the well being of the said children continuously and to give necessary assistance to them.

Again on 30.09.2021 this court upon hearing the respective parties passed the following orders modifying the earlier orders dated 16.09.2021:

i) The petitioner will stay with the minor daughters at the Gulshan Residence, the present address until further order and both parties will bear the house rent;

ii) the Respondent shall have the visitation right in the day time (9.00 A.M. to 5.00 P.M);

iii) the Deputy Director, Department of Social Services, Ministry of Social Welfare, Bangladesh, Dhaka is directed to continue monitoring the well being of the children and bring the children before the Court on 21 October-2021, at 2.00 P.M.

It is pertinent to mention here that the Court repeatedly urged the respective parties as well as their advocates to make an amicable settlement on the issue of custody of the minors. However, they failed to reach any amicable settlement.

The learned Advocate for the petitioner has made

the following submissions:

- i) the Respondent had illegally removed the minors from the custody of the petitioner mother and this act of the Respondent is nothing but an act of **'International parental Abduction/ kidnapping'** and as such it is necessary to pass an order to return the minors to Japan to their mother's custody;
- ii) the Family Court of Japan has already decided the issue of custody of the minors and examining the issue of welfare of the two minors granted custody to the petitioner and as such the Principle of **'Comity of Courts'** will apply in this particular case; since the minors were abducted/ kidnapped the **'Convention on the Civil Aspects of International Child Abduction'** will be applicable, though

Bangladesh has not signed and ratified the said Convention. However, the High Court Division in the case of **RMMURU -vs- Bangladesh and others**, reported in 72 DLR 420, held that this convention has been a part of Customary International law;

- iii) the Family Court of Japan has already decided the issue of well being of the minors and as such there is no scope to decide the said issue afresh;
- iv) the minors were brain washed by the Respondent which resulted one sided perspective and alienation, i.e. they have been suffering from STOCKHOLM SYNDROME;
- v) in the case of **Jorse Bin Sams -vs- Amir Ali Chowdhury and others**, reported in 13 BLT (AD)

115, **Abdul Jalil and others -vs- Sharon Laily Begum**, reported in 18 BLD

(AD) 21, the paramount interest of welfare of minors were considered and the minors were given custody to their mother;

vi) in determination of custody, habitual residence of the minor is fundamental and in the instant case, two minors are the habitual residence of Tokyo, Japan and Family Court of Tokyo held that the children place of residence is in Japan and as such the children should be return to their place of habitual residence;

vii) the respondent should be directed to comply the judgment and order dated 31.05.2021 passed by the Family Court, Tokyo, Japan.

The learned Advocate for the Respondent has made the following submissions:

- i) in view of the provision of section 2 of Bangladesh citizenship (temporary provisions) 1972, the minors are the citizen of Bangladesh; and as per provision of section 7 of Guardian and Wards Act, no person, other than a citizen of Bangladesh shall be appointed, or declared to be a guardian of a minor who is a citizen of Bangladesh;
- ii) Section 17(3) of Guardian and Wards Act provides that if the minor is old enough to form an intelligent preference, the court may consider that preference;
- iii) Article 12 of the **Convention On The Rights Of The Child** stated that the views of the child be

- given due weight in accordance with the age and maturity of the child;
- iv) according to Islamic Jurisprudence (Fiqh of Muslim Family, Cairo, 359-60) if the child is above 07(seven) years old the custody would then be determined according to his/her choice for better upbringing and protection;
- v) opinion of the Child is vital before declaring any interim or permanent custody;
- vi) in relation to non-conventional countries, the court in the country to which the child is removed will consider the question on merit bearing the welfare of the child as of paramount important and consider the order of foreign court as only a factor to be taken into consideration;
- vii) while considering aspect, the court may reckon the fact that child was abducted from his/her country of habitual residence but the court's overriding consideration must be child's welfare;
- viii) under Japanese law (**Article 821 of cc**) the parental authority can be exercised without courts order as the parent who has parental authorities can determine the residence of the child, he/she can take the child abroad without a court order. (**Family Law 2022, Law and Regulation, Japan, ICLG**) and as such bringing the minor daughters with the respondent in Bangladesh cannot be termed as child abduction or kidnapping;
- ix) the '**Hostage Justice**' system in Japan where only the Japanese parent gets full custody, and

the non-custodial foreign parent has no ability to see his children would permanently damage the children; there are hundreds of foreign children in Japan where the foreign father cannot have any access to the children; there are millions of Japanese children where the non-custodial Japanese parent's right to visitation is not enforced by the authorities; Japanese parents who bring their children home after a divorce abroad can defy joint custody orders made by foreign courts.

(Reference-<https://www.bbc.com/news/world-asiapacific12358440>);

- x) when the Respondent came to Bangladesh with his minor daughters, he had the physical custody of the minor daughters; therefore, travelling with

minor daughters with their free consent cannot be termed as child abduction even under the Japanese law;

- xi) the minors have expressed their desire before this court that they want to go to their father's custody and that has to be given preference in view of the Article 12 of the Convention on the Rights of the child.

Heard the learned Advocate of the respective parties, perused the writ petition, affidavit in opposition filed by the respondent and several supplementary affidavits filed by both the parties and the annexure thereto as well as cited case laws by the respective parties.

**International Parental Child Abduction:-**

Learned Advocate of the petitioner has tried to impress us that the respondent

on 21.01.2021 picked up the minors while they were returning from school and eventually, they were taken to Bangladesh from Japan without the knowledge and consent of the petitioner i.e. the mother and this acts of the respondent is a clear case of International Parental Child Abduction.

Refuting the above submission, learned Advocate of the Respondent has contended that when the Respondent father came to Bangladesh with his minor daughters, he had the physical custody of the minor daughters; as such travelling with minor daughters with their free consent cannot be termed as child abduction, even under the Japanese Law (**Article 182 of the CC**).

Under Japanese law the parental authority can be exercised without a court order. As the parent who has parental authorities can determine the residence of the

child, in view of article 821 of CC he/she can take the child abroad without Court order. (Family Law **2021** Law and Regulation Japan, ICLG).

A parent who has legal and/or physical custody of a child in Japan generally has the right to remove that child from the country. There are no specific legal requirements for a child to be able to leave Japan. If a child leaves with a parent, they will not be stopped and asked for evidence that the other parent consents to the travel. It is not possible to put a stop order with immigration to prevent a child from leaving Japan. Exit visas are not required for foreign nationals but confirmation of departure, in the form of a stamp from an immigration inspector, is necessary. [Reference-  
<https://www.gov.uk/government/publications/japan-child-abduction/in>]

On perusal of the above Japanese law in respect to child custody couple with the fact that the minors had informed the Court that they have come to Bangladesh with their father voluntarily, we are unable to accept the submission of the learned Advocate for the petitioner that the act of the Respondent is a case of parental abduction/kidnapping.

**Enforcement of Foreign Court Judgment and Principal of Comity of courts:**

Learned Advocate of the petitioner has submitted that the courts in Japan are the proper court to adjudicate and evaluate the well being of the minors as the minors were born and brought up in Japan and their education, cultural habit and friends all in Japan; and the family court of Japan having considered all aspect decided that the minors should be go to the custody of their mother and in this particular

case the principle of comity of courts shall apply.

To substantiate the above submission the learned Advocate of the petitioner has relied on the cases of **Nilanjan Bhattacharya Vs the State of Karnataka and others**, reported in 2021(1) HLR Page-330, **Surya Vadanam Vs the State of Tamil Nadu and Ursha**, reported in (2015)5 SCC page-450, **Arathi Bandi and others - Vs- Bandi Jagadrakshaka Ray and others**, reported in (2013) 15 SCC page-790, **Shilpa Aggarwal -Vs- Aviral Mittal and others**, reported in (2010) 1 SCC page-591, **Ravi Chandran -vs- Union of India and others**, reported in (2009) 1 SCC page-175.

In the above cases it has been observed that if an interim or an interlocutory order passed by a foreign court has to be disregarded, there must be some special reason for doing so. No doubt, we except foreign courts to

respect the orders passed by the courts in India and so there is no justifiable reason why domestic courts should not reciprocate and respect orders passed by foreign court.

In the above cases pursuant to the order/judgment of the foreign Court and applying the principle of Comity of Courts the minors were return back from India to the Country from where they were removed and brought to India.

On the other hand relaying on the case of **Prateek Gupta - vs- Shilpi Gupta,** MANU/SC/1537/2017 the learned Advocate for the Respondent has submitted that the court's overriding consideration must be the Childs Welfare i.e. the ultimate concerned and paramount consideration should be the welfare of the child.

In the case of **Ruchi Majoo vs. Sanjeev Majoo,** MANU/SC/062/2011; 2011 6 SCC 479 the Indian Supreme Court

has decided the ratio in respect of the applicability of principle of Comity of Courts. It has observed to that effect:

"We are not concerned with the first and the third question. As far as the second question (Comity of courts) is concerned, this court was of the view that there were four reasons for answering the question in the negative. Be that as it may, the following principles were accepted and adopted by this Court:

1. The welfare of the child is the paramount consideration. Simply because a foreign court has taken a particular view on any aspect concerning the welfare of a child is not enough for the courts in this country to shut out an independent consideration



of the matter. The principle of comity of courts simply demands consideration of an order passed by a foreign court and not necessarily its enforcement.

2. One of the factors to be considered whether a domestic court should hold a summary inquiry or an elaborate inquiry for repatriating the child to the jurisdiction of the foreign court is the time gap in moving the domestic court for repatriation. The longer the time gap, lesser the inclination of the domestic courts to go in for a summary inquiry.

3. An order of a foreign court is one of the factors to be considered for the repatriation of a child to the jurisdiction of the foreign court. **But that will not override the consideration of welfare of the child.** Therefore,

even where the removal of a child from the jurisdiction of the foreign court goes against the orders of that foreign court, giving custody of the child to the parent who approached the foreign court would not be warranted if it were not in the welfare of the child.

4. Where a child has been removed from the jurisdiction of a foreign court in contravention of an order passed by that foreign court where the parties had set up their matrimonial home, the domestic court must consider whether to conduct an elaborate or summary inquiry on the question of custody of the child. If an elaborate inquiry is to be held, the domestic court may give due weight

to the order of the foreign court depending upon the facts and circumstances in which such an order has been passed.

5. A constitutional court exercising summary jurisdiction for the issuance of a writ of habeas corpus may conduct an elaborate inquiry into the welfare of the child whose custody is claimed and a Guardian court (if it has jurisdiction) may conduct a summary inquiry into the welfare of the child, depending upon the facts of the case.

6. Since the interest and welfare of the child is paramount, **a domestic court is entitled and indeed duty bound to examine the matter independently, taking the foreign judgment, if any, only as an input for its final adjudication.**

On the facts of the case, this court held that repatriation of the minor to the United States, on the principle of "comity of courts" does not appear to us to be an acceptable option worthy of being exercised at that stage."

In the case of **Nithya Anand** **Raghavan** **MANU/SC/0762/2017(2017) 8SCC 45** it has been observed to that effect:

"so far as non-Convention countries are concerned, or where the removal related to a period before adopting the convention, the law is that the court in the country to which the child is removed will consider the question on merits bearing the welfare of the child as of paramount importance and consider the order of the foreign court as only a factor to be taken into consideration as stated in **McKee v. McKee** unless the

court thinks it fit to exercise summary jurisdiction in the interests of the child and its prompt return is for its welfare."

In the case of **Mrs. Sharon Laily Begum Jalil vs. Abdul Jalil and others**, reported in 18 BLD(AD)21; 50 DLR (AD), 55 and **Zahiruddin Ahmed (Tizu) vs. Syed Nur Uddin Ahmed and another**, reported in 29 BLD 375 our Appellate Division and High Court Division respectively decided the custody of the minors in their own way considering the welfare of the minor, despite the foreign Courts order/judgment.

Thus, in respect to the applicability of the "**Comity of Courts**" it is our considered view that the Child's welfare and well being should be considered first and the above proposition of law should not be applied in each and every case mechanically without

considering the well being and welfare of the minors.

Our Appellate Division in **Civil Petition For Leave to Appeal Nos.571 and 646 of 2018**

[16 ADC (2019) 55, 2018 14 ALR 37] has observed:

"13. Article 12 of the CRC provides that the child should be permitted to express her/his views freely in matters affecting her/him. This concept is also not new since the Guardians and Wards Act, 1890 provides that if the minor is old enough to form an intelligent preference, the Court may consider that preference. It is with such provisions in mind that we invariably speak to the children concerned in order to find out their views and preferences."

In **Civil Petition for Leave to Appeal No.527 of 2011**

the Appellate Division [17 BLC (AD) 2017) 77] has observed:

"15. We may also mention that within the modern

concept of custody and other matters concerning children, there is a requirement that the child should be allowed to express his views, (see Article 12 of the Convention of the Rights of the Child (CRC) quoted below.) This is a small progression from section 17(3) of the Guardians and wards Act, 1890 which provides that if the minor is old enough to form an intelligent preference, the court may consider that preference. The court when considering any matters relating to the custody of the child should also keep in mind the provision of Article 3 of the CRC, which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law,

administrative authorities of legislative bodies, the best interests of the child shall be a primary consideration."

In a recent judgment passed in **Civil Petition For Leave to Appeal No.942 of 2020**, the visitation rights of a mother was reduced from weekly to fortnightly on the basis of the opinion of the minor child by the Appellate Division.

Article 12 of the CRC provides as follows:-

"1. States parties, shall assure to the child who is capable of forming his or own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be

heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

On three occasions, lastly on 18.11.2021, we met and talked with the minors in our court chamber. We have tried our best possible way to understand the level of their maturity, physiological condition as well as their preference, desire, attitude towards their parents. We have also considered the report submitted by the Deputy Director, Social Welfare Office, Dhaka, wherein, it has been mentioned that the father has got more mental attachment with the minor children and they love to stay with their father rather than mother. The relevant part of the report that is quoted below:

“Ms. Eriko Nakano and Mr. Imran Sharif তাদের দুই মেয়ে Nakano Jasmin Malika @ Jasmin Malika Sharif এবং nakano Laila lina @ Laila Lina Sharif এর ব্যাপারে পারস্পরিক সমঝোতার ভিত্তিতে কোন ইতিবাচক সিদ্ধান্তে পৌঁছাতে ব্যর্থ হয়েছে বলে মনে হয়েছে। বিশেষ করে Ms. Eriko Nakano-কে কিছুটা আগ্রাসী বলে মনে হয়। অপরপক্ষে Mr. Imran Sharif-কে অনেকটাই নমনীয় মনে হয়েছে। তাদের মধ্যে আস্থা ও বিশ্বাসের একটা গভীর সংকট বিদ্যমান রয়েছে বলে প্রতীয়মান হয়।

দুই মেয়ে Nakano Jasmin Malika @ Jasmin Malika Sharif এবং Nakano Laila lina @ Laila Lina Sharif দিনের একটা বড় অংশ তাদের বাবার সাথে কাটাতে স্বাচ্ছন্দ্যবোধ করে এবং বাবার কক্ষেই তারা অনলাইনে স্কুলের ও বাংলা শেখার ক্লাসে অংশগ্রহণ করে। মায়ের সাথে তাদের সম্পর্ক এখনও অনেকটাই আনুষ্ঠানিক। মাঝে মাঝে তারা মায়ের সাথে টেলিভিশন দেখেছে তবে তাদেরকে তেমন প্রাণবন্ত মনে হয়নি। Laila মায়ের সাথে কিছুটা স্বাভাবিক হলেও Jasmin মোটেও মায়ের সংগ উপভোগ করে না এবং সে তার মায়ের আচরণ ভালো লাগে না মর্মে আমাদের জানিয়েছেন। Jasmin এর ভাষ্য মতে মা তাদের বাবার সম্পর্কে সবসময় নেতিবাচক কথা বলে যা তাদের মোটেই ভালো লাগে না। এ বিষয়ে বড় মেয়ে Jasmin ০৫(পাঁচ) টি চিঠি আমার কাছে হস্তান্তর করেন (কপি সংযুক্ত)। পর্যবেক্ষণে Ms. Eriko Nakano এর মেজাজ, ধৈর্য এবং মেয়েদের পালস্ বুঝে চলার ক্ষেত্রে যথেষ্ট ঘাটতি রয়েছে মর্মে পরিলক্ষিত হয়। স্নেহ-মমতার পরিবর্তে মেয়ে দুটিকে কিছুটা রোবটিক জীবনে অভ্যস্ত করার একটা প্রচেষ্টা Ms. Eriko Nakano এর মধ্যে বিদ্যমান রয়েছে

যা মেয়ে দুটিকে তার কাছ থেকে দূরে সরিয়ে দিচ্ছে বলে মনে হয়। অপরপক্ষে বাবা Imran Sharif এর প্রতি মেয়েরা অনেকাংশেই নির্ভরশীল। বাবাই তাদের বন্ধু, সহযোগী ও সকল আস্থার জায়গা দখল করে আছে। মেয়েদের লালন-পালনের বিষয়টি বিবেচনায় নিলে বাবা Imran Sharif তাদের মা Ms. Eriko Nakano এর চেয়ে অনেক বেশি যত্নশীল বলে মনে হয়েছে। বাবা বাসা থেকে চলে যাওয়ার সময় তাদেরকে বেশ বিমর্ষ মনে হয় যার রেশ দীর্ঘ সময়ব্যাপী বিদ্যমান থাকে। এমনকি বাবা বাসা থেকে চলে গেলে তারা ঘরের দরজা আটকিয়ে বসে থাকে এবং একধরনের বিচ্ছিন্নতাবোধ তাদের মধ্যে লক্ষ্য করা যায়। এ ধরনের বিচ্ছিন্নতাবোধ তাদের মানসিক বিকাশের অন্তরায় বলে প্রতীয়মান হয়।”

Jasmine and Laila, the minors have also expressed their desire and preference to us verbally and in writing also. Jasmine has expressed in writing to that effect:

“আমার মার সাথে থাকতে ভয় লাগে। তাই আমি জাপান যাব না। আমি ঢাকাতে থাকবো।’ And

‘কেননা মার সাথে একা থাকতে পারবো না, বাবা ছারা। . . . . । মা চায়না আমি আপনাকে কিছু বলি। Please help me and Laila. We want to stay with Abba in Bangladesh.... আমাদেরকে সাহায্য করেন। Please.”

Having talked with the minors it is very difficult for us to hold that they were brainwashed by one-sided perspectives and alienation.

Moreover, from the order sheet it will be transpired that this Court has given ample opportunity to the petitioner-mother to stay in a house with the minors since September, 2021 for removing the alienation, if any.

In deciding present issue of custody of the minors, this court has also kept in mind the following factual aspects besides legal proposition:

- i) information has been provided to this court by the learned Advocate for the petitioner that it is not possible for petitioner to stay in Bangladesh for a long time, because she is doing job in Japan and her employer has already given notice for termination;
- ii) there is no scope to make any comment in respect to the alleged ‘Hostage Justice System’ in Japan, as agitated by the Respondent;

- iii) the apprehension of the Respondent that if the minors are returned to Japan with their mother he (father) may lose his parental rights and he be separated from minor daughters which would permanently damage the children;
- iv) before passing the judgment and order by Family Court of, Tokyo, Japan, an ad-interim order has been passed by a competent Family Court of Bangladesh restraining the petitioner (mother) to take the minors from Bangladesh and the petitioner did not take any steps against the aforesaid order, though she had filed written statement to contest the said suit and the said suit is still pending;
- v) Family Court of Japan had full knowledge and information about the above ad-interim order passed by
- the Family Court of Bangladesh;
- vi) the minors have already been admitted in a school in Dhaka namely 'Canadian International School' and they are attending their class regularly and they are also learning Bangla.

The Appellate Division in the case of **Sharon Laily Begum Jalil vs. Abdul Jalil and others** [18BLD(AD)21] has held that in deciding the question of custody of a minor whether in a proceeding the nature of Habeas Corpus under Article 102 of the Constitution of the people's Republic of Bangladesh or in a proceeding for Guardianships under the Guardians and wards Act, 1890 the paramount consideration before the court is the welfare of the minor and **not the legal rights of parties under the rules of personal law or statutory provisions.**

Having given anxious consideration into the matter in

particular the best interest, welfare and wellbeing of the minors, we are inclined to pass the following orders:-

i) the Rule shall remain pending;

ii) the minors, namely Jesmin 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 Director, 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, 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.

Communicate the order to the Deputy Director, Social Welfare office, Dhaka.