

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

Writ Petition No. 12525 of 2021

IN THE MATTER OF:

An application under Article 102 of the
Constitution of the People's Republic of
Bangladesh.

-AND-

IN THE MATTER OF:

Md. Zahedul Hoque (Mithun)

...Petitioner

-Versus-

Present:

Mr. Justice Sashanka Shekhar Sarkar
And
Justice Urmee Rahman

Bangladesh, represented by the Secretary,
Ministry of Home Affairs and others

..... Respondents

Mr. Md. Shakhawat Hossain, Advocate with

Mr. S.M. Wahidul Enam, Advocate

...For the petitioner

Mr. Md. Azahar Ullah Bhuiyan, Advocate

... For the respondent no. 7

Heard on 07.05.2026 and 11.05.2026

Judgment on 12.05.2026

Urmee Rahman, J:

In the instant writ petition Rule was issued in the following
terms:

*“Let a Rule nisi be issued calling upon the
Respondent No. 07 (the Mother) to show cause as to
why she shall not be directed to produce the
Petitioner’s minor daughter “Ameerah Jannat”
(detenue), date of Birth (02-07-2020) unlawfully
detained by the Respondent No. 07 (the Mother) and*

bring her before this Court in person by directing the Respondent No. 03 and Respondent No. 04 to assist this Hon'ble Court by instructing the respondent No. 07 (the Mother) to bring the minor daughter so that this Hon'ble Court can be satisfied that the minor is not being held in custody without lawful authority or in unlawful manner and/or pass such other or further order or orders passed as to this Court may seem fit and proper.”

At the time of issuance of the Rule it was further ordered that,

“The Respondent No. 07 (Farhana Sharmin, Daughter of Kamal Mohiuddin, Present Address: Flat-301, House No. 152, Crescent View, Crescent Road (Green Road) Dhaka-1207)) is directed to produce the minor “Ameerah Jannat” (detenue), date of birth (02-07-2020) before this Court on 11.01.2022 at 03.30 P.M. and Respondent No. 3, the Officer-in-Charge, Kolabagan Police Station, Dhaka is also directed to take necessary steps to that effect.”

Necessary facts for disposal of the instant Rule, as narrated in the writ petition, in short, are that, the Petitioner got married with the Respondent No. 7 on 22.02.2019 following the Islamic Sharia Law, which was registered under Muslim Registration Act, 1974. Thereafter, a daughter was born out of the said wedlock on

02.07.2020 namely, Ameerah Jannat. Later on, their relationship resulted in a divorce on 25.10.2021. Considering the wellbeing and betterment of the minor child, the petitioner i.e. father of the child tried to amicably settle the issue of the custody and visitation of the child, but without any result due to non-co-operation from the respondent No. 7 i.e. mother of the child. In this situation he was constrained to file this Writ Petition in the form of Habeas Corpus praying for production of the minor child before the Court with a view to determine that she was not held in unlawful custody.

After issuance of the Rule on 13.12.2021 the matter came up in the list on 31.01.2022 and it appears from the record that, since his Lordship, who issued the Rule, was elevated to the Hon'ble Appellate Division by that time, the earlier order passed at the time of issuance of the Rule could not be complied with. As such by the order dated 31.01.2022 the Respondent No. 7 (mother) was again directed to produce the minor child before this Court on 06.02.2022 at 10.30 A.M. without fail.

From the following order dated 07.02.2022 it appears that, pursuant to the Court's earlier order the Respondent No. 7 produced the minor child before this Court and considering the facts and circumstances the matter was adjourned for 3(three) weeks from date. In the meantime, the respondent No. 7 was directed to allow the petitioner to take the child thrice a week, namely Friday, Saturday and Tuesday from 9.00 A.M. to 5.00 P.M. The petitioner

was further directed to ensure the safe travel, safety and security of the child in every manner.

The matter again came up in the list on 07.03.2023 following an application filed by the petitioner for ensuring the welfare and betterment of the minor daughter by giving full interim custody to the petitioner being the father of the child.

It transpires from the corresponding order dated 07.03.2023 that,

“Mr. Azhar Ullah Bhuiyan, the learned Advocate appearing on behalf of the respondent Nos. 7-9 submits that the mother is the appropriate care taker for the minor child and the allegation made against her is not true. Referring to a decision of the Appellate Division reported in 50 DLR (AD) 62 he submits that the minor children is required to be kept with the mother as long as she does not earn any disqualification for such custody and accordingly, since the mother has no such disqualification, as such, the minor child should be kept with the respondent mother. However, referring to the order dated 07.02.2022 the learned Advocate submits that the directive given by the said order may be continued.”

After hearing the application this Division was pleased to direct the parties to continue with the direction earlier given by the order dated 07.02.2022 as to the visitation right of the petitioner and with that direction the application for giving full interim custody to the petitioner was disposed of.

The petitioner again filed another application praying for full interim custody of the minor child and by the order dated 01.06.2023 this Court was pleased to order that:

“The learned Advocate for the respondent Nos.7-9 submits that the respondent mother is fully complying with the order in allowing the petitioner to take the minor child and they have no objection to the same. But the petitioner in order to frustrate the case before the Court below regarding the custody of the minor child has brought this matter with a prayer for giving full interim custody of the minor child. Accordingly, he has opposed the prayer of the learned Advocate for the petitioner.

In the circumstances, we are of the view that the parties should continue with the directive given in the order dated 07.02.2022 passed by this Court.”

On another application for custody of the minor child filed by the petitioner this Court passed the following order on 13.08.2025:

“Upon hearing the learned Advocates and going through the application filed, it appears therefrom that the reasoning as stated therein being touched the merit of the rule, the application thus to be disposed of at the time of final hearing.”

Now this matter has come up in the list before this Bench for hearing the Rule. It is pertinent to mention that neither party moved before the Appellate Division challenging any of the orders passed by this Division on earlier occasions.

Learned Advocate Mr. Md. Shakhawat Hossain with Advocate Mr. S.M. Wahidul Enam appears on behalf of the petitioner and submits that, during the pendency of this writ petition the father of the minor child has already filed a Family Suit before the Family Court being Family Suit No. 80 of 2022 for custody and the matter is pending there.

Learned Advocate for the petitioner very sensibly and candidly submits that, the welfare of the child is of paramount importance in deciding the matter of custody and the custody matter should be decided by the Family Court, who has the original jurisdiction to decide on this welfare issue upon taking evidence. Therefore, he prays that the Rule may be disposed of, however, by keeping intact the interim order passed by this Court by the order dated 07.02.2022 regarding the visitation right of the father.

On the other hand, learned Senior Advocate Mr. Md. Azahar Ullah Bhuiyan appeared on behalf of respondent Nos. 7 -9 i.e. the mother and maternal grandparents of the child and contested the Rule by filing an affidavit in opposition.

Mr. Bhuiyan submits that since divorce the child is residing in the lawful custody of the mother and admittedly the mother is

bearing all the expenses of the child by herself and there has been no violation of the interim order passed by this Court.

He also submits that, when the order dated 07.02.2022 was passed by this Court the child was about 17(seventeen) months old, now she is of the age of 5(five) years 10(ten) months and has been admitted to a school. Hence, he prays that the interim order may be modified taking into consideration of the said fact.

He also admitted that, a Family Suit is pending before the Family Court regarding the custody of the minor child.

We have heard the learned Advocates for both the parties and perused the writ petition, the supplementary affidavit, the affidavit in opposition and all the documents annexed thereto.

It is admitted fact that the child was born on 02.07.2020 and her parents got divorced on 25.10.2021 and she was around 17 months old at the time of issuance of the instant Rule and none of her parents got remarried since divorce.

It is also admitted that, during pendency of this writ petition the petitioner i.e. the father of the minor child has filed a Family Suit before the Family Court praying for full custody of his minor daughter. The Family Suit No. 80 of 2022 is now pending before the Court of Additional Assistant Judge, 2nd Court and Family Court, Dhaka and there is no order of stay of the proceeding of that Family Suit by this Division.

Both the parties also admitted that, the final decision as to the custody of the minor child will be determined by the Family Court who has the original jurisdiction regarding this matter.

This writ petition in the nature of Habeas Corpus has been filed challenging the lawful custody of the mother before filing the family suit for custody. Writ of Habeas Corpus is a high prerogative constitutional remedy intended to secure liberty against unlawful detention. It is not designed to adjudicate complex and disputed questions relating to guardianship, welfare, parental fitness or matrimonial disharmony, particularly where there is a competent family Court to deal with this matter.

In the present case, the detinue is an infant girl, who was only around 17(seventeen) months old at the time of issuance of the Rule and now about six years old. Admittedly she is in the custody of her mother, who in view of the facts and circumstances of the case, cannot be said to be holding the child in unlawful detention so as to attract the extra ordinary writ jurisdiction.

On this point, Section 352 of Mulla's Principle of Mahomedan Law can be referred, which is as follows:

“352. Right of mother to custody of infant children-The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child, unless she marries

a second husband in which case the custody belongs to the father.”

This provision of personal law has been upheld in many leading cases up to the Appellate Division.

In the present case the allegations raised by the petitioner involve serious disputed questions of fact requiring evidence, inquiry and assessment of welfare considerations of the minor, all of which fall squarely within the domain of the Family Court. Entertaining such controversies in the writ of Habeas Corpus jurisdiction would amount to converting the constitutional forum into a parallel family court dealing with custody matter, which is neither contemplated by law nor conducive to the welfare of the child.

This Court is constrained to observe that repeated invocation of writ of Habeas Corpus in ordinary custody disputes, particularly where efficacious statutory remedies are available, tends to misuse the extra ordinary jurisdiction of this Court and unnecessarily exposes minor children to continuing parental conflict and litigation induced instability.

In the leading case of *Abdul Jalil and others Vs. Sharon Laily Begum Jalil* reported in **50 DLR (AD) 1998, 55** it has been held by the Apex Court of this country that:

“...we find substance in the submission of Dr. Kamal Hossain 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 an 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 said children.”

Very recently in the famous case of *Eriko Nakano, Tokyo, Japan Vs. Bangladesh*, represented by the Secretary, Ministry of Home Affairs and others reported in **16 SCOB [2022] (AD) 107** it was further held by the Appellate Division that:

“In this case only the 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.”

It has also been held by the Appellate Division that the custody of a minor child lawfully lies with the mother until she is disqualified as per the provision of law.

From meticulous perusal of these two leading cases we find that, in both the cases writ of Habeas Corpus was filed by the mother, who claimed that her minor children were forcefully held in unlawful custody of the father and this Court on every occasion

entertained such application with the allegations made by the mother. But in the present case the writ petition in the form of Habeas Corpus has been filed by the father, who has admitted that the child is in very much in the custody of the mother and no allegation of abduction or changing of location has been made by the petitioner at any point of time.

This Court deprecates the growing tendency of invoking habeas corpus jurisdiction as a pressure tactic in pending family disputes, where no case of illegal detention is prima facie made out.

Parties in custody disputes are expected to pursue their remedies before the Family Court in a responsible manner keeping paramount consideration to the welfare, emotional security, and best interest of the minor child, instead of attempting to secure tactical advantage through constitutional proceedings founded on disputed allegations. In the present case Family Suit No. 80 of 2022 for custody pending in the Court of Additional Assistant Judge, 2nd Court and Family Court, Dhaka is the competent court to decide this matter.

Accordingly, the instant Rule issued in the Habeas Corpus petition is discharged, however, without prejudice to the rights of the parties before the Family Court, which shall decide the custody matter independently and strictly in accordance with law and by providing paramount importance to the welfare of the child.

Pursuant to the interim order dated 07.02.2022 passed by this Court the petitioner-father has been enjoying limited access to the minor child till date. Any abrupt discontinuance of such arrangement at this stage may not be conducive to the emotional welfare of the child. Both the parties have agreed to an arrangement as to the mode of right of visitation of the father. Therefore, this Court deems it proper, in the interest of the minor, the right to visitation of the father earlier ordered by this Court shall continue, however in the following modified manner:

Since the minor girl has been admitted to a school, the father is allowed to take the child from the mother on every Saturday (weekly holiday) at 9 a.m. and keep her with him till 5 p.m. and thereafter safely return the child to her mother. Additionally on every Sunday morning the father is allowed to take the child to the school and return her back to her mother by 5 p.m. This direction shall be strictly followed by the parties until any contrary or modified order is passed by the Family Court in the pending custody proceeding.

It is however, made clear that this arrangement is purely interim and equitable in nature and shall not create any right or presumption in favour of either party in the custody proceeding pending before the Family Court. The Family Court shall remain at liberty to modify, vary or recall the aforesaid arrangement in appropriate circumstances upon giving paramount importance to the welfare of the child.

In the result, the Rule is discharged with modified direction.

However, there is no order as to cost.

The concerned Family Court below is hereby directed to dispose of the Family Suit No. 80 of 2022 within 3(three) months from the date of receipt of this judgment and order.

Communicate the judgment and order at once.

Sashanka Shekhar Sarkar, J:

I agree.

Helal/ABO