IN THE SUPREME COURT OF BANGLADESH

HIGH COURT DIVISION

(CIVIL REVISIONAL JURISDICTION)

Civil Revision No. 3298 of 2023

In the matter of:

An application under section 115(1) of the Code of Civil Procedure read with Article 109 of the Constitution of the People's Republic of Bangladesh.

And

In the matter of:

Imran Sharif son of late Altaf Uddin Chowdhury of House No. 15, Road No. 11, Block A, Gulshan Model Town, Police Station-Gulshan, Dhaka-1212.

...Petitioner.

Versus

Eriko Nakano daughter of Kajuo Nakano, House No. Ka-04(5th Floor), Road No. 12, Britannia Magnesia, Baridhara, Block-K, Police Station-Gulshan, District-Dhaka-1212.

....Opposite party.

Present

Mr. Justice Mamnoon Rahman

Mr. Akhtar Imam, Sr. Adv. with
Ms. Rashna Imam, Adv.
Ms. Nasima Akhter, Adv.
Mr. Reshad Imam, Adv.
…For the petitioner.

Mr. Ajmalul Hossain KC, Sr. Adv. with
Mr. Ahsanul Karim, Sr. Adv.
Mr. Mohammad Shishir Manir, Adv.
…For the opposite party.

Heard on: ***10.10.2023, 06.11.2023, 22.11.2023 & 03.12.2023 And***

Judgment on: ***The 13rd February, 2024***

In an application under section 115(1) of the Code of Civil Procedure, 1908 rule was issued calling upon the opposite party to show cause as to why the impugned judgment and Decree dated 12.07.2023 (decree signed on 18.07.2023) passed by the learned District Judge, Dhaka in Family Appeal No. 22 of 2023 disallowing

the appeal and thereby affirming the judgment and decree dated 29.01.2023 (decree signed on 30.01.2023) passed by the learned 2nd Additional Assistant Judge Court and Family Court, Dhaka in Family Suit No. 247 of 2021 dismissing the suit, should not be set aside and/or pass such other or further order or orders as to this court may seem fit and proper.

The petitioner as plaintiff filed Family Suit No. 156 of 2021 in the court of Senior Assistant Judge, 1st Court, and Family Court, Dhaka impleading the opposite party as defendant for custody of two daughters born out of wedlock of the petitioner and opposite party. Subsequently, the suit was transferred to the court of Assistant Judge, Second Additional and Family Court, Dhaka being Suit No. 247 of 2021.

The case of the plaintiff-petitioner-appellant in short, are that, the Petitioner was born in a respectable Muslim family of Bangladesh. He is a religious, social, family-oriented Bangladeshi and working abroad for a long time. He received education in Bangladesh as well as in the U.S.A and joined a multi-national company of the U.S.A and he is an author of many books for children. Whereas, the Opposite party is a Japanese citizen having a formal education, but is unfortunately self-centered and neither religious nor family-oriented nor social. She is neither a responsible wife nor a responsible mother, although she was converted to Islam during her marriage but later, she declared herself to be an atheist and being the wife of a Bangladeshi,

she is anti-Bangladeshi. The Petitioner met the Opposite party in Japan while he was there for professional reasons and got married on 12.07.2008 and their family was blessed with 03 (three) daughters namely (i) Jasmine Malika Sharif (born on 8.02.210); (ii) Laila Lina Sharif Lina Sharif (born on 12.10.2011); and (iii) Sonia Hana Sharif (born on 25.06.2014). The said daughters are citizens of Bangladesh and the U.S.A as well and they are taught Bangla by the Petitioner though it was not supported by the Opposite party. The Petitioner and the Opposite party along with their daughters used to live in an expensive apartment in Tokyo, Japan where the Petitioner was paying 85% of the loan amount for the flat but the Opposite party and her father were the owners of that flat. During corona pandemic the Petitioner declined to pay this huge loan as rent of the house and in this regard an altercation started between them and finally the marital relationship between the Petitioner and the Opposite party deteriorated. The Petitioner was then forcefully removed from the apartment after being served a series of legal notices from the parents of the Opposite party to leave the apartment and a notice for divorce from the Opposite party. The Petitioner left the apartment on advice of the Japanese police to avoid fake complaints. As the daughters wanted to stay with the Petitioner-father and the Opposite party-mother concealed the passports of the daughters, the Petitioner applied and received new passports of his daughters and moved to Dubai on 18.02.2021 and arrived in Bangladesh on 19.02.2021 with his 1st and

2nd daughters. The said daughters are studying in a Bangladeshi school and an American online school as well. The Opposite party threatened the Petitioner that she would take away the daughters to Japan, rise them up in Japanese culture where drinking alcohol, live together, eating pork are common and will never allow them to come back to Bangladesh and/or stay with their father. The two daughters live in a joint family in Bangladesh and now, for the welfare of the children, the Petitioner- father prayed the custody of the minor daughters. The Petitioner for official reasons often travels outside Bangladesh and hence permission of the honorable court is needed. The cause of action of this plaint arose on 21.01.2021 when the Petitioner was thrown out of his home forcibly; on 19.02.2021 when the Petitioner moved to Bangladesh and on 24.02.2021 when the Opposite party threatened the Petitioner by Japanese police that she would take away the daughters. The Petitioner along with his minor daughters live in House No. 55, Road No. 05 Mohammadi Housing, Mohammadpur, Police Station- Adabor, Dhaka which is the natural and permanent address of the minor daughters, under the jurisdiction of this court. The court fee has been paid, and the name of the witnesses is included with details. The Petitioner prayed for a decree for sole custody of the daughters and that he can move in and out of the country with his daughters as and when necessary and/or any other legal orders in favour of the petitioner.

The present opposite party-defendant contested the suit by filing written objection denying all the material allegations made in the plaint. The case of the defendant-opposite party, are that, the suit is not maintainable. That the marriage of the Petitioner and Opposite party took place on 11.07.2008 at Chu Word of Tokyo Metro police, Japan vide marriage certificate No. AB21-00029 according to Japanese Law and 03 (daughters) were born out of the wedlock of the Petitioner and the Opposite party. That the daughters are Japanese citizens with Japanese passports and they lived in Japan from their birth. They are not Muslim Bangladeshi citizens. The Opposite party had been taking care of them from their birth but not the Petitioner. The Opposite party-mother applied for divorce on 18.01.2021 after their relationship had deteriorated and 2 elder daughters were kidnapped by their father. The Opposite party filed a suit in Tokyo Family-court on 28.01.2021 and the Petitioner appeared in the Tokyo Family Court through his lawyer but later illegally moved outside Japan on 17.02.2021 along with the said 02 (two) elder daughters during the pendency of the family suit in Tokyo, Japan and his lawyer Mr. Ushira resigned from the suit on 21.02.2021. The Opposite party was informed that the Petitioner was on a business trip to Dubai but the Petitioner illegally arrived in Dhaka, Bangladesh. Concealing all the facts and pending Family suit in Tokyo Family Court, the Petitioner-father filed the instant Family- suit in Bangladesh. Such actions of the Petitioner confirm that granting him the custody of his

minor daughters shall not be a good decision for the welfare of the minor daughters. The Petitioner also appointed Mrs. Ano as his lawyer in Tokyo Family Court. The Petitioner did not care about health risk of the minor daughters during Covid-19 Pandemic situation and hampered the educational life and progress of his minor daughters. Tokyo Family Court completed the hearing of the Family suit on 23.04.2021 and pronounced judgment on 31.05.2021 granting custody of all the 03 (three) daughters to their mother. That the Petitioner did not appear before the court and hence the instant suit is liable to be dismissed.

Eventually, the trial court framed as many as four Issues. During trial the plaintiff adduced four witnesses while the defendant adduced one witness and also court examined Chief Probation Officer of the court of the Chief Metropolitan Magistrate, Dhaka as C.W. 1. Both the parties also adduced documentary evidences which were duly marked as exhibits. The trial court after hearing the parties and considering the facts and circumstances, dismissed the suit.

Being aggrieved by and dissatisfied with the aforesaid judgment and decree passed by the trial court the petitioner preferred Family Appeal being No. 22 of 2023 before the District Judge, Dhaka. The lower appellate court after hearing the parties and considering the facts and circumstances, vide the impugned judgment and decree dismissed the appeal. Being aggrieved by and dissatisfied with the

aforesaid judgment and decree passed by the lower appellate court the petitioner moved before this court and obtained the present rule.

Mr. Akhtar Imam, the learned senior counsel appearing along with the learned counsel Ms. Nasima Akhter on behalf of the petitioner submits that both the courts below without applying their judicial mind and without considering the facts and circumstances, provisions of law, evidence both oral and documentary most illegally and in an arbitrary manner passed the impugned judgment and decree which requires interference by this court. The learned senior counsel submits that in the present case in hand both the courts below not only committed an error of law but also misdirected themselves into arrived in an erroneous finding regarding the jurisdiction as much as on factual aspects, namely welfare of the children, balance of convenience and inconvenience, capacity of the parents to maintain their child dismissed the suit which is liable to be set aside for ends of justice. He submits that the court below failed to apply their judicial mind in treating the case for guardianship but the case is for simple custody and in entire judgment of both the courts below the learned Judges travelled at length deciding the question of guardianship which is not at all tenable in the eye of law. He further submits that the courts below completely ignored the rights and responsibility of the petitioner as the natural and legal guardian. In support of his contention the learned counsel referred certain portions from the principle of Muhammedan Law, (Mulla) 20th addition page 435-442

as well as the case reported in 1918 PC 513. The learned counsel placed the entire proceeding before the lower appellate court and submits that the petitioner vigorously tried to produce additional evidence an opportunity of hearing to that effect but the same was severely denied in a hasty manner causing substantial injustice. He further submits that in the present case in hand the lower appellate court ought to have dismissed the appeal for default as the District Judge came to a conclusion that no one appeared on behalf of the appellant but passed the judgment and decree on merit causing substantial injustice as per Order 41 rule 17 of the Code of Civil Procedure, 1908. Regarding cause of action as well as jurisdiction the learned counsel submits that the court of Bangladesh has complete jurisdiction as per section 6 of the Family Court Ordinance, 1985. He further submits that as per the provision of section 6 the Family Courts Ordinance of Bangladesh has the jurisdiction if the cause of action has wholly or partly arisen or the parties resides or have last resides together. The learned counsel by placing the provision of law submits that the decision ultimately arrived at by both the courts below the question of jurisdiction is erroneous and not tenable in the eye of law. He further submits that both the parties were contesting for longtime in different courts of the country including our apex court which clearly shows the jurisdiction of the courts of Bangladesh to settle the dispute in question. He further submits that in the present case in hand on scrutiny of the entire judgments, it transpires that both

the courts below vividly and elaborately discussed the welfare of the minors, capacity of the father and mother to maintain the children, absolute wellbeing, future and the intention of the child but ultimately in a slipshod manner dismissed the suit on question of jurisdiction which is highly illegal. In support of his contention the learned counsel also relied the decisions as reported in 1984 BLD 24. Relying the decision as reported in 198 BCR 236 he submits that filing of written statement is sufficient cause of action to proceed with the suit as per the provisions of section 54 of the Specific Relief Act. He also relied the Explanation-1 of section 20 of the Code of Civil Procedure, 1908 so far it relates to cause of action and temporary residence. The learned counsel vigorously submits that even if there is an order passed in Tokyo Family Court but the same is not binding upon the Bangladeshi court in any manner. The learned counsel vigorously relied upon the welfare, doctrine and also non-consideration of the evidence on record. He also categorically submits that the Tokyo Family Court did not grant any visitation right to the father as much as the said right of visitation solely relied upon the opposite party.

Mr. Ajmalul Hossain KC, the learned senior counsel appearing along with the learned senior counsel Mr. Ahsanul Karim and Mr. Mohammad Shishir Manir, on behalf of the opposite party vehemently opposes the rule. The learned counsel at the very outset submits that both the courts below on proper appreciation of the facts and circumstances materials on record evidence both oral and

documentary has rightly dismissed the suit by a concurrent finding of fact and law and as such the courts below committed no error which requires interference by this court. The learned senior counsel submits that since both the courts below passed the impugned judgment and decree on concurrent finding of fact as well as law in the absence of any material irregularity affecting the real question in controversy this court cannot interfere under section 115(1) of the Code of Civil Procedure, 1908. The learned counsel further submits that the courts below have rightly came to a conclusion regarding the question of cause of action and also the question of territorial jurisdiction. By referring the provisions as laid down in the Family Courts Ordinance, 1985 he submits that both the childrens were born and brought up in Japan and they never visited Bangladesh which clearly shows that no cause of action has been arisen in Bangladesh nor the courts of Bangladesh has territorial jurisdiction to hear and dispose of the suit. The learned counsel referred the finding of the trial court wherein the trial court held that since the plaintiff failed to prove the cause of action as much as the place of residence of all the parties are in Japan so the suit is not maintainable as per section 6(1) of the Family Courts Ordinance, 1985. The learned counsel also placed the judgment and decree passed by the lower appellate court and submits that the lower appellate court categorically found that the mother instituted a Family Suit in Japan and obtained an order which clearly shows that the minor daughters being the citizen of Japan as well as they reside there

and the Tokyo Court has the ordinary jurisdiction of the matter dispute which ousted the jurisdiction of Bangladeshi court. The learned counsel also placed the chronological development in Japan's court and also submits that welfare of the subject matter of the suit and gave emphasis on physical and mental wellbeing. On this point he submits that the trial court applied its judicial mind and not only considered the case of the plaintiff and defendant side by side but also considered the statement of the children in camera and ultimately came to a conclusion regarding the better custody with an observation that the father should get the visitation right. He further submits that the lower appellate court also vividly discussed the same in a detailed manner regarding the welfare and wellbeing of the children in question and arrived at a correct finding regarding the custody of the child in question. He further submits that both the courts below vividly discussed the question of primary caregiver and it is the mother as per the courts below and he submits that in numerous decisions of this court as well as our apex court came to a conclusion that the custody should always be with the mother except in exceptional circumstances and in the present case in hand there is no such exceptional circumstances to deprive the mother from the custody of the children in question. The learned counsel also referred the question of habitual residence and submits that their lordships of our apex court in Civil Petition for Leave to Appeal No. 233 of 2022 decided the habitual residence of the children in question. By referring

a decision of the Supreme Court of Canada he submits that the court is to see and consider the child's habitual residence to determine the question of welfare and custody. The learned counsel further submits that also the trial court examined the eldest daughter who expressed her intention to live in Japan along with her siblings. He also submits that it is the foremost duty of the court of law to see the welfare of the children as well as education and a very important question of unification of siblings.

I have perused the impugned judgment and decree passed by the trial court, lower appellate court, revisional application, grounds taken thereon, counter affidavits, supplementary affidavits, provision of law, written submissions as advanced by both the parties. I have also heard the learned counsels for the petitioner and opposite party at length. I have also called both the daughters and talked to them in person.

On perusal of the same, it transpires that out of wedlock the plaintiff and the defendant have been blessed with three daughters. The father who is the plaintiff filed the instant suit claiming custody of two daughters, namely Jasmine Malika Sharif and Laila Lina Sharif Lina Sharif (both are now 14 and 12 and half years old). The reason for claiming custody has been stated in the plaint which has already been reproduced above. However, after filing of the suit the same was renumbered and transferred to another court and the defendant opposite party entered appearance by filing power and also contested

the suit by filing written statement denying all the material allegations made in the plaint. It also transpires that the trial court examined oral and documentary evidences and also examined one as court witness. Eventually, the trial court dismissed the suit.

On meticulous perusal of the judgment and decree passed by the trial court, it transpires that the trial court vividly discussed the case of the plaintiff and defendant side by side as well as considering the evidence both oral and documentary by framing four Issues. It further transpires that the court below vividly discussed the Issue No. 2, namely (বাদী পিতার হেফাজতে নাবালিকার সর্বাঙ্গীন মঙ্গল হবে কি না।)

On perusal of the same, it transpires from the judgment and decree passed by the trial court, that the trial court discussed the question of welfare of the child in the custody of the father and also relied upon many decisions of this court as well as our apex court on that count. It also transpires that the trial court considered the case of the plaintiff and defendant side by side regarding the competency to maintain and came to a conclusion which runs as follows;

> *বাদীপক্ষের বিজ্ঞ কৌসুলী যুক্তি তর্ক শুনানী কালে, বারংবার উল্লেখ করেছেন জাপানে ওয়ান প্যারেন্ট নীতির কথা, যে নীতিতে বাবা কিংবা মা একজন আইনা হেফাযতকারী নিযুক্ত হলে অপরজন চিরজীবনের জন্য সন্তানদের জীবন থেকে মুছে যাবেন। কিন্তু অত্র মোকদ্দমায় রায়ের পর্যায়ে সামগ্রিক আলোচনায় পিতা কিংবা মাতার স্বার্থের ওপরে প্রাধান্য পেয়েছে কার হেফাজত অত্র নাবালিকাদের জন্য সর্বদিক হতে মঙ্গলজনক ও নিরাপদ সেই বিষয়টি। এক্ষেত্রে, পিতা*

হিসেবে বাদী নাবালিকাদের সাথে দেখাস্বাক্ষাতের পূর্ন হকদার হলেও বিবাদী- - মাতার কাছেই অত্র দুই নাবালিকার হেফাজত তাদের শারীরিক, মানসিক, পারিপার্শ্বিক তথা সার্বিকভাবে মঙ্গলজনক মর্মে প্রতীয়মান হয়।

So, it transpires that the trial court in its entire judgment and decree discussed the said Issue and after considering the balance of convenience and inconvenience and other aspects came to a conclusion regarding the better custody and subsequently the trial court took up the Issue Nos. 1, 3 and 4 came to a conclusion which runs as follows;

যেহেতু, বাদী তার নালিশের কারন অত্রাদালতের এখতিয়ারে উদ্ভূত হয়েছে এটি প্রমান করতে ব্যর্থ হয়েছেন এবং বাদী, বিবাদী ও অত্র নাবালিকাগনের সর্বশেষ বসবাসের স্থান জাপান, সেহেতু পারিবারিক আদালত অধ্যাদেশ, ১৯৮৫ এর ধারা ৬(১) অনুযায়ী অত্র মোকদ্দমা অত্র আকারে ও প্রকারে চলতে পারেনা। অর্থাৎ, ১নং বিচার্য্য বিষয়টি বাদীর প্রতিকূলে নিষ্পত্তি করা হলো।

It also transpires that the judgment and decree passed by the lower appellate court that the lower appellate court also vividly discussed the case but it transpires that the lower appellate court gave emphasized on the question of Guardianship and Wards Act, 1890 and the entire judgment based upon the said concept of guardianship. On perusal of the judgment and decree passed by the lower appellate court, it further transpires that the lower appellate court also considered the welfare and wellbeing of the childs in question and in detailed discussion came to a conclusion relates to the education and

living standard the statement made by the minor daughters and ultimately held as follows;

> *"Now it is settled principle of law that in the matter of appointment of a custodian of a minor, the welfare of the minor shall be the paramount consideration. Paramount consideration necessarily implies that all other considerations are subordinate to the welfare of the minor."*

However, it transpires that again the court below gave emphasized in the following manner;

> *"For determining the question of competence of the husband's application under section 25 of the Guardians and Wards Act (18 of 1890) it is necessary to examine the scheme of that Act as also the relevant provisions of the Family Court Ordinance, 1985. The Guardians and Wards Act was enacted in order to consolidate and amend the law relating to Guardian and Ward. According to section 4, which is the definition section*."

The court below further held as follows;

> *"Now it is clear from the language of Section 25 that it is attracted only if a ward leaves or is removed from the custody of a guardian of his person and the Count is empowered to make an order for, the return of the ward to his guardian if it is of opinion that it will be for the, welfare of the, ward to return to the custody of his guardian. The Court is entrusted with a judicial discretion to order return of the Ward to the custody of his guardian, if it forms an opinion that such return is for the ward's welfare. The use of the words "ward" and "guardian" leave little doubt that it is the guardian who,*

having the care of the person of his ward, has be-In deprived of the same and in the capacity of guardian entitled to the custody of such ward, that can seek the assistance of the Court for the return of his ward to his custody. The guardian contemplated by this section includes every kind of guardian known to law."

The court below further held as follows;

"In my view, Section 25 of the Guardians and Wards Act contemplates not only actual physical custody but also constructive custody of the guardian which term includes all categories of guardians. The object and purpose of this provision being ex facie to ensure the welfare of the minor ward, which necessarily involves due protection of the right of his guardian ,to properly look after the ward's health, maintenance and education, this section demands reasonably liberal interpretation so as to effectuate that object. Hyper-technicalities should not be allowed to deprive the guardian the necessary assistance from the Court in effectively discharging his duties and obligations towards his ward so as to promote the latter's welfare.

The contention that if the father is not unfit to be the guardian of his minor children, then, the question of their welfare does not at all arise is to state the proposition a bit too broadly may at times be somewhat misleading. It does not take full notice of the real core of the statutory purpose. In my opinion, the dominant consideration in making orders under section 25 is the welfare of the minor children and in considering this question due regard has of course to be paid to the right of the father to be the guardian and also to all other relevant factors

having a bearing on the minor's welfare. There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children. From this point of view, in case of conflict or dispute between the mother and the father about the custody of their children, the paramount consideration will be welfare of the minor(s). There is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare. The father's fitness has to be considered, determined and weighed predominantly in terms of the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under section 25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has. These are the only two aspects pressed before me, apart from the stress laid by the father on various allegations against the mother which, in my firm opinion, he was not at all justified in contending. The father's fitness from the point of view just mentioned cannot over-ride considerations of the welfare of the minor children. No doubt, the father has been presumed by the statute, generally to be better fitted to look after the children-being normally the earning member and head of the family-but the Court has in each-case to see primarily to the welfare of the children

in determining the question of their custody, in the background of all the relevant facts having a bearing on their health, maintenance and education. The family is normally the heart of our society and for a balanced and healthy growth of children it is highly desirable that they got their due share of affection and care from both the parents in their normal parental home. Where, however, family dissolution due to some unavoidable circumstances becomes necessary the court has to come to a judicial decision on the question of the welfare of the children on a full consideration of all; the relevant circumstances. Merely because the father loves his children and is not shown to be otherwise undesirable cannot necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him as against the wife who may also be equally affectionate towards her children and otherwise equally free from blemish, and who in addition because of her profession and financial resources, may be in a position to guarantee better health, education and maintenance for them. The children are not mere chattels; nor are they mere play- things for their parents. Absolute right of parents over the destinies and the lives of their children, has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute 'between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them. The approach of the learned trial

> *court, in my view, was correct and I also agree with her views. The age of the daughters at present are such that they must need the constant company of grown-up female in the house genuinely interested in their welfare. Their mother is in the circumstances the best company for them. The daughters would need their mother's advice and guidance on several matters of importance. But this apart, even from the point of view of their education, in my opinion, their custody with the mother would be far more beneficial than their custody with the father."*

So, it transpires from the judgment that the court below confined its detailed discussion on the welfare of the child, education, family unification, the question of siblings and came to the conclusion, but ultimately it transpires that the lower appellate court below ultimately based its decisions on question of jurisdiction which runs as follows;

> *"The minor daughters being the citizens of Japan by birth, the learned Tokyo Family Court has the ordinary jurisdiction of the matter in dispute. Be that as the case may, there need mirror order, if so advise which means that the courts of the country where the child will later be living are aware of the original arrangements and they give protection for the other parent in the country where the child is living."*

It has been vigorously argued by the petitioner's side that numerous efforts have been taken as well as numerous applications have been filed on behalf of the plaintiff-appellant for taking additional evidence as well as examination of witness, namely mother

of the petitioner regarding certain issues. Whenever, there is any such application which is permissible in law and it is the duty of the court of law to consider and examine the same in a lawful manner. Obviously, the court of law has the jurisdiction either to allow or reject the same but the same has to be done judiciously and in an appropriate manner by giving an opportunity to both the parties as much as when it transpires from the judgment and decree passed by the lower appellate court that the lower appellate court discussed in detailed the question of guardianship, welfare of child, education, family unification as well as better custody and the effort as advanced by the petitioner regarding the additional evidence also relates to the same.

The paramount question which has been raised in the present case in hand relates to the jurisdiction of this court. Admittedly, the father is a citizen of Bangladesh as well as of USA and the mother is a citizen of Japan and out of three daughters the younger one is staying in Japan and the fight between the father and mother relates to the custody of two other daughters now residing in Bangladesh. It also transpires that the case was filed by the father in the court of Bangladesh seeking custody of child in question. It has been vigorously argued regarding the question of jurisdiction though both the courts below did not at all discuss the question of jurisdiction in detailed manner rather discussed the other aspects but ultimately dismissed the suit on question of jurisdiction only. The main

contention as raised by the opposite party is that since Japanese court decided the custody of the daughters, this court has no jurisdiction to hear and dispose of any question of custody. Section 6 of the Family Court's Ordinance 1985 deals with the question of jurisdiction which runs as follows;

> ***"Institution of suit-****(1) Every suit under this Ordinance shall be instituted by the presentation of a plaint to the Family Court within the local limits of whose jurisdiction-*
> *(a) the cause of action has wholly or partly arisen; or*
> *(b) the parties reside or last resided together:*
> *Provided that in suits for dissolution of marriage, dower or maintenance, the Court within the local limits of whose jurisdiction the wife ordinarily resides shall also have jurisdiction*
> *(2) Where a plaint is presented to a Court not having jurisdiction-*
> *(a) the plaint shall be returned to be presented to the Court to which it should have been presented;*
> *(b) the Court returning the plaint shall endorse thereon the date of its presentation to it and its return, the name of the party presenting it and a brief statement of the reasons therefor."*

So, it transpires that a case is competent in the court of Bangladesh if the cause of action wholly or partly arisen and the parties reside or last resided together in Bangladesh. So, it transpires that while dealing with a case in hand a court of law has to see whether the cause of action wholly or partly arisen as much as the

parties reside or last resided together. In the present case in hand on perusal of the claim of the plaintiff is that the question of custody arises when the plaintiff was residing in Bangladesh along with the daughters. Apart from that when the suit was filed and continued they are residing together in Bangladesh as last resided place. It transpires that both the courts below while deciding the case in hand came to a conclusion that since the last residing of the parties are in Japan the suit is not maintainable here only and also the same reflected in the judgment of the lower appellate court. But on perusal of the factual aspects, it transpires that the plaintiff mentioned two dates of the cause of action and it is clear that on 19.02.2021 the plaintiff came to Bangladesh along with the childs in question and thereafter filed the case while they were in Bangladesh and the daughters are residing with the father which clearly shows that the jurisdiction of this court to hear and adjudicate the dispute in question. There is no provision of law to show, the jurisdiction of the Bangladesh court is being ousted because of any decisions of the Tokyo Family Court as the same is not admissible in our jurisdiction.

The question of jurisdiction cannot be taken lightly as because being an independent country the law gives power to the court of law to adjudicate the dispute and in the present case in hand the relevant provisions of law clearly indicates the partial cause of action which is also enough to raise the claim as much as in a disputed family case regarding the custody the law clearly stipulates the word “last resided”

and when the suit was filed it transpires that the daughters were residing with the father in Bangladesh who claimed custody of the said two daughters. It also transpires that the trial court as well as the lower appellate court ought to have considered this Issue in a detailed manner. But on perusal of both the judgment passed by both courts below, it clearly transpires that considering the case by assuming the jurisdiction and decided the case ultimately on question of welfare of the child as well as the competency of the mother being a better custodian in terms of education, welfare, unification of siblings, better life and better care etc. The jurisdiction as has been mentioned earlier is given by the law itself and the same should not be dealt in an easy manner or lightly rather the same should be considered strictly considering the sovereignty, rule of law and the legal aspects of the country in question. When the law categorically stipulates and empowers the court of law to proceed with the proceeding a court of law has to consider the same very carefully and in a detailed manner and the question of jurisdiction should not be declined on mere technicality or without paper and reasoning. In the present case in hand, I am of the view that the court of Bangladesh has full jurisdiction to hear and dispose of the suit because of the provisions of law itself, namely “partial cause of action and last resided together”.

On facts and evidence it categorically revealed that the father apprehends threat while he was in Bangladesh along with his daughters and also at the time of filing of the suit they were residing

together here which clearly attract the jurisdiction of Bangladesh court in all manner.

On perusal of the judgment and decree passed by the trial court as well as the lower appellate court, especially the lower appellate court, it transpires that the lower appellate court gave emphasized on the question of guardianship and discussed in detailed manner by referring the provision of the Guardianship and Wards Act of 1980. But in the present case in hand, it transpires that the case is for only custody not for guardianship. In our jurisdiction this court as well as our apex always gave emphasized on the welfare, wellbeing of the child in question and while deciding the question of guardianship the paramount question always looks into by this court as well as our apex court is the question of child's future. The fight between the parents always creates a pressure upon the child and in such circumstances a court of law must see and consider the wellbeing of the child as a paramount factor along with other aspects.

It has been mentioned earlier that in numerous cases this court as well as our apex court always considered the custody of the mother as a better custody for the children, however, in an exceptional circumstances handed over the custody to a father also.

The custody is to be considered very carefully and other aspects. In the present case in hand, it transpires from the judgment and decree passed by the trial court that admittedly both the parents are well educated, one is an Engineer and another is a Consulted

Physician. Both are highly educated and also fully competent to take care of the child in every manner. The test as decided by the trial court is that both the parents are competent and able to take care of the children in full satisfaction. It further transpires from the judgment and decree passed by the trial court that the court examined the daughter Jasmine Malika Sharif who stated as follows;

> *“I have no complain against my dad but he lied that actually we were going to America, but he brought us here in Bangladesh, this lie makes me disappointed. I don't want to live here, please let me go to Japan. My school, all of my friends are in Japan. My born and brought up everything is in Japan.”*

So, it transpires that after Jasmine Malika Sharif left the daughter Laila Lina Sharif stated as follows;

> *সে তার "Abba"-র সাথে থাকতে চায়। মায়ের সাথে থাকতে না চাওয়ার কারন হিসেবে সে জানায়, "I was my mom's favourite child but now Sonia is her favourite. After Sonia come, she shout on me when I don't follow her instruction.”*

So, it transpires that both the daughters actually desire a peaceful life, unification of siblings as well as both the childs owned their parents too. In the case in hand the paramount question ought to have been settled that the custody of the children on facts and evidences of the case in hand and it has been mentioned earlier that the mother’s custody is the better custody and especially for a girl child and in the present case in hand there is no doubt about the competency of both the parents to raise their children in a comfortable

manner. In our jurisdiction we always give custody to the mother considering the welfare of the children with full visitation right of the father which has to be ensured in every possible manner and in the present case in hand this should also not be exception of the above principle of law and rules as well as practice followed by this court as well as our apex court.

Admittedly, in the present case in hand numerous questions have been raised, citation of different laws and provisions but in my view the paramount question should be the welfare of the children, their wellbeing, bright future, family unification etc. It further transpires from the judgment and decree passed by both the courts below that both the courts below travelled a lot on this point and considered the case of the plaintiff and defendant side by side. They discussed the life style, qualification and profession of the parents, question of schooling, future opportunities and better life etc., which is also in my view should be the paramount question to be decided regarding the question of custody. In the present case in hand the custody always should be with mother as because there is no allegation regarding the competency of the mother in bringing of her daughters and apart from that the father has the duty to give full support to the mother for rising the daughters even if the daughters are with the mother. While deciding the custody we also examined the intention of the child very carefully.

It transpires that the trial court called the daughters wherein Jasmine Malika Sharif expressed her willingness to stay with the mother and Laila Lina Sharif expressed her clear intention to stay with the father. In course of hearing the matter before this court I also called both the daughters and talked to them separately and the same expression has been made before this court wherein the younger daughter Laila Lina Sharif categorically and specifically stated that she in no circumstances will leave her father. She categorically stated that she intends fully to stay with her father and she is fully satisfied with the present residence with the father. She also stated before this court that the father is taking full care and giving her full attention with her satisfaction. It is very difficult to separate the children from each other as because siblings unification is very important for their future. I have mentioned earlier that the custody is to be given considering all aspects and also this court should consider the mental state and intention of the child and other aspects also. Regarding the daughter Laila Lina Sharif it transpires that she is adamant to stay with her father. It is to be noted that while the daughter was recovered from the father and produced before the court of the learned Chief Metropolitan Magistrate, Dhaka and the Chief Metropolitan Magistrate vide order dated 02.02.2023 stated as follows;

> *যেহেতু শিশু সন্তান নাকানো লায়লা লিনা তাহার ইচ্ছা অনুযায়ী পিতার হেফাজতে থাকতে চায়, সেহেতু তাকে যেন পিতার হেফাজতে দেয়া হয়।*

The court further held as follows;

> *বিজ্ঞ আইনজীবীর আবেদনের প্রেক্ষিতে শিশু নাকানো লায়লা লিনাকে খাস কামরায় একান্তে তার বক্তব্য শ্রবণ করি। শিশু নাকানো লায়লা লিনা কার হেফাজতে থাকতে চায় বিষয়টি জিজ্ঞাসা করা হলে, তিনি জানান যে, তিনি তার বাবার হেফাজতেই থাকতে চান। তিনি তার মায়ের হেফাজতে যেতে আগ্রহী নন। কারণ হিসেবে তিনি উল্লেখ করেন, তিনি তার মায়ের সাথে জাপান যেতে চান না। তবে তিনি তার মা-বাবা উভয়কে ভালবাসেন। ভিকটিম আরো জানান যে, তাকে যেন বাবার হেফাজতে অথবা ভিকটিম সাপোর্ট সেন্টারে দেয়া হয়। <u>কিন্তু তিনি কিছুতেই মায়ের হেফাজতে এই মুহূর্তে যেতে চান না।</u> (underlined by me)*

So, it transpires that on different occasions the said daughter expressed her willingness to stay with her father. It further transpires that on 05.02.2023 the learned Chief Metropolitan Magistrate, Dhaka passed the following order which runs as follows;

> *দেখিলাম। নথি পর্যালোচনা করিলাম। পর্যালোচনায় দেখা যায় যে, মাতার পক্ষে বিজ্ঞ আইনজীবী দরখাস্ত দাখিলপূর্বক শিশু সন্তান নাকানো লাইলা লিনাকে মাতার হেফাজতে প্রদান করার জন্য আদেশ প্রার্থনা করেছেন। অপরদিকে নাবালিকার পিতা ইমরান শরীফের পক্ষে বিজ্ঞ আইনজীবী দরখাস্ত দাখিলপূর্বক নাবালিকা শিশুকে পিতার জিম্মায় রাখার প্রার্থনা করেছেন। তদন্তকারী কর্মকর্তাও প্রতিবেদন দাখিল করেছেন। <u>প্রতিবেদনের ভাষ্য অনুসারে ভিকটিম নাবালিকাকে মাতার হেফাজতে প্রদান করা হলে সে আত্মঘাতি সিদ্ধান্ত নিবেন মর্মে উল্লেখ করেছেন।</u> (underlined by me)*

It also transpires from the report of the police forwarded to the Chief Metropolitan Magistrate, Dhaka it appears that the police in the report stated as follows;

সকাল-১১.০০ ঘটিকায় শিশুটির মা এরিকো নাকানা ও তার বড় বোন জেসমিন মালিকা (১৩) শিশু লায়লা লিনা শরীফকে জিম্মায় নেওয়ার জন্য হাজির হন। কিন্তু শিশু নাকানো লায়লা লিনা শরীফ (১১) তাহার মায়ের নিকট যেতে রাজি হয় না। এমতাবস্থায় মা এবং মেয়েকে এক সাথে একান্তে কথা বলার জন্য সুযোগ দেওয়া হয়। বেলা-১১.০০ ঘটিকা হইতে বিকাল-১৬.০০ ঘটিকা পর্যন্ত শিশুটির মা এরিকো নাকানো ও তার বড় বোন জেসমিন মালিকা ভিকটিমকে তার মায়ের সাথে যাওয়ার জন্য বুঝান। কিন্তু ভিকটিম নাকানো লায়লা লিনা শরীফ (১১) কিছুতেই তার মায়ের কাছে যেতে রাজী হয় নাই। ভিকটিম তাহার বাবার কাছে থাকতে চায়। একপর্যায়ে ভিকটিমের মা ভিকটিমকে নেওয়ার জন্য জোরাজুরি শুরু করিলে ভিকটিম বলেন যে তাহাকে জোর করে নিয়ে গেলে সে আত্মঘাতী সিদ্ধান্ত নিবে। শেষে নিরুপায় হয়ে শিশুটির মা এরিকো নাকানো শিশুটিকে না নিয়েই বাসায় চলে যায়।

So, it transpires that the said daughter expressed her extreme views even committing suicide if she is being given to her mother. In the above circumstances and situation, I am of the view that the case of the said daughter Laila Lina Sharif can be considered as exceptional case and considering the mental state and extreme willingness the custody of the said child be given to the father till attainment of her majority.

A pertinent question has been raised by the petitioner regarding the visitation right of the father as because the opposite party mother intends to take the daughters to Japan. In general situation it is also difficult for the parents to exercise their visitation right if they reside in different countries. The learned counsel for the petitioner

vehemently submits about the legal system of Japan as well as relies upon the order of the Japanese court wherein full discretion was given to the mother in respect of visitation of the father. The apprehension of the petitioner is that once the children are taken to Japan he will never see them during his lifetime because of the social and other structures though the learned counsel Mr. Ajamalul Hossain, KC appearing on behalf of the opposite party assured this court that the opposite party will take all steps to ensure the visitation right of the father. It is difficult on the part of this court to prescribe or direct the parties to enforce the visiting right in this case because of the extenuating circumstances, namely residence in foreign country. But there should be amicable arrangement between the parties to ensure the visiting right of the father, especially if the eldest daughter be taken to Japan as much as the younger one who is already there. The petitioner in the case in hand is directed to allow the mother to visit the daughter living with father as directed by this court as and when desired by the mother. However, it is expected the reciprocal treatment by the mother regarding visitation right of the father.

However, both the parties are to ensure the full visitation right of the children by themselves. It is the duty of the mother to allow the father full visitation right of Jasmine Malika Sharif and it is the duty of the father to give full visitation right of Laila Lina Sharif by her mother. The parties are also at liberty to take the respective child with them for a limited period for visitation purpose strictly.

Considering the facts and circumstances, I find substance in the instant rule which is required to be made absolute in part. Accordingly, the instant rule is made absolute in part and the judgment and decree passed by the courts below so far it relates to question of jurisdiction is hereby set aside and the custody of Jasmine Malika Sharif be decided in favour of the mother but considering the exceptional circumstances the custody of the daughter "Laila Lina Sharif" be with the father till attainment of the age of majority.

Send down the Lower Courts Record along with the judgment and order with a copy of the judgment to the concerned courts below at once.

(Mamnoon Rahman,J:)

Emdad.B.O.