IN THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

PRESENT

Mr. Justice Md. Muzammel Hossain, *Chief Justice*
Mr. Justice Surendra Kumar Sinha
Mr. Justice Md. Abdul Wahhab Miah
Mr. Justice Syed Mahmud Hossain
Mr. Justice Muhammad Imman Ali
Mr. Justice Muhammed Mamtaz Uddin Ahmed
Mr. Justice Md. Shamsul Huda

CIVIL PETITION FOR LEAVE TO APPEAL NO.527 OF 2011

(From the judgment and order dated 23.02.2011 passed by the High Court Division in Civil Revision No.4310 of 2010)

Anika Ali, daughter of late Kazi Haider Ali .....Petitioner

-Versus-

Rezwanul Ahsan, son of Monjurul Ahsan Munshi .....Respondents

For the petitioner : Mr. Md. Asaduzzaman, Advocate instructed by Mr. Syed Mahbubur Rahman, Advocate-on-Record.

For respondent : Mr. A.F. Hasan Arif, Senior advocate (with Mr. Rafiqul Islam Miah, Senior advocate) instructed by Mr. Zahirul Islam, Advocate-on-Record.

Date of hearing : 09.06.2011.

J U D G M E N T

Muhammad Imman Ali, J. This Civil Petition for Leave to Appeal arises out of the judgment and order dated 23.02.2011 passed by the High Court Division in Civil Revision No.4310 of 2010 disposing of the Rule, with observations and a direction upon the parties to strictly follow the terms and conditions of the solenama filed in the Family Suits.

The facts relevant for disposal of the instant petition, in brief, are that the petitioner Anika Ali and the respondent Rezwanul Ahsan were married on 23.12.2002 under Muslim Law and the dowry was

fixed at Tk.10,00,000/- of which 2,00,000/- was shown as paid, although, according to the petitioner, no money was paid. A child Farzan Ahsan, was born during their wedlock on 24.12.2003. Soon thereafter, the relationship between the petitioner and the respondent deteriorated. The petitioner claims that she was physically and mentally tortured by the respondent, who was a drug addict from the time of his studies in America and he had been arrested on several occasions due to his drug addiction and he had also received treatment for his addiction in New Delhi as well as in Bangladesh. However, all this information was suppressed at the time of the marriage. It is alleged by the petitioner that in July, 2004 the respondent pushed her out of his house during the night after torturing her, but she went back to the house of the respondent for the sake of her son. On 26.07.2004 the respondent again pushed the petitioner out of his house. However, there was reconciliation on the assurance by the respondent, in the presence of the guardians of both the parties, to the effect that he would not take drugs again and would not physically and mentally torture the petitioner and would arrange to rent separate accommodation. On 10.11.2004, they lived together in the rented accommodation, but the respondent again physically tortured the petitioner on 17.12.2004 and pushed her out of his house and compelled her to divorce him by the power given to her in the Kabinnama and accordingly the petitioner divorced the respondent on 18.12.2004. The petitioner then filed Family Suit No.175 of 2005 before the Court of 2nd Assistant Judge and Family Court, Dhaka against the

respondent for her dower money and maintenance for herself and her minor son. The suit was transferred to the Court of 5th Additional Assistant Judge and Family Court, Dhaka where it was renumbered as Family Suit No.322 of 2005. In her suit, the petitioner detailed the matters narrated above. She claimed that the respondent did not pay any maintenance to the petitioner since 26.07.2004 and, therefore, claimed for herself maintenance at the rate of Tk.20,000/- per month from 26.07.2004 to 18.12.2004, i.e. Tk.1,00,000/-. In addition she claimed Tk.60,000/- for her maintenance during the three months' iddat period. She claimed maintenance for her minor son at the rate of Tk.15,000/- per month from 26.07.2004 to 30.06.2005, i.e. Tk.1,65,000/-.

The respondent filed Family Suit No.284 of 2005 before the Court of 2nd Assistant Judge and Family Court, Dhaka for custody of his minor child. On transfer to the Court of 5th Additional Assistant Judge and Family Court, Dhaka the suit was renumbered as Family Suit No.484 of 2005. The respondent claimed, *inter alia,* that after the wedding both families were quite happy, but when his wife became pregnant she and her parents were not happy. After their son was born, he was under the care of his (the respondent's) mother when his wife went abroad to study on two occasions. The minor child was all along under the care of his father (the respondent). He took out an education insurance policy and a general insurance policy in his son's name for Tk.9,00,000/- and Tk.6,00,000/- respectively. The child's paternal grandmother took out an insurance policy for Tk.15,00,000/- in which the child was named as the beneficiary. The respondent

further claimed in his plaint that at one stage his wife insisted that he take a separate rented house, and when he declined to do so, she left with their child, taking with her all her jewellery and clothes. When he requested to her to return, she stated that she would not cohabit with the respondent unless they lived in a separate house. She also claimed the remainder of her dower money. Thereafter, he rented a flat in Banani, but his wife (the petitioner) refused to rejoin him unless he paid up the dower money. On 10.11.2004, with the help of his father, the respondent paid up the dower money and his wife joined him in their rented flat along with their child on 10.11.2004. However, his wife started argument with him without any good cause and eventually left his house on 17.12.2004 without his permission, taking with her their child as well as jewellery and other material belongings. Thereafter, she sent him her divorce on 18.12.2004. The respondent further claimed in his plaint that his ex-wife left the child with her mother while roaming around. He also came to know that she had gone abroad leaving the child with her mother. Claiming that the child is not safe in that house and was not receiving proper care and attention, the respondent prayed for an order of custody and full care and control over the child.

Family Suit No.322 of 2005 filed by the petitioner and Family Suit No.484 of 2005 filed by the respondent proceeded simultaneously and the instant petitioner's lawyer advised her to settle the matter amicably. On 03.04.2006 two solenamas were executed, one for each of the suits. The solenama in Family Suit No.322 of 2005 provided *inter*

alia that the dower money of Tk.8,00,000/- will be paid by the respondent in twelve installments, a cheque for Tk.66,666/- was paid to the petitioner on 03.04.2006 and eleven post-dated cheque would be handed over to the petitioner on that date; a cheque for Tk.60,000/- was paid to the petitioner on 03.04.2006 as maintenance for the period of iddat; maintenance for the minor child was fixed at Tk.15,000/- per month from January, 2005; the child would visit his father on two days per week from 10:00 a.m. to 10:00 p.m. till his admission in school and after his admission in school, from 10:00 a.m. to 8:00 p.m. on Fridays and from 5:00 p.m. to 8:00 p.m. on any one weekday during school term.

The solenama executed in Family Suit No.484 of 2005 provided maintenance for the child at the rate of Tk.15,000/- per month from January, 2005 which may be increased in the future upon consultation between the parties and would be deposited in the account of the petitioner with HSBC Bank. The due amount of Tk.2,25,000/- for the months January, 2005 to March, 2006 would be adjusted with the current month's payment; the minor child would visit his father on two days per week from 10:00 a.m. to 10:00 p.m. before admission in school, and after admission in school the visit would take place from 10:00 a.m. to 8:00 p.m. on Fridays and 5:00 p.m. to 8:00 p.m. on any one school-day during the week. The child would be admitted to school after discussion amongst the parties and the petitioner (mother) would be entitled to take her minor son abroad subject to permission of the Court.

According to the petitioner the respondent did not comply with the terms and conditions of the solenama and as a result she filed violation Miscellaneous Case No.893 of 2007 (Arising out of Family Suit No.322 of 2005) before the Court of 5th Additional Assistant Judge and Family Court, Dhaka, which is still pending. On the other hand the respondent filed an application for enforcement of the decree on 13.11.2007 which was rejected by the Family Court on 26.11.2008 upon hearing the parties, and the respondent, without preferring any appeal against the said order dated 26.11.2008, filed a Writ Petition being No.2890 of 2009 in the form of habeas corpus, claiming that the child was in unlawful custody of the petitioner. By judgment and order dated 12.08.2009 the Rule in that writ petition was discharged with the observation that if the writ-petitioner files any petition for enforcement of the terms of the solenama before the lower Court, the Court concerned shall dispose of such application within 2(two) months from the date of filing thereof. The respondent thereafter filed Family Execution Case No.77 of 2009 before the Court of 5th Additional Assistant Judge and Family Court, Dhaka for execution of the judgment and decree dated 11.07.2007 passed in Family Suit No.484 of 2005. The petitioner filed an application for dismissing the execution case on the ground that an earlier application for enforcement of the decree on 13.11.2007 was rejected on 26.11.2008 and the respondent did not prefer any appeal against that order and also that the execution case was barred by limitation (since the judgment and decree was dated 03.04.2006, decree signed on 09.04.2006). By his order dated

14.01.2010 the learned Assistant Judge, 5th Additional Assistant Judge Court, Dhaka rejected the instant petitioner's application for dismissing the execution case. The instant petitioner challenged the said order of dismissal by way of Family Appeal No.30 of 2010 before the Court of learned District Judge, Dhaka, which upon transfer to the learned Additional District Judge, 1st Court, Dhaka was dismissed by judgment and order dated 22.06.2010. The instant petitioner then challenged the dismissal of the appeal by preferring Civil Revision No.4310 of 2010 before the High Court Division. By the impugned judgment and order dated 23.02.2011 the Rule was disposed of with direction upon the parties "to strictly follow the terms and conditions of the solenama and violation of any term of the solenama by any party shall be treated as contempt of court. The petitioner is further directed to receive the entire dues within 14 days now deposited with the court and the opposite party is also directed to regularly pay the maintenance cost of the child born during their wedlock and the petitioner is also directed to make available the child before his father the opposite party, twice in a week as per the term of the aforesaid solenama."

Being aggrieved by and dissatisfied with the judgment and order dated 23.02.20011 passed by a single Bench of the High Court Division, the petitioner has filed the instant Civil Petition for Leave to Appeal.

Mr. Md. Asaduzzaman, learned advocate appearing on behalf of the petitioner, submits that the learned Judge of the High Court Division committed a gross illegality by effectively acting as the

executing Court by directing the petitioner to receive the money paid into Court and also directing the parties to follow the terms and conditions of the solenama and violation of any terms of the solenama by any party shall be treated as contempt of Court. He submits that such finding, direction and observation is illegal, unwarranted and is liable to be set aside. He submits that the High Court Division failed to appreciate that the execution case was barred by limitation under section 16(3) of the Family Court Ordinance, 1985, and by the impugned judgment and order, the decree has effectively been executed, although it was barred by limitation. He further submits that even if the decree is not considered to be a money decree, it is still barred by limitation under Article 182 of the Limitation Act read with section 16(3C) of the Family Court Ordinance, 1985. He submits that the High Court Division has committed an illegality in entertaining the Family Execution Case.

Mr. A.F. Hasan Ariff, learned Senior Counsel appearing for the respondent, submitted that the petitioner has not been prejudiced in any way by the impugned judgment and order. He further submits that in a case of this nature where the marriage has broken down between two adults, the child of the union is the victim, and his best interests should be protected.

We have considered the submissions of the learned advocates for the petitioner and the respondent and perused the judgment and order of the High Court Division as well as those of the Courts below. We note that both the parties to the marriage filed Suits in the Family Courts with their own claims and narrated events that led to the dissolution of the marriage. Both the family suits were heard simultaneously and decreed in terms of a solenama filed in each of the

family suits. The terms and conditions in each of the solenamas are essentially the same. The parties have agreed to the amount of dower money, maintenance for the wife and maintenance for the child. They also agreed, though by implication, that the child, who was at that time about two years and three months old, should remain in the custody of his mother and a schedule of access/visits was agreed upon whereby before his admission in school the child would visit his father's house on two days in every week between 10:00 a.m. and 10:00 p.m. After the child's admission in school he would visit his father's house only on Fridays between 10:00 a.m. and 8:00 p.m. and on one school-day per week between 5:00 p.m. and 8:00 p.m. In this way the dower, maintenance and custody of/access to the child was mutually agreed upon by the parties. It was also agreed that the mother of the child could take him abroad subject to the permission of the Court. The family suits were decreed on 03.04.2006. The respondent filed an application for enforcement of the solenama, which was rejected on 26.11.2008. For non-performance of the terms of the solenama, the petitioner filed a violation Case, which is still pending.

As the mother of the child took him out of the country and the father could not see his child and allegedly did not know his whereabouts, and in view of the fact that the mother of the child had married another person, he filed Writ Petition No.2898 of 2009 in the form of a writ of habeas corpus. The High Court Division upon hearing both the parties by judgment and order dated 12.08.2009 discharged the Rule upon finding that since the minor boy was staying with his mother as per order of the Court, it could not be said that the boy was illegally detained. It was observed that since in the solenama it has been categorically written that the mother of the child shall send him

to his father's house on two days every week, the writ-petitioner (respondent herein) is not without remedy and that he could take proper steps for enforcement of the terms of the solenama. The writ Bench directed as follows: "If the petitioner files any such petition before the lower Courts for enforcement of the terms of the solenama, the Court concerned shall dispose of such application, if any, within 2(two) months from the date of filing thereof." Accordingly, the respondent, father of the child, filed the Family Execution Case No.77 of 2009 which has culminated in the judgment and order impugned before us.

Since both the parties to the ill-fated marriage amicably agreed to abide by certain terms and conditions with regard to the payment of dower, maintenance and custody of the child, as embodied in the solenama, we do not find any illegality in the essence of the impugned judgment and order. Effectively, the High Court Division has ensured payment of the money due to the petitioner. Since the payment of maintenance for the child is a continuous process, the door of the Courts is always open to the child's mother to ensure the payment of the maintenance for the child, if ever there is any default in payment. Equally, the father has the right of access as mentioned in the solenama.

With regard to the custody of the child, again it is a matter that can be redressed by the Family Court, should there be any default in implementing the Court's order. Moreover, the order in relation to custody of a child should never be presumed to be inscribed in stone. Matters such as custody must always remain fluid since change in circumstances may at any time require the terms of the custody of the child to be varied upon a fresh application in order to comply with the

age-old principle that the welfare of the child is a paramount consideration and in modern parlance "the best interests of the child" must be given due consideration.

Mr. Hasan Ariff appearing for the respondent candidly submitted that the child of the broken marriage finds himself as the victim and his best interests must be ensured. The child of the marriage Farzan Ahsan is now almost seven and half years old. Although, under Mohammedan Law, hizanat (custody) of a male child over the age of seven years usually goes to the father, there are numerous decisions of our apex Court that if the welfare of the child demands, then the custody may be retained by the mother of the child. There is nothing to preclude either parent of the child from filing fresh application before the appropriate Court for changing the terms relating to the custody/access of the child.

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 or legislative bodies, the best interests of the child shall be a primary consideration. Article 12 of the CRC provides as follows:

> Article 12.1: States parties, shall assure to the child who is capable of forming his or her 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.
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> 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.

In has been held by this Division in a number of cases that the views of the minor child is of no value (see Abdul Majid Sarker vs. The State, 55 DLR (AD)1 and Badiur Rahman Chowdhury vs. Nazrul Islam and another, 16 BLD (AD)263). However, those cases relate to a different category of minors, i.e. those deciding to leave the paternal home in favour of their paramours. There is a marked divergence in the views of the Appellate Division in case of custody of children who are victims of a broken marriage. A clear distinction may, therefore, be made in case of children who find themselves victims of turbulent or broken-down marriages. The decision as to which parent shall have the custody of the child and how much access may be afforded to either parent is a most delicate one. A wrong decision may create a traumatic situation for the child, which would result in indelible psychological damage throughout his/her life. In this context it would be wise to allow the child to freely express his/her views so that the judge adjudicating upon the matter can decide what the welfare or the best interest of the child demands. The final decision, of course, lies with

the judge, who will come to a decision upon consideration of all the attending facts and circumstances. These aspects have been elaborately discussed in the case of ***Abdul Jalil and others vs. Sharon Laily Begum Jalil, 50 DLR (AD) 55.*** Their Lordships agreed that "nothing is more paramount, not even the rights of the parties under the rules of personal law or statutory provisions, than the welfare of the children which must be the determining factor in deciding the question of custody of children whether in a proceeding in the nature of habeas corpus or in a proceeding for guardianship under the Guardians and Wards Act 1890." Their Lordships also made reference to Abu Baker Siddique vs. SMA Bakar, 38 DLR (AD)106, where it was held that "If circumstances existed which justified the deprivation of a party of the custody of his child to whose custody he was entitled under Muslim Law, Courts did not hesitate to do so." In this case the eight year old child was also asked about his preference, and such preference was taken into consideration by the trial Court before giving custody to the mother. The matters to be considered before deciding the issue of custody of children were also elaborately discussed in this case.

Hence, at any time in the future either of the parents of the child shall be at liberty to move the appropriate Court for an appropriate order in respect of the custody of/access to the child in the light of prevailing circumstances at that time and the Court shall be at liberty to entertain such application and to pass necessary order in respect of the child's custody keeping in view the best interests of the child giving the child an opportunity to express his views. The Court should also keep in mind the provisions of Article 9 of the CRC. Article 9(1)(2) and (3) provide as follows:

> "9(1). States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
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> (2). In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
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> (3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

With regard to the applicability of provisions of international instruments, which have not been incorporated into our Municipal Law, reference may be made to the judgement of B.B. Roy Chowdhury, J. in Hossain Muhammad Ershad vs. State, 21 BLD (AD)69. It may be noted that in the Abdul Jalil case cited above reference was made to the Declaration of the Rights of the Child 1959. Unless provisions of international instruments are contrary to our domestic laws, the beneficial provisions may profitably be referred to and implemented in appropriate cases. (see The State vs. Metropolitan Police Commissioner, 60 DLR 660)

The observation of the learned Judge of the High Court Division that "violation of any terms of the solenama by any party shall be treated as contempt of Court," being unwarranted and beyond jurisdiction, is hereby expunged.

Save as mentioned above, we do not find any reason to interfere with the judgment and order of the High Court Division. This petition is dismissed with the above observations without, however, any order as to costs.

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The 9th June, 2011
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