

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present:

Mr. Justice S M Kuddus Zaman

CIVIL REVISION NO.3850 OF 2023

In the matter of:

An application under Section 115(1) of the Code of Civil Procedure.

And

Md. Tojammel Haque

... Petitioner

-Versus-

Mst. Rina Akter

... Opposite party

Mr. Abdullah Nurul Kabir, Advocate

... For the petitioner.

None appears

.... For the opposite party.

Heard and Judgment on 04.11.2024

This Rule was issued calling upon the opposite party to show cause as to why the judgment and decree dated 04.07.2023 passed by the Additional District Judge, 4th Court, Naogaon in Family Appeal No.22 of 2021 allowing the appeal and thereby reversing the judgment and decree dated 05.09.2021 passed by the learned Sapahar Senior Assistant Judge and Family Court, Naogaon in Family Suit No.08 of 2020 decreeing 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.

Facts in short are that the petitioner as plaintiff instituted above Family Suit for custody of her minor son Tanvir and Tasnim alleging that the defendant who is the mother of above two children had married another person and in above wedlock a baby was born and for

above reason above children are not getting required care and affection in her custody.

Defendant No.1 contested the suit by filing a written statement alleging that she would have no objection if minor Tanvir was given in the custody of his father but minor girl Tasnim may be allowed to remain in the custody of the defendant.

On consideration of the facts and circumstances of case and evidence on record the learned Judge of the Family Court decreed the suit and gave both the children in the custody of the plaintiff.

Being aggrieved by and dissatisfied with above judgment and decree of the trial Court the defendant preferred Family Appeal No.22 of 2021 to the District Judge, Naogaon which was heard by the learned Additional District Judge who allowed the appeal in part and set aside the impugned judgment and decree of the trial Court and placed minor girl Tasnim in the joint custody of the defendant and her mother and sister.

Being aggrieved by above judgment and decree of the Court of appeal below above respondent as petitioner moved to this Court and obtained this Rule.

Mr. Abdullah Nurul Kabir, learned Advocate for the petitioner submits that the plaintiff is the biological father of both minor Tanvir and Tasnim who are at 12 and $7\frac{1}{2}$ years of age respectively. During trial of the suit minor son Tanvir voluntarily went to the custody of the

plaintiff and he is still living with the plaintiff. The learned Judge of the Family Court granted custody of both above children to the plaintiff. The defendant did not dispute the custody of minor son Tanvir and since the defendant has already married another person and she has a child by her second husband, the learned judge of the Court of appeal below failed to appreciate above materials properly and most illegally reversed above judgment of the trial Court and gave minor Tasnim in the joint custody of her mother aunt and grandmother which is not tenable in law.

No one appears on behalf of the opposite party when the Rule was taken up for hearing.

I have considered the submissions of the learned advocate for the petitioner and carefully examined all materials on record.

It is admitted that both the plaintiff and the defendant after dissolution of their marriage by talak have married again and the plaintiff has a baby by his second husband.

The plaintiff filed above suit for custody of his two children, namely, Tanvir, a son of 12 years of age and Tasnim, a girl of $7\frac{1}{2}$ 7 years age. It is admitted that minor boy Tanvir went in to the custody of the plaintiff voluntarily and still he is living with his father and the defendant gave consent to above custody of minor Tanvir.

The defendant opposed to give minor Tasnim in the custody of the plaintiff. The learned Judge of the Court of Appeal below solicited

the opinion of minor Tasnim as to her custody who refused to go in the custody of her father. The learned Judge held that continuing above girl in the joint custody of her mother, maternal aunt and maternal grandmother would ensure her welfare.

The learned Judge of the Court of appeal below did not give minor Tasnim in the custody of either the plaintiff or the defendant. She has been placed in the joint custody of her mother, maternal aunt and maternal grandmother which is beyond the pleadings. Above maternal aunt and maternal grandmother were not parties to above suit nor their consent to be the custodian of Tasnim was obtained.

On consideration of above materials on record I had that the ends of justice will be met if the impugned judgment and decree passed by the Court of Appeal below is set aside and the suit is remanded back to the Family Court for re-trial after soliciting the opinion of above minor Tasnim again a fresh as to in whose custody she wants to go and then dispose of the suit in accordance with law.

In above view of the materials on record I find substance in this application under Section 115(1) of the Code of Civil Procedure and the Rule issued in this connection deserves to be made absolute.

In the result rule is hereby made absolute.

The impugned judgment and decree dated 04.07.2023 passed by the Additional District Judge, 4th Court, Naogaon in Family Appeal No.22 of 2021 is set aside and above suit is remanded back to the Family

Court for re-trial after obtaining opinion of above minor girl a fresh as to her custody and then proceed with the disposal of suit in according with law.

However, there is no order as to costs.

Send down the lower Courts records immediately.

MD. MASUDUR RAHMAN
BENCH OFFICER