

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH**

CR No.171 of 2017  
Date of Decision : 13.08.2018

Pallavi

...Petitioner

versus

Nand Kishor alias Naveen

...Respondent

**CORAM : HON'BLE MR. JUSTICE B.S.WALIA**

Present: Mr. Mukesh Rao, Advocate for the petitioner.  
Mr. Rajiv Sharma, Advocate for the respondent.

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**B.S.WALIA, J.** (Oral)

1. Challenge is to order dated 05.12.2016 (Annexure P-4) passed by the learned District Judge, Family Court-I, Faridabad, dismissing the petitioner mother's prayer for interim custody of minor child Rudransh during the pendency of application under Section 25 of the Guardians and Wards Act, 1890 (hereinafter referred to as 'the 1890 Act).

2. Brief facts of the case leading to the filing of the instant petition are that an application was moved by the petitioner before the learned District Judge, Family Court-I, Faridabad, with the averments that she was married to the respondent on 25.02.2012, that male twins, Ranvijay and Rudransh were born out of the wedlock on 27.12.2013, but that she and her son Ranvijay who was not keeping well were turned out from the matrimonial home by the respondent and his parents on 07.03.2015 though Rudransh was kept by the respondent and his parents, that she had got Ranvijay treated from Escorts Hospital as well as Sir Gangaram Hospital by spending a huge amount and during said period, neither the respondent nor

his parents supported her or Ranvijay, emotionally or financially, that the respondent is not in a position to take care of minor Rudransh due to his tender age as also on account of his remaining outside home in connection with the running of Marriage Palace, that the welfare of a child of tender age required the child to be neither separated from the mother nor his sibling twin since the same would impact the child emotionally besides affect his development and growth. Prayer was for handing over the interim custody of Rudransh to the petitioner. It needs noticing here that the petitioner who is a B.D.S., was earlier working in the Sagar Dental Hospital, Ballabgarh but now she is working in a private clinic at Faridabad.

3. Stand on behalf of the respondent was that while doing internship in the B.D. S. the petitioner stayed in a hostel for one year and during said period she left Ranvijay with her parents and now, since she is working, it would not be possible for her to take care of both the children. Learned counsel contended that ever since the petitioner had left the matrimonial home, Rudransh was living under the care and custody of the respondent father while studying in a reputed school at Faridabad, besides he was under the care and custody of his grandparents as and when the respondent had to go out in connection with work at the Marriage Palace being run by him. Learned counsel contended that in the circumstances, the order passed by the learned District Judge, Family Court-I, Faridabad, was valid and did not warrant any interference by this Court.

4. The learned District Judge, Family Court-I, Faridabad dismissed the application on the ground that minor child Rudransh was in

the custody of the respondent since 07.03.2015 and there was nothing on the record to show that the respondent was not able to look after the minor child Rudransh, besides the petitioner had failed to convince the Court that the respondent was not taking proper care of minor child Rudransh.

5. Learned counsel for the petitioner contended that as per Section 6 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as 'the 1956 Act') no doubt natural guardian of a minor child is the father, but in the case of minor who has not completed the age of five years, custody of the minor is ordinarily to be with the mother. Learned counsel further contends that the 1956 Act was in addition to the 1890 Act, besides Section 5 of the 1956 Act provided for overriding effect of the Act with regard to any other law in force in so far as it is inconsistent with any of the provisions contained in the 1956 Act, that, even if the application was filed under the 1890 Act, it was the provisions of Section 6 of the 1956 Act, which were relevant for determining as to which of the parents is entitled to the custody of a child below the age of five years. Relevant extract of Section 6 of the 1956 Act are reproduced as under :

Section 6-The Hindu Minority and Guardianship Act, 1956

6. Natural guardians of a Hindu minor.—The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother: provided that the custody of a minor

who has not completed the age of five years shall ordinarily be with the mother ;

xxx”

7. Learned counsel contends that the impugned order is unsustainable having been passed in derogation of the provisions of Section 6 of the 1956 Act as also the decision of Hon’ble the Supreme Court in case titled as Roxann Sharma vs. Arun Sharma, 2015 (2) RCR (Civil), 93, therefore liable to be set aside and the prayer for interim custody granted. Relevant extract of the decision in Roxann Sharma’s case (supra) is reproduced as under :-

“13. We must not lose sight of the fact that our reflections must be restricted to aspects that are relevant for the granting of interim custody of an infant. The Trial is still pending. The learned Single Judge in the Impugned Order has rightly taken note of the fact that the Mother was holding a Tenured College Professorship, was a post-graduate from the renowned Haward University, receiving a regular salary. Whether she had a Bi-polar personality which made her unsuitable for interim custody of her infant son Thalbir had not been sufficiently proved. In the course of present proceedings it has been disclosed that the Father has only passed High School and is not even a graduate. It has also not been denied or disputed before us that he had undergone drug rehabilitation and that he was the member of Narcotics Anonymous. This is compounded by the fact that he is not in regular employment

or has independent income. As on date he is not an Income tax assessee although he has claimed to have earned Rupees 40,000 to 50,000 per month in the past three years. We must again clarify that the father's suitability to custody is not relevant where the child whose custody is in dispute is below five years since the mother is per se best suited to care for the infant during his tender age. It is for the Father to plead and prove the Mother's unsuitability since Thalbir is below five years of age. In these considerations the father's character and background will also become relevant but only once the Court strongly and firmly doubts the mother's suitability; only then and even then would the comparative characteristic of the parents come into play. This approach has not been adopted by the learned Single Judge, whereas it has been properly pursued by the learned Civil Judge.”

8. During the course of hearing, the respondent who is present in person has stated that besides him and his son Rudransh, his father and mother are also residing in the same house and they look after the minor child Rudransh during his absence when he has to go for work at the marriage palace. On query, the respondent disclosed that his father is a heart patient while his mother is suffering from high blood pressure, depression and diabetes.

9. I have considered the submissions of learned counsel. Admittedly, the mother of the children is a B.D.S. and is working in a private clinic at Faridabad while staying with her parents. Although learned counsel for the

respondent has emphasized that the respondent being the father is entitled to the custody and is in a position to take care of the child, the fact remains that in view of Section 6 of the 1956 Act as also the decision in Roxann Sharma's case (supra), custody of minor below 5 years of age is ordinarily to be with the mother. The father's suitability to custody is not relevant where the child whose custody is in dispute is below five years as the mother per se is best suited to care for the infant during his tender age. In the circumstances, it is for the respondent father to plead and prove the petitioner mother's unsuitability since the child is below five years of age. No such unsuitability has been pointed out except that she is working as a B.D.S. The same as such does not constitute a unsuitability unless it can be shown that the children would be neglected by the petitioner. Both the parents are working. Thus the children are being taken care of by the grandparents only. Admittedly the respondent's parents are not keeping good health. No such disability has been pointed out qua the parents of the petitioner. Moreover, Section 6 of the 1956 Act mandates custody of a child below the age of 5 years to ordinarily be with the mother. Besides, if custody of Rudransh is also with the petitioner he would have the added advantage of being in the company of his sibling Ranvijay. It would not be in the welfare of Rudransh to remain separated from and be deprived of the love and affection of the petitioner mother as also his sibling in view of tender age of less than five years. Thus the rejection of the application by the learned District Judge, Family Court-I, Faridabad on the ground that there was nothing on record to show that the respondent is not able to take care of the minor child is not relevant in view of the minor Rudransh being

below five years of age. Accordingly, in the light of Section 6 of the 1956 Act, as well as decision of Hon'ble the Supreme Court in Roxann Sharma's case (supra) as also in view of the mother/petitioner, a B.D.S. working in a private clinic at Faridabad against salary, besides the father of the children i.e. respondent running a marriage palace in which obviously he remains busy for most of the day and night arranging marriage functions, leaving Rudransh dependent upon his grandparents who as per his own admissions are ill and suffering from a host of ailments, the interim custody of Rudransh, a child below 5 years of age ordinarily ought to be with the petitioner mother in the interest of welfare of the minor. Aforementioned aspects of the matter have not been taken into account by the learned District Judge, Family Court-I, Faridabad. Moreover, although the petitioner's application for grant of interim custody of Rudransh was dismissed, the learned District Judge did not order visitation rights in favour of the petitioner nor made any provision for ensuring that minor Rudransh gets opportunity to interact and grow up with his twin i.e. Ranvijay. It was only vide order dated 17.05.2017, passed by this Court that the parties along with their children were directed to meet at Haldiram's Sector, 12, Faridabad on the first and third Sunday of each month between 05:30 pm to 07:00 pm with no other person to be present at the time of meeting.

10. Another aspect which needs noticing is that attempts were made for reconciliation between the parties. The petitioner is willing to stay with the respondent, but states that she is unable to do so on account of an impossible condition having been imposed by the respondent and his

parents that the petitioner’s parents would not be allowed to meet the petitioner nor will the petitioner meet her parents. The respondent denies having imposed the condition. However, the fact remains that in the circumstances, amicable settlement is not possible as at present.

11. In the circumstances, in the light of the position as noted above, the impugned order is set aside. Custody of minor child Rudransh is ordered to be handed over by the respondent to the petitioner on or before 20.08.2018 before the Court of the learned District Judge, Family Court-I, Faridabad. The learned District Judge, Family Court-I, Faridabad is requested to dispose of the application for custody as expeditiously as possible. Needless to mention that nothing stated in this order would be taken as an expression on merits of the case. It is further ordered that during the interim custody of the child Rudransh with the petitioner, the respondent would be at liberty to meet the children in the presence of the petitioner after school hours in the evening between 5:00 p.m. to 7:00 p.m. every day at Haldiram’s Sector-12, Faridabad.

12. Petition stands allowed in above terms.

**(B.S.WALIA)**  
**JUDGE**

**13.08.2018**  
rajesh.k.khurana

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| Whether speaking/reasoned | : Yes/No |
| Whether reportable        | : Yes/No |