

295

**IN THE HIGH COURT OF PUNJAB AND HARYANAAT
CHANDIGARH**

-.-

CR-973-2022 (O&M)

Reserved on : 26.08.2022

Date of decision : 30.08.2022

Shweta

...Petitioner

Versus

Anand Sekhri and Others

...Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Manish Soni, Advocate for the petitioner.

Mr. Nikunj Dhawan, Advocate for the respondents

Petitioner and respondent No.1 are present in Court.

ALKA SARIN, J.

The present civil revision petition has been filed under Article 227 of the Constitution of India challenging the order dated 10.11.2021 whereby the Family Court declined to grant interim custody to the petitioner-mother of the twin daughter and only granted her visitation rights.

The brief facts relevant to the present lis are that the marriage of the petitioner and the respondent No.1 was solemnized on 16.11.2011. On 24.06.2020 twin children (a boy and a girl) were born to the couple. The baby girl was 1.9 kgs at the time of her birth. The baby girl was later detected as suffering from Hemihypertrophy. It is the case set-up by the petitioner that on 14.08.2021 she was thrown out of the matrimonial home and that she was not allowed to take the minor baby girl with her. The

petitioner filed a petition under Sections 7 and 12 of the Guardians and Wards Act, 1890 read with Section 6(A) of the Hindu Minority and Guardianship Act, 1956 for permanent custody of the minor twins along with an application under Section 12 of the Guardians and Wards Act, 1890 seeking urgent interim custody of the minor baby girl. The respondent No.1 contested the said petition as well as the application for interim custody. Vide the impugned order dated 10.11.2021 the application for interim custody was disposed off with the following directions:

“Hence in these circumstances, application is partly allowed with the condition that the respondent shall bring the minor daughter to the house of petitioner (house No.1203, C-Block, Classic Residency, Raj Nagar Extn. Ghaziabad) on every 2nd and 4th Saturday of the month and will hand over the custody of the minor daughter to the petitioner for a period from 11:00 AM to 2:00 PM. Similarly, petitioner shall hand over the custody of minor son to the respondent at the same time and the minor child boy shall remain in custody of the respondent from 11:00 AM to 2:00 PM at the same place. However, it is made clear that this is purely an interim arrangement and the parties are left at liberty to move application for variation and alteration of the aforesaid arrangement, only if warranted and justified in changed situation, or in case consequences of the aforesaid arrangement ordered turn out to be such which necessitate alteration or modification therein, but

for the welfare of the children. The parties to this lis are directed to comply with the order of grant of visitation rights to the petitioner and other directions passed herein meticulously, and they will fully cooperate with each other. It is also expected that they would not poison the ears of the minor children against the opposite side.”

Learned counsel for the petitioner would contend that the minor baby girl is one of the twins and is aged about 02 years and that as per Section 6(A) of the Hindu Minority and Guardianship Act, 1956 the custody of a minor, who has not completed the age of 05 years, shall ordinarily be with the mother. Learned counsel in support of his argument has relied upon the judgment by the Division Bench of this Court in the cases of **Mukul Chauhan Vs. Neha Aggarwal &Ors. [2019(4) RCR (Civil) 342]**; **Pinki Agarwal Vs. State of Punjab &Ors. [2022(1) RCR (Civil) 594]** and **Pallavi Vs. Nand Kishor alias Naveen [2018(4) RCR (Civil) 136]**.

Per contra, learned counsel for the respondents has contended that the impugned order passed by the Family Court is a well reasoned order keeping in view the fact that it is in the interest of the minor child that her custody remains with the respondent No.1-father. Learned counsel has further contended that the minor baby girl in the present case is suffering from a rare condition called Hemihypertrophy and that the respondent No.1-father has been looking after her welfare and has been taking her for regular check-ups and that it is in the welfare of the child that the custody remains with the respondent No.1-father.

Heard.

In the present case the twins, who were born on 24.06.2020, are just a little above 02 years of age. Because of the matrimonial issues between the parties the twins have been separated and are the actual sufferers in this dispute. The minor baby girl is no doubt suffering from a rare condition called Hemihypertrophy and is under treatment of one Dr. Ramani Narasimhan. However, during the course of arguments, to a pointed query put to the learned counsel for the respondents, it has very candidly been admitted that at the moment except for regular check-ups and administering a few vitamins which have been prescribed to the minor baby girl, no other treatment is being given to her. It has, however, been contended that with the love and care which is being given by the respondent No.1-father, the condition of the child has improved.

In the petition as well as in the reply filed before the Family Court, allegations and counter allegations have been made against each other by the parties. However, in the present case the Court is to only see the welfare of the child which is the paramount consideration.

Section 6 of the Hindu Minority and Guardianship Act, 1956 reads as under:

“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;

(b) in case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;

(c) in the case of a married girl - the husband”

The provisions of the Hindu Minority and Guardianship Act, 1956 itself are very clear that in case of a minor, who has not completed the age of 05 years, the custody shall ordinarily be with the mother. In the present case learned counsel for the respondents has not been able to show that the petitioner-mother, who is earning as much as the respondent No.1-father, is in anyway unfit to look after her minor twin daughter. It is not the case of the respondents that the minor twin son, whose custody is with the petitioner-mother, is not being taken care of. Rather, the only argument raised is that since the minor twin daughter, whose custody is with the respondent No.1-father, is suffering from a rare medical condition, it would be in the interest of the child that her schedule is not disturbed. Neither is there any material on the record nor at the time of arguments was the learned counsel for the respondents able to refer to any material to show that the petitioner-mother is in any manner incapable of looking after both the twin children. During the course of the arguments, a statement was made by the learned counsel for the petitioner that the petitioner-mother would continue the treatment of the minor twin daughter with the same doctor and would ensure that the child's medical needs are well taken care of.

The Supreme Court in the case of **Roxann Sharma Vs. Arun Sharma [2015(2)RCR(Civil) 93]** held 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."

Thus, in view of the law laid down in the case of **Roxann Sharma** (*supra*), the father's suitability is not relevant where the child, whose custody is in dispute, is below the age of 05 years. It would be the mother who would be best suited to take care of the minor twin daughter in the present case especially when the minor twin son is already being taken care of by her. The onus was on the respondent No.1-father to plead and prove the unsuitability of the petitioner-mother to have custody of the minor twin daughter but no such non-suitability has been pointed out except that the minor twin daughter is suffering from a rare medical condition and is being got treated by the respondent No.1-father. The mother-petitioner has expressed her willingness to continue the treatment of the minor twin daughter with the same doctor and ensure that the child's medical needs are well taken care of. Further, separating the twins by itself would not augur well for both the children. Siblings and more so twins, share a very special bond which is instrumental in their upbringing and their well being. The minor twin daughter has not only been separated from her mother but has also been deprived of the love and affection of her twin brother. The petitioner-mother seems absolutely capable of looking after the minor twin

daughter in terms of financially, physically and emotionally. The Division Bench of this Court in the case of **Mukul Chauhan** (*supra*) held as under :

“18. In the present case, we are dealing with the interim custody not of the appointment of the guardian. The Court has awarded the interim custody to respondent No.1 keeping in view the fact that the children are too young i.e. 3½ years as of now and are twins. The earlier litigation which was initiated by both of them by filing a petition under Section 13B of the Act came to an end when the settlement was arrived at between the parties and they were abiding by the settlement till the dispute again triggered off with the alleged misbehaviour of the appellant from the month of January, 2019. Thus, keeping in view the aforesaid facts and circumstances we are of the considered opinion that there is no error in the order passed the Court below which requires interference of this Court. The present appeal is thus hereby dismissed though without any order as to cost.”

In the case of **Pinky Agarwal** (*supra*) it has been held as under :

“10. xxx

As per the Act of 1956, the custody of a minor, who has not completed the age of 5 years, shall ordinarily be with the mother, unless it can be established that the mother is incompetent or unable to look after the minor. A mother plays an important role in shaping, in nurturing and moulding a young tender mind. She is in

fact the child's first teacher, guide and mentor and provides a safe emotional haven to her children. There is a presumptive truth that a mother is better suited to fulfil the needs of a minor, unless proved to the contrary. The term 'Welfare of the Child' has a wide connotation and cannot be limited to fulfilling the financial needs only. It is in this background that the legislature in its wisdom has tried to ensure that the custody of a minor child who has not attained the age of 5 would remain with the mother."

In the case of **Pallavi** (*supra*) this Court, relying on the decision of the Supreme Court passed in **Roxann Sharma Vs. Arun Sharma [2015 (2) RCR (Civil) 93]**, has held as under:

*"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.”

Keeping in view the judicial precedents discussed above as well as considering the welfare of both the twin children, the impugned order dated 10.11.2021 (Annexure P-3) is set aside. The interim custody of the minor twin daughter is directed to be handed over to the petitioner-mother on or before 12.09.2022 before the Family Court, Faridabad. The respondent No.1-father would be at liberty to meet both the twin children at the house of the petitioner every Sunday between 5:00 PM to 6:30 PM. The present revision petition stands allowed in the above terms. Pending applications, if any, also stand disposed off.

It is further made clear that any observation made herein shall not be treated as an expression of opinion on the merits of the case. The Family Court is requested to dispose of the main petition expeditiously.

August 30, 2022
tripti

(ALKA SARIN)
JUDGE

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : YES/NO