

Aakash Dwivedi vs Smt Pooja Mishra on 28 March, 2025

Author: Navin Chawla

Bench: Navin Chawla

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 28.03.2025

+ MAT.APP.(F.C.) 123/2025
AAKASH DWIVEDI

.....Appellan

Through:

Dr.Sarvan R.Khare,
Mr.Abhishek Srivastava,
Mr.Anuj Agarwal,
Mr.Kushagra Sharma and
Mr.Akarsh Khare, Advs.

versus

SMT POOJA MISHRA

.....Responden

Through:

Mr.Aashish K. Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

HON'BLE MS. JUSTICE RENU BHATNAGAR

NAVIN CHAWLA, J. (ORAL)

CM APPL. 18348/2025 (Exemption)

1. Allowed, subject to all just exceptions.

MAT.APP.(F.C.) 123/2025 & CM APPL. 18347/2025

2. This appeal has been filed by the appellant, challenging the Order dated 21.03.2025 passed by the learned Principal Judge, Family Court, North District, Rohini Court, Delhi (hereinafter referred to as, learned 'Family Court') in GP/61/2024, directing that the custody of the minor child, who is around four years old, be handed over to the respondent herein. At the same time, the learned Family Court further directed that the appellant herein shall have visitation rights over the child commencing from April, 2025, between 2:00 P.M. and 4:00 P.M., in the Children Room, Rohini Courts, Delhi, on the first and the third Tuesday of every month. Additionally, the appellant shall also be entitled to have custody of the minor child for a week during the summer vacations and for three days during the winter vacations, when the school of the minor child would be closed for holidays.

3. The present appeal has been filed claiming that the child had been living with the appellant since the respondent walked away from the matrimonial home. It is asserted that the minor child is happy in the company of the appellant, and the allegation of parental alienation was merely a facade created by the respondent to claim the custody of the child.

4. The learned counsel for the appellant submits that the Impugned Order has been passed in a mechanical manner and, therefore, deserves to be set aside. He places reliance on the Judgement of the Supreme Court in Col.Ramneesh Pal Singh v. Sugandhi Aggarwal, 2024 SCC OnLine SC 847, in support of his submission.

5. Issue notice.

6. Notice is accepted by Mr. Aashish K. Singh, the learned counsel on behalf of the respondent.

7. He submits that the minor child is only around four years old. He submits that due to the acts of cruelty committed by the appellant and his family members, the respondent had no option but to leave the matrimonial home on 11.06.2024, when she was forcibly thrown out of the matrimonial home. The respondent almost immediately thereafter filed the above Guardianship Petition.

8. He further submits that keeping in view the age of the child, the respondent is the natural guardian of the child.

9. We have considered the submissions made by the learned counsels for the parties.

10. As noted above, the girl child is only around four years old. Section 6(a) of the Hindu Minority & Guardianship Act, 1956 states that the custody of a minor child shall ordinarily be with the mother. The Supreme Court in Roxann Sharma v. Arun Sharma, (2015) 8 SCC 318, has held that the custody of a child less than 5 years of age should ordinarily be with the mother, and this can be deviated from only for a very strong reason. We quote paragraphs 10 and 13 of the judgment, as under:-

" 10. Section 6 of the HMG Act is of seminal importance. It reiterates Section 4(b) and again clarifies that guardianship covers both the person as well as the property of the minor; and then controversially states that the father and after him the mother shall be the natural guardian of a Hindu. Having said so, it immediately provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother. The significance and amplitude of the proviso has been fully clarified by the decisions of this Court and very briefly stated, a proviso is in the nature of an exception to what has earlier been generally prescribed. The use of the word "ordinarily" cannot be overemphasised. It ordains a presumption, albeit a rebuttable one, in favour of the mother. The learned Single Judge appears to have lost sight of the significance of the use of the word "ordinarily" inasmuch as he has observed in para 13 of the impugned order that the Mother has not established her suitability to be granted interim custody of Thalbir who at that point in time was an infant. The proviso places the onus on the father to prove that it is not in the welfare

of the infant child to be placed in the custody of his/her mother. The wisdom of Parliament or the legislature should not be trifled away by a curial interpretation which virtually nullifies the spirit of the enactment.

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13. The HMG Act postulates that the custody of an infant or a tender aged child should be given to his/her mother unless the father discloses cogent reasons that are indicative of and presage the likelihood of the welfare and interest of the child being undermined or jeopardised if the custody is retained by the mother. Section 6(a) of the HMG Act, therefore, preserves the right of the father to be the guardian of the property of the minor child but not the guardian of his person whilst the child is less than five years old. It carves out the exception of interim custody, in contradistinction of guardianship, and then specifies that custody should be given to the mother so long as the child is below five years in age. We must immediately clarify that this section or for that matter any other provision including those contained in the G and W Act, does not disqualify the mother to custody of the child even after the latter's crossing the age of five years."

11. While passing the Impugned Order dated 21.03.2025 granting custody of the child to the respondent, the learned Family Court observed that the appellant has not placed anything on record which can lead to a prima facie conclusion that the respondent is not fit to take the custody of her minor child. Even before us, presently there is no material placed by the appellant which may persuade us to find that the respondent is not entitled to the custody of the minor child.

12. While granting custody of a girl child, we need to also keep in mind that in her formative years, the child needs the support and love of her mother. Though the learned counsel for the appellant has pleaded that the appellant's mother can provide the love and support to the minor child, we are of the opinion that the grandmother cannot replace the love and care of the mother.

13. We take note of the fact that the respondent had filed the above application under Section 12 of the Guardian and Wards Act, 1890, on or about 07.08.2024, that is, almost immediately after being allegedly thrown out of the matrimonial home. It cannot therefore, be said that the respondent had abandoned the child.

14. We therefore, do not find any reason to interfere with the direction issued by the learned Family Court granting custody of the minor child to the respondent herein.

15. At the same time, we are of the opinion that the learned Family Court has erred in restricting the visitation right of the appellant to only the Children Room, Rohini Courts, Delhi, and that too, only on the first and the third Tuesday of each month.

16. There was no allegation in the Guardianship Petition as also in the Impugned Order that the appellant was not appropriately behaving with the child or was unfit to have regular visitation with

the child. Nor any other reason was assigned because of which he should be granted only supervised visitation rights over the child.

17. Keeping in view the above, and with the consent of the learned counsel for the respondent, we modify the Impugned Order only to the limited extent that instead of the visitation rights on the first and the third Tuesday of every month, the appellant shall be entitled to the visitation rights over the child from 10:00 A.M. till 6:00 P.M. every Saturday and Sunday of the month.

18. The appellant shall take the interim custody of the minor child from the respondent at the above designated time from the residence of the respondent and shall also drop off the minor child at the above given time at the respondent's residence.

19. There shall be no restriction on where the appellant may take the child during this period. However, the child shall not be taken out of Delhi under any circumstances.

20. The learned counsel for the appellant, on instructions from the appellant who is present in Court in person, submits that the custody of the minor child shall be handed over to the respondent on Monday, that is, 31.03.2025, at her residence by 10:00 A.M. The appellant is bound down to the above statement and undertaking.

21. We further make it clear, that the parties shall be entitled to seek modification of the above arrangement, if there are reasons for the same, from the learned Family Court, and any such application filed by either of the parties, shall be considered by the learned Family Court in accordance with law.

22. With the above modification, the appeal is disposed of.

NAVIN CHAWLA, J RENU BHATNAGAR, J MARCH 28, 2025/sg/DG Click here to check corrigendum, if any