

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No. 1390 of 2014 (O&M)

Date of Decision: 29.1.2015

Mrs. Chhaya Barjatya

...Appellant.

Versus

Rahul Barjatya

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE SNEH PRASHAR.**

PRESENT: Mr. Ajay Pal Singh Gill, Advocate for the appellant.

Mr. Prabhjit Jauhar, Advocate and
Mr. Deepak Jain, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. Feeling aggrieved by the judgment dated 6.12.2013 passed by the District Judge, Family Court, Gurgaon whereby the petition filed by the husband-respondent under Sections 17 and 25 read with Section 6 of the Guardians and Wards Act, 1890 (in short "the Act") for the custody of minors, namely, Uday Barjatya (son) and Rupal Barjatya (daughter) was allowed, the wife-appellant has approached this Court by way of instant appeal.

2. A few facts relevant for adjudication of the instant appeal as narrated therein may be noticed. The marriage of the parties was solemnized on 21.1.1997 at Jaipur according to Hindu rites and ceremonies. Out of the said wedlock, two children, namely, Uday

Barjatya (son) and Rupal Barjatya (daughter) were born on 12.11.2000 and 23.10.2006, respectively who had been residing with the appellant in Bombay since 9.5.2012. When the respondent was away to Jaipur, the appellant took the children along with her to Bombay without informing him along with her belongings and valuables. The son and the daughter were studying in school at Delhi and Gurgaon respectively upto 9.5.2012. The parents of the respondent were also residing with him in House No. EG1/8, Garden Estate, Gurgaon. They had love and affection towards the minors. The minor son was going in play school, i.e. Pallavan School, Gurgaon in the year 2004. He was admitted to football coaching in Garden Estate, Gurgaon and was pursuing taekwondo till the age of 10 years and was undergoing professional training for the same. In the year 2010, he also participated in Delhi State Taekwondo Championship. The daughter of the respondent was admitted in Anant Play School at Gurgaon in the year 2009. She was admitted for swimming coaching at Garden Estate, Gurgaon. In the year 2011 she was admitted to Heritage School, Gurgaon. The respondent was doing the business of Handicraft and Jewellery at Jaipur. His annual income was ₹ 4.5 to 5 lacs. Besides this, the respondent had a house at Jaipur and his parents had a house at Gurgaon. The respondent was residing with his parents at Gurgaon for the last 18 years. At Gurgaon, the respondent had been bearing all the educational and other expenses of the children and the wife with the support of his parents. The only problem in the married life was that the wife used to interact with her parents and when the parents of the appellant used to visit her at Gurgaon, they instigated her on one pretext or the other. On

20.1.2012, the appellant packed all her bags without informing the respondent and his parents and kept the same in the family car and picked up both the children from bus stop at Gurgaon and took them away along with her parents and brother who came to Jaipur to act as conspirators. The parties agreed to admit the son in Sriram School, Gurgaon and filled various forms for the said admission. On 20.1.2012, the school authorities of Sriram School informed the respondent that his son would get a mail for an interview. The appellant along with children with great reluctance agreed to come back to Gurgaon on 20.1.2012 at 11.30 PM. She did not lodge any report with the police or any other authority regarding physical torture on 20.1.2012 but later on she visited Government Hospital, Gurgaon to create a false evidence without informing the police about any assault. However, when she returned to the respondent at Gurgaon on 20.1.2012, she apologized for her conduct. On 23.3.2012, the brother of the appellant came to Gurgaon and started abusing the respondent in filthy language in front of the children. On 12.5.2012, the appellant filed a complaint under the Domestic Violence Act against the respondent and his parents in Bombay. In March, 2013, she filed a divorce petition in Bombay. The children had been living with the appellant in Bombay in a small apartment where there had been a lot of dispute between the appellant and her parents and brother. The son of the respondent expressed in his own hand writing vide letters dated 9.2.2013 and 17.3.2013 that he did not want to live in Bombay as he had been facing daily abuses (verbal and physical) from his maternal uncle, maternal grandfather and his mother (appellant herein). He even told that his mother had not been

taking care of them and had been taking alcohol and smoking in their presence. Uday Barjatya had repeatedly fallen sick and was taken to hospital for treatment on account of violence inflicted upon him by his maternal uncle. Accordingly, the respondent filed a petition under Sections 17 and 25 read with Section 6 of the Act for the custody of the minors. Upon notice, the appellant filed a written statement controverting the averments made in the petition. It was pleaded that after the marriage the behaviour of the respondent was not good as he was not happy with the marriage and told that he was forced into marriage. In the month of March, 1997, they had gone for honeymoon to Switzerland where he left the appellant in the middle for a small misunderstanding and went to the hotel alone where they were staying. In the year 2000, when the appellant was pregnant, the respondent told her that he wanted a boy and if there was a girl, he would not pay for the expenses and would not take care of the child. After the birth of the male child, there was no change in the behaviour of the respondent and he never gave any money to the appellant for her maintenance or the maintenance of the child. Her parents used to give money for her maintenance. When the appellant was pregnant for the second time, the respondent told that he did not want the second child. However, the appellant gave birth to a female child on 23.10.2006. The respondent wanted a male child on second time also and was not happy with the birth of female child. He did not pay even single penny for medical expenses at the time of birth of the female child. In March, 2012, their son had gone to attend a birthday party and he came late upon which the respondent beat him up with a hanger and threatened him as a result

of which he fell down. Even the appellant was not allowed to go to her parents' house. She used to visit there after 2-3 years. Her parents and other family members came to meet her at Gurgaon on 31.12.2011. They were not allowed to enter the house. The appellant was allowed to meet them outside the house on the other side of the road at a far away place. When the appellant returned after meeting her parents, the respondent got angry and gave beatings in front of their children. On 19.1.2012, the same incident was again repeated. On 20.1.2012, the appellant went to Hospital at Gurgaon for treatment and the doctors gave tetnus injection. On 20.1.2012, the appellant along with her children left the house of the respondent for going to her parent's house at Jaipur and when they were on the way to Jaipur, the respondent gave a call saying that their son had got a call for admission in Sriram School, Gurgaon. For the future of the son, the appellant returned back to Gurgaon. On reaching Gurgaon, the respondent told that he was telling a lie as no call was received from the said school. One another incident had taken place when the son had returned from Delhi. The respondent hit him again and when the appellant intervened and asked as to why he was beating the child, he said that he was not hitting her and was hitting only the child. Her brother along with his family had come to Gurgaon in March 2012. When they were at the door of the house, the respondent abused them and did not allow them to enter the house. The appellant went out with them and stayed with them at night. In the morning when she came back, the respondent started abusing her. After sometime her brother along with his family came to the appellant to speak to the respondent about his behaviour, where he abused them and told them to

get lost. Her brother asked the respondent that they had come to the house of his sister upon which the respondent took out a knife from the kitchen and told the appellant to call her brother out of the colony and they would show him what he could do to him. She requested her brother not to go outside to meet the respondent. Even the appellant was not allowed to watch the TV. On 9.5.2012, the appellant along with her children left for her parent's house in Bombay. Before leaving, she made a complaint to the police at Gurgaon to the effect that she was leaving the house because of the ill treatment given to her and her children by the respondent. At that time, the respondent was at Jaipur. The appellant's parents were also there. The respondent called them and abused them. He called her mother outside the house and put in the car and drove away the car. His mother was also sitting in the car. The respondent and his mother scolded her mother in the car and then they went to their house at Jaipur. Thereafter, the appellant went to the police in Bombay and made a complaint. The appellant also filed a case under the Domestic Violence Act. On 22.5.2012, the respondent along with his sister and brother-in-law came at Bombay and seeing them, the appellant got so scared and her brother had to call the police. The respondent was given visitation rights by the Court. As and when he exercised his visitation rights, he brain washed the children. On 15.3.2013, the respondent took away the children. On the next day, her son called her in the morning and started abusing her on the phone. He even called up his maternal uncle and abused him. After these calls, the appellant and her brother went to the police station and lodged a complaint. They also moved an application for modification of the order

regarding visitation rights. The other averments made in the petition were denied and a prayer for dismissal of the same was made. From the pleadings of the parties, the trial court framed the following issues:-

1. Whether the petitioner is entitled for the custody of minor children, namely, Uday Barjatya (son) and Rupal Barjatya (daughter) as prayed for?OPP

2. Relief.

3. In support of his case, the respondent appeared himself as PW1 and tendered various documents in his evidence. On the other hand, the appellant besides examining herself as RW1 also tendered various documents in her evidence.

4. The trial court on appreciation of evidence led by the parties decided issue No.1 in favour of the respondent holding that the custody of the children with the respondent would be for their welfare. Accordingly, the trial court vide judgment dated 6.12.2013, allowed the petition holding the respondent entitled to the custody of the children. However, the appellant was given visitation rights to meet the children. Hence, the present appeal.

4. Learned counsel for the appellant submitted that she being the mother and natural guardian of the minors had every right to claim their custody. It was further submitted that while granting the custody of the minor children, their welfare had to be considered and not the sentiments of the parties. Lastly, the appellant prayed for visitation rights being mother of the minors.

5. On the other hand, learned counsel for the respondent

supported the judgment passed by the trial court. He submitted that the trial court had rightly directed the appellant to hand over the custody of the minors to the respondent. Support was drawn from the judgment of the Apex Court in **Gaytri Bajaj v. Jiten Bhalla 2012(4) RCR (Civil) 603**. Prayer for visitation rights was also opposed by the learned counsel.

6. After hearing learned counsel for the parties, we do not find any merit in the appeal.

7. The Apex Court in **Gaytri Bajaj's case (supra)** discussing the issue relating to custody of minor child had held as under:-

“14. From the above it follows that an order of custody of minor children either under the provisions of the Guardians and Wards Act, 1890 or Hindu Minority and Guardianship Act, 1956 is required to be made by the Court treating the interest and welfare of the minor to be of paramount importance. It is not the better right of the either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the concerned parent to take care of the child are some of the relevant factors that have to be taken into account by the Court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and

welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court.”

8. The father of the minor is the natural guardian and has the right of custody unless the Court comes to the conclusion that the father is unfit to have the custody and that it is not for the welfare of the minor that the father should be allowed to exercise that right. Guardianship is in the nature of a sacred trust. In the present case, the appellant had not shown that the children were not happy in the company of their father whereas he appears to be in a position to look after the children and provide with adequate educational facilities and also to maintain them in a proper and congenial manner. The statement of the appellant in examination-in-chief was recorded on 31.8.2013 when she appeared as RW1 and her cross-examination was recorded in part. Thereafter, she did not turn up for her cross-examination on various dates and her evidence was closed on 15.10.2013. Thus, her examination-in-chief could not be read in evidence as she had not made herself available for cross-examination. In her examination-in-chief also, she had deposed that her son wanted to live with his father. On 23.11.2013, both the children were produced by the appellant in the Court. Both the children expressed their wish that they wanted to reside with the respondent and their grandparents. The discretion of the Court has to be exercised in the interest of the welfare of the minors keeping in view several factors which includes, physical as well as emotional. In such a situation, there is no justification to disapprove the right of the father. The appellant had miserably failed to prove that welfare of the minors would be better

served if their custody is with her. Thus, keeping in view the facts and circumstances of the case, it would be in the interest of the children that the custody of the minors is with the respondent. The trial court has rightly handed over the custody of the children to the respondent keeping in view their welfare. The relevant findings recorded by the trial court read thus:-

“11. In this case, the evidence of the petitioner as detailed in para No.2 of the judgment went un-rebutted and there is no reason to disbelieve the same. The respondent appeared in the witness box as RW1 on 31.8.2013, on which date her examination in-chief was recorded in full and her cross examination was recorded in part. Thereafter the case was adjourned a number of times for the cross examination of the respondent but the respondent did not turn up for her cross examination by the petitioner and on dated 15.10.2013 learned counsel for the respondent closed evidence on behalf of the respondent. Since the respondent did not turn up to be cross-examined by the petitioner, therefore, her examination in-chief cannot read in evidence against the petitioner. Even in her examination in-chief, she deposed that her son wanted to reside with his father (petitioner). Even on 23.11.2013, when the children were produced by the respondent for recording their preference, they expressed their wish that they

wanted to reside with their father and grand parents. There does not seem to be any good reason as to why the wish of the children be not respected especially in the circumstances when the children are grown up. The daughter is about 7 years old and the son is about 13 years old. It has come on record that the grand mother of the children is 66 years old. She can look after well the minor daughter of the parties. The children have attachment with their grand parents also and that is the reason that they expressed their wish that they wanted to reside with their father and grand parents. If there was some dispute or misunderstanding between the husband and wife, the respondent should not have taken the children away to Bombay in the absence of the petitioner. She forcibly put the children in different schools at Bombay without taking her husband into confidence. The children were not party to the dispute between the parties, if any, and they were unnecessary uprooted from Gurgaon and shifted to Bombay by the respondent. It has come on record that the petitioner has a good house at Gurgaon consisting 4 bed rooms and a drawing room etc. He has been residing with his parents in the said house for the last 18 years. He has sufficient income to maintain the children. Before the children were taken away by the respondent to

Bombay on 9.5.2012, they were residing with their parents and grand parents in the said house. Their friend circle was at Gurgaon. It appears that children could not adjust themselves in the environment at Bombay and due to that reason, they expressed their wish to live with their father and grand parents at Gurgaon. During the course of arguments, the petitioner had offered that the respondent could reside with them at Gurgaon where she was residing before she left for Bombay on 9.5.2012. In the facts and circumstances of the present case that the children were doing well in their studies while they were staying with their parents and grand parents at Gurgaon and they were abruptly removed from their respective schools and put in different schools at Bombay by the respondent and they want to reside with their father and grand parents at Gurgaon, I am of the view that custody of the children with the petitioner would be in their welfare. The petitioner is held entitled for the custody of the minor children of the parties.”

9. The appellant has not been able to dispel the findings recorded by the trial court arrived at on appreciation of evidence produced on record. Accordingly, the claim of the respondent to have the custody of the children vide the impugned judgment dated 6.12.2013 passed by the trial court is upheld.

10. The appellant lastly raised an argument claiming visitation rights to her. A perusal of the trial court judgment dated 6.12.2013 shows that the appellant-mother had been allowed visitation rights whereby she could meet the children in their school as well as at the residence of the husband as and when she feels like as per convenience of the children. Further, she was held entitled to have custody of the children for half of the summer and winter vacations as per the convenience of the children. Still further, on every alternate Saturday of the month, she could spend night with the children at any place at or around Gurgaon. She had to pick the children from the residence of the husband at 4 PM on Saturday and drop them at 4 PM on coming Sunday. However, this Court during the hearing of this appeal on 4.7.2014 recorded that the children had expressed their unwillingness to meet the appellant. However, the respondent had agreed that the children could meet their mother whereupon the appellant was given visitation rights to meet the children in the office of the Chief Judicial Magistrate-cum-Secretary, District Legal Services Authority, Gurgaon on first Saturday of each month from 10.00 AM to 2.00 PM commencing from 5.7.2014 which order has continued till date. In view of the consensus of the respondent in allowing the aforesaid visitation rights to the appellant-mother, we see no ground to vary the said order. In view of the above, the appeal is accordingly dismissed with the observations noticed hereinabove.

(AJAY KUMAR MITTAL)
JUDGE

January 29, 2015
gbs

(SNEH PRASHAR)
JUDGE