

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No. 4510 of 2013 (O&M)

Date of Decision: 29.1.2015

Smt. Kiran

....Appellant.

Versus

Surender Kumar @ Sanjay and others

...Respondents.

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

PRESENT: Mr. S.K. Verma, Advocate for the appellant.

Mr. Sanjay Vashist, Advocate for the respondents.

AJAY KUMAR MITTAL, J.

1. Delay of 5 days in filing the appeal is condoned.
2. Feeling aggrieved by the judgment dated 20.9.2012 passed by the District Judge (Family Court), Bhiwani, dismissing the petition filed by her under Section 6 of the Hindu Minority and Wards Act, 1956 (In short "the Act") seeking custody of minor daughter Himanshi, the appellant-wife has approached this Court by way of instant appeal.
3. A few facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The marriage of the appellant with respondent No.1 was solemnized on 19.11.2005. Out of the said wedlock, a daughter, namely, Himanshi was born on 22.5.2007. The respondents were not satisfied with the dowry brought by the appellant and they started harassing, taunting and maltreating her. Within a week of the marriage, they returned most of the dowry articles to the

shopkeepers from whom the same were purchased by her parents and received the price. They used to demand a car. The appellant came to Bhiwani from Kanpur for her BA Final exams and at that time she was in the advance stage of pregnancy. After her examination was over, she was sent to her parental home for delivery and she gave birth to a daughter on 22.5.2007. However, no one came from the respondents' side to see her and her daughter. On 11.7.2007, she along with her parents reached her matrimonial home but she was not allowed to enter the house by her in-laws and she came back to her parental home. Thereafter, a meeting was held at her parental house where respondent No.1 felt sorry for her acts and conduct and assured her that she would not be harassed, taunted or beaten in future and was taken to the matrimonial home. But they failed to improve their behaviour. On 3.7.2008, she was given merciless beatings and was threatened by respondent No.1 that he would cut her into pieces and would take her to Bhiwani. She informed all this to her parents upon which her father and brother came to her matrimonial home on 4.7.2008. They brought her to the parental house. On 23.12.2009, the respondents refused to keep her with them. Respondents No.2 and 3 came to her parental house on 5.2.2010 and forcibly took Himanshi with them. She moved the application to the police upon which FIR No. 29 was registered on 10.2.2010 against the respondents under Sections 498-A, 323, 506, 406 of the Indian Penal Code. Accordingly she filed a petition under Section 6 of the Act for custody of the minor Himanshi. The said petition was contested by the respondents by filing a joint written statement. Besides raising various preliminary objections, it was pleaded that the appellant had herself abandoned the child in Women Cell, Office of Senior

Superintendent of Police, Bhiwani on 5.2.2012 saying that she did not like to bring up the filth of others and had done so voluntarily. It was further pleaded that she withdrew herself from the society of respondent No.1 without any reasonable cause on 4.7.2008 and since then she was living with her parents. Despite best efforts, she did not join the company of respondent No.1. On 11.7.2007, the appellant along with her newly born baby, father and brother came to the house of the respondents and tried to oust them. Not only this, the father and brother of the appellant manhandled respondents No.2 and 3 saying that they would live there on which respondent No.2 called his brother and some other respectables who persuaded her father not to use force and to take his daughter to his own house and thereafter she was brought. On 22.7.2007, respondent No.1 along with some other persons brought her to his house on the assurance of her father and brother that they would not interfere in the matrimonial affairs but there was no change in her attitude and behaviour. In the last week of June, 2008, the elder sister of the appellant gave birth to a son upon which she expressed her desire to visit the birth ceremony of son of her sister. As she was not invited, respondent No.1 did not allow her to go there upon which she showed utter disregard to his feeling which led to some tension between them and she called her father and brother who reached Kanpur on the next day i.e. 4.7.2008. They brought her to Bhiwani without his permission. While going to Bhiwani, she brought all her clothes and jewellery. Thereafter, in the first week of January, 2010, she moved a false complaint to the Women Cell, Bhiwani against the respondents and sisters of respondent No.1 and their husbands. During those proceedings, she abandoned her child saying that she did not like to

bring up the filth of others and since then the minor is residing with the respondents. 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 to custody of her minor daughter Himanshi on the ground as alleged? OPA
2. Whether the petitioner has no locus standi and cause of action to file the present petition? OPR
3. Whether the petitioner is estopped by her act and conduct from filing the present petition? OPR
4. Relief.

4. In support of her case, the appellant examined herself as PW1 and her father Gulab Ram as PW2. On the other hand, respondent No.1 examined himself as RW1, Inspector Roshani Devi as RW2, Ramesh Verma as RW3 and his father Shish Ram as RW4.

5. The trial court on appreciation of evidence led by the parties, deciding issue No.1 against the appellant held that the welfare of the minor daughter Himanshi would not be in giving custody to the mother-appellant. Issues No.2 and 3 were decided against the respondents being not pressed. Accordingly, the trial court vide judgment dated 20.9.2012 dismissed the petition. Hence, the present appeal.

6. Learned counsel for the appellant submitted that as per Section 6 of the Act, the custody of the minor being less than five years of age, was to be given to the appellant. It was further submitted that the

welfare of the child is paramount consideration and in such a tender age, the love and affection of the mother was the prime necessity of the minor child. Lastly, learned counsel prayed for visitation rights to the appellant.

7. On the other hand, learned counsel for the respondents supported the judgment passed by the trial court. It was submitted that the appellant herself abandoned the custody of the minor in the presence of the police officials of Women Cell and, therefore, she was not entitled to the custody of the minor. The prayer for visitation rights was also opposed.

8. After hearing learned counsel for the parties, we do not find any merit in the submissions made by learned counsel for the appellant.

9. Under Section 6 of the Act, the father of the minor being the natural guardian, 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 his right. Guardianship is in the nature of a sacred trust and any entrustment is essentially a revocable authority. There is no allegation, either before this Court or in the pleadings of the petition 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 this right of his. In such a situation, there is no justification to displace the right of the father, that too, when the minor is in the custody, taking education, living along with their grandparents and there is no proof as to cruel treatment by her father. Further, the order of custody of minor children 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.

10. The Apex Court in **Gaytri Bajaj v. Jiten Bhalla 2012(4) RCR (Civil) 603** 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.”

11. In the present case, the appellant in her testimony as PW1 had deposed that respondents No.2 and 3 are elderly persons and it was in the interest of the minor that she should remain in their custody. She laid her claim only that she being the mother was entitled to the custody of the minor. RW1-Surender (father of the minor), RW-3 Ramesh Verma, eye witness to the incident and RW4-Shish Ram (grandfather of the minor) have categorically deposed that the appellant had abandoned the minor child in the Women Cell. RW2-Inspector Roshni Devi was also examined who had corroborated the version of the respondent and deposed that the appellant gave the custody of the minor to the respondent-Surender in her presence when she was trying to rehabilitate both the parties on a complaint moved by her and that writing in this regard was also made. Her testimony as an independent witness carries weight. Further, there was no evidence that the appellant ever tried to bring the minor back from the respondents or that the respondents took away the minor forcibly. The child appeared to be happy in the company of her father who also appears to be in a position to look after her, provide her with adequate educational facilities and also to maintain her in a proper and congenial manner. The appellant had failed to establish that the welfare of the child would be met by giving her the custody. She even nowhere deposed that she was capable of looking after the welfare of the minor daughter. In such a situation, there is no

justification to displace the custody of the minor when she is being looked after by the respondents. The trial court had, thus, rightly concluded that the appellant herself had left the minor in the Women Cell and was not entitled to have her custody.

12. No illegality or perversity could be demonstrated in the findings recorded by the trial court being based on misreading or misappreciation of evidence on record which may warrant interference by this Court. Consequently, finding no merit in the instant appeal, the same is hereby dismissed. Needless to say that the minor child would continue to remain in the custody of the respondents till she attains the age of majority.

13. However, so far as visitation rights are concerned, a prayer was made that the appellant shall move the trial court. Thus, the issue regarding visitation rights has been kept open and the appellant shall be at liberty to avail any other remedy that may be available to her, in accordance with law.

(AJAY KUMAR MITTAL)
JUDGE

January 29, 2015
gbs

(SNEH PRASHAR)
JUDGE