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Case Comment: Githa Hariharan & Anr v Reserve Bank of India & Anr

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INTRODUCTION

The Supreme Court Judgement in Githa Hariharan v RBI of 1999[1] is a binding precedent on Courts and other authorities for the determination of Natural Guardianship of Hindu minor children. Opposing the strict interpretation of the words 'after him' used in Section 6(a) of the Hindu Minority and Guardianship Act, 1956[2], which seemingly accorded the father a dominant position (during his lifetime) in natural guardianship of the minor children, this judgment bestowed equitable justice though only in certain limited circumstances. However, in the light of saving the law, neither was any affirmative step taken to grant absolute and equal rights to the mother nor were the impugned words struck off or replaced. The position as laid down in this judgment as 'inequitable' continues to remain on the statute books and leads to further confusion for all. A detailed study of this judgment is hence warranted.

[1] *Githa Hariharan & Anr v Reserve Bank of India & Anr* (1999) 2 SCC 228
[2] Hindu Minority and Guardianship Act 1956, s 6(a)

WHAT THE LAW SAYS

Section 6 (a) of the Hindu Minority and Guardianship Act, 1956[3] (hereinafter referred to as "the Act") declares the natural guardian of a Hindu minor- boy or unmarried girl to be the father and **after him** the mother. Further, it provides that the custody of a child below 5 years shall ordinarily be with the mother.

FACTS OF THE CASE

The Petitioner (Githa Hariharan) here was the mother of Rishab Bailey, her son born out of her marriage with Mohan Ram. The couple was separated and during the pendency of the divorce proceedings, the Petitioner applied to RBI (the Respondent) for a 9% Relief Bond to be held in the name of her minor son. Despite intimation to RBI with the application of being the mother of the applicant, RBI returned the application advising the Petitioner to file the application with the father's signature instead or submit a Certificate of Guardianship from a Competent Authority. Aggrieved by this stance taken by RBI, this Writ petition was filed. A separate Writ Petition praying for the custody of the minor son was pending the decision during which the minor child was in the Petitioner's custody.

ISSUES OR QUESTIONS RAISED

Whether Section 6(a) of the Act[4] read with Section 19(b) of the Guardians and Wards Act[5] is arbitrary and constitutionally invalid on grounds of violating the rights of equality of women inherent in Articles 14[6] and 15[7].

ARGUMENTS FOR THE PETITIONER

The Petitioner argued that the Father of the minor son was neglectful and had blatant disregard and disinterest in the welfare and well-being of his child on one hand, but repeatedly wrote to

[3] *Ibid*
[4] *Ibid*
[5] Guardians and Wards Act 1890, s 19(b)
[6] Constitution of India 1950, art 14
[7] Constitution of India 1950, art 15

the Petitioner for the sole purpose of asserting that he was the only natural guardian of their minor son and that no decision regarding the son may be taken without his permission. It was argued that the father asserting his right to guardianship over the minor child while otherwise not showing concern amounts to a blatant misuse of the provision of Section 6(a)[8] which specifically mentions that she can be considered as the natural Guardian only after the neglectful father's death. Section 19(b)[9] of the Guardians and Wards Act, 1890 as of the date of this Writ Petition, was similarly drafted.

It was contended by the Petitioner that Section 6(a)[10] of the Act along with Section 19(b)[11] of the Guardians and Wards Actare seriously disadvantageous to women and discriminate against them in matters of guardianship rights, responsibilities, and authority over their children. Further, they challenged that the words accord a primacy of rights of guardianship to the father during his lifetime and create an unreasonable classification of the mother's guardianship rights based on their marital status as seen in the difference of guardianship of legitimate and illegitimate children envisaged in Section 6(a) and (b) of the Act. It was asserted that Sections 6(a) of the Act and 19(b) of the Guardians and Wards Act, 1890 are violative of the Right of Equality of Women as enshrined in the Constitution under Articles 14[12] and 15[13].

ARGUMENTS FOR THE RESPONDENT

It must be noted that though the judgment does not explicitly state the arguments raised by the Respondents, the following arguments are inferred. It was contended that the lawmakers had considered and conformed with the Ancient Hindu Law, the Law as modified under British Rule including the Indian Majority Act of 1875[14] and Guardian and Wards Act of 1890[15] while drafting this Act. Hence, aligning with the erstwhile position in law, the impugned sections were

[8] Hindu Minority and Guardianship Act 1956, s 6(a)
[9] Guardians and Wards Act 1890, s 19(b)
[10] Hindu Minority and Guardianship Act 1956, s 6(a)
[11] Guardian and Wards Act 1890, s 19(b)
[12] Constitution of India 1950, art 14
[13] Constitution of India 1950, art 15
[14] Indian Majority Act 1875
[15] Guardian and Wards Act 1890

reflective of the legal position of that time when this Act was drafted. Furthermore, it was also contended that there was no legislative intention to give rise to an interpretation putting an embargo on the mother's right as guardian of the minor or ascribing the father as the preferred guardian.

JUDGMENT AND JUDGE'S REASONING

Allowing the mother to be the natural guardian in exceptional circumstances during the lifetime of the father, the Court held that the words of the impugned section be interpreted in consonance with the Constitution. The judgment and the reasoning given have been broken down systematically as follows:

Directions to Authorities: The Reserve Bank of India authorities were hereby directed to formulate an appropriate methodology to decide such issues based on the facts or context.

Welfare of the child: The Court referred to the Theory of Paramountcy of the Welfare of the Child, to interpret the impugned sections from the perspective of the child's welfare. Drawing reference from English and Indian cases, the court while admitting the inequality of this provision, threw light on the practice of Courts to generally accord the Child's welfare the utmost importance while deciding matters of natural guardianship. Some of the cases referred to on this point are as follows:

Cases Cited in Reference: In Re Mc Grath: [16]This English case placed the welfare of the child above all other factors, in determining natural guardianship. Welfare here was to be given the widest meaning, including the moral, religious, and physical welfare of the child, with due regard given to ties of affection.

Cases Cited in Reference: Gyngall:[17] In this English case, the Court directed the authorities to consider the circumstances, position of the parents and child, the age, religion, and happiness

[16] *In Re Mc Grath* [1893] 1 Ch 143
[17] *Regina v Gyngall* [1893] 2 Q B 232

of the child while deciding cases of Guardianship. The feelings and natural rights of the parents and the child must be considered before the child is taken away.

Cases Cited in Reference: J.V. Gajre v Pathankhan and Ors:[18] In a similar case, where the mother had been managing the person and property of the minor daughter in the absence of the father, the court clarified that as per the Hindu Law before and after the enactment the father **normally** when alive is considered the natural guardian first and only after his death the mother takes this position. Here, the Supreme Court, however, agreed that there may be exceptional circumstances where despite the father being alive, the mother can be the natural guardian of the minor child on grounds of the welfare of the child.

Gender equality: It was held that the word 'after' if read literally, would be violative of basic principles of gender equality as enshrined in the articles of the Constitution[19], CEDAW[20], and UDHR[21]. The Constitution being supreme, such a discriminatory and unequal statutory provision would be violative and void. Hence, the word 'after' should not be interpreted to accord a dominant position to the father. It further reasoned that interpretation of this section as obliterating the mother's right to act as the guardian during the lifetime of the father would run counter to the legislative intent and would be void and ultra vires the constitution.

Interpretation of 'after him': The judgment held that a literal interpretation of the words 'after him' is not conceivable in the context of the constitutional guarantee of gender equality and legislative intent. Furthermore, it declared that the word 'after' should not be interpreted as after the death of the father. Here, 'after' shall be interpreted as 'in the absence of the father in circumstances including and limited to:

- Temporary absence of the father;
- Total apathy of the father toward the child;
- The inability of the father because of ailment or otherwise.

[18] *J V Gajre v Pathankhan and Ors* (1970) 2 SCC 717
[19] Constitution of India 1950, arts 14-15
[20] Convention for Elimination of All Forms of Discrimination Against Women 1979, art 15
[21] Universal Declaration of Human Rights, art 2

The Court declared that only in the above-mentioned exceptional cases and in consideration of the welfare of the child, the mother shall be allowed to take the position of a natural guardian during the lifetime of the father.

Constitutionality: Regarding the principal issue, the Constitutionality of the impugned sections, the Court held that:

- The validity of legislation is to be presumed and Courts must try to retain the provision.
- Only where gross violation of the constitutional sanctions occurs, the Courts must declare such legislative enactment to be void or invalid and not otherwise.
- A narrow interpretation of a statute running counter to the constitutional mandate must be avoided unless such liberal interpretation would be a violent departure from the legislative intent. In this case, it must be declared void.

Hence, the Court held that both parents being responsible for their minor children, ought to be treated as guardians and reasoned that any interpretation according to primacy to the father shall be unconstitutional. However, the Court contradictorily specified that only in event of the exceptional circumstances the mother could become the natural guardian during the father's lifetime and not strike off the words 'after him' from the statute.

The reasoning given by Judge: The Court also brought out the original position in Hindu ancient law which provided for the father and after him, only in the absence of a Testamentary Guardian (appointed by the father), the mother to be the natural guardian of the person and separate property of the minor children. Even then, this guardian was not allowed to delegate this responsibility during his lifetime to any other person, holding this position like a Trust. Under British rule, Hindu law recognized de facto and de jure guardians or legal guardians including the natural guardian, testamentary guardian, or guardian appointed by the Court. Though the Act ensured that the Testamentary Guardian cannot supersede the mother, it continues to place the father first and allows the mother to be the natural guardian only after him.

ANALYSIS

Limited Natural Guardianship Rights: The judgment has held the provisions to be unequal and violative of the Right to Equality of mothers but has accorded only limited power of natural guardianship during the lifetime of the father. This falls short of according to the women, the absolute right at par with the men, in consonance with Articles 14 and 15[22], to become natural guardians to their minor child, and warrants a review of the law.

'After him' remains in Act: It is humbly submitted that the Hon'ble Supreme Court should have called for an amendment by the Parliament, to replace the provision with a more equitable provision. According to simultaneous Natural Guardianship to both the mother and father over their legitimate, illegitimate, and adopted children is the most just, fair, and reasonable recourse available. Striking off the words 'after him' would reduce confusion for authorities and/or individuals on the correct position of law and eliminate the resultant misuse of the provision by fathers who refuse to allow the mothers an equal opportunity to decide for their children, as was in this case. The rationale to retain the same words in the statute, on the grounds of saving the law, while liberally interpreting the same is confusing to the general masses. An unjust provision, in violation of the right to equality, has no place in the statute books in all matters of law. Why should this issue be disregarded or dismissed so lightly?

Section 19(b) amended: However, the Parliament vide the Personal Laws (Amendment) Act of 2010[23], substituted the Section 19(b) of the Guardians and Wards Act, 1890[24] with an equitable provision, namely: "*(b) of a minor, other than a married female, whose father* ***or*** *mother is living and is not, in the opinion of the court, unfit to be the guardian of the person of the minor; or*." It is hence, puzzling that when the similarly worded section 19(b) of the Guardians and Wards Act, 1890[25] has been amended to reflect gender equality, why has the same not been done with Section 6(a) of the Act[26]?

[22] Constitution of India 1950, art 14-15
[23] Personal Laws (Amendment) Act 2010, s 2
[24] Guardian and Wards Act 1890, s 19(b)
[25] *Ibid*
[26] Hindu Minority and Guardianship Act 1956, s 6(a)

Law Commission Report: To strengthen the case for simultaneous natural guardianship, it is pertinent to cite the 257th Law Commission Report here, which calls out the inadequacy of this judgment, reiterating that the principles of equality enshrined under the Constitution demand the removal of the superior rights given to the father from the code. It recommends the amendment of Section 6(a)[27] to remove the superiority of one parent over the other and that both mother and father be regarded as the natural guardians of the minor simultaneously. Furthermore, this report seeks to change or remove the incongruities between the Hindu Minority and Guardianship Act[28] and the Guardians and Wards Act[29] as the latter stands amended by Personal Laws (Amendment) Act, 2010[30].

Need for Simultaneous Guardianship: The guardianship of a minor child is a tremendous authority over the matters of the child, their person, and property, as partly envisaged in Section 8 of the Act[31]. As per the law, minors generally act through or with the permission of their guardians, ranging from marriage, custody, religious and moral education, education, traveling, medical treatments, entering contracts, suing, and to dealing with their property and/or investments, etc. Vesting the same in the hands of any one parent does not provide the necessary checks and balances for the protection and the welfare of the child. In a society where social evils in the form of child marriages, son meta preference, female illiteracy, and selling minor daughters continue, the law must be reformed to play the role of harbinger of egalitarianism. Even an illiterate mother, empowered by the law, may be able to prevent her minor daughter from being sold to human traffickers by the father or challenge her minor child's marriage. It is pertinent here to quote that Part IV of the Constitution[32] also directs the State to strive to promote the welfare of the people by securing and protecting a social order in which justice, social, economic, and political, shall inform all the institutions of the national life.

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[27] *Ibid*
[28] *Ibid*
[29] Guardians and Wards Act 1890, s 19(b)
[30] Personal Laws (Amendment) Act 2010, s 2
[31] Hindu Minority and Guardianship Act 1956, s 8
[32] Constitution of India 1950, art 38(1)

Balancing responsibilities with authority: Pew Research study[33] states that 62% of Indian adults believe that both men and women are responsible for taking care of their children. This indicates that the law has not moved in tangent with the social changes, to empower mothers as natural guardians with the fathers simultaneously. Section 6(a) of the Act[34], places the custody of children below 5 with the mother normally but allows her to be treated as a second-rate citizen when matters of authority or guardianship are involved. It is also humbly questioned, whether a mother can be expected to do everything for the welfare of the child if she lacks the power or authority to do the same.

Unreasonable classification of mother's rights based on marital status: In the same Section 6, clause (b)[35] the law places the natural guardianship of an illegitimate child with the mother first and after her with the father. This indicates that the lawmakers did not believe that the mother is incompetent to be the natural guardian of her minor child at all, and even go on to give her precedence over the father. It may be argued that in such cases the paternity of the child may not be provable and access is better for the mother. Even then, this contradictory stance regarding a mother's right to natural guardianship, over her legitimate v illegitimate child, based on the marital status of the mother does not appear to be tenable.

CONCLUSION

This article does not seek an amendment on an unjust basis nor asks for the mother to precede the father as a natural guardian of a minor. It only urges for both the mother and father to equally remain the natural guardians simultaneously and each have their decision respected by the world at large except for a challenge by the other parent or the organs of the Government in exceptional circumstances only. There is a possibility of the parents taking a contradictory stance, as may occur in medical, ethical, and legal matters, in which case it is urged to take recourse of the better judgment of courts, leaving all other issues to be amicably resolved as far

[33] Jonathan Evans et al., 'How Indians View Gender Roles in Families and Society' (*Pew Research Centre*, 02 March 2022) <https://www.pewresearch.org/religion/2022/03/02/how-indians-view-gender-roles-in-families-and-society/> accessed 12 April 2023
[34] Hindu Minority and Guardianship Act 1956, s 6(a)
[35] Hindu Minority and Guardianship Act 1956, s 6(b)

as possible between the parents. Matters even as simple as creating financial investments in the name of the minor child, as in this case, should not be challenged on such trivial and unsound principles.

Though this judgment was in the right direction according to women some rights to natural guardianship, the contradictions in the judgment are bound to be confusing. Parliament must either scrap this provision or omit the words 'after him' from the statute to avoid further challenges. The researcher humbly opines that no rationale can justify the continuation of such a provision in the Act and hopes that till amended and replaced with equitable provision, liberal interpretation of this section is the norm.