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Discrimination between Parents by '*Hindu Minority & Guardianship Act, 1956*': An Overview

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Abstract

The Hindu Minority and Guardianship Act, 1956 primarily deals with the issue of guardianship to a minor child. The expression 'minor' includes a person who has not completed the age of eighteen years. The Act is applicable only to the persons who are Hindu by religion. Section 6 of the act provides that the father shall be the guardian of minor child and after him mother shall be the guardian. The proviso thus, discriminates between the father and mother. The provision u/s 6(a) of the Act unreasonably provides that the guardianship of a child above five years of age shall be with the father. Mother shall be the guardian for the child below five years only. The proviso obviously denies the equal rights to the mother in the matter of guardianship. The matter was challenged before Hon'ble Supreme Court but the court ruled that the term "after" in section 6 not be literally interpreted to mean "in absence of father". There is thus urgent need of change in the law to ensure the equality of rights available to the parents and equality of treatment to, son and daughter.

Keywords: Hindu, Minority, Guardianship.

1. Introduction

The objects of enactment of '*The Hindu Minority & Guardianship, Act 1956* was primarily to provide guardianship to a minor child, natural or adopted or illegitimate, during disputes or distress of any kind. The expression 'minor' includes a person who had not completed the age of eighteen years^[1]. The act is applicable to those who are Hindu by religion in any of its form or development, including a virashaira, Lingayat or a follower of the *Brahmo Prarthana* or *Arya Samaj*^[2]. It also includes other who is a Buddhist, Jaina or Sikh by religion and any other person domiciled in the territories. The Act extends, who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu Law or any other custom or usage^[3]. The expression 'guardian' means a person having the care of the person of a minor or of his property or of both his person and property, which includes a natural guardian or a guardian appointed by will or appointed/ declared by a court or empowered to act as such by or under any enactment relating to any court of wards^[4]. The 'natural guardian' means any of the guardians mentioned in section 6 of the Act. According to Section 6 of the Act, in case of a boy or any unmarried girls, the father is 'guardian' and after him mother, provided that the custody of minor who has not completed the age of five years shall ordinarily be with the mother. The proviso is obviously discriminatory as it gives preferential treatment or weightage to the father and treats the mother almost like a 'baby-sitter'. The natural guardian concept has to be applied in a case where the parties involved in guardianship case are both Hindus^[5]. It does not appear reasonable to provide or treat essentially only the father as a 'guardian' of the boy or unmarried girls above five years even in case where mother is highly educated and well learning and on the other hand husband is illiterate and jobless. The facts of the unreason ability was realised by the courts of law therefore and it was consistently ruled that the interest and welfare of the child in the matter of custody of minor child, is the paramount consideration and not the convenience or pleasure of parents^[6]. As the mother is supposed to have the custody of a child who has not completed the age of five years under Sec 6(1) of the Act and, therefore, while deciding the question of ordinary residence of the minor so long the child is of five years of age, it has to be deemed that he/she is residing with the mother and the residence of the mother would be indicative of the ordinary residence of the child also.

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1.1. Situation of Adopted Son

Although a number of female orphans are being adopted all over the country by various willing parents, yet the provisions of guardianship Act, 1956 contains a unique provision, which discriminated between 'adopted son' and 'daughter' on the basis of sex. The provisions of Section 7 of the Hindu Minority and Guardianship Act, 1956 provides for natural guardianship for an adopted son only. The peculiar provision is obviously based on the traditional notion that adoption was meant exclusively for those parents who did not have a biological son and also those who are worried about their ancestry and property. The act is completely silent on the status of somebody having adopted a daughter. This glaring discrimination has not been removed so far by the legislation despite all measures taken over by the years to say good bye to the deeply ingrained prejudice of 'son preference over the daughter'.

1.2. Preference to Father

The provisions of Section of the Act, 1956 deals with natural guardianship of a biological child in respect of their person as well as property. Rather than treating the father and mother alike, Section 6 displays the pernicious influence of the patriarchy. It clearly established a hierarchy saying that the natural guardian of a Hindu minor is "the father", and after him "the mother". This formulation was interpreted to mean that as long as the father was alive, the mother could not aspire to the status of a natural guardian of her children. But the age old influence of patriarchy was evidently so strong and pervasive that even when the Law Commission first dealt with Section 6 of the Act, 1956 in 1980, it found nothing like unreasonable with the privileging of the father over the mother on the issue of natural guardianship. The Law Commission could see Section 6 for what it was only when it returned to the subject in 1989 with the express intent of removing "discrimination against women in matter relating to guardianship and custody of minor children". In order to achieve the object, the Commission recommended that Section 6 be amended "so as to constitute both the father and the mother as being natural guardian jointly and severally having equal rights in respect of the minor". But the successive government came one after the other but nothing happened on the recommendation.

1.3. Gita Hariharans's Case

Gita Hariharan, a mother, challenged the constitutional validity of Section 6(a) of the *Hindu Minority and Guardianship Act, 1956* and 19(b) of the *Guardians and Wards Act, 1890* as being violative of Article 14 and 15 of the Constitution and demanded both father and mother to be treated alike. The dispute arose when the mother, Gita Hariharan, applied to the Reserve Bank of India for relief Bonds in the name of their minor son and the bank refused to entertain the application directing the parents to produce application form signed by the father. The Supreme Court heard parties on the point as to why the mother could be the natural guardian of her minor child only after the father. Through the Apex Court did not give any substantial relief but it sought to lessen its severity and held that the term "after" in Section 6 should not be literally interpreted to mean "after the life time of the father" but instead be taken mean "in absence of the father"^[6]. It clarified that "absence" in turn could extend to situations where the father was away for a long time or was totally apathetic to the child or was rendered unfit because of illness.

2. Conclusion

Thus, we may arrive at a conclusion that there is an apparent need of removing such anomalies existing in law which discriminate between father and mother and also between son and daughter. The equal rights to both father and mother should be ensured by adequate amendments in law. The welfare principles in India also requires updating its laws on guardianship, custody and adoptions^[7].

Notes

1. Section 4(a), *the Hindu Minority and Guardianship Act, 1956*.
2. Section 3(a),
3. Section 3(b),
4. Section 4(i) to (iv),
5. Madh Bala –V- Arun Khannai; AIR 1987 Del. 81,
6. Kumar V. Jahgirdar –V- Chetna K. Rama Theertha; AIR 2001 SC 2179,
7. Gita Hariharan –V- Reserve Bank of India; AIR 1999 SC 1149,
8. The Times of India, June 25, 2015,

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2. Kusum. Cases and Material on Family Law; (Universal Law Publishing Co., Delhi, 2007)
3. Das PK. Hindu Succession; (Universal Law Publishing Co., Delhi)
4. Pandey, JN, Constitutional Law of India; (Central Law Agency, Allahabad, 2014)
5. Bakshi, PM, The Constitution of India; (Universal Law Publishing Co. Delhi, 2006)