The GithaHariharan Judgement – Still a Long Way to Go

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Abstract

This paper is an attempt to critically analyze the famous GithaHariharan judgement. In this, we will first understand the underlying principles of concepts like guardianship and parental responsibility. We will see how some laws still run on very patriarchal assumptions and how it is detrimental to the society. We will talk about the rights and duties of the natural guardian. In this paper, we will discuss that how the court failed to realize the real issue and while judging the case, the court relied on ratios of other cases, which were different from the current one. There will be some discussion on the rights available to a natural guardian as to person of the minor in the Indian and English context. By the end, we will see how this judgement fails to remove the gender inequality present in the statues in question and few alternate ways will be suggested to approach the issues similar to what were brought forth in the present case.

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Introduction

In the current scenario, laws identifying with children must be formed by various guiding principles, head of which should bethat the essential duty of upbringing the child rests with the guardians.Guardianship and ward is an idea of relationship emerging from the common inadequacies of children and people of unsound personality and once in a while different types of people, to deal with their affairs. The history of guardianship takes us to ancient Greece and Rome, where this concept began as a right over one's ward's property to protect the interests of the group. Later, it developed into a duty to preserve the interests of the wards itself.

In India, the primary statues in operation regulating the guardianship of a minor are 'The Guardians and Wards Act, 1890' and 'The Hindu Minority and Guardianship Act, 1956' (hereinafter HMGA), where the latter acts as mere extension, and not in derogation, to the former.[2]Even today, the Hindu Minority and Guardianship Act, continues to have few of the existing pillars of a patriarchal and man-centric society. In the Hindu society, a mother has been given a very significant position, where she falls in the category of being a class 1 heir of her son's property if he dies intestate, i.e. without a will, whereas father classifies as a class 2 heir.[3] But when it comes to guardianship, the mother is on a lower pedestal, as in the presence of the father, the mother cannot be a natural guardian of her minor.[4]

This constitutional validity of this very article was challenged in *GithaHariharan v. Reserve Bank of India,*[5]though the validity of the section in question was upheld, the supreme court changed the interpretation of this section as to bring it in conformity with the constitutional values.

Objective

This paper will try to

1. analyze the issues brought forth in the GithaHariharan Judgement,
2. talk about the rights and duties of a natural guardian and how they are different from a guardian,
3. will question whether the grounds outlined in the judgement for treating a father to be 'non-existent' are sufficient to consider the mother, a natural guardian? Or any more

[2]The Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956, § 2.(India).
[3] The Hindu Succession Act, 1956,No. 30, Acts of Parliament, 1956§ 8, read with § 10 (India).
[4]The Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956, § 6(a)(India).
[5]AIR 1999 SC 1149.

grounds can bring more clarity as to when can a natural guardian be considered non-existent.

Discussion

Beginning with the facts of this case, in 1984, GithaHariharan (first petitioner) along with her husband (second petitioner), had applied to Reserve Bank of India (first respondent) for relief bonds in the name of their minor sons. The petitioners state that it was agreed between them that the first petitioner will take charge as guardian in investment related matters of their minor son. The respondent, upon receiving the application, replied by asking the petitioner to either get the form signed by the father or produce of certificate of guardianship by a competent authority.

The bank based their argument on the Section 6(a) of the HMG Act, which says:

"The natural guardians of a Hindu, minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

1. in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;"

It cannot be refuted that the correct interpretation of this section, at that time, was that mother cannot be a natural guardian of a minor in presence of the father.[6]

The petitioners challenged the constitutional validity of this section along with Section 19(b) of the Guardians and Wards Act, 1890, on the ground of them being in violation of Article 14 and 15 of The Constitution of India, 1950. Article 14 and 15 of the Indian Constitution embodies the values of equality of law and equal protection of law, irrespective of a person's religion, caste, sex or place of birth.

For reference, Section 19(b) of The Guardians and Wards Act, 1890, limits the power of judiciary to appoint a guardian of a minor whose father is living and is not in the opinion of the court, unfit to be the guardian of the minor. This particular section smells of a perfect patriarchal law, where it completely ignores the say or existence of the mother of a minor whose guardianship is in question.

The division bench of judiciary decided, somewhat, in favor of the petitioners by differing theinterpretation of the Section 6(a) and said that where father is not actively taking care of the child or managing its affair, mother would be the natural guardian. Further, it said that the

[6]B. Ramendra Reddy v. B.V. Satyanarayana Reddy, 1986 (2) Civil LJ 311 at 315 (AP).

word "after" in the section should be interpreted to mean not "after death or lifetime" but "in the absence of". This decision, however, did not strike down any sections in question but merely said that when a minor is in the exclusive care and custody of the mother, she would be entitled to act as a legal guardian of the minor.

While reaching the conclusion, the court came across few previous judgements, concepts like custody and parental rights, and international conventions.But the most common thing a reader of this judgement will notice that the term 'natural guardian' is used again and again. What is this natural guardian? And how is it different from a normal Guardian?

Where guardian is someone appointed by the wisdom and policy of the law to take care of a person and his affairs, who by reason of his imbecility and want of understanding, is incapable of acting for his own interests,Natural guardians is type of guardian defined under Section 4(b) of the Hindu Minority and Guardianship Act, 1956. Section 4 can be best comprehended by reading the judgement of *Rajalaxmi v. Ramachandran,*[7] which said a Guardian means a person having the care of the person of a minor or of his property or of both and includes (a) a natural guardian (b) a guardian appointed, that can be a natural guardian or a guardian appointed by the will of the minor's father or mother, and (c) a guardian appointed or declared by a court, and (d) any person empowered to act as such by or under any enactment relating any court of wards.[8]

To understand Natural Guardianship, we may first talk about what a 'natural child' is. It is different from a child being a legitimate offspring. Natural child is the child of one's own body. In most cases, the child is both natural and legitimate, i.e. born in wedlock.Similarly, a natural guardian is the one, who gives birth to the child in question.

In law, the concept of natural guardians, when read with Section 4 of the Guardians and Wards Act, 1890 and Section 2 and 6 of the Hindu Minority and Guardianship Act, 1956, applies to cases when both the parties involved in a guardianship are both Hindus.[9]

When it comes to understanding guardianship to a deeper level, we must first differentiate guardianship from custody. Custody of a minor can shift between person to person, without taking away the rights of either guardian.[10]The idea of guardianship is likened to trusteeship. A guardian is trustee in connection to the minor of whom he is so selected. The position of

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[7]AIR 1967 Mad 113.
[8]*Ibid.*
[9]MadhuBala v. ArunKhanna, AIR 1987 Del 81 at p. 84.
[10]MedaiDalavoi T. Kumaraswami v. MedaiDalvoiRajammal, AIR1957Mad563.

guardian is graver than mere custodian. The custodial care might be for brief term and for particular purposes.[11]

Section 8 of the Hindu Minority and Guardianship Act, 1956, defines the powers of a guardian in relation to the minor's estate. It empowers the natural guardian to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate, but lays down that the natural guardian cannot, in any case, bind the minor by a personal covenant.[12]Under this law, there is no explicit provision relating to powers of guardians over the persons of the minor children. However, the position of common law in this respect is well settled. Earlier, parental powers over children were considered absolute but today these rights and powers are subjected to the welfare of the minors.[13]

While deciding this case, the court talked about the judgement in*JijabaiVithalraoGajre v. Pathankhan and Ors*[14] and said that similar issues were addressed in this case by the court. Facts of this case were that the appellant filed before the tehsildar for termination of the tenancy of the respondent as the appellant was in need of theland for personal cultivation. The tehsildar decided in favor of the appellant but it was found that the lease deed was executed by the tenant in favor of the appellant's mother, when the appellant was minor and her father was alive. The tenant, through a writ petition, challenged the decision of the tehsildar on the ground that when father of a minor is alive, then only he can be considered as a natural guardian and thus he can enjoy the rights on property of the minor. The High court held that the lease deed was valid and mother was a natural guardian because of the disinterest of father in the minor appellants affairs. The court said, "he father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned."

Another case being talked about extensively in the judgement is the*Pannilal v. Rajinder Singh &Anr*.[15] In this, some property belonging to the respondents were sold to the appellants when the appellants were minor, by the mother of the respondents under a registered sale deed. On attaining majority, the respondents sought the land back on the ground that sale deed was voidable as it lacked the permission of the court.[16]

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[11]SaraswatibaiShripadVed v. ShripadVasanjiVed, AIR 1941 Bom103.
[12]N. SRINIVASAN, THE HINDU MINORITY AND GUARDIANSHIP ACT, 1956 130 (2d ed. 2010).
[13]PARASDIWAN, LAW OF ADOPTION, MINORITY, GUARDIANSHIPAND CUSTODY 287 (4d ed. 2010).
[14]AIR 1971 SC 315.
[15][1993] 3 SCR 589.
[16]The Hindu Minority and Guardianship Act, 1956, No. 32, Acts of Parliament, 1956, § 8(3)(India).

We must note here that, to part (in any manner, sale/gift/mortgage) with any immovable property of the minor, the guardian can only do so if the parting is in the interest of the minor and has to first obtain permission of the court.

The main argument of the appellant in the Pannilalcase was that the sale deed was attested by the father and it should be considered and was validly made by the natural guardians of the minor. This case was not decided on the fact that the deed was executed by the mother. Also, in this case there was no reliable evidence to show that the sale took place for the benefit of the minors and nothing which showed that the father was not actively involved in affairs of the minor. The Supreme Court decided in the favor of the respondents by holding that the case is different from the Jijabai case as this case is decided in favor of the respondents because of lack of a statutory requirement for transfer of the immovable property of the minor.

While coming to the conclusion in the GithaHariharan, the supreme court said that the two cases referred above, i.e. Jijabai and Pannilal, are different on account of their facts and circumstances and thus not having contradictory ratios. The court, in its judgement shed some light on the situations where father can be considered as non-existent. These situations can bewhen the father is completely indifferent to the matters of the minor even if he is living with the mother or if by mutual understanding between the father and the mother, the mother given the exclusive charge over the matters of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or even inability of the father by reason of ailment, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian.

It is not disputed that the judgement resolved the superficial problem associated with the present case but is the judgement sufficient to resolve the central issue of the case? The answer is no because to consider the mother, a natural guardian, only possible when the father is not in a position to take care of the minor is “non-existent” in reference to the minor’s affairs and the grounds outlined for a father to not be the natural guardian are very narrow and these guidelines cannot keep pace with this fast evolving generation where child welfare is taking new definitions.

Let us look at some other possible ways in which we can question the position of someone as a natural guardian. We have discussed before how natural guardians attributed with certain rights and duties as to person and property of the minor and a lot of analysis has already been provided on the rights on property of the minor, while discussing the judgement. The position

of English law is much more clear when it comes to the functions of parents over person of the minor. To my understanding, a father or for that matter even a mother, can be considered to be non-existent, whenever any of the below mentioned functions are not performed in the interest of the welfare of the minor by the guardian in question.

The first right of parents over a minor is the right to physical possession. In common law, a parent has the right to possession of the child.[17] A person who had parental responsibility could require any other person who is having possession of the child to hand him or her back.[18] To enable parents and guardians discharge their rights and duties effectively, they are entrusted with the custody of the children.

The second most important function which the parents fulfill is that they control and direct the child's upbringing. The Scottish laws, in this regard, enacted a statutory right in these general terms to more specific rights relating to education, religion, and medical treatment.A parent's right in relation to education of is protected by European Convention on Human Rights, 1998. Legislations in rest of the world obliges parent to ensure that his or her child receives education suitable to age, ability and aptitude.Both in England and in India, the natural guardian's power to control the education is seen as important as power to control religion of the minor.[19] The Indian judiciary has also pretty clearly said that the guardian is entitled to regulate the mode of education and the place of it, and if the ward refuses, thecourt can compel him or her to go there.[20] A person with parental responsibility is also entrusted with the right to consent to medical treatment,[21] as a minor's consent is considered to be invalid under the global laws of contract, only the parent or guardian can give the consent for medical treatments.

It is also not debated whether parents reserve the right to control the religion of their ward or not. Judgments clearly show that there can be nothing more dear to a father (or mother) than regulating the religious education of their child.[22]Then comes the authority of a parent to inflict moderate and reasonable chastisement.[23]Then comes the right of parents to marry their children. In the early traditional (read patriarchal) social structure, the concept of guardianship in marriage of a daughter holds a special significance, as it is a duty on the part

[17]Re Agar-Ellis, (1883) 24 Ch.D. 317.
[18]R. v.Barnardo, (1889) 23 Q.B.D. 3059.
[19]Tremain's Case, (1891) 1 Stra 167; Hall v. Hall, (1749) 3 Atk 721; Mitchel v. Duke of Manchester, (1750) 1 Dick 149; Powel v. Cleaver, (1769) 2 Bro CC 499.
[20]Lovejoy Patel &Anr.AIR 1944 Cal 433.
[21]Gillick v. Norfolk and Wisbech, AHA [1986] A.C. 112.
[22]Talbot v. Earl of Shrewsbury, (1840) 4 My&Cr 672.
[23]R v. Hopley, (1860) 2 F. & F.202; CYPA 1933Section 1(7).

of the parents to give away the daughters before they menstruated. But now this patriarchal structure has been diluted and there have been many cases where a mother can perform the rites of marriage without necessarily consulting the father.[24]

The most important responsibility of a parent or guardian is to represent the minor in legal proceedings. A person under the parental responsibility is prima facie entitled to act in this capacity, unless there exists an interest of the person representing, adverse to the child's.[25]

What we will find common in all the above mentioned functions of the parents is that all these are subjected to the "welfare" or "interest" of the minor. The fundamental principal behind this whole concept of guardianship and the rights associated with guardianship is that a minor cannot take care of themselves and thus the state, asPater Patrice, holds the responsibility to all acts and things necessary for the minors' protection.[26] Welfare must hold material, moral and physical well-being.[27] The word welfare must be interpreted in the widest sense and it should not be restricted to mere monetary factors, the usual and religious well-being must be accounted.[28]

At the end of this discussion, it is clear that just by saying that physical inabilityor disinterest of a father in matters of a minor is sufficient to consider the mother a natural guardian, as said in the GithaHariharan case does not do any justice to the present day requirements of a minor's welfare theory.

Criticism

The court, in the present case, did not address the actual issues of the case but dealt with them on a mere superficial level. This petition was filed on the grounds of it being in derogation to the principles of quality enshrined in the Constitution of India. This court should have, in the first place, seen this petition and the sections in question, opportunity to set loose the laws from the shackles of a patriarchal outlook towards society. Section 6 of the HMG Act still reeks of a man-centric society, where the father is considered to hold a superior position than the mother in affairs of the minor. The court, in this case has simply put some burden on the father's side but completely failed to elevate the position of the mother. This judgement essentially says that father is the natural guardian and it is, in certain circumstances, okay for a mother to act as a natural guardian.

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[24]Madhusudan v. Jadab, 3 Cal WR 194; Brindabun Chandra v. ChundraKurmokar, ILR 12 Cal 140.
[25]Woolf v. Pemberton (1877) 6 Ch.D 19.
[26]K.R. RAMASWAMYIYENGAR, COMMENTARY ON THE GUARDIANS AND WARDS ACT, 1890 198 (2d ed. 2010).
[27]Wazid Ali v. RehanaAnjum, A.I.R. 2005 M.P.
[28]In re: McGrath (infants), (1983) 1 Ch D. 143 : 62 LJ Ch 208 : 67 LT 636.

The court here failed to bring both men and women on an equal pedestal. This judgement is simply an extended form of the Jijabaiverdict. Ideally, both parents must be given the status of natural guardians, without any proviso.

At the same time, the judgement is silent on the validity of Section 19(b) of the Guardianship and Wards Act, 1890. This section still explicitly says that the court cannot appoint a guardian to a minor if the father is alive and he is "not in the opinion of the court, unfit to be guardian of the minor". Though, in commentaries on this section you might find the mention of the ratio of the GithaHariharanjudgement but this section still stands straight, completely neglecting the existence or say of a mother in matters of a minor born out of her own womb.

Conclusion and Suggestion

In the latter part of this paper, we have supplied enough emphasis on the rights and duties of someone holding a natural guardianship or parental responsibility. It is an established theory that rights and duties go hand in hand. To enforce one's right, one must fulfill its duty. In my opinion, any guardian, be it the mother or the father can be considered "non-existent" if the facts and circumstances show that they have failed to act in the interest of the minor and its welfare and haven't fulfilled their role as a parent in any manner, instead of just being incapable of disinterested.

The most important duty of a parent is to provide their children with care and protection and it is something which is accepted internationally. It should be enough for a court to believe that a guardian is of no use if the guardian fails to provide basic care and protection, sense of belongingness and is unable to make the child feel safe and redresses the problems of the minor.