

SEMESTER-II

LM-114-GENERAL PRINCIPLES OF HINDU LAW AND HINDU LAW RELATING TO STATUS CREDIT-4

TOPIC-7: MINORITY AND GUARDIANSHIP

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INTRODUCTION

- The Minority and Guardianship under Hindu Law is governed by The Hindu Minority and Guardianship Act, 1956.
- Act was assented on 25th August, 1956, under the aegis of Hindu Code Bill, with the stated object to amend and codify certain parts of the law relating to minority and guardianship among Hindus.
- By virtue of Section 2, The Hindu Minority and Guardianship Act, 1956 (hereinafter HMGA) in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890.

- The Act considers ‘minor’ as a person who has not completed the age of **eighteen years** [Section 4(a)];
- Section 4(b) says that ‘guardian’ means a person having the care of the person of a minor or of his property or of both his person and property, and includes—
 1. a **natural** guardian, (natural guardian means any of the guardians mentioned in section 6),
 2. a guardian appointed by the **will** of the minor’s father or mother,
 3. a guardian appointed or declared by a **court**, and
 4. a person **empowered** to act as such by or under any enactment relating to any Court of wards.
- The Act shall over-riding effect on
 1. any text, rule or interpretation of Hindu Law or
 2. any custom or usage or
 3. any other law in force immediately before the commencement of this Act (**Section 5**)

NATURAL GUARDIANS OF A MINOR HINDU (SECTION 6)

- Any person can be a natural guardian under the Act who has not **ceased to be a Hindu** or completely and finally **renounced the world**.
- The natural guardians of a Hindu minor in respect of the minor's person and property (excluding his or her undivided interest in joint family property), are—
 - a. **Boy or Unmarried Girl**—the **father, and after him, the mother**:
Before **five** years of age-- ordinarily **mother**;
 - b. **Illegitimate boy or Illegitimate unmarried girl**—the **mother, and after her, the father**;
 - c. in the case of a **married girl**—the **husband**:

- The expressions “father” and “mother” **do not include a step-father and a step-mother.**

NATURAL GUARDIANSHIP OF ADOPTED SON (SECTION 7)

- The natural guardianship of an adopted son who is a minor passes, on adoption, to the **adoptive father** and **after him** to the **adoptive mother.**

POWERS OF NATURAL GUARDIAN (SECTION 8)

- The natural guardian of a Hindu minor has power to do all acts which are:
 - a. necessary or reasonable and proper for the **benefit of the minor** or
 - b. for the realization, protection or benefit of the **minor's estate;**
 - c. but the guardian can in **no case bind** the minor by a personal covenant.
- The natural guardian shall **not**, without the **previous permission of the court,—**
 - a. **mortgage or charge**, or transfer by **sale, gift, exchange** or otherwise, any part of the **immovable property** of the minor; or
 - b. **lease** any part of such property for a term exceeding **five years** or for a term extending more than **one year** beyond the date on which the minor will attain **majority.**
- Any disposal of immovable property by a natural guardian is **voidable at the instance of the minor** or any person claiming under him.
- Court shall grant permission only in case of **necessity** or for an evident **advantage** to the minor.
- The permission shall be granted by Court under the provisions of *The Guardians and Wards Act, 1890*, as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular—

- a. proceedings shall be deemed to be under section 4A of that Act,
 - b. procedure and powers of court shall be governed by section 31(2), (3)&(4) of that Act; and
 - c. appeal shall lie to the court to which appeals ordinarily lie from the decisions of that court.
- Court means the **city civil court** or a **district court** or a **court empowered under section 4A** of the Guardians and Wards Act, 1890, within the local limits of whose jurisdiction the **immovable property** in respect of which the application is made is **situate**, and where the immovable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

TESTAMENTARY GUARDIANS AND THEIR POWERS (SECTION 9).

- Under Section 9 a Guardian can be appointed in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.
- A Hindu **father** entitled to act as the natural guardian of his minor legitimate children may, by **will** appoint a guardian for any of them.
- But, If **mother survives Father**, appointment made by father shall have **no effect**. It shall revive if the mother dies without appointing guardian by will.
- A **Hindu widow and a Hindu mother** entitled to act as the natural guardian of her minor legitimate children, by reason of the fact that the *father has become disentitled* to act as such, may, **by will, appoint a guardian** for any of them.
- A Hindu mother entitled to act as the natural guardian of her minor **illegitimate children** may; by will, appoint a guardian for any of them.

- The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under the Act subject to such **restrictions of the Act and will**.
- The right of the guardian so appointed by will shall, where the minor is a girl, **cease on her marriage**.

INCAPACITIES

- A minor shall be incompetent to act as guardian of the property of any minor (Section 10).
- No person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the **de facto guardian** of the minor (Section 11).
- Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, **no guardian shall be appointed** for the minor in respect of such undivided interest.
- **High Court's** jurisdiction to appoint a guardian is not affected. (**Section 12**)

MINOR'S WELFARE TO BE PARAMOUNT CONSIDERATION (SECTION 13)

- In the appointment of declaration of any person as guardian of a Hindu minor by a court, the **welfare of the minor** shall be the paramount consideration.

- If the court is of opinion that the guardianship of any person **will not be for the welfare of the minor**, he shall not be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus.

RELEVANT CASE LAW

- *Sunil Kumar Chowdhary And Anr. vs Sm. Satirani Chowdhary And Anr.* AIR 1969 Cal 573

Para 10: “The application is under Section 25 of the Guardians & Wards Act, The child is aged more than 5 now. Though under Section 19 of the Guardians & Wards Act, if the father is not unfit to be guardian of the person of a minor aged more than 5, the *father should be the guardian, still under Section 13 of the Hindu Minority and Guardianship Act, the prime and sole consideration will be the welfare of the minor*, Section 19 of the Guardians and Wards Act will have, therefore, to be read *subject to Section 13* of the Hindu Minority and Guardianship Act, so far as Hindus are concerned.” (emphasis supplied)

- *Vegesina Venkata Narasaiah vs Chintalapati Peddi Raju* AIR 1971 AP 134

Para 11: “Section 13 of the Hindu Minority Act reads: "(1) In the appointment or declaration of any person as guardian of Hindu Minor by a Court, the welfare of the minor should be the paramount consideration". This provision clearly shows that even in spite of the Section 19 of the Act, while appointing or declaring a guardian the Court, in case of Hindus will have to take into consideration the provisions of Section 13 of the Hindu Minority Act. The paramount consideration for appointment or declaration of guardian is the welfare of the minor The paramount consideration for appointment or declaration of guardian is the welfare of the minor. The position of law even

prior to the enactment of Section 13 of the Hindu Minority Act was that the father's right to the custody of his minor child was not absolute and was subservient to the paramount consideration of the welfare of the minor.”

- ***Narain Singh vs Sapurna Kuer And Ors. AIR 1968 Pat 318***

“Para 3: As long as the father is alive the mother does not come forward as the natural guardian competent to act for the minor. In a case where the father refuses to act as the natural guardian or has neglected to discharge his obligations as a natural guardian in respect of a minor and his affairs and properties another person, more so, the minor's mother can take recourse to legal proceedings and obtain the powers to act as the guardian of the minor.”

- ***Jijabai Vithalrao Gajre vs Pathankhan & Ors 1971 AIR 315***

“We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956) the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and under s. 6 the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother. The position in the Hindu Law before this enactment was also the same. That is why we have stated that normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian, But on the facts found above the mother was rightly treated by the High Court as the natural guardian.”

- ***Ms. Githa Hariharan & Anr vs Reserve Bank Of India***
AIR1999SC1149

“Para 11: As regards the concept of guardianship both the parents under the Hindu law were treated as natural guardians, of the persons and the separate property of their minor children, male or female except however that the husband is the natural guardian of his wife howsoever young she might be and the adopted father being the natural guardian of the adopted son. The law however provided that upon the death of the father and in the event of there being no testamentary guardian appointed by the father, the mother succeeds to the natural guardianship of the person and separate property of their minor children. Conceptually, this guardianship however is in the nature of a sacred trust and the guardian cannot therefore, during his lifetime substitute another person to be the guardian in his place though however entrustment of the custody of the child for education or purposes allying may be effected temporarily with a power to revoke at the option of the guardian.

Para 18: It is pertinent to note that sub-section (c) of section 4 provides that a natural guardian means a guardian mentioned in section 6. This definition section, however obviously in accordance with the rule of interpretation of statute, ought to be read subject to Section 6 being one of the basic provisions of the Act and it is this Section 6 which records that natural guardian of a Hindu minor, in the case of a boy or an unmarried girl, is the father and after him the mother. The statute therefore on a plain reading with literal meaning being ascribed to the words used, depicts that the mother's right to act as a natural guardian stands suspended during the lifetime of the father and it is only in the event of death of the father, the mother obtains such a right to act as a natural guardian of a Hindu minor - It is this interpretation which has been ascribed to be having a gender bias and thus opposed to the constitutional provision. It has been contended that the classification is based on marital status depriving a mother's guardianship of a child during the life time of

the father which also cannot but be stated to be a prohibited marker under Article 15 of the Constitution.

Para 19: The whole tenor of the Act of 1956 is to protect the welfare of the child and as such interpretation ought to be in consonance with the legislative intent in engrafting the statute on the Statute Book and not de hors the same and it is on this perspective that the word 'after' appearing in section 6A shall have to be interpreted. It is now a settled law that a narrow pedantic interpretation running counter to the constitutional mandate ought always to be avoided unless of course, the same makes a violent departure from the Legislative intent-in the event of which a wider debate may be had having due reference to the contextual facts..

Para 20: The contextual facts in the decision noticed above, depict that since the father was not taking any interest in the minor and it was as good as if he was non-existing so far as the minor was concerned, the High Court allowed the mother to be the guardian but without expression of any opinion as regards the true and correct interpretation of the word 'after' or deciding the issue as to the constitutionality of the provision as contained in Section 6(a) of the Act of 1956 - it was decided upon the facts of the matter in issue. The High Court in fact recognised the mother to act as the natural guardian and the findings stand accepted and approved by this Court. Strictly speaking, therefore, this decision does not lend any assistance in the facts of the matter under consideration excepting however that welfare concept had its due recognition.”

- ***Lekshmi vs Vasantha Kumari on 28 June, 2005 AIR 2005 Ker 249***

Para 7: “The boy has been with the mother for last ten years and the mother is seen looking after his interest extremely well. He has accustomed himself to the atmosphere of his mother. He is prosecuting

his studies very well. In the matter of appointment of the guardian the welfare of the child is of prime importance. Even in the contest between a father and mother for custody of minor child of tender years his custody was given to the mother by this Court in *Raman Konderan v. Panchali*, 1959 KLT 280. A Division Bench of this Court has preferred the mother stating that the right of the father for custody is not inflexible and must give way where the minor's welfare demands otherwise. Law also recognizes guardianship of the mother in the absence of the father. When the mother is there she has to be appointed as guardian. The mere fact that she has married a Muslim even if the story of reconversion is to be disbelieved is not by itself a reason to take away the child from the mother.”

- ***Gaurav Nagpal vs Sumedha Nagpal (2009 1 SCC 42)***

Para 40: “Merely because there is no defect in his personal care and his attachment for his children--which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the

requirements of welfare of the minor children and the rights of their respective parents over them.

Para 42: When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The Court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in Mousami Moitra Ganguli's case (supra), the Court has to due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.

Para 43. The word `welfare' used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its *parens patriae* jurisdiction arising in such cases.”