MANU/SC/0117/1999

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IN THE SUPREME COURT OF INDIA

W.P. Nos. 489 of 1995 and 1016 of 1991

Decided On: 17.02.1999

Githa Hariharan and Ors. **Vs.** Reserve Bank of India and Ors.

Hon'ble Judges/Coram:
Dr. A.S. Anand, CJI., M. Srinivasan and U.C. Banerjee, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Indira Jaising, Sr. Adv., Sanjay Parikh, Anitha Shenoy, Sanjoy Ghose and Abinash Kumar Misra, Advs

For Respondents/Defendant: Harish Salve, Sr. Adv., H.S. Parihar, Kuldeep S. Parihar, Ajit Pudussery and C.K. Sucharita, Advs.

Case Note:
Family - guardianship - Section 6 of Hindu Minority and Guardianship Act, 1956 and Section 19 of Guardian and Wards Act, 1890 - petitioner challenged constitutionality of Section 6 of Act of 1956 and Section 19 of Act of 1890 being violative of equality clause as mother of minor relegated to inferior position on ground of sex since her right as natural guardian of minor cognizable only after father - both parents are duty bound to take care of person and property of their minor - minor was in exclusive care and custody of mother - where father for any other reason unable to take care of minor because of his physical and mental incapacity mother can act as natural guardian of minor - all action of mother would be valid even during life time of father who deemed to be absent for purpose of Section 6 (a) of Act of 1956 and Section 19 (b) of Act of 1890.

Case Category:
FAMILY LAW MATTER - MINORITY AND GUARDIANSHIP MATTERS

JUDGMENT

A.S. Anand, CJI (For himself and M. Srinivasan, J)

1. We have had the advantage of reading the draft judgment of our learned Brother Banerjee, J. While agreeing with the conclusion, we wish to add our own reasons.

2. The facts in W.P. (C) No.489/95 are shortly as follows : The first petitioner is the wife of the second petitioner. The first petitioner is a writer and several of her books are said to have been published by Penguin. The second petitioner is a Medical Scientist in Jawaharlal Nehru University, New Delhi. They jointly applied to the Reserve Bank of India (first respondent) on 10.12.1984 for 9% Relief Bonds in the name of their minor son Rishab Bailey for Rs. 20,000/-. They stated expressly that both of them agreed that

the mother of the child, i.e., the first petitioner would act as the guardian of the minor for the purpose of investments made with the money held by their minor son. Accordingly, in the prescribed form of application, the first petitioner signed as the guardian of the minor. The first respondent replied to the petitioners advising them either to produce the application form signed by the father of the minor or a certificate of guardianship from a competent authority in favour of the mother. That lead to the filing of this writ petition by the two petitioners with prayers to strike down Section 6(a) of the Hindu Minority and Guardianship Act, 1956, (hereinafter referred to as HMG Act) and Section 19(b) of the Guardian and Wards Act, 1890 (hereinafter referred to as GW Act) as violative of Articles 14 & 15 of the Constitution and to quash and set aside the decision of the first respondent refusing to accept the deposit from the petitioners and to issue a mandamus directing the acceptance of the same after declaring the first petitioner as the natural guardian of the minor.

3. In the counter affidavit filed on behalf the first respondent, it is stated that the first petitioner is not the natural guardian of the minor son and the application was not rightly accepted by the bank. It is also stated that under Section 6(a) of the HMG Act the father of a Hindu minor is the only natural guardian. The first respondent prayed forth dismissal of the writ petition.

4. In W.P. (C) No. 1016/91, the petitioner is the wife of the first respondent. The latter has instituted a proceeding for divorce against the former and it is pending in the District Court of Delhi. He has also prayed for custody of their minor son in the same proceeding. According to the petitioner, he had been repeatedly writing to her and the school in which the minor was studying, asserting that he was the only natural guardian of the minor and no decision should be taken without his permission. The petitioner has in turn filed an application for maintenance for herself and the minor son. She has filed the writ petition for striking down Section 6(a) of the HMG Act and Section 19(b) of the GW Act as violative of Articles 14 and 15 of the Constitution.

5. Since, challenge to the constitutionality of Section 6(a) of HMG Act and Section 19(b) of GW Act was common in both cases, the writ petitions were heard together. The main contention of Ms. Indira Jai Singh learned senior counsel for the petitioners is that the two sections i.e. Section 6(a) of HMG Act and Section 19(b) of GW Act are violative of the equality clause of the Constitution, inasmuch as the mother of the minor is relegated to an inferior position on ground of sex alone since her right, as a natural guardian of the minor, is made cognisable only 'after' the father. Hence, according to the learned Counsel both the sections must be struck down as unconstitutional.

6. Section 6 of the HMG Act reads as follows:

> 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-
>
> (a) 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;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father;

(c) in the case of a married girl - the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation-1 n this section, the expression "father" and "mother" do not include a step-father and a step-mother".

7. The expression 'natural guardian' is defined in Section 4(c) of HMG Act as any of the guardians mentioned in Section 6 (supra). The term 'guardian' is defined in Section 4(b) of HMG Act as a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that the definitions of 'guardian' and 'natural guardian' do not make any discrimination against mother and she being one of the guardians mentioned in Section 6 would undoubtedly be a natural guardian as defined in Section 4(c). The only provision to which exception is taken is found in Section 6(a) which reads "the father, and after him, the mother", (underlining ours). That phrase, on a cursory reading, does give an impression that the mother can be considered to be natural guardian of the minor only after the lifetime of the father. In fact that appears to be the basis of the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that welfare of the minor in the widest sense is the paramount consideration and even during the life time of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of court, where to do so would be in the interest of the welfare of the minor.

8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word 'after' in the Section would have no significance., as the Court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as guardian of the minor during the life time of the father, without the matter going to Court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6(a) (supra). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only affect he life time of the father and not during his life time.

9. Is that the correct way of understanding the section and does the word 'after' in the Section mean only 'after the life time'? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender-equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did the Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on grounds of sex? In our opinion - No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the Court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

10. We are of the view that the Section 6(a) (supra) is capable of such construction as would retain it within the Constitutional limits. The word 'after' need not necessarily mean 'after the life time'. In the context in which it appears in Section 6(a) (supra), it means 'in the absence of, the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge 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 because of his physical or mental incapacity, 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. Such an interpretation will be the natural outcome of harmonious construction of Section 4 and Section 6 of HMG Act, without causing any violence to the language of Section 6(a) (supra).

11. The above interpretation has already been adopted to some extent by this Court in Jijabai Vithalrao Gajre v. Pathankhan and Ors. MANU/SC/0516/1970 : [1971]2SCR1. The appellant in that case filed an application before the concerned Tehsildar under the provisions of Bombay Tenancy and Agricultural Lands (Vidharba Region) Act, 1958 for termination of the tenancy of the respondent therein after notice to him on the ground of personal requirements. The Tehsildar found that the application was maintainable and within time but held that the lease deed executed by the tenant in favour of the appellant's mother during his minority when his father was alive was not valid. However, the Tehsildar took the view that it could be considered as a lease created after April 1, 1957 and therefore the tenant could be dislodged. The application was granted on that ground. On appeal, the appellate authority and in further revision, the Tribunal confirmed the findings. The aggrieved tenant filed a writ petition under Article 227 of the Constitution challenging the said orders. The High Court held that the lease was valid on the ground that the mother was the natural guardian because the father was not taking any interest in his minor daughter's affairs and refused to grant the relief of possession but held that the appellant was entitled to resume a portion of the land leased for personal cultivation. Consequently, the matter was remanded. That judgment of the High Court was challenged in this Court. The Division Bench of this Court found that it was the mother who was actually managing the affairs of her minor daughter who was under her care and protection and though the father was alive, he was not taking any interest in the affairs of the minor. In the words of the Bench :

> **...**We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. *It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection.* From 1951 onwards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. *It is no doubt true that the 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.* 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 Section 6 the natural guardians of the Hindu minor in respect of minor's person as well as minor's property are the father and after him the mother. The position in Hindu Law before the 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.*
>
> (Emphasis supplied)

Consequently, the Bench dismissed the appeal. The interpretation placed by us above in the earlier part of this judgment on Section' 6(a) (supra) is, thus, only an expansion of the principle set out by the Bench in Jijabai Vithalrao Gajre (supra).

12. Our attention has been drawn to a later judgment of another Bench of this Court in Pannilal v. Rajinder Singh and Anr. MANU/SC/0552/1993 : [1993]3SCR589. In that case, some property belonging to the respondents therein was sold when they were minors by their mother acting as their guardian to the appellant under a registered sale deed. Upon attaining majority, the respondents sued the appellant for possession of the land on the ground that the sale having been made without the permission of the Court was void. The appellant relied heavily on the fact that the sale deed was attested by the father of the respondents and contended that it should be deemed to be a sale validly made by the legal guardian of the respondents. It was also argued that the sale was for legal necessity as well as for the benefit of the respondents. The trial court found that there was no reliable evidence on record to show that the sale was made for legal necessity or for the benefit of the respondents and having been effected without the permission of the Court was violable. Ultimately the trial court held the same to be void and granted a decree as prayed for by the respondents. That was affirmed by the District Court and the High Court. In this Court the Division Bench observed that in view of the concurrent findings, the sale was in any event violable. Dealing with the question whether the sale could be considered to have been effected by (the father) natural guardian of the minors, (though actually made by the mother) because father had attested the sale deed, the Court referred to the judgment in Jijabai Vithalrao Gajre (supra) and observed:

> In this behalf our attention was invited to this Court's judgment in *Jijabai Vithalrao Gajre v. Pathankhan* MANU/SC/0516/1970 : [1971]2SCR1. This was a case in which it was held that the position in Hindu law was that when the father was alive he was the natural guardian and it was only after him that the mother became the natural guardian. Where the father was *alive* but had fallen out with the mother of the minor child and *was living separately for several years without taking any interest in the affairs of the minor, who was in the keeping and care of the mother,* it was held that, in the peculiar circumstances, the father should be treated as if non-existentand , therefore, the mother could be considered as the natural guardian of the minor's person as well as property, having power to bind the minor by dealing with her immovable property.
>
> (Emphasis supplied)

Distinguishing the facts in Jijabai Vithalrao Gajre (supra), the Court observed that there was no evidence to show that the father of the minor-respondents was not taking any interest in their affairs or that they were keeping in the care of the mother to the exclusion of the father. An inference was drawn from the factum of attestation of the sale deed that the father was very much 'present' and in the picture. The Bench held

that the sale by the mother notwithstanding the fact that the father had attested the deed, could not be held to be a sale by the father and natural guardian, satisfying the requirements of Section 8. Confirming the decree of the courts below, the Bench opined :

> The provisions of Section 8 are devised to fully protect the property of a minor, even from the depredations of his parents. Section 8 empowers only the legal guardian to alienate a minor's immovable property provided it is for the necessity or benefit of the menorrhea estate and it further requires that such alienation shall be effected after the permission of the Court has been obtained. It is difficult, therefore, to hold that the sale was violable, not void, by reason of the fact that the mother of the minor respondents signed the sale deed and the father attested it.

13. Thus, on the facts of Panhilal's case (supra) even if the sale had been made by the father, it could have been annulled for want of permission from the court. It is, thus, evident from the two paragraphs extracted above, that the conclusion in Penniless case (supra) turned mainly on the fact that the sale was not supported by legal necessity; was not for the benefit of the minor and the same had been effected without the permission of the Court. That judgment, therefore, does not run counter to the interpretation now placed by us on Section 6 (supra), as that case was decided on its peculiar facts and is clearly distinguishable.

14. The message of international instruments - Convention on the Elimination of All Forms of Discrimination against Women, 1979 ("CEDAW") and the Beijing Declaration, which directs all State parties to take appropriate measures to prevent discrimination of all forms against women is quite clear. India is a signatory to CEDAW having accepted and ratified it in June, 1993. The interpretation that we have placed on Section 6(a) (supra) gives effect to the principles contained in these instruments. The domestic courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws when there is no inconsistency between them. See with advantage -- Apparel Export Promotion Council v. A.K. Chopra, MANU/SC/0014/1999 : (1999)ILLJ962SC Similarly, Section 19(b) of the GW Act would also have to be construed in the same manner by which we have construed Section 6(a) (supra).

16. While both the parents are duty bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be 'absent' for the purposes of Section 6(a) of HMG Act and Section 19(b) of GW Act.

17. Hence, the Reserve Bank of India was not right in insisting upon an application signed by the father or an order of the Court in order to open a deposit account in the name of the minor particularly when there was already a letter jointly written by both petitioners evidencing their mutual agreement. The Reserve Bank, now ought to accept the application filed by the mother.

18. We are conscious of the fact that till now many transactions may have been

invalidated on the ground that the mother is not a natural guardian, when the father is alive. Those issues cannot be permitted to be reopened. This judgment, it is clarified, will operate prospectively and will not enable any person to reopen any decision already rendered or question the validity of any past transaction, on the basis of this judgment.

19. The Reserve Bank of India and similarly placed other organisations, may formulate appropriate methodology in the light of the observations made above to meet the situations arising in the contextual facts of a given case.

20. In the light of what we have said above, the dispute between the petitioner and the first respondent in Writ Petition No. 1016 of 1991 as regards custody and guardianship of their minor son shall be decided by the District Court, Delhi, where it is said to be pending.

21. The Write Petitions are disposed of in the aforesaid manner but without any order as to costs.

U.C. Banerjee, J.

22. Though nobility and self-denial coupled with tolerance mark the greatest features of Indian womanhood in the past and the cry for equality and equal status being at a very low ebb, but with the passage of time and change of social structure the same is however no longer dormant but presently quite loud. This cry is not restrictive to any particular country but world over with variation in degree only. Article 2 of the Universal Declaration of Human Rights [as adopted and proclaimed by the General Assembly in its resolution No. 217(III)] provided that everybody is entitled to all rights and freedom without distinction of any kind whatsoever such as race, sex or religion and the ratification of the convention for elimination of all forms of discrimination against women (for short CEDAW) by the United Nations Organisation in 1979 and subsequent acceptance and ratification by India in June 1993 also amply demonstrate the same.

23. We the people of this country gave ourselves a written Constitution, the basic structure of which permeates equality of status and thus negates gender bias and it is on this score, the validity of Section 6 of the Hindu Minority and Guardianship Act of 1956 has been challenged in the matters under consideration, on the ground that dignity of women is a right inherent under the Constitution which as a matter of fact stands negatived by Section 6 of the Act of 1956.

24. In order, however, to appreciate the contentions raised, it would be convenient to advert to the factual aspect of the matters at this juncture. The facts in WP (C) No. 489 of 1995 can be stated as below:-

25. The petitioner and Dr. Mohan Ram were married at Bangalore in 1982 and in July 1984, a son named Rishab Bailey was born to them. In December, 1984 the petitioner applied to the Reserve Bank of India for 9% Relief Bond to be held in the name of their minor son Rishab alongwith an intimation that the petitioner No. 1 being the mother, would act as the natural guardian for the purposes of investments. The application however was sent back to the petitioner by the RBI Authority advising her to produce the application signed by the father and in the alternative the Bank informed that a certificate of guardianship from a Competent Authority in her favour, ought to be forwarded to the Bank forthwith so as to enable the Bank to issue Bonds as requested and it is this communication from the RBI authorities, which is stated to be arbitrary and opposed to the basic concept of justice in this petition under Article 32 of the Constitution challenging the validity of Section 6 of the Act as indicated above.

26. The factual backdrop in WP (C) No. 1016 of 1991 centers round a prayer for custody of the minor son born through the lawful wedlock between the petitioner and the first respondent. Be it noted that a divorce proceeding is pending in the District Court of Delhi and the first respondent has prayed for custody of their minor son in the same proceeding. The petitioner in turn, however, also has filed an application for maintenance for herself and the minor son. On further factual score it appears that the first respondent has been repeatedly writing to the petitioner, asserting that he was the only natural guardian of the minor and no decision should be taken without his permission. Incidentally, the minor has been staying with the mother and it has been the definite case of the petitioner in this petition under Article 32 that in spite of best efforts of the petitioner, the father has shown total apathy towards the child and as a matter of fact is not interested in welfare and benefit of the child excepting however claiming the right to be the natural guardian without how ever discharging any corresponding obligation. It is on these facts that the petitioner moved this Court under Article 32 of the Constitution praying for declaration of the provisions of Section 6(a) of the Act read with Section 19(b) of the Guardian and Wards Act as violative of Articles 14 and 15 of the Constitution.

27. Since, challenge to the constitutionality of Section 6 of the Act is involved in both the matters, the petitions were heard together.

28. Ms. Indira Jaisingh, appearing in support of the petitions strongly contended that the provisions of Section 6 of the Act seriously disadvantages woman and discriminate man against woman in the matter of guardianship rights, responsibilities and authority in relation to their own children.

29. It has been contended that on a true and proper interpretation of Section 4 and the various provisions there under and having due regard to the legislative intent, which is otherwise explicit, question of putting an embargo for the mother in the matter of exercise of right over the minor as the guardian or ascribing the father as the preferred guardian does not arise, but unfortunately however, the language in Section 6 of the Act runs counter to such an equality of rights of the parents to act as guardian to the minor child.

30. For convenience sake however Section 6 of the Act of 1956 is set out herein below:

> **6.** Natural guardians of a Hindu minor -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-
>
> (a) 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;
>
> (b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;
>
> (c) in the case of a married girl-the husband:
>
> Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this Section-
>
> (a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an

ascetic (yati or sanyasi)

Explanation - In this section, the expressions father and 'mother' do not include a step-father and a step-mother.

31. Be it noted that the Hindu Minority and Guardianship Act of 1956 has been engrafted on the statute book by way of an amendment and codification of certain parts of the law relating to minority and guardianship among Hindus. It is not out of place to mention also that Hindu law being one of the oldest known system of jurisprudence has shown no signs of decrepitude and it has its values and importance even today. But the law makers however thought it prudent to codify certain parts of the law in order to give a fruitful meaning and statutory sanction to the prevailing concept of law having due regard to the social and economic changes in the society. It is on this perspective however certain aspects of the law as it stood prior to the codification ought to be noted.

32. 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.

33. The condition of this law pertaining to guardianship however brought about certain changes in regard thereto, of which we will presently refer, but it is interesting to note that prior to the enactment, the law recognised both de facto and de jure guardian of a minor: A guardian-de-facto implying thereby one who has taken- upon himself the guardianship of a minor-whereas the guardian de jure is a legal guardian who has a legal right to guardianship of a person or the property or both as the case may be. This concept of legal guardian includes a natural guardian: a testamentary guardian or a guardian of a Hindu minor appointed or declared by Court of law under the general law of British India.

34. Incidentally, the law relating to minority and guardianship amongst Hindus is to be found not only in the old Hindu law as laid down by the smritis, shrutis and the commentaries as recognised by the Courts of law but also statutes applicable amongst others to Hindus, to wit, Guardian and Wards Act of 1890 and Indian Majority Act of 1875. Be it further noted that the Act of 1956 does not as a matter of fact in any way run counter to the earlier statutes in the subject but they are supplemental to each other as reflected in Section 2 of the Act of 1956 itself which provides that the Act shall be in addition to and not in derogation of the Acts as noticed above.

35. Before proceeding further, however, on the provisions of the Act in its true perspective, it is convenient to note that lately the Indian Courts following the rule of equality as administered in England have refused to give effect to inflexible application of paternal right of minor children. In equity, a discretionary power has been exercised to control the father's or guardian's legal rights of custody, where exercise of such right

cannot but be termed to be capricious or whimsical in nature or would materially interfere with the happiness and the welfare of the child. In re Mc Grath 1893, 1 Ch. 143 Lindley, L.J., observed: "The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word "welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well being. Nor can the ties of affection be disregarded." Lord Esher, M.R. in the Gyngall (1893) 2 Q.B. 232 stated: "The Court has to consider therefore, the whole of the circumstances of the case, the position of the parent, the position of the child , the age of the child, the religion of the child so far as it can be said to have any religion, and the happiness of the child. Prima facie it would not be for the welfare of the child to be taken away from its natural parent and given over to other people who have not that natural relation to it. Every wise man would say that, generally speaking, the best place for a child is with its parent. If a child is brought up, as one may say from its mother's lap in one form of religion, it would not, I should say be for its happiness and welfare that a stranger should take it away in order to alter its religious views. Again, it cannot be merely because the parent is poor and the person who seeks to have the possession of the child as against the parent is rich, that, without regard to any other consideration, to the natural rights and feelings of the parent, or the feelings and views that have been introduced into the heart and mind of the child, the child ought not to be taken away from its parent merely because its pecuniary position will be thereby bettered. No wise man would entertain such suggestions as these". The English law therefore has been consistent with the concept of welfare theory of the child. The Indian law also does not make any departure, there from. In this context, reference may be made to the decision of this Court in the case of J. V. Gajre v. Pathankhan and Ors. MANU/SC/0516/1970 : [1971]2SCR1 in which this Court in paragraph 11 of the report observed:

> We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20years. It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection. From 1951 on wards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. It is no doubt true that the 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. 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 Section 6 of 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".

36. Obviously, a rigid insistence of strict statutory interpretation may not be conducive for the growth of the child, and welfare being the predominant criteria, it would be a

plain exercise of judicial power of interpreting the law so as to be otherwise conducive to a fuller and better development and growth of the child.

37. Incidentally the Constitution of India has introduced an equality code prohibiting discrimination on the ground of sex and having due regard to such a mandate in the Constitution, is it justifiable to decry the rights of the mother to be declared a natural guardian or have the father as a preferred guardian? 'Ms. Indira Jaisingh answers it with an emphatic 'no' and contended that the statute in question covering this aspect of the Personal law has used the expression 'after' in Section 6(a) but the same cannot run counter to the constitutional safeguards of gender justice and as such cannot but be termed to be void and ultra vires the Constitution.

38. Be it noted here that the expressions 'guardian' and 'natural' guardian have been given statutory meanings as appears from Section 4(b) wherein guardian is said to mean a person having the care of the person of a minor or his property and includes:

(i) natural guardian;

(ii) a guardian appointed by the will of the minor's father or mother;

(iii) a guardian appointed or declared by court, and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

39. 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 contented 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.

40. 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 6(a) 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.

41. 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.

42. There is yet another decision of this Court in the case of Panni Lal v. Rajinder Singh and Anr. MANU/SC/0552/1993 : [1993]3SCR589 wherein the earlier decision in Gajre's case was noted but in our view Panni Lal's case does not lend any assistance in the matter in issue and since the decision pertain to protection of the properties of a minor.

43. Turning attention on the principal contention as regards the constitutionality of the legislation, in particular Section 6 of the Act of 1956 it is to be noted that validity of a legislation is to be presumed and efforts should always be there on the part of the law courts in the matter of retention of the legislation in the statute book rather than scrapping it and it is only in the event of gross violation of constitutional sanctions that law courts would be within its jurisdiction to declare the legislative enactment to be an invalid piece of legislation and not otherwise and it is on this perspective that we may analyse the expressions used in Section 6 in a slightly more greater detail. The word 'guardian' and the meaning attributed to it by the legislature under Section 4(b) of the Act cannot be said to be restrictive in any way and thus the same would mean and include both the father and the mother and this is more so by reason of the meaning attributed to the word as "a person having the care of the person of a minor or his property or of both his person and property...." It is an axiomatic truth that both the mother and the father of a minor child are duty bound to take due care of the person and the property of their child and thus having due regard to the meaning attributed to the word 'guardian' both the parents ought to be treated as guardians of the minor. As a matter of fact the same was the situation as regards the law prior to the codification by the Act of 1956. The law therefore recognised that a minor has to be in the custody of the person who can sub-serve his welfare in the best possible way - the interest of the child being paramount consideration.

44. The expression 'natural guardian' has been defined in Section 4(c) as noticed above to mean any of the guardians as mentioned in Section 6 of the Act of 1956. This section refers to three classes of guardians viz., father, mother, and in the case of a married girl the husband. The father and mother therefore, are natural guardians in terms of the provisions of Section 6 read with Section 4(c). Incidentally it is to be noted that in the matter of interpretation of statute the same meaning ought to be attributed to the same word used by the statute as per the definition section. In the event, the word 'guardian' in the definition section means and implied both the parents, the same meaning ought to be attributed to the word appearing in Section 6(a) and in that perspective mother's right to act as the guardian does not stand obliterated during the lifetime of the father and to read the same on the statute otherwise would tantamount to a violent departure from the legislative intent. Section 6(a) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression 'after' therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature.

45. Be it noted further, that gender equality is one of the basic principles of our Constitution and in the event the word 'after' is to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the constitutional mandate and would

lead to a differentiation between male and female. Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the statute shall have to be in accordance therewith and not de hors the same. The father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter the word 'after' shall have to be interpreted in terms of the constitutional safe-guard and guarantee so as to give a proper and effective meaning to the words use.

46. In our opinion the word 'after' shall have to be given a meaning which would subserve the need of the situation viz., welfare of the minor and having due regard to the factum that law courts endeavour to retain the legislation rather than declaring it to be a void, we do feel it expedient to record that the word 'after' does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as 'in the absence of-be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word 'after' as used in Section 6 then and in that event the same would be in accordance with the intent of the legislation viz. welfare of the child.

47. In that view of the matter question of ascribing the literal meaning to the word 'after' in the context does not and cannot arise having due regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation in our view ought to be avoided.

48. In view of the above, the Writ Petition (C) No. 489 of 1995 stands disposed of with a direction that Reserve Bank authorities are directed to formulate appropriate methodology in the light of the observations, as above, so as to meet the situation as called for in the contextual facts.

49. Writ Petition (C) No. 1016 of 1991 also stands disposed of in the light of the observations as recorded above and the matter pending before the District court, Delhi, as regards custody and guardianship of the minor child, shall be decided in accordance therewith.

50. In the facts of the matters under consideration there shall however be no order as to costs.