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Guardianship under Hindu Law: A Multi-Dimensional Understanding

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ABSTRACT

The Hindu law perspective on family is that it is a man and woman coming together to start a family and have children. The children are supposed to help the parent in their old age and even after death, by doing rituals and giving offerings to God. Thus, the parents should take responsibly of the child and take his care in order to expect his duties. The rights and duties of parent is in the form of guardianship. The issue of guardianship widely studied then why another article on it? In this paper we shall take a multi-dimensional view on the topic. The paper will walk through guardianship under ancient Hindu law. In the present time the families have started to fall apart with advancement in divorce trend. The bone of contention in marriage has always been the custody rather than guardianship; this too shall also be touched.

There will be various axis each going in different directions but all will intersect at the center i.e., concept of guardianship under Hindu law.

Keywords: *Guardianship, Hindu Family Law, Guardianship under Hindu Law, Family Law.*

I. INTRODUCTION

In this world, there are some natural relations that are created by none but are self-existent. On the other hand, the human society has created certain rules and norms for itself. One such natural bond is of parents and children. The parents give birth to children but their duty does not end by giving birth; it instead starts after it. The parents are supposed to protect and take care of them until they become familiar with their society. Thus, this can be construed as a duty of parents and right of child. This duty is often known as guardianship. The concept of guardianship is to preserve the right of child to have a protection and supervision.

II. ANCIENT HINDU LAW

Woman and man meet and marry each other to start a family. The most important in marriage under the Hindu law is to support each other and produce an offspring (primarily a male child).

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The parents are supposed to inculcate morals and ethics in son. The son after death of parent will perform rites here (on earth) so that the souls of parents in the heavenly abode will get peace and will not have to face any difficulties in the hotel of gods while they wait for their next incarnation.

In the cases of Indian courts, it was often stated that guardianship should not let the isolation of child from one side of his parent's society but to be developed with light of both sides².

In ancient Hindu Law there is not such extensive matter or texts available on the subject of guardianship (Manu, VIII, 26; Gautam, 10, 48; Narada XIII 28-29; Vasistha, 16, 17-18 are the only texts on the subject). The ideal family in Hindus was the one in which both the spouses lived together till the end of their life (there was no concept of divorce in the ancient Hindu Law). Also, the son and his wife were supposed to live together with son's parents and parents were supposed to act like guide for the newly wedded couple.

The 'Gurukul' system prevailed in the old times and hence, the protection of minor was done in the *ashram* of guru by the time minor gained majority. Therefore, hardly question for guardianship of minor for his protection ever arose in the society. Talking about the old scenario, people used to live in joint families. Even when father or both parents died the *karta* of joint family used to take care of the minor as the de facto guardian. Also, after all these provisions no person could not be without of a guardian in a kingdom. The king was the *parens patrie* of every citizen of its empire [Manu, VIII 27].

The concept of guardianship arose after families started to differ from the ancient form. Kingship had ended and democratic sovereign country began, families started to become nuclear and divorce became a common thing in livelihood. Although, king was replaced by the sovereign but the that was last option to resort. The parents or the family members had the primary right to be his/her guardian.

The most important legislation regarding the guardianship in the year of 1890 in the form of The Guardians and Wards Act and The Hindu Minority and Guardianship Act, 1956 are the major legislations to look upon while deciding the guardianship of a Hindu minor.

III. AGE OF MAJORITY

The Guardians and Wards Act defines minor as, 'person not under provision of Indian Majority Act, 1875 (9 of 1875)'. Whereas, in The Hindu Minority and Guardianship Act, a minor is defined as means a person who has not completed the age of eighteen years. (section 4a)

² Kaliappa v. Valliammal, 1949 Mad 608; Sundar v. Gopal, 1953 MB 190; Mohini v. Virendra, 1977 SC 135.

Also, in the case of *In Re: Prakash Navnitbhai vs Unknown*³ the Gujrat High Court held that, parties will have to wait till the minor becomes 21 years of age when there has been a guardian appointed by the court. This is similar to the provision given in first paragraph of section 3 of Indian Majority Act.

IV. NATURAL GUARDIANS

Persons who are related to minor by blood and sometimes by relations, who are entitled by such relations are known as natural guardians. Under the Hindu Law, list of guardians is quite long as are the relations in Hinduism but natural guardians are limited and are even restricted with the advent of The Hindu Minority and Guardianship Act.

Section 6 explicitly deals with the natural guardians.

Clause (a) deals with guardianship of boy or unmarried girl and primarily gives it to the father. With the proviso of giving custody to the mother when the child is less than 5 years of age. The legislators thought (at least in that time) that father will be most competent to take care of child and therefore, he should have absolute right to take care and provide welfare to the ward.⁴ Now the proviso to this clause has provided custody of child less than 5 years to the child. However, it must be noted that the guardianship is different from custody.

Black's Law Dictionary defines 'custody' in respect to family law as; The care, control, and maintenance of a child awarded by a court to a responsible adult.⁵ Whereas guardianship is to provide with all the best facilities as much possible for the welfare of the ward.

Hence, with the proviso under 5 years aged child may reside (its custody) with mother but it is important to note that the father will still be the guardian and particular decision related to education, health or property matter will be dealt by the father as a duty/right of a guardian. The father shall represent the child in any suit.⁶

Now as every right is not absolute and subject to reasonable restrictions. Similarly, guardianship is also subject to such conditions, like how the father (guardian) is discharging his duty. Supreme Court observed the same point that the right should be balanced with respect to duties discharged. In *Jijabai v. Pathan Khan*⁷ the apex court held that; when a mother keeps the child and takes care of her, from providing welfare to all other facilities and stays separately from father for a long period of time (in the present case for over twenty years) she is entitled

³ AIR 1986 Guj 116

⁴ *Sheo Kumar v. Shiv Rani*, AIR 1966 MP 189

⁵ 8th ed 2004

⁶ *Shobadei v. Bhima and others*, AIR 1975 Orissa 180.

⁷ AIR 1971 SC 315.

or rather becomes the guardian of the child and it is supposed that the father has died or at least his guardianship has expired. In *Narayan v. Sampurna*⁸, the court held that such guardianship is de facto and there need to be a declaration taken from a court, ipso facto that the child should not be without a guardian or under an absent guardianship. When under the care of mother solely, the father would be deemed to be absent.⁹

Such provision has been incorporated while keeping in mind the utmost welfare of the ward. It is obvious that the mother provides the best care to the child unless proved otherwise.¹⁰ It would be immaterial whether the mother is working or housewife because a mother does not let her professional commitments have hinderance in her way and always provides the best possible care to her child. On the other hand, making such tight provisions would give rise to stereotypes that mother is only best available guardian. Such interpretation would leave out the special love and affection that child shares with his/her grand-father or grand-mother. Hence, they are also given visitation right along with the father.

Now moving our discussion from the case of child under 5 years of age, as 'the child' would have also grown by the time. When the point comes as to who should now get the custody-guardianship of ward, the law of inertia helps us in understanding the case. Like inertia the custody tends to be with the mother only. As long as mother does not show any detrimental activities like loosening child care, having mental breakdown, health failure or when adultery is established. While the onus of proving is on father but when the balance scale tips towards the father, he shall be awarded the custody.

V. EMPOWERING MOTHER

It is still the father who is considered as the natural guardian of a minor but earlier he used to exercise an over-arching power with this respect. The father would appoint a testamentary guardian and that third person would be awarded the guardianship of the minor. Now Section 9, The Guardian and Wards Act deals with the hierarchical guardianship among father, mother and testamentary guardians appointed. The mother if remarries will still be entitled to act as the guardian of minor and minor's property.

VI. KARTA OVERRIDING THE MINOR'S PROPERTY GUARDIANSHIP

The concept of *karta* is still prevalent in the matter of minor's coparcenary property. Section 6

⁸ AIR 1968 Pat 318.

⁹ *Githa Hari Narayan and others v. Reserve Bank of India and others*, AIR 1999 SC 1149.

¹⁰ *Smt. Sunder Kaur v. Harbaksh Singh Sindhu*, AIR 1984 SC 124 and *Smt. Manju Tiwari v. Dr Rajendra Tiwari*, AIR 1990 SC 1156.

of The Hindu Minority and Guardianship Act, which deals with natural guardians of a Hindu minor has clearly said; minor's property (excluding his or her undivided interest in joint family property)¹¹. Therefore, the *karta* had duty or right to act as the guardian of minor's coparcenary property. Even when there is no major person who is a party to the party, the one among the minors who attains majority first will become the *karta* of property. Also, we have to wait for the male minor coparcener to attain majority even when there is an adult female member present. She will not be eligible to act as *karta*, as it was held in the *Jagannath Rangnath Chavan v. Suman Saheb Rao Ghawte*.¹²

While in the meantime Guardians and Wards Act empowers the court to appoint a person as the guardian of the whole property indirectly by making the person guardian of the *karta* (then minor). Hence, there needs to be no period prescribed for such guardianship because such guardianship will extinguish when the minor attains majority. Although we know the inherent powers of high court (specially under section 482 of Cr.P.C.) to exercise its over-arching powers. Therefore, neither the District Court nor the Family Court¹³ can where the court may seem fit, it can appoint a person other than the *karta* to act as the guardian for minor in his/her coparcenary property.

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.¹⁴

VII. CONCLUSION

This work talks about the guardianship especially related to the Hindu Minority and Guardianship Act. After researching, learning and writing on this topic the various provision of guardianship was made clear.

Beginning with the introduction the work talked about, how the concept of guardianship evolved in the classical or ancient Hindu Law. The discussion on ancient hindu law brought forward point that that there was no such concept under ancient hindu families. The concept guardianship was very much simple and strict in old hindu families. It was therefore, natural to found very less material by ancient hindu scholars on this topic.

Going through one checkpoint which was the age of majority, proved significant in resolving the conflict related to the concept and theory of age to talk under guardianship.

¹¹ Section 6, The Hindu Minority and Guardianship Act, 1956.

¹² AIR 2014 NOC Bombay 491.

¹³ *Bula Yedukonadalu v. Mal*, AIR 2014 AP NOC 198.

¹⁴ Section 12, The Hindu Minority and Guardianship Act, 1956.

The work then redirected toward the ab initio guardian of any minor i.e., the natural guardians. Talking about natural guardians was important because the concept of natural guardians give inherent right to that person to take the guardianship of that person. Also it was discussed the reasons of making those specific people that natural guardians of the minor.

In that section it was also discussed about how the provisions of law have evolved and empowered the mother as a guardian of the child.

The concept of guardian of minor's property was quite simple, once we understand the guardian of the minor. The important point in the discussion was the role of karta and guardianship of minor's property in a joint hindu property. Thus, the work on guardianship of hindu minor was concluded.

VIII. REFERENCES

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