



## LEGAL ASPECT OF GUARDIANSHIP UNDER HINDU JURISPRUDENCE: AN ANALYSIS

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**ABSTRACT-** Shastras and Quran have affirmed the idea of guardianship in the Ancient times but their views are different on the notion of Guardianship. The guardianship flows from the mental incapability or disability of the child who is unable to protect himself or handle the affairs relating to his property then is it safe to give child in the hand of such parents? Whether gender biasness on the issues related to the guardianship of the children will end in coming future or not? The crucial role of the guardianship is to protect the best interest and welfare of the child for his personality development. The legislative framework which regulates the notion of guardianship in personal laws on family jurisprudence like Hindu Minority and Guardianship Act, Guardian and Wards Act 1890, Islamic law etc. the judicial enactments of the court sometimes rely on the laws and many times it is inconsistent with laws like in some cases preference is given to the father over the mother and in some cases both father and mother stands on equal footing. The guardianship has been shifted from superiority of father to welfare principle in recent times with the laws relating to Guardianship and minority has been administered by the Hindu Minority and Guardianship Act 1956 with welfare of the child as the major consideration.

**KEYWORDS-** Guardian, Guardianship, Minor Child, Welfare of the child, Best Interest of the Child

### I. INTRODUCTION

In India Marriages are considered as sacramental and it is culturally and socially accepted union between the individuals. But nowadays most of the married couples are facing disharmony and torment. And because of these incompatibilities between the couples the biggest debatable question in recent time is the custody of children.

Children are recognized as the ray of hope on which the future of our nation relied. In India children of some families are pampered and their all the basic requirements are fulfilled for their personality development but on the other side millions of the children are deserted every year. And these abandoned children become the sufferer of sexual abuse, sex trafficking and abduction. And nowadays it is the rare of rarest case that these pauperized and abandoned Children are taken to any NGO's and Children's home where they can hope for proper care and protection

The notion of guardianship is closely linked with the custody of children and the best interest of children is the primary consideration in the guardianship and custody matters. Guardianship is basically the parent-child relationship which nourishes the physical and emotional development of child like it is the duty and right of the parent to take care of child and make decisions in the best interest of the ward. Generally the relation of guardianship appears due to the incapacity or disability of the ward to take care of self or manage and protect his property. A person who is legally responsible for taking care or who is given authority to take decisions relating to education and health on behalf of the child is called Guardian or in other words we can say person who is having custody of a child or mentally incapacitated adult is the guardian.

The old Hindu law or Dharmashastras has not analyzed the concept of guardianship in detail. It only talks about the protection of property of the minor and didn't speak about the protection of the minor. And the reason which was responsible for the shortage of developed law on guardianship was the child was under the care protection of the joint family and if in case his natural father died he or she is taken care by the persons whoever was considered as Karta. And if the minor was outside his joint family he was take care by the guru under the guru's ashram and when we talk about the property of children. It was protected by the king as the supreme guardian.

It was observed that the concept of guardianship was evolved by the courts during the British administration which says that natural guardian of infant is only his father during his life and his death

child comes under the guardianship of the mother. Later on The power to appoint guardian was conferred on Districts Courts by the Guardian and Wards Act which was passed in 1890. The Hindu Minority and guardianship Act, 1956 codified the former Hindu Law of Guardianship of infant.

### **Guardianship of minor children**

In earlier times guardianship was understood as the expansion of Patrilineal power but now in recent times guardianship is conceived as care and protection of infant. The Hindu Minority and Guardianship Act 1956 defines the minor as the person who is below the age of 18 years under section 4(b) or in other words we can say a infant is person who is physically and mentally immature and who is unable to protect himself and he or she is in need of attention, care and protection. And the Guardian is someone who is given the legal responsibility to take care of minor and his property and take decisions relating to his health and education on his behalf. As we very well know welfare of child or best interest of the child is of supreme importance so in modern law existence of guardianship is for the welfare and protection of child.

Guardian are divided into different categories which are as follows

- 1) Natural Guardian
- 2) Guardian appointed by father by will
- 3) Guardian appointed by : the District Court under Guardians and Wards Act 8 of 1890 in exercising the original Jurisdiction or  
By the Chartered High Court in exercising its inherent powers

#### **1. Natural Guardian**

Under Hindu Jurisprudence Father, mother and husband are recognized as the natural guardian of the minor child

*FATHER-* According to Hindu Minority and Guardianship Act natural guardian of legitimate sons, daughters and children is the father only. Father is person who takes care of his minor and his property or we can say he is the natural guardian. As father is a natural guardian of the infant so he is never divested from his guardianship right until he is discovered to be incapable to take care of his child, as stated under section 19, Hindu Minority and Guardianship Act 1890 but many judicial rulings and section 13 of the act have diminished section 19 which actually states that safety and security of the child is of supreme importance and guardianship of father will inevitably be subservient from the happiness of child.

it was held by the Supreme Court in *Gita Hariharan v. Reserve Bank of India* in the exceptional cases mother is assumed the natural guardianship even if father is surviving.

*MOTHER-* Mother is considered as the natural guardian of legitimate and illegitimate children even during the life of the father if the father is incapacitated to take care of his child. Proviso of clause (a) of section 6, Hindu Minority and Guardianship Act 1890 says custody of below 5 year child will always be in the hand of the mother if the mother is married in any other faith then remarriage will not deprive her from her natural guardianship.

*HUSBAND-* Husband is recognized as the natural Guardian of his wife. It is laid down in Hindu Minority and Guardianship Act that natural guardianship of minor wife and her property is vested in the hand of husband and court can even withdraw the guardianship of husband if it is satisfied that it is not under the safety and security of the wife.

#### **2) Testamentary Guardian**

The guardian who is appointed by the father for taking care of his children and for precluding the mother from the status of guardianship after his death is the testamentary guardian earlier power to appoint the guardian by will was in the hand of father but now both the parents can appoint the testamentary guardian if they in capacity if natural guardianship. If the father appoints the testamentary guardian during the lifetime of mother then it will not be in effect and mother will continue to remain guardian. But if testamentary guardian is appointed by mother he will be vested the rights and duties of testamentary guardian. According to section 9(1) of the Act Hindu Natural father is not entitled to appoint the guardian by will for his illegitimate children and in this case moth is only entitled or she is only having the power to appoint the testamentary guardian for her illegitimate minor child . After the marriage of minor

girl his testamentary guardian cease to remain guardian and this guardianship cannot be brought back even minor married girl becomes widow.

The testamentary guardian assumes the equal rights power and duties of the natural guardian but his duty to maintain her is limited to the extent of the property of the minor child. It is the responsibility of the guardian to look after the safety and security of the child and if anyone else is appointed as the guardian of the minor's property then the guardian of the minor girl can request the court for making some money available for fulfilling the requirements of the minor.

### **3) Guardianship by Affinity (Guardian of widow)**

In early times the concept of child marriage was prevailing and before the marriage girl was under the guardianship of his natural parents but after her marriage husband was assumed to be her natural guardian. But if the situation arise that his husband died then the minor widow will be maintained by relatives of her husband.

Before 1956 there was the existence of guardian of minor widow called guardian by affinity. The guardianship of minor girl is same as that of guardianship of minor wife, the only difference is that on marriage guardianship of parents passes to husband and she gets the name and Gotra of her husband. If she becomes minor widow then the eldest among nearest relatives of the husband becomes her guardian.

The guardianship by affinity was given the rationale end through the case of *Paras Ram v. State* where the minor girl was aggressively taken by her father-in-law and was married with man who was not fit for the sake of money. The question which came before the court was that whether father-in-law was guilty of removing the girl by force? The court held that he was not guilty of separating the girl from her house as father is her natural guardian.

A question came before the court that whether the nearest blood relatives of the husband becomes a natural guardian of a widow or whether he is merely preferentially entitled to guardianship and therefore he cannot perform as guardian Unless he is appointed? The *Paras Ram* seems to subscribe to former view.

### **4) Guardian Appointed by Court**

The Guardian and Wards Act, 1890 governs the guardianship of the minor children. According to section 17 of the act any person can be appointed as a guardian for the minor and his property by the district court if it is necessary for the welfare of a minor. While appointing the guardian for the minor and his property the best interest of the minor should be the prime consideration. The District Court has power to appoint the guardian of a minor and his property but he cannot appoint a guardian if the interest of the minor is undivided in the joint family property. But the Chartered High Court in his inherent jurisdiction can appoint the guardian not only for the minor and his property but also for the minor's undivided interest in the joint family property.

### **5) De Facto Guardian**

The literal meaning of the term de facto is "from that which has been done." A guardian who is not appointed by any court or natural guardian and who continuously works for the welfare and best interest of the minor's person and property is called de facto guardian. De facto guardian was recognized in 1856. According to section 11 of the Hindu Minority and Guardianship Act no de facto guardian shall be allowed to manage or deal with the minor's property on the ground that he is the de facto guardian. In *Hanuman Prasad Singh and ors v. Bhaguati Prasad and ors*, the Privy Council said that the right of a bona fide incumbrancer, who has taken the management of the land, for the purpose of saving the property, or for the benefit of property is not affected by the want of union of the de facto with the de jure title

### **Legal Aspect of Guardianship**

- **Guardianship and Wards Act, 1890-** This Act basically authorize the district court and high court in exercising their original and inherent jurisdiction to appoint guardian for the minor child if the natural guardian or guardian by will are unable to work for the welfare of child or his property. While appointing the guardian under section 7 of the act court has to take into consideration some factors as stated under section 17 of the act which are necessary for the welfare of child.

### **Personal laws (Amendment) Act 2010**

Earlier section 19(b) of the act did not authorize the court to appoint a guardian for a minor till the life of his father if he is fit to act as guardian but 133<sup>rd</sup> law commission report proposed to remove the unjustness which is done with the woman and welfare and best interest should be

given the prime importance and After Amendment Act of 2010 gender biasness was removed from the act and the right was given to the mother that no guardian will be appointed by the court during the lifetime of mother

**In Ruchi Majoo vs Sanjeev Majoo** case (2011)6SCC 479 the Supreme court by this noteworthy decision created the hope in the mind of woman who has been abandoned by her NRI husband that Indian courts has power to deal with the disputes of Custody nonetheless the an order has been passed by the foreign court in favor of either of the parent.

- **Hindu Minority and Guardianship Act 1956**

Ancient Hindu law does not talk about the guardianship or protection of the minor child but the modern statute *Hindu Minority and Guardianship Act 1956* deals with the concept of guardianship as father is only the natural guardian of his child and after him mother will become the natural guardian under section 6(a) of the Act Till 1999 the guardianship was given to the mother only after the life time of father but after 1999

In **Githa Hariharan vs Reserve Bank of India and Vandana shiva vs Jayanta Bandhopadhyay** case the constitutional validity of the section 6(a) was challenged as it was violating Article 14 of the Constitution. The Court after applying the concept of harmonious construction observed that the word 'after' used in section 6(a) must be understood in considering the best interest of the child as a prime importance. It should be as "in non attendance of father' instead of understanding as "Succeeding the life of father". And the court held that if the mother is appointed as natural guardian after the death of father then it will be prejudicial and against best interest of the child.

There are many instances of rulings where the judge recognized the mother as natural guardian nonetheless father is surviving but still it was not integrated in the act even the 133<sup>rd</sup> law commission report also proposed to eradicate the unjustness and 257<sup>th</sup> law commission report also suggested to banish the discrepancy and rely on the best interest of the child but no reform was made in the Act.

**REFORMS BROUGHT THROUGH THE ACT**

- If the testamentary guardian is appointed by the father to act after his death then it will be ineffective because mother will act as a natural guardian after father.
- According to proviso of section 6 no will be have power of guardianship if a person changes his or her religion or faith and he has become Sanyasi
- By section 8(2) the power of the guardian has been restricted as he cannot dispose of the property of minor without the permission of the court.
- This act modified the provisions of Guardian and Wards Acts 1890 that it is applicable only on the Hindus. And if any guardian is being appointed the Guardian and Wards Act should be taken into consideration.

**Section 6 Hindu Minority and Guardianship Act: Violation of Fundamental right**

Section 6(a) of the Hindu Minority and Guardianship Act states that father is the natural guardian of his legitimate boy or an unmarried girl and mother will become the natural guardian after the death of the father

Earlier the mother can become the natural guardian after the death of the father but court has widely interpreted the term "after' in a very liberal way because in the matter of guardianship the principle of best interest of the child is of prime importance, *Githa Hariharan v. RBI case* .And if the word 'after is interpreted as it is then it is violation of Article 14 and 15 of the constitution.

*Violation of Article 14 and Article 15 of Constitution*

Article 14 talks about the equality and equal privileges, rights and liabilities should be given to all in the same situation and it also talks reasonable classification of persons by fulfilling the test : that there must intelligible differentia for classification and the differentia should have a direct link with the object which has to be achieved

Article 15 states that no will be discriminated on the ground of race, caste, sex, gender, place of birth, etc.,

Section 6(a) of the act is violating article 14 and 15 by giving preference to father over mother in guardianship and even it has no reasonable connection with the object of the Act “best interest of the minor”

*Article 21 talks about the life and personal liberty and guardianship comes under the ambit of life and personal liberty and mother should not be dispossessed from the guardianship.*

### **Violation of The Prohibition of Child Marriage Act, 2006**

This Act prohibits the child marriage and if the marriage is celebrated with minor after kidnapping him it is void marriage Section 6 of Hindu Minority and Guardianship Act states the natural guardian of minor girl who is married will be husband Thus if the marriage of minor is prohibited under the legislature then how it is possible to give guardianship to a person who is already minor or part of such void marriage.

- **Hindu Marriage Act ,1955**

Section 26 of the Act deals with the custody of children that court can pass orders relating to custody , maintenance and education of minor children consistent with his wishes and court even revoke, suspend or vary any such order if it thinks

## II. CONCLUSION

In India children are considered as a epitome of God. Still each and every religion and ideals has its own pros and cons. Pros is when child is nurtured and raised in a very positive surroundings by serving the best interest of the child and Cons is when the child is deserted and in India millions of the children are deserted or abandoned from their family and in maximum cases they are pressurized for sex trafficking, sexual abuse, etc and in very exceptional cases they are taken to the NGO's for care and protection. So for the welfare and protection of child from the sufferings of these Heinous Act. Children should be raised under the guardianship of the biological parents or the guardian appointed by the court or under the testamentary guardianship.

The citizens of our country are regulated by different laws in respect of marriage, divorce, maintenance and adoption but when we talk about guardianship of a child in family jurisprudence there is no specific law Hindu Minority and Guardianship Act, Guardian and Wards Act 1890, Muslim law are prevailing.

The guardianship has a very crucial role for the upbringing of the child in the healthy manner, In the ancient times dominance of father was there as a natural guardian and after him mother assumed the right of natural guardian as stated under section 6(a) of the Hindu Minority and Guardianship Act but it was actually violation of Article 14 and 15 of Constitution but after the rulings of Githa Hariharan vs RBI equal preference of guardianship was given to the mother even though the father is surviving. But the reform is required in the section 6(a) of the Act as recommended by the Law Commission Report. That mother should be given equal preference as of father. 52The joint custody of both the parents was interpreted and executed after 2011 where both the parents are equally obligated for care and protection of child but sometimes this joint custody leave negative effects on the child so accordingly the custody of child should be given to the mother.

In our contemporary world some amendments and reforms are required in our existing legislative framework for fulfilling the changing needs of the society.

## III. SUGGESTIONS

On the basis of the Research following suggestions are put forward which can be executed to make Guardianship effectual -

- the equality under Article 14 should be followed not only duties but equality should be given to the parents in respect of status and privileges in and equal preference should be given to both of the parents by taking into consideration the best interest of the child
- Custody of the child should not be given to either of the parents. Joint custody should be given to both the parent.



- After taking into consideration the financial position of the parent and living standard of the child, alimony should be fixed for assisting the child to bear his needs and requirements.
- On the custodial disputes the mediation can be taken into consideration for the speedy disposal of the disputes so that childhood of the child is not exploited
- For the custody and guardianship matters the welfare of the child should be given first preference over the privileges and interest of the parents
- In present times different means and criteria should be adopted to bind the parents through legal framework for serving the best interest of the child and welfare of the child should be taken into consideration
- The new provisions and amendments in existing laws should be made according to the needs and social changes of the society.

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