Supreme Court of India
Ms. Githa Hariharan & Anr vs Reserve Bank Of India & Anr on 17 February, 1999
Author: Banerjee
Bench: Umesh C. Banerjee

PETITIONER:
MS. GITHA HARIHARAN & ANR.

Vs.

RESPONDENT:
RESERVE BANK OF INDIA & ANR.

DATE OF JUDGMENT: 17/02/1999

BENCH:
Umesh C. Banerjee

JUDGMENT:

BANERJEE,J.

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.217A(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. 2. 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. 3. 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:- 4. 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. 5. The factual backdrop in WP c No.1016 of 1991 centres 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 however discharging any corresponding obligation. It is on these facts that the petitioner moved this Court under Article 32 of the Constitution praying for de claration of the provisions of Section 6(a) of the Act read with Section 19(b) of the Guardian Co nstitution. and Wards Act as violative of Articles 14 and 15 of the 6.Since, challenge to the constitutionality of Section 6 of the Act is involved in both the matters, the petitions were heard together. 7. Ms. Indira Jaisingh, appearing in support of the petitions strongly contended that the provisions of section 6 of the Act seriously disadvantage woman and discriminate man against woman in the matter of guardianship rights, responsibilities and authority in relation to their own children.

8. It has been contended that on a true and proper interpretation of section 4 and the various provisions thereunder 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. 9. 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."

10. 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.

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.

12. The codification 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. 13. 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. 14. 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, therefrom.. In this context, reference may be made to the decision of this Court in the case of J.V. Gajre vs. Pathankhan and Ors. (1970 (2) SCC 717) 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 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 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."

15. 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 gro wth of the child. 16. 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 ultravires the Constitution. 17. 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;

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. 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 hav ing due reference to the contextual facts.. 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. 21. There is yet another decision of this Court in the case of Panni Lal vs Rajinder Singh and Another (1993 (4) SCC 38) 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. 22. 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. 23. 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 implies 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 tentamount 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. 24. 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 differenciation 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 used. 25. In our opinion the word `after' shall have to be given a meaning which would sub-serve 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. 26. 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. 27. 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. 28. 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. 29. In the facts of the matters under consideration there shall however be no order as to costs.