

The Guardians and Wards Act, 1890

ABC Vs. The State (NCT of Delhi)

VIKRAMAJIT SEN & ABHAY MANOHAR SAPRE, JJ.

IN THE SUPRME COURT OF INDIA

Date of Judgment – 06 -07-2015.

Section 7- Section 10 - Section 10(1), - Section 10(2), - Section 11, - Section 19; , Guardians and Wards Act, 1890

Section 6 Hindu Minority and Guardianship Act, 1956; ,

Section-8 Indian Succession Act, 1925

Section -6(4);Guardianship of Infants Act, 1964

Code of Civil Procedure, 1882 (CPC)

Issue

Whether it is imperative for an unwed mother to specifically notify the putative father of the child whom she has given birth to of her petition for appointment as the guardian of her child.

Relevant Extract

The Appellant, who adheres to the Christian faith, is well educated, gainfully employed and financially secure. She gave birth to her son in 2010, and has subsequently raised him without any assistance from or involvement of his putative father. Desirous of making her son her nominee in all her savings and other insurance policies, she took steps in this direction, but was informed that she must either declare the name of the father or get a guardianship/adoption certificate from the Court. She thereupon filed an application Under Section 7 of the Guardians and Wards Act, 1890 (the Act) before the Guardian Court for declaring her the sole guardian of her son. Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed. The Appellant has published a notice of the petition in a daily newspaper, namely Vir Arjun, Delhi Edition but is strongly averse to naming the father. She has filed an affidavit stating that if at any time in the future the father of her son raises any objections regarding his guardianship, the same may be revoked or altered as the situation may require. However, the Guardian Court directed her to reveal the name and

whereabouts of the father and consequent to her refusal to do so, dismissed her guardianship application on 19.4.2011. The Appellant's appeal before the High Court was dismissed in limine, on the reasoning that her allegation that she is a single mother could only be decided after notice is issued to the father; that a natural father could have an interest in the welfare and custody of his child even if there is no marriage; and that no case can be decided in the absence of a necessary party.

Ms. Indu Malhotra, learned senior Counsel for the Appellant, has vehemently argued before us that the Appellant does not want the future of her child to be marred by any controversy regarding his paternity, which would indubitably result should the father refuse to acknowledge the child as his own. This is a brooding reality as the father is already married and any publicity as to a declaration of his fathering a child out of wedlock would have pernicious repercussions to his present family. There would be severe social complications for her and her child. As per Section 7 of the Act, the interest of the minor is the only relevant factor for appointing of a guardian, and the rights of the mother and father are subservient thereto. In this scenario, the interest of the child would be best served by immediately appointing the Appellant as the guardian. Furthermore, it is also pressed to the fore that her own fundamental right to privacy will be violated if she is compelled to disclose the name and particulars of the father of her child. Ms. Malhotra has painstakingly argued this Appeal, fully cognizant that the question that arises is of far reaching dimensions. It is this very feature that convinced us of the expediency of appointing amicus curiae, and Mr. Sidharth Luthra has discharged these onerous duties zealously, for which we must immediately record our indebtedness. We must immediately underscore

the difference in nomenclature, i.e. 'parents' in Section 11 and 'father' in Section 19, which we think will be perilous to ignore.

It is contended on behalf of the State that Section 11 requires a notice to be given to the 'parents' of a minor before a guardian is appointed; and that as postulated by Section 19, a guardian cannot be appointed if the father of the minor is alive and is not, in the opinion of the court, unfit to be the guardian of the child. The impugned judgment is, therefore, in accordance with the Act and should be upheld. It seems to us that this interpretation does not impart comprehensive significance to Section 7, which is the quintessence of the Act. However, before discussing the intendment and interpretation of the Act, it would be helpful to appreciate the manner in which the same issue has been dealt with in other statutes and spanning different legal systems across the globe.

Section 6(b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father. Mohammedan law accords the custody of illegitimate children to the mother and her relations. The law follows the principle that the maternity of a child is established in the woman who gives birth to it, irrespective of the lawfulness of her connection with the begetter. However, paternity is inherently nebulous especially where the child is not an offspring of marriage. Furthermore, as per Section 8 of the Indian Succession Act, 1925, which applies to Christians in India, the domicile of origin of an illegitimate child is in the country in which at the time of his birth his mother is domiciled. This indicates that priority, preference and pre-eminence is given to the mother over the father of the concerned child. It is thus abundantly clear that the predominant legal thought in different civil and common law jurisdictions

spanning the globe as well as in different statutes within India is to bestow guardianship and related rights to the mother of a child born outside of wedlock. Avowedly, the mother is best suited to care for her offspring, so aptly and comprehensively conveyed in Hindi by the word 'mamta'. Furthermore, recognizing her maternity would obviate the necessity of determining paternity. In situations such this, where the father has not exhibited any concern for his offspring, giving him legal recognition would be an exercise in futility. In today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus. It seems to us that a man who has chosen to forsake his duties and responsibilities is not a necessary constituent for the wellbeing of the child. The Appellant has taken care to clarify that should her son's father evince any interest in his son, she would not object to his participation in the litigation, or in the event of its culmination, for the custody issue to be revisited. Although the Guardian Court needs no such concession, the mother's intent in insisting that the father should not be publically notified seems to us not to be unreasonable.

We feel it necessary to add that the purpose of our analysis of the law in other countries was to arrive at a holistic understanding of what a variety of jurisdictions felt would be in the best interest of the child. It was not, as learned Counsel suggested, to understand the tenets of Christian law. India is a secular nation and it is a cardinal necessity that religion be distanced from law. Therefore, the task before us is to interpret the law of the land, not in light of the tenets of the parties' religion but in keeping with legislative intent and prevailing case law.

It is imperative that the rights of the mother must also be given due consideration. As Ms. Malhotra, learned senior Counsel for the Appellant, has eloquently argued, the Appellant's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child. Any responsible man would keep track of his offspring and be concerned for the welfare of the child he has brought into the world; this does not appear to be so in the present case, on a perusal of the pleading as they presently portray. Furthermore, Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone, without the requirement of any notice to the putative fathers. It would be apposite for us to underscore that our Directive Principles envision the existence of a uniform civil code, but this remains an unaddressed constitutional expectation.

We recognize that the father's right to be involved in his child's life may be taken away if Section 11 is read in such a manner that he is not given notice, but given his lack of involvement in the child's life, we find no reason to prioritize his rights over those of the mother or her child. Additionally, given that the Appellant has already issued notice to the public in general by way of a publication in a National Daily and has submitted an affidavit stating that her guardianship rights may be revoked, altered or amended if at any point the father of the child objects to them, the rights, nay duty of the father have been more than adequately protected.

The issue at hand is the interpretation of Section 11 of the Act. As the intention of the Act is protect the welfare of the child, the applicability of Section 11 would have to be read accordingly. In *Laxmi Kant Pandey v. Union of India* MANU/SC/0080/1985 : 1985 (Supp) SCC 701, this Court

prohibited notice of guardianship applications from being issued to the biological parents of a child in order to prevent them from tracing the adoptive parents and the child. Although the Guardians and Wards Act was not directly attracted in that case, nevertheless it is important as it reiterates that the welfare of the child takes priority above all else, including the rights of the parents. In the present case we do not find any indication that the welfare of the child would be undermined if the Appellant is not compelled to disclose the identity of the father, or that Court notice is mandatory in the child's interest. On the contrary, we find that this may well protect the child from social stigma and needless controversy.

Section 11 is purely procedural; we see no harm or mischief in relaxing its requirements to attain the intendment of the Act. Given that the term "parent" is not defined in the Act, we interpret it, in the case of illegitimate children whose sole caregiver is one of his/her parents, to principally mean that parent alone. Guardianship or custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril. The uninvolved parent is therefore not precluded from approaching the Guardian Court to quash, vary or modify its orders if the best interests of the child so indicate. There is thus no mandatory and inflexible procedural requirement of notice to be served to the putative father in connection with a guardianship or custody petition preferred by the natural mother of the child of whom she is the sole caregiver.

Implicit in the notion and width of welfare of the child, as one of its primary concomitants, is the right of the child to know the identity of his or her parents. This right has now found unquestionable recognition in the Convention on the Rights of the Child, which India has acceded to on 11th November, 1992.

We are greatly perturbed by the fact that the Appellant has not obtained a Birth Certificate for her son who is nearly five years old. This is bound to create problems for the child in the future. In this regard, the Appellant has not sought any relief either before us or before any of the Courts below. It is a misplaced assumption in the law as it is presently perceived that the issuance of a Birth Certificate would be a logical corollary to the Appellant succeeding in her guardianship petition. It may be recalled that owing to curial fiat, it is no longer necessary to state the name of the father in applications seeking admission of children to school, as well as for obtaining a passport for a minor child. However, in both these cases, it may still remain necessary to furnish a Birth Certificate. The law is dynamic and is expected to diligently keep pace with time and the legal conundrums and enigmas it presents. There is no gainsaying that the identity of the mother is never in doubt. Accordingly, we direct that if a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary. Trite though it is, yet we emphasise that it is the responsibility of the State to ensure that no citizen suffers any inconvenience or disadvantage merely because the parents fail or neglect to register the birth. Nay, it is the duty of the State to take requisite steps for recording every birth of every citizen. To remove any possible doubt, the direction pertaining

to issuance of the Birth Certificate is intendedly not restricted to the circumstances or the parties before us.

We think it necessary to also underscore the fact that the Guardian Court as well as the High Court which was in seisin of the Appeal ought not to have lost sight of the fact that they had been called upon to discharge their *parens patriae* jurisdiction. Upon a guardianship petition being laid before the Court, the concerned child ceases to be in the exclusive custody of the parents; thereafter, until the attainment of majority, the child continues in curial curatorship. Having received knowledge of a situation that vitally affected the future and welfare of a child, the Courts below could be seen as having been derelict in their duty in merely dismissing the petition without considering all the problems, complexities and complications concerning the child brought within its portals.

The Appeal is therefore allowed. The Guardian Court is directed to recall the dismissal order passed by it and thereafter consider the Appellant's application for guardianship expeditiously without requiring notice to be given to the putative father of the child.

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