

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision: 29.04.2015

+ CS(OS) 280/2015, IA Nos.2291-2292/2015 & 3369/2015
MOHD SHAHNAWAZ ZAHEER Plaintiff
Through: Mr. Yogesh Kumar Jagia & Mr. Amit Sood
& Mr. Abhijeet Negi, Advs.
versus
GOVERNMENT OF NCT OF DELHI Defendant
Through: Mr. Jayendra, Adv. for D-1 with
Mr. Krishna Kumar, SDM, Defence Colony.
Mr. Rajeev Kumar, Adv. for D-2.

NAJMI WAZIRI, J. (OPEN COURT)

On 19.02.2015, this Court had *inter alia* ordered:

This suit seeks appointment of the plaintiff Mr. Mohd. Shahnawaz Zaheer son of late Mr. Zaheer Ahmed resident of 111, Pocket-1, Jasola, New Delhi-110025 as the guardian of Master Ayush Dayal (Minor) and Baby Prarthana Dayal (Minor).

The plaintiff resides with his family comprising his wife and two daughters. The elder daughter is stated to be 19 years old and is presently pursuing a degree in Finance and Economics from Hong Kong University. The younger daughter is 16 years old and studies at Delhi Public School, R.K. Puram. The plaintiff is a Commander/Senior Instructor with Air India. He is posted at Delhi. The plaintiff's residence comprises four floors, of which he and his wife are the

joint owners. An extended joint family consisting of his mother and his parents-in-law reside in the said residence. All the members of the immediate family as well as the extended family stay together as a family.

The plaintiff's wife, Smt. Almas Zaheer, is a law graduate from the University of Delhi, his father-in-law retired as Registrar from the Jawahar Lal Nehru University and is presently working as Registrar, Sharda University, Greater Noida while his mother-in-law retired as a teacher from the Government of NCT of Delhi. The plaintiff's mother is a homemaker. It is stated that there is continuance (*sic*) parental oversight, care and guidance because of the three elders, comprising the plaintiff's mother, mother-in-law and father-in-law, being present in the house.

The twin minor children reside on the ground floor of the property with the plaintiff and his family, which is in the make of a duplex and consists of 5 bedrooms, drawing room, family room and a dining area. It is stated that the twins have a room each to themselves. The first floor is occupied by the parents-in-law of the plaintiff. The second floor is being kept for guests of the family. It is stated that no portion of the property is let out and indeed, the entire property is in possession of the plaintiff and there is no

interference of any third party unknown to his joint family.

The minor children are the orphans of the best friend and colleague of the plaintiff. The mother of the children, Smt. Kavita Dayal, succumbed to cancer on 20.4.2012 while their father, Shri Praveen Dayal, passed away on 30.4.2013 after a prolonged ailment. Towards the end of his life Shri Praveen Dayal had repeatedly expressed his desire that the plaintiff must take care of his children since there was nobody else in his own family who could take care of them. He had also indicated this many a times to his colleagues of the Indian Commercial Pilots Association (IPCA). The only surviving relative of late Mr. Praveen Dayal is his brother, Mr. Amit Dayal, who resides in the USA. The latter has already given his consent by way of a declaration that the children, his nephew and niece, be brought up under the care of the plaintiff. The said declaration reads as under:

“And Declarant declare that after the death of Shri Praveen Dayal, the issue of welfare of his minor children Master Ayush Dayal and Baby Prarthana Dayal was discussed among all the acquaintance etc. and the members of Indian Commercial Pilot Association (ICPA), of which late Shri Praveen Dayal was the member and

during consultation Shri Amit Dayal due to his personal engagements/reasons showed his inability to take care of the children however Shri Mohd. Shahnawaz Zaheer son of Late Zaheer Ahmed resident of 111, Pocket-1, Jasola, New Delhi, who himself is the senior member of ICPA and office colleague and very close family friend of late Shri Praveen Dayal and is working as commander with Air India airlines, in terms of the wishes of late Shri Praveen Dayal, offered to take all possible care of the Master Ayush Dayal and Baby Prarthana Dayal including custody and to act as guardian, which initiative was welcomed by everybody keeping in mind the welfare of the children paramount and thereafter Shri Mohd Shahnawaz Zaheer took the physical custody of the children and became their de facto guardian.”

Furthermore, a Special Power of Attorney (at pages 83-87) was executed by Mr. Amit Dayal whereby the plaintiff has been appointed as his attorney for the property owned by late Shri Praveen Dayal and himself. It is stated that the mother of late Smt. Kavita Dayal, Smt. Situ N. Shivadasani is the only surviving blood relative of the minor children and is stated to be 85 years old. She had kept no

contact either with the children or their family since the demise of Shri Praveen Dayal. It is also uncertain whether she visited India upon the passing away of Shri Praveen Dayal. It is stated that therefore, the said grandmother did call once from the USA but expressed her inability to visit India or to take care of the children due to her advanced age. She is stated to be residing with relatives at 39338 Tunstall Drive, Clinton TWP, MI 48038-2694, USA.

It is stated that there is nobody to take care of the minor children upon the demise of their parents and the plaintiff has taken them under his own care as his family. It is further stated that the plaintiff is in constant consultation with the Indian Commercial Pilots Association of which the deceased, Shri Praveen Dayal, was a member. A decision was taken on 11.10.2013 that in terms of the desire of late Shri Praveen Dayal, the children be brought up by the plaintiff. It is further stated that a Trust has been created for the benefit of the minor children on 11.10.2013 under the name of 'Aayush-Prarthana Benevolent Trust' of which the plaintiff is the Settler Managing Trustee and has contributed a sum of Rs.10,000/- and the other Trustees are Shri Tarun Kumar Chopra and Shri Ashish Minocha, the latter being Commercial Pilots and members of the ICPA

having their office at Old France Cargo Building, M.T. Workshop, IGI Airport, Palam, New Delhi-110037. The said two Trustees have been appointed by the ICPA by virtue of Article 5 of the terms of the Trust. According to the terms of the Trust, the period of the Trust has also been defined as under:

“Article-3 Period

The period of the trust shall be limited till beneficiaries attain age of 22 years. Beneficiaries on attaining age of 22 years shall be entitled to claim and receive their respective share of the trust fund by dissolving the trust. On exercise of this option, trustees shall be duty bound to dissolve the trust and distribute all the funds of the trust to the beneficiaries as provided in these presents.”

The minor children are entitled to the following:

“Article-2 Beneficiaries

XXXX

Share of Beneficiaries

a.....

b. That beneficiary on attain age of 15 year may draw a sum of Rs.15,000/- per month for their personal monthly expense subject to specific permission of Managing Trustee. The amount so withdrawn shall deemed to be withdrawal against share of respective

beneficiary. Limit of Rs.15,000/- can be revised by the Managing Trustee after considering requirements of beneficiaries. These withdrawal shall be in exclusion to expenses to be incurred for education etc. for the beneficiaries.

c.....”

This Court notices that the children have been studying in the same school unhindered, despite the demise of their mother and father in the years 2012 & 2013 respectively. The Court has also seen the photographs annexed to the plaint, which show that the children are in a happy and caring atmosphere with the children and extended family of the plaintiff, Mr. Zaheer.

Since the children were born to Hindu parents and it would be expected that they be brought up according to Hindu customs and traditions the Court would be conscious that appropriate ambience be made available to the minors. To prove this, the plaintiff has filed the affidavit of his neighbour, Mr. Arun Saini, who has been taking care of the children's upbringing according to Hindu customs. The affidavit of Mr. Saini states that he has been in constant touch with the minor children on a daily basis, that he is

known to the plaintiff for the last five years and has been having regular family interactions with him. Mr. Saini further deposes that the plaintiff had discussed the facts of the case with him on the 4th or 5th day after the demise of the father of the minor children and that he wholeheartedly supported the benevolent cause of the plaintiff, who has been taking care of the minor children as their de facto guardian and also filed the present suit for appointment as a Guardian by this Court. Mr. Saini states that he belongs to the same Punjabi Hindu community to which the parents of the minor children belonged and has been rendering assistance to the children and is ready and willing to offer unconditional services to help the minor children learn/pursue their religious practices/customs etc. He claims to be supported by his wife Mrs. Anita Saini and daughter Ms. Anshree in this noble endeavour.

This application has been filed under Section 7 of the Guardian and Wards Act, 1890 read with Section 13 of the Hindu Minority and Guardianship Act, 1956, which read as under:

“The Guardian and Wards Act, 1890

7. Power of the court to make order as to guardianship

(1) Where the court is satisfied that it is for

the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property, or both, or

(b) declaring a person to be such a guardian, the court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.”

....

The Hindu Minority and Guardianship Act, 1956

“13 . Welfare of minor to be paramount consideration.- (1) In the appointment of declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.”

This Court is of the view that there is no bar to the appointment of a guardian under the Guardian and Wards Act, 1890, and this Court would have the jurisdiction with regard to the appointment of a guardian under Section 4 (4) of the said Act which reads that “(4) *"District Court" has the meaning assigned to that expression in the Code of Civil Procedure, 1882 (14 of 1882), and includes a High Court in the exercise of its ordinary original civil jurisdiction*”.

The minor children are 11 years old twins. The age difference between the children and the younger daughter of the plaintiff is not much; all the three

children are residing on the ground floor of the said premises. The photograph annexed with the plaint show that the children are in an amiable settings and in an ambience, which is healthy and suitable for their welfare and upbringing. The residential accommodation and arrangement for religious instructions by the immediate neighbour, the character of the proposed guardian is *ex facie* not in doubt. The plaintiff and his wife have been taking care of the two children since the demise of their father in the year 2013. It is stated that the children's performance in the school has improved in the last two (2) years. Additionally, the children are stated to be involved in extracurricular activities such as Salsa (dance) and Jazz (music) through private tutors and their commutation has been arranged through the family driver of the plaintiff. The classes are stated to be within the said colony of Jasola.

The learned counsel for the plaintiff submits that some time in the recent past, a sum of Rs.1.50 crores was collected for the benefit, care and upbringing of the minor children as contribution by the erstwhile colleagues (IPCA members) of the late Mr. Praveen Dayal. The entire money has been kept in a fixed deposit with Axis Bank. It is stated that only the school fee of the children has been paid from the said

amount and all other living expenses are being borne voluntarily by the plaintiff. Upon a query by the Court the plaintiff states that he will continue to do so, as he is bringing up the minor children as his own.

The plaintiff states that he has collected information from various sources to ascertain the investments made by the deceased, Mr. Praveen Dayal, in insurance policies, fixed deposits, balance in bank accounts, etc., which are listed in the Schedule to Form-A of the plaint. He requests for orders to complete and facilitate his pursuit of gathering the requisite information from all such agencies. Accordingly the banks, insurance companies, etc. as listed in Column-I in the Schedule to Form-A are directed to co-operate and give details of the investments or interests as may be, in favour of the late Mr. Praveen Dayal, the late Mrs. Kavita Dayal as well as their minor children to the plaintiff within four (4) weeks of receipt of this order.

The learned counsel for the plaintiff has relied upon the dicta of the Supreme Court in ***Madhegowda (Dead) By LRs v. Ankegowda (Dead) By LRs and Ors., (2002) 1 SCC 178*** which holds that Section 12 of the Hindu Minority and Guardianship Act, 1956: “*carves out an exception to the rule that should there be no adult member of the joint family in management*

of the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the joint Hindu family property may be a male or a female, not necessarily the Karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. Under Section 8 a natural guardian of the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the Court. But since there need be no natural guardian for the minors undivided interest in the joint family property, as provided under Sections 6 and 12 of the Act, the previous permission of the court under Section 8 for disposing of the undivided interest of the minor in the joint family property is not required.” The power of the High Court, otherwise to appoint a guardian, in justifying situations has been preserved.

There is no natural guardian of the children in India to take care of them. Their maternal grandmother has expressed her inability to take care of them due to her advanced age. The only other surviving relative of the minor, their paternal uncle,

who is residing in the USA, has also expressed his inability to look after the children but he has granted his consent for the children to be brought up by the plaintiff and to be their guardian. No other surviving blood relative or near relation who has come forward to take care of the children for the past nearly 24 months. Mr. Zaheer, the plaintiff is honouring the wishes of his deceased best friend by raising the latter's children as his own.

The march of nature is unmindful of worldly approval. The cycle of life, survival and existence does not await societal sanction. The existential imperative for life always finds a way. Nurturing of life is not premised upon judicial imprimatur. Every society finds a solution to take care of and adapts to circumstances which support life. So has it been in the present case. Upon the demise of the parents of the children, the plaintiff Mr. Mohd. Shahnawaz Zaheer took the children into his family-fold and for the past two years has been raising, nurturing and caring for them as his own. The goodness in caring for children – any children - can never be overemphasized. This value has been elegantly articulated by the noted Urdu poet Nida Fazli:

*Ghar se masjid hai bahut duur, chalo yuun kar lein
Kisee rotay hue bachche ko hansaya jaye.*

(The place of worship is far, so let us then
Make a crying child happy.)

The plaintiff has arranged for the children's religious instruction according to the community to which their deceased father belonged viz. Punjabi Hindu. The children's grades in school have improved.

They are involved in extra-curricular activities like Salsa dance and Jazz music, for which private tuitions have been arranged in the same neighbourhood. Conveyance to the classes has been ensured by the plaintiff's family driver. The plaintiffs' younger daughter being of the same age group is stated to be getting along very well with the twins. Other elders such as the plaintiff's mother lives in the ground floor alongwith the children. His parents-in-law are also available in the same house. The immediate neighbour Mr Arun Saini, an active participant in the children's religious instructions, has deposed in favour of the adequacy of this arrangement for their care. The children's only surviving relatives: the maternal grandmother (*naani*) and a paternal uncle (*chacha*), have been living in the United States of America for many years and have expressed their inability to take care of the children because of their own personal circumstances such as age and other constraints. Indeed, the said paternal uncle, Mr Amit

Dayal, has given his consent for the present arrangement for the children to be brought up by the plaintiff Mr Zaheer. In fact he has indeed appointed the plaintiff as his attorney, for the property owned by his late brother Mr Praveen Dayal and himself. There is evident support for this arrangement even from the Indian Commercial Pilots Association (IPCA). The estate of the children's father is to vest in a Trust created by the plaintiff solely for the children's benefit, of which he is the Managing Trustee alongwith two other Trustees appointed by the IPCA. For all practical purposes the plaintiff has been the guardian of the children. The children's foster-care in his home is as per the wishes of their father and with the consent of their sole surviving uncle (*chacha*).

The court is of the view that this arrangement is *ex facie* for the welfare and in the interest of the children and it should continue. In the circumstances, the plaintiff – Mr. Mohd. Shanawaz Zaheer is appointed the guardian of Master Ayush Dayal and Miss Prarthana Dayal, children of the late Mr Praveen Dayal and the Late Mrs Kavita Dayal, till further orders.

Thereafter, the case was listed on 6th & 27th April, 2015 and finally today.

The learned counsel for defendant No.2 states that the said defendant is the brother of late Mr. Praveen Dayal, therefore, he is the uncle of the children and the closest relative alive. He has no objection to and indeed he supports the appointment of the plaintiff as the guardian of the children as well as to their interests in the estate of late Mr. Praveen Dayal and late Ms. Kavita Dayal.

There is no appearance on behalf of defendant No.3, who is the maternal grandmother of the children. Notice was served upon her at the last known address, i.e.: 39338 Tunstall Drive, Clinton TWP, MI 48038-2694, USA, through Speed Post on 25.03.2015, as well as through electronic mail. An affidavit in compliance of Section 65B of the Indian Evidence Act, 1872 has been filed.

Despite repeated opportunities having been granted, the State has chosen not to file a reply. Indeed, the learned counsel for the State submits, upon instructions, that insofar as the children's closest and only relative alive has no objection to the appointment of the plaintiff as guardian of the children, the Court may pass appropriate orders. There is no opposition from any party, including the State, to the grant of the relief sought in the plaint.

The Court would see that there is no impediment apropos the suit being decreed. There is no bar under the provision of Section 13 of Hindu Minority and Guardianship Act, 1956 read with Section 7 of the Guardian and Wards Act, 1890 to the appointment of the plaintiff as the guardian of the children, i.e., Master Ayush Dayal and Baby Prarthana Dayal and to the estate of late Mr. Praveen Dayal s/o Late Shri Raj Ranotra and Late Mrs. Kavita Dayal w/o late Shri Praveen Dayal.

The children's mother had passed away more than two years ago.

During the critical phase of his illness their father, Mr. Praveen Dayal, had requested his best friend Mohd. Shahnawaz Zaheer – plaintiff , to take care of his children who would otherwise be orphaned in the eventuality of Mr. Praveen Dayal’s demise. The father had absolute trust in Mr. Zaheer; the children’s uncle (defendant No. 2) too has faith in the plaintiff for discharging the noble duty and responsible charge of guardianship of the children; indeed he seconds the plaintiff. The children have evidently transitioned smoothly into their new life with the family of the plaintiff, who had virtually been appointed a guardian by the children’s father himself. They are well settled and have been accepted as part of Mr. Zaheer’s family. Their needs are being met and they are being protected by the plaintiff. The plaintiff is un rebutted, therefore, it should be allowed.

The Court is of the view that taking care of orphaned children who are in urgent need of foster care and the protection of their interests is amongst the noblest of human endeavours. Poets and writers of different literatures have elegantly articulated and eulogised the principle of foster care and guardianship amongst the foremost and finest human duties. The essence of human endeavour in caring for innocent lives has been aptly and beautifully expressed by renowned Urdu poet Javed Akhtar in the following words:

*“Jo mazhab ho jo zaat ho
Jo bhi naam ho uska,
Insaan wohi hai jisko
Mohabbat karna aaye.
Kaho jo agar masoom
Miley usko rahon mein,
Usey gair nahin samjhe
Badhke usey apna-ey.”*

(Whatever be the religion or creed,

only the one who can love is human;
like the one who embraces as one's own,
an orphaned child in life's way.)

In the circumstances, this Court is of the view that the prayers sought in the plaint should be granted. The suit is therefore, decreed in terms of prayers (i), (ii) and (iii) of the plaint.

It is obligatory upon the guardian to take all such action as would be necessary to safeguard the interests of the children who are successors of their parent's estate which would for sometime vest in the Trust namely "*Aayush Prarthana Benovolent Trust*". Therefore, in compliance of the Court's previous directions and to discharge the obligation of Guardian as contemplated under Section 13 of Hindu Minority and Guardianship Act, 1956 read with Section 7 of the Guardian and Wards Act, 1890, the plaintiff requests that all banks, financial institutions and insurance companies be directed to make all payments, maturity or redemption amounts etc., as may be, in the name of "*Aayush Prarthana Benovolent Trust*", otherwise issuance of cheques or financial instruments in the name of minor children or the guardian/plaintiff would only create complications and frustrate the objective.

This court is of the view that the aforesaid prayer is fair and should be granted. Since, all the monies to which the children are entitled, from the estate of their deceased parents will be kept in the aforesaid Trust till the children attain the age of 25 years and both interim and other monies would be expended according to the terms of the Trust, it is therefore, directed that all banks, financial institutions and insurance companies shall make all payments, maturity or redemption amounts, etc., as may be, apropos the

estate of late Mr. Praveen Dayal s/o Late Shri Raj Ranotra and Late Mrs. Kavita Dayal w/o late Shri Praveen Dayal, in the name of “*Aayush Prarthana Benovolent Trust*”.

Decree sheet be drawn up accordingly.

The suit is disposed off in the above terms.

NAJMI WAZIRI, J

APRIL 29, 2015/ak/acm