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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
MISCELLANEOUS PETITION NO. 84 OF 2016**

Amrita Sanjay Achharya	...Petitioner
<i>And</i>	
Sanjay Achharya, s/o Shivkumar Achharya	...Deceased

Mr. A. R. Bapat, *a/w Mr. Niraj Malaviya and Mr. Manan M., i/b
Divya Shah Associates, for the Petitioner/Applicant.*

CORAM: G.S. PATEL, J
DATED: 14th September 2016

PC:-

1. I am unable to understand why the Registry insists on an order of a Court in matters like this.

2. The Petitioner is the mother of two minor children, a daughter named Thavi and a son named Vedant. Thavi is sixteen years old. Vedant is six years old. Their father, the Petitioner's husband, Sanjay died intestate on 9th September 2015 in Mumbai. In addition to the Petitioner and two minor children, Sanjay was survived by his mother, Lata. There is a pending Petition by the present Petitioner for Letters of Administration.

3. In the meantime, the Department has raised an objection and directed the Petitioner to obtain an order of a Court that the

Petitioner, Amrita, “being the mother and natural guardian” of the minor children is their “guardian”. This is a completely incomprehensible requirement. In law, once the father has passed away, it is evidently the birth mother who is and must be the natural guardian of the minor children. If she is the mother and natural guardian and the Department (mercifully) does not dispute this, then she is obviously the guardian. I do not see why any order of the Court is required for this purpose, and I must agree with Mr. Bapat when he says the objection is totally without substance.

4. There was once a view that it is only on the death of a minor’s father, the mother becomes the natural as well as the legal guardian of the minor.¹ That, as we shall see, is incorrect. In the absence of the father, the mother is certainly the natural and legal guardian of the minor. Section 4(2) of the Guardians and Wards Act, 1890 is not limited to legal, testamentary or court-appointed guardians; it includes natural guardians as well.² Apostasy has been held to make no difference;³ neither does divorce. I have noted some this before in Testamentary Petition No. 63 of 2012, *In re: Freyan Zarir Icchaporia*.⁴ There, the department had demanded that the divorced mother obtain an order that she is the guardian *ad-litem*, the father having passed away. I held there could be no such requirement, departmental or otherwise. The implicit suggestion there was (and

1. *Sarada Nayar v Vayankara Amma and Ors.*, AIR 1957 Ker 158.

2. *Manjula d/o Jagjivandas Adhia and Anr. v Himansu Prakash Boral and Anr.*, 1984 (1) Bom CR 433; *Noshirwan v. Sharoshbanu*, AIR 1934 Bom 311; *Ratan and Anr. v Bisan Ramchandra Pardeshi*, AIR 1978 Bom 190.

3. *Sheila Umesh Tahiliani v Soli Phirozshaw Shroff and Ors.*, AIR 1981 Bom 175.

4. Order dated 16th October 2015.

probably is in the case at hand) that even though the birth mother is alive, and even absent anything to show that she should be stripped of the incidents of guardianship, a Court might randomly appoint someone else, say an officer of the Court, to be the ‘guardian *ad-litem*’ of the minor. That is a proposition utterly bereft of substance.

5. An almost identical point appears to have been taken before a Single Judge of the Madras High Court in *C.B. Chandrasekhar*.⁵ The father was the natural guardian. The question was whether he could not, being the natural guardian, file an original petition for Letters of Administration with Will Annexed without praying first for his appointment as a natural guardian by the Court. There, too, the office seems to have insisted on such an appointment. The learned single Judge in a short order said the departmental view was incorrect. This is also the view of the Allahabad High Court in *Smt. Rasulan v Dilawar and Anr.*⁶

6. In any case, the approach that mother is not the natural guardian so long as the father is alive is patently incorrect in law and is fundamentally flawed. It is an unacceptably misogynistic approach, contrary to Constitutionally-mandated standards of gender neutrality and equality. Interpreting the relevant provisions of the Hindu Minority and Guardianship Act, 1956 and Sections 4 and 6 of that Act in particular, the Supreme Court in *Githa Hariharan & Anr. v Reserve Bank of India & Anr.* said this:⁷

5. I (1990) DMC 410 : 1989-2-LW 357 : MANU/TN/0267/1989.

6. AIR 1971 All 248.

7. (1999) 2 SCC 228 : AIR 1999 SC 1149 : 1999 (2) ALL MR (SC) 416 : 2000 (1) Bom. C.R. 251 : [1999] 95 CompCas 913 (SC) : (1999) 152 CTR (SC) 479 : [1999] 236 ITR 380 (SC) : JT 1999 (1) SC 524 : 1999 (2) Mh. L.J. 703 :

43. 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 the 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 their 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 words 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**

1999 (1) SCALE 490 : [1999] 1 SCR 669 : [1999] 104 TAXMAN 220 (SC). I have provided multiple equivalents for the general edification of our registry, confident that it will be able to find at least one of these.

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 subserve his welfare in the best possible way — the interest of the child being the paramount consideration.**

44. 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 a 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, the 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 tantamount 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.

45. 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 differentiation 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 safeguard and guarantee so as to give a proper and effective meaning to the words used.

46. In our opinion, the word “after” shall have to be given a meaning which would subserve the need of the situation, viz., the welfare of the minor and having due regard to the factum that law courts endeavour to retain the legislation rather than declare it to be 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., the welfare of the child.

47. In that view of the matter, the 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.

(Emphasis added)

7. This was a decision of a three-judge Bench of the Supreme Court. Banerjee J wrote the principal judgment; Anand CJ delivered a separate but concurring judgment for himself and for M. Srinivasan J. In the separate judgment, Anand CJ said:

16. While both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, **we hold that in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be “absent” for the purposes of Section 6(a)**

**of the HMG Act and Section 19(b) of the
GW Act.**

(Emphasis added)

8. Now that was a case where both birth parents were alive. Even in that situation, the Supreme Court said — and this is therefore unequivocally the law of the land — that the mother was as much a natural guardian as the father. It is a matter of greatest dismay that when the Supreme Court said, over 16 years ago, that all organisations should amend their processes and ways accordingly, it is, quite astonishingly in my view, the registry of a High Court that seems to have ignored this altogether.⁸

9. I will not permit this to continue. This is the second time in less than a year that I have encountered such an objection, and that is twice too often.

10. I am also unable to understand what amount of citing of law is required for the registry to stop mindlessly raising the same so-called ‘objection’ again and again. It not the province or the remit of the registry to continually evolve new ways, or unthinkingly repeat old and hackneyed ones, to make the lives of litigants before us even more complicated than they are already given our opaque and impenetrable processes. We are here to serve, not to obstruct; certainly not to impede without reason. The sooner our department understands that its over-zealous fascination with a thoroughly

8. I must note, with equal dismay, that I missed a reference to *Githa Hariharan* when deciding *Ichhaporia*. Fortuitously, that omission did not affect the final result.

incorrect understanding of the law is not what is expected or demanded of it, the better. As courts, we must indeed make space and time for trials. But we must do so without fashioning room for tribulations.

11. Unless, therefore, the Department is able to establish that there is some legal requirement for such an order in the facts of a particular case, it is not to insist on such applications have to be made or such orders being obtained. Where the father is alive and an application is made for *exclusive* guardianship by the mother, the requirements of *Githa Hariharan* in paragraph 46 in particular must be satisfied. That class of matters may be required to be placed before a court. Where the father is not alive, no order of ‘appointment’ of a birth mother as a ‘guardian’ is ever necessary.

12. In any event, in such a case there can never be a question of appointing any *other* fit and proper person as the guardian of the two minor children so long as their birth mother is present. That would require a separate Petition made by another person claiming to be a guardian for very special reasons and in very special circumstances. It can never be set as an alternative prayer nor should the Registry insist on it.

13. For the present, the Petition is made absolute in terms of prayer clause (a).

14. A copy of this order is to be placed before the Assistant Prothonotary for his reference and to ensure that no such objection is raised without a foundational basis again.

15. All concerned to act on an authenticated copy of this order.

(G. S. PATEL, J.)