

CASE NOTE ON ABC V THE STATE (NCT OF DELHI)

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The Guardians and Wards Act is a secular legislation regulating issues of guardianship and custody of children. The primary objective of the act is the welfare of the child. All the provisions in the act are guided by this principle. However, the laws regarding guardianship of the child, if not custody, give primacy to the father over the mother. In the case of ABC v. The State (NCT of Delhi), the Supreme Court while addressing a single, unwed mothers' petition upheld the right of an unwed mother to become the sole guardian of her child under section 11 without the consent of the father. The court noted the predicament of the mother who did not want to disclose the name of the father but was forced to do so under the present law. The paper is an analysis of this case. It discusses the reasoning of the court and its reading of various other legislations and case laws to uphold the welfare of the child and give effect to the legislative intent. It argues that even though the judgment is a progressive reading of the law, its impact is limited to the procedure laid down by the act and not a conclusive reading of the rights of an unwed mother.

I. Introduction

The primary objective of the guardianship laws is to ensure the welfare of the minor. However, these laws do not create a level playing field for both parents. Earlier, the father was considered to be the natural guardian of a minor child and after him, it was the mother. It required a judicial pronouncement by the Supreme Court of India to give mothers an equal right of being the natural guardian of their children.¹ Thus, the guardianship laws in our country have inadvertently endorsed a

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¹ Githa Hariharan v. Reserve Bank of India, (1999) AIR 1149 (SC).

patriarchal social structure. This is reflected by the many procedural requirements that insist on father's name on forms for various important documents, thereby creating problems for single or unwed mothers. As a result, there have been many long, legal battles for equal guardianship rights by women. The judgment by the Supreme Court in the present case ABC v. The State (NCT of Delhi),² which upheld the right of an unwed mother to become the sole legal guardian without seeking prior consent of the father has been heralded as a milestone judgment for the cause of single or unwed mothers in India. However, reading the judgment to mean that unwed mothers were given sole guardianship of their child is in all probability a wrong conclusion. Despite the efforts of the judiciary since the Githa Hariharan case, single, unwed or divorced women still suffer at the hands of laws that make custody and guardianship of their child a torturous legal battle.

II. Procedural History of the Case

This Special Leave Petition arose from a judgment of the Delhi High Court. The appellant was an educated, financially secure unwed mother who had been taking care of her minor son since his birth, without the involvement of his father. In order to make the son her nominee in all her savings, she filed an application for guardianship with the local authority. She was asked to either disclose the name of the child's father or get a guardianship certificate from the court.

She filed an application before the Guardianship Court under section 7 of the Guardianship and Wards Act, 1890 ('the Act') to declare her the sole guardian of the minor. Since the appellant refused to reveal the name of the father, the Guardianship Court dismissed her application in April, 2011. She appealed to the High Court which again dismissed her appeal in August, 2011 stating that the natural father of the child could have an interest in the child's welfare and therefore he had to be notified. Thus, the High Court refused to decide the case in the absence of a necessary party, that is, the father.

Aggrieved by the High Court's decision, the appellant approached the Supreme Court with this Special Leave Petition.

² ABC v. The State (NCT of Delhi), Arising out of S.L.P. (Civil) No. 28367 of 2011.

III. Court's Interpretation of other Legislations and Conventions

While delivering the judgment, the apex court looked closely at various legislations and personal laws pertaining to guardianship. It meticulously read sections 7, 11 and 19 of the Act. While section 7 empowers the court to appoint a guardian for the welfare of the minor, section 11 elucidates the procedure to be followed when an application for guardianship of a minor is received. The court emphasized on clause (i) of Section 11(1)(a) which requires a notice to be served in accordance with the Civil Procedure Code on the parents of the minor if they reside in any state to which the Act applies. Section 19 prevents the court from appointing a guardian if the father of the minor is living and is, in the court's opinion, fit to become the guardian of the minor. The State argued that under the above provisions, a notice had to be given to the 'parents' of the minor and the court could not appoint a guardian while the father of the minor was still living. Thus according to the State, the judgment of the High Court was in accordance with the Act. The court rejected this argument of the State stating that such an interpretation of the provisions would defeat the essence of the statute, which was to protect the welfare of the minor. Section 11, which is a procedural safeguard, requires sending notice to the parents of the child, would have to be read accordingly keeping in mind the intention of the legislation. It observed that there was a significant difference between 'parents' as used in section 11 and 'father' as used in section 19. "The dominant factor to be considered by the court is the welfare of the minor and not of any procedural lapse and that too a procedure which does not contravene the law."³ The court stated that section 11 of the Act ideally applies when a third party is seeking guardianship, which is not the situation in this case. A literal reading of the provision would make it mandatory to notify and hear the father before proceeding with the guardianship application, which was the position taken by the Delhi High Court.⁴ But the peculiar circumstances of the

³ Society of Sisters of Charity St. Gerosa Convent v. Karnataka State Council for Child Welfare, (1992) AIR Kant 263.

⁴ Saurav Datta, *Why The Elation Around The SC Ruling On Unwed Mothers Was Overblown*, CATCH NEWS, 8th July 2015, available at: <http://www.catchnews.com/pov/false-elation-why-the-sc-ruling-on-custody-and-unwed-mothers-was-overblown-1436356616.html>.

case demanded a different interpretation of this provision. The Act makes the "welfare of the minor" the sole consideration to appoint a guardian. The Supreme Court by invoking section 7 of the Act, which states that the child's welfare should be the fundamental and deciding factor in awarding guardianship, took a more liberal approach, in keeping with the intention of the legislation.⁵ Thus, the court took a holistic view of the act as well as attempted to incorporate the reasoning of legislations from other jurisdictions.

A. Foreign/Domestic Legislations

A notable feature of this judgment is the reference made by the court to the provisions of various domestic and foreign legislations which ensure the welfare of the minor. The court looked at legislations from various jurisdictions in order to "arrive at a holistic understanding"⁶ of how they ensured the best interests of the child and not to understand the tenets of Christian law. The court emphasized the secular character of our nation and the need to keep religion away from the interpretation of law. The Hindu Minority and Guardianship Act, 1956 and Mohammedan law both give primacy to the mother of the illegitimate child over the father. Even the Indian Succession Act, 1925 in section 8 further establishes this primacy by stating that the domicile of origin of the illegitimate child is in the country in which his mother is domiciled at the time of his birth.

The court referred to the legislations in the United Kingdom, the United States of America, Ireland, Philippines, New Zealand and South Africa. All these jurisdictions give the biological mother of the child, regardless of whether she is married or unmarried, the sole custodial and guardianship rights over the child. The court used this predominant position in various countries to interpret Indian legislation as bestowing similar rights on the mother of the child.⁷

The Supreme Court therefore concluded that the guardianship laws in India give priority and preference to the mother over the father of the concerned child. It observed that in today's society where women are increasingly choosing to raise children alone, it is often in the best

⁵ *Ibid.*

⁶ *Supra* note 2 at p.10.

⁷ *Ibid.*

interest of the child to not impose on him a father who is unwilling to remain a part of the child's life and is not concerned with the child's well being.⁸

IV. Interpretation of Precedents

The Act makes the father the natural guardian of a child. But the landmark case of *Githa Hariharan v. Reserve Bank of India*⁹ affirmed the position of the mother as a natural guardian. In this case, the Supreme Court held that a mother can be appointed as the guardian of the child instead of the father for the child's best interest. The court, while taking into account the mother's right to privacy as well as the child's best interest, referred to section 6 of the Hindu Minority and Guardianship Act, 1956 which names the father as the natural guardian of a minor and after him, the mother. The case recognized both mother and father as natural guardians of a minor child. The court interpreted that 'after' can also mean temporary absence of the father because of any reason. This case was cited in order to point out that when the mother is the exclusive caregiver of the child and the child is under her custody, for any reason, she can act as the natural guardian of the minor and all her actions would be valid even during the lifetime of the father.¹⁰

The court, while exercising its *parens patriae* jurisdiction to secure the welfare of the child, noted that even though the case involves determining the rights of the mother, father and child, it is the third that is the most relevant in this case. It referred to *Laxmi Kant Pandey v. Union of India*,¹¹ to reiterate that the welfare of the child should be given priority over anything else, including the rights of the parents. The court, even in the face of express terms in the statute, directed that notice should not be sent to the biological parents, as that could jeopardize the future and interest of the child who was being adopted.

The Supreme Court, while taking a progressive stance indicated that in today's society, where single women are increasingly choosing to raise their children alone, views of an uninvolved father are not essential, to

⁸ *Ibid.*

⁹ *Supra* note 1.

¹⁰ *In the Name of the Mother*; ECONOMIC AND POLITICAL WEEKLY, 11th Jul 2015, available at: <http://www.epw.in/editorials/name-mother.html>

¹¹ *Laxmi Kant Pandey v. Union of India*, (1985) SCC 701 (Supp).

protect the interests of a child born out of wedlock and being raised by the mother.¹² It drew a fine balance between the rights of a child and the procedural norms. It waived the requirement to name the father while keeping with the requirement of notice of guardianship through publication in a daily newspaper.¹³ Even while doing so, the court secured the right of the child to know about his father. This is in consonance with the Convention on the Rights of the Child, which India adopted on 11 December, 1992.¹⁴ In fact this was not the first time the Supreme Court has stressed on the right of the child to know about his father. Previously, the court has clarified that the right of a child to know about his father or origin is a part of the (fundamental) right to life under Article 21 of our Constitution.¹⁵ Thus, the court did not find it mandatory to disclose the identity of the father in the child's interest. But acting as the *parens patriae* of the child, it did stress on the child's right to know his father, which shouldn't be compromised with. It observed that the Universal Declaration of Human Rights, to which India is a party, has recognized the right of a child to know the identity of his or her parents. Therefore, the judges impressed upon the woman to disclose his father's name to her son, and submit all details in a sealed envelope, the contents of which would be revealed pursuant to specific and appropriate directions given by the court.¹⁶

In the present case, the woman claimed that naming the father in the guardianship application would breach her privacy, making her child vulnerable to future paternity suits. The privacy of the mother and the rights of the child as well as the father were an issue here. In *Dipanwita Roy v. Ronobroto Roy*¹⁷ the court was faced with similar issues about the privacy concerns of an unwed mother and the rights of a child and father. The court, in that case, protected the privacy of the mother while at the same time acted in the interest of the child. Similarly, the court in the

¹² *Supra* note 6.

¹³ Sidharth Luthra and Viraj Gandhi, *Single Mothers, Absent Fathers and the Best Interests of the Child: Drawing a Fine Balance in the ABC Case*, OXFORD HUMAN RIGHTS HUB, 16th July 2015, available at: <http://ohrh.law.ox.ac.uk/single-mothers-absent-fathers-and-the-best-interests-of-the-child-drawing-a-fine-balance-in-the-abc-case/>.

¹⁴ Convention of the Rights of the Child, G.A. Res. 44/25 (1989).

¹⁵ *Narayan Dutt Tiwari v. Rohit Shekhar*, (2011) IAD 404 (Delhi).

¹⁶ *Supra* note 4.

¹⁷ *Dipanwita Roy v. Ronobroto Roy*, (2015) AIR 418 (SC).

present case held that if the woman is forced to disclose the name and particulars of the father of her child, her fundamental right of privacy would be violated.

V. Analysis

This judgment has been hailed by the media as progressive and landmark. However, on a closer scrutiny, it can be noticed that the Supreme Court failed to address certain issues.

A. Not on Any Substantive Issue

In paragraph 18, the court states that the present dispute was not a custodial battle so it was unnecessary to go into the competence of the appellant as the guardian of the welfare of the child. Therefore, the judgment was not about whether an unwed mother could be appointed as the guardian of the minor child. It was merely about the requirement of notifying the putative father of the minor about the unwed mothers' guardianship application. This is made clear in the second line of the judgment itself where the court says, "the conundrum is 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."¹⁸ The appellant had submitted an affidavit agreeing for an alteration or revocation of the status of guardianship, if required, in future upon challenge to the same by the father of the child. In the last paragraph, the court orders the Guardian Court to recall its order of dismissal and consider the appellant's application without giving a notice to the putative father of the minor. This further underpins the argument that the judgment did not decide any substantial right. Rather it did away with a procedural requirement of disclosing the name of the putative father in order to ensure the welfare of the minor.

The court merely upheld the right of an unwed mother to not disclose the father's name, for important documents like passports, school forms etc. and directed authorities to issue a birth certificate that lists only the mother's name as long as she furnishes an affidavit to this effect. This would help in making it easier for single mothers to apply for such official documents for their child. Though the court did away with

¹⁸ *Supra* note 2 at p. 1.

the procedural aspect of the law, it did not give a ruling on the substantive rights of the unwed mother regarding guardianship of her child. A woman's right to custody and guardianship of her child is still subject to too much litigation. The court also did not go into the merits of the case. Though they did observe that the father in this case did not bother or show any concern regarding his child, the court did not intend to rule on the issue of custody of the child. Thus, the case is not applicable to cases where one of the spouses approaches the court to unilaterally seek custody of a child behind the back of their spouse.¹⁹

B. Judgment Does Not Cover All Cases

The judgment offers protection to unwed mothers of minor children. This can be seen as a limited protection given only to unwed mothers. This protection should have been extended to all mothers who do not wish to reveal the identity of the father for reasons that would affect the welfare of the minor.²⁰ As argued by activist Githa Hariharan, the law should categorically state that women of all communities, whether wed, unwed or widowed are the natural guardians of their minor children as much as the men.²¹ Had this issue been addressed by the court, there could have been some response by the law-making agencies to look into the matter and amend the law to place all mothers at par with the fathers as natural guardians of the minor children.

C. Policy Implications

Even though the judgment does not decide any substantive right, it certainly seeks to give some procedural respite. It is a progressive step in ensuring relief to unwed mothers who do not wish to disclose the identity of the father of the minor child. The court reiterates the recent trend where the requirement of furnishing the name of the father in case of applications for a child's admission in school or obtaining a passport has been done away with.²² However, under both these circumstances, a Birth Certificate is required. The court, in this regard, issues a directive

¹⁹ *Ibid* at p.14.

²⁰ *Unwed Mother Can Be Made Guardian Of Child Without Father's Consent: SC*, THE MINT, 7th July 2015, available at: <http://www.livemint.com/Politics/BFVJbdzcYznrNBixjlzVjK/Unwed-mother-can-be-made-guardian-of-child-without-fathers.html>

²¹ *Ibid*.

²² *Supra* note 2 at p.19.

that if a single parent or unwed mother applies for a Birth Certificate for a child born from her womb, then she only needs to submit an affidavit to that effect, after which the concerned authorities must issue her the Birth Certificate unless there is a direction from the court to the contrary. Thus, it removes another procedural requirement which would have created problems for unwed/single mothers in case they chose not to reveal the identity of the father of their minor child. The court places the duty of recording the birth of every citizen by issuing a Birth Certificate upon the State.

Such a directive by the court is a welcome step in efforts to reduce the agony faced by single/unwed mothers. While the passport authority has framed new guidelines which deleted the requirement of mentioning the father's name in the application,²³ it is yet to be seen how well the authorities issuing birth certificates implement this directive. This can be a step forward in ensuring that a mother's name is sufficient in procuring various documents for the child if she does not wish to disclose the name of the father for any reason whatsoever that may jeopardize the welfare of the minor.

VI. Conclusion

The Guardian and Wards Act is guided by the best interests of the child. The welfare of the child takes precedence over the statutory provisions. However, the laws regarding guardianship are very often riddled with instances where inequality between both the parents is apparent. The 257th Law Commission Report attempts to address this problem and stresses on the equality between parents as a goal that needs to be pursued.²⁴ It recommends looking beyond the gender stereotypes and bringing the law in line with the present times. Though the 2010 amendment to the Act did attempt to abolish the preferential position given to the father, the judgment at hand shows that the laws are still lagging behind when it comes to the problems faced by single,

²³ *Passport Rules on Including Father's Name Being Revised: Centre*, THE ECONOMIC TIMES, 23rd February 2015, available at: http://articles.economictimes.indiatimes.com/2015-02-23/news/59423282_1_passport-authorities-regional-passport-officer-passport-application-form.

²⁴ Report No 257: Reforms in Guardianship and Custody Laws in India, LAW COMMISSION OF INDIA (2015), available at: <http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf>.

unwed or divorced mothers fighting for their child's custody or guardianship.

The present case presented with itself a very common predicament faced by single mothers while naming their child's father in various forms. For a number of reasons, a mother may not want to disclose the identity of the father, but the procedural requirements make it almost impossible to do so. This results in the mother as well as the child facing hardships in acquiring even the most basic documents. The court while delivering this judgment took note of the difficulty faced by many such mothers and held that 'parents' under section 11 could mean the parent who is raising the child alone and is the primary caregiver, and not both the parents. By doing so, it achieved the dual objective of not imposing an unconcerned or absent parent on the child, while at the same time protecting the privacy of the mother.

However, the court while giving a favorable ruling for the mother, did not conclusively settle the substantive rights of mothers fighting for the custody of their children. It merely read a procedure in the act to reflect the growing change in the society regarding child rearing where both the parents are not involved. It must be noted that the Act lays down the procedure for guardianship and custody but the substantive rights are still governed by the personal laws. Despite the present ruling, unwed mothers can still get a raw deal at the hands of such laws by the very same court.

In fact, this problem may be more adeptly handled by the legislature. A private member's bill to be introduced in the Monsoon session of the Parliament, in order to bring about an amendment to the constitution to provide mothers the right of sole guardianship of a child, is a step in the right direction. This will finally acknowledge the realities of unwed motherhood and help in addressing the problems faced by such mothers while raising their children singlehandedly.