

Case Name	Githa Hariharan & Anor v Reserve Bank of India & Anor and Another Writ Petition
Topic	Mother may be child's guardian during father's lifetime
Category	CHILDREN - guardianship; EQUALITY - discrimination (sex); FAMILY LIFE - children;
Tribunal	Supreme Court
Country	India (Asia)
Case Date	17 Feb 1999
Judge(s)	Anand CJ, Srinivasan J, Banerjee J

The petitioners, a married couple, jointly applied to the respondent bank to open a deposit account in the name of their minor son. They expressly stated that they both agreed that the first petitioner (the mother) would act as their son's guardian for the purpose of the investments. The bank advised them either to produce the application form signed by the father or a certificate of guardianship from a competent authority in favour of the mother. The petitioners filed a writ petition under s 32 of the Constitution seeking, *inter alia*, a declaration that, by failing to recognise a woman's equal right to the guardianship of her children, s 6(a) of the Hindu Minority and Guardianship Act, 1956 and s 19(b) of the Guardian and Wards Act, 1890 amounted to sex **discrimination** in violation of the constitutional right to equality (Arts 14 and 15). Section 6 provides that the natural guardian of a minor's person or property is... '(a) in the case of a boy or an unmarried girl the father, and after him, the mother...'. The expression 'natural guardian' is defined in s 4(c) as any of the guardians mentioned in s 6. The term 'guardian' is defined in s 4(b) as a person having the care of the person or property of a minor, including a natural guardian. Section 19 provides: 'Nothing in this Chapter shall authorize the Court...to appoint and declare a guardian of the person... (b)...of a minor whose father is living and is not, in the opinion of the Court, unfit to be a guardian of the person of the minor'.

In disposing of the writ petition with directions, it was held that:

Per Anand CJ and Srinivasan J (Banerjee J concurring):

1. The courts are primarily concerned with the best interests of the child in determining disputes over custody and guardianship. A father may be replaced by the child's mother or any other suitable person by an order of court if the child's welfare requires it.
2. The word 'after' in s 6(a) need not necessarily mean 'after the death of the father'. It is well settled law that the constitutional validity of legislation is to be presumed; s 6(a) would be unconstitutional and violate the gender equality guarantee if it were given this construction. Given the context in which the word appears in s 6(a), it should be given the meaning 'in the absence of', referring to the father's absence from the care of the child's property or person for any reason (*Jijabai Vithalrao Gajre v Pathankhan & Ors* (1970) 2 SCC 717 (Ind SC) applied and *Pannilal v Rajinder Singh & Anor* (1993) 4 SCC 38 (Ind SC) distinguished). Section 19(b) should be construed in a similar manner.
3. This interpretation gives effect to the principles contained in the 1979 UN **Convention on the Elimination of All Forms of Discrimination Against Women**, ratified by India in June 1993, and the Beijing Declaration, which directs all state parties to take appropriate measures to prevent **discrimination** of all forms **against women** (*Apparel Export Promotion Council v A K Chopra* (India, Supreme Court, Civil Appeal Nos 226-227 of 1999, 20 Jan 1999, unreported); since reported in AIR 1999 SC 625 considered).
4. A father may be considered absent if he is indifferent to the child, if an agreement between him and the mother places the child in the exclusive care and custody of the mother or if he is physically or mentally unable to take care of the child. In such situations, the mother is the recognised natural guardian and all her actions are valid, even during the lifetime of the father, who would be deemed to be 'absent' for the purposes of ss 6(a) and s 19(b).
5. The respondent was not right to insist upon an application signed by the father or an order of the court in order to open the deposit account, particularly when there was already a letter jointly written by both petitioners evidencing their mutual agreement. The respondent should now accept the application filed by the mother.
6. This judgment will operate prospectively and will not enable any person to reopen any decision already rendered or question the validity of any past transaction.
7. The respondent and other similar organisations are directed to formulate appropriate methodology in the light of the observations in this judgment in order to deal appropriately with other such cases as they arise.

Per Banerjee J:

1. The word 'after' in s 6(a) should not be ascribed a literal meaning but should be interpreted to give full play to the legislative intent, namely the protection and welfare of the child.
2. Both the mother and the father of a minor child should be treated as guardians of the child. The word 'guardian' and the meaning attributed to it by the legislature under s 4(b) is not restrictive and is meant to include both the father and the mother who are duty bound to take due care of the child's person and property.
3. The meaning and implication of the word 'guardian' in s 4(c) includes both parents, and should be attributed to the word as it appears in s 6(a). It follows that a mother's right to act as guardian does not stand obliterated during the lifetime of the father. As s 6(a) itself recognises that both the father and mother ought to be treated as natural guardians, the word 'after' should be read and interpreted in a manner so as not to defeat the true intent of the legislature.
4. The word 'after' must also be interpreted in accordance with the constitutional guarantee of gender equality. If the word were construed to disqualify a mother from acting as a guardian during the father's lifetime, it would definitely run counter to the basic requirement of the constitutional mandate. It follows that a father cannot be ascribed to have a preferential right over the mother in matters of guardianship.

Legal Provision	Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW), 1979 Beijing Declaration Universal Declaration of Human Rights, (UDHR), 1948, Art 2
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Citations	[1999] 1 LRI 353, (1999) 2 CHRLD 199, (1999) 2 SCC 228; [2000] 3
Notes	Heard together with WP(C) No 1016 of 1991, <i>Dr Vandana Shiva v Mr Jayanta Bandhopadhyaya & Anor</i>