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Whether a Muslim Woman is Entitled to be a Legal Guardian of her Minor Children: A Commentary on C Abdul Aziz & Ors. V. Chembukandy Safiya & Ors, 2022 LiveLaw (Ker) 332

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ABSTRACT

The Indian constitution guarantees the right to equality to every individual, by Article 14. But, when it comes to personal laws, this concept is jeopardised, as different personal laws carry different approaches toward gender identity. Although through various judicial interpretations, the judiciary tries to harmonise the concept of equality with the personal laws, the flaws still exist and religious resistance and influences have been often limiting the scope of application of these personal laws.

Muslim personal laws are intriguing, where long interpretations and expertise in the religious text verses should be known for the application of the law. Through the recent legal development, such as the Triple talaq case, the court played an important role in interpreting the personal law by holding the constitutional values, and declaring practices like Triple talaq as unconstitutional.

Such a progressive approach has also been taken in the present case which has been subjected to case comment. Through this Case comment, the author here tries to analyse various aspects such as the Competency of a Muslim mother to Act as a Guardian, whether a Personal law can be considered a 'Law', the scope of religious sources in interpreting an Individual's, right, and finally analyses the validity of the partition deed executed on the behalf of the minors.

I. INTRODUCTION

The property in question initially belonged to two brothers, namely, Chempumkandy Veeran and Chempumkandy Abu. The respondents are the children of Veeran. Appellants are the legal heir of Abu. In the year 1969, the said properties were partitioned in which deed, in addition to the respondents, their mother Ayishabi and Abu were also parties. The respondents were minors at the time of execution of the partition deed. The respondents have ratified the act of their mother by executing a release deed dated 13/05/1989.

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The respondents, arguing that the partition deed of 1969 executed by the mother for and on behalf of them is void, filed a suit for partition. The III Additional Sub Court, Kozhikode decided in favour of the respondents. Hence, an appeal was preferred by the appellants.

The Present situation can be analysed as :

1. Whether prohibiting a Muslim mother from being the guardian of her minor child's person and property, be violative of Articles 14 and 15 of the Constitution?
2. Whether the respondents are stopped from seeking partition?

The main contention of the Respondents was that the partition deed executed by the Muslim mother on behalf of their minor children is void since the Muslim mother cannot act as a guardian under the Muslim personal law. Further, they contended that their mother, out of the mistaken impression that the said partition deed was that of the power of attorney, such deed is void.

Therefore, the Topics to discern are as follows ;

1. Competency of a Muslim mother to Act as a Guardian.
2. Whether a Personal law can be considered a 'Law'
3. Scope of religious sources in interpreting an Individual's, right?
4. Validity of the partition deed executed on the behalf of the minors.

II. COMPETENCY OF A MUSLIM MOTHER TO ACT AS A GUARDIAN

It was pointed out by the learned counsel of appellants that there is nothing in the Quran prohibiting a mother from being the guardian, neither does it approves a Muslim mother to be a guardian. The Quran has never explicitly mentioned anywhere that a Muslim mother can be a guardian or not. Throughout the argument, the Appellants quoted various verses in the Quran which circuitously support that a Muslim mother can act in the capacity of a guardian. In Hadiths, which are considered to be the secondary source of the Muslim law, have recognised the women to be the 'Guardian of their husband's property and their offspring. The Appellants raise the grievance of the Hon'ble Supreme court which has pronounced that the Muslim mother cannot be a guardian, without considering the Hadiths. Also, they argued that the previous judgments of the supreme court (Mohd. Amin v. Vakil Ahmad[2], Syed Shah Gulam Ghouse Mohiuddin v. Syed Shah Ahmad Mohiuddin Kamisul Qadri, and Meethiyan Sidhiqu vs.

[2] Mohd. Amin v. Vakil Ahmad, AIR 1952 SC 358.

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Muhammed Kunju Pareeth Kutty[3]), have never raised this question of importance in any of its discussion so that it failed to prompt a judgment deciding on the competency of the Muslim mother to act as a guardian.

But According to the respondents one cannot read into the Quran or Hadith something which is not there. They argue that at a point time when the Quran and Hadiths were pronounced, women were never considered equal to men they were treated considered inferior to men. So, the question of conferring guardianship on them was never even contemplated. The learned amicus Curie argued since there the status of Muslim woman as a guardian remains ambiguous this particular issue of guardianship can only be judged after a proper evaluation of the equality, rights and position/status given to women in the Quran., right from her birth till death and salvation. The Quran in its verses treats men and women equally, and hence the same scripture cannot deprive her of being a natural guardian of her minor child and dealing with the properties. Further verse 6 of chapter 4 of the Quran permits a woman to be a natural guardian and dispose of their immovable property in cases of dire necessity. For the protection of the minor, the guardian can sell the property of the minor, whether movable or immovable, without indicating specifically that the guardian should be male. The Muslim scholars have nowhere stated, that this verse is to be confined to male guardians. In various judgements, it was reiterated by the Apex court that the Quran is the fundamental source to understand Islamic law.

But here, the question arises whether the judicial body has the power or capacity to interpret something which is not explicitly said in the religious texts. When a religious text is silent about certain religious practices, rights or duties, the court can take an optimistic approach by taking the progressive view in such matters. When the other personal laws have given the right to guardianship to a mother (Such as in Gita Hariharan .v. Reserve Bank of India[4]), what is prohibiting a Muslim mother from her right to Act as a guardian for her minor children is a debatable challenge for the Judiciary to answer.

In the judgment, the Court emphasised the role of the court, by quoting the State of Karnataka .v. Appu Balu Ingale[5], where the judiciary acts as a bastion of the freedom and the rights of the people. Law should be capable to expand the freedom of the people and the legal order can weigh with utmost equal care to provide the underpinning of the highly inequitable social order. Judicial review must be exercised with insight into social values to supplement the changing social needs. The existing social inequalities or imbalances are required to be removed by

[3] Meethiyan Sidhiqu v. Muhammed Kunju Pareeth Kutty, AIR 1996 SC 1003.
[4] Gita Hariharan .v. Reserve Bank of India, 1999 KHC 444.
[5] State of Karnataka .v. Appu Balu Ingale, AIR 1993 SC 1126.

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readjusting the social order through rule of law. However, the High court in this case has not taken a rigid decision, due to its inability placed under Article 141[6], where it cannot overrule the Supreme court judgment.

Throughout the case, the ambiguity in the religious texts can be subjected to the progressive views rendered through the judicial interpretations, by ensuring equality and eliminating discrimination, thus conferring every person their right conferred under Articles 14[7] and 15[8] of the constitution.

This Thus poses a Question: denying the Muslim mother from being a guardian can be violative of fundamental rights under Articles 14 and 15 of the Indian Constitution. Article 14 reads that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth". In what way, a state is denying a person equality in the present case is the plausible question to answer. In Naresh Sridhar Mirajkar.v. In the state of Maharashtra[9], the court noted that Judiciary while exercising its rule-making power under Article 145[10], would be covered by the expression 'State' covered the expression state within the meaning of Article 12[11]. In Ujjain Bhai .v. State of UP[12], Judgment wherein it was held that a quasi-judicial or judicial body in the exercise of its functions could not violate fundamental rights. So, concerning these cases, it can be said that the judiciary, coming within the purview of the 'State' is responsible to act as a check factor, whether an Individual's right has been violated or not. Thus Articles 14 and 15 come into relevance when determining the competency of a Muslim mother to act as a guardian.

III. WHETHER A PERSONAL LAW CAN BE CONSIDERED A 'LAW'?

To determine whether personal law can be considered as a "law" the relationship between Personal laws and Article 13[13] has to be established. Unfortunately, the Indian judiciary cannot conclude this. Through the series of judicial interpretations, the court is in the process of examining the relationship between Article 13 and personal laws. State of Bombay v. Narasu Appa Mali[14] is currently the "good law" that determines the relationship between Article 13 and

[6] INDIA CONST. art. 141.
[7] INDIA CONST. art. 14.
[8] INDIA CONST. art. 15.
[9] Naresh Sridhar Mirajkar.v. State of Maharashtra, 1 1966 SCR (3) 744.
[10] INDIA CONST. art. 145.
[11] INDIA CONST. art. 12.
[12] Ujjam Bhai .v. State of UP, 1962 AIR 1621.
[13] INDIA CONST. art. 13.
[14] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.

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Personal Laws in India. This landmark judgement is the binding precedent which held that personal laws are immune from the application of Article 13 on two grounds:

1. Personal laws are not "laws" under Article 13(3)(a)[15] of the Constitution, and
2. Personal laws are not "laws in force" under Article 13(3)(b)[16] of the Constitution.

According to J. Chagla, while the personal laws referred to original scriptures and texts, Customs were more specific to the practices that were deviations from these scriptures and texts (Para 12). Thus, Personal Laws in India were not the same as "Customs and usages" as defined in the article. According to him, Article 13 is purposefully made to exclude personal laws, so that immunity is granted to personal laws to exclude them from any kind of constitutional challenges.

However, in Mary Roy v. the State of Kerala[17], and Danial Latifi v. UOI[18], the courts have followed the "scrutinising approach", and tested the personal laws on the touchstone of Fundamental Rights. These judgements have thus taken a shift from the judgement pronounced in Narasu Appa Mali's case. Further, in the case of Shayara Bano v. Union of India[19], a Constitutional Bench in a 3:2 verdict ruled that talaq-ul-bidder or triple talaq is not legally valid and the Muslim Personal Law (Shariat) Application Act, 1937[20] is a law made by the legislation before the Constitution and it falls within the expression "laws in force" in Article 13(3)(b) and would be hit by Article 13(1)[21] as the practice of triple talaq is against the provision of Part III of the Constitution. All the Muslims in India are governed by the Muslim Personal Law (Shariat) Application Act, 1937.

Section 2[22] of the Shariat Act reads:

Application of Personal Law to Muslims.-Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, Ila, share, loan, khula and Mubarak, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and

[15] INDIA CONST. art 13 § 3, cl. a.
[16] INDIA CONST. art 13 § 3, cl. b.
[17] Mary Roy v. State of Kerala, 1986 AIR 1011.
[18] Danial Latifi v. UOI, Writ Petition (civil) 868 of 1986.
[19] Shayara Bano v. Union of India, AIR 2017 9 SCC 1 (SC).
[20] Muslim Personal Law (Shariat) Application Act, 1937, No. 26, Acts of Parliament, 1937 (India).
[21] INDIA CONST. art. 13, § 1.
[22] Muslim Personal Law (Shariat) Application Act, 1937, § 2, No. 26, Acts of Parliament, 1937 (India).

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religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat) ".

The Shariat Act is a central legislature enactment and thus could not consider making state laws as the same existed beyond the legislative competence. By analysing the Act, we can see that the Act has failed to achieve its purpose of ensuring equal rights to both males and females which were restricted by the application of customary laws. Further, who are the persons, and who can be the guardians are not mentioned in the Act, which is one of the main reasons leading to this controversy about the competency of a Muslim mother to act as a guardian. Because of the absence of provincial laws on these subjects, State legislatures have the authority to formulate laws on this matter. So, in such circumstances, the legislatures with the support from the part of judiciary as well as from the religious text interpretations could also make clear the guardianship.

IV. SCOPE OF RELIGIOUS SOURCES IN INTERPRETING AN INDIVIDUAL'S RIGHT

Whether the status of guardianship held by the Muslim mother is to be considered as right or as a mere duty is to be determined. Although the Muslim sources or religious texts confers Muslim law's position on women's rights as "far superior" to that of Brahmanical Hindu law and Christian matrimonial law, still the patriarchal dominion tries to withhold certain rights to be conferred to Muslim women. One such instance is guardianship. In the absence of the husband, giving the right to the Muslim woman to be the guardian for her children's property is unacceptable to the community, although there is no explicit ban by the religious text prohibiting or allowing a woman to act as a guardian.

It is said in numerous verses of the Quran, that conferring a mother to look after her husband and his properties. Hence, it can also be interpreted as a duty of the mother to Act as a guardian in case of executing a property on the behalf of the minor children. Considering the social factor, the children being minors are more attached to their mother, as she is the sole caretaker of her children it is the duty of the mother to take care of her children and execute properties of her children, in case of necessity as well as the best interest of her children. This has also been accepted by the Quran through its verses. In such circumstances, preventing the mother from acting as a guardian, is synonymous to prevent her right to look after her minor children, and thus preventing her right to live with dignity.

When a particular religious text is silent about the rights of the individual. The scholars and various jurists associated with such religious texts usually interpret such rights. But the scope of such interpretations has to be confirmed by judicial authorities while taking the socio-legal

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aspects of such rights. If such rights are essential or are closely connected to fundamental rights, they shall be given prevalence and confer such rights to the individual.

In the present case, whether the right to act as a guardian of a Muslim mother is questioned. Since the religious texts are silent on this part, there are several implications given in its verses, giving Muslim women equal rights and opportunities. In the light of such verses, the right to act as a guardian can also be granted with effective judicial and legislative interventions.

V. VALIDITY OF THE PARTITION DEED EXECUTED BY THE MUSLIM MOTHER ON THE BEHALF OF THE MINORS.

In the present case, a partition deed was executed by the Muslim mother of the respondents, where the respondents challenged that such a partition deed executed by their mother is void since a mother cannot act as a guardian for her minor child. The appellants in the instant case have argued that the principle of estoppel and equity are not alien to Muslim law as can be evident from the decisions cited on their behalf. In C. Beepathuma .v. Vasari Shankaranarayana Kadambolithaya[23], it has been held that after having obtained benefit from a transaction, a minor cannot, later on, deny it and that he is estopped from repudiating the same.

Although the partition deed executed by the mother for and on behalf of the respondents and appellants is void, after the execution of the partition deed in the years thereafter, the plaintiffs and defendants after attaining a majority have executed the release deed wherein, they have referred to partition deed also. In such a circumstance, the respondents are thus estopped from claiming the property.

Since here, the hon'ble court has not taken a particular stand on the competency of the Muslim mother to be the guardian of her minor child, the partition deed executed by her is considered to be the void one. This can be only subjected to a change only after properly recognising the Muslim mother to act as a guardian.

VI. CONCLUSION

Inheritance, marriage, guardianship, etc are varied all over India. The group of women organisations, due to inconsistency in the customary and religious practices, says that these customary practices are anti-feminist, which prompted the legislature to enact the Muslim personal law Shariat Act 1937. The Muslim community all over the country are governed by the Muslim personal law (Shariat Act) and its customary usage and practices. However, the question that comes into our mind is whether the personal laws are reviewable as contravening

[23] C. Beepathuma .v. Velasari Shankaranarayana Kadambolithaya, 1965 KHC 481.

the fundamental right from part III of the constitution. This is based on the question that how much its applicability reflects on the fundamental rights, and whether it creates discrimination against the community as such classes of people to whom it applies. This is the notion which comes into our mind when thinking from the constitutional perspective. Since the Muslims are the minority community and whenever something is coming into their domain, a feeling of insecurity creeps in. probably that is the reason you find that in Narasu Appa mali's case, it was held that personal laws cannot come under Article 13 of the constitution. In Shah Bano Begum's case, which is subsequently followed by Shayara Bano's case and similar cases, the courts have attempted to break this barrier saying that personal laws are susceptible especially when it is violative of Part III of the Constitution. From these, we can see that the courts have interpreted in a very progressive way. In Shayar Bano's decision, and making a comparative reading with the famous Sabarimala case, the court asked whether it is high time that the personal laws shall be subjected to judicial scrutiny, and is it the time to come out of the barrier placed in Narasu Appa Mali's case decision, wherein it is observed that certain personal laws if discriminatory to the class of person, it shall be reviewed by the courts because India is the country where the constitution is supreme so that the touchstone is the constitution.

As of now, the court has not concluded that the Muslim woman is the natural guardian, in disposing of the property of the minor child. The court in this case has made an attempt, but how much it was successful, and whether it is high time for the courts to scrutinise personal laws is to be questioned. If the progressive approach can be taken for the cases such as inheritance or triple talaq, why the courts are hesitant to take a progressive approach for guardianship is still a question left over by this decision.

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