REPORTABLE

IN THE SUPRME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. …….. OF 2015
[Arising out of SLP (Civil) No. 28367 of 2011]

ABC … Appellant

Versus

The State (NCT of Delhi) … Respondent

J U D G M E N T

VIKRAMAJIT SEN, J.

1. A legal nodus of seminal significance and of prosaic procedural origination presents itself before us. 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. The common perception would be that three competing legal interests would arise, namely, of the mother and the father and the child. We think that it is only the last one which is conclusive, since the parents in actuality have only legal obligations. A child, as has been ubiquitously articulated in different legal forums, is not a chattel or a ball to be shuttled or shunted from one parent to the other. The Court exercises *paren patrae* jurisdiction in custody or guardianship wrangles; it steps in to secure the welfare of the hapless child of two adults

whose personal differences and animosity has taken precedence over the future of their child.

2. Leave granted. This Appeal is directed against the Judgment dated 8.8.2011 delivered by the High Court of Delhi, which has dismissed the First Appeal of the Appellant, who is an unwed mother, holding that her guardianship application cannot be entertained unless she discloses the name and address of the father of her child, thereby enabling the Court to issue process to him. As per the Appellant's request, her identity and personal details as well as those of her son have not been revealed herein.

3. The Appellant, who adheres to the Christian faith, is well educated, gainfully employed and financially secure. She gave birth to her son in 2010, and has subsequently raised him without any assistance from or involvement of his putative father. Desirous of making her son her nominee in all her savings and other insurance policies, she took steps in this direction, but was informed that she must either declare the name of the father or get a guardianship/adoption certificate from the Court. She thereupon filed an application under Section 7 of the Guardians and Wards Act, 1890 (the Act) before the Guardian Court for declaring her the sole guardian of her son. Section 11 of the Act requires a notice to be sent to the parents of the child before a guardian is appointed. The Appellant has published a notice of the petition in a daily newspaper, namely Vir Arjun, Delhi Edition but is strongly

averse to naming the father. She has filed an affidavit stating that if at any time in the future the father of her son raises any objections regarding his guardianship, the same may be revoked or altered as the situation may require. However, the Guardian Court directed her to reveal the name and whereabouts of the father and consequent to her refusal to do so, dismissed her guardianship application on 19.4.2011. The Appellant's appeal before the High Court was dismissed *in limine*, on the reasoning that her allegation that she is a single mother could only be decided after notice is issued to the father; that a natural father could have an interest in the welfare and custody of his child even if there is no marriage; and that no case can be decided in the absence of a necessary party.

4. Ms. Indu Malhotra, learned Senior Counsel for the Appellant, has vehemently argued before us that the Appellant does not want the future of her child to be marred by any controversy regarding his paternity, which would indubitably result should the father refuse to acknowledge the child as his own. This is a brooding reality as the father is already married and any publicity as to a declaration of his fathering a child out of wedlock would have pernicious repercussions to his present family. There would be severe social complications for her and her child. As per Section 7 of the Act, the interest of the minor is the only relevant factor for appointing of a guardian, and the rights of the mother and father are subservient thereto. In this scenario, the interest of the child

would be best served by immediately appointing the Appellant as the guardian. Furthermore, it is also pressed to the fore that her own fundamental right to privacy will be violated if she is compelled to disclose the name and particulars of the father of her child. Ms. Malhotra has painstakingly argued this Appeal, fully cognizant that the question that arises is of far reaching dimensions. It is this very feature that convinced us of the expediency of appointing *amicus curiae*, and Mr. Sidharth Luthra has discharged these onerous duties zealously, for which we must immediately record our indebtedness.

5. It would be pertinent to succinctly consider the Guardians and Wards Act, 1890. The Act, which applies to Christians in India, lays down the procedure by which guardians are to be appointed by the Jurisdictional Court. Sections 7, 11 and 19 deserve extraction, for facility of reference.

> "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 details of the form of application are contained in Section 10 and the procedure that applies to a guardianship application is prescribed in Section 11.

> 11. Procedure on admission of application
> (1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing-
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> (a) to be served in the manner directed in the Code of Civil Procedure,1882(14 of 1882)11 on-
>
> (i) **the parents of the minor if they are residing in any State to which this Act extends**;
>
> (ii) the person, if any, named in the petition or letter as having the custody or possession of the person or property of the minor;
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> (iii) the person proposed in the application or letter to be appointed or declared guardian, unless that person is himself the applicant; and
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> (iv) any other person to whom, in the opinion of the court special notice of the applicant should be given; and
>
> (b) to be posted on some conspicuous part of the court-house and of the residence of the minor, and otherwise published in such manner as the court, subject to any rules made by the High Court under this Act, thinks fit.
>
> (2) The State Government may, by general or special order, require that when any part of the property described in a petition under section 10, sub-section (1), is land of which a Court of Wards could assume the superintendence, the court shall also cause a notice as aforesaid to be served on the Collector in whose district the minor ordinarily resides and on every Collector in whose district any portion of the land is situate, and the Collector may cause the notice to be published in any manner he deems fit.
>
> (3) No charge shall be made by the court or the Collector for the service or publication of any notice served or published under sub-section (2).

Section 19 is of significance, even though the infant son does not independently own or possess any property, in that it specifically alludes to the father of a minor. It reads thus:

> 19. Guardian not to be appointed by the court in certain cases
> Nothing in this Chapter shall authorise the court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards or to appoint or declare a guardian of the person-
> (a) of a minor who is a married female and whose husband is not, in the opinion of court, unfit to be guardian of her person; or
> (b) **of a minor whose father is living and is not in the opinion of the court, unfit to be guardian of the person of the minor**; or
> (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

We must immediately underscore the difference in nomenclature, i.e. 'parents' in Section 11 and 'father' in Section 19, which we think will be perilous to ignore.

6. It is contended on behalf of the State that Section 11 requires a notice to be given to the 'parents' of a minor before a guardian is appointed; and that as postulated by Section 19, a guardian cannot be appointed if the father of the minor is alive and is not, in the opinion of the court, unfit to be the guardian of the child. The impugned judgment is, therefore, in accordance with the Act and should be upheld. It seems to us that this interpretation does not impart comprehensive significance to Section 7, which is the quintessence of the Act. However, before discussing the intendment and interpretation of the Act, it would be helpful to appreciate the manner in which the same issue has been dealt with in other statutes and spanning different legal systems across the globe.

7. Section 6(b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father. Mohammedan law accords the custody of illegitimate children to the mother and her relations. The law follows the principle that the maternity of a child is established in the woman who gives birth to it, irrespective of the lawfulness of her connection with the begetter. However, paternity is inherently nebulous especially where the child is not an offspring of marriage. Furthermore, as per Section 8 of the Indian Succession Act, 1925, which applies to Christians in India, the domicile of origin of an illegitimate child is in the country in which at the time of his birth his mother is domiciled. This indicates that priority, preference and pre-eminence is given to the mother over the father of the concerned child.

8. In the United Kingdom, the Children Act 1989 allocates parental responsibility, which includes all rights, duties, powers, responsibilities and authority of a parent over the child and his/her property. According to Section 2(2) of that Act, parental custody of a child born of unwed parents is with the mother in all cases, and additionally with the father provided he has acquired responsibility in accordance with the provisions of the Act. To acquire responsibility, he would have to register as the child's father, execute a parental responsibility agreement with the mother or obtain a Court order giving him parental responsibility over the child. In the U.S.A., each State has different

child custody laws but predominantly the mother has full legal and physical custody from the time the child is born. Unless an unmarried father establishes his paternity over the child it is generally difficult for him to defeat or overwhelm the preferential claims of the mother to the custody. However, some States assume that both parents who sign the child's Birth Certificate have joint custody, regardless of whether they are married. In Ireland, Section 6(4) of the Guardianship of Infants Act, 1964 ordains - "The mother of an illegitimate infant shall be guardian of the infant." Unless the mother agrees to sign a statutory declaration, an unmarried father must apply to the Court in order to become a legal guardian of his child. Article 176 of the Family Code of the Philippines explicitly provides that "illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled to support in conformity with this Code." This position obtains regardless of whether the father admits paternity. In 2004, the Supreme Court of the Philippines in Joey D. Briones vs. Maricel P. Miguel et al, G.R. No. 156343, held that an illegitimate child is under the sole parental authority of the mother. The law in New Zealand, as laid out in Section 17 of the Care of Children Act, 2004, is that the mother of a child is the sole guardian if she is not married to, or in civil union with, or living as a de facto partner with the father of the child at any time during the period beginning with the conception of the child and ending with the birth of the child. In South Africa, according to the Children's Act No. 38 of 2005, parental responsibility includes the responsibility and the

right (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child. The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child. The father has full parental responsibility if he is married to the mother, or if he was married to her at the time of the child's conception, or at the time of the child's birth or any time in between, or if at the time of the child's birth he was living with the mother in a permanent life-partnership, or if he (i) consents to be identified or successfully applies in terms of Section 26 to be identified as the child's father or pays damages in terms of customary law; (ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and (iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period. This conspectus indicates that the preponderant position that it is the unwed mother who possesses primary custodial and guardianship rights with regard to her children and that the father is not conferred with an equal position merely by virtue of his having fathered the child. This analysis should assist us in a meaningful, dynamic and enduring interpretation of the law as it exists in India.

9. It is thus abundantly clear that the predominant legal thought in different civil and common law jurisdictions spanning the globe as well as in different statutes within India is to bestow guardianship and related rights to the mother

of a child born outside of wedlock. Avowedly, the mother is best suited to care for her offspring, so aptly and comprehensively conveyed in Hindi by the word '*mamta*'. Furthermore, recognizing her maternity would obviate the necessity of determining paternity. In situations such this, where the father has not exhibited any concern for his offspring, giving him legal recognition would be an exercise in futility. In today's society, where women are increasingly choosing to raise their children alone, we see no purpose in imposing an unwilling and unconcerned father on an otherwise viable family nucleus. It seems to us that a man who has chosen to forsake his duties and responsibilities is not a necessary constituent for the wellbeing of the child. The Appellant has taken care to clarify that should her son's father evince any interest in his son, she would not object to his participation in the litigation, or in the event of its culmination, for the custody issue to be revisited. Although the Guardian Court needs no such concession, the mother's intent in insisting that the father should not be publically notified seems to us not to be unreasonable.

10. We feel it necessary to add that the purpose of our analysis of the law in other countries was to arrive at a holistic understanding of what a variety of jurisdictions felt would be in the best interest of the child. It was not, as learned Counsel suggested, to understand the tenets of Christian law. India is a secular nation and it is a cardinal necessity that religion be distanced from law. Therefore, the task before us is to interpret the law of the land, not in light of the

tenets of the parties' religion but in keeping with legislative intent and prevailing case law.

11. It is imperative that the rights of the mother must also be given due consideration. As Ms. Malhotra, learned Senior Counsel for the Appellant, has eloquently argued, the Appellant's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child. Any responsible man would keep track of his offspring and be concerned for the welfare of the child he has brought into the world; this does not appear to be so in the present case, on a perusal of the pleading as they presently portray. Furthermore, Christian unwed mothers in India are disadvantaged when compared to their Hindu counterparts, who are the natural guardians of their illegitimate children by virtue of their maternity alone, without the requirement of any notice to the putative fathers. It would be apposite for us to underscore that our Directive Principles envision the existence of a uniform civil code, but this remains an unaddressed constitutional expectation.

12. We recognize that the father's right to be involved in his child's life may be taken away if Section 11 is read in such a manner that he is not given notice, but given his lack of involvement in the child's life, we find no reason to prioritize his rights over those of the mother or her child. Additionally, given that the Appellant has already issued notice to the public in general by way of a publication in a National Daily and has submitted an affidavit stating that her

guardianship rights may be revoked, altered or amended if at any point the father of the child objects to them, the rights, nay duty of the father have been more than adequately protected.

13. The issue at hand is the interpretation of Section 11 of the Act. As the intention of the Act is to protect the welfare of the child, the applicability of Section 11 would have to be read accordingly. In **Laxmi Kant Pandey** vs. Union of India 1985 (Supp) SCC 701, this Court prohibited notice of guardianship applications from being issued to the biological parents of a child in order to prevent them from tracing the adoptive parents and the child. Although the Guardians and Wards Act was not directly attracted in that case, nevertheless it is important as it reiterates that the welfare of the child takes priority above all else, including the rights of the parents. In the present case we do not find any indication that the welfare of the child would be undermined if the Appellant is not compelled to disclose the identity of the father, or that Court notice is mandatory in the child's interest. On the contrary, we find that this may well protect the child from social stigma and needless controversy.

14. Even in the absence of **Laxmi Kant Pandey**, we are not like mariners in unchartered troubled seas. The observations of a three Judge Bench of this Court in Githa Hariharan v. Reserve Bank of India (1999) 2 SCC 228 are readily recollected. The RBI had refused to accept an application for a fixed deposit in the name of the child signed solely by the mother. In the context of Section 6 of

the Hindu Minority and Guardianship Act as well as Section 19 of the Guardians and Wards Act, this Court had clarified 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 life time 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." This Court has construed the word 'after' in Section 6(a) of the Hindu Minority and Guardianship Act as meaning "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." Thus this Court interpreted the legislation before it in a manner conducive to granting the mother, who was the only involved parent, guardianship rights over the child.

15. In a case where one of the parents petitions the Court for appointment as guardian of her child, we think that the provisions of Section 11 would not be directly applicable. It seems to us that Section 11 applies to a situation where the guardianship of a child is sought by a third party, thereby making it essential for the welfare of the child being given in adoption to garner the views of

child's natural parents. The views of an uninvolved father are not essential, in our opinion, to protect the interests of a child born out of wedlock and being raised solely by his/her mother. We may reiterate that even in the face of the express terms of the statute, this Court had in **Laxmi Kant Pandey** directed that notice should not be sent to the parents, as that was likely to jeopardize the future and interest of the child who was being adopted. The sole factor for consideration before us, therefore, is the welfare of the minor child, regardless of the rights of the parents. We should not be misunderstood as having given our imprimatur to an attempt by one of the spouses to unilaterally seek custody of a child from the marriage behind the back of other spouse. The apprehensions of Mr. Luthra, learned *amicus curiae*, are accordingly addressed.

16. Section 11 is purely procedural; we see no harm or mischief in relaxing its requirements to attain the intendment of the Act. Given that the term "parent" is not defined in the Act, we interpret it, in the case of illegitimate children whose sole caregiver is one of his/her parents, to principally mean that parent alone. Guardianship or custody orders never attain permanence or finality and can be questioned at any time, by any person genuinely concerned for the minor child, if the child's welfare is in peril. The uninvolved parent is therefore not precluded from approaching the Guardian Court to quash, vary or modify its orders if the best interests of the child so indicate. There is thus no mandatory and inflexible procedural requirement of notice to be served to the

putative father in connection with a guardianship or custody petition preferred by the natural mother of the child of whom she is the sole caregiver.

17. Implicit in the notion and width of welfare of the child, as one of its primary concomitants, is the right of the child to know the identity of his or her parents. This right has now found unquestionable recognition in the Convention on the Rights of the Child, which India has acceded to on 11th November, 1992. This Convention pointedly makes mention, *inter alia*, to the Universal Declaration of Human Rights. For facility of reference the salient provisions are reproduced -

> ***Article 1***
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> For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.
>
> ***Article 3***
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the

> upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
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> *Article 21*
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> States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
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> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
>
> *Article 27*
>
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
>
> 4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

18. In **Laxmi Kant Pandey**, this Court duly noted the provisions of the Convention on the Rights of the Child, but in the general context of adoption of children and, in particular, regarding the necessity to involve the natural parents in the consequent guardianship/custody proceedings. The provisions of the Convention which we have extracted indeed reiterate the settled legal position

that the welfare of the child is of paramount consideration *vis a vis* the perceived rights of parents not only so far as the law in India is concerned, but preponderantly in all jurisdictions across the globe. We are mindful of the fact that we are presently not confronted with a custody conflict and, therefore, there is no reason whatsoever to even contemplate the competence or otherwise of the Appellant as custodian of the interests and welfare of her child. However, we would be loathe to lose perspective of our *parens patriae* obligations, and in that regard we need to ensure that the child's right to know the identity of his parents is not vitiated, undermined, compromised or jeopardised. In order to secure and safeguard this right, we have interviewed the Appellant and impressed upon her the need to disclose the name of the father to her son. She has disclosed his name, along with some particulars to us; she states that she has no further information about him. These particulars have been placed in an envelope and duly sealed, and may be read only pursuant to a specific direction of this Court.

19. We are greatly perturbed by the fact that the Appellant has not obtained a Birth Certificate for her son who is nearly five years old. This is bound to create problems for the child in the future. In this regard, the Appellant has not sought any relief either before us or before any of the Courts below. It is a misplaced assumption in the law as it is presently perceived that the issuance of a Birth Certificate would be a logical corollary to the Appellant succeeding in

her guardianship petition. It may be recalled that owing to curial fiat, it is no longer necessary to state the name of the father in applications seeking admission of children to school, as well as for obtaining a passport for a minor child. However, in both these cases, it may still remain necessary to furnish a Birth Certificate. The law is dynamic and is expected to diligently keep pace with time and the legal conundrums and enigmas it presents. There is no gainsaying that the identity of the mother is never in doubt. Accordingly, we direct that if a single parent/unwed mother applies for the issuance of a Birth Certificate for a child born from her womb, the Authorities concerned may only require her to furnish an affidavit to this effect, and must thereupon issue the Birth Certificate, unless there is a Court direction to the contrary. Trite though it is, yet we emphasise that it is the responsibility of the State to ensure that no citizen suffers any inconvenience or disadvantage merely because the parents fail or neglect to register the birth. Nay, it is the duty of the State to take requisite steps for recording every birth of every citizen. To remove any possible doubt, the direction pertaining to issuance of the Birth Certificate is intendedly not restricted to the circumstances or the parties before us.

20. We think it necessary to also underscore the fact that the Guardian Court as well as the High Court which was in seisin of the Appeal ought not to have lost sight of the fact that they had been called upon to discharge their *parens patriae* jurisdiction. Upon a guardianship petition being laid before the Court,

the concerned child ceases to be in the exclusive custody of the parents; thereafter, until the attainment of majority, the child continues in curial curatorship. Having received knowledge of a situation that vitally affected the future and welfare of a child, the Courts below could be seen as having been derelict in their duty in merely dismissing the petition without considering all the problems, complexities and complications concerning the child brought within its portals.

21. The Appeal is therefore allowed. The Guardian Court is directed to recall the dismissal order passed by it and thereafter consider the Appellant's application for guardianship expeditiously without requiring notice to be given to the putative father of the child.

……..J.
(VIKRAMAJIT SEN)

……..J.
(ABHAY MANOHAR SAPRE)

New Delhi
July 06, 2015.