

5th SURANA & SURANA AND ARMY INSTITUTE OF LAW
NATIONAL FAMILY LAW MOOT COURT COMPETITION 2024

BEFORE THE HON'BLE FAMILY COURT OF KOLKATA

ORIGINAL JURISDICTION

UNDER SECTION 7 OF THE FAMILY COURTS ACT, 1984

IN THE MATTER OF

Mrs. AMBIKA..... APPLICANT

V.

Ms. SAKSHI.....RESPONDENT

WRITTEN SUBMISSIONS ON THE BEHALF OF APPLICANT

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2. The Hindu Minority and Guardianship Act, 1956.
3. The Hindu Widows Remarriage and Property Act, 1989.
4. The Hindu Succession Act, 1956
5. The Constitution of India.
6. The Juvenile Justice (Care & Protection) Act, 2015.
7. The Juvenile Justice (Care And Protection of Children) Rules, 2007.
8. The Family Courts Act, 1984.
9. The Code of Civil Procedure, 1908

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2. Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217.
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2. LIST OF ABBREVIATIONS

LIST OF ABBREVIATION	FULL FORM
AIR	All India Reporter
All	Allahabad
AP	Andhra Pradesh
Art.	Article
CRC	Convention on Rights of Children.
Del	Delhi
GWA	Guardians and Wards Act
HC	High Court
HAMA	Hindu Adoption and Maintenance Act
HMGA	Hindu Minority and Guardianship Act
HMA	Hindu Marriage Act
HWR	Hindu Widow Remarriage
HWRP	Hindu Widows Remarriage and Property
HP	Himanchal Pradesh
Hon'ble	Honourable
J.	Justice
JJ.	Juvenile Justice (Care & Protection) Act
KANT	Karnataka
Ker	Kerala
Mad	Madras
MP	Madhya Pradesh
Ors.	Others
Para	Paragraph
Pat	Patna
RBI	Reserve Bank of India
RCR	Recent Civil Reports
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports

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Sec.	Section
TC	Team Code
UP	Uttar Pradesh
Vol.	Volume
vs.	Versus
v.	Versus

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3. STATEMENT OF JURISDICTION

The Applicant has herein approached the Hon'ble Family Court of Kolkata by invoking the **Section 7** of the Family Court's Act, 1984¹ which states that a family court has and can exercise all the jurisdictions exercised by the district court or subordinate civil court, corresponding to any law for the time being in force provided that the disputes are of the nature as specified in the explanations of this section.

With effect to the custody case filed by the Applicant, the **explanation (g)** to this section states that the family court can handle cases relating to a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor. With regard to the property claimed by Applicant, **clause (b) of sub-section 2 to Section 7** of the Family Courts Act 1984 invokes the jurisdiction of Code of Civil Procedure, 1908. The jurisdiction of the

¹ **Jurisdiction.** —

(1) Subject to the other provisions of this Act, a Family Court shall—

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation. —The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely: —

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

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present case shall also be read in conjunction with **Section 9²**, **Section 15³** and **Section 151⁴** of the Code of Civil Procedure, 1908.

THE PRESENT MEMORANDUM SETS FORTH THE FACTS, CONTENTIONS, AND ARGUMENTS IN THE PRESENT CASE.

² ***Courts to try all civil suits unless barred.*** - *The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.*

³ ***Court in which suits to be instituted.*** - *Every suit shall be instituted in the Court of the lowest grade competent to try it.*

⁴ ***Saving of inherent powers of Court.*** - *Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.*

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4. STATEMENT OF FACTS

Backdrop

Sidhant and Ambika, colleagues turned spouses, faced strains in their marriage. Ambika, seeking solace from friend Akaash, was burdened by household duties and Sidhant's indifference. Their son Armaan's illness exacerbates tensions between the couple. Siddhant, has an unmarried elder sister named Sakshi who works as a lecturer in a private college. Following their parents' passing away, Siddhant battled depression, seeking help from a psychiatrist. He possesses a century old ancestral bungalow, alongside a grand residence and a showroom generating a monthly rent of Rs 2 lakh. Their father's unregistered will dictates the inheritance of all properties to Siddhant, Sakshi, and the offspring of Siddhant and Ambika.

Sequence of Incidents Leading to the Conflict

On November 20, 2022, Sakshi visited Bangalore for a friend's wedding and met Ambika, who confided in her about struggling to balance work and childcare. Sakshi offered to care for Ambika's son, Armaan, temporarily. On December 28, 2022, while caring for Armaan at the hospital, Siddhant expressed to Sakshi that she was Armaan's true mother and urged her to always care for him. Tragically, Siddhant died later that night due to alcohol and sleeping pill consumption. On December 31, Ambika asked Sakshi to continue caring for Armaan in Kolkata, as she needed to focus on her job in Delhi as she wanted to give Armaan a secured future. Ambika planned to take Armaan permanently once settled. However, when Ambika attempted to take Armaan with her on March 11, 2023, he clung to Sakshi, causing tension. In June 2023, Akaash proposed to Ambika, intending to adopt Armaan after marriage, which took place on July 30, 2023. In October 2023, Ambika learned she was pregnant. Eventually, Ambika arrived at Kolkata to bring Armaan back permanently on February 10, 2024.

Action taken by the Parties

Ambika informs Sakshi of her intention to pursue legal avenues to regain custody of Armaan, whom she claims as her biological child. Sakshi declines to return Armaan. Ambika initiates legal proceedings seeking custody based on her status as the natural guardian and also asserts her entitlement to a portion of the property.

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5. STATEMENT OF ISSUES

ISSUE 1:

WHETHER THE HON'BLE FAMILY COURT OF KOLKATA HAS JURISDICTION TO HEAR AND DECIDE UPON THE PRESENT MATTER?

ISSUE 2:

WHETHER AMBIKA'S CLAIM AS THE NATURAL GUARDIAN OR SAKSHI'S DEFENSE TO BE APPOINTED AS THE LEGAL GUARDIAN IS IN THE BEST INTEREST AND WELFARE OF THE CHILD?

ISSUE 3:

WHETHER REMARRIAGE OF AMBIKA AMOUNTS TO THE TERMINATION OF GUARDIANSHIP OVER HER SON AND HER SHARE IN PROPERTY?

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6. SUMMARY OF ARGUMENTS

[1] WHETHER THE HON'BLE FAMILY COURT OF KOLKATA HAS JURISDICTION TO HEAR AND DECIDE UPON THE PRESENT MATTER?

It is humbly submitted, that Ambika's petition is maintainable in the Family Court of Kolkata because she has **locus standi** to file it as a natural guardian of her child, Armaan, who was denied custody after her husband's death. The cause of action arose in Kolkata, where Sakshi resides, and where the ancestral property is located. The court has jurisdiction over both the custody matter and Ambika's claim to her deceased husband's property under relevant laws, overriding civil court jurisdiction. The jurisdiction of the Code of Civil Procedure, 1908 is invoked to establish the Family Court's competence.

[2] WHETHER AMBIKA'S CLAIM AS THE NATURAL GUARDIAN OR SAKSHI'S DEFENSE TO BE APPOINTED AS THE LEGAL GUARDIAN IS IN THE BEST INTEREST AND WELFARE OF THE CHILD?

It is humbly submitted before the Hon'ble Court that the case revolves around Armaan's custody, weighing Ambika's claim as the biological mother against Sakshi's bid for legal guardianship. Emphasizing the child's welfare, the argument draws on legal provisions and principles, underscoring Ambika's natural bond and her responsibility in Armaan's upbringing. It contests Sakshi's suitability, asserting Ambika's fitness as a guardian. The submission is backed by statutory definitions, international conventions, and legal precedents, aiming to establish that granting custody to Ambika is in Armaan's best interest and welfare.

[3] WHETHER REMARRIAGE OF AMBIKA AMOUNTS TO THE TERMINATION OF GUARDIANSHIP OVER HER SON AND HER SHARE IN PROPERTY?

It is humbly submitted that Ambika's remarriage with Akaash does not terminate her guardianship over Armaan or her entitlement to Siddhant's property. Citing Hindu laws, it argues that neither the Hindu Minority and Guardianship Act nor the Hindu Succession Act provides grounds for terminating guardianship due to remarriage. Emphasizing Ambika's pivotal role in Armaan's upbringing, it contends that her remarriage introduces positive changes for Armaan's well-being. Additionally, it asserts Ambika's right to claim her share in Siddhant's property post-remarriage, backed by legal precedents.

7. ARGUMENTS ADVANCED

[1] WHETHER THE HON'BLE FAMILY COURT OF KOLKATA HAS JURISDICTION TO HEAR AND DECIDE UPON THE PRESENT MATTER?

1. It is most humbly and respectfully submitted that the petition filed by Ambika is **maintainable** in the Hon'ble Family Court of Kolkata. The further mentioned sub-issues legally justify this claim.

[1.1] Ambika has locus standi to file the petition:

2. In the present matter, Ambika, being a natural guardian of Armaan after Siddhant' death, has been denied of the custody of her child⁵ which is a violation of the right of any natural guardian⁶. It is humbly submitted before this Hon'ble Court that with regards to the property dispute, Ambika has been indirectly denied of her share in her former deceased husband's property by Sakshi as mentioned in the proposition,⁷ thus infringing her legal right to property.

[1.2] Cause of action arose in Kolkata:

3. It is humbly submitted before this court that the cause of action arose when Sakshi denied Ambika the physical custody of Armaan as mentioned in paragraph 24 of the proposition. This cause of action arose in Kolkata, where Sakshi resided. Also, the ancestral and immovable property of Siddhant is situated at Kolkata in which Ambika's share is denied to her.

[1.3] The Hon'ble Court has the jurisdiction try the custody matter of Armaan:

4. It is humbly submitted that the **explanation (g) in Section 7(1)** of the Family Courts Act, 1984 is read as: "*(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.*" It provides that the family court has jurisdiction to grant the custody of the child to a proper person and to make that right person the guardian of a minor. The cases related to the custody of the child are filed before the family court where

⁵ Moot Proposition para 24

⁶ Dr. Paras Diwan, *Modern Hindu Law (Codified and Uncodified)* (24th edn, 2019) 272

⁷ Moot Proposition para 21

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the child usually resides, as per **Section 9** of the Guardian and Wards Act, 1890⁸. It is submitted that from paragraph 16, 17, 19 and 24 of the proposition, it is quite evident that in the present case, the child (Armaan) dwells at Kolkata. It is submitted that according to the present circumstance, only Family Court in Kolkata has the jurisdiction to try the case. According to the **Section 8** of the Family Courts Act, 1984⁹, the jurisdiction of Civil Courts or any other court in regard to the subject matter of the jurisdiction of the Family Court, as provided in the explanations, is barred. **Section 20**¹⁰ also endorses the view which we have taken, since the Family Courts Act, 1984, has an **overriding effect** on other law.

[1.4] The Hon'ble Court has the jurisdiction to try Ambika's claim of the property:

5. It is submitted that by **Section 7(2) (b)** of the Family Courts Act, 1984, we have the right to invoke the jurisdiction of the Code of Civil Procedure, 1908. It is read as: "*(b) such other jurisdiction as may be conferred on it by any other enactment.*" And as per **Section 9** of the Code of Civil Procedure, 1908¹¹, it is quite evident that for the present matter, this suit is of civil nature¹². **Section 15** of Code of Civil Procedure, 1908 says: "***Court in which suits to be instituted.*** -Every suit shall be instituted in the Court of the lowest grade competent to try it."

6. For the present matter, the jurisdiction of civil court is ousted as the valuation of the suit is above the pecuniary limit of the Civil Court of Kolkata, as stipulated by The City Civil Court Act, 1953¹³. Hence, the Family Court of Kolkata is the lowest competent court to try the present matter after it. Further, in order to get the speedy and effective justice and avoidance of multiplicity of proceedings in more than one courts, **Section 151** of Code of Civil Procedure, 1908 is invoked which deals with *the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court*. Thus, it is clear that the present court has the requisite jurisdiction to hear and decide both the matters.

⁸ ***Court having jurisdiction to entertain application.*** — (1) If the application is with respect to the guardianship of the person of the minor, it shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides.

⁹ The Family Courts Act, 1984, s 8

¹⁰ ***Act to have overriding effect.*** The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

¹¹ ***Courts to try all civil suits unless barred—*** The Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

¹² *Ram Sarup Gupta (Dead) By Lrs vs Bishun Narain Inter College & Ors* [1987] AIR 1242.

¹³ The City Civil Court Act, 1953, s 5

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[2] WHETHER AMBIKA'S CLAIM AS THE NATURAL GUARDIAN OR SAKSHI'S DEFENSE TO BE APPOINTED AS THE LEGAL GUARDIAN IS IN THE BEST INTEREST AND WELFARE OF THE CHILD?

1. It is humbly submitted before the Hon'ble Court that Ambika's claim as the natural guardian of Armaan weighs its significance against Sakshi's defense to be appointed as the legal guardian because it is in the best interest and welfare of the 5 years old child as Ambika is his biological mother and knows better about the wellbeing of the child. She has always taken steps for the welfare of the boy and takes decisions to better his life.

2. Several provisions of Juvenile Justice (Care & Protection) Act, 2015 (JJ Act) can be relied upon, to understand the content and meaning of the expression "the best interest of child". The said expression - employed by Courts in determining the issue of whether the child should be directed to be returned to his country of origin, or not, is legally defined in the JJ Act. The said statutory definition, it is argued, can be useful in understanding the meaning of that expression even for the present purpose. "Best interest of the child is a decision taken to ensure the physical, emotional, intellectual, social and moral development of juvenile or child."¹⁴ Specific reliance is made on **Section 2 (9)** and **Sec 3 (iv), (v), and (xiii)** of the JJ Act. **Sec 3(iv)** of the JJ Act mandates that all agencies should base their decisions in respect of a child on the primary consideration that they are in the best interest of the child, and to help the child to develop full potential. The best interest of the child is of paramount consideration and should involve the fulfilment of his/ her basic rights and needs - socially, physically, and emotionally for the overall development of the child. One of the statutorily recognized fundamental principles, is that "The primary responsibility of care, nurture, and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be".¹⁵ It is submitted that under the *Principle of repatriation and restoration*: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.¹⁶

¹⁴ The Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 2(c)

¹⁵ The Juvenile Justice (Care & Protection) Act 2015, s 3(v).

¹⁶ The Juvenile Justice (Care & Protection) Act 2015, s 3(xiii).

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3. Furthermore, the Indian legislation has defined this concept as “*“best interest of child” means the basis for any decision taken regarding the child, to ensure fulfilment of his basic rights and needs, identity, social well-being and physical, emotional and intellectual development.*”¹⁷ It is in the interest of the State that children should be properly brought up and educated and the State as *parens patriae* is duty bound to look to the maintenance and education of the children. The Indian Constitution being alive to this aspect of the matter incorporated it as one of the directive principles of State Policy in **Chapter-IV 39(f)**.¹⁸

4. The principle "welfare of the child" not only dominates the domestic legal framework in our country, but the same concept is found in International Human Rights Law as well. In the United Nations Conventions on the Rights of the Child, it has generally been provided that all actions concerning children, irrespective of whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the well-being and the best interest of the child is of primary consideration.¹⁹

5. When the question of custody arises, the primary factor of consideration by the courts will be the welfare of the child, which includes a safe environment for the upbringing of the child. The ethical background and mental condition of the applicant is important to be considered while giving custody of the minor child. A balance has to be struck between the attachment and sentiments of the parties towards the minor children and the primary aspect of the welfare of the minors, which is of paramount importance.

6. The general principle governing the award of custody of a minor is succinctly stated in the following words in Halsbury's Laws of England, Fourth Edition, Vol. 24, Article 511 at page 217: *...Where in any proceedings before any court the custody or upbringing of a minor is in question, then, in deciding that question, the court must regard the minor's welfare as the first and paramount consideration.*

7. In the American Jurisprudence, Vol. 39, Second Edition, Paragraph 148 at pages 280-281, the same principle is enunciated in the following words: *..... a court is not bound to deliver a child into the custody of any claimant or of any person, but should, in the exercise of*

¹⁷ The JJ Act 2015, s 2(9)

¹⁸ *Meera Agarwalla Bansal and Anr. v. Shyam Sundar Agarwalla* [2002] I DMC 593.

¹⁹ Prashant Chandra, *Laws Relating to LIBERTY, CHILD CUSTODY AND DETENTION* (Pg 220, 1st edn., LexisNexis, 2023)

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a sound discretion, after careful consideration of the facts, leave it in such custody as its welfare at the time appears to require.

[2.1] Ambika has a legal-right as the biological mother to get the custody of Armaan.

8. Ambika is Armaan's biological mother, and there is a natural bond between them and this bond is fundamental to the child's well-being. The preservation of the biological ties between parents and children is significant as it contributes to a child's identity and sense of self. Being the biological mother, Ambika has a unique and irreplaceable bond with the child and also a legal right to get his custody.

9. These arguments are in line with **Section 6(a)** of the HMGA, 1956 which recognizes the mother as a natural guardian of the child. **Proviso to clause (a) of S. 6.** HMGA lays down that the custody of a minor who has not completed the age of five shall ordinarily be with the mother. Thus, the mother is entitled to the custody of the child below five years, unless the welfare of the minor requires otherwise.²⁰ But this does not mean that she is not entitled to custody thereafter.²¹ The Court is under a duty to appoint the most suitable person amongst the rival claimants for guardianship. Under **section 17** of the GWA a person who under the personal law would be entitled to the custody of the child in preference to anyone else should be appointed as the guardian. This, is however a flexible rule. The scope of **section 17** of the Act is that the Court has to see who of the several applicants has a preferential right to be appointed as guardian of the minor under the personal law keeping also in view the welfare of the minor.²² According to Hindu Personal Law the mother has a preferential right over his paternal aunt (Sakshi) to be appointed as guardian of the minor.

10. The argument also gathers support from the leading case of Githa Hariharan v. RBI²³ which was a watershed judgment on the subject-matter of guardianship and paved the way for recognition of mothers as natural guardians.²⁴

²⁰ *Chandra v. Prem* [1969] Del. 283.

²¹ Dr. Paras Diwan, *Modern Hindu Law* (Pg 273, 25th edn., Allahabad law Agency, 2022)

²² *Mohd. Ramzan Magrey v. Taja* [1983] SCC OnLine J&K 3

²³ [1999] 2 SCC 228.

²⁴ Tanisha Saini, 'Rights of Mothers as Natural Guardians in the Changing Indian Society *Githa Hariharan v. RBI and ABC v. State: Case comments*' (SCC Online Times, 8 September 2022)

<https://www.sconline.com/blog/post/2022/09/08/rights-of-mothers-as-natural-guardians-in-the-changing-indian-society-githa-hariharan-v-rbi-and-abc-v-state-case-comments/> accessed 15 February 2024

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11. The term ‘Guardian’ is defined by GWA, 1890 as a “*person having the care of the person of a minor or of his property or of both his person and property*”.²⁵ Reference may be made to the decision of the Hon’ble SC in the case of J.V. Gajre vs. Pathankhan and Ors.²⁶ in which the Court in paragraph 11 of the report observed: *We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), the mother is the natural guardian after the father. The above Act came into force on August 25, 1956, and under sec 6 the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother.*

12. In **section 19** of the GWA, it has been laid down that no third party be appointed as a guardian if either of the parents is alive. The only exception would be in those cases where the parent, though alive, is not fit to take care and adequately safeguard the well-being and welfare of the minor. If the father is living, then in view of **section 19(b)** thereof; no one else can be declared or appointed to be the guardian of the person of the minor, unless the Court is of opinion that the father (or mother) is ‘unfit’ to be a guardian.²⁷ It is clarified in the forthcoming arguments that Armaan’s well-being rests in the care and protection of Ambika. Thus, Sakshi cannot be entitled to his guardianship while Ambika, being his natural guardian is alive.

[2.2] Ambika has been responsible enough for Armaan’s care and upbringing for a significant period:

13. Ambika, as Armaan's mother, has been responsible for his care and upbringing for a significant period. This responsibility should be recognized in determining the child's best interest. Ambika has been actively involved in Armaan's upbringing since his birth in December 2018. This is evident from her acts of taking care of Armaan during the period of Corona lockdown, dealing with his health issues. When Armaan was diagnosed with a severe case of Rickets in August 2020, Ambika was actively involved and concerned about his health. This demonstrates her commitment to Armaan's well-being.

²⁵ Guardians and Wards Act 1890, s 4(2)

²⁶ [1970] 2 SCC 717.

²⁷ *Raj Kumar Gupta v. Barbara Gupta* [1988] SCC OnLine Cal 177.

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14. Even though she had no support from her husband, who did not contribute to supporting Ambika in carrying on household chores neither physically nor financially rather his drinking habit became worse. Ambika gave up her outgoing nature, her love for parties and clubbing, and her social life and completely took to working and taking care of Armaan. Ambika's decision to resign from her job on 15.12.22 and move to Delhi to seek better opportunities by joining a new venture to make better arrangements for his future is another instance that portrays her willingness to prioritize Armaan's well-being and make personal sacrifices for his sake. Ambika's attempt to take Armaan with her on 11.03.23, which is met with resistance from Sakshi, where she also stated that once she arranges for her own accommodation at Delhi, she would take Armaan to Delhi with her permanently emphasizes Ambika's ongoing commitment to be actively involved in Armaan's life. It is fairly possible that Sakshi might have manipulated Armaan to act that way on 12.03.23 which compelled Ambika to leave for Delhi without Armaan. The child might have been tutored to make him hostile towards his mother.

15. **Sub-section (3) of Section 17** of the Guardians and Wards Act,1890 provides that *if the minor is old enough to form an intelligent preference, the Court may consider that preference*. But, in the present case, Armaan is just a small boy of not even six years. There is a high chance that his act of jumping off his mother's lap toward Sakshi was a result of Sakshi's plan which might have been engineered to falsely convince Armaan that not Ambika but Sakshi was his real mother because Sakshi was in a position to impact Armaan's choice. In this connection, it is worth mentioning here that Sakshi wants to wipe out the existence and identity of Armaan's biological mother from his mind and if it is so, then it may be disastrous for the future of the son. The child should not be deprived of the love and affection of the mother which is required for the proper development of the mental health of the child.

16. The facts highlighted above suggest that Ambika has a strong emotional connection with Armaan and she has continually put in efforts to protect his interest and keep in touch with her biological child. The Calcutta High Court has held, "It is the settled principle of law that while deciding the question of custody of the child, the paramount consideration is the welfare of the child. In order to decide the question of welfare of the child, the surrounding facts and

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circumstances are to be taken into consideration.”²⁸ As per **Section 7** of the GWA the court is satisfied that it is for the welfare of the minor order to appoint a guardian of his person.

17. **Section 19(b)** of the GWA states that a court is not authorized to appoint a guardian to the person of a minor, whose father or mother is alive, and who, in the opinion of the court, is not unfit to be a guardian. All the acts of Ambika are centered around Armaan which signifies her fitness to be a guardian and therefore it would be in the best interest and welfare of the child that his custody be given to his biological mother, Ambika.

[2.3] Other factors which show that it would be in the best interest and welfare of Armaan to live with Ambika:

18. Ambika’s prior decision to send Armaan with Sakshi was not a seed of her mind rather it was Sakshi who suggested that she would take Armaan with her for some time and in the mean-while Ambika could gather herself. Therefore, it can be inferred that Ambika never wanted to part with the child. The circumstances called for the said step. The situation was difficult wherein she found it difficult to balance her job and child simultaneously as Ambika was looking after the child along with managing her official work all by herself. She sent Armaan with Sakshi for she considered it in his welfare at that point in time. But now Ambika will have the support of her husband, Aakash which will facilitate her to take care of the child along with pursuing her career. On 31.12.22 while requesting Sakshi to continue to keep Armaan at Kolkata, Ambika stated that she has to sustain herself and will have to work harder for herself and Armaan. This proves that Ambika has always intended to prioritize Armaan’s well-being and has acted accordingly so that she can secure a better future for the boy.

19. In a recent case of it was held, “*A child, especially a child of tender years, requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right.*”²⁹ Also, in the case of T.S. Ramesh vs V. Krithika³⁰ of the Madras High Court N.KIRUBAKARAN.J. held, “*A child is bound to have father's love and guidance and mother's care and affection, which are the birth rights of every child.*”

²⁸ *Nilratan Kundu v. Abhijit Kundu* [2008] 2 ICC Cal DB 445.

²⁹ *Yashita Sahu v. State of Rajasthan* [2020] 3 SCC 67.

³⁰ [2023] SCC OnLine Mad 1464.

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Besides these, in the case of Selvaraj v. Revathi³¹ the Court was of the view that “It is always good for the upbringing of the child that he has love and affection of both the parents.”

20. In Report No.257 of the **LAW COMMISSION OF INDIA** issued a Consultation Paper on Adopting a Shared Parenting System in India. The Consultation Paper posed a set of questions pertaining to shared parenting and invited comments from the public. One of the responses read, “*Children need both their mother and father—they seek advice from each parent in different situations.*” Psychological studies reveal that the involvement of both parents in child rearing is preferable to sole custody arrangements.³² In light of these points, it would be in the best interest and welfare of the child that his custody is given to Ambika because in her household he would get the love and affection of both mother and father as Akaash has shown strong intentions to adopt Armaan after marriage. His suggestions to Ambika to bring Armaan back on several occasions signify his interest in raising Armaan in the best way possible.

21. In the case of Athar Hussain v. Syed Siraj Ahmed³³, the court held that it must determine if a child is in lawful custody with a third person, not a natural guardian, as a natural guardian has legal rights to the child. Only in exceptional cases can guardianship be removed from the mother. If Sakshi enters a marital relationship, Armaan's interest may be neglected, causing him to become alone and negatively impact his mental and emotional well-being, as emphasized by the court in a judgement.³⁴

22. Welfare of the minor child is of paramount consideration in the appointment of a guardian.³⁵ The term guardian has to be taken in its widest possible sense. It has to be measured not only in terms of money and physical comfort but also should include moral and ethical welfare of the child. Welfare of the child depends on facts and circumstances of each particular case.³⁶ And in this case depending on facts and circumstances as explained above, Ambika is the best custodian of Armaan’s welfare.

³¹ [2023] SCC OnLine SC 1644.

³² Glover, R. & Steel, C., ‘Comparing the Effects on the Child of Post-Divorce Parenting Arrangements, Journal of Divorce’ [1989] Vol. 12 No. 2–3

³³ [2010] AIR SC 1417.

³⁴ *Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam* [2010] 10 SCC 314.

³⁵ The Hindu Minority and Guardianship Act 1956, s 13

³⁶ *Bimla Devi v Subhash Chandra Yadav* [1992] AIR Pat HC 76, see also *Elizabeth Dinshaw v Arvand M Dinshaw* [1987] AIR SC 3.

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[3] WHETHER REMARRIAGE OF AMBIKA AMOUNTS TO THE TERMINATION OF GUARDIANSHIP OVER HER SON AND HER SHARE IN PROPERTY?

1. It is humbly submitted before the Hon'ble Court that the remarriage of Ambika with Akaash does not amount to the termination of guardianship over her son and her share in property. This is explained by the following sub issues:

[3.1] The remarriage of Ambika does not amount to termination of guardianship over her son:

2. It is humbly submitted that the **remarriage of a mother** does **not** automatically lead to the termination of her guardianship rights. Under the **Hindu Minority and Guardianship Act, 1956**, every natural guardian has a duty to act in the best interest of their child. This includes taking care of the child's needs, education, health, and overall well-being. **Section 13** of the Act emphasizes the welfare of the child as the paramount consideration. **It grants the court the authority to terminate guardianship if the appointment is not made in the child's best interest.** The guardian means a person having the care of the person of a minor or of his property, or of both his person and property;³⁷. It is also mentioned that - "*The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property are—in the case of a boy or an unmarried girl—the father, and after him, the mother.*"³⁸. In the present case, the fact that Siddhant is no longer alive, Ambika is unquestionably Armaan's natural guardian.

3. In the case of Mohd. Irshad & Anr vs. Nadeem³⁹, the Delhi High Court ruled that mere second marriage of the father in the circumstances when he has lost his first wife, cannot be held per se a disqualification for him continue as a Natural Guardian. Similarly, it may be applied to the matter at hand, where Ambika is Armaan's natural guardian and merely because she decided to go ahead in life, and entered into a second marriage, it provides no ground to deprive her of the custody of Armaan.

[3.1.1] Factors considered by the court for termination of guardianship:

³⁷ The Guardians and Wards Act 1890, s 4(2)

³⁸ The Hindu Minority and Guardianship Act 1956, s 6(a)

³⁹ *Mohd. Irshad & Anr vs. Nadeem* [2023] LiveLaw (Del) 786.

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4. **The HMGA, 1956**, as mentioned in the case of Jijabai Vithalrao Gajre vs Pathankhan & Ors.⁴⁰, allows for the termination of a guardian under specific circumstances:

- i. **Death or Resignation:** A guardian's role terminates upon their **death** or if they voluntarily **resign** from the position.
- ii. **Incapacity:** If the guardian becomes **incapable** of fulfilling their duties (due to illness, mental incapacity, etc.), the court may appoint a new guardian.
- iii. **Misconduct or Neglect:** The court can terminate guardianship if the guardian is found guilty of **misconduct** or **neglect** towards the child's welfare.
- iv. **Child's Best Interest:** The paramount consideration is always the **child's best interest**.

5. It is submitted before the court that none of the aforementioned parameters address remarriage as a ground. Furthermore, Ambika is not meeting any prerequisites to get her guardianship over Armaan terminated. Her care for Armaan is genuine which is evident from her aspiration to become financially secure in order to provide him a better future.

[3.1.2] Mothers have an undeniable and consequential role in the child's upbringing:

6. The role of a mother is second to none. In the case of Chandima Janaka Wijesinghe v. Union of India⁴¹, the Bombay High Court remarked that to refuse a woman of her rights as a mother is parallel to refusing to acknowledge and respect her very core biological and social identity. It is submitted before the court that there can be no substitute to the affection of a natural parent. Undeniably, Sakshi who is the paternal aunt may have immense love and affection for Armaan as is evident by the care she provided to Armaan in every possible way, but it cannot substitute the love and affection of a natural parent. Ambika was the only one who took care of Armaan round-the-clock when he was ill. The court in Lekha vs P. Anil Kumar⁴² remarked that "*Since it is the mother who would have the interest of the minor most at heart, the tender years of a child needing the care, protection and guidance of the most interested person, the mother has come to be preferred to others. The fact that the mother has married again after the death of her first husband is no ground for depriving the mother of her parental*

⁴⁰ *Jijabai Vithalrao Gajre vs Pathankhan & Ors.* [1971] AIR SC 315.

⁴¹ *Chandima Janaka Wijesinghe v. Union of India* [2021] AIR BOM 1161.

⁴² *Lekha vs P. Anil Kumar* [2006] AIR SCW 6358.

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right of custody. The mother may have shortcomings but that does not imply that she is not deserving of the solace and custody of her child. If the court forms the impression that the mother is normal and independent, young woman and shows no indication of imbalance of mind in her, then in the end the custody of the minor child should not be refused to her". In the case of Rajeev Singh v. Smt. Gurpreet Kaur⁴³, the court held that the wife's remarriage did **not** automatically extinguish her guardianship rights. The Supreme Court in ABC v. State⁴⁴, reiterated that the mother's remarriage does not automatically deprive her of guardianship. It is submitted before the court that even the *disparity in the financial status cannot be a relevant factor for denying the custody of a child to the natural parent*. Even though Ambika and Akaash are facing financial difficulties, this predicament won't necessarily last for lifetime.

[3.1.3] Impact of remarriage of Ambika on Armaan:

7. Remarriage of the custodial parent introduces changes such as a new home, family, perhaps even a different city for the children. A stepparent can **catalyse positive transformations** if the remarriage brings financial stability, emotional harmony, and overall well-being. It is submitted that Akaash genuinely cares about Armaan as he repeatedly urged Ambika to bring Armaan to Delhi. He expressed the desire to adopt him following their marriage. He is a man with generous character who stood with Ambika during her difficult moments. He is a partner who fosters a positive influence on Ambika's life and shares a harmonic link with Armaan, without even having met the child. **Thus, alongside Ambika's love and care, Arman will also receive paternal devotion from Akaash.** Furthermore, it can be inferred from the **Article 21** of the Constitution⁴⁵ that it is the right of a child to develop his personality and intelligence. And this is only achievable in a favourable environment, which would not be attainable if Armaan remains with Sakshi.

[3.1.4] Child's wishes and best interests:

8. It is submitted that Courts increasingly recognize the child's voice in custody matters. If the child expresses a desire to stay with the mother, especially after her remarriage, courts

⁴³ *Rajeev Singh v. Smt. Gurpreet Kaur* [2018] AIR ALL 620.

⁴⁴ *ABC (Karuna Purti) v. State (NCT of Delhi)* [2015] AIR SC 2569.

⁴⁵ ***Protection of life and personal liberty*** -No person shall be deprived of his life or personal liberty except according to procedure established by law.

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take cognizance of this preference. The child's emotional well-being, educational prospects, and overall development are of pivotal consideration. **Section 12** of the Family Courts Act, 1890 talks about Assistance of medical and welfare experts. However, in the present case, no interview with Armaan has taken place as of yet to ascertain his interests or opinions. In *Bai Tara v. Mohanlal*⁴⁶, the Hon'ble court remarked that "*The boy is of tender age and I think that at present the personal care of the mother is a paramount consideration.*" In that case the boy was seven years old. In the present case, Armaan is just five years and 2 months old, so what was urged in *Bai Tara v. Mohanlal* can be applied with even greater force to the present case.

[3.2]. Ambika is entitled to her share in the property:

[3.2.1] Ambika has a right to remarry:

9. It is submitted before the court that Ambika experienced a challenging marriage with Siddhant. She was the sole breadwinner and was in charge of running the family and caring for Armaan. Siddhant was ignorant and abusive towards her. Ambika had the right to remarry following his death, and her marriage to Akaash was legally recognized under **Section 3** of The Hindu Widow's Remarriage and Property Act, 1989. The Act legalizes the remarriage of Hindu widows.⁴⁷

[3.2.2] A widow can claim property after the second marriage:

10. It is submitted that succession opened on the very day when Siddhant died. Apparently, he was entitled to one-third of the ancestral property under his father's bequest. So, in this case, Ambika is seeking her portion of Siddhant's ancestral property and was entitled to her part of the aforementioned property following Siddhant's death since property can never be **RES NULLIUS**. The Nagpur Bench of Bombay High Court held in *Jaiwantabai Wankhade v. Sunanda & Ors.*⁴⁸ that a re-married widow has the right in her deceased husband's property if she was not re-married on the day the succession opens. Prior to the 2005 Amendment, the Daya Bhaga School granted property rights, inheritance rights, and the ability to enforce

⁴⁶ *Bai Tara v. Mohanlal* [1922] AIR BOMBAY 405.

⁴⁷ *Marriage of Hindu widows legalised.* - No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or berthed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the contrary notwithstanding.

⁴⁸ *Jaiwantabai Wankhade v. Sunanda & Ors.* [Second Appeal No.144 of 2007].

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partition against brothers to the widow Although the school of thought offers a certain degree of freedom than the Mitakshara School, it still imposed limitations. The amendment of 2005 in the Hindu Succession Act, 1956 grants equal inheritance rights to spouse in all property of the deceased. This includes self-acquired as well as ancestral property, if partner died intestate. The Hon'ble Bombay High Court in a recent judgment has ruled that a widow, even after she has remarried, has the rights over her former husband's properties⁴⁹. The petition was filed by a man against his former sister-in-law who had claimed the right over her deceased husband's properties after she married another man. The brother of the deceased relied on the provisions of **Section 2 of the HWRA, 1856** which talks about the *Rights of widow in deceased husband's property to cease on her remarriage*. It says that— A widow's rights and interests in her deceased husband's property, whether through maintenance, inheritance, or a will, cease upon her re-marriage and determine as if she had died. The next heirs or other entitled parties will inherit the property.⁵⁰,

11. Whereas, **Section 8 the HSA, 1956** provides the **general rules of succession in case of males**.⁵¹The Court ruled that provisions of the HSA, 1956 would prevail over the repealed HWRA, 1856. There was no provision in the HSA, 1956 which was pari materia with **sec 2** of the HWRA, 1856. The Apex Court ruled in a case said that the Hindu Widows Remarriage Act, 1956, was not scrapped by the **HSA, 1956**,⁵² because **Section 4**⁵³ of the latter Act had an overriding effect, rendering the HWRA, 1856, ineffective. The Court further observed the widow even after remarriage would qualify as Class I heir and concluded that a woman doesn't lose rights over her dead husband's properties - **moveable and immovable** even if she remarries. **Section 2 of 1856 Act** and **Sections 4 and 24 of 1956 Act** were the subject

⁴⁹ The Hindu Succession Act 1956, s 8

⁵⁰ The Hindu Widows' Remarriage Act 1856, s 2

⁵¹ General rules of succession in the case of males. —*The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter: —*

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

⁵² *Chando Mehtain & Ors vs. Khublal Mahto & Ors* [1983] AIR PATNA 33.

⁵³ Over-riding effect of Act.—(1)Save as otherwise expressly provided in this Act,—(a)any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;(b)any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

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matter of interpretation before the Apex Court in a case where the Apex Court remarked: *The Hindu Succession Act brought about a change in Shastric Hindu Law. Hindu widows were brought on equal footing in the matter of inheritance and succession along with the male heirs.*⁵⁴.

12. The Kerala High Court, in Thankam v. Rajan⁵⁵, held that remarriage of the wife cannot be a ground for her losing right to succeed to her deceased husband's property. "An initiative was taken by the Law Commission of India under the chairmanship of **Justice B.P. Jeevan Reddy** in its **174th Report** on "Property Rights of Women: Proposed Reforms under Hindu Law" to improve the position of Hindu females. The committee was of the view: "*The right of a widow who remarries is denied, whereas, the right of a widower who remarries is protected. We are making a distinction between a widower who remarries and his right is not affected. But the widow who remarries is denied the right.*"⁵⁶

[3.2.3] Ambika had the intention to gain her share in the property prior to her remarriage:

13. It is further submitted to the court that Ambika tried to get her share in the property before her marriage with Akaash but Sakshi raised an objection by enjoining to have a talk with the lawyer regarding it. Sakshi, as stated in the proposition⁵⁷, has thus silently and cleverly deprived Ambika of her portion in her late husband's estate.

[3.2.4] The castes of Ambika and Siddhant are unstated:

14. It is submitted that Section 4 of the HWRP Act, 1989 has a proviso which says, *Provided always that, if in any caste, of Hindus, widow re- marriage was permitted prior to the passing of this Act and a widow was not thereby deprived of rights mentioned in this section, its provision shall not operate to deprive her of such rights*⁵⁸. But in the present case, the castes of the parties have nowhere been stated **explicitly**. Thus, it is not proper to assert that Ambika belongs to a specific caste in which widow was deprived of her property rights after remarriage.

⁵⁴ *Cherotte Sugathan (D) by L.Rs. v. Cherotte Bharathi* [2008] AIR SC 1467.

⁵⁵ [1999] AIR KER 62.

⁵⁶ Law Commission of India, *Property Rights of Women: Proposed Reforms under Hindu Law* (174th Report, D.O. No. 6(3)(59)/99-LC(LS), 2000)

⁵⁷ Moot Proposition Para 21

⁵⁸ The Hindu Widow's Remarriage and Property Act, 1989, s 4

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8. PRAYER

WHEREFORE it is prayed, in the light of the issues raised, arguments advanced and authorities cited, it is most humbly submitted that this Hon'ble Family Court of Kolkata may be pleased to adjudge, hold and declare that:

1. The present petition is maintainable in the Family Court of Kolkata.
2. The custody of Armaan be given to Ambika as she is his Natural Guardian.
3. Ambika be allotted with the share in Siddhant's property to which she is legally entitled.
4. The interim custody of Armaan be given to Ambika.
5. The cost that Sakshi has spent in defending the case be paid to her by Ambika.

AND/OR

Pass any other Order, Direction, or Relief that it may deem fit in the best interests of Justice, Fairness, Equity and Good Conscience. For this act of kindness, the applicant shall duty bound forever pray.

All of which is humbly prayed,

Date: ___06.03.2024___

Sd/-

TC-14P

Counsel for Applicant