



**Date – 8 August 2022**

## **Mother has right to decide child's surname: Supreme Court**



- Recently the Supreme Court ruled that the mother, being the sole natural guardian of the child after the death of the biological father (husband), has the right to decide the surname of the child.
- The court was considering a petition challenging a judgment passed by the High Court of Andhra Pradesh in January 2014, seeking to replace the child's surname with the surname of her

late first husband and to record the surname of the second husband.

### **New rules of Supreme Court:**

- Surname is not only indicative of ancestry and should not only be understood in the context of history, culture and lineage, but more importantly, it is related to social reality as well as to the feeling of children in their particular environment.
- Uniformity of surname emerges as a mode of creating, maintaining and displaying 'family'.
- The Supreme Court also said that being the sole natural guardian, the mother can also give her second husband the right to adopt the child.

### **Laws relating to Guardianship in India:**

#### **Hindu Minority and Guardianship Act:**

- Indian laws give preference to the father in case of guardianship of a minor (below 18 years of age).
- The natural guardian of a Hindu minor in relation to the minor or property under the Hindu religious law or the Hindu Minorities and Guardianship Act, (HMGA) 1956 is the father and then the mother.
- Provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother.

#### **Guardians and Wards Act, 1890 (GWA):**

- It deals with the appointment of a person as the 'guardian' of the child in respect of both the child and the property.
- Issues of child custody, guardianship and visitation between parents are determined under the GWA if the natural guardian wishes to be declared as a special guardian for their child.
- In a petition under the GWA read in conjunction with the HMGA when there is a dispute between the parents, guardianship and custody may be vested in one parent with the rights of visitation or visitation of the other parent.

- The welfare of the minor or “best interest of the child” shall be paramount in doing so.

### **Meaning of “best interest of the child”:**

- India is a signatory to the United Nations Convention on the Rights of the Child (UNCRC).
- The Juvenile Justice (Care and Protection of Children) Act, 2015 incorporates the definition of ‘best interests of the child’ present in the UNNCR.
- “Best interest of the child” means “the basis of any decision made regarding the child to ensure the fulfillment of his/her basic rights and needs, identity, social welfare and physical, emotional and intellectual development” and any custody the battle of Custody is paramount in the battle.

### **Muslim Personal Law (Shariat) Application Act, 1937:**

- As per the Muslim Personal Law (Shariat) Application Act [The Muslim Personal Law (Shariat) Application Act, 1937], in the case of guardianship, the Shariat or religious law shall apply, according to which the son does not attain the age of seven years. And the father is the natural guardian until the daughter attains the adult stage, although the father enjoys the right of general supervision and control.
- The concept of custody or ‘Hijanat’ in Muslim law states that the welfare of the child is paramount.
- This is the reason why Muslim law gives preference to the mother over the father in the matter of custody of children during the tender years.

### **Supreme Court’s decision:**

- The landmark Supreme Court judgment in 1999 in Geeta Hariharan v. Reserve Bank of India provided partial relief.
- In this case HMGA was challenged for violating the guarantee of gender equality under Article 14 of the Constitution of India.

- Article 14 states that no person shall be denied equality before the law or the equal protection of the laws in the territory of India.
- The Court held that the word “after” should not mean “after the life of the father”, but “in the absence of the father”.
- The decision, however, failed to recognize both the parents as equal guardians, making the role of the mother subordinate to that of the father.
- Although the judgment sets precedent for the courts, it has not led to any amendments to the HMGA.

**Swadeep Kumar**

## **Model Tenancy Act**



- According to the Ministry of Housing and Urban Affairs (MoHUA), the Model Tenancy Act has been amended so far by only four states, Andhra Pradesh, Tamil Nadu, Uttar Pradesh and Assam.

## **Requirement of Model Tenancy Act:**

- The existing rent control law is hindering the development of rental housing and it discourages landlords from renting out their vacant houses for fear of them being re-occupied.
- Possible measures to rent out vacant houses include bringing transparency and accountability to the existing tenancy system and judiciously balancing the interests of both the property owner and the tenant.
- According to the 2011 census, more than 1 crore houses are lying vacant in urban areas.
- Earlier, about one-third of all Indians were living in urban areas, the proportion of which increased from 27.82 percent in 2001 to 31.16 percent in 2011. By the year 2050, more than half of India's people will be living in cities or towns, mainly due to migration.

## **Model Tenancy Act:**

- The Model Tenancy Act, 2021 aims to establish a Rent Authority to regulate the rent of premises and to protect the interests of landlords and tenants and to provide a speedy adjudication mechanism for settlement of disputes and matters connected therewith or connected therewith.
- It aims to create a vibrant, sustainable and inclusive rental housing market in the country.
- It will enable construction of adequate rental housing for all income groups, thereby solving the problem of homelessness.
- It will enable institutionalization of rental housing by gradually shifting towards the formal market.

## **Major Provisions:**

### **Written Agreement Mandatory:**

- For this it is necessary to have a written agreement between the owner and the tenant of the property.



## **Establishment of Independent Authority and Rent Court:**

- The Act establishes an independent authority in each state and union territory for the registration of tenancy agreements and even sets up a separate court to settle tenancy disputes.

## **Maximum limit for security deposit:**

- In this Act, the Advance Security Deposit of the tenant has been limited to a maximum of two months of rent for residential purposes and a maximum of six months for non-residential purposes.

## **Describes the rights and obligations of the landlord and tenant:**

- The landlord will be responsible for structural repairs (not damage caused by the tenant) such as whitewashing the walls, painting the doors and windows, etc.
- Tenant will be responsible for drain cleaning, repair of switches and sockets, replacement of glass panels in windows, doors and maintenance of gardens and open spaces etc.

## **24 hours prior notice by landlord:**

- Landlord must give 24 hours prior notice before entering rental premises to make repairs or replacements.

## **Mechanism to vacate the premises:**

- If a landlord has fulfilled all the conditions mentioned in the rent agreement such as giving notice etc. and the tenant fails to vacate the premises on the period or expiry of the rental, the landlord is entitled to double the monthly rent.

## **Importance:**

- The authority established under this Act shall provide an expeditious mechanism for resolving disputes and other related matters.
- The Act will help in overhauling the legal framework regarding rental housing across the country.

- It is expected to encourage private participation in rental housing as a business model to address the acute housing shortage.

### **Challenges:**

- This Act is not binding on the states as land and urban development are state subjects.

**Swadeep Kumar**

