

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3313 OF 2021**

Nirupama Jitendra Mehta	...Petitioner
<i>Versus</i>	
State of Maharashtra	...Respondent

**Ms Tulsi Shah, i/b Akash P Shah, for the Petitioner.
Mrs Jyoti Chavan, AGP, for Respondent No. 1-State.**

**CORAM G.S. Patel &
 Madhav J. Jamdar, JJ.
DATED: 17th December 2021**

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1. The Petition seeks an appointment of the Petitioner (“**Nirupama**”) as the legal guardian of her husband, **Jitendra Mansukhlal Mehta** (“**Jitendra**”). He is said to be in a vegetative state since 21st February 2017. He took suddenly unwell that afternoon. He was unable to move. An immediate consultation with the family physician required that Jitendra be moved to a hospital. On 23rd February 2017 he was admitted to the casualty ward of the Kokilaben Dhirubhai Ambani Hospital at Andheri. He was then shifted to the ICU. He was unresponsive and nearly comatose. His condition was said to be critical and he slipped into a deep coma.

Several tests were done of the brain and the spine and it was finally believed that he was suffering from some form of meningitis.

2. The Petitioner consulted specialists who advised that Jitendra be moved to Saifee Hospital at Charni Road, Mumbai. There, on 4th April 2017, Jitendra was diagnosed meningoencephalitis and also a ventilator-associated urinary tract infection and pneumonia. He was under observation for several days. He was gradually taken off support and ventilation. There was no meaningful neurological recovery. He was discharged to home care on 15th May 2017. At that time, Jitendra had a tracheostomy tube, a PEG tube and a silicon catheter.

3. At their residence, Nirupama was compelled to convert one room virtually into a ward with ICU-level facilities. She had to hire fulltime nursing staff. Before he fell ill, Jitendra and the Petitioner lived in a one room apartment, Flat No. 301 of only 300 sq ft in a building called Unity Apartments, at Damodar Park, LBS Marg, Ghatkopar (West), Mumbai 400 086. That building has no lift. The space is inadequate. Nirupama was compelled to take alternative premises on rent at Borivali (West) and to shift Jitendra there.

4. Since 2017, Jitendra has been in and out of the hospital several times. In July 2018 he was taken to the Breach Candy Hospital and, in 2019 to the Lotus Multispeciality Hospital. The first was for an accidental injury on the left leg suffered during physiotherapy and then later in 2020, for a replacement of the PEG tube.

5. He was recently again admitted to the Lotus Hospital in February 2021 for further complications including hypothyroidism and other issues.

6. Jitendra's position today is that he is entirely vegetative. He is being fed through a tube. He cannot move on his own. His respiration is assisted with a Bi-PAPventilation system. He is persistently in this condition and is being monitored periodically by specialists.

7. In paragraph 13, Nirupama says that she has spent more than 30 lakhs already and there is monthly expenditure of over Rs. 1.25 lakhs on Jitendra's care. There has been no improvement since February 2017. He is conscious and opens his eyes but he cannot speak, comprehend or make any voluntary movements of his own. The general medical opinion is that there is unlikely to be any change in Jitendra's condition and there is virtually no prospect of a return to normalcy.

8. Nirupama has no independent source of income. She is in deep financial distress. She herself is a heart patient and has been advised to undergo a valve replacement surgery. She too needs physiotherapy. In her own name she has only about Rs. 8.80 lakhs. All other assets are either in Jitendra's name or are jointly held with Jitendra. Flat No. 301 at Unity Apartments in Ghatkopar is also in Jitendra's name.

9. The Petitioner and Jitendra have two children, both adults. The son is a software engineer and lives in America. Their married daughter lives elsewhere in Mumbai. Both children have filed supporting Affidavits to this Petition.

10. In our judgment of 13th December 2021, in the matter of *Lubina Mohamed Agarwal & Anr vs Union of India & Ors*,¹ we examined the law in such matters. The same considerations will apply in the present case also. We only need to make a note of our observations in paragraphs 11 to 17 of that order. These are reproduced below.

“11. We do not however believe that hands of the Writ Court in a matter such as this are necessarily constrained by the provisions of a statute or the existence of a statutory body. That approach, commended by the State Government, may have been preferable had such an application being brought by an outsider, that is to say, someone outside the immediate family, and it might have been prudent in those circumstances. But when Kamar’s three children are agreed on a course of action, should the Writ Court decline the Petition and refuse relief only because there exists a competent authority established by statute? We do not believe that is the state of the law.

12. Mr Khambata, learned Senior Counsel for the Petitioners, has placed before us a note on the various statutes in question including the Mental Healthcare Act 2017, The Rights of Persons with Disabilities Act 2016 and what we will refer to as the National Welfare Trust Act of 1999.

1 Writ Petition No. 1266 of 2021.

13. Overriding all these is the doctrine of *parens patriae*, one that was discussed by the Supreme Court in *Aruna Ramchandra Shanbaug v Union of India and Ors*,² and more recently in *Shafin Jahan v Asokan KM & Ors*.³ The Supreme Court has said that the *parens patriae* doctrine may be invoked in a Constitutional Court in exercise of its jurisdiction wherever the welfare of the person, be it a child or a person who is mentally ill, needs protection. The doctrine is invoked to meet the ends of justice. It is not to be applied blindly in every case, but in exceptional cases where the subject of the petition is not mentally or physically capable (or is of a very young age) and where there is no other parent or legal guardian. This is perhaps a reversal of the usual guardian-and-ward doctrine. There, a birth parent is the natural guardian of the person and property of the minor child. But reverse situations have often come to court, where it is the parent who needs care from the child. The law does not explicitly or automatically recognise the child as the legal guardian of the parent, and it is for this purpose that the parents *parens patriae* principle is invoked to provide precisely such relief. In *Rajni Hariom Sharma V Union of India & Anr*,⁴ a Division Bench of this Court had before it the claim of a wife to be appointed the guardian of her husband, said to be in a vegetative state. In paragraph 17, the Division Bench said:

“17. Learned counsel for the petitioner submits that by virtue of being the wife of Mr Hariom Sharma, petitioner is in the best position to act as his guardian considering his comatose condition and vegetative state for the last more than two years with no sign or prospect of revival. She can certainly be

2 (2011) 4 SCC 454.

3 2018 16 SCC.

4 2020 SCC OnLine Bom 880.

construed as the next friend and appointed as the guardian. On a query by the Court on what basis she was invoking writ jurisdiction of the Court, learned counsel for the petitioner submits that there is no statutory provision relating to appointment of guardian of a person who is in a state of coma or lying in a vegetative state. Therefore, a writ court exercising jurisdiction under Article 226 of the Constitution of India would be in the best position to grant relief to the petitioner....

14. This and other decisions were considered in *Vijay Ramchandra Salgaonkar v the State*, a judgment of 17th July 2021 by a Bench of which one of us (Madhav J Jamdar J) was a member.⁵ The Petitioner sought an order appointing himself as the guardian of his wife. She too had dementia (apart from other ailments). The Bench reviewed some of the case law on the subject and in paragraphs 15 to 16 held:

“15. Writ Petition No.9712 of 2017 was filed before this Court by Santosh Rohidas Deshmukh seeking a direction to appoint him as a guardian of his father Rohidas Deshmukh who was not in a position physically and mentally, to take care of himself and managing his property. After referring to the decision of Madras High Court in the case of *Sairabanu Mohammed Rafi Vs. State of Tamil Nadu*, Writ Petition No.28435 of 2016 decided on 06.01.2016, this Court appointed the petitioner as guardian of his father including for the purpose of operating bank accounts.

15.1 Likewise in Writ Petition (L) No.28269 of 2017, *Philomena Leo Lobo Vs. Union of India*

5 Writ Petition No. 637 of 2021.

decided on 13.10.2017, a Division Bench of this Court allowed the prayer of the petitioner Philomena Leo Lobo for declaring her as guardian of her husband Leo Lobo who was in a comatose condition.

16. In *Sikha Arjit Bhattacharya Vs. Union of India*, Writ Petition No.11757 of 2018 decided on 27.10.2020, a Division Bench of this Court accepted the prayer of the petitioner Sikha Arjit Bhattacharya and declared her as the guardian of her husband Dr Arjit Bhattacharya who was in a vegetative state.

16.1 Very recently, a Division Bench of this Court in *Smt Reshma Salam Kondkari Vs. Union of India*, Writ Petition (L) No.11394 of 2021 decided on 17.06.2021, declared the petitioner Reshma Salam Kondkari as the guardian of her husband Abdul Salam Ismail Kondkari who is in a vegetative state, for managing the bank accounts and immovable property of the husband including selling of flat.”

15. We also choose to reproduce paragraphs 17.1 to 17.3 of the decision in *Salgaonkar* below:

“17.1 In that case it was held that when a person is in coma or in a comatose condition or in a vegetative state, it cannot be construed that such a person is a physically challenged person or a mentally challenged person as is understood under the relevant statutes. Nor such a person can be construed to be a minor for the purpose of appointment of guardian. In the circumstances it was held that statutes like

the Guardians and Wards Act, 1890, Mental Healthcare Act, 2017 etc. would not applicable to persons in a comatose condition or in a vegetative state. It was also held that there is no legislation in India relating to appointment of guardians to patients lying in comatose or vegetative state.

17.2 On the crucial issue as to relief that may be granted to the petitioner by invoking writ jurisdiction under Article 226 of the Constitution of India, it was noticed that there is no statutory provision governing the field relating to appointment of guardian of a person lying in a comatose condition or in a vegetative state. This Court referred to and deliberated upon the doctrine of *parens patriae* whereafter it was held that in a case like this it is the court alone as the *parens patriae* which must take the ultimate decision though views of the near relatives, next friend and doctors must be given due weightage. After referring to decisions of various High Courts including our High Court, this Court examined the width and plenitude of the power of the High Courts under Article 226 of the Constitution of India and also relied upon the decision of the Supreme Court in *Aruna Ramchandra Shanbaug Vs. Union of India*, (2011) 4 SCC 454, and held that when the High Court exercises jurisdiction under Article 226 of the Constitution of India, it does so to further the cause of justice. It was held as under:

“38. From the above, it is clearly deducible that when the

High Court exercises jurisdiction under Article 226 of the Constitution of India, it does so to further the cause of justice. To provide justice or discharge *ex debito justitiae* is the *raison d'être* of the courts. The Latin expression *ex debito justitiae* literally means a debt of justice; on account of justice; a claim the refusal of which would involve an injustice, and therefore, one which justice owes it to the claimant to recognize and allow. The doctrine of *ex debito justitiae* is well established and requires no further elaboration. In addition to Article 226 of the Constitution, such power of the High Court is traceable to section 151 of the Civil Procedure Code, 1908 and section 482 of the Code of Criminal Procedure, 1973.”

17.3 While acceding to the prayer of the petitioner in that case, this Court also sounded a note of caution that there should be some kind of monitoring of the functioning of the petitioner as guardian to ensure that guardianship was being used for the benefit of the person who was in a vegetative state observing that such monitoring may be carried out through the forum of Maharashtra State

Legal Services Authority constituted under the Legal Services Authorities Act, 1987.”

16. Sitting singly one of us (GS Patel J) had a similar application though in a suit on the Original Side in *Nitin Thakker and Another v State of Maharashtra and Ors.*⁶ By an order dated 13th August 2020, the Court appointed a Senior Advocate of this Court as the guardian of solicitor who had no family at all but was himself suffering from dementia. In paragraph 20, the decision said:

“20. The present case falls only partly within the provisions of Order 32-A(2)(c) [*of the Code of Civil Procedure, 1908*]. But as this Complaint points out, the state of the law in India simply does not make any sort of provision for a situation such as the present one. Mr. Damania is neither mentally challenged, nor of unsound mind nor a minor. He has no family. He is incapacitated by an illness and the current laws of guardianship do not provide any recourse in as situation like this. This is, therefore, something of a vacuum in law. That, however, does not mean that Courts are helpless or that situations such as these should go unattended and unaddressed. I can draw support from the provisions of Order 32-A of the CPC, Kathawalla J’s previous order of 6th March 2017 and also in a properly brought Suit make reference to the omnibus provision for doing substantial justice that we find in Section 151 of the CPC. This says that nothing in the CPC *limits* or otherwise affects the *inherent* power of the Court to make such orders as may be

6 Interim Application No.677 of 2020 in Suit No 42 of 2021.

necessarily for the ends of justice or to prevent the abuse of the process of the Court.”

17. This was also considered in *Rajni Hariom Sharma*.”

11. We also do not think it is necessary to order a further examination of Jitendra. Simply moving him to a hospital for tests is going to be an expensive and cumbersome exercise and asking other doctors to see him again is possibly even more traumatic. He has had medical attention since 2017 and the necessary documents are annexed to this Petition. We see no reason not to accept these.

12. We make the Petition absolute in terms of prayer clauses (a) and (b) which read thus:

“(a) That this Hon’ble court may be pleased to issue appropriate writ, order or direction under Article 226 of the Constitution of India holding and declaring the Petitioner as the guardian of her husband Mr Jitendra Mehta who is in a vegetative state since 21/02/2017;

(b) That this Hon’ble Court may be pleased to issue appropriate writ, order or direction thereby permitting the Petitioner to deal with and/or dispose off and/or operate the movable properties of Mr Jitendra Mehta as per the Schedule annexed at Exhibit ‘I’ to the Petition.”

13. Items (1) to (5) of Exhibit “I” at pages 48 to 49 relate to movables.

14. The companies, authorities and entities in question are directed by virtue of this order, to recognize the Petitioner,

Nirupama, as the guardian and authorized representative of Jitendra Mansukhlal Mehta. They will permit the Petitioner to transact all those assets (including sell them) without insisting on further documents or declarations. They will act on production of an authenticated copy of this order, the issuance of which is expedited, without insisting on a certified copy of this order.

15. All official and government authorities will also act accordingly.

16. As regards the sale of Flat No. 301 in Unity Apartments, we permit the Petitioner to enter into negotiations for sale and to decide on a prospective purchaser as also the consideration. For good order, and in keeping with the general law on the subject, we will only require the Petitioner to seek a formal order of this Court permitting the sale of that flat. For this purpose, the Petitioner will have to file a fresh IA. The Petitioner will be granted utmost priority when that application is filed. To that application, a copy of the proposed Agreement for Sale should be annexed specifying the name of the purchaser, other particulars and the consideration amount. The purchaser need not be made a party to such an IA.

17. Since the sale is presently proposed in Jitendra's lifetime, and since the flat is solely in his name, the consent of the children is not separately required for the sale. Their Consent Affidavits annexed to this Petition will suffice.

18. We clarify that the Registry will permit the filing of the IA even if it is made in the Petition that we are today disposing of .

19. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J)

(G. S. Patel, J)

Note: This order is modified by an order dated 11th January 2022 passed on a praecipe. Corrections are shown in bold and italics.