

\$~50

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 22nd March, 2023
+ **W.P.(C) 3607/2023 and CM APPL. 13964/2023**
SHYAM MALIK Petitioner
Through: Ms. Stuti Gupta, and Ms. Kirti
Mewar, Advocates (M-7204073750)
versus

STATE AND ORS Respondents
Through: Mr. Anupam Srivastava, ASC for
GNCTD with Ms. Sarita Pandey,
Advocate for R-1.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by Mr. Shyam Malik, son of Late Mr. Roshan Lal Malik, who had four children, namely, the Petitioner - Mr. Shyam Malik, Mr. Deshbandhu Malik, Mrs. Vinod Sabharwal and Mrs. Kanchan Suri. The case of the Petitioner is that his father was the owner of the property bearing no. A- 319, measuring 217 sq. yds., situated at Defence Colony, New Delhi-110024 (*hereinafter 'subject property'*). Mr. Deshbandhu Malik, the brother of the Petitioner is stated to be mentally incapacitated and since his birth, he has various mental and physical disabilities.
3. The father of the Petitioner had passed away intestate on 24th October, 2007 leaving behind his wife - Late Mrs. Swaraj Kumari and his four children. The Petitioner was appointed as a guardian of his brother under Sections 52 and 53 of the Mental Health Act, 1987. The Petitioner has

approached this Court in order to be able to enter into a collaboration agreement in respect of the subject property and execute the same on behalf of his brother.

4. Ld. counsel for the Petitioner submits that vide order dated 31st March, 2009, the Petitioner was appointed as the guardian and manager of the properties of Mr. Deshbandhu Malik in accordance with Section 52 and Section 53 of the Mental Health Act, 1987 by the Id. District Judge-III (West). The relevant extract of the said order reads as under:

“7. In view of the averments made in the petition and the testimony of the petitioner, it stands proved that Deshbandhu Malik is mentally challenged and cannot take care of himself and his property without the help of any other person. Petitioner is the brother of the mentally challenged Deshbandhu Malik. It can be safely held that the petitioner has no interest adverse to that of his brother. I find him to be a fit and suitable person to be appointed as a guardian of the person and the properties of the mentally challenged Deshbandhu Malik.

*8. Accordingly, **I allow the petition and appoint Sh. Shyam Malik as guardian of the person and Manager of the properties of the mentally challenged Deshbandhu Malik @ Billa.** Necessary certificate be issued in favour of the petitioner on his furnishing necessary bond/undertaking.”*

5. Ld. Counsel for the Petitioner further submits that both the mother and the sisters of the Petitioner had executed a relinquishment deed on 8th January, 2008 in favour of the Petitioner. Thus, as on date, the Petitioner is the owner of 4/5th share in the subject property and the brother of the Petitioner is the owner of 1/5th share of the property. The Petitioner is also willing that his brother would be the owner of the ground floor of the

property after construction of the property.

6. Ld. counsel appearing for the Respondent No.1 submits that if the other heirs have no objection, the State would have no objection in the Petitioner being permitted to be the guardian of the properties.

7. Mr. B. Kartik, Ld. counsel for the Respondent Nos.2 and 3 i.e., the sisters, submits that he represents the said Respondents and he would be filing his *vakalatnama*. He submits that the Respondent Nos. 2 and 3 who are the sisters of the Petitioner do not have any objection as they have already executed a relinquishment deed in favour of the Petitioner.

8. The Petitioner has approached this Court in view of the repeal of the Mental Health Act, 1987. An application was moved by the Petitioner before the Id. ADJ-07 South-East District seeking permission for execution of the collaboration agreement, under Section 59(2) of the Mental Health Act, 1987 and the same was rejected by order dated 6th March, 2023 in the following terms:

“Upon being informed about Section 126 of the Mental Healthcare Act, 2017, whereby the Mental Health Act, 1987, has been repealed by the Parliament, the Ld. Advocate for the petitioner has submitted that this case may be taken to be covered by clause (f) of Section 126(2) of the Mental Healthcare Act, 2017. I am unable to agree qua the said submission because the said clause per se applies to proceedings pending in a Court on the date of coming into force of the Mental Healthcare Act, 2017 and cannot be understood to be applicable to this fresh petition. At this stage, the Ld. Advocate for the petitioner has submitted that she may be permitted to withdraw this petition, reserving liberty for the petitioner to seek appropriate remedy as per law. The signatures of the Ld. Advocate for the petitioner have been taken on this order sheet, as

acknowledgement of the said submission. This petition stands withdrawn. The liberty, as prayed for, is reserved. File be consigned to the record room."

9. The issues concerning the repeal of the Mental Health Act 1987 and the vacuum which has been created has been noticed by this Court in **W.P. (C) 1271/2020** titled **SD v. Govt. of NCT of Delhi and Ors.** In the said decision, after considering the scheme of the Mental Health Act, 1987, Mental Healthcare Act, 2017 as also Rights of Persons with Disabilities Act, 2016 this Court noted that there is no procedure prescribed for appointment of a guardian. The extracts of the said judgment is set out below:

"210. Under the RPWD-2016, the power to appoint guardians is vested both in the District Court as well as the Designated Authority. Under the RPWD (Delhi) Rules-2018, which are applicable to Delhi, the Designated Authority has only been notified under Section 15(1) and not under Section 14. The RPWD (Delhi) Rules-2018 itself show that the District Court is to proceed with quickness and alacrity when a guardianship request is received by it. As per Rule 7(5), a decision on limited guardianship has to be taken within one month. In effect, this means that the District Court is not to conduct a detailed trial before appointing a guardian. Depending upon the facts and circumstances of the case, the Court has to merely consider the suitability of the person in the order of preference as contained in Rule 7(6) and the PwD has to be consulted. Rules 7 to 9 relating to limited guardianship, as extracted above, become relevant.

211. A perusal of the said rules shows that the District Court has to take the following steps:

- i) It has to satisfy itself that the concerned PwD is not in a position to take legally binding decisions.*
- ii) Hearing would be held to determine the legal capacity of such a person.*

iii) *The Court may consult an expert to determine legal capacity.*

iv) *The period of validity of the appointment would be three years, which can be further extended. For such extension, the same procedure as is required for appointment of a limited guardian shall be followed.*

v) *The decision has to preferably be taken within a period of one month.*

vi) *The consent of the limited guardian has to be obtained before appointing him/her.*

vii) *The order of preference for granting limited guardianship is as follows:*

(i) *The parents or adult children of the person with disability;*

(ii) *Immediate brother or sister;*

(iii) *Other Blood relatives or care givers or prominent personality of the locality; and*

(iv) *In case the family of the person with disability is not known, Superintendent of the Government Institution or In charge of the Registered organization under whose care the person with disability is residing, may be considered.*

212. *The RPWD (Delhi) Rules-2018 provide that the limited guardian who has been appointed in terms of Section 7(1) would consult the person in all matters before taking any legally binding decisions. Interestingly, the rules do not stipulate any mechanism for providing total support under the proviso to Section 14(1).*

213. *The fact that the power under Section 14 of the RPWD-2016 is vested with the District Courts and the Designated Authority and the procedure itself does not involve recording of evidence or a trial shows that the Court's primary concern is with the timely appointment of the guardian.*

214. *Even under Order XXXIIA of the CPC, the Civil Court would have jurisdiction to appoint guardians in*

respect of all persons with disability, including a minor. Even in Rule 5 of Order XXXIIA, the inquiry by the Court into facts is "so far it reasonably can". Again, a trial is not contemplated. The said provision reads as under:

"1. Application of the Order.--(1) The provisions of this Order shall apply to suits or proceedings relating to matters concerning the family.

(2) In particular, and without prejudice to the generality of the provisions of sub-rule (1), the provisions of this Order shall apply to the following suits or proceedings concerning the family, namely:-

-

(a) a suit or proceeding for matrimonial relief, including a suit or proceedings for declaration as to the validity of a marriage or as to the matrimonial status of any person;

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

(c) a suit or proceeding in relation to the guardianship of the person or the custody of any minor or other member of the family, under a disability;

(d) a suit or proceeding for maintenance;

(e) a suit or proceeding as to the validity or effect of an adoption;

(f) a suit or proceeding, instituted by a member of the family, relating to wills, intestacy and succession;

(g) a suit or proceeding relating to any other matter concerning the family in respect of which the parties are subject to their personal law.

(3) So much of this Order as relates to a matter provided for by a special law in respect of any suit or proceeding shall not apply to that suit or proceeding.

...

5. Duty to inquire into facts.--In every suit or

proceeding to which this Order applies, it shall be the duty of the Court to inquire, so far it reasonably can, into the facts alleged by the plaintiff and into any facts alleged by the defendant."

215. *While exercising power under Order XXXIIA CPC, the Court can seek the assistance of a welfare expert. Even these provisions do not bar the exercise of parens patriae jurisdiction.*

216. *In any event, since the power under Section 14 of RPWD-2016 can be exercised by a Designated Authority, such a Designated Authority would fall within the overall superintendence of this Court exercising writ jurisdiction. In the absence of a Designated Authority having been notified under Section 14, this Court is also vested with the power to exercise jurisdiction under the proviso to Section 14(1), as there is a clear legal vacuum that has been created.*

217. *While exercising parens patriae jurisdiction, Courts used to apply the principle of "best interest of the individual". However, with the introduction of the UNCRPD, "best interest" of the individual has to be in the light of the "wills and preferences" of the individual. The same could be determined by means of advance directives and in the absence of advance directives, facts and circumstances which point towards the wishes/intent of the concerned person. Thus, the "wills and preferences" of the mentally ill person have to be considered by the Court in deciding the manner in which care is to be given.*

218. *As noted in the concerns raised during the Parliamentary debates concerning the MHA-2017 and also from the lack of designated authorities explained above, there are gaps unaddressed by the legislations. The social fabric of family structures in India ought to be considered. In the same vein, the Court notes that the MHA-1987 had laid down certain standards and factors to be considered while determining the "best*

*interest" of the mentally ill person. However, under RPWD-2016 and the MHA-2017, no guidance exists as to what would constitute the "wills and preferences" of the person. Under Section 14 of RPWD-2016, limited guardianship is for a specific period, a specific decision and a specific situation, in accordance with the will of the PwD. Even in the proviso to Section 14, the factors to be considered for providing total support are conspicuously absent. **The MHA-2017 has no provision in respect of management of financial affairs, appointment of guardians or the manner in which the moveable/immovable property of the mentally ill person is to be taken care of. Thus, there is a clear statutory vacuum.***

10. As held in the above decision it is clear that there exists a legal vacuum in respect of appointment of guardians for immoveable or moveable property of mentally ill persons. The Petitioner in this case, can therefore, approach the Court under writ jurisdiction in Article 226. In the present petition, the Petitioner is seeking the following prayers:

- "a. Allow the Petitioner to execute Collaboration Agreement of property no. A 319, Defence Colony, New Delhi-110024*
- b. Allow the Petitioner to transfer one floor with common areas of newly constructed building in favour of the developer or his nominee on such terms as may be agreed under the collaboration agreement.*
- c. Allow the Petitioner to divide the remaining portions of the building between Petitioner and Sh. Deshbandhu Malik by giving absolute ownership rights in the ground floor with common areas in favour of Shri Deshbandhu Malik and absolute ownership rights of the remaining portions/ floors in favour of the Petitioner."*

11. Considering the legal position and considering the factual position as discussed above, it is clear that there is no impediment in the Petitioner being appointed as the guardian and manager of the properties of his brother - Mr. Deshbandhu Malik. Accordingly, the Petitioner is permitted to execute the collaboration agreement in respect of the property bearing no. A- 319, measuring 217 sq. yds., situated at Defence Colony, New Delhi-110024 and take all steps required to ensure that the construction is completed and the ground floor which is to be vested with Mr. Deshbandhu Malik is duly vested in him.

12. All steps in respect of the rights of Mr. Deshbandhu Malik shall be taken by the Petitioner for and on behalf of his brother - Mr. Deshbandhu Malik.

13. There shall be no impediment in the Petitioner selling one floor of the newly constructed building provided that the ground floor is ensured to be vested with Mr. Deshbandhu Malik.

14. Petition is disposed of in these terms. All pending applications are disposed of.

न्यायमेव जयते

PRATHIBA M. SINGH
JUDGE

MARCH 22, 2023

Rahul/AM