

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 14803 of 2022****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

DHIRUBHAI RAVJIBHAI SORATHIYA

Versus

11TH ADDL. DISTRICT JUDGE, DISTRICT AND SESSIONS COURT,
RAJKOT

Appearance:

MR VIMAL PATEL FOR MR HITESH V PATEL(6090) for the Petitioner(s) No. 1,2

LAW OFFICER BRANCH(420) for the Respondent(s) No. 1

MR. ZALAK B PIPALIA(6161) for the Respondent(s) No. 2,3

MS PJ DAVAWALA(240) for the Respondent(s) No. 1

MS TRUSHA K PATEL(2434) for the Respondent(s) No. 1

CORAM:HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**Date : 31/03/2023****ORAL JUDGMENT**

1. Mr.Vimal Patel, learned advocate appearing with Mr. Hitesh V. Patel, learned advocate for the petitioners has sought for leave to amend the cause title by adding the Collector, Office of the Collector & District Magistrate, District Rajkot as party respondent. Leave is granted. The amendment shall be carried out during the course of

the day.

2. Issue Rule, returnable forthwith. Ms.Parinda J. Davawala, learned advocate waives service of notice of Rule on behalf of respondent no.1, Mr.Zalak Pipalia, learned advocate waives service of notice of Rule on behalf of respondent nos.2 and 3 and Ms.Dhwani R. Tripathi, learned Assistant Government Pleader waives service of notice of Rule on behalf of the newly added respondent no.4.

3. This Court deems it fit to refer the parties to the captioned proceedings and the parties connected to the proceedings, either by their abbreviated initials and/or relationship.

4. By this petition, the petitioners have prayed for quashing and setting aside the order dated 03.11.2021 passed by the respondent no.1 in Civil Misc. Application no.43 of 2021 whereby, the application filed by the petitioners has been rejected. The petitioners have also prayed for allowing the application Exhibit-1, exercising the *parens patriae* jurisdiction by appointing the petitioners jointly as guardian or petitioner no.1 individually as guardian or petitioner no.2 individually as a guardian of his brother and/or uncle respectively (hereinafter referred to as, "PRS" or the brother as the context warrants") for dealing with his medical and mental disability and with regard to all the matters relating to his estate including movable and immovable properties etc.

5. The facts in nutshell are that the petitioner no.1 is the brother and petitioner no.2 is a nephew of Shri PRS i.e. the brother. According to the petitioners, the brother is aged 74 years, husband of respondent no.2 and has two sons, Shri MPS and Shri BPS, aged 37 years and 40 years respectively. The respondent no.3 is a married daughter, aged 39 years and is residing with her in-laws at

Village Jasdan, Rajkot. It is the case of the petitioners that the brother is suffering from 'Major Neuro Cognitive Disorder (Chronological Neurological Condition)' and 'Bipolar One Disorder (Mental Illness)'. Both sons are also suffering from 'Intellectual Disability', having other mental disorders due to brain damage and dysfunction which is assessed to an extent of 75% as permanent disability.

5.1. Pandit Deendayal Medical College & Hospital, Rajkot, has issued a certificate, certifying that the brother is suffering from 'Major Neuro Cognitive Disorder (Chronological Neurological Condition)' and 'Bipolar One Disorder (Mental Illness)'. The Department of Empowerment of Person with Disabilities, Ministry of Social Justice & Empowerment, Government of India has also issued a disability certificate dated 24.02.2020, certifying that it is the case of multiple disability and suffers from Chronic Neurological Condition, which has been assessed as 75% and mental illness diagnosed as Bipolar Disorder, assessed as 75%. Similarly, the respondent no.2 is suffering from 'Locomotor Disability' with foot deformity in both the legs. Such disability has been assessed to an extent of 40%. So is the case with both the sons. The Department of Empowerment of Person with Disabilities, Ministry of Social Justice & Empowerment, Government of India, has certified the case of Shri BPS as other mental disorders due to brain damage and dysfunction and physical disease. The disability assessed is 75%. Another son, namely, Shri MPS, has also been issued disability certificate by the Department of Empowerment of Person with Disabilities, Ministry of Social Justice & Empowerment, Government of India. Shri MPS has been certified as a case of 'Intellectual Disability', coupled with other mental disorders due to brain damage and dysfunction and physical disease. The disability has been assessed to an extent of 75%.

5.2. It is under the said circumstances, that the petitioners have filed an application – Exhibit 1 under Section 14 of the Right of Persons with Disabilities Act, 2016 (hereinafter referred to as “the Act of 2016”) being Civil Misc. Application no.43 of 2021 before the District & Sessions Judge, *inter alia*, praying for providing the brother, further support of unlimited guardianship and to take legally binding decisions on behalf of the brother. The application was heard. The Court notice was published inviting written objections from the persons interested; however, no objections were received opposing the said application. The petitioners were examined and the respondent nos.2 and 3 have filed their respective affidavits. In the affidavit of the respondent no.2, she has declared that if the applicants i.e. the petitioners are appointed as guardian, she has no objection. The respondent no.3 has also filed her affidavit dated 18.08.2021 on similar lines. It has been declared before the Court that if the petitioners are appointed as guardian, she has no objection. Another brother Shri BRS has also given his consent Exhibit 25, *inter alia*, consenting to appointment of the petitioners as a guardian of the brother.

5.3. The petitioners have prayed that the petitioners shall be permitted to deal with the properties. As has been set out in the petition, the brother is holding one property individually and other properties jointly, namely; (i) agricultural land admeasuring 26,709 sq. mtrs. of survey no.307 of Village Mavdi, District Rajkot in the joint name of the brother, which is recorded in the revenue record vide entry no.3786; (ii) non-agricultural land admeasuring 714.29 sq. mtrs. situated at Village Mavdi, District Rajkot bearing City Survey no.686 in the joint name and (iii) non-agricultural land admeasuring 120.78 sq. mtrs. situated at Village Mavdi, District Rajkot bearing City Survey no.641 in the name of the brother. The said application came to be rejected by learned 11th Additional

District Judge, Rajkot. What weighed with the learned Judge, was that respondent no.2, wife is of a sound mind and capable of taking legal decisions for Shri PRS and for legal assistance, support of the Court as well as Designated Authority is very well available to her. With this, as aforesaid, the application came to be rejected and hence, the captioned writ petition with a prayer to quash and set aside the order dated 03.11.2021 and to allow the petitioners to act jointly or individually as the guardian of the brother.

6. Mr.Vimal Patel, learned advocate appearing with Mr.Hitesh Patel, learned advocate for the petitioners submitted that the petitioner no.1 is the brother of Shri PRS i.e. the brother, aged 74 years whose family is consisting of a wife, two sons and one daughter. It is submitted that it is not in dispute that the brother is suffering from disabilities. In support of such disabilities, reliance is placed on the certificate issued by the Department of Empowerment of Person with Disabilities, Ministry of Social Justice & Empowerment, Government of India so also, the certificate issued by Pandit Deendayal Upadhyay Medical College & Hospital, Rajkot, where the brother has been taking treatment, certifying that he is suffering from 'Major Neuro Cognitive Disorder (Chronic Neurological Condition) and 'Bipolar One Disorder (Mental Illness)'.

6.1. It is submitted that the brother has multiple disabilities as specified in the Schedule of the Act of 2016. So far as the respondent no.2 is concerned, it is submitted that she is also suffering from 'Locomotor Disability' having foot deformity in both the legs and the disability assessed, is 40% which fact is strengthened by the certificate dated 16.07.2020 issued by the Department of Empowerment of Person with Disabilities, Ministry of Social Justice & Empowerment, Government of India. Similar is the case of both the sons, namely, Shri BPS and Shri MPS, who are also

suffering from 'Intellectual Disability', having other mental disorders due to brain damage and dysfunction. The disability has been assessed to 75% which fact is strengthened by the disability certificates both dated 20.01.2020 certifying, *inter alia*, mental disorders due to brain damage and dysfunction. It is therefore, submitted that the brother and his two sons are unable to take any decision, which may be in their interest and likely to be misguided by any party, other than the family members, who can easily take undue advantage.

6.2. It is next submitted that in past i.e. in the month of March 2020, some unknown persons, taking advantage of the condition of the brother and two sons, have obtained signatures on certain papers and that is how, survey no.307, which is a huge chunk of agricultural land admeasuring 26,709 sq. mtrs. and in the joint name, got transferred in their names. Moreover, fraudulent bank accounts were opened in the name of the brother and his two sons. As a result whereof, the respondent no.2 wife was constrained to lodge First Information Report with Mavdi Police Station for the offences punishable under Sections 406, 420, 465, 467, 468, 471, 120B and 114 of the Indian Penal Code, 1860 against the said persons. It is submitted that there were various occasions on which, the brother was found missing and the petitioners so also, the respondent no.3 were constrained to give an advertisement in the newspaper seeking information of the brother. It is also not in dispute that the petitioners are having their residence adjacent to the residence of the brother and are taking care of the family of four. Not only this, the petitioners are providing adequate and appropriate support to the brother and his family as the daughter, who is married, is residing at village: Jasdan, which is at the distance of 59 kilometer and is unable to provide the constant support.

6.3. It is further submitted that though the provisions of the Act of 2016, more particularly, Section 14, provide for limited guardianship but, there is a vacuum so far as the aspect of total support is concerned. It is submitted that Section 14 opens with a non-obstante clause and provides that where a district court or any designated Court finds that a person with disability, who had been provided adequate and appropriate support but is unable to take legally binding decisions, may be provided further support of a limited guardianship to take legally binding decisions on his behalf in consultation with such person, in manner, as may be prescribed. It is submitted that explanation to sub-section (1) of Section 14 defines the term “limited guardianship” to mean a system of joint decision which operates on mutual understanding and trust between the guardian and the person with disability, which shall be limited to a specific period and for specific decision and situation and shall operate in accordance to the will of the person with disability.

6.4. It is next submitted that in furtherance of the provisions of the Act of 2016, the State Government, in exercise of powers conferred under sub-Section (2) of Section 101 of the Act of 2016, has framed the Gujarat Rights of Persons with Disability Rules, 2019 (hereinafter referred to as “the Rules of 2019”). Relevant would be Rule 6, which provides for “limited guardianship”. Sub-rule (1) of rule 6 provides that a District Court or any designated authority as designated by the State Government on its own or otherwise shall grant a support of limited guardianship to a person with disability to take a legally binding decision on his behalf in consultation with such person. It is submitted that the proviso to sub-rule (3) of rule 6 provides that the consent of the person to act as a limited guardian shall also be obtained before grant of such guardianship. It is further submitted that sub-rule (5) of rule 6, contemplates that while granting such support of limited guardianship, the District Court or designated

authority, shall consider a suitable person to be appointed as limited guardianship in the preference of merits which, would be (a) the parent or adult children of the person with disability; (b) immediate brother or sister and (c) other blood relatives or caregivers or prominent personality of the locality.

6.5. It is submitted that so far as clause (a) of rule 5 is concerned, it provides for parents or adult children of the person with disability; however, in the present case, the parents are not available of the brother and so far as the adult children are concerned, both the sons are suffering from mental illness and daughter is unable to take care. Clause (b) of rule 5 provides for immediate brother or sister, to act as a suitable person to be appointed as limited guardianship and the petitioner no.1 being the brother would be covered within the clause (b) of rule 5. Similarly, petitioner no.2 being the nephew, would be definitely covered within clause (c) of rule 5, being a blood relative as the petitioners have been taking care of the brother and his family, extending assistance financially and otherwise as well.

6.6. For such submission, reliance is placed on the judgment of the High Court of Delhi in the case of *S.D. v. Government of NCT of Delhi & Others* reported in 2022(1) RCR (Civil) 384 : MANU/DE/2910/2021. It is submitted that considering the provisions of Section 14 of the Act of 2016, it has been held and observed that the Act of 2016 deals with an extremely wide range of disabilities; Section 14 is suitably crafted to take into consideration those persons, who are unable to express their will to the limited guardian. It has also been noted that a person with disability having support needs or a person with disability requiring such support due to other factors, would be squarely covered as a person with disability requiring total support under Section 14 of the Act of

2016. It is submitted that the petitioners have requested for limited guardianship but, considering the condition of the family members, request is for total support. It is submitted that the petitioners are ready and willing to accept all the conditions that may be imposed by this Court in furtherance of the interest of the brother and his family members. Heavy reliance is placed on the observations made in paragraph 196 of the judgment of the High Court of Delhi wherein, it has been pointed out that the intention of the Act of 2016 is to first examine if the person with disability is capable of expressing his or her view or preferences and second, under exceptional circumstances, where consultation is not possible, enable the provision of total support. It is therefore, urged that in the present case, the brother is unable to express his view or preferences and therefore, this being exceptional circumstance for, consultation is not possible that the total support is the only option which the petitioners would like to avail of.

6.7. It is therefore, submitted that Section 14 of the Act of 2016 read with the provisions of the Rules of 2019, only makes the provision of “limited guardianship”. It is submitted that the High Court of Delhi, in its judgment in the case of *S.D. vs. Govt of NCT of Delhi* (supra), while dealing with the maintainability, has held and observed that the act and the rules do not create any embargo on the exercise of *parens patriae* jurisdiction. The Court has also acknowledged that there is no guidance provided under the proviso to Section 14 to be considered for providing total support. It is submitted that since there is a vacuum as regards the total support, that the Delhi High Court has held and observed that the Court can exercise the jurisdiction of *parens patriae* and extend the relief of total support. It is therefore, urged that the petitioners be permitted to extend the total support by this Court in exercise of

the jurisdiction as the *parens patriae*.

7. On the other hand, Ms.P.J. Davawala, learned advocate for the respondent no.1 submitted that considering the provisions of Section 14 of the Act of 2016, limited guardianship may be allowed. It is further submitted that the brother is having a daughter, who is capable of taking a decision and therefore, to give powers in exclusivity to the brother and the nephew, is likely to create some complications in future. Apprehension is also raised that after the properties are disposed of, it may happen that the brothers and the nephew and his family members may stop taking care of the family of the brother, as they are doing presently. It is however, urged that total support shall be permitted only imposing stricter conditions and it should be under the constant supervision of the authority to take care of the interest of the brother and his family members. That there should be some check and balance so that, the properties, movable and immovable, are not being siphoned away or abused.

8. Heard the learned advocates appearing for the respective parties and considered the documents available on record.

9. The captioned writ petition by the brother and the nephew, is for quashing and setting aside the order dated 03.11.2021 passed by the respondent no.1 in Civil Misc. Application No.43 of 2021. While knocking the door, the petitioners have also requested this Court to exercise the *parens patriae* jurisdiction by either appointing the petitioners jointly or individually as guardian of the brother for dealing with his medical and mental disability so also, all matters relating to his estate, including movable and immovable properties, namely, opening of bank accounts; control and management of

bank accounts, financial affairs, investment such as shares etc.

10. In the instant case, the brother of the petitioner no.1, aged 74 years, is suffering from Chronic Neurological Condition and mental illness. Two sons, unfortunately, are suffering from mental disorder due to brain damage and dysfunction and to physical disease. Left is wife, who is suffering from Locomotor Disability having foot deformity in both the legs to the extent of 40% with low vision at her disposal. Therefore, almost all the family members are faced with incapacity and as a result whereof, except wife, brother and the two sons are unable to take any decision in their own interest. Wife, having foot deformity, is unable to move and her movement, restricts her of carrying out any activity in furtherance of her wish and will. Daughter, she is married and staying with her in-laws, which would not allow her to take care of the family in day to day routine. The predicament of the wife and the daughter i.e. respondent no.3 is difficult to comprehend. Such a situation faced by the family would be a rarity and in absence of any guidance provided in the Act of 2016 and the Rules of 2019 as regards total support, the arguments are made for invoking the jurisdiction of *parens patriae*.

11. The consideration therefore, would be the provisions of the Act of 2016 and the Rules of 2019. Apt would be Section 14 of the Act of 2016, which provides for guardianship and reads thus:-

“14. (1) Notwithstanding anything contained in any other law for the time being in force, on and from the date of commencement of this Act, where a district court or any designated authority, as notified by the State Government, finds that a person with disability, who had been provided adequate and appropriate support but is unable to take legally binding decisions, may be provided further support of a limited guardian

to take legally binding decisions on his behalf in consultation with such person, in such manner, as may be prescribed by the State Government:

Provided that the District Court or the designated authority, as the case may be, may grant total support to the person with disability requiring such support or where the limited guardianship is to be granted repeatedly, in which case, the decision regarding the support to be provided shall be reviewed by the Court or the designated authority, as the case may be, to determine the nature and manner of support to be provided.

Explanation.—For the purposes of this sub-section, “limited guardianship” means a system of joint decision which operates on mutual understanding and trust between the guardian and the person with disability, which shall be limited to a specific period and for specific decision and situation and shall operate in accordance to the will of the person with disability

(2) On and from the date of commencement of this Act, every guardian appointed under any provision of any other law for the time being in force, for a person with disability shall be deemed to function as a limited guardian.

(3) Any person with disability aggrieved by the decision of the designated authority appointing a legal guardian may prefer an appeal to such appellate authority, as may be notified by the State Government for the purpose.”

12. Sub-section (1) of Section 14 opens with a non-obstante clause. It envisages that notwithstanding anything contained in any other law for the time being in force, on and from the date of commencement of the Act, where a district Court or any designated authority, as notified by the State Government, finds that a person with disability, who had been provided adequate and appropriate support but, is unable to take legally binding decisions, may be provided further support of a limited guardian to take legally binding decisions on his behalf in consultation with such person, in such manner, as may be prescribed. Proviso to sub-section (1) is, *inter*

alia, to the effect that District Court or the designated authority, as the case may be, may grant total support to the person with disability requiring such support.

13. Explanation to sub-section (1) of Section 14 defines the term “limited guardianship” to mean a system of joint decision which operates on mutual understanding and trust between the guardian and the person with disability, which shall be limited to a specific period and for specific decision and situation and shall operate in accordance to the will of the person with disability.

14. Moreover, Chapter IV of the Rules of 2019 provides for limited guardianship. Except this rule, there are no other provisions, which provide for the mechanism of guardianship. Rule 6 of the Rules of 2019 reads thus:-

“6. Limited Guardianship (1) A District Court or any designated authority as designated by the State Government on its own or otherwise shall grant the support of limited guardianship to a person with disability to take a legally binding decision on his behalf in consultation with such person.

(2) The District Court or the designated authority before granting limited guardianship for the person with disability shall satisfy itself that such person is not in a position to take legally binding decision of his own.

(3) The District Court or the designated authority shall take a decision preferably within a period of one month from the date of receipt of an application regarding grant of limited guardianship or from the date of coming to his notice of the need of such limited guardianship.

Provided that the consent of the person to act as a limited guardian shall also be obtained before grant of such limited guardianship.

(4) The validity of the limited guardianship as appointed under sub-rule (1) shall be initially for a

period of five years which can be further extended by the District Court or the designated authority as the case may be;

Provided that the District Court or the designated authority shall follow the same procedure while extending the validity of the limited guardianship as followed while granting the initial guardianship.

(5) While granting the support of such limited guardianship the District Court or the designated authority shall consider a suitable person to be appointed as a limited guardianship in the following preference of merit:-

- (a) The parents or adult children of the person with disability,
- (b) Immediate brother or sister,
- (c) Other Blood relatives or care givers or prominent personality of the locality.

(6) Only those individuals who are over the age of 18 years and who have not been previously convicted or any cognizable offence as defined in the Code of Criminal Procedure, 1973 (1 of 1974) shall be appointed as limited guardian.

(7) The limited guardian appointed under sub-rule (1) shall consult the person with disability in all matters before taking any legally binding decisions on his behalf.

(8) The appointed limited guardian shall ensure that the legally binding decisions taken on behalf of the person with disability are in the interest of the person with disability."

15. It states that a District Court or any designated authority as designated by the State Government on its own or otherwise shall grant the support of limited guardianship to a person with disability to take a legally binding decision on his behalf in consultation with such person. Sub-rule (5) of Rule 6 provides that while granting the support of such limited guardianship, the District Court or the designated authority shall consider a suitable person to be

appointed as a limited guardianship in the preference of merits, namely, (a) the parents or adult children of the person with disability; (b) Immediate brother or sister and (c) other blood relatives or care givers or prominent personality of the locality. Therefore, sub-rule (1) of Rule 6 provides that the District Court or any designated authority shall grant the support of limited guardianship and sub-rule (5) provides for a preference of merits, as discussed herein above. Rule 6 of the Rules of 2019, is a provision relatable to the limited guardianship; however, the element of providing total support as contained in proviso to sub-section (1) of Section 14, is not available.

16. The Delhi High Court has in detail considered the aspect of “total support” as contained in the proviso to sub-section (1) to Section 14. It has been pointed out that the Act of 2016, deals with an extremely wide range of disabilities, Section 14 is suitably crafted to take into consideration those persons who are unable to express their will to the limited guardian. A person with disability having high support needs or requiring such support due to any other factors, would be squarely covered as a person with disability requiring total support under Section 17. While dealing in detail the provisions of Section 14, more particularly, proviso, it observed that the intention of the Act of 2016, is (i) to examine if the person with disability is capable of expressing his/her will or preferences, and (ii) under exceptional circumstances, when consultation is not possible, enable the provision of “total support”. Paragraphs 192, 193, 196, read thus:-

192. Keeping this scope of the RPWD-2016 in mind, it is clear that Section 14 could not restrict support to only appointment of a limited guardian, which would cater merely to PwDs who would be able to participate in a

limited guardianship arrangement. This becomes clearer in view of the proviso to Section 14(1) which recognizes the grant of 'total support' under two conditions:-

- a) In respect of PwDs requiring such support; or
- b) If the limited guardianship is to be granted repeatedly.

193. Since the RPWD-2016 deals with an extremely wide range of disabilities, Section 14 is suitably crafted to take into consideration those persons who are unable to express their will to the limited guardian. A PwD having high support needs or a PwD requiring such support due to any other factors, would be squarely covered as a PwD requiring total support under Section 14.

196. Based on this analysis, this Court is of the opinion that the intention of the RPWD-2016, is to first, examine if the PwD is capable of expressing his or her will or preferences, and second, under exceptional circumstances, where consultation is not possible, enable the provision of total support.”

17. Adverting now to the aspect of *parens patriae* jurisdiction, apt would be the judgment of the Apex Court in the case of *Shafin Jahan vs. Asokan K. M.*, reported in (2018) 16 SCC 368. Explaining the doctrine of *parens patriae* jurisdiction, it has been held that Constitutional Courts may also act as *parens patriae*, so as to meet the ends of justice; however, the Courts cannot in every and any case, invoke the *parens patriae* doctrine and it has to be invoked only in exceptional cases, where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian. Paragraphs 39 to 46 read thus:-

“39. Constitutional Courts in this country exercise *parens patriae* jurisdiction in matters of child custody treating the welfare of the child as the paramount concern. There are situations when the Court can invoke the *parens patriae* principle and the same is

required to be invoked only in exceptional situations. We may like to give some examples. For example, where a person is mentally ill and is produced before the court in a writ of habeas corpus, the court may invoke the aforesaid doctrine. On certain other occasions, when a girl who is not a major has eloped with a person and she is produced at the behest of habeas corpus filed by her parents and she expresses fear of life in the custody of her parents, the court may exercise the jurisdiction to send her to an appropriate home meant to give shelter to women where her interest can be best taken care of till she becomes a major.

40. In *Heller v. Doe*, Kennedy, J., speaking for the U.S. Supreme Court, observed:

“.... ‘the State has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable ...to care for themselves.’

41. The Supreme Court of Canada in *E. v. Eve* observed thus with regard to the doctrine of *parens patriae*:

The *parens patriae* jurisdiction for the care of the mentally incompetent is vested in the provincial superior courts. Its exercise is founded on necessity. The need to act for the protection of those who cannot care for themselves. The jurisdiction is broad. Its scope cannot be defined. It applies to many and varied situations, and a court can act not only if injury has occurred but also if it is apprehended. The jurisdiction is carefully guarded and the courts will not assume that it has been removed by legislation.

While the scope of the *parens patriae* jurisdiction is unlimited, the jurisdiction must nonetheless be exercised in accordance with its underlying principle. The discretion given under this jurisdiction is to be exercised for the benefit of the person in need of protection and not for the benefit of others. It must at all times be exercised with great caution, a caution that must increase with the seriousness of the matter. This is particularly so in cases where a court might be tempted to act because failure to act would risk imposing an obviously heavy

burden on another person.”

42. The High Court of Australia in *Secretary, Department of Health and Community Service v. J.W.B. and S.M.B.*, speaking through Mason, C.J., Dawson, Toohey and Gaudron JJ., has made the following observations with regard to the doctrine:

“71. No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the *Parens Patriae* jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind.”

43. Deane J. in the same case stated the following:

“4... Indeed, in a modern context, it is preferable to refer to the traditional *parens patriae* jurisdiction as “the welfare jurisdiction” and to the “first and paramount consideration” which underlies its exercise as “the welfare principle”.”

44. Recently, the Supreme Court of New South Wales, in the case of *AC v. OC*, has observed:

“36. That jurisdiction, protective of those who are not able to take care of themselves, embraces (via different historical routes) minors, the mentally ill and those who, though not mentally ill, are unable to manage their own affairs: *Eve*, SCR at pp. 407-17; *Court of Australia in Deptt. Of Health and Community Services Secretary, Department of Health and Community Services v. JWB and SMB*, CLR at p. 258; *PB v. BB*, *Nswsc*, paras 7, 8, 40, 42, 57, 58 and 64, 65.

37. A key concept in the exercise of that jurisdiction is that it must be exercised, both in what is done and what is left undone, for the benefit, and in the best interest, of the person (such as a minor) in need of

protection.”

45. Thus, the Constitutional Courts may also act as *parens patriae* so as to meet the ends of justice. But the said exercise of power is not without limitation. The courts cannot in every and any case invoke the *parens patriae* doctrine. The said doctrine has to be invoked only in exceptional cases where the parties before it are either mentally incompetent or have not come of age and it is proved to the satisfaction of the court that the said parties have either no parent/legal guardian or have an abusive or negligent parent/legal guardian.

46. Mr. Shyam Divan, learned senior counsel for the first respondent, has submitted that the said doctrine has been expanded by the England and Wales Court of Appeal in a case *DL v. A Local Authority and others*. The case was in the context of "elder abuse" wherein a man in his 50s behaved aggressively towards his parents, physically and verbally, controlling access to visitors and seeking to coerce his father into moving into a care home against his wishes. While it was assumed that the elderly parents did have capacity within the meaning of the Mental Capacity Act, 2005 in that neither was subject to "an impairment of, or a disturbance in the functioning of the mind or brain", it was found that the interference with the process of their decision making arose from undue influence and duress inflicted by their son. The Court of Appeal referred to the judgment in *Re: SA (Vulnerable Adult with Capacity: Marriage)* to find that the *parens patriae* jurisdiction of the High Court existed in relation to "vulnerable if 'capacitous' adults". The cited decision of the England and Wales High Court (Family Division) affirmed the existence of a "great safety net" of the inherent jurisdiction in relation to all vulnerable adults. The term "great safety net" was coined by Lord Donaldson in the Court of Appeal judgment which was later quoted with approval by the House of Lords in *In Re F (Mental Patient: Sterilisation)*. In paragraph 79 of *Re: SA (Vulnerable Adult with Capacity: Marriage)*, Justice Munby observes:-

"The inherent jurisdiction can be invoked wherever a vulnerable adult is, or is reasonably believed to be, for some reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent. The cause may be, but is not for this purpose limited to, mental disorder or mental illness. A

vulnerable adult who does not suffer from any kind of mental incapacity may nonetheless be entitled to the protection of the inherent jurisdiction if he is, or is reasonably believed to be, incapacitated from making the relevant decision by reason of such things as constraint, coercion, undue influence or other vitiating factors."

18. Apt would also be the judgment of the High Court of Allahabad in the case of *Uma Mittal & Others v. Union of India*, reported in AIR 2020 All 202 wherein, it has been held and observed that the Court, in its extraordinary jurisdiction under Article 226 of the Constitution of India, may act as *parens patriae* and can pass the orders by issuing necessary directions for subserving the ends of justice. It has been held that the Court cannot shirk its responsibility when a distress call is given by a sinking family of a person lying in a comatose state.

19. Apt would also be the judgment of the High Court of Delhi in the case of *S.D. vs. Govt. of NCT of Delhi* (supra), which was dealing with the provisions of Section 14 of the Act of 2016 viz-a-viz the Rules framed thereunder. While dealing with the issue of maintainability and the issue of appointment of a guardian, it noted that the question of maintainability has two aspects, one which is a legal and the second, factual and while discussing the aspect of *parens patriae* jurisdiction, in paragraph 202, it observed thus:-

"202. The question of maintainability has two aspects, one which is legal and the second, which is factual. This Court will first discuss the legal aspect of *parens patriae* jurisdiction. The doctrine of *parens patriae* traces its origin back to the 13th Century. The term literally means 'father of his country', which power vested in the Monarch. The doctrine of *parens patriae* recognises the power and duty of the Monarch to extend protection to such persons who are unable to care for themselves as also their property. In democratic countries, the same power vests in the people and is exercised by Courts.

The said doctrine is elucidated in *Corpus Juris Secundum* (67A C.J.S. *Parens Patriae* (1978)) as under:

"*Parens Patriae*- The words "*parens patriae*," meaning "father of his country," were applied originally to the king. Since, on this country's achieving its independence, the prerogatives of the crown devolved on the people of the states, the state, as a sovereign, is the *parens patriae*. The doctrine of *parens patriae* expresses the inherent power and authority of the state to provide protection of the person and property of a person non sui juris, and under the doctrine the state has the sovereign power of guardianship over persons of disability, and in the execution of the doctrine the legislature is possessed of inherent power to provide protection to persons non sui juris and to make and enforce such rules and regulations as it deems proper for the management of their property."

20. In paragraph 208, the judgment of the Apex Court in the case of *Shafin Jahan* has also been referred to wherein, the Apex Court has discussed the scope of *parens patriae* jurisdiction which, has been referred to in the preceding paragraphs.

21. While discussing the aspect of maintainability as well as the provisions of the Act and the Rules, more particularly, Section 14 of the Act of 2016, the High Court of Delhi has held and observed that the Rules provide that the limited guardian, who has been appointed in terms of Section 7(1) would consult the person in all the matters before taking any legally binding decisions. It has also been held that the rules do not stipulate any mechanism for providing a total support under the proviso to Section 14(1). Moreover, under Section 14 of the Act of 2016, limited guardianship is for a specific period, a specific decision and a specific situation, in accordance with the will of the persons with disability. Even in the proviso to Section 14, the factors to be considered for providing total support are conspicuously absent. It has been held and observed that the Mental Health Care Act, 2017 has no provision in

respect of management of financial affairs, appointment of guardians or the manner in which the movable/immovable property of the mentally ill person is to be taken care of and therefore, there is a clear statutory vacuum. In paragraph 219, it has been, *inter alia*, noted that the Court is exercising jurisdiction under Article 226/227 of the Constitution of India, which is a jurisdiction conferred by the Constitution of India and in various judgments of the Supreme Court, the *parens patriae* jurisdiction is clearly vested in the Constitutional Courts. In paragraph 220 of the said judgment, it has been held and observed that solemn nature of the said jurisdiction having been repeatedly recognized by the Supreme Court, the question as to which Court has to exercise it and in what manner is one of mere procedure. So long as the "wills and preferences" of the mentally ill person and the other factors set out in the rules are borne in mind by the Court exercising *parens patriae* jurisdiction, it cannot be held that the High Court exercising power under Article 226 is denuded of power in view of the provisions of the Act of 2016 or the Rules thereunder.

22. Common thread running through all the judgments is that the Constitutional Courts may also act as *parens patriae*, so as to meet the ends of justice in exceptional cases. As stated herein above, the mechanism for providing total support is missing and the Constitutional Courts having been conferred with the powers; permitting it to exercise the jurisdiction of the *parens patriae*; in view of the exceptional circumstances pointed out, request of the petitioners for being appointed them as guardians, for extending total support, is required to be accepted; more particularly, when nothing adverse or objectionable has been placed on record.

23. Adverting to the merits, perceptibly and undisputedly, the

brother has been certified of having the disability as per the certificate Annexure - C (page 34) issued by Pandit Deendayal Upadhyay Medical College & Hospital, Rajkot. The relevant extracts whereof, read thus. *"This is to certify that has been examined of this hospital by Dr. M.K. Patel, O.P.D. Case No.OP/191227/0/262 dated 03.01.2020 and found that the patient is suffering from Major Neuro Cognitive Disorder (Chronic Neurological condition) and Bipolar one Disorder (Mental illness). Patient is suggested to have a legal Guardian as patient can't make a valid legal decision.* As per the disability certificate issued by the Department of Empowerment of Persons with Disabilities, Ministry of Social Justice & Empowerment, Government of India, the brother has been certified that he is suffering from Chronic Neurological Conditions which, as discussed herein above, has been assessed to 75%. Similarly, it is certified that he is suffering from mental illness i.e. Bipolar One disorder, to be assessed as 75%. The certificate also contains that the condition is not likely to improve. Therefore, it is beyond any dispute that the brother is suffering from Major Neuro Cognitive Disorder.

24. Coming to his two sons, the disability certificates have been placed on record. So far as the elder son is concerned, as per the disability certificate, his case is of intellectual disability and other mental disorders due to brain damage and dysfunction and to physical disease. So is the position with the younger son who, is also suffering from mental disorder due to brain damage and dysfunction. The another member left, would be the wife i.e. respondent no.2, who has been certified to have been suffering from Locomotor Disability and having the foot deformity in both the legs, is unable to walk. Moreover, she has low vision in the eyes. The daughter is married and staying with her in-laws at the distance of 59 kms. and

has filed an affidavit that if the petitioners are appointed as the guardian, she has no objection.

25. Considering the health conditions of all the family members, it suggest that all of them are incapable of taking any decision in their interest, except the wife, who is having the physical incapacity to take care of the interest of her husband and two sons.

26. Further, Mr. Zalak Pipalia, learned advocate for the respondent nos.2 and 3 has tendered the affidavits filed by the respective respondent nos.2 and 3. In the affidavit of the respondent no.2, it has been, *inter alia*, stated that her husband is suffering from mental illness and has symptoms by which, he is unable to recognize the relatives and is in the habit of leaving the home. Concern is also expressed that the brother is capable of being misguided by any person and taking undue advantage of his mental illness, that some of the persons have tried to obtain his signature and got the property transferred in their names. She has also declared before this Court that she has foot deformity to an extent of 40% and is not capable of moving around and therefore, she has no objection, if the petitioners are appointed as guardian, as the petitioners are competent to take care of the brother as well as the estate of the family. The relevant extracts from the affidavit read thus.

“3. I state that, I am wife of Parshottambhai Ravjibhai Sorathia (hereinafter referred to as “disabled person”). I state that, petitioner No.1 is brother of the disabled person and petitioner No.2 is nephew of disabled person. Further, petitioner No.2 is the son of petitioner No.1. I state that, I have two sons by the name Mahendrabhai and Bharatbhai aged 37 years and 40 years respectively and one daughter by the name

Chandrikaben aged 39 years. That, my daughter Chandrikaben is married to Bhaveshbhai Sayani and is residing at Jasdan.

4. I state that, the petitioners are residing adjoining to my residence and are taking day to day care of myself and my husband who is a disabled person. I state that, the petitioners are providing all the support as a family member to my family and also helps in visiting the doctors and the hospitals from time to time for timely treatment of my husband and two sons who are suffering from mental illness.

5. I state that, my husband suffers from mental illness and has symptoms by which he is not able to recognize relatives and has a habit to run away from home. He is suffering from major neuro cognitive disorder and bipolar disorder having multiple disabilities. Further, my both the sons are also suffering from mental disorder due to brain damage and dysfunction. Therefore, the petitioners give full support and helps me and my family in such circumstances and also helps to meet all the medical expenses and other expenses to run the family.

6. I state that, the disabled person would be easily misguided by any person and taking advantage of mental illness of the disabled person, group of six persons took the signature of the disabled person and got the property of Survey No.307 transferred in their name in the month of March 2020 because of which, I was constrained to file FIR dated 20/03/2020.

7. I further state that, I myself suffering from foot deformity having 40% permanent disability and as such having locomotor disability. Hence, I myself is also unable to sustain the pressure and take care of everyone. It is only because of the help of the petitioners that me and my family are able to face all the difficulties and taking care of all the situations that arise from time to time.

8. I state that, it was because of the circumstances of disabled person that it was decided that the petitioners jointly may be appointed as a guardian for disabled person for dealing with his medical and mental disability and with all matters relating to his estate including immovable and movable properties and to operate bank accounts and such other incidental acts. That, I had by an affidavit dated 18/08/2021 disclosed that I have no objection if the petitioners are appointed

as guardian because the petitioners are competent to take care of the disabled person as well as the estate of the disabled person in the interest of the disabled person as well as myself and my family.

9. I state that, I am also having 40% permanent disability and as such having locomotor disability and therefore it is difficult for me to act as a guardian on behalf of the disabled person. I am an illiterate person and in fact I also take guidance and help from the petitioners. Under the circumstances it would not be possible for me to act as a guardian for the disabled person and I have full faith and trust in the petitioners."

27. The daughter has also filed an affidavit on the similar lines.

28. Also, in the proceedings before the Court below, the respondent no.2 has filed an affidavit dated 18.08.2021, *inter alia*, stating that she cannot see from her right eye and that, she is unable to move, owing to her right leg. It has been stated that her husband, she and her family is being taken care of by her brother-in-law and the nephew. She has also stated that she is illiterate and aged and therefore, her husband i.e. the brother, needs a guardian so that, the movable and immovable properties are not misused. She has given her consent that she has no objection, if her brother-in-law and nephew are appointed as the guardian. The daughter i.e. the respondent no.3, has filed the affidavit on similar lines, giving her consent for appointment of the petitioners as guardian. One brother has also given his consent for appointment of the petitioners as the guardian.

29. During the pendency of the captioned writ petition, this Court, vide order dated 16.03.2023, directed the Collector, Rajkot to constitute a team of five doctors/experts, to verify the medical condition of the brother, his wife and two sons and after examining, to submit a report. Apropos the said direction, the office of the

Collector & District Magistrate, vide its communication dated 21.03.2023, appointed a team of five experts, who have examined the brother and the family members and having examined, prepared a report dated 27.03.2023. The Committee has opined that brother is suffering from major Neuro Cognitive Disorder, is a known case of Bipolar-1 Disorder with 75%. So far as the respondent no.2 is concerned, the team has opined that she is a case of Locomotor Disability as the patient is having B/L Foot Deformity. Similarly, so far as the two sons are concerned, it has been opined that both are suffering from Intellectual Disability, which has been assessed at 75%.

30. From the aforesaid discussion, it is clear that not only the brother, but the family members are suffering physical incapacity to take care of their estate, namely, movable and immovable properties and therefore, the present, can be termed as an exceptional case wherein, the brother needs support in taking the decision in his own interest and in the interest of the family.

31. In view of the above discussion, the captioned writ petition deserves to be allowed and is accordingly allowed, declaring the petitioners, namely, Dhirubhai Ravjibhai Sorathiya, the brother as well as Yogesh Dhirubhai Sorathiya, the nephew, as the guardian of the brother Shri PRS.

32. With a view to seeing that the present order is adhered to and is observed in its true letter and spirit and that, there is no breach, following conditions are necessitated:

- (i) The petitioners - guardian, shall act always in the best interest of the brother - Shri PRS and shall be responsible for medical care and treatment.

(ii). The transactions in respect of the movable and immovable properties of the brother, by the petitioners - guardian, shall be in consultation and in concurrence with the respondent no.2 - MRS with an intimation to the daughter i.e. respondent no.3 - CBS, strictly in accordance with the provisions of law. If the petitioners - guardian are found to be abusing the power or neglect or act contrary to the best interest of the brother and his family, it will be open to the respondent nos.2 and 3 and any relative or next friend to apply to this Court for removal of such guardian.

(iii) The petitioners - guardian shall file, every three months, a report with the Registrar General, High Court of Gujarat advertent to the transactions, if any, undertaken by the petitioners - guardian in respect of the movable and immovable properties, as indicated in the abovereferred paragraph, namely, (i) agricultural land admeasuring 26,709 sq.mtrs.; (ii) non-agricultural land admeasuring 714.29 and (iii) non-agricultural land admeasuring 120.78 sq.mtrs. Besides the report, shall also indicate the funds, if any, received by the guardian and their utilization for the purpose of maintaining the brother.

(iv). In case a relative or a next friend of the brother finds that the guardians are not acting in the best interest of the brother and his family, such person will also have the locus to approach this Court for issuance of appropriate directions and/or for removal

of the guardian.

(v). The Registrar General, High Court of Gujarat, shall cause a separate register to be maintained which shall set out, *inter alia*, the details of the proceedings, the details of the persons appointed as a guardian and orders, if any, passed after the appointment of the guardian. Measures shall also be taken by the Registrar General, High Court of Gujarat to preserve the reports filed by the petitioners – guardian from time to time.

(vi). It should be ensured that there is no misuse of the power or misappropriation of the funds and if, there is, any, or there is no requisite care and protection or support with regard to the treatment being extended, it will be open to place the matter for further consideration of this Court and to reopen and revoke the power, to take appropriate action against the petitioners – guardian. It will be also open for the Court to appoint another person/public authority/Social Welfare Officer as the guardian in accordance with law.

(vii). The petitioners – guardian, shall intimate their appointment to the public official/Social Welfare Officer or officer of the equivalent rank designated by the State Government. The petitioners - guardian as well as the Registrar General, High Court of Gujarat, will cause a copy of this order of guardianship being served upon such officer. Such officer, shall visit the family of the brother at least once in three months

and will generate report of his/her visit. If it is found that the petitioners - guardian are not acting in the best interest of the brother, such officer will be at liberty to file appropriate application before this Court at the earliest, seeking appropriate directions.

33. With the aforesaid directions, the petition is partly allowed.

34. Rule is made absolute to the aforesaid extent. No order as to costs.

35. The copy of this order shall be submitted to the learned Registrar General, High Court of Gujarat for information and necessary compliance.

Hitesh

(SANGEETA K. VISHEN,J)