
(2023) 10 CAL CK 0021
In the Calcutta High Court
Case No : W.P.A. No. 17528 Of 2023

Vishal Osatwal

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 05-10-2023

Acts Referred:

Constitution Of India, 1950 — Article 21, 226
National Trust Act, 1999 — Section 15, 16

Citation : (2023) 10 CAL CK 0021

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Siddhartha Lahiri, Aritra Chakraborty, Debraj Dutta, Tuli Sinha,
Amitabha Nayak, Aditi Singhania

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner is the son of Sri Rajesh Kumar Osatwal. Proforma respondent no.3 is the wife and Proforma respondent nos.4 and 5 are the daughters of the said Rajesh.
2. Rajesh, while attending a family wedding in Secunderabad, suffered from a heavy chest congestion and chest pain on November 21, 2015 and was transported to a hospital in Secunderabad. Upon treatment, he showed signs of improvement. However, on November 24, 2015, at about 10a.m., the patient developed right-sided Hemiparesis accompanied by right-sided Upper Motor Neuron (UMN) type of VII Nerve Palsy. A massive subdural hematoma on the left side of the brain extending from the frontal to occipital region was discovered on CTScan. Due medical procedure was carried on under expert supervision on the petitioner's father thereafter.
3. On November 26, 2015, another CT scan revealed an acute intracerebral haemorrhage affecting the right capsule ganglionic region accompanied by surrounding oedema. The patient remained on ventilator continuously for a

month thereafter and was released on December 23, 2015, upon which he was taken a health-care centre at Hyderabad namely Suvitas Holistic Healthcare Pvt. Ltd., which is a leading rehabilitation centre, on inpatient transition care facility for comprehensive nursing care, physiotherapy and specialized medical nutrition. All the children of Rajesh and his wife, including the petitioner, used to travel to and fro between Hyderabad and their residences during the said period.

4. On April 29, 2016, the petitioner's father had to be readmitted to the Krishna Institute of Medical Sciences Limited with fever and blood in his urine. After about 15 days, the patient was discharged on May 13, 2016 with the same pre-existing medical condition and was taken back to the same Rehabilitation Centre, Suvitas.

5. The patient's treatment continued. Ultimately, on October 14, 2016, the petitioner's father was discharged from Suvitas and was flown to Kolkata via air ambulance. The petitioner accompanied him. The patient was brought to the family residence of the petitioner at 34/1U, Ballygunge Circular Road, Kolkata-700 019.

6. Thereafter, the petitioner's father has been residing in a designated area in the said residence which has been converted into a well-equipped ward resembling the critical care environment of an Intensive Care Unit (ICU), conducive to the proper care and medical treatment of the patient. The patient was thereafter admitted to the Park Clinic, Kolkata on February 6, 2017 for D1 Vertebral Compression Fracture with phytic deformity and was discharged on February 8, 2017. Since then, the petitioner's father Rajesh has been under continuous medical and nursing care at home and has been all along in a comatose condition.

7. The treatment of Rajesh requires immense expenses. For the past eight years, the petitioner and his mother have been financing the said treatment and nursing care using their family savings. However, it is pleaded that the financial burden has become increasingly overwhelming. Unless access is given to the petitioner to the funds of his father lying in his bank accounts and his property, it will be extremely difficult to meet the mounting expenses for the treatment of the comatose Rajesh. In such circumstances, the petitioner seeks to be appointed as a guardian of the person and property of his father Rajesh, details of which properties have been enumerated in the writ petition itself.

8. In support of his submissions, learned counsel for the petitioner cites the judgments of several High Courts and two reports of the Supreme Court, which shall be discussed presently. I must express appreciation to learned counsel for the petitioner for having undertaken extensive research work on the evolving law in the field.

9. Learned counsel appearing for the Union of India argues that the writ petition is barred under Order XXXIIA of the Code of Civil Procedure. It is argued that as per the said provision, the application should have been filed before a civil court.

10. Heard learned counsel for the parties. The first judgment relied on by the petitioner is Charan Lal Sahu Vs. Union of India, reported at (1990) 1 SCC 613. The said case pertains to the tragic gas leak disaster at Bhopal.

11. The said judgment has been cited by the petitioner in support of the concept of *Parens Patriae*. In the said judgment, the Supreme Court adopted the principle to hold that the State and the court could act as the constitutional protector of all property in matters of public concern.

12. The petitioner next cites Aruna Ramachandra Shanbaug Vs. Union of India and others, reported at (2011) 4 SCC 454. In the said case, the Supreme Court was dealing with physician-assisted death by way of euthanasia. Aruna Shanbaug was in a vegetative state. The Supreme Court again adopted the principle of *Parens Patriae*, conferring on the High Court the status of granting approval to the relatives and next of kin of the patient to decide whether to withdraw her life support.

13. In Shobha Gopalakrishnan Vs. State of Kerala Represented by the Secretary, Health and Family welfare Department, Government Secretariat and Others, reported at 2019 SCC OnLine Ker 739, a Division Bench of the Kerala High Court, apparently as a first, formulated certain guidelines. Upon consideration of several relevant Acts like the Guardians and Wards Act, 1890, the Mental Health Act, 1987, etc., the court fixed the said guidelines as a temporary measure till the Legislature enacted proper statutes in respect of victims lying in a comatose state. The said guidelines are as follows:

i) petitioner/s seeking for appointment of Guardian to a person lying in comatose state shall disclose the particulars of the property, both movable and immovable, owned and possessed by the patient lying in comatose state.

ii) The condition of the person lying in comatose state shall be got ascertained by causing him to be examined by a duly constituted Medical Board, of whom one shall definitely be a qualified Neurologist.

iii) A simultaneous visit of the person lying in comatose state, at his residence, shall be caused to be made through the Revenue authorities, not below the rank of a Tahsildar and a report shall be procured as to all the relevant facts and figures, including the particulars of the close relatives, their financial conditions and such other aspects.

iv) The person seeking appointment as Guardian of a person lying in comatose state shall be a close relative (spouse or children) and all the persons to be classified as legal heirs in the due course shall be in the party array. In the absence of the suitable close relative, a public official such as 'Social Welfare officer' can be sought to be appointed as a Guardian to the person lying in 'comatose state'.

v) The person applying for appointment as Guardian shall be one who is legally competent to be appointed as a Guardian vi) The appointment of a Guardian as

above shall only be in respect of the specific properties and bank accounts/such other properties of the person lying in comatose state; to be indicated in the order appointing the Guardian and the Guardian so appointed shall act always in the best interest of the person lying in 'comatose state'.

vi) The person appointed as Guardian shall file periodical reports in every six months before the Registrar General of this Court, which shall contain the particulars of all transactions taken by the Guardian in respect of the person and property of the patient in comatose state; besides showing the utilization of the funds received and spent by him/her.

vii) The Registrar General shall cause to maintain a separate Register with regard to appointment of Guardian to persons lying in 'comatose state' and adequate provision to keep the Reports filed by the Guardian appointed by this Court.

viii) It is open for this Court to appoint a person as Guardian to the person lying in comatose state, either temporarily or for a specified period or permanently, as found to be appropriate.

ix) If there is any misuse of power or misappropriation of funds or non-extension of requisite care and protection or support with regard to the treatment and other requirements of the person lying in comatose state, it is open to bring up the matter for further consideration of this Court to re-open and revoke the power, to take appropriate action against the person concerned, who was appointed as the Guardian and also to appoint another person/public authority/Social Welfare Officer (whose official status is equal to the post of District Probation Officer) as the Guardian.

x) It shall be for the Guardian appointed by the Court to meet the obligations/duties similar to those as described under Section 15 of the National Trust Act and to maintain and submit the accounts similar to those contained in Section 16.

xi) The Guardian so appointed shall bring the appointment to the notice of the Social Welfare Officer having jurisdiction in the place of residence, along with a copy of the verdict appointing him as Guardian, enabling the Social Welfare Officer of the area to visit the person lying in 'comatose state' at random and to submit a report, if so necessitated, calling for further action/interference of this Court.

xii) The transactions in respect of the property of the person lying in 'comatose state', by the Guardian, shall be strictly in accordance with the relevant provisions of law. If the Guardian appointed is found to be abusing the power or neglects or acts contrary to the best interest of the person lying in 'comatose state', any relative or next friend may apply to this Court for removal of such Guardian.

xiii) The Guardian appointed shall seek and obtain specific permission from this Court, if he/she intends to transfer the person lying in comatose state from the jurisdiction of this Court to another State or Country, whether it be for availing

better treatment or otherwise.

14. The same guidelines were adopted by a learned Single Judge of the Delhi High Court in *Vandana Tyagi and Another Vs. Government of National Capital Territory of Delhi and Others*, reported at 2020 SCC OnLine 32.

15. A Division Bench of the High Court at Allahabad in *Uma Mittal and Others Vs. Union of India and Others*, reported at 2020 SCC OnLine All 777, observed 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 for the past year and a half. The dominant factor, after all, is not enforcement of rights guaranteeing protection of life of warring parties under Article 226 of the Constitution but the protection of the rights of a human being lying in a comatose state under Article 21 of the Constitution of India. The court, taking a cue from *Shobha Gopalakrishnan (supra)*, went on to adopt the same guidelines. The court accepted a medical report submitted by a medical board and appointed the petitioner no.1 therein as the guardian of her husband who was in a comatose condition.

16. A Division Bench of the Bombay High Court in *Rajni Hariom Sharma Vs. Union of India and Another*, reported at 2020 SCC OnLine Bom 880 considered the same issue including whether Order XXXIIA of the Code of Civil Procedure could be a bar. The court entertained the application under Article 226 and proceeded to pass appropriate orders *ex debito justitiae*.

17. A learned Single Judge, in *Arun George Antony Vs. Union of India*, represented by its Secretary, Ministry of Health and Family welfare Department, Government Secretariat and Others, reported at 2020 SCC OnLine Ker 19909, proceeded on the same premise, as did a learned Single Judge of the Telangana High court in *Prabhat Vinnakota Vs. State of Telangana and Others*, reported at 2023 SCC OnLine TS 511, and a learned Single Judge of the Gauhati High Court in *Ayan Kumar Das and Another Vs. Union of India and Others*, reported at (2023) 1 Gauhati Law Reports 354.

18. The question which presents itself before us is whether the principle as laid down in the above judgments should be followed in the case at hand.

19. In the present case, the petitioner's father, as discussed above and affirmed on oath, is undoubtedly in a comatose condition.

20. All the heirs and legal representatives of the comatose person, namely Rajesh, are impleaded in the present writ petition and have offered their consent to the reliefs sought herein.

21. Vide order dated August 8, 2023, the State was directed to constitute a medical board comprised of four eminent medical practitioners in their respective fields, having expertise respectively in the fields of neurology, psychiatry, cardiology and medicine. Such a Board was duly constituted and reports have been filed, which are on record.

22. A communication made by the Medical Superintendent-cum-Vice Principal, IPGMER-SSKM Hospital, Kolkata on August 26, 2023 indicates that the physical and neurological condition of the patient Rajesh Kumar Osatwal was ascertained by the Board at his residence on August 21, 2023 at 12.30 pm.

23. A copy of the opinion of the Board, signed by all its members, dated August 21, 2023 has also been presented. The Medical Board comprised of Dr. Sanjoy Kumar Chatterjee, Professor & HOD of Medicine of the said hospital, Dr. Atanu Biswal, Professor & HOD of Neuromedicine, Dr. (Prof.) Amit Kumar Bhattacharyya, Director of IOP COE and Dr. Saroj Mandal, Professor of the Department of Cardiology.

24. It appears from the report that, after thorough examination of Mr. Rajesh Osatwal, the Board members have unanimously arrived at the conclusion that his present physical, mental and neurological condition make him incapable of taking care of himself and perform day-to-day activities at present. He is currently bedridden, unable to comprehend and communicate, and not in a state of taking any decision.

25. Thus, it is beyond doubt that the patient is bedridden and incapable of comprehension and communication, let alone being able to take any decision and perform day-to-day activities.

26. Thus, the petitioner's father is in a comatose condition, incapable of looking after his own interests and well-being.

27. Insofar as Order XXXIIA of the Code of Civil Procedure is concerned, the said provision is not applicable at all in the circumstances of the case. The said provision deals with suits relating to matters concerning the family. In matters concerning the family, as per the said Order, proceedings may be held in camera, the court has a duty to make efforts for settlement and it is open to the court to secure the services of a welfare expert.

28. This is not a suit relating to "matters concerning the family". Rather, this is a writ petition filed by the petitioner on behalf of his now-incapable father, for protecting his comatose father's right to life, guaranteed under Article 21 of the Constitution of India. Right to life includes the right to live a dignified life worth the name, with the entire bundle of rights associated with it. Hence, Order XXXII A of the Code of Civil Procedure is not attracted in any manner whatsoever.

29. None of the said provisions are germane in the present context. Order XXXII of the Code provides for suits by or against minor and persons unsound mind, which the present writ petition is not.

30. A person in a comatose condition is not a person of "unsound mind". Unsound mind connotes that a person's mental faculties are impaired, affecting his actions and decisions. However, an unsound mind presupposes a functional mind, which does not operate at its optimum capacity for some reason or the other. A person in a comatose condition, as opposed to one of "unsound mind", is

incapable of taking care of himself or even to comprehend, respond to stimuli or communicate.

31. There is no statute in India which provides for appointment of guardian to take care of comatose persons or persons in a vegetative state.

32. None of the available statutes are relevant in such cases. The statutes relating to mental health do not apply, since those deal with mentally ill persons having mental disorder or retardation of sorts, but not persons who are in an inert condition, incapable of interacting meaningfully with their environment. For them, life passes by without registering any chord. Left unattended or uncared for – medically and socially, such a person is incapable of surviving. The Guardians and Wards Act and similar statutes, on the other hand, deal with minors and dependents. Specific statutes pertaining to persons with Autism, Cerebral Palsy, mental retardation and multiple psychological disabilities also do not accommodate the condition of the patient in the present case.

33. In any event, there is no question of relegating the petitioner to a civil suit, keeping in view the urgent need of operating the movable properties and dealing with the immovable properties of the petitioner's father, the comatose patient, primarily to fund the huge expenses of regular upkeep of the medical facilities and expert care for the patient himself.

34. As repeatedly observed in the judgments discussed above, the concept of Parens Patriae has found considerable currency in the Indian legal environment.

35. The fundamental rights guaranteed under the Constitution of India, in particular Article 21, which recognizes the right to life, includes the right to live with dignity. In order to confer such right on the patient, it is required that his resources are appropriately channelized for his own treatment and well-being.

36. Thus, the appropriate recourse for the petitioner is the one which has been adopted, that is, invocation of the jurisdiction of this court under Article 226 of the Constitution of India to ensure the right to live with dignity of the patient, for the protection of which the petitioner seeks to be appointed a guardian of the person and property of his father.

37. The guidelines in Shobha Gopalakrishnan (supra), followed in Vandana Tyagi (supra) and Uma Mittal (supra), provide a roadmap for the Legislature to follow. However, till such legislation is enacted for the care of comatose persons, the guidelines stipulated therein operate as a workable solution.

38. Hence, the said guidelines, as set out in paragraph no. 13 above, are adopted herein.

39. Insofar as the present case is concerned, the petitioner has sufficiently established that he has been looking after his father, who is in a comatose state for quite some time, and is capable and sensitive enough to look after his father in the capacity of a guardian/legal representative.

40. Accordingly, WPA No. 17528 of 2023 is allowed, thereby appointing the petitioner Vishal Osatwal as the guardian and legal representative of his father Mr. Rajesh Kumar Osatwal. The petitioner shall henceforth act as the sole agent and legal representative of Rajesh Kumar Osatwal in the capacity of his guardian and deal with all movable and immovable properties of the said patient.

41. The properties in respect of which the petitioner is being appointed guardian of Rajesh Osatwal are in terms of Schedule A of the writ petition which is replicated hereinbelow:

SCHEDULE A

IMMOVABLE PROPERTIES Particulars

1.

25% Share in Residential House at 34/IU, Ballygunge Circular Road, Kolkata-700 019

2.

Land at Rajarhat in Kalikapur Mouza under Dag No.1159 and 1219 measuring about 7 Cottahs

3.

Share of Land in Plot No E, Dag No. 715 Mahesh Colony, Block No. 48. Mahesh Housing Cooperative Colony Society, P.S. Sreerampore, District Hooghly

MOVABLE PROPERTIES Particulars

4.

i) Locker having no. 2018 at axis bank, golpark branch connected with savings a/c. No. 910010028682047

ii) Locker having no. 3020 at Axis Bank, Golpark Branch connected with savings a/c. No. 910010028629677

iii) Locker having no. e-33 at Punjab National Bank, Shakespeare Sarani Branch connected with savings a/c. no. 3190000100057037 with Late Bimla Osatwal (mother) and Manju Osatwal, proforma respondent no.3

iv) Locker having no. e-31 at Punjab National Bank, Shakespeare Sarani branch connected with savings a/c. no. 3190000100057055 with Later Bimla Osatwal (Grand-mother of Petitioner) and Anuja Osatwal, sister of Rajesh Kumar Osatwal.

5.

Shares & Debentures in his name hold in Demat in following Demat accounts:

iii) DP NAME :- IDBI BANK

DP ID:- IN300450 Client ID :- 12669245

iv) DP NAME :- AUM Capital Market Pvt. Ltd. DP ID :- 12057800

Client ID :- 00027837

6.

Public Provident Fund till date in A/c No. 1703801765 with GPO.

7.

Balance as on date with the IDBI Bank Brabourne Road Branch, Kolkata-700001 Savings A/c No. 060104000077190 IFSC CODE: IBKL0000060

8.

All Loan & Advances Given

42. However, the petitioner shall, every three months for the first year and thereafter every six months, file detailed accounts in the form of a report indicating the transactions and dealings undertaken by the petitioner with regard to the moveable and immovable property of his father Rajesh Kumar Osatwal up to that period. The report, further, shall also include the current medical condition of Rajesh Kumar Osatwal. Relevant documents in support of the report shall also be annexed along with it. The said report shall be filed before the Department of Women and Child Development and Social Welfare, Government of West Bengal.

43. The first of such reports shall be filed (for the transactions from this date till December 31, 2023) in next January, positively by the 10th day of January, 2024. Throughout the year 2024, the petitioner shall continue to file similar quarterly reports. For example, after January, the next report will be filed between April 1 and 10, 2024 and so on and so forth.

44. From the year 2025 onwards, the petitioner shall file similar reports every six months, by the 10th of the month when it becomes due.

45. During the entire period, in the event there is any discrepancy in the said reports, the Department of Women and Child Development and Social Welfare shall place the matter in writing before the Registrar General of this Court. Upon such communication being made, the learned Registrar General shall place the same before the appropriate Bench having determination to take up residuary matters and/or place the same before the Hon'ble the Chief Justice for allocating the same before any Bench for passing appropriate orders thereon.

46. It will be open to any person, at any point of time, to file an application before this Court seeking appropriate orders for alteration of this order and/or change of guardian/legal representative of Rajesh Kumar Osatwal, citing

sufficient reasons for such prayer.

47. The petitioner shall ensure that the resources of his comatose father Sri Rajesh Kumar Osatwal are prudently and optimally invested and used to cater to all the needs of the said Rajesh throughout the patient's lifetime or in, case of recovery of Sri Rajesh Kumar Osatwal from his present comatose condition, till such recovery takes place. In the event of the recovery of Rajesh from his present comatose condition and/or his demise, the petitioner shall immediately file an appropriate writ petition intimating this court of such development and seek appropriate orders.

48. I part with the expectation that the Legislatures – both the Union and/or the States -shall immediately look into the issue of legislative vacuum in the field, repeatedly being pointed out by several High Courts, and enact an appropriate statute and/or pass proper guidelines for the purpose of looking after the person and property of comatose persons and the modalities regarding the same.

49. There will be no order as to costs.

50. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.