

Neutral Citation No. - 2025:AHC-LKO:31423-DB

A.F.R.

**High Court of Judicature at Allahabad
Lucknow**

**Reserved on : 07.05.2025
Delivered on : 27.05.2025**

Court No. - 2

Case :- WRIT - C No. - 10898 of 2024

Petitioner :- Saurabh Mishra

Respondent :- State Of U.P. Thru. Prin. Secy. Deptt. Of Medical Health And Family Welfare U.P. Lko. And 3 Others

Counsel for Petitioner :- Surendra Singh

Counsel for Respondent :- C.S.C.

Hon'ble Rajan Roy,J.

Hon'ble Om Prakash Shukla,J.

(Per : Om Prakash Shukla, J.)

- (1) Heard Shri Surendra Singh, learned counsel for the petitioner and learned Standing Counsel for the State/respondents no. 1 to 3.**

- (2) The petitioner has invoked the writ jurisdiction of this Court, seeking direction to quash the impugned order dated 16.11.2024 passed by the opposite party no.2-Mansik Swasthya Punarvilokan Board, Barabanki (hereinafter referred to as 'Board'), whereby the application filed by the petitioner under Section 14 of the Mental Healthcare Act, 2017 (hereinafter referred to as 'MH Act, 2017) came to be rejected on the ground that the petitioner had a criminal history of two cases, therefore, the petitioner cannot be appointed as a representative**

of opposite party no.4, who has been suffering from intellectual disability.

- (3) The fulcrum of the present case is that father of opposite party no.4 was working as a Noter and Drafter in Madhyanchal Vidyut Vitran Nigam Limited at Ayodhya region and while working in the same capacity, he retired on attaining the age of superannuation. Thereafter, father of the opposite party no.4 was getting pensionary benefits from the department till his death on 16.07.2021. Prior to it i.e. on 09.09.2018, mother of the opposite party no.4 already died.
- (4) It is stated by the petitioner that since opposite party no.4 was an unmarried daughter and was suffering from Moderate Intellectual Disability IQ-44 (VSMS) (disability about 75% as per Disability Certificate, Annexure-4), which is not curable by way of the treatment, she applied for family pension, which came to be considered by the department and she was granted Rs. 14,400/- towards family pension to her on 17.02.2023 till her marriage or death, whichever is earlier.
- (5) According to the petitioner, he is a close relative (Nephew) of opposite party no.4 and looking into the pathetic condition of the opposite party no.4, he decided to take responsibility of the opposite party no.4, for which other family members have no objection. In this regard, on 01.10.2024, the petitioner moved

an application before the Board under Section 14 of the MH Act, 2017, seeking his nomination as a representative/prabandhak to take care of the opposite party no.4 and her property. This application of the petitioner was examined by the Board and after due deliberations/considerations, the Board opined that since two criminal cases i.e. (i) Case Crime No. 129 of 2016, under Sections 143, 341 I.P.C., Section 7 of the Criminal Law (Amendment) Act, 2013 and Section 6/11 of the United Providential Special Power Act and (ii) Case Crime No. 292 of 2016, under Sections 143, 341, 323, 332 I.P.C. and 7 Criminal Law (Amendment) Act, 2013, are pending and the Station House Officer, Ramnagar had not recommended character verification of the petitioner, the claim of the petitioner to nominate him as representative of the opposite party no.4 was not appropriate and accordingly, the Board had rejected the application of the petitioner vide order dated 16.11.2024. It is this order dated 16.11.2024, which has been assailed in the present petition by the petitioner.

(6) It has been submitted by the petitioner that petitioner's application came to be rejected by the Board vide the impugned order dated 16.11.2024 only on the sole ground that the petitioner has a criminal history of two cases. According to learned Counsel, both the cases are pending before the Court of Additional Chief Judicial Magistrate, Barabanki and the same

are at a very nascent stage of admission. Learned Counsel has submitted that no person is held guilty until proven so in a Court of law. He, therefore, prays that impugned order violates the mandate of Article 21 of the Constitution of India and is liable to be quashed and the petitioner may be appointed as the representative of opposite party no.4 in the given facts and circumstances of the case.

(7) On 20.12.2024, we have passed the following order :-

“Heard.

Let learned Standing Counsel satisfy the Court as to how the order impugned is sustainable as *prima facie* Susri Ganga Devi resides with the petitioner and is being looked after by him as per the report of Tehsildar, Ramnagar, Secondly, the legal heirs of Late Narayan Sharma Mishra the husband of Susri Ganga Devi have no objection and have given no objection certificate. Therefore, merely because two criminal cases are there that too pertaining to offences which do not appear to be heinous offences, we fail to understand as to how the nomination of petitioner as guardian of Susri Ganga Devi could have been denied as that was being sought only to facilitate receipt of pension by Ganga Devi which could be utilized for her welfare especially as it is undisputed that Susri Ganga Devi resides with the petitioner and is being looked after by him. Therefore, what purpose does the impugned order serve we fail to understand. In the facts of this case, we do not see why we should relegate the petitioner to remedy of appeal and further increase the agony of private opposite party who would be beneficiary of such nomination. We see no necessity to issue notice to opposite party no.4.

List this case on 06.01.2025 as fresh.

Whatever affidavits are required to be filed by the opposite parties be filed before the next date.”

(8) Apparently, pursuant to the aforesaid order dated 20.12.2024, no counter affidavit has been filed on behalf of respondent no.1-State/respondent no.3-District Magistrate, Barabanki, however, the respondent no.2-Board has filed counter affidavit, supporting the impugned order, but in the same vein also admitting that both criminal cases pending against the petitioner were not heinous in nature. An additional ground in the form of explanation has been appended in the counter affidavit to say that application was rejected as according to them the offences appeared to be involving moral turpitude.

(9) First and foremost, this Court finds that the Board having been constituted under Section 73 of the MH Act, 2017 has passed the impugned order by exercising its power under section 80 (2) (a) of the MH Act, 2017, which are essentially statutory in nature. The law relating to additional reasoning by a statutory functionary at the time when the impugned order is being tested, stands settled in the well celebrated Constitutional Bench judgment of the Apex Court rendered in the case of **Mohinder Singh Gill Vs. The Chief election Commissioner, New Delhi** : 1978 (1) SCC 405, wherein the Constitutional Bench held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the

reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or by a reply, otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out by the said statutorily functionary. Thus, the additional explanation of the Board asserted in the counter affidavit that the offences appeared to be involving moral turpitude, is merely noted to be rejected.

(10) In any case, the term ‘moral turpitude’ is not defined under the law, but based on judicial precedents, it refers to instances where an individual indulges in acts which are against morality, integrity, and ethics. Courts have identified offences involving moral turpitude to include financial misappropriation, criminal breach of trust, theft, sexual misconduct, etc. and refers to a conduct which is inherently base, vile, or depraved. This Court in the facts of the present case and taking a holistic view of the sections invoked against the petitioner in two criminal cases pending against the petitioner, is of the considered view that the offences alleged does not involve any offence of moral turpitude. However, since this Court is merely considering the sections invoked against the petitioners in the said two criminal cases with the limited lens of disposal of the present petition under the provisions of MH Act, 2017, any observation made by this Court shall not have any bearing on the merits of said

two criminal cases, which shall have their own consequences on the basis of their individual merits, as per law.

(11) The next question, which falls for consideration is as to whether in the facts and circumstances of the present case wherein the impugned order is unsustainable in the eyes of law, whether the petitioner should be relegated to the stage of Board/Authority or this Court can appoint the petitioner as the representative or not. Having said so, this Court finds that in view of Section 4 of the MH Act, 2017, every person, including a person with mental illness shall be deemed to have capacity to make decisions regarding his mental healthcare or treatment. Thus, a deemed capability is envisaged by the MH Act, 2017 itself and as such Section 5(1)(c) of the MH Act, 2017 says that every person, who is not a minor, shall have a right to make an advance directive in writing to the effect that any individual or individuals, in order of precedence, he or she wants to appoint his nominated representative as provided under section 14 of the MH Act, 2017.

(12) However, in the present case, what this Court find is that opposite party no.4, who is suffering from Moderate Intellectual Disability IQ-44 (VSMS) (disability about 75% as per Disability Certificate, Annexure-4), is unable to exercise her right and there is no advance directive and as such the impugned application came to be filed by the petitioner under

Section 14(4)(d) of the MH Act, 1977. It would be profitable to extract Section 14 of the Act, which inter-alia says as follows:

“Section 14: Appointment and revocation of nominated representative.

- (1) Notwithstanding anything contained in clause (c) of sub-section (1) of section 5, every person who is not a minor, shall have a right to appoint a nominated representative.
- (2) The nomination under sub-section (1) shall be made in writing on plain paper with the person's signature or thumb impression of the person referred to in that sub-section.
- (3) The person appointed as the nominated representative shall not be a minor, be competent to discharge the duties or perform the functions assigned to him under this Act, and give his consent in writing to the mental health professional to discharge his duties and perform the functions assigned to him under this Act.
- (4) Where no nominated representative is appointed by a person under sub-section (1), the following persons for the purposes of this Act in the order of precedence shall be deemed to be the nominated representative of a person with mental illness, namely:-
 - (a) the individual appointed as the nominated representative in the advance directive under clause (c) of sub-section (1) of section 5; or
 - (b) a relative, or if not available or not willing to be the nominated representative of such person; or
 - (c) a care-giver, or if not available or not willing to be the nominated representative of such person; or
 - (d) a suitable person appointed as such by the concerned Board; or
 - (e) if no such person is available to be appointed as a nominated representative, the Board shall appoint the Director, Department of Social Welfare, or his

designated representative, as the nominated representative of the person with mental illness:

Provided that a person representing an organization registered under the Societies Registration Act, 1860 or any other law for the time being in force, working for persons with mental illness, may temporarily be engaged by the mental health professional to discharge the duties of a nominated representative pending appointment of a nominated representative by the concerned Board.

- (5) The representative of the organisation, referred to in the proviso to sub-section (4), may make a written application to the medical officer in-charge of the mental health establishment or the psychiatrist in-charge of the person's treatment, and such medical officer or psychiatrist, as the case may be, shall accept him as the temporary nominated representative, pending appointment of a nominated representative by the concerned Board.
- (6) A person who has appointed any person as his nominated representative under this section may revoke or alter such appointment at any time in accordance with the procedure laid down for making an appointment of nominated representative under sub-section (1).
- (7) The Board may, if it is of the opinion that it is in the interest of the person with mental illness to do so, revoke an appointment made by it under this section, and appoint a different representative under this section.
- (8) The appointment of a nominated representative, or the inability of a person with mental illness to appoint a nominated representative, shall not be construed as the lack of capacity of the person to take decisions about his mental healthcare or treatment.
- (9) All persons with mental illness shall have capacity to make mental healthcare or treatment decisions but may require varying levels of support from their nominated representative to make decisions.

(Emphasis supplied)

(13) Section 14 (4) of MH Act, 2017 enumerates five different categories of persons, who can be appointed, in case no nominated representative is appointed by a person under section 14 (1) of MH Act, 2017. The first is the individual appointed as the nominated representative in the advance directive under Clause (c) of sub-section (1) of section 5. In case, no such persons is available in the advance directive, section 14 (4) (b) of the MH Act, 2017 talks about appointing a relative as a nominated representative and finds mention at a higher pedestal to any other categories. It is only, if, a relative is not available or is not willing to be the nominated representative that in the order of preference, a care-giver or thereafter a suitable person can be appointed. A relative as defined under section 2 (za) of the MH Act, 2017 means any person related to the person with mental illness by blood, marriage or adoption.

(14) However, as to what is the criteria or suitability and as how to ensure the same, there is no mechanism provided under the MH Act, 2017 for appointment of a representative to take care of such intellectually challenged persons or their asset. These legal vacuum has been considered in various Judgments by the Hon'ble Supreme Court and the High Courts and each time, the Courts had exercised its *parens patriae* jurisdiction while appointing a representative or a guardian under the MH Act, 2017.

(15) Traditionally, while exercising *parens patriae* jurisdiction, Courts used to apply the principle of "*best interest of the individual*", however, with the introduction of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), in compliance of which the MH Act, 2017 came to be explicitly designed, the earlier concept of "best interest" of the individual has to be now in the light of the "*wills and preferences*" of the individual. Thus, the "*wills and preferences*" of the intellectually challenged person has to be determined either in the background of advance directives as stated herein above or in the absence of advance directives, it ought to be guided by the factors, which points towards the 'wish & intent' of the said mentally ill person.

(16) In the absence of advance directions, the social fabric of family structures in India plays a pivotal role in determining the 'wish & intent' of an intellectually challenged person and that is why we see that the legislature has significantly enumerated a "relative" to be nominated as a representative very next and immediate to *advance directive* of the said individual, before any category of person. The word 'Family' under Section 2(h) of the MH Act, 2017, means 'a group of persons related by blood, adoption or marriage'. This Court finds that there is no marked difference between relative and family under the provision of the MH Act, 2017. Both can be used

interchangeably. Thus, a relative can be said to be a family and in the same breath, it can be said that a family consist of relatives. This Court is conscious of the fact that the petitioner is a close relative of opposite party no.4 as being her nephew and there is 'No Objection' from other relative to his nomination as her representative and even the concerned Tehsildar has reported that opposite party no.4 is under the care of the petitioner as recorded by this Court herein above.

(17) Further, this Court notes that the MH Act had laid down certain standards and factors to be considered while determining the "best interest" of the mentally ill person. However, no guidance exists as to what would constitute the "wills and preferences" of the person. Even in the proviso to Section 14 (1), the factors to be considered for providing total support are conspicuously absent. The MH Act 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. Thus, there is a clear statutory vacuum. In any event, this Court is of the opinion that the solemn nature of the said jurisdiction having been repeatedly recognized by the Hon'ble Supreme Court, the question as to whether it is the Board or the Appellate Authority or 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 Board or this Court while exercising its *parens patriae* jurisdiction.

(18) In the present case, the initial will and preference of the opposite party no.4 could not be determined. Even, as on today, considering her physical and mental state, it is clear that she is even unable to express her will or her preference. The Court in these circumstances has to step in under the *parens patriae* jurisdiction to redeem the agony of the opposite party no.4, who is the ultimate beneficiary in the present case.

(19) In view of the facts of this case as also the reports placed on record, this Court is convinced that opposite party no.4 is unable to take decisions in her interest and is in a seriously declined mental and physical state. Insofar as the persons, who ought to be appointed as her guardians are concerned, opposite party no.4 does not appear to have any other legal heir, except the petitioner, who is her relative and a family as being the son of her real brother. Further, the affidavit of no objection of the other relatives appears convincing and there seems to be no impediment in nominating the petitioner as the representative of opposite party no.4.

(20) In these circumstances, the Court exercising *parens patriae* jurisdiction direct as under :-

- (i) The impugned order dated 16.11.2024 is quashed;
- (ii) The petitioner is appointed as the nominated representative of opposite party no.4 under the MH Act, 2017 and for providing support to her under the Rights of Persons with Disabilities (RPwD) Act, 2016;
- (iii) The petitioner shall take all decisions in respect of the affairs of the opposite party no.4 including her medical treatment, healthcare, daily living, financial affairs, etc.
- (iv) The petitioner shall be nominated to deal with all the movable and immovable assets of the opposite party no.4, including the family pension granted by Madhyanchal Vidyut Vitran Nigam Limited, however, he shall not undertake transfer of immovable assets, without the prior approval and consent of the ‘Mansik Swasthya Punarvilonkan Board’, Bareilly.
- (v) In case, any relative/family or friend of opposite party no.4 points out that the nominated representative/petitioner is not acting in her best interest, such person will also have the locus to approach either the Board or this Court for issuance of proper direction and for removal of the petitioner.
- (vi) It is made clear that the notwithstanding the petitioner being nominated as representative

of by this Court, the Board shall have all the supervisory powers as envisaged under the provision of the MH Act, 2017, including Section 82 of the MH Act, 2017.

(vii) The aforesaid directions have been passed on the strength of the petitioner's submission and averments made before this Court as well as the report of the Tehsildar-Ramnagar that opposite party no.4 is under the care and living along with the petitioner and there is valid and existing 'no objection' Affidavit of other relatives of opposite party no.4 in favour of the petitioner. The parties shall be bound by the said submission and in case, the same are found otherwise, appropriate proceedings including Contempt of Court may be initiated against them.

(21) The petition is, accordingly, **allowed**.

(Om Prakash Shukla, J.) (Rajan Roy, J.)

Order Date : 27th May, 2025
Ajit/-