



Kavita S.J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

GUARDIANSHIP PETITION (L) NO.21364 OF 2023

...Petitioner

And

Mr. Vivek Kantawala a/w Mr. Amey Patil, Mr. Jash Vyas i/b Vivek M. Sharma, Advocates for Petitioner.

CORAM : R.I. CHAGLA, J.

DATE : 31ST AUGUST, 2023.

ORDER :

1. By this Guardianship Petition, the Petitioner is seeking to be appointed as Guardian of her daughter

, who though being a major aged 27 years, is suffering from mental retardation. Annexed at Exhibit-B to the Petition is a Medical Certificate from Sir J.J. Group of Hospitals, Mumbai dated 1st June, 2010 certifying that the said Aashna is suffering from disability-70%, moderate mental retardation.

2. The Petitioner has stated that she has two children, one son who has now attained the age of majority and the said for whose benefit, the present Petition has been filed. The said was born on 9th July, 1996 and her Birth Certificate is annexed at Exhibit-A to the Petition.

3. The Petitioner has stated that the father and natural Guardian of the said expired on 23rd October, 2009 and the Petitioner being her mother, is the only parent who can be a Guardian and in a position to look after the welfare and upkeep, maintenance of said .

4. The Petitioner has stated that in view of the Petitioner's husband death the Petitioner had no efficacious remedy but to file Suit being Suit No.1874 of 2010 for partition claiming the estate of late . Under the Consent Terms filed in the said Suit dated 3rd April, 2013 amongst various other matters, there was one premise being

("the said premises") which came to be divided between the two minor children, who have thereafter attained majority.

5. The Petitioner has stated that the said is the joint owner of the said premises, now Flat No.902 (“new Flat”) as described in Paragraph 8 of the Petition after the re-development of the building. Under the Consent Terms, the interest of the said was to be looked after by the Petitioner. Further, in the event of re-development, the allotment of the new Flat would be in the name of both the children, one of whom is the said The Petitioner has annexed the Consent Terms and order dated 3rd May, 2013 accepting the Consent Terms as well as Affidavit of the Petitioner stating that she is acting as a Guardian of the minor children.

6. The Petitioner has accordingly filed the present Guardianship Petition to be appointed as Guardian of said in respect of her person as also in respect of her property both moveable and immovable property viz. the new Flat, a list of which is annexed at Exhibit-F to the Petition and to take all decisions necessary and incidental in respect of the welfare, benefit and properties of said Aashna. This would include taking decision of selling, mortgaging, leasing, licensing the new Flat and deposit the sale proceeds therefrom in a deposit for 10 years and to reap the interest therefrom

which would be solely utilized for the benefit and upkeep of the said

7. The Petitioner has stated that the said _____ resides with the Petitioner and within the jurisdiction of this Court and this Court has exclusive jurisdiction entertain and dispose of the instant Guardianship Petition.

8. Mr. Vivek Kantawala, learned Counsel appearing for the Petitioner, has submitted that the Guardianship Petition is being filed under Section 7 of the Guardians and Wards Act, 1890 which is the only remedy available for the Petitioner to seek appointment as Guardian of the said _____ who is at presently a major and suffering from mental retardation. He has submitted that the repealed Mental Health Act, 1987 had in the definition of Mental illness under Section 2(l) excluded mental retardation. Although, it was provided under Section 53 of the Mental Health Act, 1987, that where a mentally ill person is incapable of taking care of himself, the District Court or, where a direction has been issued under sub-section (2) of Section 54, the Collector of the District, may appoint any suitable person to be his guardian. However, the repealing Act viz. Mental Health Act, 2017 contains no such provision. Further, the definition of “mental

illness” under Section 2(s) of the new Mental Health Act, 2017 also excludes mental retardation. Thus, as in the present case, a person suffering from mental retardation is not covered under the Mental Healthcare Act, 2017.

9. Mr. Kantawala has submitted that the Guardians and Wards Act, 1890 under Section 7 provides for the appointment of the Guardian of a Ward, who is a minor. He has submitted that this should include the case of a child who has attained majority but is suffering from mental retardation and having no independent thinking, considering the peculiarity of such cases. Otherwise there is no remedy available to a Petitioner seeking appointment as Guardian of an adult, who is suffering from mental retardation.

10. Mr. Kantawala has placed reliance on *Jamseed Soli Sorabjee Vs. Dr. Jehangir Soli Sorabjee & Ors., in Guardianship Petition No.8 of 2023, decision dated 17th August, 2023.* In that case, this Court had appointed the siblings and the nephew of the said Jamsheed Soli Sorabjee, an adult, suffering from mental retardation, as his Guardian under Section 7 of the Guardians and Wards Act.

11. Having considered the submissions, in my view, there is much merit in the submissions of Mr. Kantawala. In the peculiar facts of this case, as in *Jamsheed Soli Sorabjee (supra)*, where the Petitioner seeks appointment as Guardian of the Ward who is not a minor but a major, suffering from mental retardation, Section 7 of the Guardians and Wards Act is in my view applicable for such appointment.

12. Having perused the provisions of the Mental Health Act, both the repealed Act as well as the repealing Act, it appears that mental retardation is not covered under the Act as it does not fall within the definition of mental illness. Further, in the repealing Act viz. the Mental Healthcare Act, 2017, there is no provision as in the repealed Act for the District Court to appoint a suitable person as Guardian of a person suffering from mental illness and incapable of taking care of himself. Thus, in my view the only remedy available in such cases is for the Petitioner to apply under the Guardians and Wards Act, 1890 for the Petitioner to be appointed as Guardian of the person, despite he/she being a major, but suffering from mental retardation.

13. In these circumstances and particularly considering that

said Aashna in the present case is joint owner of immovable property viz. the new Flat together with moveables described in Exhibit-F of the Petition, it would be necessary for the Petitioner who is the mother of the said Aashna to be appointed as her Guardian for taking all such decisions necessary and incidental for the welfare, benefit and property of the said Aashna. This would include taking decisions relating to selling, mortgaging, leasing, licensing the new Flat and deposit of the sale proceeds therefrom in a deposit for 10 years and to reap the interest therefrom which would be solely utilized for the benefit and upkeep of the said Aashna.

14. Accordingly, the Petition is made absolute in terms of prayer Clause '(a)' and '(b)' which reads thus :

“(a) That this Hon’ble Court be pleased to appoint the petitioner as a Guardian of Aashna in respect of her person as also in respect of her property as enlisted at Exhibit-F hereto and take all such decisions necessary and incidental to the said . for welfare and benefit of the said ;

(b) That this Hon’ble Court be pleased to declare that the Petitioner is the Guardian of the said . and her

property as enlisted at Exhibit-F hereto and that the Petitioner be entitled to take all such decisions necessary and/or incidental in respect of the welfare, benefit and properties of Aashna inclusive of taking decisions of selling, mortgaging, leasing, licensing the said Flat and deposit the sale proceeds therefrom in a deposit for 10 years and to reap the interest therefrom which would be solely utilized for the benefit and upkeep of the said , ;”

15. Guardianship Petition is accordingly disposed of.
16. No orders as to costs.

[R.I. CHAGLA, J.]