* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: 13 January 2023**
**Order pronounced on: 13 February 2023**

\+ W.P.(C) 8359/2022 & C.M. Appl. 25173/2022

SUNIL PODAR ..... Petitioner
Through: Mr. Dinesh Kumar, Advocate.

versus

THE NATIONAL TRUST FOR WELFARE OF PERSON WITH AUTISM, CEREBRAL PALSY, MENTAL RETARDATION AND MULTIPLE DISABILITIES AND ANR. ..... Respondents
Through: Mr. Chetan Sharma, ASG with Mr. Rakesh Kumar, CGSC and Mr. Kirtiman Singh, CGSC with Mr. Sunil, Adv. and Mr. Amit Gupta and Ms. Vidhi Jain, Advs. for UOI.

**CORAM:**
**HON'BLE THE CHIEF JUSTICE**
**HON'BLE MR. JUSTICE YASHWANT VARMA**

**O R D E R**

1. The petitioner, who is the father of a person suffering from severe mental retardation and certified to be suffering from a 90% disability, assails the validity of Rule 17(1)(iii)(a) of the **National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000**[1] as well as Regulation 12(1)(i) of the **Board of the Trust Regulations, 2001**[2] which restrict the appointment of a guardian to a person who is an Indian citizen. The challenge is essentially mounted on the assertion

[1] Rules
[2] Regulations

that Rule 17 as well as Regulation 12 are ultra vires the parent provisions contained in the **National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999**[3]. The submission proceeds on the premise that in the absence of the parent Act disabling a non-citizen from applying to be appointed as a guardian of a person with disabilities, such a prescription could not have been introduced by virtue of delegated legislation and in this case the Rules read with the Regulations.

2. The son of the petitioner who is a major is one who is described to suffer from severe mental retardation. He is also stated to have been duly examined and assessed by the National Institute of Mental Health as well as the Medical Superintendent of Safdarjung Hospital who proceeded to issue a disability certificate in that regard. The petitioner and his son are stated to be citizens of the United States of America. The son was adopted by the petitioner and his now estranged wife. Both are stated to have relocated to the country on account of the breakdown of marital relations and the consequential legal separation of the parents. The erstwhile wife is said to be residing in the United States of America. The petitioner asserts that he has been granted legal custody of his son and has been acting as his primary caregiver since the time of adoption. Both the father and the son are stated to have relocated to India in 2009 and hold **Overseas Citizenship of India**[4] cards. The petitioner sought to be appointed as the guardian of his son in terms of the Act. The said application, however, presently faces the barrier of Rule 17 and Regulation 12 which prescribe

[3] the Act
[4] OCI

citizenship to be an essential qualification.

3. Learned counsel for the petitioner has questioned the validity of the said provisions asserting that since no restriction stands placed under Section 14 of the Act, it was impermissible for the respondents to have introduced a provision curtailing the right of a person to be appointed as a guardian and connecting it to the citizenship of the applicant. It was submitted that Section 14 clearly stipulates that the parent of a person with disability or his relative may make an application to the Local Level Committee for appointment of "*any person*" of their choice to act as the guardian of a person with disability. Learned counsel submitted that the expression "*any person*" is thus a manifestation of the intent of the Legislature enabling the parent or the relative to nominate "any person" to be considered for appointment as a guardian. Emphasis was essentially laid on the aforesaid phrase to contend that the same would be indicative of such a nominated person even being a foreigner as distinguished from an Indian citizen. It was thus submitted that once Section 14 recognises the right of a parent or a relative of a person with disability to make a nomination in favour of any person and does not yoke that choice to citizenship, the disqualification as introduced in terms of the Rules and the Regulations is clearly ultra vires Section 14. It was contended that the word "parent" and "relative" as finding place in Section 14 also do not stipulate that person to necessarily be a citizen of India. In view of the above, it was urged that the offending Rule and Regulation could not have introduced a condition which impinges the enabling provisions of the Act and as such are liable to be struck down.

4. Appearing for the respondents, the learned ASG as well as Mr. Rakesh Kumar while addressing submissions argued that the Act is principally concerned with securing and safeguarding the interests of a person with disability. It was submitted that a holistic consideration of the various provisions contained in the Act as well as the Rules and Regulations framed thereunder would establish that the Local Level Committee is to closely monitor and oversee the care, upbringing and the welfare of a person with physical and mental impairment. That duty cast upon the Local Level Committee, according to learned counsels, is envisioned to be periodical, continuous and permanent. It was in the aforesaid light that the learned ASG submitted that the provisions contained in the Rules and Regulations insofar as they mandatorily require a guardian to be an Indian citizen subserve a salutary and important function. The submission essentially was that in light of the periodic monitoring obligation which stands placed upon the Local Level Committee, the requirement of regular interaction, the duty to continually keep a watch over the well-being and upbringing of a person with disabilities, the environment in which they stand placed require a guardian to be a permanent resident of India.

5. Both Mr. Kumar and the learned ASG laid stress upon the facet of the welfare of a person with disability being continually supervised and the various obligations placed in this respect upon the guardian as well as the Local Level Committee. It was their submission that if a foreign national were to be permitted to act as a guardian, a situation may arise where a person with disability may in fact be removed from the very jurisdiction of the particular Local Level Committee or for that matter beyond the territorial boundaries of the country itself.

According to the respondents, it is to obviate such genuine apprehensions that the Rules and Regulations place the citizenship stipulation. According to the learned ASG, the spectre of the person with special needs being moved out of or relocated to a place outside India or for that matter to a place beyond the jurisdiction of the authorities constituted under the Act or courts itself, is real and plausible. According to learned counsel, it is this apprehension and fear which appears to have weighed with the rule making body introducing the impugned restrictions.

6. Learned ASG submitted that the qualifications which must be possessed by a guardian in order to be entrusted with the charge of a person with disability have neither been specified nor explicitly spelt out in the Act. It was the contention of the respondents that the appointment of guardians is a subject which was clearly reserved under Section 14(4) to be determined by Regulations. Drawing the attention of the Court to the provisions contained in Sections 34 and 35 of the Act, and which comprise the power to frame subordinate legislation to carry forward its purposes, it was submitted that those provisions clearly enable and empower the respondents to prescribe the qualifications and prerequisites subject to which a person may be appointed as a guardian of a person with disability. In view of the aforesaid, it was contended that the prescription of a guardian being a citizen of India was clearly one which could have been validly incorporated in both the Rules as well as the Regulations.

7. It was the submission of the learned ASG and Mr. Kumar that the Act as well as the Rules and the Regulations framed thereunder must be understood bearing in mind the principles of purposive

interpretation of statutes. It was further contended that a foreign national cannot possibly assert a right to be appointed as a guardian under an Indian statute. According to the learned ASG, since the right to be appointed as a guardian is regulated by a Parliamentary legislation together with subordinate rules and regulations framed in terms thereof, no foreigner can assert or claim the right to be appointed a guardian *de hors* the qualifications which stand prescribed therein.

8. In order to examine the aforesaid rival submissions, it would be apposite to firstly notice the salient provisions of the Act. The Act which came to be promulgated by Parliament in 1999, and as would be evident from its Preamble, envisages the constitution of a body at the national level for the welfare of persons with autism, cerebral palsy, mental retardation and multiple disabilities together with matters connected therewith or incidental thereto. A person with disability is defined in **Section 2(j)** as follows:-

> "2(j) "persons with disability" means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability"

9. The conditions relating to cerebral palsy, mental retardation, severe disability are also defined in clauses (c), (h) and (o) of Section 2. **The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities**[5] owes its genesis to Section 3. The Trust is envisaged to be a body corporate with perpetual succession and is the pivotal institution constituted in terms of the enactment to implement the various

[5] the Trust

provisions of the Act. Section 10 sets out the various objects of the Trust and is reproduced hereinbelow:-

> **"10. The objects of the Trust shall be -**
>
> (a) to enable and empower persons with disability to live as independently and as fully as possible within and as close to the community to which they belong;
>
> (b) to strengthen facilities to provide support to persons with disability to live within their own families;
>
> (c) to extend support to registered organisations to provide need based services during period of crisis in the family of persons with disability;
>
> (d) to deal with problems of persons with disability who do not have family support;
>
> (e) to promote measures for the care and protection of persons with disability in the event of death of their parents or guardians;
>
> (f) to evolve procedure for the appointment of guardians and trustees for persons with disability requiring such protection;
>
> (g) to facilitate the realisation of equal opportunities, protection of rights and full participation of persons with disability; and
>
> (h) to do any other act which is incidental to the aforesaid objects."

10. As would be manifest from the above, the primary objectives of the Trust are to enable and empower persons with disabilities, to strengthen facilities, provide support and encouragement, to facilitate the realisation of equal opportunities and their participation and integration in society. The Trust is also obliged to evolve an appropriate procedure for the appointment of guardians and trustees of persons with disabilities. To enable the Trust to discharge its functions, the Union Government is stated to have placed at its disposal a corpus of Rs. 100 crores as a one-time contribution. In terms of Section 12, an association or a body of persons with disabilities or parents of such persons are also entitled to be registered. This is evident from Section 12 which reads as under:-

**"12. Procedure for Registration -**

(1) Any association of persons with disability, or any association of parents of persons with disability or a voluntary organisation whose main object is promotion of welfare of persons with disability may make an application for registration to the Board.

(2) An application for registration shall be made in such form and manner and at such place as the Board may by regulation provide and shall contain such particulars and accompanied with such documents and such fees as may be provided in the regulations.

(3) On receipt of application for registration, the Board may make such enquiries as it thinks fit in respect of genuineness of the application and correctness of any particulars thereon.

(4) Upon receipt of such application the Board shall either grant registration to the applicant or reject such application for reasons to be recorded in writing.

Provided that where registration has been refused to the applicant, the said applicant may again make an application for registration after removing defects, if any, in its previous application."

11. The Act envisages the constitution of Local Level Committees in terms of Section 13. The said provision reads thus: -

**"13. Constitution of Local Level Committees-**

(1) The Board shall constitute a local level committee for such area as may be specified by it from time to time.

(2) A local level committee shall consist of-

(a) an officer of the civil service of the Union or of the State, not below the rank of a District Magistrate or a District Commissioner of a district.

(b) a representative of a registered organisation; and

(c) a person with disability as defined in clause (f) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996).

(3) A local level committee shall continue to work for a period of three years from the date of its constitution or till such time it is reconstituted by the Board.

(4) A local level committee shall meet at least once in every three months or at such interval as may be necessary."

12. The subject of appointment of a guardian is dealt with by Section 14 and which reads as under: -

> **"14. Appointment of guardianship** -
>
> (1) A parent of a person with disability or his relative may make an application to the local level committee for appointment of any person of his choice to act as a guardian of the persons with disability.
>
> (2) Any registered organisation may make an application in the prescribed form to the Local Level Committee for appointment of a guardian for a person with disability.
>
> Provided that no such application shall be entertained by the local level committee, unless the consent of the guardian of the disabled person is also obtained.
>
> (3) While considering the application for appointment of a guardian, the local level committee shall consider-
>
> - whether the person with disability needs a guardian;
>
> - the purposes for which the guardianship is required for person with disability.
>
> (4) The local level committee shall receive, process and decide applications received under sub-sections (1) and (2), in such manner as may be determined by regulations:
>
> Provided that while making recommendation for the appointment of a guardian, the local level committee shall provide for the obligations which are to be fulfilled by the guardian.
>
> (5) The local level committee shall send to the Board the particulars of the applications received by it and orders passed thereon at such interval as may be determined by regulations."

13. The duties of a guardian are set out in Section 15 and expatiated as follows: -

> **"15. Duties of Guardian** –
> Every person appointed as a guardian of a person with disability under this Chapter shall, wherever required, either have the care of such persons of disability and his property or be responsible for the maintenance of the person with disability."

14. Section 16 places a guardian under the statutory obligation of furnishing inventories and accounts periodically. That provision reads

as follows: -

> **"16. Guardian to furnish inventory and annual accounts** -
>
> (1) Every person appointed as a guardian under section 14 shall, within a period of six months from the date of his appointment, deliver to the authority which appointed him, an inventory of immovable property belonging to the person with disability and all assets and other movable property received on behalf of the person with disability, together with a statement of all claims due to and all debts and liabilities due by such person with disability.
>
> (2) every guardian shall also furnish to the said appointing authority within a period of three months at the close of every financial year, an account of the property and assets in his charge, the sums received and disbursed on account of the person with disability and the balance remaining with him."

15. In terms of Section 34, the Union Government stands empowered to make rules for carrying forward the provisions of the Act. That Section reads thus: -

> **"34. Power to make rules** –
>
> (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Act.
>
> (2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all of the following matters, namely –
>
> (a) the procedure in accordance with which the persons representing registered organisations shall be elected under clause (b) of sub -section (4) of section 3;
>
> (b) the conditions of service of the Chairperson and Members under sub-section (2) of section (4);
>
> (c) the rules of procedure in the transaction of business at meetings of the Board under sub- section (6) of section 4;
>
> (d) the powers and duties of the Chief Executive Officer under sub-section (1) of section 8;
>
> (e) the form in which an application for guardianship may be made by a registered organisation under sub-section (2) of section 14;
>
> (f) the procedure in accordance with which a guardian may be removed under section 17;

(g) the form in which, and the time within which, the budget of the Trust shall be forwarded to the Central Government under section 23;

(h) the form in which the annual statement of accounts shall be maintained under sub-section (1) of section 24,

(i) the form in which, and the time within which, the annual reports shall be prepared and forwarded under section 25;

(j) any other matter which is required to be, or may be, prescribed."

16. Rules 16 and 17 which deal with the appointment and removal of guardians are reproduced hereinbelow: -

**"16. Application for guardianship-**

(1) The application by a parent, relative or registered organisation for appointment of guardian for a person with disability shall be made to the local level committee in Form A.

(2) The confirmation of appointment of guardian on such application shall be made in Form B.

(3) A quarterly report in the prescribed format shall be given by the local level committee to the Board or to the State level agency authorised by the Board giving particulars of the applications received and orders passed thereon.

**17. Procedure for removal of Guardian-**

(1) (i) The local level committee upon receiving an application for removal of a guardian from a parent or a relative of a person with disability or a registered organisation on the grounds specified in clauses (a) and (b) of sub-section (1) of section 17 of the Act, shall appoint a team of investigators consisting not less than three persons.

(ii) The team shall consist of one representative of parent organisation, one representative of the association for the disabled and one Government official associated with disability not below the rank of Assistant Director.

(iii) While taking a decision on the appointment of guardian, the local level committee shall ensure that the person whose name has been suggested for appointment as guardian is :

(a) a citizen of India;

(b) is not of unsound mind or is currently undergoing treatment for mental illness;

(c) does not have a history of criminal conviction;

(d) is not a destitute and dependent on others for his own living; and

(e) has not been declared insolvent or bankrupt.

(iv) In case of an institution or organisation being considered by the local level committee for appointment as a guardian, the following guidelines shall be followed :

(a) the institution should be recognised by the State or the Central Government;

(b) the institution should have a minimum of 2 years' experience in offering disability rehabilitation services including running residential facilities or hostel to the respective c' category of persons with disability;

(c) the residential facility or hostel for persons with disabilities shall maintain minimum standards in terms of space, staff, furniture, rehabilitation and medical facilities as specified by the Board.

(v) The team of investigators while investigating a complaint for assessing the abuse or neglect of a person with disability shall follow the guidelines specified by the Board.

(vi) The following Acts of commission or omission shall constitute abuse or neglect on the part of the guardian, namely -

(a) solitary confinement of person with disability in a room for longer period of time;

(b) chaining of the person with disability;

(c) beating or treating a person with disability resulting in bruises, skin or tissue damage (not due to his injurious behaviour indulged by the persons with disabilities);

(d) sexual abuse;

(e) long deprivation of physical needs such as food, water and clothing;

(f) no provision or non-compliance of rehabilitation or training programmes as specified by experts in the field of disability rehabilitation;

(g) misappropriation or misutilisation of the property of the person with disability; and

(h) lack of facilities or no provision of trained or adequate staff for meeting the training and management needs of the persons with disabilities.

(2) The team of investigators shall submit their report within a period of ten days.

(3) Upon receiving the report of the investigation team, the local level committee shall take the final decision within the period of

ten days on the removal of the guardian against whom the complaint has been received after giving the said guardian an opportunity of being heard.

(4) The local level committee shall record in writing its reasons for removal of the guardian or rejection of the application."

17. The **Board of Trustees of the Trust**[6] is conferred the authority to frame regulations with the previous approval of the Union Government in terms of Section 35. That provision is extracted hereunder: -

**"35. Power to make regulations** –

(1) The Board may, with the previous approval of the Central Government, by notification in the Official Gazette, make regulations consistent with this Act and rules generally to carry out the, purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely –

(a) the manner and purpose for which person may be associated under subsection (5) of section 3;

(b) the time and place at which the Board shall meet under sub-section (6) of section 4;

(c) the terms and conditions of service of, Chief Executive Officer, other officers and employees of the Trust under sub-section (3) of section 8;

(d) the form and manner in which the application shall be made for registration under sub- section, (2) of section 12 and the particulars which such application shall contain under that sub-section; 19'"

(e) the manner in which application for guardianship shall be received, processed and decided by local level committee under sub-section (4) of section 14;

(f) the particulars of applications and orders passed thereon by the local level committee under subsection (5) of section 14;

(g) the procedure for evaluating the pre-funding status of the registered organisations and framing of guidelines for

[6] The Board

monitoring and evaluating the activities of such registered organisations under section 19;

(h) the time within which notice for annual general meeting shall be sent and quorum for such meeting under sub-sections (2) and (3) of section 20; and

(i) any other matter which is required to be, or may be, provided by regulations."

18. Regulations 11 and 12 which would be relevant for the purposes of examining the issue that stands raised read thus: -

**"11. Who may apply for guardianship** - (1) Both the parents may jointly, or, in the event of the absence of one due to death, divorce, legal separation, desertion or conviction, may singly apply for guardianship of their or as the case may be his ward beyond the age of 18 years.

(2) In the event of death, desertion, conviction of both the parents, the siblings (including half and step siblings) jointly or singly (reason of single application to be explained separately) may apply for guardianship of a disabled member of the family.

(3) In the event of non-application of sub-regulation (1) and (2) above, a relative may make an application for guardianship.

(4) In the event of non-application of sub-regulation (1), (2) and (3), any registered organization may make an application for guardianship.

(5) The Local Level Committee may direct a registered organization to make an application for guardianship in case of a destitute or abandoned person.

**12. Who may be indicated by applicant as guardian** -

(1) Both the parents jointly, or, singly in the event of the absence of one due to death, divorce, legal separation, desertion or conviction, being natural guardian of minor may apply to the Local Level Committee to get themselves or himself as the case may be, appointed as guardian of their or as the case may be, his disabled ward beyond the age of 18, in which case the application shall be accepted unless the parent is disqualified on account of

i. loss of citizenship;

ii. being of unsound mind;

iii. being convicted by a court of law; or

iv. being a destitute.

> (2) The applicant may indicate siblings, or any member of the family or any other person or a registered institution for consideration as a guardian and in case of institutions, the conditions of eligibility of institutions shall be as stipulated in sub regulations(3), (4) and (5).
>
> (3) In the case of considering the institution as a guardian, the institution must be registered under a law and be capable of providing care of the person.
>
> (4) In the event of institution ceasing to be registered under a law or stops functioning, or is found otherwise unsuitable, the Local Level Committee shall make alternative arrangements for the foster care of any such inmate or the ward, who is under the care of any such institute.
>
> (5) The alternative care under sub-regulation (4) shall not be permanent in nature and shall be placed by permanent guardianship within a period of one year.
>
> (6) The applicant must be living in the vicinity or close proximity to the place where the ward has been habitually living at the time of appointment of guardian.
>
> (7) No single male shall be considered as a guardian for a female ward and in the case of female wards, the male person shall be given co-guardianship with his spouse, who shall be master co- guardian."

19. Having noticed the principal provisions and the statutory framework in the backdrop of which the question which stands posited would merit evaluation, the Court at the outset notes that Section 14 enables a parent or a relative of a person with disability to nominate any person of their choice to act as a guardian. Section 14(1) would thus appear to suggest that a parent or a relative or for that matter any person nominated by them may apply to be appointed as a guardian of a person with disabilities. In terms of Section 14(4), the Local Level Committee is obliged to receive, process and decide applications that it may receive in accordance with the Regulations. This is evident from the phrase "*in such manner as may be determined by Regulations*" as occurring therein. The Court also bears in mind Section 10(f) which places a statutory duty upon the Trust to evolve a

procedure for the appointment of guardians and trustees of persons with disabilities.

20. Section 14 apart from broadly indicating the category of persons who may apply to be appointed as a guardian, does not proceed further to either specify or delineate the qualifications that must be possessed by an applicant. In fact, Section 14(4) clearly leaves that subject open to be determined by Regulations. The fact that the Act does not specifically incorporate any provisions which may indicate the minimum or essential qualifications that may be possessed by a person desirous of being appointed as a guardian, also flows from Section 10(f) and which leaves it to the Trust to evolve the procedure for appointment of guardians and trustees. The Trust in furtherance of the aforesaid obligation would thus be clearly empowered to frame appropriate provisions in accordance with the regulation making power that stands conferred upon it by virtue of Section 35. The prescription of qualifications that must be possessed by guardians, thus, clearly appears to be a subject which is left for the rule and regulation making authority to evolve and formulate.

21. Section 34(e) empowers the Central Government to make rules governing the form in which an application for guardianship may be made by a registered organisation under Section 14(2). It also empowers it to frame rules in respect of any other matter which is required or may be prescribed. In terms of Section 35, the Board is conferred the authority to frame regulations to carry forward the purposes of the Act. Section 35(2)(i) is the residuary clause and empowers the Board or the Trust to frame regulations dealing with any other matter which is required to be provided for by Regulations.

Both Sections 34(2) as well as Section 35(2) while specifying some of the matters in respect of which rules or regulations may be framed employ the oft repeated phrase *"without prejudice to the generality of the foregoing power"* which drafters of statutes use in order to delineate the plenitude of the measures that may be adopted by the subordinate agency in order to give effect to the principal legislation.

22. The Court, on an overall conspectus of the aforesaid statutory provisions, thus finds itself unable to sustain the submission addressed on behalf of the petitioner that Rule 17 and Regulation 12 travel beyond the scope and the conferral of authority on the Union Government as well as the Board in terms of the Act. As would be evident from the aforesaid discussion, the Act purports to lay down a broad and basic structure relating to the assistive measures liable to be adopted for differently abled persons and which could include the appointment of a guardian. Insofar as other details are concerned, it clearly and in express terms leaves it open to be determined by Rules and Regulations that may be framed. This is evident from Section 14 itself when it leaves it to the Local Level Committee to *"decide"* applications that may be received by it and for those applications being considered in a manner to be *"determined by regulations;*". Section 10(f) empowers the Trust to evolve a procedure for appointment of guardians and trustees. The aforenoted provisions, thus, clearly indicate and evidence a conferral of power to prescribe and stipulate the qualifications that must be possessed by persons desirous of being appointed as guardians. The Court also deems it apposite to underline the fact that the Act does not even attempt to specify the essential qualifications that a guardian must possess. On an overall consideration of the aforesaid aspects, the Court comes to the

firm conclusion that neither the Rules nor the Regulations can be said to have travelled beyond the scope of the authority conferred under the Act and that the Union Government as well as the Board were duly empowered to prescribe the qualifications of a guardian.

23. The Court also finds itself unable to sustain the contention addressed on behalf of the petitioner that the Rules and the Regulations conflict with Section 14 for the following additional reasons. It becomes pertinent to observe that the mere usage of the word's *"parent", "relative"* or *"any person"* in Section 14 does not convince this Court to come to the conclusion that a non-citizen could also claim a right to be appointed as a guardian of a person with disability. Neither of those three expressions can be possibly understood as constituting a legislative intent to recognise foreign nationals as being entitled to be appointed as guardians. While a parent, relative or any other person can ordinarily apply for being appointed as a guardian, the same would not detract from those persons otherwise being compliant with the qualifications that may be validly prescribed. The Act as well as the Rules and Regulations clearly put in place an evaluation criterion which is meant to guide the competent authority while deciding applications for appointment of guardians that may be received. No parent, relative or any person nominated by them can, thus, claim an indefeasible right to be appointed as a guardian or be freed of the obligation of being otherwise qualified in terms of the statutory regime which prevails.

24. While much stress was laid by learned counsel for the petitioner on the expression *"any person"* as appearing in Section 14 of the Act, this Court is unimpressed by the said argument for the following

reasons. It must at the outset be stated that the expression *"any person"* is liable to be perceived and interpreted in the context in which it appears and cannot be conferred a meaning in ignorance of the background in which it stands placed in Section 14(1). As was noticed in the preceding parts of this decision, Section 14(1) enables a parent or a relative of a person with disability to make an application for being appointed as a guardian. The phrase *"any person"* is indicative of a discretion being conferred on the parent or the relative of the person with disabilities to nominate any other person of their choice if so desired. While the phrase *"any person"* would thus include persons other than a parent or a relative being also entitled to be considered for appointment as a guardian, the person so nominated would necessarily have to be one who is eligible under Rule 17 read with Regulation 12. The Court notes that both Rule 17 as well as Regulation 12 disqualify a non-citizen from applying to be appointed as a guardian. Consequently, it finds itself unable to accede to the submission that the phrase *"any person"* would enable even a foreigner to apply under the provisions of the Act. This more so since Section 14 in clear and unambiguous terms leaves it to the regulation and rule-making authority to prescribe and lay down standards of evaluation as well as the qualifications which must be possessed by a person seeking to be appointed as a guardian.

25. It would in this context be pertinent to notice the judgment of the Supreme Court in **Workmen of Dimakuchi Tea Estate vs. Dimakuchi Tea Estate**[7] which was cited for our consideration by the learned ASG. **Dimakuchi** was essentially concerned with an identical phrase occurring in Section 2(k) of the **Industrial Disputes Act,**

[7] AIR 1958 SC 353

**1947**. As before us, it was contended before the Supreme Court that the words *"any person"* should be conferred an expansive meaning and be equated with the expression *"any workman"*. Negating that submission, the Supreme Court had held as follows:

> **"9.** A little careful consideration will show, however, that the expression "any person" occurring in the third part of the definition clause cannot mean anybody and everybody in this wide world. First of all, the subject-matter of dispute must relate to (*i*) employment or non-employment or (*ii*) terms of employment or conditions of labour of any person; these necessarily import a limitation in the sense that a person in respect of whom the employer-employee relation *never existed* or *can never possibly exist* cannot be the subject-matter of a dispute between employers and workmen. Secondly, the definition clause must be read in the context of the subject-matter and scheme of the Act, and consistently with the objects and other provisions of the Act. It is well settled that "the words of a statute, when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained". (Maxwell, *Interpretation of Statutes*, 9th Edn., p. 55)."

26. The Court also finds merit in the submissions addressed by the learned ASG and Mr. Kumar when they contended that the requirement of a guardian being a citizen of India is designed to subserve a larger societal and public purpose. As is manifest from a conjoint reading of Sections 15, 16 and 17 of the Act, the affairs and the well-being of a person with disability is subject to periodical monitoring by the Local Level Committee and other authorities charged with discharging that obligation. In terms of Section 16(1), a person appointed as a guardian is to deliver an inventory of all immovable property belonging to a person with disability within six months from the date of his appointment. The guardian, additionally and in terms of Section 16(2), is further obliged to furnish returns in

respect of the property and assets in his charge every three months on the closure of a financial year. A guardian may also come to be removed, if he be found to be abusing or neglecting a person with disability or even in a case where he has misconducted himself and mismanaged while dealing with the property and assets of such a person. In terms of Rule 17(1)(vi) various misdemeanours stand chronicled and which are recognised under the Rules to constitute abuse and neglect. Those too would lend credence to the statute obliging the competent authorities under the Act to continually monitor and oversee the welfare and the condition of persons with disabilities. Not only would the appointment of a person who is neither a citizen of the country nor ordinarily residing herein give rise to serious apprehensions and leave the authorities grappling with various imponderables and a state of continued uncertainty, it would also impede the discharge of the monitoring obligation placed upon the statutory authorities.

27. While the aforesaid discussion would have been sufficient to close the instant writ petition bearing in mind the limited challenge which was raised and addressed by learned counsel for the petitioner, the Court deems it apposite to dilate upon the question which stands raised in a slightly broader perspective bearing in mind the significance of the question that stands raised, namely, the welfare of a person with disabilities. The discussion which follows, however, may be firstly prefaced by a reiteration of the principal question that arises for our consideration. As was noticed hereinabove, the fundamental issue which arises is whether a foreigner can claim the right to be appointed as a guardian of such a person under the Act and whether the disqualification as embodied in Rule 17 read with

Regulation 12 is valid in law.

28. It must at the outset be noted that the Act itself is an embodiment of the *parens patriae* obligation which stands placed upon the State to look after the interest and welfare of all its citizens including those who are challenged or suffering from debilitating disabilities. As would be evident from the Preamble of the Act itself, the formation of the Trust was to ensure that persons with disabilities are enabled and empowered to independently exist and integrate in society. The objects of the Trust which are described to be the strengthening of facilities and providing support to persons with disabilities, to evolve a procedure for appointment of guardians, and to use the words as employed in the statute itself, to facilitate the realisation of equal opportunities, protection of rights of persons with disabilities and the formulation of measures for their fuller participation in society are a reiteration and reaffirmation of the *parens patriae* obligation of the State. The Trust is essentially a vehicle through which the State acting as the sovereign seeks to discharge its *parens patriae* duty.

29. The origins of the principles underlying the *parens patriae* obligation was lucidly explained by the Supreme Court in **Shafin Jahan v. Asokan K.M.**[8]. The Court deems it apposite to extract the following passages from that decision:

> **"31.** Another aspect which calls for invalidating the order of the High Court is the situation in which it has invoked the parens patriae doctrine. Parens patriae in Latin means "parent of the nation". In law, it refers to the power of the State to intervene against an abusive or negligent parent, legal guardian or informal caretaker, and to act as the parent of any child or individual who is in need of protection. "The parens patriae jurisdiction is sometimes

[8] (2018) 16 SCC 368

spoken of as 'supervisory'" [ P.W. Yong, C. Croft and M.L. Smit, On Equity.] .

**32.** The doctrine of parens patriae has its origin in the United Kingdom in the 13th century. It implies that the King as the guardian of the nation is under obligation to look after the interest of those who are unable to look after themselves. Lindley, L.J. in *Thomasset* v. *Thomasset* [*Thomasset* v. *Thomasset*, 1894 P 295 (CA)] pointed out (p. 299) that in the exercise of the parens patriae jurisdiction, "the rights of fathers and legal guardians were always respected, but controlled to an extent unknown at common law by considering the real welfare". The duty of the King in feudal times to act as parens patriae has been taken over in modern times by the State.

**33.** *Black's Law Dictionary* defines "parens patriae" as:

> "*1*. The State regarded as a sovereign; the State in its capacity as provider of protection to those unable to care for themselves.
>
> *2*. A doctrine by which a Government has standing to prosecute a lawsuit on behalf of a citizen, especially on behalf of someone who is under a legal disability to prosecute the suit. The State ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit."

**34.** In *Charan Lal Sahu* v. *Union of India* [*Charan Lal Sahu* v. *Union of India*, (1990) 1 SCC 613] , the Constitution Bench, while delving upon the concept of parens patriae, stated : (SCC p. 648, para 35)

> "*35*. … In the "*Words and Phrases*" Permanent Edn., Vol. 33 at p. 99, it is stated that parens patriae is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words parens patriae meaning thereby "the father of the country", were applied originally to the King and are used *to designate the State referring to its sovereign power of guardianship over persons under disability*. Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability. Conceptually, the parens patriae theory is the obligation of the State to protect and takes into custody the rights and the privileges of its citizens for discharging its obligations. Our Constitution makes it

> imperative for the State to secure to all its citizens the rights guaranteed by the Constitution and where the citizens are not in a position to assert and secure their rights, the State must come into picture and protect and fight for the rights of the citizens. …"
>
> (emphasis in original)

xxx xxx xxx

**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 *L (Vulnerable Adults with Capacity : Court's Jurisdiction), In re (No. 2)* [*L (Vulnerable Adults with Capacity : Court's Jurisdiction), In re (No. 2)*, 2013 Fam 1 : (2012) 3 WLR 1439 : (2012) 3 All ER 1064 (CA)] . 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 *SA (Vulnerable Adult with Capacity : Marriage), In re* [*SA (Vulnerable Adult with Capacity : Marriage), In re*, 2005 EWHC 2942 : (2006) 1 FLR 867 (Fam)] 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 *F (Mental Patient : Sterilisation), In re* [*F (Mental Patient : Sterilisation), In re*, (1990) 2 AC 1 : (1989) 2 WLR 1025 (CA & HL)] . In para 79 of *SA (Vulnerable Adult with Capacity : Marriage), In re* [*SA (Vulnerable Adult with Capacity : Marriage), In re*, 2005 EWHC 2942 : (2006) 1 FLR 867 (Fam)] Munby, J. 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."

30. The evolutionary principles underlying the *parens patriae* doctrine were explained to constitute the sovereign power of guardianship which vests in the State with respect to persons with disabilities. That doctrine pertains to the obligation of the State to protect and take under its care the rights and privileges of disabled citizens in discharge of its essential obligations as a sovereign. With the advent of the Constitution, the *parens patriae* jurisdiction was also exercised by the constitutional courts of our country while dealing with matters relating to child custody and examining measures liable to be adopted for the welfare of children. It essentially represents the obligation and the duty cast upon the State to take care of those of its citizens who are unable or are rendered incompetent to stand on their own.

31. The origins of guardianship have also been explained in some detail in **Corpus Juris Secundum** and some of the passages as appearing in that seminal work may profitably be referred to:

> "**§ 2 Nature of office or relation, generally**
>
> **Research References**
> West's Key Number Digest, Guardian and Ward 🗝1, 2
>
> **Guardianship, which may be viewed broadly as a trust, is designed to further the well-being of one who is incompetent to act for himself or herself by placing his or her person, property, or both in the hands of one designated as his or her guardian.**
>
> The historic power of the king to function as guardian of persons under legal disabilities to act for themselves has passed in the United States to the individual states, and the need for exercise of such power is met by provisions for court-administered guardianships. A guardian is a creature of the law and has no

authority, rights, or duties except those which the law confers or imposes.

A guardian is an officer or agent of the court that appointed him or her. However, while an enactment creating the office of a public guardian may indicate a legislative intent that a guardian have the status of a public officer, a guardian is not ordinarily a public officer.

While a conservator is, in a sense, an appointed officer of the probate court, the term "guardian" does not include conservators; a conservatorship differs from a guardianship in that it is voluntary rather than involuntary, is limited to the estate of the ward, and it is not necessary that the ward be mentally incompetent. The offices of general guardian and guardian ad litem are also separate and distinct. While guardianship is viewed as a fiduciary position similar to that of a trustee, and it may properly be denominated a trust, in the common acceptation of the term, it is not a trust in the technical sense, and so, a guardian is not a trustee. The offices of guardian, executor, and trustee are separate and distinct from, and independent of, each other and, ordinarily, must be treated as such if there is to be an orderly and efficient performance of the duties of each office in conformity with the rules governing the conduct of fiduciaries.

**§ 7 Classes or kinds of guardians– Volunteers; guardians de facto or de son tort**

**Research References**
West's Key Number Digest, Guardian and Ward ⚷5, 6

**A person who has assumed to act as the guardian of another without right or lawful authority may be treated as a guardian de facto, who is subject to all responsibilities which attach to a guardian who has been appointed legally.**

While the law knows no person as guardian but the one lawfully appointed for that purpose, where a person has assumed to act as the guardian of another without right or lawful authority, the courts, in various circumstances, have recognized such person as a volunteer guardian, often described as a guardian de facto or de son tort. One who takes possession of an infant's property without right or lawful authority may be treated as a trespasser, or the tort may be waived and the intermeddler treated as guardian. A de facto guardian is subject to all responsibilities which attach to a guardian who has been appointed legally.

In a case where the guardian appointed fails to qualify, he or she is neither guardian de jure nor de facto.

**§ 8 Regulation and supervision of guardianship**

**Research References**
West's Key Number Digest, Guardian and Ward 🗝2

> **The subject of guardianship is within the control of the legislature. When a guardian is appointed, he or she is subject to control and supervision by the courts.**

The public and the State are properly concerned with the subject of guardianship. The legislature may regulate guardianship by the enactment of laws within its authority, and the statutes control all matters which relate to guardians and wards. Thus, as the right to appoint a testamentary guardian depends on statute, it follows that the whole subject is within the control of the legislature and that it may not only regulate and restrict the power of appointment but may also define, limit, and regulate the authority of the guardian and prescribe the conditions under which the authority may be exercised.

By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship. A guardian appointed by a court of competent jurisdiction is always under the court's control and is subject to its directions and supervision even though the ward nominated the guardian. The jurisdiction of the court in this respect is an exclusive and a continuing one. A court vested with the supervisory control of guardianships cannot make an order divesting itself of such control and deprive the minor of his or her right to have his or her estate administered under its control. Testamentary and natural guardians are also subject to control by the appropriate court.

Since the guardian acts under the authority and supervision of the court, he or she may apply to it for instructions or for the construction of written instruments connected with the discharge of his or her duties. However, in the absence of specific statutory authority, the court cannot make an order, on application of the guardian, binding the ward beyond his or her minority.

The discretion of a court in the exercise of its power of supervision must not be arbitrary, but it is a general discretion to be exercised within reason and with due regard to the rights of all concerned. The court acts for, and on behalf of, the child in guardianship proceedings, and the best interests and welfare of the ward must guide the court at all times. The court may not substitute its judgment for that of a guardian unless it plainly appears that a case has been made justifying its interference with the discretion of the guardian as to what is in the best interests of the ward.

The jurisdiction of particular courts within a state to control guardians in the performance of their duties depends on the applicable and constitutional provisions of the particular state. Ordinarily, courts in equity have the power to control and direct guardians in the performance of their trust so as to secure the proper care of the person and property of their wards. In many jurisdictions, matters relating to guardianship are within the jurisdiction of probate and similar courts, which have such powers as to guardianship as are conferred by, or implied from, legislation. In some jurisdictions, courts of superior jurisdiction have supervisory power over the acts, proceedings, and functions of inferior courts relating to guardianship matters.

**§ 17 Jurisdiction, generally**

**Research References**
West's Key Number Digest, Guardian and Ward 🗝 8, 13(1)

> **Probate courts or courts exercising probate jurisdiction have original and general jurisdiction to appoint guardians of minors; and under the constitutional or statutory provisions of some states, they have exclusive jurisdiction.**

Constitutional or statutory provisions may confer power to appoint guardians on courts of probate or courts exercising probate jurisdiction, such as county courts, orphans' courts, surrogate's courts, superior courts, or district courts. The jurisdiction which these courts possess over the subject matter is sometimes original, exclusive, continuing, and general. According to some authorities, the appointment of a guardian is uniquely a creature of statute and absent full compliance with the statute the court lacks jurisdiction, and a guardianship order is void. Statutes conferring jurisdiction in guardianship matters are strictly construed.

Sometimes, a juvenile court has jurisdiction, by virtue of statute, to appoint a guardian. However, the jurisdiction conferred by the statute may be so limited as not to invade or impair the jurisdiction of the probate court. Statutes may also confer jurisdiction on family courts to appoint guardians in certain types of cases.

Courts of equity have inherent original and general jurisdiction to appoint guardians for infants within their territorial jurisdiction. In view of the general principle that a court of equity never loses a jurisdiction which it has once assumed, except by reason of some statutory enactment, in the absence of a clearly expressed legislative intent to the contrary, statutes vesting jurisdiction in probate courts, or courts exercising probate jurisdiction, merely confer jurisdiction concurrent with that of courts of equity and do not divest the jurisdiction of such courts.

In a particular case, the court must acquire jurisdiction of the person. This is accomplished where the parties are properly before the court, the case described in the petition is within the class of cases with which the court has statutory power to deal, and the petition on its face states a cause of action even though the evidence fails to support the petition, and an order of appointment is therefore erroneous and subject to reversal on appeal. It has been said that jurisdiction, when dependent on facts excusing the giving of notice, depends on the facts shown and not on whether or not an order made sets forth the facts on which it is based. However, it has also been held that all facts necessary to sustain the jurisdiction or decrees of equity courts are presumed to exist until the contrary appears in the record.

The power of a probate court to appoint a guardian is not affected by the fact that the will of the parent is being administered by an independent executor, by a foreign divorce decree which makes no award of custody of the child, or by an agreement or convention between the parents which the probate judge has not approved. Also, a court having jurisdiction to appoint a guardian is not deprived thereof by the fact that another court also has jurisdiction over the child, or by the fact that another court has made an order awarding custody of the child, or even by a former order of the same court committing the child to a state school. Jurisdiction extends to all matters which touch the guardianship.

*Citizenship or nationality.*

Regardless of the nationality of the child, the courts of a state have jurisdiction over the guardianship of a child within the state, and the courts of one state or country may appoint guardians for the estate or property, situate therein, of persons residing in any foreign state or country and who are citizens thereof. A personal guardian for a child may be a noncitizen.

**§ 32 Other persons– Nonresidents and aliens**

**Research References**
West's Key Number Digest, Guardian and Ward 🗝10

> **In the absence of statutory provisions to the contrary, a nonresident may be appointed guardian although such appointments are not favored. An alien may also be appointed guardian in the absence of statutory provision to the contrary.**

In the absence of statutory provisions to the contrary, a nonresident may be appointed guardian, and the appointment of a nonresident is not void where such appointment is in the best interests of the infant. Such appointments are not favored,

> however, the rule being that a resident should be appointed rather than a nonresident unless some very strong reason for appointing the latter is made to appear, since a resident is more amenable to the court's continuous watchful eye, supervision, and control. It has been considered improper to appoint a nonresident as guardian for a nonresident infant. However, according to some authorities, the appointment of a nonresident as guardian for a nonresident infant is not considered invalid where the infant has property within the state.
>
> *Aliens.*
>
> In the absence of statutory provision to the contrary, an alien may be appointed guardian although the nomination sometimes subject to court approval."

32. As would be evident from the aforesaid extracts, the State is concerned deeply with the subject of guardianship and its obligation to take under its care those who are either rendered physically unable to care and fend for themselves or are otherwise vulnerable. The doctrine of *parens patriae* evolved over centuries in recognition of the obligation of the State to take such persons under its care and to not leave them abandoned in a state of destitution, left to eke out their existence as a result of the cruel hand that destiny chose to deal.

33. Guardianship always has and remains a subject which is regulated by statute. It is equally well settled that a guardian even though appointed always remains under the control of the court and subject to its directions and supervision. As was explained in the aforesaid work, the jurisdiction of the courts in that respect is exclusive and continuing. In India too, the subject of guardianship is regulated by the provisions contained in the **Hindu Minority and Guardianship Act, 1956**[9], **The Guardians and Wards Act, 1890**[10] and to a certain extent by the provisions enshrined in the **Hindu**

[9] HMG Act
[10] GW Act

**Adoptions and Maintenance Act, 1956**[11]. What the Court seeks to emphasize is that guardianship cannot be countenanced as a right which may be claimed without reference to the statutory regime which stands constructed and put in place. While Section 6 of the HMG Act recognizes the father of a Hindu minor as his/her natural guardian, that in itself cannot be understood as anything more than an acceptance of the position which may normally prevail. However, even a father by virtue of being the natural guardian cannot claim an indefeasible or inviolable right to be appointed as a guardian. This would be evident from the following pertinent observations as were entered by the Supreme Court in **Anjali Kapoor vs. Rajiv Baijal**[12]:

> **"26.** Ordinarily, under the Guardian and Wards Act, the natural guardians of the child have the right to the custody of the child, but that right is not absolute and the courts are expected to give paramount consideration to the welfare of the minor child. The child has remained with the appellant grandmother for a long time and is growing up well in an atmosphere which is conducive to its growth. It may not be proper at this stage for diverting the environment to which the child is used to. Therefore, it is desirable to allow the appellant to retain the custody of the child."

34. The asserted right of a father to be appointed as a guardian and to be accorded custody again fell for consideration of the Supreme Court in **Gaurav Nagpal v. Sumedha Nagpal**[13]. Dealing with the said issue, the Supreme Court had observed as follows:

> **"43.** The principles in relation to the custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the parents under a statute for the time being in force.
>
> **44.** The aforesaid statutory provisions came up for consideration before courts in India in several cases. Let us deal

[11] HAM Act

[12] (2009) 7 SCC 322
[13] (2009) 1 SCC 42

with few decisions wherein the courts have applied the principles relating to grant of custody of minor children by taking into account their interest and well-being as paramount consideration.

**45.** In *Saraswatibai Shripad Ved* v. *Shripad VasanjiVed* [AIR 1941 Bom 103 : ILR 1941 Bom 455] , the High Court of Bombay stated : (AIR p. 105)

> "… It is not the welfare of the father, nor the welfare of the mother, that is the paramount consideration for the court. *It is the welfare of the minor and of the minor alone which is the paramount consideration*…."
>
> (emphasis supplied)

**46.** In *Rosy Jacob* v. *Jacob A. Chakramakkal* [(1973) 1 SCC 840] this Court held that object and purpose of the 1890 Act is not merely physical custody of the minor but due protection of the rights of ward's health, maintenance and education. The *power* and *duty* of the court under the Act is the welfare of minor. In considering the question of welfare of minor, due regard has of course to be given to the right of the father as natural guardian but if the custody of the father cannot promote the welfare of the children, he may be refused such guardianship.

**48.** Merely because there is no defect in his personal care and his attachment for his children—which every normal parent has, he would not be granted custody. Simply because the father loves his children and is not shown to be otherwise undesirable does not necessarily lead to the conclusion that the welfare of the children would be better promoted by granting their custody to him. Children are not mere chattels nor are they toys for their parents. Absolute right of parents over the destinies and the lives of their children, in the modern changed social conditions must yield to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society and the guardian court in case of a dispute between the mother and the father, is expected to strike a just and proper balance between the requirements of welfare of the minor children and the rights of their respective parents over them.

**49.** In *Surinder Kaur Sandhu* v. *Harbax Singh Sandhu* [(1984) 3 SCC 698 : 1984 SCC (Cri) 464] this Court held that Section 6 of the Act constitutes father as a natural guardian of a minor son. But that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. [See also *Elizabeth Dinshaw* v. *Arvand M. Dinshaw* [(1987) 1 SCC 42 : 1987 SCC (Cri) 13] and *Chandrakala Menon* v. *Vipin Menon (Capt.)* [(1993) 2 SCC 6 : 1993 SCC (Cri) 485] .]

**50.** When the court is confronted with conflicting demands made by the parents, each time it has to justify the demands. The court has not only to look at the issue on legalistic basis, in such matters human angles are relevant for deciding those issues. The

> court then does not give emphasis on what the parties say, it has to exercise a jurisdiction which is aimed at the welfare of the minor. As observed recently in *Mausami Moitra Ganguli case* [(2008) 7 SCC 673 : JT (2008) 6 SC 634] , the court has to give due weightage to the child's ordinary contentment, health, education, intellectual development and favourable surroundings but over and above physical comforts, the moral and ethical values have also to be noted. They are equal if not more important than the others.
>
> **51.** The word "welfare" used in Section 13 of the Act has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the court as well as its physical well-being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the court exercising its *parens patriae* jurisdiction arising in such cases."

35. The primordial position which must be accorded to the *parens patriae* principle when it comes to the welfare of a child was re-emphasized by the Supreme Court in its recent judgment in **Smriti Madan Kansagra v. Perry Kansagra**[14].

> **"15.1.** It is a well-settled principle of law that the courts while exercising *parens patriae* jurisdiction would be guided by the sole and paramount consideration of what would best subserve the interest and welfare of the child, to which all other considerations must yield. The welfare and benefit of the minor child would remain the dominant consideration throughout. The courts must not allow the determination to be clouded by the inter se disputes between the parties, and the allegations and counter-allegations made against each other with respect to their matrimonial life. In *Rosy Jacob* v. *Jacob A. Chakramakkal* [*Rosy Jacob* v. *Jacob A. Chakramakkal*, (1973) 1 SCC 840] this Court held that : (SCC p. 855, para 15)
>
> > "*15.* … The children are not mere chattels : nor are they mere playthings for their parents. *Absolute right of parents over the destinies and the lives of their children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society*…."
> >
> > (emphasis supplied)

[14] (2021) 12 SCC 289

**15.2.** A three-Judge Bench of this Court in *V. Ravi Chandran (2)* v. *Union of India* [*V. Ravi Chandran (2)* v. *Union of India*, (2010) 1 SCC 174 : (2010) 1 SCC (Civ) 44] opined : (SCC p. 194, para 27)

> "*27.* … It was also held that whenever a question arises before a court pertaining to the custody of a minor child, *the matter is to be decided not on considerations of the legal rights of the parties, but on the sole and predominant criterion of what would serve the best interest of the minor*."
>
> (emphasis supplied)

**15.3.** Section 13 of the Hindu Minority and Guardianship Act, 1956 provides that the welfare of the minor must be of paramount consideration while deciding custody disputes. Section 13 provides as under:

> "**13. *Welfare of minor to be paramount consideration***.— (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.
>
> (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

**15.4.** This Court in *Gaurav Nagpal* v. *Sumedha Nagpal* [*Gaurav Nagpal* v. *Sumedha Nagpal*, (2009) 1 SCC 42 : (2009) 1 SCC (Civ) 1] held that the term "welfare" used in Section 13 must be construed in a manner to give it the widest interpretation. The moral and ethical welfare of the child must weigh with the court, as much as the physical well-being. This was reiterated in *Vivek Singh* v. *Romani Singh* [*Vivek Singh* v. *Romani Singh*, (2017) 3 SCC 231 : (2017) 2 SCC (Civ) 1] , wherein it was opined that the "welfare" of the child comprehends an environment which would be most conducive for the optimal growth and development of the personality of the child.

**15.5.** To decide the issue of the best interest of the child, the Court would take into consideration various factors, such as the age of the child; nationality of the child; whether the child is of an intelligible age and capable of making an intelligent preference; the environment and living conditions available for the holistic growth and development of the child; financial resources of either of the parents which would also be a relevant criterion, although not the sole determinative factor; and future prospects of the child.

**15.6.** This Court in *Nil Ratan Kundu* v. *Abhijit Kundu* [*Nil Ratan Kundu* v. *Abhijit Kundu*, (2008) 9 SCC 413] set out the principles governing the custody of minor children in para 52 as follows: (SCC p. 428)

> "*Principles governing custody of minor children*
>
> *52*. In our judgment, the law relating to custody of a child is fairly well settled and it is this : in deciding a difficult and complex question as to the custody of a minor, a court of law should keep in mind the relevant statutes and the rights flowing therefrom. But such cases cannot be decided *solely* by interpreting legal provisions. It is a human problem and is required to be solved with human touch. A court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the court is exercising parens patriae jurisdiction and is expected, *nay* bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the court as to what is conducive to the welfare of the minor."
>
> (emphasis in original)"

36. This Court thus finds that the petitioner while being the father of his son with disabilities in light of being an American citizen cannot claim or assert a vested right to be appointed as his guardian. Such a right if at all would have to flow from a provision that may be in existence and which permits a foreigner to claim a right to be appointed as a guardian unfettered by any valid statutory restrictions that may stand placed.

37. It must also be noted that guardianship and a right that may be asserted in connection therewith essentially owes its genesis to statutory provisions which stand enshrined in the enactments noted above. Additionally, the Court notes that guardianship cannot be recognised as a right that may flow from any of the provisions which

stand enshrined in Part III of the Constitution and those under which protection may be claimed even by a foreign national. It, in any case, finds itself unable to countenance Articles 14 or 21 as being the source or the repository of a claim that may be raised in that regard.

38. Undisputedly, the petitioner, by virtue of being an American citizen, cannot claim the protection of Part III rights to the same extent as may stand conferred on a citizen. This in light of the limited rights that he can possibly claim under Part III of the Constitution. This aspect was explained by the Supreme Court in **State Trading Corpn. of India Ltd. vs. CTO**[15] as follows:

> **"5.** Before dealing with the argument at the Bar, it is convenient to set out the relevant provisions of the Constitution. Part III of the Constitution deals with Fundamental Rights. Some fundamental rights are available to "any person", whereas other fundamental rights can be available only to "all citizens". "Equality before the law" or "equal protection of the laws" within the territory of India is available to any person (Article 14). The protection against the enforcement of *ex-post facto* laws or against double-jeopardy or against compulsion of self-incrimination is available to all persons (Article 20), so is the protection of life and personal liberty under Article 21 and protection against arrest and detention in certain cases, under Article 22. Similarly, freedom of conscience and free profession, practice and propagation of religion is guaranteed to all persons. Under Article 27, no person shall be compelled to pay any taxes for the promotion and maintenance of any particular religious denomination. All persons have been guaranteed the freedom to attend or not to attend religious instructions or religious worship in certain educational institutions (Article 28). And, finally, no person shall be deprived of his property save by authority of law and no property shall be compulsorily acquired or requisitioned except in accordance with law, as contemplated by Article 31. These in general terms, without going into the details of the limitations and restrictions provided for by the Constitution, are the fundamental rights which are available to any person irrespective of whether he is a citizen of India or an alien or whether a natural or an artificial person. On the other hand, certain other fundamental rights have been guaranteed by the Constitution only to citizens and certain disabilities imposed upon the State with respect to citizens only. Article 15 prohibits the State from discriminating against any

[15] (1964) 4 SCR 99

citizen on grounds only of religion, race, caste, etc. or from imposing any disability in respect of certain matters referred to in the Article. By Article 16, equality of opportunity in matters of public employment has been guaranteed to all citizens, subject to reservations in favour of backward classes. There is an absolute prohibition against all citizens of India from accepting any title from any foreign State, under Article 18(2), and no person who is not a citizen of India shall accept any such title without the consent of the President, while he holds any office of profit or trust under the State (Article 18(3)). And then we come to Article 19 with which we are directly concerned in the present controversy. Under this Article, all citizens have been guaranteed the rights:

(*a*) to freedom of speech and expression;

(*b*) to assemble peaceably and without arms;

(*c*) to form associations or unions;

(*d*) to move freely throughout the territory of India;

(*e*) to reside and settle in any part of the territory of India;

(*f*) to acquire, hold and dispose of property; and

(*g*) to practise any profession, or to carry on any occupation, trade or business.

Each one of these guaranteed rights under clauses (*a*) to (*g*) is subject to the limitations or restrictions indicated in clauses (2) to (6) of the Article. Of the rights guaranteed to all citizens, those under clauses (*a*) to (*e*) aforesaid are particularly apposite to natural persons whereas the freedoms under clauses (*f*) and (*g*) aforesaid may be equally enjoyed by natural persons or by juristic persons. Article 29(2) provides that no citizen shall be denied admission into any educational institution maintained by the State or State-aid on grounds only of religion, race, caste, language or any of them. This short resume of the fundamental rights dealt with by Part III of the Constitution and guaranteed either to "any person" or to "all citizens" leaves out of account other rights or prohibitions which concern groups, classes or associations of persons, with which we are not immediately concerned. But irrespective of whether a person is a citizen or a non-citizen or whether he is a natural person or a juristic person, the right to move the Supreme Court by appropriate proceedings for the enforcement of their respective rights has been guaranteed by Article 32.

**6.** It is clear on a consideration of the provisions of Part III of the Constitution that the makers of the Constitution deliberately and advisedly made a clear distinction between fundamental rights available to "any person" and those guaranteed to "all citizens". In other words, all citizens are persons but all persons are not citizens, under the Constitution."

39. The Court thus comes to conclude that the petitioner cannot even claim a constitutional right to be appointed as a guardian of a person with disabilities. It draws sustenance for the aforesaid conclusion from the following succinct observations as were rendered by five learned Judges of the Supreme Court in **Sahibzada Saiyed Muhammed Amirabbas Abbasi v. State of M.B.**[16]:

> **"8.** Exercising jurisdiction under Article 32 of the Constitution, this Court may grant relief for enforcement, only of the rights conferred by Part III of the Constitution. The alleged right of the first petitioner to guardianship of his minor children under the Personal Law is not one of the fundamental rights guaranteed to him by the Constitution; nor by appointing Respondent 2 as the guardian of the minors under the Guardian and Wards Act is discrimination practised against the minors. The second respondent was appointed guardian of the minors by order of a competent court, and denial of equality before the law or the equal protection of the laws can be claimed against executive action or legislative process but not against the decision of a competent tribunal. The remedy of a person aggrieved by the decision of a competent judicial tribunal is to approach for redress a superior tribunal, if there be one. In the present case, against the order of the District Court appointing the second respondent the guardian of the person and property of the minors, an appeal was preferred to the High Court and that appeal was dismissed. Even an application for special leave to appeal to this Court was rejected, and the order of the District Court became final. If, since the date on which the order appointing the guardian of the minors, events have transpired which necessitate a modification of that order the proper remedy of the first petitioner is to apply to the District Court for relief in that behalf and not to approach this Court for a writ under Article 32 of the Constitution. This Court has rejected the application for special leave to appeal under Article 136; and that order cannot be circumvented by resorting to an application for a writ under Article 32. Relief under Article 32 for enforcement of a right conferred by Chapter III can be granted only on proof of that right and infringement thereof, and if, by the adjudication by a Court of competent jurisdiction the right claimed has been negatived, a petition to this Court under Article 32 of the Constitution for enforcement of that right, notwithstanding the adjudication of the civil court, cannot be entertained."

[16] AIR 1960 SC 768

40. In the aforesaid decision, the petitioner who had in 1948 migrated to West Pakistan and had taken up residence in Rawalpindi, staked a claim to be appointed as a guardian of two minor children borne from his first marriage. It was asserted by the petitioner that since he was a natural guardian, he was entitled to be appointed as their guardian. It was in the aforesaid backdrop that he had petitioned the Supreme Court under Article 32 of the Constitution. The said challenge came to be negated with the Supreme Court pertinently observing that the asserted claim could not be recognised as a manifestation of a fundamental right so as to justify the institution of a petition under Article 32 of the Constitution.

41. The Court for all the aforesaid reasons finds no merit in the challenge raised to the validity of the Rules and Regulations. It has additionally for reasons aforenoted found itself unable to countenance a right inhering in the petitioner to be appointed as a guardian.

42. That, however, cannot lead to a closure of these proceedings since it would clearly be failing in its duty if it were to leave the person with disabilities with an uncertain future and without framing measures and putting in place steps to safeguard and ensure his future. The petitioner is stated to have been looking after and caring for all the needs of his son since adoption. The mother is not shown to have taken any interest in the upbringing of the physically challenged son. The son is stated to be in the legal custody of the petitioner. The ends of justice would thus appear to merit the following directions being framed.

43. Let the Local Level Committee examine and evaluate the circumstances and surroundings of the person with disabilities in

question forthwith. The Committee may also advise the adoption of such further measures as may be warranted bearing in mind the welfare, overall health and well-being of the person concerned. The Court leaves it open to the petitioner to nominate an Indian citizen who may be appointed as the statutory guardian of the son with special needs. Any nomination that may be made in this respect shall be duly examined and considered by the Local Level Committee. The statutory guardian, when appointed, shall together with the petitioner be obliged to attend to the welfare and upbringing of the person concerned. The statutory guardian acting together with the petitioner shall be responsible for the discharge of all statutory obligations that stand placed under the Act.

44. The aforesaid directions, however, shall not be understood as authorising the removal of the son from the custody of his natural guardian, the father and the petitioner here, unless the Local Level Committee finds that circumstances warrant otherwise. The statutory guardian as well as the petitioner shall be jointly responsible to care for and look after the welfare of the person with disabilities.

45. The writ petition along with the pending application shall consequently stand disposed of in terms of the directions set out in paragraphs 43 and 44. The Local Level Committee shall cause an inspection to be made with due expedition and upon the appointment of a statutory guardian place a comprehensive report on the record of these proceedings within a period of two months from today.

46. The Court additionally grants liberty to the Local Level Committee to apply for such further directions as may be considered necessary and in case circumstances so warrant.

**SATISH CHANDRA SHARMA, C.J.**

**YASHWANT VARMA, J.**

**FEBRUARY 13, 2023**
SU/rsk