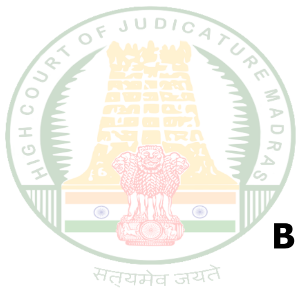


BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 24.01.2023

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.18042 of 2022

G.Babu ... Petitioner

Vs

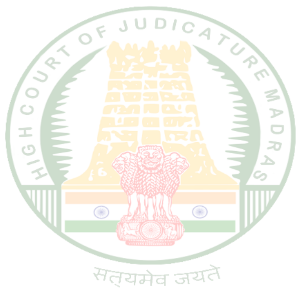
1.The District Collector,
Madurai District, Madurai.

2.The District Differently Abled Welfare Officer,
District Disabled Rehabilitation Office,
Collectorate, Madurai,
Madurai District.

3.The Mental Health Review Board,
Government Rajaji General Hospital,
Madurai. ... Respondents

(R3 *suo motu* impleaded by this Court
vide order dated 11.08.2022)

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to the impugned order in Na.Ka.No.1911/AST/2022 dated 29.06.2022 passed by the 2nd respondent and quash the same and consequently direct the respondents to appoint the petitioner as a lawful guardian for G.P who was mentally challenged person.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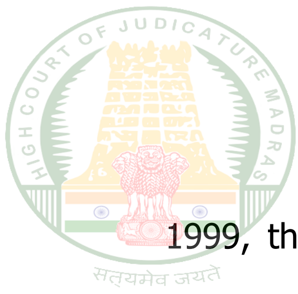
For Petitioner : Mr.S.Muniyandi

For Respondents : Mr..K.Balasubramanian
Special Government Pleader

ORDER

The issue posed for consideration is whether under Section 14 of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (Central Act 44 of 1999), the petitioner can be appointed as legal guardian for his schizophrenic sister.

2.The petitioner's sister Ms.G.P suffers from "chronic schizophrenia". Her disability has been assessed at 60% in IDEAS Scale. The Regional Medical Board, Government Rajaji Hospital, Madurai – 20 has certified that she cannot earn livelihood on her own and that she is dependant upon her family members to look after her day to day activities. The District Differently Abled Welfare Officer, Madurai has also issued certificate on the same lines. The jurisdictional Tahsildar has certified that Ms.G.P is a spinster and that she is mentally ill and that she is under the care of her brother Babu (petitioner herein). Armed with these materials, the petitioner approached the respondents for appointing him as her legal guardian. The petitioner's request was rejected on the sole ground that under the Central Act 44 of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1999, there is no provision for appointing legal guardian for a person with mental illness. The rejection order dated 29.06.2022 is put to challenge in this writ petition.

3.The learned counsel appearing for the petitioner reiterated the contentions set out in the affidavit filed in support of the writ petition and called upon this Court to grant relief as prayed for. Per contra, the learned Special Government Pleader submitted that the impugned communication does not call for any interference. He prayed for dismissal of the writ petition.

4.I carefully considered the rival contentions and went through the materials on record.

5.Section 14 of the Central Act 44 of 1999 is as follows :

> "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.

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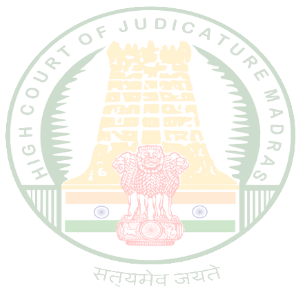
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(3) While considering the application for appointment of a guardian, the local level committee shall consider- - whether the person with disability needs a guardian; - the purposes for which the guardianship is required for person with disability.

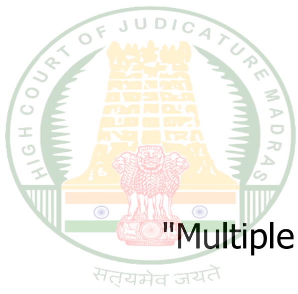
(4) The local level committee shall receive, process and decide applications received under sub-sections (1) and (2), in such manner as may be determined by regulations: Provided that while making recommendation for the appointment of a guardian, the local level committee shall provide for the obligations 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."

The aforesaid provision provides for appointment of guardian for a "person with disability". Section 2(j) of the 1999 Act is as follows :

"person 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."

The above definition consists of two parts. The first part specifies what the expression "person with disability" means. The second part states what is included. Such a definition is meant to be exhaustive vide ***Mahalakshmi Oil Mills v. State of UP (1989) 1 SCC 164***. Section 2(h) of the Act defines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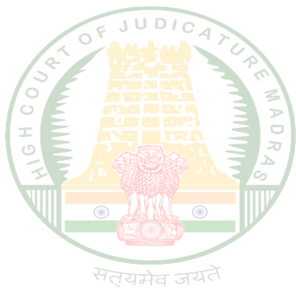
"Multiple Disabilities" as meaning a combination of two or more disabilities as defined in clause (i) of section 2 of the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996). Section 2(o) of the 1999 Act defines "severe disability" as meaning disability with eighty percent or more of one or more of multiple disabilities. Section 2(i) of the Central Act 1 of 1996 is as follows :

> "(i)"Disability" means- (i) Blindness; (ii) Low vision; (iii) Leprosy-cured; (iv) Hearing impairment; (v) Loco motor disability; (vi) Mental retardation; (vii) Mental illness;"

6.Central Act 1 of 1996 had been repealed by Section 102 of the Rights of Persons with Disabilities Act, 2016 (Central Act 49 of 2016). The corresponding definitions in the new Act are found in Sections 2(r), 2(s) and 2(zc) of the 2016 Act which are as follows :

> (r) "person with benchmark disability" means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority;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> (s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others;
>
> (zc)"specified disability" means the disabilities as specified in the Schedule;"

The Schedule to the Act deals with specified disabilities such as physical disability, intellectual disability, mental illness, disability caused due to chronic neurological conditions, blood disorder and multiple disabilities. Clause 3 of the Schedule reads as follows :

> "3. Mental behaviour,— "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, but does not include retardation which is a conditon of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence."

From a reading of the aforesaid provisions, one can conclude that mental illness has been classified as a disability both under the 1995 Act as well as the 2016 Act.

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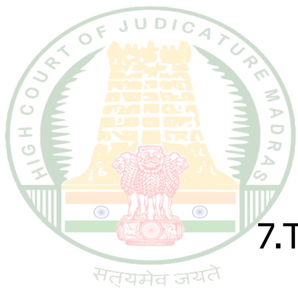
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7.Though the 1995 Act has been repealed by the 2016 Act, in view of Section 24 of the General Clauses Act r/w. Section 102 of the 2016 Act, the Rules framed under the 1995 Act will hold good to the extent they are not inconsistent with the Central Act 49 of 2016. In other words, the Rules framed under the repealed Act would survive to the extent envisaged in Section 24 of the General Clauses Act, 1897.

8.It must be clarified at the very outset that the institutional framework laid down in Central Act 44 of 1999 is not confined only to persons with autism, cerebral palsy and mental retardation. The aforesaid disabilities are congenital in nature. The authorities appear to be under the impression that the 1999 Act is not meant to deal with acquired disabilities. This understanding is incorrect. This is because the second part of the definitional clause in Section 2(j) of the 1999 Act encompasses persons suffering from multiple disabilities. As already noted, this definition will take us to the definition set out in 2(i) of the 1995 Act. The first five categories catalogued in the said definition can be either congenital or acquired later. None of the said categories either by themselves or even in combination would necessarily warrant appointment of guardian. Mental illness has been mentioned as the seventh category in the definition. I am therefore of the view that mental illness ought not to be kept out of the scope of the 1999 Act.

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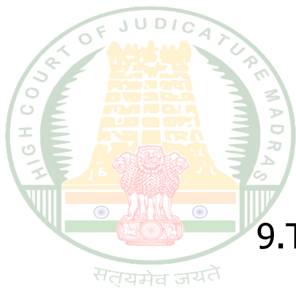
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9.The first question that arises is how to apply Section 2(h) of the Central Act 44 of 1999 which defines multiple disabilities in terms of Section 2(i) of the repealed 1995 Act. Section 8 of the General Clauses contains the key. It reads as follows :

"8.Construction of references to repealed enactments.—

(1) Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted], with or without modification, any provision of a former enactment, then reference in any [Central Act] or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.]"

The Hon'ble Supreme Court of India in ***State of Uttarkhand v. Mohan Singh (2012) 13 SCC 281*** held as follows :

"17.A subsequent legislation often makes a reference to earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by later legislation. Such a legislation may either be (i) a referential legislation which merely contains a reference to or the citation of the provisions of the earlier statute; or

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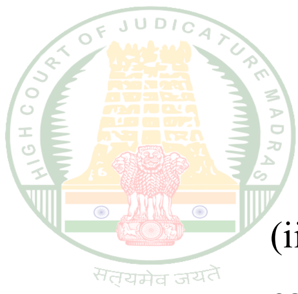
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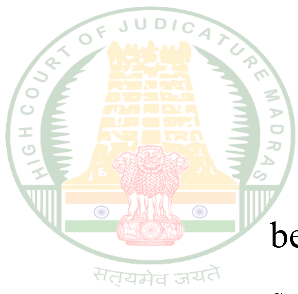
(ii) a legislation by incorporation whereunder the provisions of the earlier legislation to which reference is made are incorporated into the later legislation by reference.

18.The question how the above two principles operate came up for consideration in U.P. Avas Evam Vikas Parishad v. Jainul Islam and Anr. MANU/SC/0055/1998 : (1998) 2 SCC 467 before a three-judge Bench of this Court and it was held as follows:

17.A subsequent legislation often makes a reference to an earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by the later legislation. Such a legislation may either be (i), a referential legislation which merely contains a reference to or the citation of the provisions of the earlier statute; or (ii) a legislation by incorporation whereunder the provisions of the earlier legislation to which reference is made are incorporated into the later legislation by reference. If it is a referential legislation the provisions of the earlier legislation to which reference is made in the subsequent legislation would be applicable as it stands on the date of application of such earlier legislation to matters referred to in the subsequent legislation. In other words, any amendment made in the earlier legislation after the date of enactment of the subsequent legislation would also be applicable. But if it is a legislation by incorporation the rule of construction is that repeal of the earlier statute which is incorporated does not affect operation of the subsequent statute in which it has been incorporated. So also any amendment in the statue which has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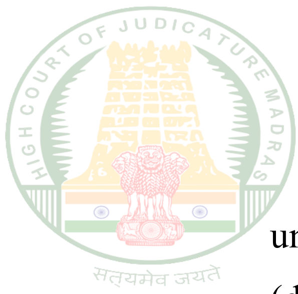
been so incorporated that is made after the date of incorporation of such statute does not affect the subsequent statute in which it is incorporated and the provisions of the statue which have been incorporated would remain the same as they were at the time of incorporation and the subsequent amendments are not to be read in the subsequent legislation. In the words of Lord Esher, M.R., the legal effect of such incorporation by reference "is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all." [See: Wood's Estate Re, Ch D at 615.] As to whether a particular legislation fails in the category of referential legislation or legislation by incorporation depends upon the language used in the statute in which reference is made to the earlier legislation and other relevant circumstances. The legal position has been thus summed up by this Court in State of Madhya Pradesh v. M.V. Narasimhan: (SCR p. 14: SCC p. 385, para 15)

where a subsequent Act incorporates provisions of a previous Act then the borrowed provisions become an integral and independent part of the subsequent Act and are totally unaffected by any repeal or amendment in the previous Act. This principle, however, will not apply in the following cases:

(a) Where the subsequent Act and the previous Act are supplemental to each other,

(b) where the two Acts are in pari materia;

(c) where the amendment in the previous Act, if not imported into the subsequent Act also, would render the subsequent Act wholly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unworkable and ineffectual; and

(d) where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act.

19.Law is, therefore, clear that a distinction has to be drawn between a mere reference or citation of one statute into another and incorporation. In the case of mere reference of citation, a modification, repeal or re-enactment of the statute that is referred will also have effect for the statute in which it is referred; but in the latter case any change in the incorporated statute by way of amendment or repeal has no repercussion on the incorporating statute."

I need not get into technical issue as to whether Section 2(i) of the 1995 Act is finding place in Central Act 44 of 1999 by way of reference or by way of incorporation. When we are dealing with beneficial legislations, the court's approach must be to adopt the one that would empower the targeted categories. While in the 1999 Act, the expression "severe disability" means disability with eighty percent or more of one or more of multiple disabilities, 2016 Act talks of "benchmark disability" which refers to a person with not less than forty percent of a specified disability where it has not been defined in measurable terms. The 2016 Act does not employ the expression "severe disability". Reference has to be made to the landmark decision in ***Vikash Kumar v. UPSC (2021) 5 SCC 370***. The 2016 Act has been described as

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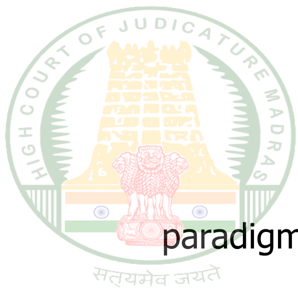
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paradigm shift from a stigmatizing medical model of disability under the 1995 Act to a social model of disability. The 2016 RPwD Act now recognizes 21 specified disabilities and enables the Central Government to add further categories of disability. I therefore construe the statutory scheme set out in Central Act 44 of 1999 with reference to and in the light of Central Act 49 of 2016.

10.Let us come back to the definition set out in Section 2(j) of 1999 Act. We are concerned with the second part of the definition ie., "person suffering from severe multiple disability". While Section 2(h) of the said Act defines "multiple disabilities", Section 2(j) employs the expression "severe multiple disability". It is not known if this is a grammatical error. But I shall take advantage of the same. Though Section 2(h) talks of combination of two or more disabilities as defined in Section 2(i) of the 1995 Act, it has already been noted that the first five categories set out therein do not really necessitate appointment of guardian. The sixth category, namely, mental retardation is dealt with in the 1999 Act. That leaves us only with the category of mental illness. Looked at from that angle, it is superfluous to insist that the condition of mental illness should be combined with one or more of the first five categories. This is because guardianship is required only because of the condition of mental illness. To reiterate, the conditions set out in the first five

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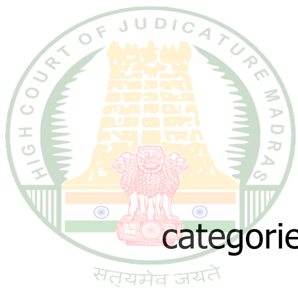
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categories do not really by themselves or even in combination require appointment of guardian. The expression "combination of two or more disabilities" must be appropriately and purposively understood. Section 13 of the General Clauses Act states that in all Central Acts and Regulations, unless there is anything repugnant in the subject or context, words in the singular shall include the plural and vice versa.

11.Parliament enacted the Mental Health Care Act, 2017 to promote the welfare of persons with mental illness. This Act repealed the earlier 1987 Act. As per the statutory scheme set out in the Mental Health Act, 1987, the District Court would involve the District Collector to appoint any suitable person as guardian for the management of the property of the mentally ill person. There is no provision in the 2017 Act for appointment of guardian for a mentally ill person. The Hon'ble Division Bench of the Kerala High Court in the decision reported in ***2019 SCC OnLine Kerala 739 (Shobha Gopalakrishnan vs. State of Kerala***) took note of the absence of provision for appointment of guardian in the 2017 Act. The court was dealing with a case of a person in comatose condition. It took the view that the 1999 Act cannot deal with such cases. Invoking parens patriae jurisdiction and Article 226 of the Constitution of India, it laid down a set of guidelines as a temporary measure till the field is taken over by proper legislation. As per

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the said norms, in cases involving persons in comatose condition, the High Court can appoint guardians. However, the principles set out in the National Trust Act, 1999 shall be borne in mind.

12.A learned Judge of the Madras High Court (Justice V.Ramasubramanian as His Lordship Then Was) in ***Madhuben Suryakant Patel vs. Union of India (2014) 7 MLJ 649*** dealt with a similar case of guardianship for a person in comatose condition. When it was contended that such condition will not fall within the statutory scope of the 1999 Act, it was held that the authorities ought not to adopt a narrow interpretation in such cases and allowed the writ petition.

13.The Hon'ble Delhi High Court in ***Pratibha Pande and Ors. vs. Union of India and Ors. (2016 SCC OnLine Del 1167)*** held that the High Court exercising power under Article 226 is the ultimate guardian of minor children and disabled persons who are non sui juris. A learned Judge of this Court vide order dated 08.12.2022 in O.P No.527 of 2022 (S.Ramji v. Mrs.G.Banumathi and ors) held that schizophrenia qualifies as mental illness and that the High Court can appoint a guardian for such persons under Clause 17 of the Letters Patent as the Mental Health Care Act, 2017 does not provide for appointment of guardian. An argument was advanced that 1999 Act does

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not deal with mental illness. No opinion was expressed by the Hon'ble Judge on this.

14.Under the 1999 Act, the Local Level Committee which has the power to appoint guardians is invariably headed by the District Collector. The Local Level Committee will not allow an application for appointment of guardian for the asking. Under Section 14(3), it would consider whether the person with disability needs a guardian and the purposes for which guardianship is required for a person with disability. As already noted, the District Collector was very much in the scheme of things in the repealed Mental Health Act, 1987.

15.There are different standards and varying principles of interpretation. It all depends on the context. Some provisions require strict interpretation. Some demand liberal and expansive interpretation. Usually, the language of the statute is construed as such without leaving out any part. But at times, in order to advance the legislative object, certain words may have to be glossed over. A conjunctive word "and" is read as "or". While dealing with emancipatory statutes, the Court will be guided only by the principles of purposive interpretation. Adopting such an approach, the expression "person suffering from multiple disability" occurring in Section 2 (j) of the 1999 Act

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must be understood to mean "a person with benchmark disability" as defined in Section 2(r) of the 2016 Act. Adopting such an approach would enable the Local Level Committee to deal with cases of appointment of guardian for persons suffering from any kind of disability. The Local Level Committee constituted under Central 44 of 1999 should not confine themselves to cases of congenital conditions such as autism, cerebral palsy and mental retardation alone. They should also deal with other disabilities. The 1999 Act should be applied in the light of the new 2016 RPwD Act and not in the light of the repealed 1995 Act. This is more so because it is easier to secure appointment of guardianship under the 1999 Act. Approaching the High Court and getting orders expeditiously may not always be possible. If the Local Level Committee under the 1999 Act has the power to appoint guardian, that would certainly enable easier and quicker access to justice.

16.The petitioner's sister is suffering from 60% disability. As per the definition in the 1999 Act, only if the person is suffering with more than 80% disability, it will come under the severe category. It has already been noted that the concept of severe disability has been given up in the 2016 Act. The materials on record clearly indicate that the petitioner's sister is suffering from benchmark disability. A case for appointing guardian has been clearly made out. In this view of the matter, the order impugned in this writ petition is set

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aside. The first respondent is directed to appoint the petitioner as guardian for his sister Ms.G.P.

17.The writ petition is allowed. No costs.

24.01.2023

Index : Yes / No
Internet : Yes/ No
SKM

To

1.The District Collector,
Madurai District, Madurai.

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3.The Mental Health Review Board,
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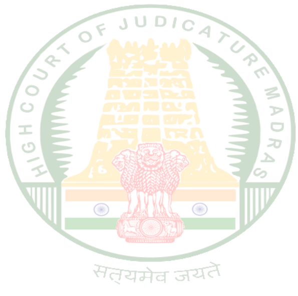

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G.R.SWAMINATHAN, J.

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