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

\+ **W.P.(CRL) 3317/2017**

Reserved on: 16th March 2018
Decided on: 26th April 2018

RAVINDER ..... Petitioner

Through: Mr. Akhil Sharma, Advocate with Ms. Isha Aggarwal, Advocate

versus

GOVT. OF NCT OF DELHI & ORS. ..... Respondents

Through: Mr. Rahul Mehra, Sr.Standing Counsel with Mr. Prashant Singh, Mr. Tushar Sannu, Advocate for R-1 and R-2.
Mrs. Neelima Tripathi, Advocate with Mr. Shikhar Khare, Mr. Motish Kumar Singh, Mr. Saurabh Sachdev, Advocates for R-3/IHBAS

CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S.MEHTA

JUDGMENT

Dr. S. Muralidhar, J.:

Introduction

1. The Petitioner came to this Court on 25th November 2017 with this writ petition under Article 226 of the Constitution of India, seeking a writ of *habeas corpus* for the release of his 71 year old father, Mr. Ram Kumar @ Ram Kanwar (Respondent No.4), from illegal detention at the Institute of Human Behaviour and Allied Sciences ('IHBAS') (Respondent No.3) at

Shahdara, Delhi.

2. In the course of the hearing of this petition on 25th November 2017, it transpired that, on 3rd November 2017, pursuant to the order of the Judge of the Motor Accidents Claims Tribunal (MACT) -2, Rohini, an Assistant Sub-inspector (ASI) attached to the Police Post (PP) at the Rohini District Court took Respondent No.4 in custody for medical check up to the nearby Baba Saheb Ambedkar (BSA) Hospital. Subsequently pursuant to a 'reception order' passed by the Duty Metropolitan Magistrate (MM) at Rohini, Respondent No.4 was, unbeknownst to his family, taken away to IHBAS for observation for two days. His unlawful detention at IHBAS was continued by orders dated 5th November of the Duty MM and 20th November 2017 of the MM at Rohini.

3. On 25th November 2017, after hearing counsel for the parties i.e. the State (Respondents 1 and 2) and IHBAS, this Court directed the immediate release of Respondent No.4 after finding his detention to be illegal and unconstitutional. The Court on a *prima facie* examination of the record of IHBAS and the provisions of the Mental Health Act, 1987 (MHA) set aside the orders dated 3rd, 5th and 20th November 2017. The writ petition was nevertheless retained on board for consideration of the constitutional and legal issues that arose, after the reply of IHBAS to the petition was received.

4. In the judgment that follows the Court first discusses the background facts and the circumstances under which Respondent No.4 landed up at IHBAS and remained there till 25th November 2017. The second part sets out the

defence of IHBAS and its doctors. The affidavit of ASI Krishan Kumar is also discussed. In the third part, the Court then discusses the illegalities that have taken place. The Court concludes that there have been egregious violations of the rights to personal liberty and dignity of Respondent No.4 particularly in light of the provisions of the Constitution of India.

5. Although in this case, there was no occasion to invoke MHA and order the detention thereunder of Respondent No.4, since IHBAS has pleaded 'bonafide confusion' about the orders passed by the Duty MM and MM, the Court has, in the fourth part, undertaken a detailed analysis of Sections 23, 24 and 28 of the MHA. The Court has traced the development of the mental health law internationally and domestically. This includes discussion of the relevant provisions of the Convention on the Rights of People with Disabilities (CRPD), ratified by India. Decisions in other jurisdictions and the 'best interest' principle in treatment and care of mental illness are also discussed in this part.

6. The fifth part of the judgment summarises the legal position under the MHA. The sixth part traces the numerous instances where there has been an abuse of the powers under the mental health law in this country i.e. under the Indian Lunacy Act 1912 (ILA) and later the MHA. This emphasises the need to view the mental health law as essentially concerning the right to treatment and care of persons with mental illness whilst respecting their rights to liberty and dignity and need for autonomy in respect of decisions concerning themselves. It calls for a complete dismantling of the penal custodial model of mental health care. The seventh part of the judgment

recapitulates the illegalities committed in the present case, an afterword, the scope of the *habeas corpus* jurisdiction and the consequential directions.

I

Background facts

7. The Petitioner and Respondent No.4 are defending MACP No. 4277/2016 before the MACT in the Rohini Courts, Delhi. This is a claim filed originally in 2008, arising from road accident that happened in 2007. The accident involved a mini bus owned by Respondent No.4 which at the relevant time was being driven by the Petitioner. Exhausted perhaps of their resources in engaging lawyers to represent them, Respondent No.4 has, for some years now, been appearing in person. He is Respondent No.2 and his son, the Petitioner herein, is Respondent No.1in the said claim petition.

8. The documents show that on 5th July 2017 the above case was listed before the MACT. When it was called out in the forenoon, Respondent No.4 was not present. The MACT gave the claimant before it a last and final opportunity to "conclude his entire evidence on the next date" and adjourned the case to 3rd November 2017. It appears that subsequently on the same day, when some other case was going on before the MACT, Respondent No.4 appeared at around 3.15 pm. In an order passed at that time the MACT noted that Respondent No.4 entered the court room and "started creating a scene." The order noted that he had "failed to maintain the decorum of the court and has used untoward language about my Ld. Predecessor and has also shown disrespect to the Chair". Further, despite the Presiding Officer apprising him of the order passed in the forenoon and asking him to

maintain the decorum "he did not desist from using foul language and shouted for quite some time and ultimately he left away from the court room". The order further noted "Considering the age of the aforesaid person and his mental state of mind, no adverse order is being passed against him this time in the interest of justice".

9. On 3rd November 2017 when the case was heard before the MACT an altercation took place between Respondent No.4 and the lawyers for the opposite parties. Respondent No.4 is alleged to have created a 'ruckus'. The order passed by the Judge, MACT in the case noted that Respondent No.4 had "started shouting in the court room" and had used "unparliamentary language." Despite persuasion, he continued in the same vein. The judge noted that he had displayed similar conduct earlier. The judge then noted in the order:

> "Considering the fact that respondent No.2 is not represented by any counsel, it would be appropriate that he is provided counsel from the DSLSA, North in order to represent him in this case. **The aforesaid conduct of respondent No.2 is also directed to be brought to the notice of the Incharge PP, Rohini Court through Naib Court attached with the Claims Tribunal**. Information be given to the Office Bearers of Rohini Bar Association in this regard." (emphasis supplied)

10. As a result, the *naib Court* (the name used for the police officer attached to the Court) went to give the information to the PP at the Rohini Court complex. ASI Krishan Kumar, who was attached to Police Station (PS) Prashant Vihar, and was at the time at the PP, states in an affidavit dated 14th December 2017 filed in this petition, that the *naib Court* informed him at 11.15 am that an 'abusive quarrel' was going on in the Court. The

information was noted down as Daily Dairy (DD) No. 18 PP. ASI Krishan Kumar along with Constable (Ct.) Maya Ram went to the MACT and found Respondent No.4 "using abusive language and creating nuisance in the court." Respondent No.4 was then taken by ASI Krishan Kumar and Ct. Maya Ram to the BSA Hospital, Rohini for medical examination.

11. The judge MACT again took up the matter "on the request of counsel for the parties." The judge noted in the further order *inter alia* that the Secretary and other office bearers of the Rohini Bar Association "have been apprised about the conduct displayed by respondent No.2 as well as the proceedings of the present matter." At 3.30 pm on 3rd November 2017, the Judge, MACT-2 passed a further order in which he noted: "It is informed by Naib Court that police official has taken respondent no. 2 to some government hospital for his medical examination." The orders passed on the subsequent dates in the claim petition before the MACT, i.e. 12th January 2018 and 6th April 2018 do not show that the Judge, MACT made any effort to find out what had happened to Respondent No.4 after he was taken for the medical examination to the BSA Hospital on 3rd November 2017.

At the BSA Hospital, Rohini

12. What transpired at the BSA Hospital is spoken to by ASI Krishan Kumar in his affidavit dated 14th December 2017. The medico-legal certificate ('MLC') prepared there is in the form of an "Emergency Registry Card" ('ERC'). It shows that Dr. Himanshu Bhatheja, MD, General Medicine, Senior Resident ('SR') at the BSA Hospital first saw Respondent No.4 at 2.25 pm on 3rd November 2017. He noted that the Respondent No.4 was

"complaining irrelevant, sometimes abusive giving H/o stent in coronary artery in Apollo hospital but showing no documents". The said SR did not find anything abnormal but still referred Respondent No.4 to the Medical SR/Psychiatrist for further medical examination and opinion.

13. The ERC further shows that at 2.50 pm, Respondent No.4 was examined by Dr. Ashutosh Dash, SR. Under a caption titled "Mental State Examination", Dr. Dash noted that "no psychopathology" was detected. Further, he noted that "no thought or perceptual disturbances" were noticed. He further noted that Respondent No.4's attention and concentration were not maintained during the interview. It appears that in his own hand, Respondent No.4 wrote on the side of the above notes: "I am under treatment of Dr. K. K. Saxena, Indraprastha Hospital. Refused admission in BSAH". Respondent No.4 also signed with the date of 3rd November 2017. The other notes on the ECR read: "patient repeatedly reluctant to go Medicine SR/ECG for further MX"; "on the cross sectional examination the patient is not showing any problems for memory, thought disturbances"; "no past history of any psychiatric illness". It appears that Respondent No.4 was kept at the BSA hospital till 5.45 pm. There is a further noting of Dr. Dash which reads: "Referred to IHBAS for 24 hr observation."

Before the Duty MM

14. Thereafter, ASI Krishan Kumar and Ct. Maya Ram brought Respondent No.4 back to the Rohini District Courts Complex. However, the Court had closed for the day. As a result, Respondent No.4 had to be taken to a duty MM. Since the Duty MM was residing in the Trans-Yamuna area,

Respondent No.4 could be produced there only at around 9 pm on 3rd November 2017. ASI Krishan Kumar presented an application before the Duty MM praying for an order to the effect that Respondent No.4 should be sent to IHBAS. No provision of any law was cited in this application. The order passed by the learned Duty MM reads as under

> "DD No.18PP PV Dated 03.11.2017
> PS Prashant Vihar
> 03/11/2017
>
> At my home at 09.30 pm
>
> Pr: Person Ram Kumar with ASI Krishan Kumar
>
> A person Ram Kumar has been produced before me today at my home by ASI Krishan Kumar. It is submitted that this person has created a ruckus today in Court No. 13 Rohini Court today and the learned Judge has got informed the area police about it. His MLC was done at BSAH, Sector 10, Rohini. MLC perused.
>
> I have talked quite some time with the patient. He is unable to give any coherent answers and seems to be potentially violent. His whereabouts and family is also not ascertainable for (*sic* from) questioning him. He has a very threatening attitude towards everyone. Hence, I deem it fit to allow this application. I hereby pass reception order WRT patient Ram Kumar. He be kept under observation in IBHAs for 24 hours. Be produced before DMM on 5th November 2017. IBHAS to send their report in this regard."

15. At this stage, none of the family members of Respondent No.4 had been informed by ASI Krishan Kumar that he had been detained in the manner described above and was being produced before the Duty MM. ASI Krishan Kumar, in his affidavit dated 14th December 2017, states that he came to

know the name and address of the person whom he had detained as Mr. Ram Kumar along with his father's name and residential address. However, ASI Krishan Kumar does not state when or at what time he came to know these details. He simply states that he came to know "later on". It has been pointed out by counsel for the Petitioner that Respondent No.4 was carrying with him his mobile phone and it would not have been difficult at all to ascertain the contact numbers of his family members. Yet, neither ASI Krishan Kumar nor even the Duty MM considered it necessary to ensure that the family members of Respondent No.4 were informed of his detention. There was no lawyer representing Respondent No.4 before the Duty MM. The above 'reception order' was passed without referring to any law, much less the MHA.

16. 4th November 2017, a Saturday, was a Court holiday on account of Guru Nanak's birthday. Therefore, the Duty MM fixed the next returnable date as 5th November 2017, which was a Sunday.

First three days at IHBAS

17. The notes on the file of IHBAS show that Respondent No.4 arrived there at 10.05 pm accompanied by ASI Krishan Kumar. The file noting shows that Respondent No.4 was carrying a bag containing case papers which he refused to show to anyone and the ASI refused to take custody of. It was noted that there was no known history or reliable information available. The above notes were prepared by Dr. Prabhleen Singh Jaggi, SR Psychiatry. He noted that the patient was well groomed and wearing a suit. His nails were stained and unkempt, and it was noted that he talked about various cases that

he is involved in and wants to defend himself. It was specifically mentioned that he said "I want to root out corruption". It was further noted "Imp-Psychosis to be specified". The treatment advice was "Admit in SOF for observation". [SOF translates as Short Observation Facility]. The ERC was prepared on that day itself.

18. At 11 pm on 3rd November 2017, it was noted by Dr. Jaggi that "the patient is refusing to go to bed. However, appears drowsy. Vitals stable". At 8.40 am on 4th November 2017, the noting reads: "Patient seen and examined. Psychopathology maintained. Vitals stable". Dr. Jaggi saw Respondent No.4 at 8.30 am on 4th November 2017. He noted: "Pt seen and examined. Psychopathology maintained. Vitals stable."

19. Dr. Sartaj Deepak, SR Psychiatry at IHBAS, saw Respondent No.4 next at 4 pm on 4th November 2017. His noting reads: "over intrusiveness; pressured speech, grandiose ideas". He noted "it has been decided to request the Hon'ble Court to pass reception order under Section 28 as the patient needs admission for further observation and management. Not allowing for blood sampling and oral medication".

20. The noting at 7 pm by Dr. Kirti Sharma, SR Psychiatry was to the effect, "Ward behaviour: adamant behaviour; intrusiveness; uncooperative with hospital staff; patient refuses to sit on bed, says that he will sit and sleep on settee which is for the patient's attendant as he is not a patient". The other observations are that he was appropriately dressed, had an irritable affect and grandiose ideas, impaired judgment and absent insight. The further

noting as regards the 'plan' was "to keep in SOF until appropriate order for admission under Section 28 is obtained from the Hon'ble Court".

21. There are two entries made by Dr. Kirti Sharma on the morning of 5th November 2017. First, in the ERC at 8 am she notes, "Patient requires admission for detailed admission and evaluation. It is requested to the Hon'ble Court that an appropriate reception order under Section 28 of MHA, 1987 may be passed for the same". The entry at 8.30 am in the follow-up sheet is: "patient woke up early, got dressed in his black suit and demanded to be sent home. He is repeatedly asking to call the police personnel who were with him so that he can be taken to Court where he would fight his case. Escaping tendency. Not cooperating for treatment or for investigations or checking of vitals". The advice noted was "Keep in SOF until appropriate Court orders obtained; 24 hour security guard to be posted on patient; continue ward observation; Serial MSE; inform SOS". There is a noting of 4 pm on the same date about ASI Krishan Kumar having come to take the patient Ram Kumar to be produced in Court and about the patient having been handed over to ASI Krishan Kumar "after taking the receiving for the same". However, this note appears to have been later scored off.

Again before the Duty MM

22. On 5th November 2017, Respondent No.4 was produced before the Duty MM since it was a Sunday. The following order was passed:

> "ASI Krishan in person along with patient namely Ram Kumar who is produced form IBHAS referred by Dr. Kirti Sharma, Senior Resident Psychiatry, IHBAS Delhi along with his two

> sons namely Ravinder and Rajiv and one daughter namely Smt. Renu.
>
> I perused the report of patient Ram Kumar. Report of doctor reflects that the patient required admission for detailed assessment and evaluation.
>
> Concern M.S. IBHAS is hereby directed to admit the patient Ram Kumar. IO and concerned doctor is hereby directed to file the medical report of patient before concerned court on 20.11.2017. Copy dasti".

23. The presence of the two sons and daughter of Respondent No.4 was noted by the learned MM. Yet, the MM had no interaction with them. No lawyer represented Respondent No.4 even on this date. The order simply stated that the patient required admission for detailed assessment and evaluation. A direction was given to IHBAS to 'admit' Respondent No.4 to a mental health institution and yet there was no reference by the MM to the MHA.

24. The returnable date given by learned duty MM was 20th November 2017, i.e. detention of Mr. Ram Kumar was extended for a further period of 15 days. This was contrary to Section 28 (2) of the MHA which mandates that no detention thereunder can exceed 10 days at a time.

Back at IHBAS: 6th November 2017

25. From 6th November 2017 onwards, the family members ('FMs') of Respondent No.4 were at IHBAS trying their best to get him released from there. The next noting in the file maintained for Respondent No. 4 at IHBAS is at 8 am on 6th November 2017. It reads: "Patient is sometime authoritative

and hostile but becomes cooperative with defining boundaries. No psychopathology detected. No disruptive behaviour in the ward". The further noting at 8 am on that day was: "Prepare for discharge as f/m (family members) are unwilling for any intervention but as Court order was received, patient was kept in SOF".

26. At 10.30 am on 6th November 2017, Respondent No.4 was seen by another doctor who noted *inter alia* "Pt & f/m are unwilling for admission". Further, the patient was uncooperative for any investigation and taking any medicines. It was also noted that the patient refused evaluation for heart pathology and insisted on continuing his heart treatment from Apollo hospital. The noting by the same doctor at 6 pm on that day was that: "Pt. &f/m refusing for admission" and that the patient repeated that "he will only listen to Court".

At IHBAS: 7th November 2017

27. The next noting in the IHBAS file is at 3.30 am on 7th November 2017. It *inter alia* reads: "Plan - to continue monitoring his behaviour; FM's are not willing to stay at IHBAS and want to get patient's treatment from Apollo hospital". It was further noted, "As discussed in evening rounds, Court letter to be sent by the treating team".

28. There are detailed notes at 10 am on 7th November 2017 of Dr. Pravesh SR. Importantly, it notes that Respondent No.4 had been having cardiac problems and had been taking medicines from Apollo hospital. He insisted on being produced before the Court. Even at this point, there was no determination of his mental illness. It did not appear that there were any

such symptoms being displayed by him at all.

29. There is a noting at 4 pm on the same date, i.e. 7th November 2017 by Dr. Sartaj Deepak that Respondent No.4 was asking that he should be referred to a cardiac centre. On that day, Respondent No.4 was taken to the Guru Teg Bahadur Hospital ('GTBH'), Dilshad Garden at 5 pm. There he was seen by Dr. Arvind Kumar, the Casualty Medical Officer ('CMO'). He was prescribed some medication. It was noted there, "Patient wants cardiology consultation which is not available in GTB Hospital. Refer to RGSSH/GB Pant Cardiology". However, for some reason, it appears that Respondent No.4 was not taken to the Rajiv Gandhi Super-Speciality Hospital ('RGSSH') on that day but brought back to IHBAS instead. It is surprising that the notes on the file of IHBAS for 7th November 2017 do not refer to Respondent No.4 having been taken to the GTBH although the original of the ERC of GTBH giving the aforementioned details which have been extracted by this Court is available on file.

30. The noting at 8 pm on 7th November 2017 after he was taken back to IHBAS, *inter alia*, is to the effect: "Patient reports he is not a psychiatric patient and wants to go home". The plan recommended by the doctor who saw him then was, "Admission for diagnostic clarification". This was repeated at 10 pm. The DMO's notes are, "Patient admitted to MCW-1, patient refused to go there reportedly he says that he is not a psychiatric patient, he need not be admitted here". This noting is by one Dr. Amandeep.

At IHBAS: 8th to 23rd November

31. It appears that at 8 am on 8th November 2017, Respondent No.4 was

seen again by Dr. Amandeep who noted, "No fresh complaint". The plan recommended simply stated "Admission". On that date, it was again stated under the admission notes, by Dr. Pravesh: "Not yet diagnosed". The notes for 9th November 2017 only note the rating scale prepared by Dr. Rosali Bhoi, Junior Resident (JR) at IHBAS.

32. There is a note dated 10th November 2017, without mentioning the time, by Dr. Pravesh, SR that: "He keeps moving in ward always with black coat, has authoritative speech and behaviour." Further, "…repeatedly asking, 'how can you keep me here'." Dr. Pravesh notes the words spoken by Respondent No.4 about claiming to know the judges. For the first time it is noted: "Possibility of affective psychosis." After this noting of 10th November 2017, Dr. Pravesh SR saw Respondent No.4 next only on 23rd November 2017, i.e. after twelve days.

33. The next date before the MM was 20th November 2017. What was produced before the MM was the report dated 10th November 2017 prepared by IHBAS which reads as under:

> "The aforesaid patient was admitted at IHBAS on 03.11.2017 in compliance to the Hon'ble Court order for detailed assessment and evaluation. It is submitted to the Hon'ble Court that patient is under evaluation and after completion of evaluation, he will be examined by Standing Medical Board. This whole process will take around 4-6 weeks and the report will be submitted to the Hon'ble Court at the earliest.
>
> This is for your kind information and necessary action, please."

34. In the meanwhile on 10th, 13th, 15th, 16th, 18th, 20th and 21st November

2017 the only doctor who appears to have seen him was Dr. Rosali Bhoi JR. Although Dr. Nimesh Desai claims in his affidavit that he "personally examined the patient" and had discussions with his colleagues on 21st November 2017 there are no notes of Dr. Desai on the file for the above date. Also there is no noting of any diagnosis that Respondent No.4 was having 'manic episodes' as claimed by Dr. Desai.

35. In her notes for 13th November 2017, Dr. Rosali Bhoi stated: "Patient usually interacts with family and staff by self but would talk authoritatively with doctors when it is difficult to interrupt him, refuses to take hospital medications". The notings on 15th and 16th November 2017 again speak of his refusal to cooperate for investigation. "Roams around with his list of cardiac medications; repeatedly claims to get discharged for getting angioplasty done".

36. The noting by Dr. Pravesh for 23rd November 2017 is that "currently Pt. is reporting breathlessness and he was asked to be taken to RGSSH. He was then taken to RGSSH that day. The Plan noted was "Court to be intimated about the same."

37. The Court has examined the notings in the file of Respondent No.4 at IHBAS up to 23rd November 2017. It finds that there is not a single noting to the effect that Respondent No.4 is suffering from any kind of mental illness or even "manic episode" as claimed.

Back before the MM on 20th November

38. On 20th November 2017, the learned MM perused the above report of IHBAS which had been prepared on 10th November 2017 itself. The MM thereafter passed the following order:

> "ASI Krishan in person with patient namely Ram Kumar.
>
> Medical report of patient Ram Kumar filed which reflects that patient is under evaluation and after completion of evaluation, patient will be examined by Standing Medical Board and this whole process will taken around 4-6 weeks' time.
>
> As per medical report, IO and concerned doctor is directed to file the medical report of patient on 05.01.2018. IO is further directed to admit the patient Ram Kumar in IBHAS.
>
> Director IBHAS is further directed to take care of mental as well as physical health care of the patient.
>
> Director IBHAS is also directed to appear in person in the court on next date of hearing.
>
> Another application moved by applicant for release of patient Ram Kumar @ Ram Kanwar from IBHAS. In view of the report of doctor, the present application stands dismissed."

39. Even on the above date the MM failed to refer to the provisions of the MHA. The MM failed to note that even till then there was no actual diagnosis of Respondent No.4 being 'mentally ill'. Therefore, the applicability of the MHA was itself doubtful. Notwithstanding this, the MM failed to note the proviso to Section 28 (2) of the MHA that the aggregate period of detention at a mental health facility for the purposes of observation cannot exceed 30 days. The MM fixed the next date of hearing as 5th January 2018.

40. What was even more egregious was the report of IHBAS informing the learned MM that the entire process of evaluation would take around "4-6 weeks". This was again in the teeth of the proviso to Section 28 (2) read with Section 28 (2) MHA whereby the total period of detention could not exceed 30 days in the aggregate. Thus both IHBAS and the MM acted in violation of the MHA. This was one more hearing where Respondent No.4 was not represented by an Advocate. This was in the teeth of Section 91 MHA which mandates legal aid being provided to those facing proceedings under the MHA.

41. The learned MM also erroneously dismissed the application of the family of Respondent No.4 seeking his release from IHBAS. The dismissal was perfunctory. In just one line it was stated: "In view of report of doctor, the present application stands dismissed". This was a non-speaking order. It did not refer to any law. In that application, the present Petitioner had pointed out, "The applicant's father will suffer irreparable physical as well as mental loss due to unnecessary stay at IHBAS". The application specifically mentioned that Respondent No.4 was suffering from heart ailments.

IHBAS's report dated 24th November 2017

42. For the next hearing on 5th January 2018, a report was already prepared by IHBAS on 24th November 2017. It reads as under:

> "The aforesaid patient was admitted at IHBAS on 3rd November 2017 in compliance to the Hon'ble Court order for detailed assessment and evaluation. Patient has been assessed in detailed

and diagnosed as suffering from Manic Episode for which medications were prescribed but patient had not been taking medications for the same. Although patient has no high risk behaviour and psychiatrically can be treated on outpatient basis. The final report of mental status will be submitted to the Hon'ble Court through Standing Medical Board at the earliest.

It is further submitted to the Hon'ble Court that patient is known case of Coronary artery disease/Ischemic cardiomyopathy (Ejection fraction 30-365%) with Moderate MR with Mild TR. Currently, patient reported breathlessness and he was sent to Cardiology Department, Rajiv Gandhi Super Specialty Hospital. In Rajiv Gandhi Super Specialty Hospital, he has been admitted on the advice of the concerned doctors (copy enclosed).

Hence it is requested to the Hon'ble Court to kindly issue discharge order from IHBAS and issue an order for admission in Rajiv Gandhi Super Specialty Hospital.

This is for your kind information and necessary action, please."

43. Up until this point in time, IHBAS did not think it necessary to inform the MM that retaining Respondent No.4 at IHBAS was not only unnecessary but also a risk given his heart condition. When Respondent No.4 again complained of breathlessness, he was sent to the cardiology department of RGSSH. His family was understandably even more concerned. Thus, on 24th November 2017, the present petition was filed.

This Court's Order dated 25th November 2017

44. This Court on the next date, 25th November 2017, passed a detailed order at a special sitting where, *inter alia,* after referring to the background facts and IHBAS's report dated 24th November 2017, the Court set aside the

above illegal orders of the Duty MMs and MM. The Court proceeded to order as under:

> "30. It appears that as a result of the above report. Respondent No. 4 has now been taken to Rajiv Gandhi Super Specialty Hospital where he is present hospitalized. Learned counsel for the Petitioner points out that his heart condition has deteriorated.
>
> 31. The Court is left in no doubt that there has been a total violation of the mandatory provisions of Section 28 (1) read 24 (2) (a) of MHA at every stage in these proceedings. In none of the proceedings did the Duty MM/MM ensure that the Respondent No.4 was represented by counsel. No question was even put to him in that regard. The orders passed, on the reports of IHBAS, have resulted in a violation of the fundamental right of Respondent No.4 to life and liberty under Article 21 of the Constitution.
>
> 32. While a further detailed order will have to await the completion of pleadings and hearing of all the parties, the Court issues the following directions for immediate compliance:
>
> (i) Respondent No. 4 is hereby directed not to be taken back to IHBAS after he is found fit for discharge from the Rajiv Gandhi Super Specialty Hospital.
> (ii) After his discharge from the Rajiv Gandhi Super Specialty Hospital, Respondent No.4 will be taken care of by his family at his home;
> (iii) The orders dated 3rd, 5th and 20th November 2017 passed by the learned Duty MMs and MM respectively directing the detention of Respondent No.4 at IHBAS are hereby set aside. As far as IHBAS is concerned, this order should be treated as an order of discharge of Respondent No. 4 as inpatient of IHBAS. Further proceedings before the MM are hereby stayed.
> (iv) Separate affidavits shall be filed by the Director, IHBAS as well as each of the mental health professionals

associated with the treatment of Respondent No. 4 during his stay at IHBAS explaining how without a proper certificate being issued regarding the mental illness of Respondent No. 4 within the meaning of Section 24 (2) (a) read with Section 2 (1) of the MHA his continued detention in IHBAS was justified;

(v) An affidavit giving dates and time be filed by the ASI Krishan Kumar explaining inter alai why the family members of Respondent No. 4 were not immediately informed of his whereabouts when he was detained on 3rd November 2017 itself and why this was not done not till November 2017. He also file a detailed account of what transpired between the time that Respondent No. 4 was taken from the BSA Hospital to the residence of learned MM at 9.30 pm on 3rd November 2017.

(vi) The above affidavits will be filed within two weeks with advance copy to learned counsel for the Petitioner who may file a response thereto before the next date of hearing.

(vii) A copy of this order to be placed forthwith before the concerned Committees of the High Court on the administrative side supervising the work of the learned MMs who passed the orders dated 3rd, 5th and 20th November 2017 together with a copy of the paperbook of this case for their perusal and appropriate action;

(viii) A copy of this order be delivered forthwith to the Director, Delhi Judicial Academy (DJA) to organise at least four exclusive orientation courses on the MHA, in the next year, for the benefit of judicial officers as well as the mental health professionals of IHBAS and other similar institutions in the NCR of Delhi in which the representatives of the Delhi Police will also participate.

33. List on 14 December 2017 at 2.15 pm. A copy of this order be given dasti to learned counsel for the parties under the signature of the Court Master/Private Secretary."

II

The stand of the doctors at IHBAS

45. A letter dated 30th November 2017 was sent by IHBAS to the Court confirming that Respondent No.4 had been discharged from RGSSH on 25th November 2017 in compliance with this Court's order. A set of affidavits was filed by the Director of IHBAS and the treating doctors on 12th December 2017.

46. In his affidavit, Dr. Nimesh Desai, Director of IHBAS, asserted that the family members of Respondent No.4 were given access to him at all times and had not raised any grievance. Dr. Desai stated that it was only on 21st November 2017 that he personally examined Respondent No.4. He had discussions with the treating team on 21st and 22nd November 2017 and thereafter found that "although the patient was found to be suffering from manic episodes and was litigious but he could be treated as an OPD patient as he was no longer at high risk behaviour".

47. Dr. Desai claimed that the said decision was verbally conveyed to the family members of Respondent No.4 on 22nd November 2017. Given his cardiac condition, Respondent No.4 was admitted to RGSSH on 23rd November 2017. Dr. Desai stated that the formal request for the discharge of Respondent No.4 was prepared on 23rd November 2017 and was filed before the MM on 24th November 2017. Since the learned MM was not holding Court on that date, the matter was adjourned to 25th November 2017. Despite the family being informed of the above development, they filed the present petition.

48. Dr. Desai sought to explain that there was *bona fide* confusion on account of the order dated 3rd November 2017 passed by the MM. Dr. Desai disclosed that the team of doctors treating Respondent No.4 comprised Dr. Om Prakash (Associate Professor); Dr. Kirti Sharma (SR); Dr. Prabhleen Singh Jaggi (SR); Dr. Pravesh Kumar (SR); Dr. Deepak Kumar (Associate Professor and acting HoD); and Dr. Rosali Bhoi (JR). Each of them, with the exception of Dr. Bhoi, has filed an affidavit. Despite explaining in detail the symptoms that they observed, none of these affidavits categorically states that Respondent No.4 was suffering from any kind of mental illness.

49. Dr. Om Prakash, Associate Professor of Psychiatry at IHBAS, in his affidavit dated 12th December 2017 stated that the procedure to be followed on production of a mentally ill person or a person who is suspected to be mentally ill is provided under Section 24 (1) MHA. The MM is required to examine the person to assess his "capacity to understand". Thereafter, under Section 24 (1) (b) MHA, the MM is required to cause such a person to be examined by a medical officer. The MM can pass a reception order only after the requirements of Section 24 (2) (a) and (b) MHA are met.

50. According to Dr. Om Prakash, before passing an order under Section 24 (2) (a) MHA, the MM is required to direct the alleged mentally ill person to be examined in accordance with Section 28 MHA. This detention is required to be under proper medical custody and observation of a general hospital, psychiatric hospital, etc. The period contemplated under Section 28 (1) MHA for such observation cannot exceed ten days as the MM

may consider it necessary to enable the medical officer to determine whether a certificate under Section 24 (2) (a) MHA is required to be issued or not. The total period of detention for this purpose cannot exceed 30 days in the aggregate in terms of the proviso to Section 28(2) MHA.

51. Dr. Om Prakash explained in para 5 of his affidavit that in the present case "the reception order was passed straightaway without resorting to the requirements of a certificate referred to under Section 24 (2) (a) or the procedure under Section 28". The 'bona fide confusion' allegedly caused is sought to be explained as under:

> "6. It is submitted in all humility and with great respect that since a reception order was passed by the Ld. MM, the case had progressed beyond the stage of issuance of a certificate under Section 24(2) (a). It is respectfully submitted that confusion crept in as the Ld. MM was pleased to issue reception order without awaiting compliance with the procedure laid down in Section 28 and the issuance of a certificate under Section 24(2)(a). It is this confusion which is noted in this Hon'ble Court's order dated 25.11.2017 in Para 17 thereof. However, it is submitted that since detailed assessment and examination of patient was required in view of the initial assessment and observation, further time was sought by IHBAS from the Ld. MM, so that after a detailed examination the treating team may arrive at a conclusion with regard to the nature and degree of the mental illness which the Patient was suffering from.
>
> 7. It is submitted with humility that there was bonafide confusion. This bonafide confusion arose because a certificate contemplated after following the procedure under Section 28, viz. a certificate under Section 24(2) (a) is a certificate, which is required to be filed prior to the Ld. MM passing a reception order. This is so because after filing of this certificate, the Ld. MM would also exercise his discretion within the meaning of

> Section 24(2) (b). Both the conditions are conjunctive and are connected with the expression "and". I say this on the basis of my understanding of the said provision and the on the basis of the legal advice received. However, in the instant case, the reception order, which normally has to be passed at the stage of Section 24(2) (a) after issuance of the certificate and the application of the mind of the Ld. MM, had already been passed on 03.11.2017. This confusion is deeply regretted."

52. Separate affidavits, all dated 12th December 2017, have been filed by the doctors at IHBAS, i.e. Dr. Kirti Sharma Duty Medical Officer (DMO) (SR), Dr. Deepak Kumar Associate Professor and acting HOD (Psychiatry) at IHBAS, Dr. Prabhleen Singh Jaggi DMO SR and Dr. Pravesh Kumar SR. On the legal aspects, all the affidavits more or less state the same thing, viz. that the reception order dated 3rd November 2017 was passed by the MM without following the procedure and the conditions needing to be fulfilled on a collective reading of Sections 24 (1) and 24 (2) (a) MHA and Section 28(1) MHA.

53. The Court at the outset would like to observe that although in the letter dated 24th November 2017 addressed to the MM the doctors at IHBAS have stated *inter alia* that Respondent No.4 has been "diagnosed as suffering from Manic Episode" there is no noting in the file to that effect on any of the dates that he was seen by the doctors at IHBAS. Even the letter dated 24th November 2017 of IHBAS to the MM does not certify the mental illness of Respondent No.4. The fact of the matter is that although IHBAS purports to have acted in terms of the provisions of the MHA, the basic document that would form the basis of a reception order viz., the certificate of medical illness was not available even 20 days after Respondent No.4 had been kept

at IHBAS on a continuous basis.

54. In their affidavits the doctors at IHBAS seek to justify the diagnosis of 'manic episode' by setting out the actual words allegedly spoken by Respondent No.4. However, these words do not feature in many of the notings in his file. The affidavits of Dr. Jaggi and Dr. Kirti Sharma fall in this category. Even Dr. Sartaj Deepak, who appears to have seen Respondent No.4 only twice i.e. 4 pm on 4th November and 4pm on 7th November 2017, sets out in his affidavit what Respondent No.4 is purported to have said whereas his notes on the file do not reflect those words having been spoken. The purpose of maintaining notes on file is that it constitutes a contemporaneous record of observations of the visiting doctor. The Court is not inclined to take into account claims in the subsequent affidavits of the doctors about what they observed, when it finds no mention in their contemporaneous notes on the treatment file.

55. It is stated in the affidavit dated 12th December 2017 of Dr. Jaggi that based on the Mental State Examination performed by him, "The provisional diagnosis 'psychosis to be specified' was made". While such medical jargon might obfuscate the true condition of Respondent No.4's mental health, the fact remains that there is not a single noting in the file or any statements in any of these affidavits to the effect that any of the psychiatrists who examined Respondent No.4 came to the conclusion that he was suffering from any mental illness which required his hospitalisation.

56. It was attempted to be stated in the affidavit dated 12th December 2017

of Dr. Pravesh Kumar that on the basis of the behaviour, observations and MSEs: "The diagnosis 'manic episode' was confirmed". However, this is at variance with what Dr. Nimesh Desai has said in his affidavit that Respondent No.4 "could be treated as an OPD patient as he was no longer at high-risk behaviour".

57. The notes of 4th and 5th November 2017 show that two of the doctors viz., Dr. Sartaj Deepak and Dr. Kirti Sharma were of the opinion that the MM should be asked to pass a reception order under Section 28 MHA. This was in ignorance of the law. Reception orders are passed under Section 24 and not Section 28 MHA.

58. The affidavits of the IHBAS doctors show that despite their knowing that Respondent No.4 did not require treatment as an in-patient, they did not attempt to inform the MM of this fact. They ignored the repeated requests for discharge made by Respondent No.4 and his family They allowed the illegality to be perpetuated for 20 days. The excuse that they did so because the MM ordered them to do so, and that there was genuine confusion, is not acceptable at all. When on 23rd November 2017 IHBAS decided apply to the MM for discharge of Respondent No.4, it was only because of his deteriorating heart condition.

Affidavit of ASI Krishan Kumar

59. In his affidavit dated 14th December 2017, ASI Krishan Kumar has stated that even on 3rd November 2017 he tried unsuccessfully to get the contact number of his family members from Respondent No.4. However, he

did have the address. He claims that he went to the address but could not locate the house. This part of the affidavit is not believable at all. It is contrary to what Section 23 (2) MHA requires of a police officer. Even the Duty MM stating in the order dated 3rd November 2017 that the whereabouts of his family is not ascertainable is not very convincing. The power vested in the MM under Section 24 (1) (c) MHA to make inquiries is precisely for such contingencies. More on this later.

Order dated 14th December 2017

60. At the hearing on 14th December 2017, this Court passed the following order:

> "1. An affidavit has been filed by Assistant Sub-Inspector (ASI) Krishan Kumar, which has been handed over today in Court. Copy thereof also be given to the learned counsel for the Petitioner as well as counsel for IHBAS. Separate affidavits have also been filed by Dr. Nimesh G. Desai, Director, IHBAS and five other Doctors of IHBAS, who treated Mr. Ram Kumar @ Ram Kanwar.
>
> 2. The Court has retained the 'Patient Record' file of IHBAS. It will be kept in a sealed cover with the Registrar concerned and be produced again in the Court on the next date of hearing.
>
> 3. The Court has requested the learned counsel for the parties to address arguments on the legal issues that arise in the matter, on the next date of hearing.
>
> 4. List on 12th January 2018 at 2:15 pm. To be taken up as part-heard".

61. The petition was thereafter heard on 12th January and 16th March 2018.

62. The Court heard the submissions of Mr. Akhil Sharma and Ms. Isha Aggarwal, learned Advocates for the Petitioner, Mrs. Neelima Tripathi, learned Advocate for IHBAS and Mr. Rahul Mehra, Senior Standing Counsel for the NCT of Delhi. Detailed written submissions were filed by the counsel for the Petitioners and counsel for IHBAS.

III

63. The present case presents a dismal failure of our system, which includes the police, the judiciary and the mental health professionals, to protect the fundamental rights of an individual. It points to the disastrous consequences that the abuse of the mental health law can have for the right to liberty, dignity and privacy.

64. Before proceeding to discuss the numerous illegalities that have been perpetrated in this case, a caveat needs to be entered at this stage. Although the Mental Healthcare Act, 2017 (MHCA) has been enacted by Parliament to replace the MHA, it has been notified by the central government to come into operation only with effect from 8th July 2018. Therefore, the discussion in this judgment is in the context of the MHA, which is the law that is applicable to the facts at hand.

Violation of the right to life, liberty and dignity

65. The above narration confirms that the order of the Judge, MACT and the Duty MM on 3rd November 2017 had the combined effect of depriving Respondent No.4 of his liberty. The first violation of the fundamental right of Respondent No.4 took place when pursuant to the order of the Judge MACT, a police officer took Respondent No.4 from his Court in police

custody for a medical check up. The creation of a 'ruckus' in Court was no justification for this. The Court finds it strange that the Judge MACT noted in his order at 3.30 pm on 3rd November 2017 that his *Naib Court* informed him that Respondent No.4 had been taken by the police official "to some government hospital for his medical examination" and yet did not enquire under whose orders and under what authority of law he was being so taken. To treat a person causing disorderliness in Court as one requiring to be taken into police custody straightaway and then for such person to be taken in custody for a medical check up, without the authority of law, is in clear violation of Article 21 of the Constitution.

66. The second violation of the fundamental and constitutional rights of Respondent No.4 took place on the night of 3rd November 2017 when the Duty MM passed a 'reception order' directing Respondent No.4 to be kept at IHBAS for more than 24 hours. This was on an application by ASI Krishan Kumar praying for an order that Respondent No.4 should be sent to IHBAS. It will be recalled that this application cited no provision of any law. This resulted in a totally illegal 'reception order' being passed without reference to any law; without informing the family of Respondent No.4; and without ensuring that Respondent No.4 was represented by a legal aid counsel.

67. The combined effect of the order of the Judge, MACT and then the Duty MM on 3rd November 2017 was to first render Respondent No.4 to the police custody of ASI Krishan Kumar and Ct. Maya Ram and thereafter into judicial custody at IHBAS. This illegality was allowed to persist on 5th and 20th November 2017 when the MM continued the detention of Respondent

No.4 at IHBAS again without any authority of law. In the course of a single day, 3rd November 2017, a combination of judicial orders resulted in the deprivation of the rights to liberty and dignity of Respondent No.4

68. Liberty forms the bedrock of the Constitution of India. The Preamble foregrounds liberty of thought, expression and belief as having been secured to all its citizens. The Preamble secures to all citizens 'fraternity assuring the dignity of the individual'. The right to dignity of the individual is among the guaranteed rights enshrined in the Constitution.

69. Dignity of the individual is inseparable from human life. Therefore, when the Constitution guarantees, under Article 21, the right to life and liberty, it guarantees to every person the protection of one's dignity. That the right to life under Article 21 inheres in it the right to dignity was explained by the Supreme Court in ***Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (1981) 1 SCC 608*** as under:

> "We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation protanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which

stands the test of other fundamental rights."

70. In ***Shabnam v. Union of India (2015) 6 SCC 702***, in the context of setting aside death warrants issued for execution within six days of the confirmation of the death penalty, the Supreme Court observed:

> "This right to human dignity has many elements. First and foremost, human dignity is the dignity of each human being 'as a human being'. Another element, which needs to be highlighted, in the context of the present case, is that human dignity is infringed if a person's life, physical or mental welfare is armed. It is in this sense torture, humiliation, forced labour, etc. all infringe on human dignity."

71. A nine-judge Constitution Bench of the Supreme Court in ***Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1*** (hereafter the '***Privacy case***') declared that the right to privacy was part of the right to life under Article 21 of the Constitution. The lead and the concurring opinions dwelt on the aspect of the right to dignity being inseparable from the right to privacy. In the lead opinion, authored by Dr. D. Y. Chandrachud J., it was observed:

> "118. Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the State is to safeguard the ability to take decisions - the autonomy of the individual - and not to dictate those decisions. Life within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.
>
> 119. To live is to live with dignity. The draftsmen of the

> Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve."

72. In the separate concurring opinion of S.A. Bobde, J. in the ***Privacy case***, it was noted:

> "Privacy, with which we are here concerned, eminently qualifies as an inalienable natural right, intimately connected to two values whose protection is a matter of universal moral agreement: the innate dignity and autonomy of man… Both dignity and privacy are intimately intertwined and are natural conditions for the birth and death of individuals, and for many significant events in life between these events."

Denial of right to legal aid

73. Apart from the violation of the fundamental rights to liberty, dignity and privacy of Respondent No.4, as enshrined in Article 21 of the Constitution, the orders of the MM also were in violation of the right of Respondent No. 4 to being informed of the grounds of arrest and legal representation in the proceedings as contained in Article 22 read with Section 12 of the Legal Services Authorities Act, 1987 (LSAA). Article 22 of the Constitution states that no person arrested shall be detained in custody "without being informed as soon as may be of the grounds for such arrest". He shall also not be

denied "the right to consult, and to be defended by, a legal practitioner of his choice." Although Article 22 does not speak of free legal aid, Section 12 LSAA makes free legal aid available to every person in custody.

74. The right to legal aid has been recognised as being a fundamental right under Article 21 read with Article 39 A of the Constitution. [See ***Madhav Hoskot v. State of Maharashtra (1978) 3 SCC 544*** and ***Ajmal Kasab v. State of Maharashtra (2012) 9 SCC 234***]. In the present case, at every occasion, i.e. 3rd, 5th and 20th November 2017, there was no lawyer representing Respondent No.4 and the orders passed against him by the Duty MM/MM were illegal and unconstitutional on that ground alone. Respondent No.4 was not informed at any of these stages by the MM that he had a right to be represented by a lawyer at state expense. This by itself was another violation of Article 21 of the Constitution.

Breach of Section 91 MHA

75. There is another statutory provision of the MHA that has been violated by IHBAS and the orders of the MMs. This is assuming the MHA could have been invoked in the case of Respondent No.4 although this Court is clearly of the view that it could not have been. As already noticed, Respondent No.4 was not represented by a lawyer in the proceedings before the MM on three dates i.e. 3rd, 5th and 20th November 2017. Even while he was at IHBAS, he was not offered legal services. This is in the teeth of Section 91 MHA which reads as under:

> "91. Legal aid to mentally ill person at State expense in certain cases.

(1) Where a mentally ill person is not represented by a legal practitioner in any proceeding under this Act before a District Court or a Magistrate and it appears to the District Court or Magistrate that such person has not sufficient means to engage a legal practitioner, the District Court or Magistrate shall assign a legal practitioner to represent him at the expense of the State.

(2) Where a mentally ill person having sufficient means to engage a legal practitioner is not represented by a legal practitioner in any proceeding under this Act before a District Court or a Magistrate and it appears to the District Court or Magistrate, having regard to all the circumstances of the case, that such person ought to be represented by a legal practitioner, the District Court or Magistrate may assign a legal practitioner to represent him and direct the State to bear the expenses with respect thereto and recover the same from out of the property of such person.

(3) The High Court may, with the previous approval of the State Government, make rules providing for—

(a) the mode of selecting legal practitioners for the purpose of sub-sections (1) and (2);

(b) the facilities to be allowed to such legal practitioners; (c) the fees payable to such legal practitioners by the Government and generally for carrying out the purpose of sub-sections (1) and (2).

Explanation.- In this section "legal practitioner" shall have the meaning assigned to it in clause (i) of section 2 of the Advocates Act, 1961 (25 of 1961).

The NALSA Scheme

76. In the written submissions filed by IHBAS, reference is made to a scheme formulated by the National Legal Services Authority (NALSA) a

statutory apex body under the LSAA for providing legal aid to those sought to be brought within the ambit of the MHA. The scheme is called the 'NALSA (Legal Services to the Mentally Ill and Mentally Disabled Persons) Scheme, 2015' (hereafter 'the NALSA 2015 Scheme'). The background note appended to the NALSA 2015 Scheme notes:

> "India is a signatory to the UN Convention on the Rights of Persons with Disabilities (CRPD) 2008 and since our country has ratified the Convention, it is obligatory for our legal system to ensure that human rights and fundamental freedoms of persons with disability (including mentally ill persons and persons with mental disabilities) are enjoyed on equal basis with others and to ensure that they get equal recognition before the law and equal protection of the law. The Convention further requires us to ensure effective access to justice for persons with disabilities on an equal basis with others.
>
> Under Section 12 of the Legal Services Authorities Act, 1987, persons who are disabled as defined in clause (i) of Section 2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and those in a psychiatric hospital or in a psychiatric nursing home within the meaning of clause (q) of Section 2 of the Mental Health Act, 1987 are entitled to legal services.

77. According to the background note, a need was felt to strengthen the 2010 Scheme and therefore a revised Scheme was issued in 2015 which would involve the State Legal Service Authorities (SLSAs), District legal Services Authorities (DLSAs) and para legal volunteers (PLVs). It was proposed in the NALSA 2015 Scheme that the High Court should set up a Board of Visitors in each State to visit the mental health institutions periodically to assess the living conditions of the inmates. It was accordingly proposed *inter alia* that:

> "The SLSAs/ Board of Visitors should review the persons in these hospitals, homes and facilities to ascertain whether there are cured persons staying there whose families appear reluctant to take them back, or are themselves not able to contact their families. Whenever the SLSAs/DLSAs or Board of Visitors find such inmates the SLSAs/DLSAs must take all steps to facilitate restoration, including providing legal representation in court to seek orders for restoration of the cured person with the family.
>
> Legal services institutions shall during their visits to the psychiatric hospitals or homes or facilities ascertain through interaction with inmates , doctors and staff as to whether any of the persons admitted there are victims of forced admission or not. In such cases, legal services shall be given to such persons for their release from the psychiatric hospitals or homes or facilities.
>
> SLSAs/DLSAs should setup Legal Services Clinics at the psychiatric hospitals, homes and facilities in order to provide legal assistance wherever required to the mentally ill/ mentally disabled persons and their families to address legal issues concerning the mentally ill and mentally disabled persons.
>
> Such a legal clinic should be manned by Para legal volunteers and Panel Lawyers who are sensitive to such issues and persons."

78. Specific to the need for legal aid during Court proceedings, the NALSA 2015 Scheme provided *inter alia* that "it shall be the duty of the legal service institutions to depute its retainer/panel lawyer to the court where an application for reception orders has been moved or is under consideration under Section 19, 20, 22, 24, 25, 26, 27 or 28" of the MHA. The MM was to be requested to give notice to the legal service institutions "for protecting the interest of the mentally ill persons in relation to whom the application for

reception order or discharge order is being made." The role of the legal service institutions was to keep track of cases and ensure that, for the purposes of Section 28 of the MHA, no person is "detained longer than needed for the issuance of the certificate of mental illness under Section 24 (2) (a) of the MHA."

79. In its written submissions IHBAS states that a legal aid clinic was established in its premises by the Delhi State Legal Services Authority (DSLSA). However, IHBAS is silent on why in this case, no help was offered to respondent No.4 by the said legal aid clinic. There is no noting in the file of IHBAS or any mention in any of the affidavits that Respondent No.4 was ever told of the availability of such legal service. Clearly the NALSA 2015 Scheme and the DSLSA failed to provide Respondent No.4 legal services both within IHBAS and in the proceedings before the MM. The system failed Respondent No.4.

Not informed of the grounds of detention

80. Neither in the affidavit of ASI Krishan Kumar nor in any of the affidavits of the IHBAS doctors is there any reference to the fact that Respondent No.4 or his family members were informed of the grounds of his detention. The orders of the MM also make no reference to this fact. Not keeping the person detained and his family or relatives or friends informed of the grounds of his detention is another serious violation of his right to life and liberty under Article 21 and the fundamental rights of an arrested person under Article 22 of the Constitution of India. The detention of respondent No.4 at IHBAS from 3rd to 23rd November 2017 was illegal and

unconstitutional.

81. This case is a pointer to the need to sensitise the judicial officers presiding over courts and tribunals subordinate to the High Court to be aware of the constitutional dimensions of their judicial power. Every order that has the potential of depriving a person of her or his life, liberty, dignity and privacy have to stay within the constitutional limits of the exercise of such judicial power. The judges have to be conscious that judicial power exercised indiscriminately, or as in this case the exercise of non-existent judicial power may result in serious violations of the person's constitutional and fundamental rights.

IV

The mental health law

82. In the present case, at no stage during his incarceration at IHBAS between 3rd and 23rd November 2017, was there a certification by a qualified mental health professional that Respondent No.4 suffered from any mental illness that required him to be admitted to IHBAS for treatment. Therefore, there was no question of applying the MHA at all. Further the MMs in any event made no reference to the MHA in any of their orders. Nevertheless, since extensive arguments have been made on the interpretation of various provisions of the MHA, the Court proposes to embark on an analysis thereof.

83. In interpreting the provisions of the MHA, the Constitution has to be the lodestar. Since the MHA has several provisions which contemplate the deprivation of a person's liberty, by way of involuntary admission to a

mental health facility, the interpretation of those provisions have to be consistent with respect for the right to life, liberty and dignity enshrined in Article 21 of the Constitution.

84. In ***Common Cause v. Union of India 2018 (4) SCALE 1***, the Supreme Court recognised the concept of a 'living will'. In a separate concurring opinion, Dr. D.Y. Chandrachud, J. observed

> "80. Under our Constitution, the inherent value which sanctifies life is the dignity of existence. Recognising human dignity is intrinsic to preserving the sanctity of life. Life is truly sanctified when it is lived with dignity. There exists a close relationship between dignity and the quality of life. For, it is only when life can be lived with a true sense of quality that the dignity of human existence is fully realized. Hence, there should be no antagonism between the sanctity of human life on the one hand and the dignity and quality of life on the other hand. Quality of life ensures dignity of living and dignity is but a process in realizing the sanctity of life."

85. A.M. Sapre, J. in his separate opinion in the ***Privacy case***, observed:

> "The incorporation of the expression "Dignity of the individual" in the Preamble was aimed essentially to show explicit repudiation of what people of this Country had inherited from the past. Dignity of the individual was, therefore, always considered the prime constituent of the fraternity, which assures the dignity to every individual. Both expressions are interdependent and intertwined".

86. Aharon Barak, a former President of the Supreme Court of Israel, in his book *Human Dignity: The Constitutional Value and the Constitutional Right*, highlighted the value of human dignity in determining the proportionality of a statute that limits a constitutional right. He said:

> "Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights. This normative unity is expressed in the three ways: first, the value of human dignity serves as a normative basis for constitutional rights set out in the constitution; second, it serves as an interpretative principle for determining the scope of constitutional rights, including the right to human dignity; third, the value of human dignity has an important role in determining the proportionality of a statute limiting a constitutional right."

87. The above observation of Justice Barak is significant from the perspective of the MHA, the provisions of which do have the potential of depriving a person of liberty and dignity. We must also bear in mind the international law perspective when interpreting the MHA and its successor, the MHCA.

International perspectives

88. The United Nations General Assembly by Resolution 46/119 dated 17th December 1991, adopted the 'Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Healthcare.' Principle 15 emphasises that admitting a person for treatment to a mental health institution or facility on involuntary basis should be avoided as far as possible. Principle 16 states that a person may be admitted involuntarily only if a medical practitioner is of the view that the mental illness is of such nature that is likely to pose immediate or imminent harm to that person or to other persons or if he is of the view that failure to so admit that person is likely to lead to serious deterioration in his or her condition and will prevent the giving of treatment. Principle 17 envisages that review of the decision to admit or retain a patient on involuntary basis should take place immediately

after they are made with a further periodical review by an independent body. Involuntary patients should be given the option to apply to the review body for release or voluntary status. Principle 18 envisages the patient producing evidence and personally participating in any hearing.

89. The World Health Organization (WHO) formulated 'Ten Basic Principles of Mental Health Care Law', 1996. These principles emphasise the autonomy of the patient regarding decisions concerning her or his care and treatment. These principles were to serve as guiding principles for member States to bring about changes in their respective mental healthcare laws. Principle 5 provides that consent of the patient is essential. If for some reason a mentally ill person is unable to consent, a surrogate decision maker should be appointed. This could be a friend, relative or authority, authorized to decide on behalf of such person. In terms of Principle 6 where a patient is able to consent, but is merely experiencing difficulties in appreciating the implications of a decision, such patient should receive assistance from a lawyer, social worker, etc. Such person should be made aware of this right the moment he is in need of such assistance. Principle 7 provides for interested persons to seek review of decisions by judges, or representatives of a patient and by health care providers. Principle 8 calls for an automatic periodical review by a mechanism, at reasonable intervals, in cases of decisions affecting the integrity and liberty of a patient.

90. In India we have the Protection of Human Rights Act 1993 (‘PHRA’), Section 2 (d) of which defines the expression ‘human rights’ to mean “the rights relating to life, liberty, equality and dignity of the individual

guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India". The expression "International Covenants" has been defined under Section 2 (f) PHRA to mean "the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966 (and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify)".

91. The Convention on the Rights of People with Disabilities 2006 ('CRPD') is one such international convention that has been ratified by India on 1st October 2007. The CRPD came into effect in 2008. The CRPD is, by virtue of Section 2 (d) read with 2 (f) PHRA, enforceable and applicable in India, unless there is a provision in any Indian law contrary thereto. In fact the Indian Parliament has, consistent with its obligations under the CRPD, enacted the Rights of Persons with Disabilities Act, 2016.

92. The CRPD foregrounds the dignity of persons with disabilities both physical and mental. Article 3 (a) highlights the general principle that there shall be "Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons". Article 3 (d) talks of the "respect for difference and acceptance of persons with disabilities as part of human diversity and humanity".

93. Article 14 (b) of the CRPD mandates that the State is obliged to ensure that the disabled are "not deprived of their liberty unlawfully or

arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty". As regards the responsibility of health care professionals Article 25 (d) of the CRPD obliges the States to "require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care".

94. Thus it is seen that the international law of mental health has moved to recognising the autonomy of the person whose mental illness requires care and treatment. The law recognises the right of such person to participate in the process of decisions being arrived at concerning the person's care and treatment. Custodial treatment at a mental health facility through involuntary admission process is to be avoided. It is to be exercised only where the other less restrictive alternatives are not feasible. The interpretation of the MHA and its successor legislation, i.e. the MHCA, must be consistent with India's obligations under the CRPD.

Interpretation of the relevant provisions of the MHA

95. In the aforementioned backdrop, the Court proceeds to undertake an analysis of the relevant provisions of the MHA. The Statement of the Objects and Reasons of the MHA, which replaced the Indian Lunacy Act 1912 (ILA), acknowledged that the attitude of society towards persons with mental illness has changed considerably and that, "No stigma should be

attached to such illness as it is curable particularly when diagnosed at an early stage".

96. The MHA envisages admission to a psychiatric hospital or a psychiatric nursing home on voluntary or involuntary basis. Part I of Chapter IV of the MHA deals with admissions on voluntary basis. Part II of Chapter IV of the MHA and Section 19 thereunder deals with 'admission under special circumstances' which is a form of admission on involuntary basis.

97. Part III deals with 'reception orders' in situations of admissions on involuntary basis. There are two kinds of reception orders. Para A under Part III deals with 'reception order on an application' by either the medical officer in charge of a psychiatric hospital or by the spouse or relative of the mentally ill person. Section 20 (1) deals with such a request. Para B under Part III of Chapter IV of the MHA deals with "reception orders on production of mentally ill person before Magistrate". Sections 23 to 25 fall under this Para B. Section 28 under Para C titled 'detention of alleged mentally ill person pending report by medical officer' is relevant in this context.

98. At the risk of repetition it must be stated that none of the provisions of the MHA apply *stricto sensu* to the facts of the present case. However, since all the actors viz., the police, the magistrates, the doctors at IHBAS have purported to proceed as if the MHA applied, it is necessary to examine which provisions of the MHA, if at all, might have been relevant.

Section 23 MHA

99. Section 23 which falls in Para B of Part III of Chapter IV of the MHA reads as under:

> "23. Powers and duties of police officers in respect of certain mentally ill persons.—
>
> (1) Every officer in charge of a police station,—
>
> (a) may take or cause to be taken into protection any person found wandering at large within the limits of his station whom he has reason to believe to be so mentally ill as to be incapable of taking care of himself, and
>
> (b) shall take or cause to be taken into protection any person within the limits of his station whom he has reason to believe to be dangerous by reason of mental illness.
>
> (2) No person taken into protection under sub-section (1) shall be detained by the police without being informed, as soon as may be, of the grounds for taking him into such protection, or where, in the opinion of the officer taking the person into protection, such person is not capable of understanding those grounds, without his relatives or friends, if any, being informed of such grounds.
>
> (3) Every person who is taken into protection and detained under this section shall be produced before the nearest Magistrate within a period of twenty-four hours of taking him into such protection excluding the time necessary for the journey from the place where he was taken into such protection to the court of the Magistrate and shall not be detained beyond the said period without the authority of the Magistrate".

100. Two conditions have to be satisfied before a police officer in charge of a police station can exercise powers under Section 23 (1) of the MHA. First,

such officer should find that the person is wandering 'at large' i.e. a person who has been abandoned by relatives and friends. Second, the police officer must have 'reason to believe' that such person is "so mentally ill" that he is not in a position to take care of himself. Unless both conditions are fulfilled, a police officer cannot detain a person under Section 23 of the MHA. Further, under Section 23 (2) MHA no person shall be taken into protection or detained "without being informed, as soon as may be, of the grounds for taking him into such protection", or where such person is not capable of understanding those grounds, "without his relatives or friends, if any, being informed of such grounds".

101. Section 23 MHA is an instance of a power coupled with a duty. If the police officer fails to fulfil the statutory obligations in Section 23 (1) and 23 (2) MHA as outlined above, the exercise of power by him shall be rendered unlawful. Since the consequence would be the deprivation of the liberty of the person taken into 'protection' the non-fulfilment by the officer of the mandatory requirements of Section 23 MHA would also render his actions unconstitutional. From the affidavit filed by ASI Krishan Kumar himself, it is evident that the above statutory and mandatory requirements were not observed.

102. When a police officer produces such a person before the MM under Section 23 (3) MHA, the MM has to first ascertain if the above procedure has been duly complied with by the police officer. In the present case, however, the process began not with the police officer in-charge of a police station taking a person 'wandering at large' into protection. It began by the

Judge, MACT asking the *naib* Court attached to his Court (who of course was not an officer in charge of a police station) to inform the police at the PP in Rohini Court who in turn took Respondent No.4 in custody to the BSA Hospital for a medical examination. It appears that there was no written order authorising it. What, therefore, happened was in the realm of 'no law' and 'no procedure' known to law. The detention of Respondent No.4 by the police officer pursuant to the order of the Judge, MACT was without the authority of law and not referable to any provision of the MHA. It was not only violative of the MHA, but also violative of Article 21 of the Constitution which mandates that there can be no deprivation of life and liberty except in accordance with the procedure established by law.

103. It could be argued that the police officer attached to the Court was bound to act on the order of the Judge, MACT. But that order was only to direct the *naib Court* to inform the police, and nothing more. Even if one were to accept for a moment that it was inevitable for ASI Krishan Kumar to take Respondent No.4 into temporary custody, it did not relieve ASI Krishan Kumar from seeking the authority of law for his actions. In this case, he could not have proceeded to take Respondent No.4 in custody for his medical examination without recourse to Section 23 MHA.

104. The MHA is not a penal statute for punishing a person for disorderly behaviour in a Court. It is not a penal custodial law. It is a law for the care and treatment of mentally ill persons. Since this basic understanding of the MHA was lost sight of by the judicial officer and the policeman, a cascading series of egregious violations of the rights to liberty and dignity of

Respondent No.4 ensued.

Section 24 MHA

105. Having taken Respondent No.4 to the BSA Hospital and without any certification by the SR there that Respondent No.4 suffered from any mental illness, the question of the learned MM passing an order authorizing detention of Respondent No.4 in IHBAS did not arise. The procedure that had to be followed thereafter by the learned MM is set out under Section 24 of the MHA which reads as under:

> "24. Procedure on production of mentally ill person.—
>
> (1) If a person is produced before a Magistrate under sub-section (3) of section 23, and if, in his opinion, there are sufficient grounds for proceeding further, the Magistrate shall—
>
> (a) examine the person to assess his capacity to understand,
>
> (b) cause him to be examined by a medical officer, and
>
> (c) make such inquiries in relation to such person as he may deem necessary.
>
> (2) After the completion of the proceedings under sub-section (1), the Magistrate may pass a reception order authorising the detention of the said person as an inpatient in a psychiatric hospital or psychiatric nursing home,—
>
> (a) if the medical officer certifies such person to be a mentally ill person, and
>
> (b) if the Magistrate is satisfied that the said person is a mentally ill person and that in the interests of the health and personal safety of that person on for the protection of others, it is necessary to pass such order:

> Provided that if any relative or friend of the mentally ill person desires that the mentally ill person be sent to any particular licensed psychiatric hospital or licensed psychiatric nursing home for treatment therein and undertakes in writing to the satisfaction of the Magistrate to pay the cost of maintenance of the mentally ill person in such hospital or nursing home, the Magistrate shall, if the medical officer in charge of such hospital or nursing home consents, make a reception order for the admission of the mentally ill person into that hospital or nursing home and detention therein:
>
> Provided further that if any relative or friend of the mentally ill person enters into a bond, with or without sureties for such amount as the Magistrate may determine, undertaking that such mentally ill person will be properly taken care of and shall be prevented from doing any injury to himself or to others, the Magistrate may, instead of making a reception order, hand him over to the care of such relative or friend".

106. In the present case, the Duty MM on 3rd November 2017 straightway passed a 'reception order'. This was done on an application by ASI Krishan Kumar, without even looking at the MHA or referring to its provisions. The direction was that Respondent No.4 should be kept "under observation in IHBAS for 24 hours". The reasons adduced by the Duty MM were that Respondent No.4 was "unable to give any coherent answers and seems to be potentially violent." Further he had "a very threatening attitude towards everyone." Had the Duty MM read Section 24 (1) (a) MHA, she would have realised that she first required to form an opinion that there are sufficient grounds to proceed further. Next she had to examine the alleged mentally ill person to "assess his capacity to understand." Thirdly, if she wanted to further proceed the Duty MM had to cause Respondent No.4 to be examined

by a medical officer. Fourthly, she had to "make such enquiries in relation to such person" as she "may deem necessary."

107. The exercise to be undertaken by the Duty MM as described above could not have possibly been completed in undue haste. It was not enough, as was done in the present case, for the Duty MM to ask questions of the person produced about his family contact details. It was necessary for the Duty MM to order an enquiry in that regard by the police officer before making a reception order. This is because the MHA is not to be treated as a statute to exercise power over and control people. It is essentially a statute for the care and treatment of mentally ill persons in need of such care and treatment. If the person produced before a Magistrate does have family or relatives or friends who can take care of him and prevent him from injuring himself and others, there would be no need to go ahead with such a 'reception order'.

108. On the aspect of seeking the opinion of a medical officer in terms of Section 24 (1) (b) MHA, on the date and time when the learned MM passed the reception order i.e. on 3rd November 2017 at 9.30 pm, there was no certificate by any medical officer that Respondent No.4 was mentally ill. What the learned MM had before her were the notes on the MLC prepared by the BSA Hospital, where Respondent No.4 was taken on 3rd November 2017 at 2.25 pm. The noting on the said MLC is that, "No psychopathology detected". In short, nothing stated in the MLC issued by the BSA Hospital in respect of Respondent No.4 on 3rd November 2017 could qualify as a certification by a medical officer that Respondent No.4 was 'mentally ill'.

Clearly, therefore, there was no question of the learned MM passing a reception order at 9.30 pm on 3rd November 2017.

109. The noting by the BSA doctor: "Referred to IHBAS for 24 hours observation" can at best be said to have enabled the Duty MM to order that Respondent No.4 be kept at IHBAS for a day. But the learned MM could not have ordered him to be kept for two days, since the next returnable date was 5th November 2017 i.e. beyond 24 hours. Then again, the learned MM could have first found out if the family of Respondent No.4 was prepared to take him and bring him back, if at all necessary, for such observation. This could have been done by invoking Section 24 (1) (c) MHA and deferring the passing of the order till a report was received from the police about the whereabouts of the family of Respondent No.4. In the meanwhile the police should have been asked to take Respondent No.4 back to his residence subject to his remaining present on the next date. The idea is for the MM to, at all times, explore the possibility of the least restrictive alternative.

110. Under Section 24 (2) MHA no reception order can be passed without a certificate of a medical officer that the person concerned is mentally ill. In the present case, as already noticed, there was no such certificate before the Duty MM on 3rd November 2017. The second proviso to Section 24 (2) MHA states that if any relative or friend of the mentally ill person undertakes that such mentally ill person will be properly taken care of, the Magistrate need not make the reception order but hand over the person to the care of such relative or friend. The second proviso to Section 24 MHA underscores the need for the Magistrate to explore the least restrictive

alternative. The legislature therefore is conscious that an order of commitment to a mental health facility can have adverse consequences for a person's right to liberty and dignity. The conclusion from the above discussion is that the 'reception order' passed by the Duty MM on 3rd November 2017 was illegal and contrary to Section 24 of the MHA.

Analysis of Section 28 MHA

111. Under Section 28 of the MHA, it is possible that the Magistrate may authorize the detention of the mentally ill person in an observation ward of a general hospital or a general nursing home or a psychiatric hospital or psychiatric nursing home for a period not exceeding 10 days for enabling "any medical officer to determine whether a medical certificate in respect of that alleged medical ill person may properly be made under Clause (a) of Sub Section (2) of Section 24 of the MHA". Section 28 of the MHA reads as under:

> "28. Detention of alleged mentally ill person pending report by medical officer.—
>
> (1) When any person alleged to be a mentally ill person appears or is brought before a Magistrate under section 23 or section 25, the Magistrate may, by order in writing, authorise the detention of the alleged mentally ill person under proper medical custody in an observation ward of a general hospital or general nursing home or psychiatric hospital or psychiatric nursing home or in any other suitable place for such period not exceeding ten days as the Magistrate may consider necessary for enabling any medical officer to determine whether a medical certificate in respect of that alleged mentally ill person may properly be given under clause (a) of sub-section (2) of section 24.
>
> (2) The Magistrate may, from time to time, for the purpose

> mentioned in sub-section (1), by order in writing, authorise such further detention of the alleged mentally ill person for periods not exceeding ten days at a time as he may deem necessary: Provided that no person shall be authorised to be detained under this sub-section for a continuous period exceeding thirty days in the aggregate".

112. Under Section 28 (1) MHA, the Duty MM had to first be satisfied that the keeping of Respondent No.4 for observation at IHBAS was necessary for enabling a medical officer to determine whether a medical certificate that Respondent No.4 suffers from any mental illness, that required treatment as an in-patient could be given for the purposes of Section 24 (2) (a) MHA. Section 28 (1) MHA uses the expression 'may'. The power vested in the MM to pass such an order is discretionary. It had to be for valid reasons and based on relevant material. This is because admission of a person into a mental facility even for the purposes of 'observation' can have liberty depriving consequences.

113. For the purposes of Section 28 (1) MHA, the Duty MM could have made the effort of finding out from the family members whether they would be able to bring Respondent No.4 to IHBAS for observation. If the family agreed, as they may have, there would have been no need to keep him under observation at IHBAS only for the purposes of enabling the medical officer to determine whether he was suffering from mental illness that required treatment as an in-patient. Section 28 (1) MHA also talks of 'other suitable place' where a person could be kept. This could well be his own home where the person has a family that is willing to take care of him. These less restrictive alternatives were not explored by the Duty MM.

114. It may be possible to argue that where there is a person 'wandering at large' who is allegedly mentally ill; who is unable to look after himself and has absolutely no one to look after him, then, for the limited purpose of a enabling a medical officer to certify that his mental illness requires him to be treated as an in-patient, he may have to be kept under observation. But then again, even in such instance, the person need not necessarily be sent to a mental health facility but to a half way home that is less restrictive. In such instance, the responsibility on the MM is even greater. The MM passing an order under Section 28 MHA, for the purposes of Section 24 (2) (a) has to be conscious that it has the potential of violating the constitutional and fundamental rights of the person subject to such 'observation'.

115. In the present case, the MM was ignorant of the legal position, and so were the doctors at IHBAS. As already noticed, the note written on file on 4th November 2017 at 4 pm by Dr Sartaj Deepak was: "It has been decided to request the Hon'ble Court to pass a reception order under Section 28 as patient needs admission for further observation and management". Dr. Deepak ought to know that reception orders are not passed under Section 28 of the MHA. Then we have the noting of 8 am on 5th November 2017 by Dr. Kirti Sharma that: "It is requested to the Hon'ble Court that an appropriate reception order under Section 28 of the MHA, 1987 may be passed for the same". Dr. Sharma ought to know that reception orders have to be issued passed under Section 24 of the MHA and strictly in conformity with the procedure outlined therein.

116. The doctors at IHBAS make it appear as if they were obliged by the order dated 3rd November 2017 of the Duty MM to detain Respondent No.4 at IHBAS. Not every person brought to IHBAS has to necessarily be admitted there. There could be mental illnesses which do not require treatment as an in-patient. Unless the family or the friend or relative of an alleged mentally ill person expresses its inability to provide care, an alleged mentally ill person should not be admitted to a mental health facility only for the purposes of assessing whether he is so mentally ill that he requires treatment as an in-patient. In the present case, the family of Respondent No.4 was present at IHBAS from 5th November onwards. Throughout, they and Respondent No.4 himself were 'refusing admission' and were making repeated request for his discharge. The doctors at IHBAS need not have waited till 24t November 2017 to inform the MM that Respondent No.4 was not required to be admitted to IHBAS. They should have done so at the first available opportunity i.e. 5th November 2017. In the circumstances, The Court rejects the submission of IHBAS that its doctors were under some 'bonafide confusion' about the correct legal position.

Decisions in other jurisdictions

117. The interpretation of Sections 23, 24 and 28 of the MHA in the above manner is consistent with the evolving jurisprudence in the area of mental health law, as reflected in the CRPD. It also finds resonance in the decisions of other jurisdictions to which a brief reference may be made at this juncture.

118.1 In ***O'Connor v. Donaldson 422 U.S. 563 (1975)*** the U.S. Supreme Court was considering the validity of the confinement of the Respondent in a Florida State hospital for more than 15 years for "care, maintenance and treatment". This was despite the evidence showing that he was no longer dangerous to himself or others and despite undertakings by responsible persons offering to care for him if necessary. Agreeing that such confinement was unlawful, the Court asked:

> "May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty. In short, a State cannot constitutionally confine, without more, a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

118.2 The U.S. Supreme Court further observed:

> "The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement.... Nor is it enough that Donaldson's original confinement was founded upon a constitutionally adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed. A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."

119.1 In the case of ***Winterwerp v. Netherlands (1979) 2 EHRR 387*** the European Court of Human Rights (ECHR) was considering the legality of the detention of Mr. Winterwerp in a mental health facility pursuant to an order of the district court in Netherlands which was confirmed in appeal by the Regional Court. In that context the ECHR was interpreting Article 5 (1) of the European Convention of Human Rights which read as follows:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
> ...
> (e) the lawful detention ... of persons of unsound mind ...;

119.2 The ECHR held that Article 5 (1) (e) "obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. To hold otherwise would not be reconcilable with the text of Article 5 para. 1." It then dwelt on the expressions "lawful" and "procedure prescribed by law" and observed that: "Indeed, these two expressions reflect the importance of the aim underlying Article 5 para. 1 ....in a democratic society subscribing to the rule of law no detention that is arbitrary can ever be regarded as "lawful". The ECHR also affirmed that "no one may be confined as 'a person of unsound mind' in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation. The ECHR held:

> "except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be

established before the competent national authority -that is, a true mental disorder -calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder."

'Best interest' principle

120. In the written submissions of IHBAS, it is contended that "ordinarily the court will not interfere with the findings of a doctor or the treatment or course of action suggested by him as this discretion lies with him completely." It is added that "this does not however detract from the court's power to interfere if the findings or recommendations of the doctor are illegal or malafide or shown to be otherwise incorrect." It is submitted that the doctors follow the principle of "best interest treatment", which means that the primary concern for a doctor is to ascertain what steps he must take in the best interest of the health of his patient. It is submitted that the best interest test goes 'hand in hand' with the 'balance test' which implies that the autonomy of the patient is not taken away "on extraneous considerations but only in the best interest of the patient.

121.1 The above principle of 'best interest' has been explained succinctly by the Court of Appeals in the U.K. in ***Regina (n) v. Dr. M [2002] EWCA Civ 1789***. There the doctor certified that the claimant was suffering from paranoid psychosis/severe personality disorder and that she required regular anti-psychotic treatment. The challenge by the claimant to the said certificate was made in the context of Article 3 of the European Convention

on Human Rights. The challenge was rejected by the Judge of the Queen's Bench Division who *inter alia* held that he had to be satisfied that the proposed treatment was both in the claimant's best interests and "medically necessary" for the purposes of Article 3 of the Convention. He held that the 'best interests test' goes wider than 'medical necessity'. He relied on the decision of the ECHR in ***Herczegfalvy v. Austria (1992) EHRR 437*** where it was held that: "The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a method which is a therapeutic necessity cannot be regarded as inhuman or degrading. The court must nevertheless satisfy itself that the medical necessity has been convincingly shown to exist."

121.2 The Court of Appeals affirmed the judgment under appeal and explained that "the fact that there is a responsible body of opinion against the proposed treatment is relevant to the question whether it is in the patient's best interests or medically necessary, but it is no more than that. The court has to decide in the light of *all* the evidence in the case whether the treatment should be permitted." The order that the Court will pass in terms of Section 24 (2) read with Section 28 MHA will have to be on the same basis viz., consider the medical opinion on the principles of both 'best interests' and 'medical necessity' but ultimately take the final call whether the line of treatment should be permitted.

122. On the facts of the present case, it is apparent that there was an abject failure of the IHBAS doctors to apply either the 'best interests test' or the 'medical necessity test' in determining whether Respondent No.4 required to

be detained as an in-patient. They failed to examine the least restrictive alternatives despite the family of Respondent No.4 asking that he be sent home. The autonomy of Respondent No.4, who till the end was not found by them to be mentally ill as contemplated by the MHA, was not respected.

V

Summary of the legal position under the MHA

123. The legal position that emerges on the analysis of Sections 23, 24 and 28 of the MHA, in light of the Constitution of India and the CRPD, is summarised hereunder. It is expected that this will apply in the matter of interpreting the corresponding provisions of the MHCA as well.

(i) International law of mental health has moved to recognising the autonomy of the person whose mental illness requires care and treatment. The law recognises the right of such person to participate in the process of decisions being arrived at concerning the person's care and treatment. The current jurisprudence in the area of mental health law is that custodial treatment at a mental health facility through involuntary admission process is to be avoided. It is to be exercised only where the other less restrictive alternatives are not feasible. The interpretation of the MHA and its successor legislation i.e. the MHCA must be consistent with the above legal position which is encapsulated in the CRPD which India has ratified.

(ii) The MHA is not a penal statute intended to punish a person for disorderly behaviour in a Court. It is not a penal custodial law. It is a law for the care and treatment of mentally ill persons.

(iii) The MHA is not a statute for exercising power over and control people. It is essentially a statute for the care and treatment of mentally ill persons genuinely in need thereof.

(iv) Section 23 and Section 24 read with Section 28 MHA contemplate a situation of involuntary commitment to a mental health institution. These provisions pre-suppose that the person sought to be committed to the mental health institution is incapable of consenting to it. The severity of the consequences that this has for the life, liberty, privacy and dignity of an individual must guide the interpretation of these provisions in light of the constitutional mandate referred to earlier.

(v) The power under Section 23 MHA is one coupled with a duty. Two conditions have to be satisfied before a police officer in charge of a police station can exercise powers under Section 23 (1) of the MHA. First, such officer should find that the person is wandering 'at large' i.e. a person who has been abandoned by relatives and friends. Second, the police officer must have 'reason to believe' that such person is "so mentally ill" that he is not in a position to take care of himself. Unless both conditions are fulfilled, a police officer cannot detain a person under Section 23 of the MHA. Further, under Section 23 (2) MHA the police officer has to mandatorily inform the person detained of the grounds of such detention. If the police officer is of the view that the person detained is not in a position to understand those grounds, the police officer has to inform his relatives or friends.

(vi) If the police officer has not followed the procedure as outlined in (v) above, the MM cannot proceed to pass any order under Section 23 (3) MHA. Even if the procedure has been followed, the MM should not pass such an order unless the MM is satisfied, for reasons to be recorded in writing, that such detention is required.

(vii) Under Section 24 (1) (a) MHA, the MM is first required to form an opinion that there are sufficient grounds to proceed further. Next the MM has to, himself or herself, examine the alleged mentally ill person to "assess his capacity to understand." Thirdly, if she has to further proceed the MM has to cause the alleged mentally ill person to be examined by a medical officer. Fourthly, the MM has to "make such enquiries in relation to such person as he may deem necessary." These steps are mandatory. Any order passed contrary thereto will invite invalidation.

(viii) The procedure under Section 24 (2) (a) read with (b) of the MHA as regards the passing of a reception order is again mandatory. Without the certificate of a medical officer to the effect that a person is so mentally ill that he needs to be treated as an in-patient in a mental health facility, no reception order can be passed by the MM. Further, even if a medical officer certifies a person to be mentally ill, the learned MM need not pass a reception order if a relative or friend undertakes that such a mentally ill person shall be properly taken care of. The second proviso to Section 24 (2) MHA underscores the need for the Magistrate to explore the least restrictive alternative in light of the fact that an order of commitment to a mental health facility can have severe consequences of abrogating a person's fundamental

rights including the right to liberty, dignity and freedom of movement.

(ix) For the purposes of Section 28 MHA, unless the MM is satisfied, on the basis of his own observation and relevant material that a person needs to be kept under observation for the purposes of enabling his assessment by a medical officer for certifying his mental illness, the MM cannot order the detention of such a person in a mental health facility for that purpose. Even at that stage the MM should first explore the less restrictive alternative of ascertaining after enquiry under Section 24 (1) (c) MHA whether the family, relative or friend of such person can take care of such person and bring him for such assessment as and when required.

(x) For enabling assessment by a medical officer whether an alleged mentally ill person requires treatment as an in-patient, it is not necessary for the person to be admitted to a mental health facility. Section 28 (1) MHA uses the expression 'may'. The power vested in the MM to pass such an order is discretionary. It had to be for valid reasons and based on relevant material. This is because admission of a person into a mental facility even for the purposes of 'observation' can have liberty depriving consequences. Section 28 (1) MHA also talks of 'other suitable place' where a person could be kept. This could well be his own home where the person has a family that is willing to take care of him. They could be asked to bring him for assessment to the medical officer as and when required.

(xi) There may be a person, wandering at large and allegedly mentally ill, who cannot be housed anywhere else, who is unable to look after himself

and has absolutely no one to look after him. Then, for the limited purpose of determining whether such a person is mentally ill to a degree that requires him to be treated as an in-patient, he may be ordered to be kept under observation, not necessarily in a mental health facility but in a less restrictive place like a half way home. In such case, the responsibility of the MM is even greater.

(xii) As far as Section 28 MHA is concerned, the request by a medical officer to a Court that they need more time for observing the person to give a certificate and for that purpose require a detention of such a person for the observation cannot be made as a matter of routine. It can be made only in exceptional circumstances, viz., where there is no relative or friend of such a person who is willing to take care of such a person and is ready to bring that person for the assessment. In other words, every effort should be made to require the observation to be made without admitting the person to a mental health facility.

(xiii) This approach acknowledges that an order of detention in a mental health institution, even for the purposes of Section 28 MHA can irreparably harm the person who is in fact not in need of such treatment. In other words, the admission of a person to a mental health institution under Section 28 MHA just for determining whether such a person requires such admission must be used extremely sparingly and only in extraordinary circumstances. The attempt in the first place must always be to explore the least restrictive alternative. An order of admission to a mental health institution for whatever reasons has serious consequences for the life, liberty, privacy, freedom and

dignity of such person.

(xiv) Even if an order is passed under Section 28 MHA for keeping a person in a mental health facility for observation, the time period under the proviso to Section 28 MHA has to be scrupulously and mandatorily followed. In other words, no order of detention beyond ten days at a time and thirty days in the aggregate can be passed. The order has to be a reasoned one clearly revealing the application of mind by the Magistrate to the report of the mental health professional making the request. It is not a mechanical exercise.

(xv) In terms of Section 24 (2) read with Section 28 MHA, the Court concerned will have to consider the medical opinion on the principles of both the 'best interests' and the 'medical necessity' but ultimately take the final call on whether the line of treatment suggested should be permitted.

124. In the present case there was a series of violations – first by ASI Krishan Kumar, then by the Duty MM, the MM and the doctors at IHBAS. The orders passed by the MMs on 3rd, 5th and 20th November 2017, were illegal and have therefore been set aside by this Court by the order dated 25th November 2017. The action of the police officer ASI Krishan Kumar and the decisions of the doctors of IHBAS which were in violation of the law as explained above are declared as such. The cascading nature of the violations had a domino effect on Respondent No.4 who was illegally trapped in IHBAS for over 20 days. There was a plain misuse and misapplication of the MHA to deprive Respondent No.4 of his fundamental rights under Articles

21 and 22 of the Constitution.

VI

Past instances of misuse of the MHA

125. There are several known instances of gross misuse of the provisions of the mental health law in our country. Despite orders of the Court, the misuse has continued. As we enter a new phase of working the MHCA, it is essential to recall some of these instances. That will hopefully help in avoiding the mistakes of the past.

125.1 Conceived in the pre-independence era, the Indian Lunacy Act 1912 (ILA) was a law that *inter alia* viewed the wandering mentally ill person as someone from whom society needed to be protected. This basic approach unfortunately continued under the MHA as well, as we shall presently see. This approach envisaged dealing with such persons in the criminal justice system. These 'offenders' differed from others inasmuch as they did not require to commit an offence in order to be treated as an offender. They were termed as 'offenders' not for what they did but who they were. This appellation of a 'status offender' attached to the wandering mentally ill because of who he was and not necessarily what he did.

125.2 Under the ILA, there were innumerable instances of rampant abuse of the powers to put away 'inconvenient' people by labelling them as 'non-criminal lunatics' (NCL). In connivance with local policemen, those abusing the law would get the police to send such 'NCLs' to jails on the pretext of keeping them in places of 'safe custody'.

125.3 A public interest litigation commenced in the Supreme Court with a journalist, Sheela Barse, writing to it after visiting the Presidency Jail in Calcutta, and finding a large number of NCLs, who were seemingly normal, incarcerated there along with regular prisoners. First the Supreme Court by an order dated 16th June 1992 appointed two commissioners - Prof. Srinivasa Murthy of NIMHANS Bangalore and Prof. Amita Dhanda, a law academic - to visit a representative sample of the jails and mental hospitals in West Bengal and submit a report. The Commissioners were asked to suggest guidelines for monitoring the commitment of NCLs and the minimum care and treatment facilities that should be made available. The Commissioners' report titled *"Unlock the Padlock": Mental Health Care in West Bengal*, found that 930 persons had been jailed, purportedly under ILA, but on arbitrary grounds. The process of having a person picked up by the police and remanded to the jail under the orders of the Magistrate was done casually, and without any attention to the requirement of the law. There were several instances of misuse of the ILA in connivance with the local police. For instance, one of the inmates was a girl who had been dumped in the jail by her brothers when she insisted on marrying a person of her choice. There were NCLs in every one of the 22 jails in West Bengal. One uniform feature was that the inmates were never represented by counsel in any of the proceedings under the ILA before the Magistrates.

125.4 In a landmark judgment dated 17th August 1993 in ***Sheela Barse v. Union of India (1993) 4 SCC 204*** the Supreme Court declared the jailing of NCLs to be illegal and unconstitutional. It directed the State of West Bengal to constitute a committee to evaluate the existing mentally ill in jails and

make recommendations to discharge such of those found fit and ensure their return to their homes and/or their rehabilitation and "move out such of those persons requiring continued treatment and care from out of the jails, to the nearest places of treatment and care."

125.5 Several months later, the Supreme Court found that its judgment in ***Sheela Barse v. Union of India*** (*supra*) was not followed in the State of Assam where persons labelled as NCLs were still being held in jails. The reasons given for the detention ranged from schizophrenia to depressive psychosis, cerebral palsy, and obsessive-compulsive neurosis. One person was detained on the ground that he was simply "talkative". This time another Commissioner, Mr. Gopal Subramanium, a Senior Advocate, was appointed to visit the jails in Assam and ensure the implementation of the Court's orders.

125.6 Mr. Subramanium submitted a detailed report in five volumes (hereafter '***Assam Report***') in which he concluded that the authorities had exhibited not only "utter ignorance/disregard of the provisions of law …but also shocking ignorance/disregard of the orders and judgments passed by the Supreme Court from time to time." The judicial magistrates had mechanically passed orders of commitment of the allegedly mentally ill to jails contrary to the decision in ***Sheela Barse*** (*supra*). With the connivance of the medical profession, innocent citizens had been allowed to be detained without trial and without any evaluation of their mental status. There were numerous instances where the Commissioner, upon finding the persons jailed to be perfectly normal, directed their immediate release.

125.7 The Supreme Court accepted the ***Assam Report***, and in an order reported as ***Sheela Barse v. Union of India 1994 (4) SCALE 493*** *inter alia* observed:

> "It is a shocking state of affairs that there is no understanding of the judgment of this Court dated 17th August, 1993, which strictly prohibited confining non-criminal mentally ill patients to jail. The State of Assam has a splendid record of having confined 387 persons to jail only on the ground that they were mentally ill. In many of the cases the Commissioner has found that they were, in fact, no mentally ill. In one case a person was confined to jail for merely being "talkative. At present, no steps are being taken by the State of Assam to have rehabilitation homes for non-criminal mentally ill persons".

125.8 Later in ***Sheela Barse v. Union of India (1995) 5 SCC 654*** the Supreme Court asked the various High Courts to carry on with the task of monitoring the implementation of its directions. However, the misuse of the provisions of the MHA, which replaced the ILA with effect from 1st April 1994, continued.

126.1 In ***Anamika Chawla v. Metropolitan Magistrate (1997) 5 SCC 346***, the Supreme Court set aside an order of a Magistrate admitting the Petitioner to a psychiatric centre for observation and treatment on the basis of certificates issued by two psychiatrists who acted "with undue haste and even without seeing the patient". One of the said two psychiatrists was Dr. Sunil Mittal, Director of the Delhi Psychiatry Centre (DPC) in Preet Vihar.

126.2 Two decades later, the same Dr. Sunil Mittal permitted, without even

an examination, a person to be admitted to the same DPC [now known as Cosmos Institute of Mental Health and Behavioural Sciences] under Section 19 MHA for observation. In ***Dr. Sangamitra Acharya v. State (NCT of Delhi)*** (judgment dated 18th April 2018 in W.P. (Crl) No. 1804 of 2017) this Court held the said action to be both illegal and unconstitutional and ordered remedial measures.

127. In ***Miss. Ezlinda Fernandes v. Chetan Sanghi (1997) 4 Bom CR 641*** the Bombay High Court found that the Petitioner had been detained in the Institute of Psychiatric and Human Behaviour illegally and arbitrarily from 7th October to 6th November, 1991. Since the MHA had not been notified, the Court dealt with the corresponding provisions under the ILA. In this case, despite a no objection certificate having been issued by the doctor in-charge, the Petitioner was not released from the hospital immediately. It was then observed,

> "...No one can be detained in a hospital against his or her wish even for a day. We have no doubt in our mind that the petitioner was detained in the said hospital without authority of law in any event on and after 1st November 1991. By reason of such wrongful and illegal detention, the fundamental rights of the petitioner guaranteed under Article 21 of the Constitution of India were undoubtedly infringed. The respondent No. 4 institute is a Govt. institute and is 'State' within meaning of Article 12 of the Constitution of India. The State is liable to pay reasonable compensation to the petitioner for infraction of her fundamental right under Article 21 of the Constitution of India".

128.1 In ***Ms. Asha Shamandas Bajaj v. Mrs. Meeran Borwankar 2008 (110) Bom LR 3586***, the Petitioner therein had been sending repeated text

messages to Respondent No.1, who was then the Joint Commissioner of Police, first in order to seek her cooperation in pursuing a complaint filed by the Petitioner against some person in Mumbai, and later because the Petitioner developed a liking for the Respondent No.1's son and wished to seek an alliance with him.

128.2 At a later stage, when the Petitioner wished to apologize for her conduct and went to the Respondent No.1's residence, she was beaten up and abused by the latter, who then directed police constables present at her residence to prepare a case diary stating that the Petitioner was a mentally ill person. On the registration of the Respondent No.1, the Petitioner was taken into custody and a case was prepared that she was mentally ill and then produced before a Lady Magistrate at 9.30 pm. After some order was passed on the application made before the Magistrate by the police, the Petitioner was straightway taken to the Sasoon Mental Hospital in Pune and admitted to the general psychiatric ward. This happened on 14th June 2008.

128.3 Despite being produced before the Additional Chief Metropolitan Magistrate, Pune at 4.30 pm on 16th June 2008 and despite her mother trying to convince the learned Magistrate that her daughter was not suffering from any mental disorder and despite both of them apologising, the Magistrate passed an order of detention of the Petitioner for ten more days at the Yerawada Mental Hospital, Pune. Thereafter on 17th June 2008, she managed to escape from the hospital and filed a writ petition before the Bombay High Court seeking quashing of the orders passed by the Magistrate on 16th June 2008.

128.4 The Bombay High Court discussed the relevant provisions of the MHA and in particular Sections 23 and 24 MHA and concluded that "the first requirement of Section 24 of the 1987 Act to form an opinion for examination of the person to assess his capacity to understand was not met by the learned Magistrate." Further the second requirement under Section 24 (1) (b) MHA for the protected person to be examined by the medical officer could have been ordered only after the Magistrate himself examined the person and assessed his capacity to understand. "Therefore, the Magistrate from very inception was wrong to refer petitioner No.1 for examination by a medical officer." The Court further noted: "There was no record before the Magistrate compelling her not to grant request of the mother of Petitioner No.1, who was present before the Magistrate. At best the Magistrate could have demanded a bond from the mother of petitioner No.1. It appears that the Magistrate was performing formalities and the decision was taken even prior to medical report".

128.5 Just like in the present case, in that case too after 10 days of the admission the doctor concerned was "Not able to make the final diagnosis". The Bombay High Court noted that "even if the doctors were of the opinion that she needed hospitalisation or assistance under law, the Magistrate was bound to give her custody to her mother who was willing to take her".

128.6 The Court held:

> "14...the Magistrates should treat themselves to be the custodian and protector of the rights of the people and if police fail in their duty the Magistrates should not fail and should ensure that

the person is not sent to a mental hospital without strict compliance of the provisions of the Act".

128.7 The order passed by the Additional Chief Metropolitan Magistrate was accordingly quashed.

129.1 A similar instance arose before the Madras High Court in ***Nathalie Vandenbyvanghe v. State of Tamil Nadu*** (decision dated 19th September 2008 in Habeas Corpus Petition No.1041 of 2008). The Petitioner was the daughter of the person detained in terms of a reception order under the MHA and approached the Madras High Court with the above writ petition. Her father, a French national, was visiting India to seek the blessings of a religious figurehead with a valid passport and visa, when he lost his passport, travel documents and personal belongings, including clothes. He spoke French and was unable to communicate with anyone. He was wandering on the roads of Kanyakumari District and resorted to seeking alms as a means of survival.

129.2 When her father did not return home even after the expiry of the visa, the Petitioner was alarmed. When she enquired with the French Embassy, she was informed that her father had been admitted to a mental health institute at Chennai. When she made a request to the hospital authorities, after coming to Chennai, to discharge her father, they refused and that is how the petition came to be filed.

129.3 The Madras High Court noted in its judgment that on 9th July 2008, an Inspector of Police at Kottar Police Station rounded up 115 persons invoking

Section 23 of the MHA and made them appear before a team of doctors. One of these 115 persons was the Petitioner's father. They were all certified to be suffering from bipolar disorder mania. On the strength of the above certificates, applications were filed before the Judicial Magistrate, Nagercoil, Kanyakumari District, to pass reception orders authorizing the detention of 115 persons, including the Petitioner's father, in the Institute of Mental Health at Chennai. They were then brought there. The Petitioner's father was put on observation for ten days and during this time in the Institute of Mental Health, it was found that he did not exhibit any abnormality of psychopathology.

129.4 The Madras High Court then passed orders restoring the Petitioner's father to her. Expressing its displeasure over the manner in which 115 persons were declared mentally ill and taken to the mental health institute after getting reception orders, the Madras High Court observed as under:

> "...It would be better, in fact imperative, that the police, the doctors and the judicial officers put themselves in the shoes of these marginalized groups of persons who are treated as if they are non-persons before they deal with their rights.
>
> 16. Every person wandering on the street is not mentally ill. The police should not "round up" people as if they were stray cattle and deal with them as such. Each individual should be dealt with as a separate case, he/she shall be treated as a human being with all the Constitutional rights. This will be possible if the police/NGO or any other person bring up each case individually as and when it arises.
>
> 17. The police need not wait to reach such a huge number in order to produce such persons before the Judicial Magistrate concerned. They shall act promptly as and when they happen to

see an abandoned or destitute or mentally affected or suspected ill persons wandering in the public places. When such mentally ill persons are handled by the police, they are to be treated with humanity and dignity and they should not be treated as chattel. The police officers who are actually executing the work of taking cognizance of the mentally ill persons who are roaming in the streets and other public places shall deal with them as per Section 23 of the Mental Health Act, 1987.

18. It is also apparent that the medical officers have not given the due care and caution before certifying a person as mentally ill. This has several serious legal consequences, depriving them of many rights. For example a mentally unsound person cannot contest an election. There are so many disqualifications that attend a person with mental unsoundness. In this case, the petitioner's father has been certified as suffering from bipolar disorder without justification. He is as healthy as the person who first examined him, as the certificate from the Institute of Mental Health, Chennai would show. The doctors cannot mindlessly certify a person as mentally ill. If they need time for examination, they shall insist on that time being given. Importantly, a person does not deserve any less attention than another merely because he/she is found on the street or is poor or is a beggar. The doctors shall also attend immediately to any physical injury that is found on the said person".

129.5 As far as the Magistrates are concerned, the Madras High Court observed as under:

"19. The trust and hope laid on the Judicial Magistrates in *Sheela Barse vs. Union of India, (1993) 4 SCC 204* should have been fulfilled by the Judicial Magistrates by observing and enforcing the provisions of the Mental Health Act, 1987, strictly when the suspected mentally ill persons are produced before them. The Judicial Magistrates concerned should have examined the persons to assess their capacity to understand and cause him to be examined by the Medical Officer and to make such enquiries in relation to such person whenever necessary. It

> is humanly impossible to "examine" 115 persons, as has been done in this case. Any deviation of Section 24 of the Act is not only harmful to the persons concerned but will also affect the society at large. Under these circumstances, the Judicial Magistrates of this State of Tamil Nadu as well as the State of Puducherry are to be instructed that they should follow the procedures mentioned in Section 24 of the Mental Health Act, 1897 in letter and spirit and to see that justice is done to the persons concerned. The mentally ill persons shall not be made to wait unduly long before reception orders are issued. The Magistrates shall remember the trust and faith reposed on them while they discharge their duty under this Act. What happened in this case must not ever recur".

130. In ***Uma Manickam v. Inspector of Police V-1 2007 (2) MWN (Cr) 388 (DB)*** a healthy person was illegally detained by labelling him as mentally ill under the MHA with the ulterior motive of grabbing his property. The Madras High Court quashed the judicial orders directing detention of the person in a mental health facility beyond 30 days in contravention of Section 28 (2) MHA.

131. It is not unusual in our Courts to come across vexatious litigants making wild allegations against all and sundry. Their petitions and the prayers therein are often incomprehensible. Not infrequently, they give vent to their frustrations in Court. They test the patience of the Courts and lawyers. In such instances, the Court may take measures to restore calm. However, as the cases discussed hereafter show, it will not straightaway invoke the MHA. A Single Judge of this Court on noticing the repeated petitions filed by a party in person, and after having noticed his abnormal behaviour in Court, issued two directions viz., (i) that he shall not appear in

any Court either in person or as an attorney of a third party, as he does not have inherent right to appear and argue; and (ii) he should be medically examined whether he was suffering from any mental disorder. The SHO of PS Tilak Marg was directed to get the appellant admitted in IHBAS, Shahdara, Delhi. The Medical Superintendent of IHBAS was directed to submit a report within a week. However, in appeal the above directions were set aside by a Division Bench in ***Deepak Khosla v. Montreaux Resorts Pvt. Ltd***. (***2012) ILR 5 Del 117*** holding that: "Before passing and issuing the said direction it would have been appropriate if a preliminary examination and report of a doctor or a psychiatrist was obtained."

131.1 A similar occasion arose before a Single Judge of the Madras High Court in ***S. Hariprakash v. The Hon'ble Chief Justice, Madras High Court 2014 SCC OnLine Madras 7331***. Again the Petitioner in that case was one who repeatedly kept filing petitions casting all kinds of aspersions on the judges of that Court. Despite his earlier petitions having been dismissed by the Division Benches of that Court, he filed one more vexatious petition. The prayers in the petition made no sense. Further, the learned Single Judge noted:

> "…from the fact that despite the rejection of the earlier petitions by the Division Benches, the petitioner has come up with this petition with reckless allegations, I have very strong reasons to doubt the mental health of the petitioner. I am of the view that a man of normal mental health or ordinary prudence would not have made such reckless allegations. Therefore, I am of the opinion, merely rejecting this petition even by imposing cost would be meaningless."

131.2 The learned Single Judge next examined if he should proceed under the MHA and noted that:

> "23. Sub Section (1) of Section 2 of the Mental Health Act defines the term "Mentally ill person" to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation. The said Act, provides enormous safeguards prescribing a long procedure to be followed before recognizing or labelling a person as mentally ill. Obviously, such safeguards are due to the fact that labelling a man/woman as a mentally ill person, will, in the prevailing mind set of the society, carry a stigma having adverse impact on his/her life and liberty. It needs no emphasis that labelling a person, either by mistake or due to over zealousness, as a mentally ill person, though in fact, he may not be so, will surely, be violative of Article 21 of the Constitution of India. Therefore, every authority including a Magistrate under the Act should put in extra care and caution while dealing with an individual before bringing him within the ambit of The Mental Health Act, 1987.

131.3 The learned Single Judge then noted the decision of the Division Bench of this Court in ***Deepak Khosla v. Montreaux Resorts Pvt. Ltd***. (*supra*) and directed as under:

> "34. In the instant case, I simply follow the said decision of the Division Bench of the Delhi High Court. In the case on hand, the direction which I have issued herein to the Commissioner of Police is not on the conclusion that the petitioner is mentally ill, but, only on doubt and therefore, the Commissioner of Police shall not straight away treat the petitioner as a mentally ill person and instead, cause him to be examined by medical experts summarily to offer their preliminary opinion as to whether he can be dealt with under the provisions of The Mental Health Act or not. For any reason, if the medical experts give positive opinion, then, it is needless to say that the Commissioner of Police shall deal with him under the provisions of the Act."

132. The above long line of cases shows that there have been numerous

instances of misuse of the MHA which have required remedial orders to be passed by the Court. It appears that the mental health law has been viewed more as a penal custodial statute than as a law that recognises the rights of mentally ill persons to treatment and care. The decision of the Supreme Court in ***Saarthak Registered Society v. Union of India AIR 2002 SC 3693*** issuing detailed directions for the effective working of the MHA is testimony to the fact that this is a neglected area.

133. It is expected that lessons would be learnt from the past failures, and a new beginning would be made with the MHCA becoming operational. It is time to abandon the earlier approach of using the mental health law to control or punish people whose behaviour is unacceptable but to view it as an instrument that facilitates care and treatment of the mentally ill in need of it, consistent with their rights to life, liberty, dignity, privacy and autonomy. The indiscriminate use of the mental health law has to stop. It is high time that we dismantled the penal custodial model of the mental health law.

VII

A recap of the illegalities in the present case

134. To recapitulate, there have been a series of violations in the present case by the police, the mental health professionals at IHBAS and the MM who ordered Respondent No.4 to be detained at IHBAS. This resulted in the infraction of his fundamental rights to liberty, dignity and privacy under Article 21 of the Constitution and his fundamental rights under Article 22 of the Constitution. These have been discussed in detail earlier.

135. In the present case, on every occasion before the Duty MM and MM,

i.e. 3rd, 5th and 20th November 2017, there was no lawyer representing Respondent No.4. He was also not informed on any of these dates by the MM that he had a right to be represented by a lawyer at state expense. This by itself was another violation of Article 21 of the Constitution. The orders passed against him on those dates were illegal on that ground as well.

136. The MMs who dealt with his case did not bother to refer to any law for the source of their power. Their orders on 3rd, 5th and 20th November 2017 were without the authority of law. Respondent No.4 ought not to have been proceeded against under the MHA at all in the first place. There was no determination that he had any problem concerning his mental health that required a reception order to be passed under the MHA.

137. Even if the MHA were to apply, Sections 23, 24 and 28 of the MHA were violated. Neither Respondent No.4 nor his family were informed of the grounds on which he was taken into custody. The family was not informed of his being taken before the MM and then to IHBAS. The time limits in terms of the proviso to Section 28 (2) MHA for ordering retention of an allegedly mentally ill person in a mental health facility for observation were breached. The reception order assed by the MM requiring Respondent No.4 to be kept at IHBAS was without the certificate of a medical officer that he was mentally ill to such an extent that he required treatment as an in-patient. Section 24 (2) MHA was violated.

138. IHBAS failed to inform the MM, in good time, that the orders dated 3rd, 5th and 20th November 2017 were without the authority of law. IHBAS

allowed the illegality of the detention of Respondent No.4 to continue. In examining Respondent No.4 in order to determine whether he was in need of care and treatment for any mentally illness as an in-patient, the 'best interests' principle was not followed by the doctors at IHBAS. Despite the presence of his family, the least restrictive alternatives were not explored by them. The mere fact that Respondent No.4 may have talked loudly, behaved authoritatively, repeated himself or had 'grandiose ideas' did not make him a 'mentally ill person' within the meaning of the MHA.

139. Apart from the fact that Respondent No.4 was not represented by a lawyer at any of the hearings before the MM, he was not offered legal services during his stay at IHBAS. He was not informed by IHBAS that such services were available. Section 91 MHA was violated. Respondent No.4, a heart patient, was subject to tremendous stress on account of his illegal confinement at IHBAS. In short there was a cascade of violations that had a domino effect on Respondent No.4 denuding him of his rights to life, liberty, dignity and privacy.

Scope of the habeas corpus jurisdiction

140. In its *habeas corpus* jurisdiction under Article 226 of the Constitution, the task of a High Court does not necessarily end with the termination of the illegal detention of a person. In ***Arvinder Singh Bagga v. State of U.P. (1994) 6 SCC 565***, the Supreme Court did not stop with granting relief of termination of the illegal detention. It continued the writ petition as one for qualified habeas corpus for examining the legality of the detention and for determining whether those illegally detained were entitled to be

compensated as a public law remedy for violation of fundamental rights under Article 21 of the Constitution. This was apart from the criminal or civil liability which may be pursued in the ordinary course. Ultimately the Supreme Court in those proceedings did grant compensation to those illegally detained.

141. In ***Union of India v. Luithukla (1999) 9 SCC 273***, the Supreme Court was in its *habeas corpus* jurisdiction considering the question of compensation for extra judicial killing. It observed thus:

> "9. As to the plea on behalf of the appellants that the affidavits on their behalf should not have been rejected by the High Court without a factual enquiry, we would comment that the High Court ought to have added that it was open to the first respondent to file a suit against the appellants to claim damages, if so advised. In that event a trial on facts would have been necessary and would have taken place. As it is, Budha Singh was last seen in the company of security forces, now 16 years ago. The security forces must, therefore, be held to be liable to make payment of the aforestated nominal amount of rupees one lakh to the 1st respondent".

142. In view of the above legal position, the Court proposes hereafter to issue certain directions by way of consequential reliefs.

Afterword

143. The genesis of the problem that Respondent No.4 faced was the case before the MACT which he was defending as party in person. The ten year wait had obviously tested his limits. Litigation fatigue had set in. Every day's wait for a litigant who has had to spend a decade defending a case is bound to aggravate his litigation neurosis.

144. The annoyance caused to the presiding Judge of the MACT was not unexpected. The judicial system is overburdened. Judges too are humans. Most of them are overworked. Their patience gets tested often, particularly by litigants in person who, in the process of navigating the legal maze on their own, disrupt the orderly functioning of the Court. However, being part of an imperfect judicial system, a judge must be prepared for an outburst, every now and then, from a disgruntled user of the system.

145. Where a person's behaviour disrupts the orderly proceedings in a Court, and persuasion fails, the presiding judge can possibly requisition the security apparatus for assistance. At all times, the measures adopted will have to proportionate. The absolute minimum coercion ensuring the dignity of the person sought to be removed, consistent with the limits set by the law, should be deployed. If the Court considers *prima facie* that the conduct of the person constitutes contempt of the court, then recourse can be had to the procedure set out in the Contempt of Courts Act 1971.

146. However, to get the police to take such person into custody and take him away for medical examination, without any order to that effect, is not an option available in law. Likewise, for the MM to pass a reception order sending such person to a mental health facility for observation, without referring to any law or source of judicial power is unacceptable. Indiscriminate use of a non-existent judicial power is bound to invite opprobrium and invalidation.

147. Respondent No. 4 has returned to his family. On account of his son

approaching this Court, and the order passed by it on 25th November 2017, Respondent No.4 could be immediately released from illegal detention at IHBAS. But there could be many more in the same plight who have not been able to reach the Courts. They should be reached at the earliest.

148. A direction is issued to the MACT-2, Rohini Courts to positively dispose of MACP No. 4277/2016 within a period of six months from today. The Judge MACT-2, Rohini Courts, will give the above case priority and enforce strict timelines for the parties.

Consequential reliefs

149. In view of the above discussion:

(i) This Court expresses its apology to Respondent No.4, and his family members including the Petitioner, for the unlawful orders passed by the MMs on 3rd, 5th and 20th November 2017, which have already been held illegal and set aside by this Court by its order dated 25th November 2017.

(ii) The Court directs that a token compensation of Rs.2 lakhs shall be paid by the Government of NCT of Delhi to Respondent No.4 within four weeks by way of a demand draft, for his being illegally detained between 3rd November 2017 and 23rd November 2017 at IHBAS. This, however, will not prevent Respondent No.4 from seeking other remedies that he may have in accordance with law against the State, IHBAS and the doctors involved.

(iii) The original record of IHBAS deposited with the Court will be handed over by a Special Messenger to the Secretary, Medical Council of India

(MCI) in a sealed cover forthwith along with the copy of the paperbook of this case. The Registry will, prior thereto, scan the IHBAS record, and retain a copy thereof digitally signed by the Registrar, in the court record. An inspection of or issuance of a certified copy of the scanned record shall not be permitted unless specifically ordered by the Court.

(iv) The MCI shall examine the IHBAS record delivered to it, as well as the paperbook of this case, including the affidavits filed by the IHBAS doctors concerned and if considered necessary initiate appropriate action against such of them involved in the wrongful detention at IHBAS of Respondent No.4 from 3rd to 23rd November 2017. The MCI will proceed in the matter in accordance with law. The exercise shall be completed within a period of twelve weeks from today.

(v) The MACT-2 Rohini Courts shall dispose of MACP No. 4277/2016 positively within a period of six months from today. The Judge MACT-2, Rohini Courts shall set and enforce strict timelines for the parties to adhere to.

(vi) NALSA and the DSLSA should, in collaboration with the Central Mental Health Authority (CMHA) and the Delhi State Mental Health Authority (SMHA), conduct a survey of the mental health institutions and facilities in the NCT of Delhi to ascertain how many inmates are being illegally held therein in violation of the MHA and the Constitution of India. This should be an on-going exercise even after the MHCA becomes operational from 8th July 2018. The initial exercise be completed within a period of six months from today.

(vii) Corrective and ameliorative action under the MHA and/or MHCA be taken by the NALSA and DSLSA in collaboration with the CMHA and SMHA. NALSA and the DSLSA will ensure that the NALSA 2015 Scheme is effectively implemented in the mental health facilities in the NCT of Delhi.

(viii) The Delhi Judicial Academy (DJA) shall organise at least four exclusive orientation courses on the MHA, and its successor legislation i.e. the Mental Healthcare Act 2017 every year, for the judicial officers, the mental health professionals in the NCR of Delhi and the Delhi Police. The DJA should associate the NALSA, DSLSA, the CMHA and the SMHA in this exercise.

150. The writ petition is disposed of with the above directions.

151. Certified copies of this judgment shall be delivered forthwith by a Special Messenger to the CMHA, SMHA in Delhi, NALSA, DSLSA, the DJA, the Secretary MCI, the Commissioner of Police, Delhi and the MACT-2, Rohini Courts, for compliance.

S. MURALIDHAR, J.

I.S. MEHTA, J.

APRIL 26, 2018
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