

(2008) 11 KL CK 0029

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22335 of 2008

Narayanankutty Menon

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 04-11-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2009) 1 KLJ 339

Hon'ble Judges : V. Giri, J

Bench : Single Bench

Advocate : K.P. Balasubramanyan and Nirmal, S, for the Appellant; M.R. Sreelatha, Government Pleader, for the Respondent

Judgement

V. Giri, J.—Sunilkumar, son of late Mudakodi Chandrashekara Menon and late Mullappilli Kamalamma is a mentally retarded person. Certain items of properties were obtained by Chandrashekara Menon and Kamalamma from their respective tarwards, Chandrashekara Menon died on 24-3-1995; the mentally retarded person was being looked after by his father till his death. It may also have to be mentioned that Kamalamma, the mother of Sunilkumar developed some mental illness after giving birth to Sunilkumar and she was also looked after by her husband. After the death of Chandrashekara Menon, one Govindankutty Menon was looking after the person and properties of Kamalamma and Sunilkumar. He filed OP (MH) 429/2005 before the District Court, Ernakulam for appointing him as guardian of Sunilkumar. In fact the said application was filed by Govindankutty Menon for appointing him as guardian of Kamalamma also. Another person, a stranger to the family claiming to be a close friend of late Chandrashekara Menon filed OP (MH) 394/95 before the same Court for the same purpose. The application filed by the stranger was dismissed and the matter was taken up in appeal before this Court in MFA No. 1316/99. The appeal was dismissed. By Ext.P-2, the application filed by Govindankutty Menon was allowed and he was appointed as the guardian. Later Govindankutty Menon died and Narayanankutty Menon, s/o. Govinda Menon, the maternal uncle of

Sunilkumar filed OP(MH) 323/2006 before the District Court, Ernakulam, for appointing him as guardian of the mentally retarded person and for managing the property. By Ext. P-3 judgment the District Court found that the OP is not maintainable under the provisions of the Mental Health Act and dismissed the same giving liberty to the Petitioner to file appropriate application before appropriate forum under the provisions of the Act applicable to mentally retarded persons. The said view was confirmed by the Division Bench of this Court in MFA 18/2008, but without prejudice to the right of the Petitioner to seek his remedies elsewhere. It is thereafter that the instant petition under Article 226 of the Constitution has been filed by Narayanankutty Menon praying for the following reliefs:

(a) to pass an order appointing the Petitioner as guardian of the person and manager of the properties of Sri Sunilkumar, the mentally retarded person.

(b) in the alternative to hold that the Mental Health Act, 1987 is void and unconstitutional and violative of Article 14 of the Constitution of India and that the Lunacy Act revives.

(c) to pass such other writs, order or directions which this Honourable Court deems fit to grant

2. Pursuant to the interim order passed by this Court on 24-7-2008, the District Collector forwarded a report to the Registrar (Judicial). The relevant portion of the report reads as follows:

It is hereby reported that Sri Narayanankutty Menon, except he is 64 years of old, having good financial background and he is also having privilege of a uncle to protect Sri Sunilkumar.

3. I heard learned Counsel for the Petitioner Sri K.P. Balasubramanian and the learned Government Pleader.

4. I entertained a doubt as to whether a petition under Article 226 of the Constitution could be maintained for the above-mentioned reliefs. Learned Counsel for the Petitioner submits that the Mental Health Act excludes from its purview mentally retarded persons. The said Act only provides for mentally ill persons. There are provisions in the said enactment for appointment of a guardian for the person and manager for the property of a mentally ill person and not for a mentally retarded person. Two other legislations have been brought in for the benefit of mentally retarded persons. Both the aforementioned enactments are for the welfare of the mentally retarded persons. But they do not contain any provision for appointing a person as guardian for a person and property of a mentally retarded individual. Appointment of any person as guardian obviously involves an adjudication. Mentally retarded person like a minor is non sui juris and therefore person appointed as guardian of such disabled individual should in the assessment of the Court, be suitable to safeguard the interest of the disabled person.

5. Mr. Balasubramanian submits that there is a lacunae in the Mental Health Act in as much as it excludes mentally retarded persons from the purview of the enactment. It is possible that the parliament might have in mind Anr. comprehensive legislation to take care of the mentally retarded person as distinguished from a mentally ill person. But no other legislation has been brought into force subsequently. The net result is there is now a vacuum by reason of absence of a suitable statutory frame work for dealing with cases of mentally retarded persons both in the context of appointing a guardian for management of the person and the property of the mentally retarded person or for any other ancillary purpose dealing with the person and properties in that regard. It is in these circumstances, the Petitioner has been constrained to approach this Court invoking the jurisdiction under Article 226 of the Constitution of India.

6. Learned Counsel for the Petitioner made a reference to the judgment of the Division Bench in OP 12957/1998 which was also one preferred under Article 226 of the Constitution of India seeking a direction that the first and second Petitioners be appointed as guardian of the person and manager of the properties of one Ayisumma, a mentally retarded person incapable of looking after herself or her properties. The direction as sought for, subject to certain conditions, was issued by this Court.

7. This Court exercising jurisdiction under Article 226 of the Constitution of India, in a sense, exercises unlimited jurisdiction. The jurisdiction is not confined by any statutory provision. The jurisdiction is constitutionally conferred and no limitations as such have been placed in the manner of its exercise except to the limited extent provided under Article 226 of the Constitution. This Court might decline jurisdiction in certain cases, de hors the merits of the contentions or issues which come up for consideration, for reasons such as existence of an alternate remedy or on account of disputed questions of fact which requires an adjudication by a Court where evidence could be adduced. But there is one fact which has been taken note of in this regard. The Court is the ultimate guardian of minor and disabled persons who are non sui juris. This aspect has been dealt with in detail by a Larger Bench of this Court in Mathew Varghese Vs. Rosamma Varghese, . One passage from a finding given by the Larger Bench in Mathew Varghese's case merits reproduction:

86(5) The concept of parents patriae "originates from the English common law where the King had a royal prerogative to act as guardian to persons with legal disabilities such as infants". Literally, the expression means "parent of the country". Traditionally, it refers to the "role of State as sovereign and guardian of persons under legal disability, such as juveniles or the insane and in child custody determinations, when acting on behalf of the State to protect the interests of the child. It is the principle that the State must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents". In India the principle has been recognised. If the

State as a fictional parent is under a duty to take care of the infant and the invalid, the real parent cannot be absolved of his responsibility. It is a duty. It is not an imperfect obligation. It arises out of his position as a guardian. He must not be allowed to abandon the weak and leave him alone and lonely to face the world.

8. In that view of the matter, this Court exercising unlimited jurisdiction under Article 226 of the Constitution of India would be competent to issue such orders to see that the person and properties of a mentally retarded person are protected, for the benefit of such disabled person.

9. For all these reasons, the writ petition is allowed in part. The Petitioner herein is appointed as the guardian and next friend of the mentally retarded person Sunilkumar, son of late Mudakodi Chandrashekhara Menon and late Mullappilly Kamalamma. The Petitioner shall look after the person and properties of the mentally retarded person Sunilkumar. The Petitioner will be required to submit a statement of the assets standing in the name of the aforementioned Sunilkumar before the District Collector within two months from the date of receipt of a copy of this judgment. Thereafter the Petitioner shall continue to submit half yearly statement before the District Collector giving details of the income generated from the properties standing in the name of the mentally retarded person, the expenditure incurred for the maintenance of the mentally retarded person and the expenditure incurred for looking after the properties as such. It is open to the District Collector to move this Court for variation of the order of the Petitioner's appointment, if there arise circumstances which necessitates a change in the guardianship of the mentally retarded person. A copy of this judgment shall be produced by the Petitioner before the District Collector and acknowledgement in that behalf shall be filed by the Petitioner before the registry of this Court within two weeks from the date of receipt of a copy of this judgment.

10. The facts involved in this case reveals a lacunae in the Mental Health Act. There does not seem to be any reason why the provisions of the Act providing an adjudicatory mechanism should not comprehend a mentally retarded person also. Elaborate provisions have been made in relation to a mentally ill person. Subject to suitable modifications, the same could be made applicable to mentally retarded persons as well. These are matters for legislative interference. In the circumstances the registry shall communicate a copy of this judgment to the Chief Secretary to Government of Kerala and the Secretary to the Department of Law and Company Affairs, Government of India, with a view to enable the Government to look into this issue and device a manner in which the existing lacunae in the Mental Health Act could be addressed.

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