
(2023) 07 KL CK 0062
In the High Court Of Kerala
Case No : Writ Petition (Crl) No. 296 Of 2023

Santha Kumari

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 10-07-2023

Acts Referred:

National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 — Section 10, 14

Citation : (2023) 07 KL CK 0062

Hon'ble Judges : P.B.Suresh Kumar, J;C.S.Sudha, J

Bench : Division Bench

Advocate : R.Krishna Raj, E.S Soni Kumari, Sangeetha S.Nair, Resmi A., Santhosh P.Poduval, P.Narayanan, K.A.Anas

Final Decision : Disposed Of

Judgement

P.B.Suresh Kumar, J.

1. The petitioner in this Writ Petition (Crl) is the mother of an autistic ward (the ward) aged 39 years. The petitioner was married to one Salim and had three children in the said wedlock. The ward is one among them. After the birth of the ward, the petitioner and her husband were living separately and the ward was being looked after by the husband of the petitioner. It is stated by the petitioner that even though the husband of the petitioner married the sixth respondent thereafter, the said marriage also did not last and he was consequently residing in a shed with the ward. In the meanwhile, the husband of the petitioner also obtained an order for reasons best known to him under Section 14 of the the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (the Act), appointing him as the guardian of the ward with the sixth respondent as her alternative guardian. The husband of the petitioner died on 02.03.2023.

2. It is stated by the petitioner that the present health condition of the ward is such that she needs bystander care round the clock. It is alleged by the

petitioner in the writ petition that the ward was not even aware of the death of her father. It is stated by the petitioner that when the people in the locality came to know of the death of the husband of the petitioner and the pathetic condition in which the ward was placed, the matter was brought to the local Grama Panchayat and the District Administration, and on their intervention, arrangements have been made for the stay of the ward in the fifth respondent institution, which is a society registered under the Board of Control of Orphanages and Other Charitable Homes. It is also stated by the petitioner that on coming to know of the death of the husband of the petitioner, the petitioner made arrangements for performance of the last rites and cremated his body. It is stated by the petitioner that thereafter, when she requested the fifth respondent to give custody of the ward to her, the fifth respondent insisted that since the ward was entrusted with them by the District Administration and the Grama Panchayat, the petitioner needs to obtain their concurrence for claiming custody of the ward. It is stated that even though the petitioner thereupon approached the District Administration and the Grama Panchayat for their concurrence to obtain the custody of the ward, they refused to give concurrence as the deceased husband of the petitioner obtained an order appointing him as the guardian of the ward and appointing his second wife as her alternative guardian under Section 14 of the Act. This writ petition(CrI) is instituted in the above background seeking directions to the District Administration and the Grama Panchayat to produce the ward of the petitioner before this Court and entrust her custody to the petitioner.

3. Heard the learned counsel for the petitioner, the learned Government Pleader appearing for the District Administration and the learned Standing Counsel for the Grama Panchayat. The sixth respondent did not enter appearance on receipt of notice.

4. The proceedings in this matter indicates that even though the petitioner was insisting for an interim order for the custody of the ward, it is seen that this Court did not grant such an order as this Court was informed that the ward is taken care of well by the fifth respondent institution. The order obtained by the father of the ward appointing him as the guardian of the ward and appointing his second wife as the alternative guardian was another impediment for the petitioner to obtain the custody of the ward.

5. When this matter was taken up for final hearing, the stand taken by the District Administration and the Grama Panchayat was that they have no objection in handing over the custody of the ward to the petitioner if there is no legal impediment in doing so. At the same time, it was pointed out by the learned Government Pleader as also the learned Standing Counsel for the Grama Panchayat that appropriate measures shall be taken by this Court to ensure that the petitioner takes care of the ward as she is now being taken care of by the fifth respondent institution.

6. In the light of the submission aforesaid, this Court directed the petitioner to

file an affidavit indicating whether she would be in a position to take care of the ward. In response to the said direction, the petitioner has filed an affidavit. Paragraphs 2 to 4 of the affidavit read thus:

"2. As submitted in the Writ Petition (Crl) my husband Mr. Salim has left me and my two girl children as early as in the year 1994. She has taken the detenue along with him and since then the petitioner has taken care of the two daughters left with her by the husband and both of them are now married and settled near my residence. I have purchased seven cents of land by virtue of document No 2627/2000, where in I am residing after constructing a double storied building having about 900sq. Feet. More over by virtue of Document No- 2811/1994, I have got one fourth share over 20 cents which was given as gift by my husband's mother. True copy of the Document No2627/2000 dated 03.07.2000 is produced and marked as Exhibit P-5. True copy of the Document No 2811/1994 dated 02.08.1994 is produced and marked as Exhibit P-6.

3. Over and above have got fixed deposit worth 3 lakhs, which is deposited in Poothamkulam Service Co-operative Bank. I am also conducting a small business under the Kudumbasree unit manufacturing paper bag and cloth bag as Zera Bags from which am getting more than Rs.25000/- from month. I am also engaged in the business of selling vegetables and coconut collected from household and I am getting more than 10,000 per month from this business. My eldest daughter Mrs.Prasanthi, who is a divorcee, who has got separate assets has come forward to help me to look after the detenue. A separate affidavit of Prasanthi, explaining her assets and her willingness to look after the detenue is produced along with this affidavit. I also swear before this Hon'ble Court that am willing to execute document transferring my title over my share of my 5 cents of property covered by Exhibit P-6 document in the name of the detenue. My daughter Mrs. Prasanthi also filing affidavit swearing her willingness to transfer her rights of 5 cents of property covered by Exhibit P-6 document in the name of the detenue. True copy of the fixed deposit receipt in Poothakulam Service Co-operative Bank dated 27.05.2023 is produced and marked as Exhibit P-7. True copy of the fixed deposit receipt in Poothakulam Service Co-operative Bank dated 16.05.2022 is produced and marked as Exhibit P-8. True copy of the fixed deposit receipt in Poothakulam Service Co-operative Bank dated 05.01.2022 is produced and marked as Exhibit P-9.

4. So in effect my daughter Priya.S. will be having 15 cents of property in her name. From the above it can be seen that I got sufficient assets and income to look after my daughter Priya.S who is at present in the care of 5th respondent. So it is most humbly prayed that this Hon'ble Court may be pleased to grant me the custody of detenue Priya.S and this Hon'ble Court may be pleased to accept the document produced and marked as Exhibit P-5 to Exhibit P-9 in this writ petition."

In the light of the said affidavit, we have no doubt in our mind that the petitioner would be in a position to take care of the ward properly, and the entrustment of

the custody of the ward to the petitioner will not, in any manner, impair the welfare of the ward. We take this view also for the reason that the petitioner is none other than the mother of the ward and no one else can give to the ward all that a mother can give to her.

7. The next question is whether the provisions of the Act would preclude this Court from entrusting the custody of the ward to the petitioner.

8. The Act is one intended for establishing a National Trust (the Trust) for the welfare of persons with autism, cerebral palsy, mental retardation, multiple disabilities and for matters connected therewith or incidental thereto. The Act is a beneficial legislation. No doubt, the objects of the Trust, among others, include promotion of measures for the care and protection of persons with disability in the event of death of their parent or guardian. The scheme of the Act is that persons with disability cannot be permitted to live without a guardian and are entitled to care and protection from the State. Section 10 of the Act dealing with the objects of the Trust reads thus:

10. Objects of Trust

The objects of the Trust shall be –

(a) to enable and empower persons with disability to live as independently and as fully as possible within and as close to the community to which they belong;

(b) to strengthen facilities to provide support to persons with disability to live within their own families;

(c) to extend support to registered organisations to provide need based services during period of crisis in the family of persons with disability;

(d) to deal with problems of persons with disability who do not have family support;

(e) to promote measures for the care and protection of persons with disability in the event of death of their parents or guardians;

(f) to evolve procedure for the appointment of guardians and trustees for persons with disability requiring such protection;

(g) to facilitate the realisation of equal opportunities, protection of rights and full participation of persons with disability; and

(h) to do any other act which is incidental to the aforesaid objects. ”

Section 14 is the provision dealing with appointment of guardianship. Section 14 reads thus:

“14. Appointment of guardianship -

(1) A parent of a person with disability or his relative may make an application to the local level committee for appointment of any person of his choice to act as a

guardian of the persons with disability.

(2) Any registered organisation may make an application in the prescribed form to the Local Level Committee for appointment of a guardian for a person with disability:

PROVIDED that no such application shall be entertained by the local level committee, unless the consent of the guardian of the disabled person is also obtained.

(3) While considering the application for appointment of a guardian, the local level committee shall consider -

(a) whether the person with disability needs a guardian;

(b) the purposes for which the guardianship is required for person with disability.

(4) The local level committee shall receive, process and decide applications received under sub-sections (1) and (2), in such manner as may be determined by regulations:

PROVIDED that while making recommendation for the appointment of a guardian, the local level committee shall provide for the obligations which are to be fulfilled by the guardian.

(5) The local level committee shall send to the Board the particulars of the applications received by it and orders passed thereon at such interval as may be determined by regulations."

As evident from Section 14, it is a provision enabling aggrieved and interested persons to approach the competent authority under the Act for appointment of a guardian for persons with disability in appropriate cases where such a course is necessary, for the welfare of persons with disability. The said legislative intendment is explicit from the use of the word 'may' in sub-section (1) of Section 14. In other words, the provisions of the Act do not affect in any manner, the rights of the parents of persons with disability to take care of their dependent children with disabilities, if they are not otherwise disqualified.

9. The question remaining to be considered is whether this Court is empowered to entrust the custody of the ward to the petitioner in a proceedings of this nature. It is now trite that constitutional courts are also empowered to act as *parens patriae* to meet the ends of justice, though exercise of the said power is not without limitation, and the courts are empowered to invoke the *parens patriae* doctrine only in exceptional cases [See *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368]. The case on hand, according to us, is an exceptional case for invocation of the *parens patriae*, inasmuch as the jurisdiction of the court is sought in favour of a person who is not suffering from any disabilities, to take care of her autistic daughter, who would otherwise be at the mercy of others.

In the said view of the matter, we dispose of the writ petition(Crl) directing the

District Administration to hand over the custody of the ward referred to in the writ petition to the petitioner, so as to enable the petitioner to take care of her.