

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

THURSDAY, THE 10TH DAY OF OCTOBER 2019 / 18TH ASWINA, 1941

WP(C).No.14802 OF 2019(A)

PETITIONER:

G.S.MANJU
AGED 49 YEARS
W/O. P. AJITH KUMAR, HOUSE NO.158, ARSHA NAGAR,
KAVANADU, KOLLAM - 691 003.

BY ADV. SRI.G.HARIKUMAR (GOPINATHAN NAIR)

RESPONDENTS:

- 1 K.N.GOPI @ GOPINATHAN PILLAI
KRISHNA VILASAM (MEDAYIL VEEDU), MULLUVILLA CHARI,
VADAKKAVILLA P.O., KOLLAM DISTRICT - 691 001,
REPRESENTED BY ITS POWER OF ATTORNEY HOLDER HARIDASAN
AGED 50 YEARS, S/O. KUMARAN, HARI VIHAR, MANKARA,
SHASTAMKOTA P.O., KOLLAM - 690 521.
- 2 ADDL R2, SUB DIVISIONAL MAGISTRATE,
KOLLAM, PRESIDING OFFICER, MAINTENANCE TRIBUNAL,
KOLLAM-691 001
- 3 ADDL R3, THE DISTRICT COLLECTOR,
PRESIDING OFFICER ,APPELLATE TRIBUNAL FOR MAINTENANCE
AND WELFARE OF PARENTS AND SENIOR CITIZENS,
KOLLAM -691 001
- 4 ADDL R4, SUB REGISTRAR,
ERAVIPURAM, ERAVIPURAM-PALLIMUKKU ROAD, PALLIMUKKU
KOLLAM 691 021
- 5 ADDL R5, THE VILLAGE OFFICER,
VADAKKEVILA VILLAGE OFFICE, PALLIMUKKU MARKET,
VADAKKEVILA, KOLLAM-691 021.
ADDL R2 TO ADDL R5 ARE IMPEADED AS PER ORDER DATED
18-06-2019 IN IA NO.3/19 IN WP(C) 14802/2019.

R1 BY ADV. SRI.B.N.SHIVSANKAR
ADV. SMT.C.S.SHEEJA, SR.GOV'T. PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
10.10.2019, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

“C.R.”

J U D G M E N T

The petitioner is the daughter of the first respondent, who is a senior citizen. The first respondent executed a gift deed in favour of the petitioner in the year 2014. He approached the Maintenance Tribunal to revoke the deed invoking Section 23 of the Maintenance and Welfare of Parents and Senior Citizens Act & Rules (hereinafter referred to as the Senior Citizens Act). The Tribunal declined the prayer under Section 23. However, the Tribunal ordered the petitioner to provide necessary facilities to the first respondent to protect his well being. He approached the appellate authority in appeal. The appeal was allowed revoking the deed. Challenging this order, the petitioner has approached this Court.

2. The appeal was heard substantially by the District Magistrate, who is not an appellate authority under Section 16 of the Senior Citizen Act. It is true that in the impugned order, it was mentioned that the District Collector, who is the appellate authority, heard the matter. Nevertheless as revealed from the proceedings, the matter was also heard on several occasions by the District

Magistrate. On this ground alone, the matter ought to be remitted to the appellate authority.

3. However, the learned counsel for the petitioner pointed out to the pleadings in the application filed by the senior citizen under Section 23. According to him, the pleadings clearly shows that this is not a case where Section 23 of the Act can be invoked. The learned counsel argues that, Section 23 would be attracted only in the case of admission of a valid transfer. In the application in column No.4, the senior citizen had stated that the deed was fraudulently obtained by undue influence and coercion. Therefore, it was argued that it is a matter of civil dispute. Thus the learned counsel submits that this dispute can be resolved only by a civil court and not by a Maintenance Tribunal under the Act. This argument appears to be attractive.

4. In the light of the argument raised by the learned counsel for the petitioner, it is necessary to address the question of nature of power and procedure to be followed by the Maintenance Tribunal. This is for giving guidelines to the Tribunal and Authorities under the Senior Citizen Act while exercising the power under the Act.

5. To understand the nature of power of the Tribunal and Authorities under the Act, it is necessary to look at the legislative object of the enactment. Indian society is a religious society. The traditional norms and values of the Indian society emphasize on the duty of taking care of elders. Joint families were prevalent in different forms across the country. In traditional Indian society, duties of children towards one's parent were considered as a debt owed to them.

5(i) The Kurma Purana, one of the Eighteen Mahapuranas and named after the tortoise avatar of Vishnu prescribes :

“No Deva can equal the mother and no superior can equal one's father. Hence, no son can get relieved of the debt he owes to them.” [Kurma Purana 2.12.36]

5(ii) In Manusmriti, 2/227, it is given that, “Parents who give birth and rear children face agony that cannot be overcome in a hundred years. Therefore, the father, mother and teacher must always be kept happy and content through care and service. This is important to attain truth and success in life.”

5(iii) In Holy Quran, in chapter 2-83 (Al-Baqarah), duty is enjoined upon believers to do good deeds to parents.

In chapter 46-15 (Al- Ahqaf), it is mentioned, “And We have enjoined upon man, to his parents, good treatment. His mother carried him with hardship and gave birth to him with hardship, and his gestation and weaning [period] is thirty months. [He grows] until, when he reaches maturity and reaches [the age of] forty years, he says, “My Lord, enable me to be grateful for Your favour which You have bestowed upon me and upon my parents and to work righteousness of which You will approve and make righteous for me my offspring. Indeed, I have repented to You, and indeed, I am of the Muslims.”

5(iv) In the Holy Bible, the tenth book of New Testament, Ephesians, chapter 6, verses 1-3, prescribes :

“Children, obey your parents in the Lord, for this is right. Honor your father and mother, which is the first commandment with a promise, that it may go well with you and that you may enjoy long life on the earth”. [Ephesians 6:1-3]

These religious values are universal values acknowledged and encompassed in all civilized society or class.

6. In modern era, due to urbanisation and vast expansion in search for livelihood, parents have been treated as a liability because of their old age and physical

infirmities. Old age homes have sprung up in every nook and corner of the country. The act of serving and caring for the parents which was once considered as part of the tradition and culture has slowly disappeared giving rise to new social challenges. The State is concerned about cohesive order in the family which is the basic unit of the society. Happiness in the State would depend upon the happiness cherished in the Society. This happiness is derived from the values cherished. These values have been cited as moral values.

7. The parliament enacted the Senior Citizens Act to uphold the dignity and respect of a senior citizen at the time of old age. State had serious concern about the challenge faced by the people in their old age. Apart from physical vulnerabilities, they face emotional and psychological challenges. On account of these frailties, they are totally dependent. The moral laws formulated through the legislation is necessary to rationalise the well being of all in the society. The moral values that prevailed in the society in the past have been accepted as universal values. The State in its wisdom, considering the acceptance of these values, seeks to promote the common good through the Senior Citizens Act. These values carried duties

and obligations.

8. The deontological moral theory of legislation refers to certain type of actions having universal acceptance. Immanuel Kant propounded the philosophical concept of categorical imperative as an ultimate command of reason, as it was produced independent of particular end or desire. Kant, in formulation of the categorical imperatives treats 'humanity' as an end in itself and not as a means to an end; 'so act that humanity, both in their own person and that of others, be used as an end in itself, and never as a mere mean' (Chapter II, Metaphysic of Ethics translated by John William Semple). Those values are treated as rational values required to govern the society. The past experience that existed in the Indian society is proof of the legislative intent. The Senior Citizens Act is based on a-priori experience and reasoning. Thomas Hobbes in "Man and Citizen" refers to legislation based on a-priori principles like this; "Finally, politics and ethics (that is the sciences of the justs and unjust, of equity and inequity) can be demonstrated a-priori ; because we ourselves make the principles - that is, the causes of justice (namely laws and comments) [Page 42, edited by Bernard Gert 1978]. It is

therefore clear that the legislative intent is to formalise duties and obligations based on relationship to sustain a society.

9. In this legislative background, the scope of an enquiry by a Tribunal or authority will have to be considered. Section 7 of the Senior Citizens Act refers to Constitution of Maintenance Tribunal. The Tribunal shall be presided over by an officer not below the rank of a sub-divisional officer of a State. Section 5 refers to the application for maintenance. This can be filed by a senior citizen or a parent or any organisation authorised by him if he is incapable. The Tribunal has also power to initiate suo motu action. Section 23 gives power to the Tribunal to declare transfer of deed as void in certain circumstances referred therein. It states that after the commencement of the enactment, transfer of property of a senior citizen by way of gift or otherwise, is subject to the condition that transferor would be provided basic amenity and physical needs and that if the transferee refused to provide basic amenities and physical needs. Thereafter, the Tribunal can declare such deed as void invoking power under Section 23.

10. The nature of enquiry to be followed by the

Tribunal or authority in such proceedings is a matter of concern for this Court. The enactment itself flows from Article 41 of the Constitution of India which calls for the protection of a citizen during his old age. The Tribunal has been conferred with such powers and authority in the light of the fact that, it may not be practically possible to conduct an enquiry to protect the well being of a senior citizen in a system of formal adjudication.

11. There is a fundamental difference between an adversarial legal system and inquisitorial legal system. In adversarial system, the court or independent authority act as a neutral body to elicit truth through an open competition between the adversaries involved in the dispute. In sporting theory of justice, Roscoe Pound referred to it as two teams competing with each other while the court acts like a referee to ensure that the competing teams follow the rules of the game. In inquisitorial system, the court or the Tribunal does not depend mainly on the stand of parties. The court or Tribunal resolves the dispute by investigating the truth. The Judge or authority in such matter will have to play an active role to find out the truth. The Judge or authority will collect all the information to elicit the

truth. In that process, the Judge or authority is free to decide the case independently with or without the assistance of the parties.

12. The legislative background and object of conferring power on the Tribunal clearly demands that enquiry as contemplated under the enactment is similar to the process adopted in an inquisitorial system. The duty on the Tribunal under the Senior Citizen Act therefore is to elicit truth. For that he can refer to pleadings and evidence. But that is not decisive. The Tribunal has to independently enquire into the truth and take measures to protect the well being of senior citizen/parents. The Tribunal is actually not deciding any dispute in like manner as involved in an adversarial system, but is only taking measures to protect the senior citizen/parents. The focus of the enquiry, therefore, is the protection of the senior citizen or parents as the case may be, through stages of decision taken by him at different level. Thus I make it clear in the light of the legislative intent assimilated on philosophical reasoning and narratives as afore referred, that the scheme of the Senior Citizens Act is not intended at dispute resolution but to promote measures to secure the

welfare and interest of the senior citizens and parents. Through measures such as demanding an enquiry under the Act as in an investigation to protect well being of senior citizens or parents in a manner prescribed therein. In Adversarial Litigation, rights and interests of both parties will be adjudicated or decided. The Senior Citizens Act does not contain such process of adjudication. The Tribunal must be guided by those factors that are required to protect such interest by eliciting the truth. The Tribunal cannot act like a neutral umpire in an adversarial systems. Considering the object of the legislation as above, the Tribunal has to follow the procedure for enquiry as in an inquisitorial system and not as in an adversarial litigation. Irrespective of the pleadings raised by the senior citizen, he has to address the grievance of the senior citizen as expressed before him to elicit truth.

13. This Court in **Radhamani and others v. State of Kerala (2016 (1) KHC 9)** held that there is no requirement under law that there should be a written stipulation in the deed to the effect that the transferee would maintain the transferor. It is appropriate to refer the relevant paragraphs in the above judgment which read thus :

“11. It is to be noted that the special scheme in terms of Senior Citizens Act, 2007 could declare certain transfer as void, taking note of the fact that by taking advantage of the emotionally dependent senior citizens, relatives grab the property on the pretext of providing emotional support. Therefore, legislature thought such transaction could be declared as void as the conduct leading to transaction was based on malice or fraud. Therefore, condition referred in Section 23 has to be understood based on the conduct of the transferee and not with reference to the specific stipulation in the deed of transfer.”

Thus this Court is of the view that it is not necessary that there should be a specific recital or stipulation as a condition in the deed of transfer itself. This condition mentioned in Section 23 is only referable as a conduct of the transferee, prior to and after execution of the deed of transfer.

14. In the light of the judgment in **Radhamani's** case, the scope of enquiry in a matter related under Section 23, must be related and confined to the circumstances under which the document was executed. In the light of **Radhamani's** judgment, the Tribunal has to examine the circumstances under which the deed was executed. It is also

necessary to find out whether senior citizen expected that the transferee would provide amenities and physical needs to the transferor at the time of transfer. There may not be any written document in this regard. Normally this has to be concluded from human conduct and nature of relationship and circumstances in which such deed was executed. Strict pleadings or evidence cannot be insisted in such proceedings. It is to be noted that law only contemplates breach on the part of the transferee in providing amenities and physical needs to the transferor. It does not stipulate that the condition of providing maintenance should be part of such transfer. If love and affection was the circumstances for executing such deed, any failure on the part of the transferee to provide amenities and physical needs to the transferor would attract the grounds for revocation under Section 23. Therefore, any emotional detachment or creation of an atmosphere as opposed to the one demanded by a senior citizen would be sufficient to attract Section 23.

15. In the light of the discussion as above, I am of the view that the matter requires reconsideration by the Maintenance Tribunal. Accordingly, the impugned orders are

set aside. The matter is remitted back for reconsideration by the Tribunal as above. The parties shall appear before the Tribunal on 25.11.2019 either personally or through counsel. It is now submitted that the senior citizen is currently residing abroad. The Tribunal therefore can hold the session with the senior citizen through video conference or through any other electronic media.

The Writ Petition is disposed of as above.

Sd/-

**A.MUHAMED MUSTAQUE
JUDGE**

csl

APPENDIX

PETITIONER'S/S EXHIBITS:

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| EXHIBIT P1 | TRUE COPY OF THE PETITION FILED UNDER MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007 DATED 06.10.2015. |
| EXHIBIT P2 | TRUE COPY OF THE PETITION NO.C 2354/2015 BEFORE REVENUE DIVISIONAL OFFICER, KOLLAM. |
| EXHIBIT P3 | TRUE COPY OF THE OBJECTIONS FILED BY THE PETITIONER DATED 11.02.2016. |
| EXHIBIT P4 | TYPED COPY OF THE ORDER DATED 29.04.2017 PASSED BY THE TRIBUNAL FOR MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS AND SUB DIVISIONAL MAGISTRATE, KOLLAM. |
| EXHIBIT P5 | TRUE COPY OF APPEAL MEMORANDUM IN APPEAL NO.30008 OF 2017 DATED 27.06.2017 FILED BEFORE THE APPELLATE TRIBUNAL FOR MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS. |
| EXHIBIT P6 | TRUE COPY OF THE WRITTEN SUBMISSIONS OF THE PETITIONER DATED 13.08.2018 IN APPEAL NO.30008 OF 2017. |
| EXHIBIT P7 | TRUE COPY OF ORDER IN APPEAL NO.30008 OF 2017 DATED 07.05.2019 PASSED BY THE APPELLATE TRIBUNAL FOR MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS. |

RESPONDENT'S/S EXHIBITS:

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| EXHIBIT-R(1) | TRUE COPY OF THE ORDER IN I.A.9481/2015 IN W.P(CRL) 281/2015 DATED 07/07/2015 |
| EXHIBIT-R(2) | TRUE COPY OF THE COMMISSION REPORT IN I.A 9481/2015 IN W.P(CRL) 281/2015 DATED 15/07/2015 |

EXHIBIT-R(3)

TRUE COPY OF THE STATEMENT OF DETENUE

EXHIBIT-R(4)

**TRUE COPY OF THE JUDGMENT IN W.P(CRL)
281/2015 DATED 18/08/2015**