

Madras High Court

G.Nityanandam vs Tmt.D.Saritha on 16 April, 2013

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated 16.4.2013
Coram
THE HONOURABLE Mr.JUSTICE R.SUDHAKAR
Original Petition No.62 of 2013

G.Nityanandam. Petitioner

vs.

1.Tmt.D.Saritha,

2.Shri G.Jeevanandam Respondents

The Original Petition is filed under Sections 3, 7 to 10 and 29 of Guardians and Wards

For petitioner : Mr.S.Yeganarayanan,

Ms.Narmadha Sampath, Amicus Curiae
(appointed by this Court as per order
dated 8.3.2013)

O R D E R

This Original Petition is filed under Sections 3, 7 to 10 and 29 of Guardians and Wards Act, 1890 read with Order XXI Rules 2 and 3 of Original Side Rules praying to appoint the petitioner as the guardian of the person and property of Miss.G.Prabhavathy, mentally retarded person and pass such further or other orders as may be deemed fit and proper in the circumstances of the case.

2. Heard Mr.S.Yeganarayanan, learned counsel appearing for the petitioner, Ms.Narmadha Sampath, learned advocate appointed as Amicus Curiae by this Court.

3. This Original Petition has been filed by Thiru G.Nityanandam, the brother of Miss.G.Prabhavathy, said to be a mentally retarded person to appoint him as guardian of the person and property under

the provisions of the Guardians and Wards Act, 1890 read with Original Side Rules.

4. The first respondent Tmt.D.Saritha, is the sister and the second respondent Shri G.Jeevanandam, is the brother of the alleged mentally retarded person. The reason for making the present petition is that the alleged mentally retarded person Miss.G.Prabhavathy, is incapable of managing herself and her properties. Based on the disability certificate issued by State Resource-cum-Training Centre for Differently Abled Persons, K.K.Nagar, Chennai 600 078 (unit of the office of the Commissionerate for Welfare of the Differently Abled, Chennai-6), the present petition is filed. Petitioner claims to be the brother and seeks for an order to appoint him as a guardian of the alleged mentally retarded person with a plea that the respondents are agreeable for appointing him as the guardian of the alleged mentally retarded person. Petitioner states that he is taking care of the alleged mentally retarded person and therefore, he is most appropriate person to be appointed so. The further plea is that the father has already expired and mother's whereabouts are not known since 1995.

5. When the petition was moved before this court a doubt arose as to how the provision of Guardian and Wards Act, 1890 would apply in a case for appointment of guardian to a mentally retarded person. This court taking note of the provisions of the Guardians and Wards Act, 1890 which specifically provides for appointment of guardian in respect of minors and the present case which is to appoint a guardian in respect of an alleged mentally retarded person, aged about 31 years, is of the view that the petition under Guardians and Wards Act, 1890 is not maintainable. If that be the case, as to what is the remedy the petitioner will have for the above stated relief was considered. On the doubt that arose in the mind of the Court, the Court appointed Tmt.Narmadha Sampath, Advocate, as Amicus Curiae, considering her experience in this field and exposure to similar issues coupled with her participation in the recently conducted International Conference on Child Welfare with special emphasis on International Law and Child Justice, to assist the Court as to how the case of a mentally retarded person could be considered based on law that has developed in the field of mental health and mental disability.

6. The learned Amicus Curiae submitted as follows:-

(1) The person in this case who said to be mentally retarded will not fall within the definition of mentally ill person as mental retardation stands excluded from the provision of the Mental Health Act, 1987. Section 2(l) of the Mental Health Act, 1987 defines mentally ill person as follows:-

(1) mentally ill person means a person who is in need of treatment by reason of any mental disorder other than mental retardation; Therefore, the petitioner, who is stated to be mentally retarded, cannot seek appointment as guardian under the provisions of the Mental Health Act, 1987.

(2) She, on the contrary, pointed out Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral, Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and the definition of the words mental retardation to clarify that the case of the petitioner will fall within the parameters of 1999 Act.

(g) mental retardation means a condition of arrested or incomplete development of mind of a person which is specially characterised by sub-normality of intelligence; (3) She further pointed out the definition of mental illness and mental retardation under clause (q) and (r) of Section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 to clarify the issue that mental illness and mental retardation are distinctively different.

(q) mental illness means any mental disorder other than mental retardation; (r) mental retardation means a condition of arrested or incomplete development of mind of a person which is specifically characterised by sub-normality of intelligence; (4) Based on the above definitions, learned Amicus Curiae pointed out that mentally retardation as is the case on hand, would come under the provision of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (Act 44/1999) and not either under Guardians and Wards Act, 1890 or Mental Health Act, 1987.

(5) She further pointed out that Section 3 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 provides for constitution of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability. The said Trust shall be administered by a Board consisting a Chairperson and other members. The objects of the Trust is defined under Section 10 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and it reads as follows:-

o. 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 the 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 parent or guardian;

(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. (6) It is contended that in order to further the objects of the Trust, the Act provides that the Board shall constitute Local Level Committees. Section 13 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, Act, 1999 provides for constitution of Local Level Committees and the Local Level Committee according to Section 13 consists of following members:-

3. Constitution of Local Level Committees: (1) The Board shall constitute a Local Level Committee for such area as may be specified by it from time to time.

(2) A Local Level Committee shall consist of -

(a) an officer of the civil service of the Union or of the State, not below the rank of a District Magistrate or a District Commissioner of a district;

(b) a representative of a registered organisation; and

(c) a person with disability as defined in clause (t) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996). She also points out that such Committees are functioning in every district and they are the persons competent to consider such a claim.

(7) She pointed out that the fund for the Local Level Committee has been provided by the Central Government to implement the objects of the Trust for the benefit of persons suffering from autism, cerebral palsy, mental retardation and multiple disabilities and this will enure to the benefit of the mentally retarded person in the present case. She emphasised the need to relegate the petitioner to approach that forum.

(8) The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 further provides for appointment of a guardian to a person with disability as defined under Section 2(j) of the Act which includes a person suffering from severe multiple disability and it reads as follows:-

(j) person with disability means a person suffering from any of the conditions relating to autism, cerebral palsy, mental retardation or a combination of any two or more of such conditions and includes a person suffering from severe multiple disability; (9) She referred to Section 14 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 which provides for making an application to the Local Level Committee to appoint a person to act as a guardian to the person with disability to contend that the petitioner has to make an application in terms of Section 14 as above.

(10) She also points out that to implement the provisions of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and in exercise of power conferred under Section 34 of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999; the Central Government

framed Rules called The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000 . These Rules provide the guidelines.

(11) Rule 16 of The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000 provides the manner in which the application should be made to the Local Level Committee and that is prescribed in Form A .

(12) The Rule 16(2) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000 provides that the confirmation of appointment of guardian on such application shall be made in Form B .

(13) She also pointed out that in order to make the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and the Rules 2000 effective for the welfare of the persons suffering from Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, and in exercise of the power conferred by Section 35(1) and (2) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, the Board with the previous approval of the Central Government framed Regulations called The Board of the Trust Regulations, 2001 as amended in 2006. Regulations 11, 12 and 13 were brought to the attention of the Court which provides the details of the person who may apply for guardianship; the person who may be indicated by applicant as guardian; and the guidelines for receiving, processing and confirmation of application for appointment of a guardian. Regulations 11, 12 and 13, which are relevant, reads as follows:-

1. Who may apply for guardianship:- (1) Both the parents may jointly, or, in the event of the absence of one due to death, divorce, legal separation, desertion or conviction, may singly apply for guardianship of their or as the case may be, his ward beyond the age of 18 years.

(2) In the event of death, desertion, conviction of both the parents, the siblings (including half and step-siblings) jointly or singly (by reason of single application to be explained separately), may apply for guardianship of a disabled Member of the family.

(3) In the event of non-application of sub-regulations (1) and (2) above, a relative may make an application for guardianship.

(4) In the event of non-application of sub-regulations (1), (2) and (3), any registered organisation may make an application for guardianship.

(5) The Local Level Committee may direct a registered organisation to make an application for guardianship in case of a destitute or abandoned person.

12. Who may be indicated by applicant as guardian:- (1) Both the parents jointly, or singly in the event of the absence of one due to death, divorce, legal separation, desertion or conviction, being natural guardian of minor may apply to the Local Level Committee to get themselves or himself as the case may be, appointed as guardian of their or as the case may be, his disabled ward beyond the

age of 18, in which case the application shall be accepted unless the parent is disqualified on account of:-

- (i) loss of citizenship;
- (ii) being of unsound mind;
- (iii) being convicted by a Court of law; or
- (iv) being a destitute.

(2) The applicant may indicate siblings, or any Member of the family or any other person or a registered institution for consideration as a guardian and in case of institutions, the conditions of eligibility of institutions shall be as stipulated in sub-regulations (3), (4) and (5).

(3) In the case of considering the institution as a guardian, the institution must be registered under a law and be capable of providing care of the person.

(4) In the event of institution ceasing to be registered under a law or stops functioning, or is found otherwise unsuitable, the Local Level Committee shall make alternative arrangements for the foster care of any such inmate or the ward, who is under the care of any such institute.

(5) The alternative care under sub-regulation (4) shall not be permanent in nature and shall be placed by permanent guardianship within a period of one year.

(6) The applicant must be living in the vicinity or close proximity to the place where the ward has been habitually living at the time of appointment of guardian.

(7) No single male shall be considered as a guardian for a female ward and in the case of female wards, the male person shall be given co-guardianship with his spouse, who shall be master co-guardian.

13. Guidelines for receiving, processing and confirmation of application for appointment of a guardian:- (1) The Local Level Committee shall receive applications for appointment of guardian in Form D or Form A under the rules.

(2) On receipt of the application for appointment of guardian, the Local Level Committee shall scrutinise the application and call for any supporting document or information that may be necessary for deciding the issue of guardianship.

(3) In case of application received from parents for guardian other than themselves, the Local Level Committee may decide to get parent's counselling in any manner, it may decide to determine the genuineness of having a guardian other than parents.

(4) If parents or relatives are not available for the person with disability who is in need of guardian, because of being a vagrant or destitute or found abandoned, Member or the Members of the Committee may ask for applications from a registered organisation to initiate the process of guardianship for the person.

(5) The person with disability must be assessed by the Local Level Committee, to determine the genuineness of the need of guardianship and it shall be open to the Local Level Committee to seek the assistance of technical personnel or their services to determine the need.

(6) The Local Level Committee shall satisfy itself about the capabilities and the suitability of the person on whom guardianship is being conferred.

(7) The application for guardianship for personal care and maintenance shall be accepted to cover the following areas, namely:-

- (a) Food, clothing and shelter needs;
- (b) Health care needs;
- (c) Religious needs;
- (d) Education, training and employment needs;
- (e) Leisure and nutrition needs;
- (f) Protection from exploitation and abuse;
- (g) Protection of constitutional and human rights; and
- (h) Medical and surgical needs.

(8) The confirmation of appointment of the guardian on application made by (1) a registered organisation; or (2) the parent or relative of a person with disability shall be made in Form E or Form B under the rules. (14) On a combined reading of these provisions, the Amicus Curiae pointed out that the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 is a self contained, but a Special provision to cater to the needs of persons suffering from Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities. Their interest will be considered and taken care of by the Local Level Committee, which will not only appoints a guardian but will also monitor the guardian so appointed on a regular basis. Hence, the petition has to be filed in terms of the above said provisions.

7. Thiru Sivakumar, the Under Secretary to Government who was present before this Court stated that besides appointment of guardian, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 and the Rules, 2000 and the

Policy of the Government provides for certain welfare measures to the benefit of the persons suffering from multiple disability as defined under Section 2(j) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. The Government, continuously issues policy statement year after year providing for grant to the various Local Level Committees to take care of these people. It is stated that the Department for the Welfare of Differently Abled Persons issues the policy note providing for various ameliorating measures to the Differently Abled Person or Persons suffering from multiple disability. A policy note of the year 2013-14 was placed before this Court. He pleaded that the mentally retarded person in this case will benefit more under this procedure.

8. In the light of these provisions, Ms.Narmadha Sampath, the learned Amicus Curiae submitted before this Court that the present petition filed under the Guardians and Wards Act, 1890 is not proper and the petitioner should go before the Local Level Committee and make an application for appointment of the petitioner as guardian under Section 14 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, in Form A in terms of Rule 16(1) of The National for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000 and that will be best course of action in the given circumstances.

9. On a perusal of the provisions as above, the Court after consideration of the relevant materials and the arguments of the Amicus Curiae, is of the view that the petition filed under Guardians and Wards Act, 1890, may not be correct and the proper course of action would be to pursue action under the Act 44/99 and for the following reasons:

(1) The petition filed in the matter of Miss.G.Prabhavathy, 31 years old lady under the Guardians and Wards Act, 1890 will not be proper as the first contention raised by the learned Amicus Curiae, that the Guardians and Wards Act, 1890 will apply only in respect of minor children, and not in a case of mentally retarded person is tenable in law. Therefore, the petition as filed under the Guardians and Wards Act, 1890 is not maintainable.

(2) On the other hand, as has been rightly pointed out by the Amicus Curiae, in a case of mental retardation, the provisions of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (Act 44/1999) provides for a special purpose vehicle to address the needs of persons suffering from multiple disabilities which includes Autism, Cerebral Palsy, Mental Retardation. If as stated by the petitioner, the person Miss G.Prabhavathy is mentally retarded person, necessarily an application needs to be filed before the Local Level Committee under Section 14 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, in Form A in terms of Rule 16(1) of The National for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000 for appointment of the petitioner as guardian. The Act provides for that and it specifies the rules and regulations governing such a plea.

The guidelines for receiving, processing and confirmation of application for appointment of a guardian has been stated under Regulation 13 of the Board of the Trust Regulations, 2001. The

person who may seek appointment for guardian is provided under Regulation 11 and that is in consonance with Rule 16 read with Section 14 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (Act 44 of 1999).

(3) As a consequence it is to be noticed that the provision of National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (Act 44 of 1999), the Rules, 2000 and the Regulations, 2001 clearly provide a well established method to address the claim of a person seeking to appoint himself as guardian of an alleged mentally retarded person. The Act, Rules and Regulations provide for appointment of Members representing voluntary organisation under the category of registered organisation as defined under Section 2(m) of Act 44 of 1999 and it reads as follows:-

.(m) registered organisation means an association of persons with disability or an association of parents of persons with disability or a voluntary organisation, as the case may be, registered under section 12; They will be able to assist and supplement the working of Local Level Committee to address the needs of person suffering from multiple disabilities. Hence, the petitioner will be entitled to seek remedy under the provisions of Act 44 of 1999 only. The petition before this Court under Guardians and Wards Act, 1890 is not maintainable.

10. A difficulty has been expressed by the learned counsel for the petitioner stating that the procedure for appointment of guardian is cumbersome under the said Act and the Rules and is forcing the persons like the petitioner to approach this Court for relief under various provisions of the Act as stated above.

11. This apprehension is allayed by the Amicus Curiae and the Under Secretary to Government stating that in each one of the Districts, the District Collector and his co-ordinate members are conducting the meeting once in three months as per the mandate of law and the claims or applications under the enactments relating to Differently Abled Persons suffering from multiple disabilities are being considered on a regular basis. Therefore, if the petitioner in this case makes an application under Section 14 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, in Form A in terms of Rule 16(1) of The National for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000, the District Collector of Chennai and the Committee will consider the said claim on merits after following the procedure prescribed and pass appropriate orders.

12. The learned Amicus Curiae further pointed out that though a citizen charter has been issued by the Government of Tamil Nadu, for the welfare of disabled persons, a copy of which has been handed over by the Under Secretary pointing out the methods, by which the Government is addressing to the needs of Differently Abled Person, she suggested that the court should take endeavour to pass orders and ensure that the provisions of this Act are widely publicised and awareness is brought to the general public on these welfare legal provisions. She suggested that besides regular paper publication by the Government, the gist or highlights of the provisions of this welfare Act should be printed on the reverse of public utility receipts, like cash bills, etc., by making it mandatory so as to enable the public to get an insight into the provisions of the special enactment.

This she requested in larger public interest. She suggested this model by taking note of similar procedure adopted in western countries particularly in United States of America where the State gives more importance to persons with disabilities.

13. It was further pointed out by the Amicus Curiae that besides considering the claim for appointment of guardian, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 also provides for continuous monitoring of the mentally retarded person and the guardian by way of periodical report in Form "C" in terms of Rule 27(1). Hence, the claim of the petitioner is evaluated and the interest of the mentally retarded person is well also protected. These issues are considered and taken and the government is directed to take note of the suggestions for improving the well being of mentally retarded persons.

14. In the result, the petitioner is directed to approach the District Collector, Chennai, the Chairman of the Local Level Committee for considering the claim under the Act 44/99.

15. The suggestion made by the Amicus Curiae is accepted as far as it is feasible. It is for the Government to take appropriate steps to bring to more attention to the public, for the benefit of Differently Abled Persons. The various welfare measures that are being taken by the Government for Differently Abled Person or Persons suffering from multiple disabilities should be shown its due. Any one or more of the methods as suggested by the Amicus Curiae can be adopted by the Government to implement the provisions of the Act.

16. In our country, the major population consists of farmers, toilers, etc., and are uneducated. The level of awareness is almost nil. The suggestion made, as above, by Ms.Narmadha Sampath, Amicus Curiae, assisting the court is justified. This Court on a number of occasions has found that many of the petitions are filed before this court without seeking recourse to the various provisions of the Acts and welfare measures which have been brought out by the Government. While requesting the Government to consider a better reach to the public at large on this special legislation, this court is inclined to direct the petitioner in this case to make an application before the District Collector, Chennai who is the Chairman of the Local Level Committee for appropriate orders. The District Collector, Chennai, assures this Court through the Advocate General that the Local Level Committee will consider the claim immediately on receipt of the application and take up the claim in accordance with the provisions of the Act and the Rules. The said statement made on behalf of the Advocate General is recorded.

17. The Original Petition filed under Guardians and Wards Act, 1890 is not maintainable. However, the Original Petition is disposed of giving liberty to the petitioner to approach the District Collector, Chennai under Section 14 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999, in Form A in terms of Rule 16(1) of The National for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Rules, 2000 for appointment of guardian of the person and property of Miss. G.Prabhavathy, alleged mentally retarded person. On receipt of the application, as assured by the learned Advocate General, the District Collector, Chennai, the Chairman of Local Level Committee will consider the same and take up the claim in accordance with the provisions of the Act and the

Rules immediately.

18. The valuable assistance rendered by Ms.Narmadha Sampath, Advocate, appointed as Amicus Curiae is recorded and appreciated by this Court. The Assistance rendered Thiru Sivakumar, Under Secretary to Government and the District Differently Abled Welfare Officer, Chennai is also appreciated and recorded.

16.4.2013 Index: Yes Internet:Yes Office to note:-

1) Issue copy on or before 8.5.2013

2) The Registry to issue free copy to

(i) The Office of the Advocate General, High Court, Madras.

(ii)The Secretary to Government, Social Welfare Department, Fort St. George, Chennai.

(iii)The National Trust Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities, Ministry of Social Justice & Empowerment, Government of India, IPH Complex, 4 Vishnu Digamber Marg, New Delhi 110 002.

(iv)Welfare of Differently Abled Persons Department, Secretariat, Chennai- 600 009.

(v) Ms.Narmadha Sampath, Advocate, Amicus Curiae, No.244, Kilpauk Garden Road, Kilpauk, Chennai-600 010, (Mobile No.9884111999)

(vi) The District Collector, Chennai ts R.SUDHAKAR,J., ts Order in O.P.No.62 of 2013

Date:16.4.2013