IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

Friday, the 13th day of August 2021 / 22nd Sravana, 1943

OP(CRL.) NO. 487 OF 2019

PETITIONER:

SUO MOTU

RESPONDENTS:

1. **STATE OF KERALA**
   REPRESENTED BY ITS CHIEF SECRETARY
   (BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
   ERNAKULAM - 682 031).
2. **THE SPECIAL SECRETARY**
   SOCIAL JUSTICE DEPARTMENT, GOVERNMENT SECRETARIAT
   THIRUVANANTHAPURAM - 695 001.
3. **THE STATE POLICE CHIEF**
   POLICE HEADQUARTERS, THIRUVANANTHAPURAM - 695 001.
4. **THE DIRECTOR GENERAL OF PRISONS AND CORRECTIONAL SERVICES**
   PRISONS HEADQUARTERS, POOJAPPURA, THIRUVANANTHAPURAM - 695 012.
5. **THE SECRETARY**
   LAW DEPARTMENT, GOVERNMENT SECRETARIAT
   THIRUVANANTHAPURAM - 695 001.
6. **THE MEMBER SECRETARY**
   KERALA STATE LEGAL SERVICES AUTHORITY
   NIYAMA SAHAYA BHAVAN, HIGH COURT COMPOUND, ERNAKULAM - 682 031.
7. **THE SECRETARY**
   KERALA STATE MENTAL HEALTH AUTHORITY
   RED CROSS ROAD, THIRUVANANTHAPURAM - 695 035.

8. THE SECRETARY

DISTRICT LEGAL SERVICES AUTHORITY, COURT COMPLEX

KOZHIKODE - 673 032.

9. THE SECRETARY

DISTRICT LEGAL SERVICES AUTHORITY

VANCHIYOOR, THIRUVANANTHAPURAM - 695 035.

10. THE SECRETARY

DISTRICT LEGAL SERVICES AUTHORITY, CIVIL STATION

AYYANTHOLE, THRISSUR - 680 003.

BY THE PUBLIC PROSECUTOR FOR THE RESPONDENTS

This OP(Criminal) having come up for orders again on 13/08/2021 upon perusing the petition and this Court's order dated 21/07/2020, the court on the same day passed the following.

'C.R'

V.G.ARUN, J.

OP(Crl).No. 487 of 2019

Dated this the 13th day of August, 2021

O R D E R

"***They must take me for a fool, or even worse, a lunatic. And no wonder, for I am so intensely conscious of my misfortune and my misery is so overwhelming that I am powerless to resist it and am being turned into stone, devoid of all knowledge or feeling.***"

Don Quixote *– Miguel de Cervantes*

This original petition is about the powerless, voiceless mentally ill prisoners languishing in prisons and mental health centres for years together, embroiled in legal quagmire and abandoned by family and friends. The system and the society presume them to be devoid of knowledge and feeling, thereby turning them into stone.

2. The original petition came to be registered *suo motu,* on the plight of mentally ill remand prisoners, being brought to the notice of the Hon'ble Chief Justice by a learned Judge, with an

opinion that such instances amount to violation of fundamantal rights. The newspaper report, that caught the learned Judge's attention, had highlighted the case of a 72-year-old remand prisoner lodged in the Government Mental Healthcare Centre, Kuthiravattom for the last 49 years. He was remanded by the Sessions Court, Palakkad, on the trial against him being postponed for reason of his unsoundness of mind. Thereupon, information about the mentally ill remand prisoners was collected with the aid of the Kerala Legal Services Authority (KELSA) and the High Court Registry. The Government was also prodded into action. It was reported that as on 10.08.2020, there were 77 convicts/ remand prisoners undergoing treatment in Government Mental Health Centres in the State, of whom 22 are continuing after acquittal. Of the other 55 prisoners,48 are undertrial prisoners and 7 are convicts. Out of the 22 acquitted persons, 18 are fit for discharge and can be sent to rehabilitation centres and even from among the under trial prisoners, some are fit to be rehabilitated. In his report, the Member Secretary, KELSA has put forth the following suggestions.

> *"1). Regarding the persons who are undergoing treatment in mental health centres and are acquitted by the Court but continuing in the mental health Centre either for want of*

family or reluctance from the family tot ake them back or due to the absence of home, can be rehabilitated in the 33 psycho social rehabilitation centres identified by the second respondent. In the case of persons from other STaes, KeLSA will take steps to find out their relatives and to persuade to take them back into the family. If, the attempt was not successful, KeLSA can take steps to rehabilitate them by the respective State governments with the help of State Legal Services Authority (SLSA) in the State concerned.

2) *In the case of remand prisoners undergoing treatment on mental health centres, if the offence alleged is punishable with imprisonment not more than 10 years and continuing in mental health centre for more than 5 years and still unfit for trial, can be rehabilitated to their homes. In the absence of family or reluctance of the family to take them back they can be rehabilitated in Psycho Social Rehabilitation Centres as stated in the report of the second respondent. They have top be periodically (every 3 months or 6 months) examined by the medical board and report to the Court, whether they are fit to stand trial. If, they are continuing in the same position i.e unfit for trial for a period of 5 years after such rehabilitation the matter has to be reported to the High Court and the Honourable High Court may invoke the power under Section 482 of Cr.P.C, to secure the ends of justice.*

3) *In the case of remand prisoners, where the offence alleged is punishable with imprisonment of more than 10 years or death penalty, can be rehabilitated to their family or in the absence of family or their reluctance to take them back, can be rehabilitated to the Psycho Social Rehabilitation Centre, after 10 years of admission to the mental health centre and the medical board had opined that still they are unfit for trial. The medical board has to periodically (every 3 months and 6 months) examine the prisoners and to ascertain whether they are fit for trial. If they are continuing in the same position i.e unfit for trial for 10 years thereafter the matter has to be reported to the High Court and the Honourable High Court may invoke its power under Section 482 Cr.P.C to secure the ends of justice."*

3. On its part, the Government framed a scheme for rehabilitation of mentally ill prisoners continuing in Mental Health

Centres after acquittal. The Scheme provides for shifting such prisoners to Psycho-Social Rehabilitation Centres which had expressed willingness to look after such persons. The Government also decided to sanction an amount of Rs.39,660/- per year to such Psycho-Social Rehabilitation Centres and issued G.O(Rt).No.426/2019/SJD dated 10.7.2019 sanctioning Rs.39,660/- to the Psycho Social Rehabilitation Institutions that had taken in eight mentally ill acquitted persons.

4. The Government has filed a statement in this original petition through its Secretary, Social Justice Department. It is stated that the Social Justice Department had convened a meeting on 22.09.2020 with stakeholders such as State Police Chief, Home Department, Health Department, Director of Social Justice, Mental Health Authority, Orphanage Control Board, Kerala Social Security Mission (KSSM), Director of Health Services and Superintendents of Mental Health Centres. Based on the deliberations in the meeting and recommendation of the stakeholders, the Government has accepted the suggestions of the Member Secretary, KELSA.

5. Before proceeding to take a decision on the suggestions,

an analysis of the relevant statutory provisions is highly essential. Chapter XXV of the Code of Criminal Procedure, the provisions of which are extracted here under, governs the enquiry, trial and acquittal/conviction of mentally ill persons;

> *"S.328**.—Procedure in case of accused being lunatic***
>
> *(1) When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.*
>
> *(1A) If the civil surgeon finds the accused to be of unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation:*
>
> *Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of—*
>
> *(a) head of psychiatry unit in the nearest government hospital; and*
>
> *(b) a faculty member in psychiatry in the nearest medical college;*
>
> *(2) Pending such examination and inquiry, the Magistrate may deal with such person in accordance with*

the provisions of Section 330.

(3) If such Magistrate is informed that the person referred to in sub-section (1-A) is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate shall record a finding to that effect, and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if he finds that no prima facie case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with him in the manner provided under Section 330:

Provided that if the Magistrate finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused, and order the accused to be dealt with as provided under Section 330.

(4) If such Magistrate is informed that the person referred to in sub-section (1-A) is a person with mental retardation, the Magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence, and if the accused is found so incapable, the Magistrate shall order closure of the inquiry and deal with the accused in the manner provided under Section 330.

329. ***Procedure in case of person of unsound mind tried before Court****.—*

(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it

shall record a finding to that effect and shall postpone further proceedings in the case.

(1A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of—

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.

(2) If such Magistrate or Court is informed that the person referred to in sub-section (1-A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under Section 330:

Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

(3) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with Section 330.

***330. Release of person of unsound mind pending investigation or trial**.—*

(1) Whenever a person if found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be shall, whether the case is one in which bail may be taken or not, order release of such person on bail:

Provided that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the nearest medical facility and to prevent from doing injury to himself or to any other person.

(2) If the case is one in which, in the opinion of the Magistrate or Court, as the case may be, bail cannot be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State Government:

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the State Government may have made under the Mental Health Act, 1987 (14 of 1987).

(3) Whenever a person is found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the release of the accused can be ordered:

Provided that—

(a) if on the basis of medical opinion or opinion of a specialist, the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under Section 328 or Section 329, such release may be ordered, if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person;

(b) if the Magistrate or Court, as the case may be, is of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training.

331. Resumption of inquiry or trial.—

(1) Whenever an inquiry or a trial is postponed under Section 328 or Section 329, the Magistrate or Court, as the case may be, may at any time after the person concerned has ceased to be of unsound mind, resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under Section 330, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

***332. Procedure on accused appearing before Magistrate or Court**.—*

(1) If, when the accused appears or is again brought before the Magistrate or Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall act according to the provisions of Section 328 or Section 329, as the case may be, and if the accused is found to be of unsound mind and consequently incapable of making his defence, shall deal with such

accused in accordance with the provisions of Section 330.

333. ***When accused appears to have been of sound mind.—***

When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act, which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be tried by the Court of Session, commit him for trial before the Court of Session.

*334. J****udgment of acquittal on ground of unsoundness of mind.—***

Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

335. Person acquitted on such ground to be detained in safe custody.—

(1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence,—

(a) order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit; or

(b) order such person to be delivered to any relative or friend of such person.

(2) No order for the detention of the accused in a lunatic asylum shall be made under clause (a) of sub-

section (1) otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

(3) No order for the delivery of the accused to a relative or friend shall be made under clause (b) of sub-section (1), except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person,

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct.

(4) The Magistrate or Court shall report to the State Government the action taken under sub-section (1).

***336. Power of State Government to empower officer in charge to discharge**.—*

The State Government may empower the officer in charge of the jail in which a person is confined under the provisions of Section 330 or Section 335 to discharge all or any of the functions of the Inspector-General of Prisons under Section 337 or Section 338.

***337. Procedure where lunatic prisoner is reported capable of making his defence**.—*

If such person is detained under the provisions of sub-section (2) of Section 330, and in the case of a person detained in a jail, the Inspector-General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of Section 332; and the certificate of such Inspector-General or visitors as aforesaid shall be receivable as evidence.

338. Procedure where lunatic detained is declared fit to be released.—

(1) If such person is detained under the provisions of sub-section (2) of Section 330, or Section 335, and such Inspector-General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the State Government may thereupon order him to be released, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make a formal inquiry into the state of mind of such person, take such evidence as is necessary, and shall report to the State Government, which may order his release or detention as it thinks fit.

***339. Delivery of lunatic to care of relative or friend**.—*

(1) Whenever any relative or friend of any person detained under the provisions of Section 330 or Section 335 desires that he shall be delivered to his care and custody, the State Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such State Government, that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person;

(b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct;

(c) in the case of a person detained under sub-section (2) of Section 330, be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence, the trial of which has been postponed by reason of

his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in clause (b) of sub-section (1), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production the Magistrate or Court shall proceed in accordance with the provisions of Section 332, and the certificate of the inspecting officer shall be receivable as evidence."

6. On going through the provisions it is seen that Section 328 applies at the enquiry stage and Section 329, at the trial stage. Both sections prescribe the procedure to be followed when the Magistrate or Court of Session has reason to believe that the accused is a person of unsound mind. The sections also provide for discharging the accused, if he is found to be a person of unsound mind incapable of entering his defence and no prima facie case is made out against him. In the case of others, the proceedings has to be postponed for the period required for their treatment. In either case the procedure under Section 330 should be followed. Section 330 provides for either releasing the accused on bail or, of ordering the accused to be kept in a place where regular psychiatric treatment can be provided, if the case is one in which bail cannot be granted. Section 335 provides for detention in safe custody of a person acquitted on the ground of unsoundness of mind and Section 339 empowers the State

Government to deliver a person of unsound mind, detained under Sections 330 or 335, to any relative or friend of the person upon application and on giving security that the person delivered will be taken care of properly and produced for inspection of such officer, at such times and places, as the State Government may direct. Going by Section 337, the detention under Section 330(2) will continue till the person is certified to be capable of making his defence.

7. From a conjoint reading of the provisions it is evident that, in spite of being found eligible for discharge or release on bail or even on being acquitted, a mentally ill prisoner may have to continue in prison or a mental health facility, until a friend or relative volunteers to take him and to give him proper care. Such good Samaritan's being absent in the case of most of the mentally ill accused, they continue to languish in prisons and mental health centres for years together. Even worse is the case of undertrial prisoners, who are to continue under remand till they are capable of making their defence, which may take years together and for the most unfortunate, may never happen.

8. A survey of the statutes enacted for the welfare and well

being of mentally ill persons shows that the Lunacy Act of 1912, with its inappropriate terminologies like 'lunatic asylums', 'criminal lunatic' etc. and discriminatory provisions, was repealed and replaced by the Mental Health Act, 1987 containing more ameliorative provisions. On 1.10.2007, India became a signatory to the United Nations convention on rights of persons with disabilities and it's optional protocol. The United Nations convention made it obligatory for the Government to align its policies and laws with the convention. Hence it became imperative to replace the Mental Health Act, 1987 with the Mental Healthcare Act, 2017 ('the Act', for short), envisaged to bring about revolutionary changes in the life and living standards of persons with mental illness. Under the Act, a person with mental illness is conferred with a right to make an advance directive in writing, specifying the way he wishes to be cared for and treated for a mental illness and to name the individual or individuals, in order of precedence, he wants to be appointed as his nominated representative. The Act has made community living the right of every mentally ill person, and guarantees the right to protection from cruel, inhuman and degrading treatment. The Following are some of the contextually relevant provisions of the Act.

"*Section 2.* ***Definitions.-***

xx xx xx

(d) "Board" means the Mental Health Review Board constituted by the State Authority under sub-section (1) of Section 80 in such manner as may be prescribed;

xx xx xx

(o) "Mental healthcare" includes analysis and diagnosis of a person's mental condition and treatment as well as care and rehabilitation of such person for his mental illness or suspected mental illness;

(p) "mental health establishment" means any health establishment, including Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homoeopathy establishment, by whatever name called, either wholly or partly, meant for the care of persons with mental illness, established, owned, controlled or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, cooperative society, organisation or any other entity or person, where persons with mental illness are admitted and reside at, or kept in, for care, treatment, convalescence and rehabilitation, either temporarily or otherwise; and includes any general hospital or general nursing home established or maintained by the appropriate Government, local authority, trust, whether private or public, corporation, cooperative society, organisation or any other entity or person; but does not include a family residential place where a person with mental illness resides with his relatives or friends;

xx xx xx

(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;

xx xx xx

(w) "prisoner with mental illness" means a person with mental illness who is an undertrial or convicted of an offence and detained in a jail or prison;

xx xx xx

*19**. Right to community living**.—(1) Every person with mental illness shall,—*

(a) have a right to live in, be part of and not be segregated from society; and

(b) not continue to remain in a mental health establishment merely because he does not have a family or is not accepted by his family or is homeless or due to absence of community based facilities.

(2) Where it is not possible for a mentally ill person to live with his family or relatives, or where a mentally ill person has been abandoned by his family or relatives, the appropriate Government shall provide support as appropriate including legal aid and to facilitate exercising his right to family home and living in the family home.

(3) The appropriate Government shall, within a reasonable period, provide for or support the establishment of less restrictive community based establishments including half-way homes, group homes and the like for persons who no longer require treatment in more restrictive mental health establishments such as long stay mental hospitals.

xx xx xx

***73. Constitution of Mental Health Review Boards**.—(1) The State authority shall, by notification, constitute Boards to be called the Mental Health Review Boards, for the purposes of this Act.*

(2) The requisite number, location and the jurisdiction of the Boards shall be specified by the State Authority in consultation with the State Governments concerned.

(3) The constitution of the Boards by the State Authority for a district or group of districts in a State under this section shall be such as may be prescribed by the Central Government.

(4) While making rules under sub-section (3), the Central Government shall have regard to the following, namely—

(a) the expected or actual workload of the Board in the State in which such Board is to be constituted;

(b) number of mental health establishments existing in the State;

(c) the number of persons with mental illness;

(d) population in the district in which the Board is to be constituted;

(e) geographical and climatic conditions of the district in which the Board is to be constituted.

***74. Composition of Board.**—(1) Each Board shall consist of—*

(a) a District Judge, or an officer of the State judicial services who is qualified to be appointed as District Judge or a retired District Judge who shall be Chairperson of the Board;

(b) representative of the District Collector or District Magistrate or Deputy Commissioner of the districts in which the Board is to be constituted;

(c) two members of whom one shall be a psychiatrist and the other shall be a medical practitioner.

(d) two members who shall be persons with mental illness or caregivers or persons representing organisations of persons with mental illness or caregivers or non-governmental organisations working in the field of mental health.

(2) A person shall be disqualified to be appointed as the Chairperson or a member of a Board or be removed by the State Authority, if he—

(a) has been convicted and sentenced to imprisonment for an offence which involves moral turpitude; or

(b) is adjudged as an insolvent; or

(c) has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government; or

(d) has such financial or other interest as is likely to prejudice the discharge of his functions as a member; or

(e) has such other disqualifications as may be prescribed by the Central Government.

(3) A Chairperson or member of a Board may resign his office by notice in writing under his hand addressed to the Chairperson of the State Authority and on such resignation being accepted, the vacancy shall be filled by appointment of a person, belonging to the category under sub-section (1) of Section 74.

xx xx xx.

*103. **Prisoners with mental illness**.—(1) An order under Section 30 of the Prisoners Act, 1900 (3 of 1900) or under Section 144 of the Air Force Act, 1950 (45 of 1950), or under Section 145 of the Army Act, 1950 (46 of 1950), or under Section 143 or Section 144 of the Navy Act, 1957 (62 of 1957), or under Section 330 or Section 335 of the Code of Criminal Procedure, 1973 (2 of 1974), directing the admission of a prisoner with mental illness into any suitable mental health establishment, shall be sufficient authority for the admission of such person in such establishment to which such person may be lawfully transferred for care and treatment therein:*

Provided that transfer of a prisoner with mental illness to the psychiatric ward in the medical wing of the prison shall be sufficient to meet the requirements under this section:

Provided further that where there is no provision for a psychiatric ward in the medical wing, the prisoner may be transferred to a mental health establishment with prior permission of the Board.

(2) The method, modalities and procedure by which the transfer of a prisoner under this section is to be effected shall be such as may be prescribed.

(3) The medical officer of a prison or jail shall send a quarterly report to the concerned Board certifying therein that there are no prisoners with mental illness in the prison or jail.

(4) The Board may visit the prison or jail and ask the medical officer as to why the prisoner with mental illness, if any, has been kept in the prison or jail and not transferred for treatment to a mental health establishment.

(5) The medical officer in charge of a mental health establishment wherein any person referred to in sub-section (1) is detained, shall once in every six months, make a special report regarding the mental and physical condition of such person to the authority under whose order such person is detained.

(6) The appropriate Government shall set up mental health establishment in the medical wing of at least one prison in each State and Union Territory and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment.

(7) The mental health establishment set up under sub-section (5) shall be registered under this Act with the Central or State Mental Health Authority, as the case may be, and shall conform to such standards and procedures as may be prescribed.

The access to mental health care and to demand community living have become the rights of a person with mental illness."

9. The provisions of the Act, if implemented in its letter and spirit will undoubtedly provide solace to the mentally ill persons,

including the mentally ill prisoners. As far as the mentally ill prisoners are concerned, when a prisoner with mental illness is directed to be admitted into any suitable mental establishment, he has to be transferred either to the psychiatric ward in the medical wing of the prison and in the absence of such facility, to a mental health establishment, with prior permission of the Board. The appropriate Government has to set up a mental health establishment in the medical wing of at least one prison in the state and prisoners with mental illness should ordinarily be referred to and cared for in the said mental health establishment. The mental health establishment thus set up has to be registered under the Act and should conform to the prescribed standards and procedures.

10. One among the most important functionaries under the Act is the Mental Health Review Board ('the Board', for short) constituted under Section 73(1). The composition of the Board under Section 74 includes a District Judge or an officer of a State Judicial Services, who is qualified to be appointed as District Judge or a retired District Judge. The transfer of a prisoner with mental illness to a mental health establishment shall only be with prior permission of the Board. The Medical Officer of a prison or a jail

has to send quarterly reports to the concerned Board certifying that there are no prisoners with mental illness in the prison or jail. The Board has to visit the prison or jail and ask the Medical Officer as to why the prisoner with mental illness, if any, has been kept in the prison and not transferred for treatment to a mental health establishment. The medical officer in-charge of mental health establishments having mentally ill prisoners as inmates is bound to submit a special report regarding the mental and physical condition of such persons to the authority under whose order the persons are detained.

11. It is pertinent to note that the provisions of the Code of Criminal Procedure are yet to be amended in tune with the provisions of the Mental Healthcare Act, 2017. For example, in most of the Sections of Chapter XXV of the Code, mentally ill accused are still termed as ‘lunatic’ and for mental health establishments the term used is lunatic asylum. Not only the terminology, the procedure prescribed in Chapter XXV has to be amended, to make the provisions commensurate with the provisions of the Mental Healthcare Act, so as to achieve the laudable objective of the Act, viz., to make improve the life and living standards of persons with mental illness.

12. The Secretary, KELSA has submitted suggestions and the Government has agreed to them, keeping in mind the best interest of the mentally ill prisoners. The suggestion with regard to the undertrial mentally ill prisoners facing prosecution for offences punishable with a maximum imprisonment of not more than 10 years and continuing in prison/mental health establishments for years together is that, if the period spent as remand prisoner is more than half the period of maximum imprisonment, the High Court may quash the criminal proceedings, invoking the power under Section 482 Cr.P.C. The same remedy is suggested in the case of remand prisoners facing prosecution for offences punishable with imprisonment of more than 10 years or death penalty and continuing in prison/mental health establishments beyond 10 years. Before accepting the suggestion, it will be worthwhile to have a look at the decisions of the Honourable Supreme Court with regard to the delay in completing trial and the rights of undertrial prisoners in such cases. In ***Hussainara Khotoon v. Home Secretary*** [(1980) 1 SCC 81], right to speedy trial was held to be an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution of India. Later, in

A.R.Antulay v. R.S.Nayak [(1992) 1 SCC 225], the Apex Court held that the constitutional guarantee of speedy trial emanating from Article 21 is properly reflected in the provisions of the Code and that no time limit could be drawn for completion of trial, since it cannot be said that the only consequence flowing from an infringement of right to speedy trial is the quashing of the charges and/or conviction. After holding so, the Apex Court issued certain guidelines in regard to speedy trial. The right to speedy trial and the consequence of delay was considered thereafter, in ***Common Cause*-I** [(1996) 4 SCC 33], ***Raj Deo Sharma*-I** [(1998) 7 SCC 507] and ***Raj Deo Sharma*-II** [(1999) 7 SCC 604] and it was held that inordinate delay confers a right on the undertrial prisoner/accused to be acquitted/discharged. The modality to be followed in such cases was also laid down. Later, in ***Ramachandra Rao P. v. State of Karnataka*** [(2002) 9 SCC 430] a five Judges Bench, after considering the above decisions, opined that it would be appropriate for a Bench of seven Judges to consider whether the dictum laid down in ***A.R.Antulay (supra)*** still holds the field and if not, whether the general directions of the kind given in ***Common Cause*** and ***Raj Deo Sharma*** are permissible in law and could be upheld. Accordingly, in

P. Ramachandra Rao v. State of Karnataka, [(2002) 4 SCC 578], the Seven Judges Bench answered the reference with the conclusive finding that the dictum in ***A.R.Antulay (supra)*** is correct and still holds the field. The Bench held that it is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings and hence, the time-limits or bars of limitation prescribed in the several directions made in ***Common Cause (I), Raj Deo Sharma (I)*** and ***Raj Deo Sharma (II)*** could not have been so prescribed or drawn and are not good law. The Bench also opined that criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time. The Bench held that such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused. It was held that the criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial but, in appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be

invoked for granting appropriate relief or for issuing suitable directions. The law on the point having thus been laid down, there cannot be a general direction prescribing any specified time limit beyond which the proceedings against an under trial remand prisoner is bound to be quashed. In appropriate cases, the High Court can invoke its jurisdiction under Section 482 CrPC and Articles 226 and 227 of the Constitution to quash/set aside the proceedings.

13. Having considered the report of the Secretary, KELSA, the statement submitted on behalf of the Government, the relevant provisions under the Code of Criminal Procedure, the Mental Healthcare Act and being guided by the doctrine of *parens patriae* I deem it appropriate to issue the following interim directions;

I) The State Government shall forthwith set up a mental health establishment, as stipulated in Section 103(6) of the Mental Healthcare Act, in at least one prison in the State. The prisoners with mental illness shall ordinarily be referred to and cared for in the said mental health establishment.

II) The Government shall forthwith constitute Mental Health Review Boards under Section 73 of the Mental Healthcare Act, the composition of which shall be in accordance with Section 74 of the Act.

III) The Medical Officers of prisons and mental health establishments shall strictly comply with the duties imposed on them under Section 103 of the Mental Healthcare Act.

IV) The Mental Health Review Boards shall ensure that prisoners with mental illness are allowed to live with dignity and treated as equal to persons with physical illness.

V) The Mental Health Review Boards shall make available details of the mentally ill remand prisoners detained in jails and mental health establishments to the Kerala State Legal Services Authority. Based on the details thus received, the Secretary, KELSA may bring deserving cases to the notice of the High Court, to enable the High Court to take an appropriate decision on the judicial side.

VI) The State Government shall, with the assistance of the KELSA, take necessary steps to trace the relatives of

acquitted mentally ill prisoners and of the undertrial prisoners fit for rehabilitation and persuade their family members to provide necessary care and protection to those persons. If the family members of the acquitted mentally ill persons refuse to take them back, the State Government shall take steps for their rehabilitation by transferring them to the willing registered mental health establishments. Once the mentally ill acquitted person is shifted to a mental health establishment, the amount fixed under G.O(Rt).No.426/2019/SJD dated 10.7.2019 shall be disbursed to that establishment.

VII) The Special Secretary, Social Justice Department shall file a report specifying the steps taken in terms of the above directions.

Post the original petition for further consideration after three months.

Sd/-

V.G.ARUN, JUDGE

vgs