

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.06.2022

CORAM :

THE HON'BLE MR. JUSTICE R.MAHADEVAN
and
THE HON'BLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

Contempt Petition No. 515 of 2018

in W.P. No. 22967 of 2015

and

Writ Petition Nos. 16984 of 2017 and

suo motu WP.No.28237 of 2017 and

Writ Petition Nos. 30458, 30469, 30874 and 30884 of 2019

and

WMP.Nos.30976, 30977, 30978, 30973, 30974, 30975 and 30481 of 2019

Contempt Petition No. 515 of 2018

S. Krishnamurthy
Son of N. Sundaresan
1A, Shriniwas Flats
11/30, Sadulla Street
T. Nagar, Chennai - 600 017

.. Petitioner

Versus

Dr. Manivasan
The Principal Secretary
Social Welfare & Nutritious Meal Programme Department
Fort St. George, Chennai - 600 009

.. Respondent

Writ Petition No. 16984 of 2017

S. Sivaraman

.. Petitioner

Versus

1. The Secretary to Government
Social Welfare and Nutritious Meal Programme Department
Secretariat, Fort St. George
Chennai - 600 009
2. The District Collector
Office of the District Collector
Coimbatore - 641 041
3. M/s. Tapovan Residents Welfare Association
rep. by its President N. Padmanabhan Iyer @ N.P. Iyer
No.18, Tapovan Complex
Karadimadai Road, Kuppanur Post
Coimbatore
4. Tvl. Swasthya Retirement Homes Private Limited
140/3, Sholanur Village
Pollachi - 642 002

(RR3 and 4 were impleaded as per the order dated
05.02.2020 made in WMP Nos. 10468 and 8596 of 2019
in WP No. 16984 of 2017)

5. Tapovan Senior Citizens Foundation Trust
represented by its Secretary R. Subramanian
Having Office at 2A, Tapovan Complex
Karadimadai Road, Kuppanur Post
Coimbatore - 641 010
(R5 impleaded as per order dated 29.04.2022
made in WMP No. 7164 of 2022 in
WP No.16984 of 2017)

.. Respondents

Suo motu WP.No.28237 of 2017

- 1.The Principal Secretary,
Social Welfare and Nutritious Meal Programme Department
Fort St.George, Secretariat
Chennai – 600 009.
- 2.The Director of Social Welfare,
Guindy, Chennai – 600 032
- 3.The District Collector,
Coimbatore.
- 4.The District Social Welfare Officer,
Coimbatore.
- 5.Dhyanaprastha Foundation,
promoted by Mr.A.V.Ramaswamy,
No.3, Pyramid Complex,
Vadavalli, Coimbatore – 641 041. ...Respondents

WP .No. 30458 of 2019

M/s. Dhyanaprastha Foundation
rep. by its Secretary Mr. R. Venkataraman
A-1, Vanaprastha
Kasthuri Naicken Palayam
Coimbatore - 641 041 .. Petitioner

Versus

1. State of Tamil Nadu
rep. by its Secretary to Government
Social Welfare and Nutritious Meal Programme Department
Ministry of Social Welfare and Nutritious Meal Programme
Department
Fort St. George, Chennai - 600 009
2. Director of Social Welfare

Chepauk, Chennai - 600 005

3. The District Collector
Office of the District Collector
Coimbatore - 641 041

4. S. Krishnamurthy .. Respondents

WP No. 30469 of 2019

M/s. Brindhavan Senior Citizen Foundation
rep. by its Vice-President Mr. R. Parthasarathy
Guhan Gardens, Lakshmi Nagar
Thondamathur Road, Coimbatore

.. Petitioner

Versus

1. State of Tamil Nadu
rep. by its Secretary to Government
Social Welfare and Nutritious Meal Programme Department
Ministry of Social Welfare and Nutritious Meal Programme
Department, Fort St. George, Chennai - 600 009
2. Director of Social Welfare
Chepauk, Chennai - 600 005
3. The District Collector
Office of the District Collector
Coimbatore - 641 041

4. S. Krishnamurthy .. Respondents

WP .No. 30874 of 2019:-

M/s. Sree Dharma Sastha Trust
rep. by its President Mr. R. Venkataraman
Ayyappa Complex
6/2027B, Lalan Road
Mattancherry, Cochin - 682 002

.. Petitioner

Versus

1. State of Tamil Nadu
rep. by its Secretary to Government
Social Welfare and Nutritious Meal Programme Department
Ministry of Social Welfare and Nutritious Meal Programme
Department
Fort St. George, Chennai - 600 009

2. Director of Social Welfare
Chepauk, Chennai - 600 005

3. The District Collector
Office of the District Collector
Coimbatore - 641 041

4. S. Krishnamurthy

.. Respondents

WP. No. 30884 of 2019:-

M/s. Vanaprastha
rep. by its Managing Director Mr. A.V. Ramaswamy
267-B, Dr. Ambedkar Road
Coimbatore - 641 025

.. Petitioner

Versus

1. State of Tamil Nadu
rep. by its Secretary to Government

Social Welfare and Nutritious Meal Programme Department
Ministry of Social Welfare and Nutritious Meal Programme
Department
Fort St. George, Chennai - 600 009

2. Director of Social Welfare
Chepauk, Chennai - 600 005
3. The District Collector
Office of the District Collector
Coimbatore - 641 041
4. S. Krishnamurthy

.. Respondents

Contempt Petition No. 515 of 2018:- Contempt Petition filed under Section 11 of The Contempt of Courts Act, 1971 praying to punish the respondent or any other authority as this Court deems fit for Contempt of Court, for deliberately disobeying the order dated 28.11.2016 passed in WP No. 22967 of 2015.

WP No. 16984 of 2017: Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Mandamus directing the respondents to effectively and strictly implement the G.O. Ms. No. 83 in Social Welfare and Nutritious Meal Programme Department dated 23.11.2016 in the State of Tamil Nadu.

Suo motu WP.No.28237 of 2017: Petition under Article 226 of the Constitution of India praying to issue a writ of mandamus directing the respondents to implement G.O.Ms.No.83 dated 23.11.2016 issued by the Social Welfare and Nutritious Meal Programme Department that (1)All senior citizen homes must register with the District Social Welfare Officer (DSWO). All bi-lateral agreements between the senior citizen and the Home must be compulsorily registered with the appropriate authority (2)Food and other essential services to the residents should not be stopped under any circumstances (3)Fund provides should be inducted as majority in the management for financial transparency (4)there should be proper medical facilities, supply of purified drinking water and other various basic requirements of senior citizens; and file a report for the above compliance

before this court.

WP No. 30458 of 2019:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the first respondent pertaining to the Government Order dated 23.11.2016 in G.O. (Ms) No.83, issued by the Social Welfare and Nutritious Meal Programme (SW6(1) Department viz., the first respondent herein, under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and Tamil Nadu Maintenance of Welfare of Parents and Senior Citizens Rules, 2009 and quash the same and direct the third respondent not to take any action against the petitioner under the G.O. (Ms) No. 83 dated 23.11.2016 issued by the first respondent.

WP No. 30469 of 2019:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the first respondent pertaining to the Government Order dated 23.11.2016 in G.O. (Ms) No.83, issued by the Social Welfare and Nutritious Meal Programme (SW6(1) Department viz., the first respondent herein, under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and Tamil Nadu Maintenance of Welfare of Parents and Senior Citizens Rules, 2009 and quash the same and direct the third respondent not to take any action against the petitioner under the G.O. (Ms) No. 83 dated 23.11.2016 issued by the first respondent.

WP No. 30874 of 2019:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the first respondent pertaining to the Government Order dated 23.11.2016 in G.O. (Ms) No.83, issued by the Social Welfare and Nutritious Meal Programme (SW6(1) Department viz., the first respondent herein, under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and Tamil Nadu Maintenance of Welfare of Parents and Senior Citizens Rules, 2009 and quash the same and direct the third respondent not to take any action against the petitioner under the G.O. (Ms) No. 83 dated 23.11.2016 issued by the first respondent.

WP No. 30884 of 2019:- Petition filed under Article 226 of The Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records of the first respondent pertaining to the Government Order dated 23.11.2016 in G.O. (Ms) No.83, issued by the Social Welfare

and Nutritious Meal Programme (SW6(1) Department viz., the first respondent herein, under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and Tamil Nadu Maintenance of Welfare of Parents and Senior Citizens Rules, 2009 and quash the same and direct the third respondent not to take any action against the petitioner under the G.O. (Ms) No. 83 dated 23.11.2016 issued by the first respondent.

For Petitioner : Mr. J. Narayanasamy
Amicus Curiae in Cont.P. No. 515 of 2018

Mr. S. Arokia Maniraj
in WP No. 16984 of 2017

Mr. N.L. Rajah, Senior Counsel
for Mr. K.R. Arun Shabari
in WP Nos. 30458, 30469, 30874, 30884
of 2019

For Respondents : Mr. V. Arun
Additional Advocate General
assisted by Mr. P. Balathandayutham
Special Government Pleader in all cases

Mrs. Aparna Nandakumar for R4
in WP No. 16984 of 2017

Mr. N.L. Rajah, Senior Counsel
for Mr. K.R. Arun Shabari for R5
in Suo motu WP No. 28237 of 2017

Mr. C.G. Kumar for R5 in
WP.No.16984 of 2017

COMMON ORDER

R.MAHADEVAN, J.

For the sake of convenience, this order is arranged under the following

heads:

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I. PREFATORY NOTE

1. To expect a tree to flourish without nurturing its roots, is an analogy comparable to the present generation disregarding and treating with

contempt their parents, elders and senior citizens of society. It is often said that the measure of a society is the way in which it treats its most vulnerable, and going by that standard, it would not be an exaggeration to State that we, as a society, have failed in measuring up to the expectation of our ancestors and elders, who laboured hard to imbibe those very values of respect and compassion in us.

2. The present case is an instance, where one of the important pillars of the State, has decisively exercised its '*parens patriae*' jurisdiction acting as the parent of the State and every one of its citizens. This court is conscious of the limitations of its role and powers, seen from the angle that a society that does not keep up with its duty to protect its elderly can never be positively transformed by judicial edicts alone. In any case, this court is embarking on the journey to safeguard the interests of elderly and senior citizens with the fervent hope that the Indian society will realize its moral duties towards its elders and the State will play a proactive role in ensuring health, self-sufficiency as well as dignity to every senior citizen of this country.

II. DETAILS OF CASES TO BE DECIDED & PLEADINGS OF THE PARTIES

3. The issues involved in all these cases are identical and common, therefore, they are taken up for hearing together and disposed of by this common order.

Contempt Petition No. 515 of 2018 in WP. No. 22967 of 2015

4. According to the contempt petitioner by name Krishnamurthy, he originally filed a Public Interest Litigation in WP No. 22967 of 2015 praying to issue a Writ of Mandamus directing the respondents to frame regulation and appoint a regulatory authority to monitor the functioning of the Senior Citizen homes. By order dated 16.10.2019, this Court appointed Mr. J. Narayanaswamy, Advocate as *Amicus Curiae* to suggest three more advocates to constitute a team of *Amicus Curiae* to cross verify the compliances made by the respondents and to file an affidavit with regard to specific cases of non-compliance or lack of facilities in the old age homes for the benefit of senior citizens. Subsequently, slew of orders and/or directions were issued by this Court in WP No. 22967 of 2015, pursuant to

which the Government had reported about the modifications brought to the existing G.O. (Ms) No.83, Social Welfare and Nutritious Meal Programme (SW 6(1)) Department dated 23.11.2016. By recording the same, this court disposed of the said writ petition viz., WP No. 22967 of 2015 in the following terms:

“a. The modified G.O. (Ms.) No.83, Social Welfare and Nutritious Meal Programme (SW 6(1)) Department dated 23.11.2016 has been issued and the petitioner expresses his satisfaction with the same. He, however, expresses a dual concern: (a) there should be a sincere endeavour to inspect the existing Homes to ensure that they are compliant; and (b) an endeavour should be made to locate the unregistered Homes and they should be visited for consequences of non-registration.

b. Learned Government Pleader assures that on both the aspects, serious effort would be made.

c. We appreciate the constructive role played by the State Government and the counsels for the State Government and the Central Government, as also the petitioner and his counsel in taking up the issue, the resultant of which is the G.O. which has now been issued.

d. Writ petition is, accordingly, closed. No costs.”

5. For the alleged non-compliance of the aforesaid order dated 28.11.2016 passed in WP No. 22967 of 2015, this contempt petition came to be filed by the petitioner.

6. The grievance of the petitioner in the contempt petition is that the Government or the instrumentalities of the Government have not taken any efforts to inspect the unregistered or registered homes to satisfy that the guidelines issued by the Government in G.O. Ms. No. 83 dated 23.11.2016 have been complied with in its letter and spirit. It is further stated that in paragraph 10 of the said G.O. Ms. No.83 dated 23.11.2016, the Government has merely delegated the task of inspecting and/or monitoring the old age homes with the Director of Social Welfare as well as the District Collector. Therefore, the petitioner has written letters requiring the authorities to implement the order of this Court, particularly by referring to Rule No. IX(i), which provides for management of governance. As per Rule IX (i), the management should be broad based with majority of elected representatives of fund providers with transparency in financial matters. The said Rule empowers the senior citizens, who are fund providers, to have an effective voice and participate in the decision making process especially when they have parted with their hard earned money and terminal benefits to these private homes. However, the directions issued by this Court have not

been complied with. Therefore, the present contempt petition is filed.

7. The first respondent filed a reply affidavit denying the averments made in the affidavit filed in support of the contempt petition. It is stated that some of the senior citizens like the petitioner, entered into agreement with the management of the private homes, which contains several clauses including payment of security deposit. In such cases, at the expiry of the period of agreement, the occupier has to either vacate the old age home or get the agreement extended for a further period. Therefore, the conditions based on which a contract has been entered into by the petitioner with a third person will bind him. Most of the occupiers of old age home are executing leave and license agreement for 20 years. The land belongs to the trust/foundation and only the building was leased out. In the case of Dhyana Prastha Foundation, a society registered under the Tamil Nadu Societies Registration Act, on 08.10.2002, under which the petitioner became a lessee, paid a caution deposit of Rs.6,89,000/- and licence was executed in his favour for 20 years. Out of the caution deposit, a sum of Rs.24,000/- will be deducted towards maintenance and the remaining

amount will be refunded after expiry of 20 years as per the agreement dated 25.05.2014. It is further stated that Dhyanaprastha Foundation consists of several committees and the petitioner is one of the members in the Kitchen committee of the said foundation. Further, most of the members of the committees are elected by the inmates among themselves and they are looking after the administration of the Trust/Old age home. While so, the present attempt of the petitioner is to interfere with the business transaction of the trust while being a lessee. The petitioner being a lessee and having entered into an agreement with the Trust, the dispute, if any, has to be resolved by themselves and interference of the respondents cannot be called upon.

8. It is further stated by the first respondent that even though the Government cannot interfere with the contractual dispute between two private parties, on the basis of the order dated 24.06.2019 passed by this Court, a show cause notice dated 07.08.2019 was issued to Dhyanaprastha Foundation, Coimbatore calling upon them to show cause as to why action should not be taken against them for contravention of clause IX (i) of G.O.

Ms No.83, Social Welfare and Nutritious Meal Programme 6(1) Department dated 23.11.2016 or to close down the Senior Citizen home run by them. But, so far, no reply has been received to the said show cause notice. It is further stated in the reply statement of the first respondent that a reply is awaited from the Old Age Home or if the Foundation fails to submit the reply, appropriate action deemed fit will be taken up by the District Collector, Coimbatore as per law.

WP No. 16984 of 2017

9. This writ petition has been filed as a Public Interest Litigation. According to the petitioner, he is a Senior Citizen and is in receipt of pension every month. It is stated that there are more than 18 paid senior citizens homes mushroomed in Coimbatore District and the services rendered in those homes are paid service. In other words, each and every service rendered in those homes are chargeable or paid service. The petitioner further averred that the promoters of those Old Age Homes are fleecing the inmates and demanding exorbitant amount as service charges. Even the petitioner and his wife are living in the Old Age Home called

Tapovan since February 2014 and at the time of their induction, they have entered into a lease deed for 20 years with one Mr. M.N. Varadarajan and paid Rs.20 lakhs. However, after staying there for three years, the petitioner came to know that the said Varadarajan is not the owner of the property. On enquiry, the petitioner came to know that one Mr. Adithya is the owner of the facility and he had given a General Power of Attorney in favour of the said Varadarajan. Thus, it is stated that the grievance, if any, could not be ventilated by the inmates of the Private Old Age Homes and there should be a mechanism put in place.

Suo motu WP No. 28237 of 2017

10. This *suo motu* writ proceeding is registered on the basis of a letter dated 25.10.2017 written by one Mr.Sangameswaran Krishnan, who is a resident of a paid senior citizen's home, known as Pyramid Complex in Coimbatore, praying for a direction to the respondents to implement G.O. Ms. No. 83 dated 23.11.2016 issued by the Social Welfare and Nutritious Meal Programme Department with a direction to all senior citizen homes to be registered with the District Social Welfare Officer; all bi-lateral

agreements between the senior citizen and the Home to be compulsorily registered with the appropriate authority; food and other essential services to the residents should not be stopped under any circumstances; fund providers should be inducted as majority in the management for financial transparency; to provide proper medical facilities, supply of purified drinking water and other basic requirements of senior citizens and to file a report of compliance before this Court.

11. In the said letter dated 25.10.2017, it is alleged by the said Mr.Sangameswaran Krishnan that lured by the pep talk of the promoter of the home A.V. Ramaswamy, they moved into the senior citizen home during the year 2006 after paying Rs.13 lakhs as interest free security deposit. At the time of their accommodation, fancy promises were made by the promoter of the home offering quality food, security, religious recreational activities and opportunity to interact with similar age group of persons. Therefore, he signed a long term lease for 20 years with provision for renewal for a further period of 20 years at the option of the lessee on the same terms or with altered conditions. The lease deed was not registered though it is

compulsory, which resulted in loss of revenue to the exchequer. Further, the promoter Ramasamy flouted all the provisions of law and now, he is showing his resistance and unwillingness to implement the order passed by the Government in G.O. Ms. No.83 dated 23.11.2016, with the result, the hapless and vulnerable senior citizens are severely affected with nowhere to turn except to approach this Court.

12. In response, two status reports were filed, one by the first respondent - Principal Secretary to the Government of Tamil Nadu, Social Welfare and Nutritious Meal Programme Department and another by the Director of Social Welfare, Chennai - 600 032. In the status report of the second respondent, it was stated that in the 32 Districts of the State, there are 118 Old Age Homes are being run by Non-Governmental Organisations with State and Central Government Grant-in-aid and they are duly registered in accordance with G.O. Ms. No.83 dated 23.11.2016. According to the second respondent, implementing G.O. Ms. No.83 dated 23.11.2016 would result in mandatory registration of the Old Age Homes bringing such homes within the administrative control of the Social Welfare Department, which *inter alia* require compliance of Rule 16 of the Tamil Nadu Maintenance

and Welfare of Parents and Senior Citizens Rules, 2009, the minimum area per inmate, provision for proper ventilation, floors with wooden carpets to cover slippery surfaces, safe drinking water, medical care and special assistance, special toilets and ramps for differently abled persons, dignified burial of the bodies in the event of death etc. The said compliances are also verified by the District Social Welfare Officer periodically. Further, registration of the Old Age Homes would result in adherence of several compliances such as proof of building stability certificate, fire safety certificate, sanitation certificate, qualification of the staff, salary given to them, photographs of the staff, audited statement once in three years, annual report once in three years, nutrition charge, submission of report by the District Social Welfare Officers etc. In case of absolute purchase of retirement homes by individual, the owner should have absolute right to sell the unit and any breach of agreement would result in de-registration/cancellation of the entity. As per Rule 23 of the Tamil Nadu Maintenance and Welfare of Parents and Senior Citizens Rules, 2009, the District Committee of Senior Citizens is the regulatory authority established in all the District with the District Collector as Chairman. Apart from

periodical monitoring and inspection of old age homes, the G.O. Ms. No.83 also provides for resolution of the petitions received in the office of the District Social Welfare Officer and out of the 2224 cases, around 1003 cases have been amicably settled and 1221 cases, which could not be settled through counselling, were referred to Sub-Divisional Tribunals headed by the Revenue Divisional Officer and District Tribunals headed by the District Collector. It is further averred that there are Old Age Homes which are free from any complaint from the inmates. However, in some Homes, when the management hikes, the charges due to increase in grocery and other provisional items, dispute arose between the inmates and management. Even in the present case, the dispute is attributable due to increase in food charges by the Promoter and non-payment of the party. However, instructions were issued to the Promoter not to stop supply of food at any cost and to ensure that basic amenities are continued to be provided. The respondents are also insisting those Old Age Homes, which are not registered, to get it registered mandatorily. Thus, it is stated that effective steps were taken to redress the complaints then and there as provided in G.O. Ms. No.83, Social Welfare and Nutrition Meals Programme

Department dated 23.11.2016.

Writ Petition Nos. 30458, 30469, 30874 and 30884 of 2019

13. These writ petitions are filed by the petitioners, who are running and maintaining private old age homes for senior citizens. They are aggrieved by the order dated 23.11.2016 passed in G.O. Ms. No.83, Social Welfare and Nutritious Meal Programme Department, issued by the Government.

14. The main grievance projected in these writ petitions is that G.O. Ms. No. 83 dated 23.11.2016 has been passed invoking the provisions of The Maintenance and Welfare of Parents and Senior Citizens Act and Rules, which according to them, has no application to the running of old age homes. It is vehemently contended that those Senior Citizens, who are admitted in their homes, are not indigent, but are affluent inasmuch as they retired from government service after holding top posts. The children of most of the inmates were settled in foreign countries and therefore, they anticipated a decent shelter at their advanced age. Their accommodation in the Old Age Homes is preceded by agreements for leave and licence which contain several terms and conditions. As per the agreement, a fixed amount will be remitted towards caution deposit and utilising the same, the inmates

will be provided with all the basic amenities such as food, round the clock security, clean drinking water, ambulance services, medical care, amusement and entertainment, religious activities such as prayers etc., to suit their needs. The petitioners also utilise the amount so deposited for payment of salaries to the staff employed at the complex and to meet the other incidental expenses.

15. The petitioners further averred that the petitioner in Contempt Petition No. 515 of 2018, has filed WP No. 22967 of 2015 for framing regulations and appointment of regulatory authority to monitor the functioning of the Senior Citizen homes and on the basis of the directions issued by this Court, the Government issued the impugned G.O. Ms. No.16 dated 09.02.2016 which provides for periodical visit to the old age homes to ensure compliance of various procedural requirements. On the basis of the directions issued by this Court, the impugned G.O. Ms. No. 83 dated 23.11.2016 was issued.

16. It is further submitted that the Maintenance of Parents and Senior Citizens Act, 2007 envisages setting up of old age homes by the State Government to accommodate indigent senior citizens. In the case of the

petitioners, they are only accommodating affluent senior citizens who have the wherewithal and are resourceful enough to remit the amount towards caution deposit. The applicability of the scheme can at best be extended to Homes or Shelters established by the Government to accommodate the indigent persons or those who have no wherewithal or abandoned by their children. The scope of the Act, therefore, cannot be extended to private homes run by the petitioners. In the case of the petitioners, they enter into Leave and Licence agreement with the Senior Citizens, who require shelter, which contains several clauses and it would bind the Old Age Home as well as the lessee. In such circumstances, the periodical visit or interference of the instrumentalities of the Government is not required and it offends the fundamental rights as guaranteed to the petitioners under Article 19 (2) (g) of The Constitution of India.

17. A counter affidavit was filed by the Additional Chief Secretary to the Government of Tamil Nadu, Social Welfare and Women Empowerment Department on behalf of the respondents. According to the respondents, the petitioners have registered themselves under the Societies Registration Act for the purpose of running, maintaining and managing the senior citizens

homes. When the petitioners involved themselves in such activities, it is always open to the respondents to cause periodical inspection and whether the medical care and other amenities are properly provided, notwithstanding the leave and licence agreement entered into between the occupants and the writ petitioners. Thus, it is stated that the State Government has a bounden duty to discharge in protecting the senior citizens from being harassed or victimised in any manner. Therefore, it cannot be said that the Senior Citizen Homes run by the petitioners must be free from the purview of any interference, inspection or supervision by the Government.

18. The moot question therefore that arises for consideration before this Court at this stage is the validity of G.O. Ms. No. 83 dated 23.11.2016. If this question is decided, the issues raised in the contempt petition as well as the other two writ petitions seeking implementation of the said G.O. would automatically be settled.

III. VALIDITY OF THE IMPUGNED G.O.

A. SUBMISSIONS AND CONTENTIONS

19. Mr. J.Narayanaswamy, learned *Amicus Curiae* submitted that the

State must act upon the Model Guidelines for retirement homes and formulate appropriate rules/legislations. He further submitted that the Amendment Bill to the 2007 Act is presently pending before the Parliament, however, the proposed definition of 'senior citizens care homes' will not mean to cover the retirement homes. He drew the attention of the court to the Preamble and section 19(1) of the Act which envisages the powers of the District Collector and his/her duties under the 2007 Act and submitted that these provisions clearly reflect that they are intended to ensure security and dignity of senior citizens, which are broad and will not be limited to just government run homes. It is further submitted that subsequent to the order dated 28.11.2016, the government has collected data and/or statistics about the old age homes which are registered and those homes which are non-registered. The Government also proposed to cut off electricity and water supply to those homes which are not registered. Further, the primary grievance of the contempt petitioner pertains to non-implementation of clause IX (i) of the G.O. Ms. No.83, which would allow the residents to take care of their own needs. The endeavor of the contempt petitioner is to ensure formation of an association for maintenance and administration of the day-

to-day affairs of the retirement homes. The fact remains that the government itself agrees that G.O. Ms. No.83 needs a re-look and improvement and the senior citizens should form part of day to day activities. However, G.O. Ms. No.83 does not specify the term “day-to-day” enabling the residents to manage the daily affairs.

20. While agreeing that G.O. Ms. No. 83 may need some improvements, the learned *Amicus Curiae* submitted that it will be incorrect to say that the G.O. has no legs to stand as it came into existence only through an order of this Court. He also submitted that Senior citizens form a different class of persons, who will be governed by the Maintenance and Welfare of Senior Citizens Act, 2007. Section 19(2) of the said Act stands on a different footing, as per which, the state government is empowered to ensure standards for all homes for senior citizens. Further, the duty of the District Collectors prescribed under the Rules is wide enough to understand that the state governments have powers to make regulations for privately run old age homes and retirement homes. He also submitted that the G.O. will still be applicable to retirement villa communities as the initial G.O. Ms. No. 16 did and by extension, G.O. Ms. No. 83 should also cover the villa communities.

In the event of any grievance of the inmates of the Homes, there are nodal authorities to address the issues of the senior citizens.

21. The learned Amicus Curiae also submitted that the model guidelines for retirement homes prepared by the Ministry of Housing and Urban Affairs state that there are no regulations for private homes. The introduction to the impugned G.O. itself makes it clear that it is applicable to private homes too. It cannot be said that G.O. Ms. No. 83 is *ultra vires* the Act. It came into existence as a result of judicial action initiated by this Court. Therefore, the order of this Court itself provides legs and legal sanctity for the G.O. to stand. It is not that the senior citizens volunteer to be a part of the management. They are just forced to claim a position of influence there as their needs are not being taken care of. Apart from the said submissions, with able assistance, the learned *Amicus Curiae* also produced various materials to substantiate his arguments.

22. The learned counsel appearing for the Contempt Petitioner submitted that the committee managing the retirement homes contains only the promoter and their relatives. The welfare association constituted in such Old

Age Homes has control and supervision only insofar as it relates to kitchen and maintenance activities and nothing else. He also brought to the notice of this Court several issues, such as, non-availability of nurse or a doctor on call during night hours; leakage of ceilings that have not been fixed despite repeated complaints; water logging issues that could result in senior citizens slipping while walking; broken glass/window panes. The learned counsel further submitted that in this background, the implementation of para 9 (i) of the Government Order will only enable the inmates of the Old Age Home be made a part of the management. The learned counsel also submitted that there are certain homes where the agreements are not given to the leaseholders inspite of demands and no associations are allowed to be formed. The Government, having issued G.O. Ms. No.83, failed to give effect to it and thereby committed contempt of the Order passed by this Court.

23.1. Mr. N.L. Rajah, learned Senior counsel appearing for the Petitioners in WP Nos. 30458, 30469, 30874 and 30894 of 2019 would contend that the impugned Government Order cannot be made applicable to

Old Homes run by the petitioners inasmuch as there is no legal basis on which the guidelines have been made. He brought to the notice of this Court that there are two categories of old age homes *viz.*, those that are run by the Government through the Social Welfare Department or other Departments and those which are run by private agencies like the petitioners. The constitution of these two categories of Old Homes are different. The Private Old Age Homes like the one run by the petitioners are maintained by Trusts or Societies registered under the Tamil Nadu Cooperative Societies Act. The inmates are accommodated after entering into agreements, which govern their stay. While so, the invocation of the Maintenance and Welfare of Parents and Senior Citizens Act and Rules is untenable and it is not intended to regulate the private Old Age Homes run by private agencies like the petitioners herein.

23.2. The learned Senior counsel further submitted that the impugned order in G.O. Ms. No. 83 is arbitrary and incapable of being implemented and complied with. In this context, attention was drawn to the condition that requires separate rooms/dormitories to be given for men and women and he questioned as to how it will be possible for couples who wish to live

together. Therefore, it is submitted that these guidelines are inapplicable to old age homes that are commercially run to suit the specific needs of the Senior Citizens.

23.3. The learned Senior counsel also submitted that the constitutional guarantees conferred to the petitioners under Article 19(1)(g) cannot be interfered with by the Government by passing a Government Order, if at all, it must be through a legislation. Thus, the impugned Government Order which is made applicable to commercial homes, providing for inspection or periodical visits offends Article 19 (1) (g) of the Constitution of India, will be beyond the ambit of the parent Act, which does not envisage such applicability. The learned Senior counsel further submitted that even in the report submitted by the Government, it was specifically mentioned that it is applicable only to those NGOs which are in receipt of grant and subsequently, the government undertook to frame separate guidelines for privately run homes.

23.4. According to the learned Senior counsel, it is improper to say that inmates or occupiers are not involved in management of day-to-day affairs. In the case of Dhyana Prastha foundation, the residents themselves

are managing the common area and kitchen. In Vanaprastha and another home, the residents are not inclined to take up management. In case of Brindhavan, there exists an association that is dealing with daily affairs. While so, in G.O. Ms. No. 83, paragraph IX (i) is vaguely worded. It says 'fund providers' should be elected as representatives in management that is broad based. However, the G.O. does not define 'fund providers' and does not provide for any mechanism for elections among fund providers. The earlier G.O. Ms. 18 did not have any objectionable clauses, on which the comments were also called for from the central and state governments. The stand of the state government reflected a demarcation between lease-based and ownership based homes. However, the classification that was espoused by the state government did not find place in the subsequent G.O. Ms. No.83. Similarly, the difference between leasehold homes and ownership homes is not found in G.O. Ms. 83. The writ petitioners receive lease amounts which are used for development of these homes on one hand and used for repayment of loans on the other hand. Thus, the impugned Government Order would amount to excessive legislation which is not intended for allegedly protecting the inmates of the Home.

23.5. The learned Senior counsel referred to the object of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. It is his contention that it relates only to senior citizens and that objective has to run through all the provisions of the Act. Section 19 of the Act provides for establishment of old homes by the state government and that too for indigent senior citizens only. The same intention is reflected in rule 19 of the Tamil Nadu Maintenance and Welfare of Parents and Senior Citizens Rules, 2009 (“TN Rules”). It provides for the “scheme for management of old age homes for indigent senior citizens” i.e., established under section 19 of the Act. Further, Rule 19 (1)(B) of the Rules provides for a procedure that shall be followed to select the inmates of the home. Thus, there is nothing in the rules and the Act providing for the minimum standards for private old age homes. While so, it cannot be substituted by means of a Government Order.

23.6. Similarly, Paragraph IX (b) of the Government Order provides that “the managing committee and sub-committee should meet regularly-monthly once to discuss the improvements of home and standards”. However, neither ‘managing committee’ nor ‘sub-committee’ is defined. The rules under the Maintenance and Welfare of Parents and Senior Citizens

Act, 2007 define 'Management Committee in Old Age Homes' differently as consisting of (i) District Social Welfare Officer (ii) Extension Officer (SW) (iii) Non Governmental Organization and (iv) Inmates (3 persons). While so, it will not be practically possible for private homes or retirement homes to be managed by a committee of this nature. Further, there is no clarity as to who should be appointed in the managing committee and the sub-committee. These rules are derived from sections 19 and 32 of the Act and would therefore not be applicable to the retirement homes in question. Paragraph I(5) of the Government Order provides that "each old age home should be secular and respect the faith and religious sentiments of the residents. This cannot be enforced as against private homes or they cannot be forced to be secular. The occupants of the private homes might consist of minority entities wanting to establish retirement homes where they cannot be forced to be secular.

23.7. Coming to Paragraph II (3)(3) it is stated that it provides for "separate rooms/dormitories for males and females" which is impossible in case couples who want to stay together. Further, it contradicts Rule 19(1)(D) of the Rules which provide that "the home shall provide separate lodging for

men and women inmates, unless a male and a female inmate are either blood relations or a married couple”. Further Paragraph II (3)(5) provides that “dormitories should compulsorily be in the ground floor” which essentially affects the usage of floor space in retirement homes. Thus, the impugned Government Order is not something that is envisaged by the Senior Citizens Act, 2007. The Model Guidelines for Development and Regulation of Retirement Homes published by the Ministry of Housing and Urban Affairs makes the intention of the government and the situation clear. The following parts of the Model Guidelines were highlighted to drive home the intention of the government with regard to retirement homes:

“The Ministry of Housing and Urban Affairs (MoHUA) has recognised the fact that ‘Retirement Homes’ comes under the category of real estate project and are subject to the provisions of the Real Estate (Regulation & Development) Act, 2016. MoHUA has prepared these Model Guidelines to enable the State Governments and Union Territories to make appropriate provisions in their respective Acts and Regulations to protect the rights of the senior citizens and retirees, who are residents of Retirement Homes.”

The Central government seeks to bring regulations under the Real Estate (Regulation & Development) Act, 2016 by the state government as it pertains to the concurrent list.

“Article 41 of the Constitution of India, stipulates that the “The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.” Social Justice has been made the concurrent responsibility of the Central and State Governments. In view of this, the Government of India

enacted the 'Maintenance and Welfare of Parents and Senior Citizens Act' ('MWPSCA') in 2007. The MWPSCA makes it mandatory for legal heirs (child/ relative) to provide care to their older parents or relatives after they attained the age of 60 years or above. The Ministry of Social Justice & Empowerment (MoSJE) prepared the 'National Policy for Senior Citizens' in 2011, which states that "institutional care [should be seen] as the last resort" for senior citizens. In furtherance of this policy, the MoSJE implements the 'Integrated Programme for Old Persons' (IPOP), which provides support for the establishment and maintenance of Old- Age Homes, day-care centres, mobile medical units, regional resource & training centres and formation of senior citizen associations. The States are expected to establish and maintain 'Old-Age Homes' for the care of senior citizens, with at least one old-age home for 150 persons to be provided in every district.⁶ However, the demand for Old-Age Homes is not evenly spread across the States/UTs due to different socio-economic conditions."

23.8. According to the learned Senior Counsel, the above paragraphs make the stand of the government clear. The government seeks to take a segmented approach that is sensitive to different needs of the senior citizens. The state government has a duty towards the senior citizens who are indigent. Therefore, it is the responsibility of the state to regulate old age homes that house indigent senior citizens. As far as retirement homes are concerned, it is submitted, appropriate modifications must be carried out in the rules under the RERA and empower the senior citizens to claim redressal of their grievances under the RERA. Therefore, the G.O. Ms. 83 cannot be made applicable to all old age homes and retirement homes. Further, the basis of the model guidelines as stated in the document was highlighted as

follows:

“Recognising its role and responsibility with regard to the regulation of real estate in particular and urban development and housing in general, MoHUA has drafted a set of Model Guidelines, which can be implemented by the State Governments and Union Territories to develop and regulate the Retirement Homes in order to ensure senior citizens an independent and dignified life after retirement”

23.9. Referring to Paragraph II (7) of the G.O. which provides for bedding facilities, the learned Senior counsel submitted that these provisions have to be applied only if the States are providing for such facilities. There are different models of retirement homes that exist (i) where 10 senior citizens come together and buy certain property which takes a nature of a joint venture (ii) Private old age homes that are run by NGOs for non-profit (iii) Where senior citizen buys a house and takes care of the house independently that is similar to a gated community (iv) Where house premises are sold and services are rented out. Here, multiple services such as medical, pharmacy, recreational and religious facilities are provided. There is no uniformity in the ways in which these homes operate and therefore mandating bedding facilities to such homes is totally unacceptable.

23.10. In Paragraph II (8) of the G.O., it requires that “cameras should be installed in all rooms in the homes”. This is a clear invasion of privacy.

CCTVs can be installed in corridors but not in rooms. Similarly, in Paragraph II (10) admission criteria is stipulated, which is unacceptable and cannot be mandated for retirement homes run by private individuals. In Paragraph III it provides for undertaking productive activities, meditation, prayers and outings. These cannot be mandated as if they are done for school children. In Paragraph V, it provides that toiletries must be provided. Here, the same is a matter of choice of each resident.

23.11. According to the learned Senior counsel, the petitioners are not against the regulation, but such regulations must be in a manner known to law which is provided by both state and central governments. Even in the Preamble to the Senior Citizens Act, 2007 it clearly states that it is for the “indigent” senior citizens only. The State of Tamil Nadu has recently released a Draft State Policy on Senior Citizens which seeks to provide guidelines, standard operating procedures etc., for both non-profit and commercial old age homes i.e., run by both government and private entities. While the state has proposed to standardize the establishment and management of commercial old age homes, these guidelines which are arbitrary and ultra vires the Act cannot be legally sustained. The various

provisions under the G.O. are vague and there is a lot of bureaucratic discretion. Such bureaucratic interference and vagueness will discourage people from venturing into the sector and defeat the whole purpose. As far as indigent senior citizens are concerned, the paternalist attitude of the State in framing guidelines and regulations is appropriate. As far as commercial homes are concerned, State has no power to regulate. Therefore, the learned Senior counsel for the petitioner submitted that (i) a specific authority can be designated to receive the complaints and address the grievances (ii) The impugned Government Order can be quashed or the conditions stipulated thereof shall be modified.

23.12. Referring to the statement of objects and reasons to the Senior Citizens Bill it is submitted that the Bill clearly provides that it is enacted for the “indigent” senior citizens. The whole enactment must be construed in light of this proposition in the statement of objects and reasons. Section 19 provides for establishment of old age homes for indigent senior citizens and Section 19(2) cannot be read in isolation. It must be read harmoniously with section 19(1). The sub-section (2) follows sub-section (1) and the legislature has not provided it as a separate section. Both central and the state

governments are in the process of legislating enactment for commercial old age homes. In such cases, it is inappropriate for state governments to pre-empt and enact. The Draft Policy for Planned Development of Retirement Housing through grant of license under the Haryana Development and Regulation of Urban Areas Act, 1975. The same has not been issued under the Senior Citizens Act, 2007. This makes it sufficiently clear that these homes form a separate category all together.

23.13. With regard to redressal of grievances, the senior counsel submitted that the same can be addressed in the following manner: Toll-free numbers for senior citizens to make complaint have been instituted. Upon receiving complaints, the state government can take action on those complaints to redress the grievances. If they cannot be resolved, there is sufficient scope for the state government itself to approach authorities under the Consumer Protection Act, 2019. Section 2(5) which defines “complainant” to mean:

- “(i) a consumer; or*
- (ii) any voluntary consumer association registered under any law for the time being in force; or*
- (iii) **the Central Government or any State Government;** or*
- (iv) the Central Authority; or*
- (v) one or more consumers, where there are numerous consumers having the same interest; or*

*(vi) in case of death of a consumer, his legal heir or legal representative; or
(vii) in case of a consumer being a minor, his parent or legal guardian;”*

23.14. Therefore, the learned senior counsel would submit that the definition of “complainant” is broad enough to include state and central governments. If the service provider does not agree with the state government’s proposal to address the grievances, the state government can initiate a complaint before the consumer protection forum along with the aggrieved parties. For instance, in a different issue, the District Collector had filed a complaint before the consumer protection forum. The same can be done in case of senior citizens’ issues as well. Thus, there exists a compliance system and the court may just give a nudge for the district collectors to act according to the provisions of the enactment and utilize scope given to approach authorities.

23.15. The learned Senior counsel placed reliance on the decisions in (i)*K.A. Abbas v. Union of India and another [1970 (2) SCC 780]* (ii)*State of Tamil Nadu & another v. P. Krishnamurthy [2006 (4) SCC 517]* and (iii)*Shreya Singhal v. Union of India [(2015) 5 SCC 1]* and contended that a subordinate legislation can be challenged on the ground of vagueness.

When the law is vague and people applying it are left with uncertainty, there is more scope for misuse which should eventually render the law invalid.

23.16. He also placed reliance on the decision in the case of *Kartar Singh v. State of Punjab [1994 SCC (Cri) 899]* and contended that vague laws delegate basic policy matters impermissibly and such uncertain and undefined deployment will lead to unlawful application.

24.1. On the other hand, Mr. V. Arun, learned Additional Advocate General appearing for the respondent - Government submitted that a resident of a private complex who had entered into a lease agreement had demanded certain changes and raised grievances with the management. In this context, dispute had arisen and the inmate was left without providing food, water and certain basic amenities. The District collector and the Secretary to State had visited the complex to ensure their grievances were addressed. Further, the resident had approached the RERA which initiated action against the entity and imposed penalty as well. The Government old age homes are under government control. In case of private homes, whenever complaints are made by resident associations, the homes are visited and grievances are redressed by the state. The Government also filed a report in contempt

petition providing clear data on the number of retirement homes and the manner in which they are functioning. In the said report, it was stated the aggrieved inmates of the Old Age Homes can approach the authorities for any issues concerning their stay and those who are responsible for handling such complaint and/or inspecting homes are mentioned in the report. The Old Age Homes situated throughout the State are rendering various services to the inmates and therefore, they have to be brought under the supervisory control of the Government. The learned Additional Advocate General also brought to the notice of this Court the definitions of ‘maintenance’ and ‘welfare’ under the Act. In the preamble to the Government Order, it is clearly stated that the said G.O. is within the ambit of the parent Act as it envisages welfare and maintenance of senior citizens in general. The Government Order therefore cannot be said to be outside the scope of the Senior Citizens Act, 2007 for the following reasons: (i) Preamble of the Senior Citizens Act is broad enough to ensure the welfare and maintenance of senior citizens (ii) The definitions of “maintenance” and “welfare” of senior citizens is broad as well. It does not qualify maintenance and welfare to relate only to indigent or residents of state run old age homes (iii) Section

19 of the Senior Citizens Act provides for the establishment of old age homes by the state government. Section 19(2) of the Act specifically provides that “the state government may prescribe scheme for management of old age homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes” Further, section 20 of the Act provides for medical support. The introduction to G.O. Ms. No. 83 thus makes it clear that different categories of old age homes are sought to be covered. The Government Order has been issued on the basis of the directions issued by this Court and all the directions contained in G.O. Ms. No. 83 are in consonance with the parent Act and it cannot be said to be in violation in Article 19(1)(g) or Article 21. Further, the *vires* of TN Maintenance and Welfare of Parents and Senior Citizens Rules, 2009 has not been challenged and in the absence of the same, the petitioners have no *locus stnadi* to challenge the Government Order.

24.2. With respect to the Contempt Petition, the learned Additional Advocate General submitted that G.O. Ms. No. 83 provides for fund providers to be made a part of the management and that lease holders, such

as Mr. Krishnamurthy, Contempt Petitioner will not be considered as fund providers. The contempt petitioner namely Mr. Krishnamurthy cannot be regarded as a 'fund provider' for the purposes of para IX(i) of the G.O. Ms. No.83. Further, he submitted that the question of non-implementation of paragraph IX (i) that provides "management should be broad based with a majority of elected representatives of the fund providers, with transparency in financial matters" and it does not arise in this case inasmuch as the contempt petitioner is not a fund provider, but he is only a resident and lease-holder. According to the learned Additional Advocate General, the term 'Fund provider' refers only to those running the homes and not to residents and the residents may not be considered as fund providers. In any event, the official respondents have complied with the directives issued by this Court and therefore, the question of invocation of contempt jurisdiction is not called for. The Government issued various directions pertaining to registration of Homes and endeavor is being made to ensure compliance of the G.O. Ms. No.83. The said order only refers to old age homes and does not speak about retirement homes. The contempt petitioner is residing in a retirement home and the order passed by this Court, which is the subject

matter of the contempt petition, also deals with the same.

24.3. The learned Additional Advocate General further contended that under the Model Guidelines for Development and Regulation of Old Age Homes issued by the Ministry of Housing and Urban Affairs, the state governments are mandated to frame guidelines in consonance with the model guidelines to regulate the retirement homes. In pursuance of the same, the state of Haryana has framed a Draft Policy for Planned Development of Retirement Housing through grant of license under Act 8 of 1975 i.e., Haryana Development and Regulation of Urban Areas Act, 1975. Thus, Rule 19 of the TN Maintenance and Welfare of Parents and Senior Citizens Rules, 2009 is *pari materia* with Rule 22 of Haryana Maintenance and Welfare of Parents and Senior Citizens Rules, 2009. Therefore, there would be no reason for Tamil Nadu not to adopt the same approach to frame appropriate guidelines for retirement homes. Further, he submitted that the Senior Citizens Act, 2007 is within the purview of the Ministry of Social Justice and Empowerment and consequently, the Model Guidelines issued by the Ministry would be made applicable to retirement homes within the purview of the Ministry of Housing and Urban Affairs.

24.4. With respect to specific non-compliance of paragraph IX (i) of G.O. Ms. No.83 which provides that “management should be broad based with a majority of elected representatives of the fund providers, with transparency in financial matters”, the learned Additional Advocate General contended that “inmates” cannot be considered as “fund providers” and thus cannot be elected into the management. Nevertheless, the inmates have the right to form associations to ensure their welfare. Thus, there is no contempt in that specific aspect as well. The learned Additional Advocate General therefore prayed for dismissal of the Contempt Petition.

25. Mrs. Aparna Nandakumar, learned counsel appearing for the fourth respondent in WP No. 16984 of 2017 submitted that the fourth respondent is a private limited company. They have constructed a “retirement villa community” containing 62 Villas in phase – I and 19 in Phase II. These villas have been sold and the fourth respondent is solely engaged in “maintenance” and acts as a service provider. The villas having been sold, the provisions under the G.O. will not be applicable to the fourth respondent any longer. She submitted that under the Model Guidelines for Development and Regulation of Old Age Homes issued by the Ministry of Housing and

Urban Affairs, the state governments are mandated to frame guidelines in consonance with the model guidelines to regulate the retirement homes. In pursuance of the same, the State of Haryana has framed a Draft Policy for Planned Development of Retirement Housing through grant of license under Act 8 of 1975 i.e., Haryana Development and Regulation of Urban Areas Act, 1975. She submitted that Rule 19 of the TN Maintenance and Welfare of Parents and Senior Citizens Rules, 2009 is *pari materia* with Rule 22 of the Haryana Maintenance and Welfare of Parents and Senior Citizens Rules, 2009. Therefore, there would be no reason for Tamil Nadu not to adopt the same approach to frame appropriate guidelines for retirement homes. Further, the learned counsel sought to differentiate the Ministries which control the old age homes and retirement communities. While the old age homes viz., the Senior Citizens Act, 2007 is within the purview of the Ministry of Social Justice and Empowerment, the retirement homes i.e., Model Guidelines are within the purview of the Ministry of Housing and Urban Affairs. Paragraph 9 of the introduction to G.O. Ms. No.83 clearly excludes from its purview the category of homes which fall under the RERA.

B. DISCUSSION AND FINDINGS

26. We have heard the counsel on either side and perused the materials placed on record.

i. On power to issue the impugned order

27. Before going into the *vires* of the executive order and testing it on the anvil of whether it falls within the four corners of the legislation concerned, viz. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, it would be appropriate to reiterate the circumstances in which this executive order came to be passed, which is after the filing of the first writ petition in this regard seeking for framing of regulations and the establishment of a regulatory body for the administration of private old age homes and the subsequent directions of the First Bench. The Government had come out with this executive order in the circumstances of the case recognizing the various problems faced by elderly persons in the old-age homes and the sorry State of affairs which can be traced to the fact or of absolute non-regulation of these old-age homes by the Government.

28. Having said that, the scope of the Act and the Rules made thereunder need to be examined. The stated object of the Act is to provide for more

effective provisions for the maintenance and welfare of parents and senior citizens, which has been guaranteed and recognized under the Constitution and for matters connected therewith or are incidentally thereto. The Act provides for a mechanism for a senior citizen who is unable to maintain himself from his own earning or out of the property owned by him to approach a Tribunal seeking for maintenance. It also mentions the parties against whom such a claim can lie under the Act. The jurisdiction and procedure to be followed by the Tribunal has also been set out in the Act, including the constitution of the Tribunal, the summary procedure in case of enquiry, the order for maintenance, the enforcement of the order of maintenance, et cetera.

29. The Act, which is the first of its kind as a legislation in India on the subject, also talks of establishment of old-age homes by the State Government under Section 19, medical support for senior citizens, the measures to be taken by the State Government for publicity and awareness for the welfare of senior citizens et cetera. It is seen that the Tamil Nadu Government has also come out with subordinate legislation in the form of Rules which have been issued under the Act, which set out in detail the

procedure for filing an application for maintenance, and its registration, the preliminary scrutiny of the application, the service of notice and application on the respondent, the procedure in case of non-appearance by the opposite party, the procedure in case of admission of claim, the procedure for impleading children or relatives, the appointment of conciliation officer, reference to the conciliation officer, the proceedings by the conciliation officer, the maintenance of register by the District Social Welfare Officer and also the procedure before the Appellate Tribunal. The Rules also set out under Rule 19, a scheme for management of the old-age homes which are established by the State Government under Section 19 of the Act. The Rules also make provision for a plan for the protection of life and property of senior citizens under Rule 21 and the establishment of a State Council of senior citizens which shall be done by the State Government to advise the Government on the effective implementation of the Act and to perform such other functions in relation to senior citizens as the Government may specify in this regard. The composition of the State Council has also been mentioned under the Rules. Under Rule 23, the establishment by the State Government of District Committee of Senior Citizens for each District to

advise on effective and coordinated implementation of the Act at the District level and to perform such other functions in relation to senior citizens at the District level as the State Government may specify, has also been envisaged. The functions and duties of the Council have also been detailed out in Rule 24.

30. It is therefore seen that the Act and the Rules thereunder have been passed for safeguarding as well as protecting the rights and interests of senior citizens in almost all aspects of their life by the State Government. However, just as any legislation cannot be completely foolproof and only at the time of implementation of legislation, the loopholes in the legislation as well as the future needs of society and circumstances which may come up much later will expose the shortcomings of any legislation, it is seen that this Act and the Rules thereunder are riddled with several deficiencies. The Act is completely silent about the establishment, management or administration of old-age homes which are owned and run by private individuals or entities.

31. A perusal of the Act and the Rules would therefore make it evident that there is no provision in the Act for establishment of an old age home

which is run privately and at best, section 19 of the Act only deals with the establishment of old-age homes by the State Government. Section 19 of the Act falling under chapter III- 'Establishment of old-age homes', may be usefully extracted hereunder:

"19. Establishment of old-age homes-

(1) the State Government may establish and maintain such number of old-age homes at accessible places, as it may deem necessary, in a phased manner, beginning with at least one in each District to accommodate in such homes a minimum of one hundred fifty senior citizens who are indigent.

(2) The State Government may, prescribe a scheme for management of old-age homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes.

Explanation- For the purposes of this section, "indigent" means any senior citizen who is not having sufficient means, as determined by the State Government, from time to time, to maintain himself."

32. It therefore becomes clear that the Act deals with the establishment of an old age home by the State Government and for indigent persons, meaning thereby, persons who are not having sufficient means, which term would also be defined by the State Government from time to time. Having said this, the question would therefore arise as to whether the impugned GO, which is an executive order passed by the State Government can be said to fall within the four corners of this legislation and the further question which is of greater importance would be whether if the impugned G.O. does not fall

within the four corners of the Act, it would stand scrutiny before the law and be upheld as being valid.

33. The answer to the first question would be in the outright negative, that is to say, that the impugned Government Order would not fall within the provisions of the Act as the Act only contemplates the establishment of old-age homes by the State Government and their maintenance by the State Government while the provisions of the Act are clearly and unambiguously silent about the establishment, administration or management of old-age homes by the private individuals or entities or even of their supervision by the State Government in any manner.

34. Now, coming to the most important legal question on the powers of the State Government to regulate old-age homes which are managed privately, outside the framework of the Act and the Rules as well as whether such a power can be understood to be held by the State Government with or without a legislation in this regard. In order to examine this question, we would have to turn to the constitutional provisions regarding the executive power of the State.

35. Article 162 of the Constitution deals with the extent of executive

power of the State, which reads as under:

“Article 162. Extent of executive power of State.-Subject to the provisions of this Constitution, the executive power of the State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the union or authorities thereof.”

Once it is understood that the executive power of the State is co-extensive with its legislative power, the next aspect would be to identify the head/field of legislation under which the State can exercise its executive as well as legislative power in this regard. With respect to the maintenance and welfare of senior citizens, the field of legislation which is available to the State Government would be under the head “Social Security” which falls under Entry 23 of the Concurrent List under the Seventh Schedule to the Constitution.

36. The earliest case on the point is the judgement of the Constitution Bench of the Hon'ble Apex Court in *Rai Sahib Ram Jawaya Kapur and Ors. v. The State of Punjab, [AIR 1955 SC 549]*, where the precise question for consideration was whether the executive power of the State could extend to matters upon which the State legislature is competent to legislate, and are

confined to matters over which legislation had been passed already. While dealing with this question, the Hon'ble Supreme Court held as under:

"7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of section 8 and 49 respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down :

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws :

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

8. Thus under this Article the executive authority of the State is executive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also.

Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to

suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 162 clearly indicates that the powers of the State executive do extend to matters upon which the state Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr. Pathak's contention.

...

13. A question very similar to that in the present case did arise for consideration before a Full Bench of the Allahabad High Court in Motilal v. The Government of the State of Uttar Pradesh MANU/UP/0312/1950 : AIR1951All257 . The point canvassed there was whether the Government of a State has power under the Constitution to carry on the trade or business of running a bus service in the absence of a legislative enactment authorizing the State Government to do so. Different views were expressed by different Judges on this question. Chief Justice Malik was of opinion that in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. According to the chief Justice the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach upon the rights of others or is not contrary to law. The running of a transport business therefore was not per se outside the ambit of the executive authority of the State. Sapura, J., held that the power to run a government bus service was incidental to the power of acquiring property which was expressly conferred by article 298 of the Constitution. Mootham and Wanchoo, JJ., who delivered a common judgment, were also of the opinion that there was no need for a specific legislative enactment to enable a State Government to run a bus service. In the opinion of these learned Judges an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public. Agarwala, J., dissented from the majority view and held that the State

Government had no power to run a bus service in the absence of an Act of the legislature authorizing the State to do so. The opinion of Agarwala, J., undoubtedly supports the contention of Mr. Pathak but it appears to us to be too narrow and unsupportable.

14. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another.

The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited merely to the carrying out of these laws.

15. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

16. *In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature ? Under article 53(1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Minister with the Prime Minister at the head to aid advise the President in the exercise of his functions. The president has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part." The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.*

17. *Suppose now that the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon ? We cannot say that such legislation is always necessary..... ."*

37. The ratio in ***Ram Jawaya Kapur's case*** was followed by the Constitution Bench of the Supreme Court in ***Naraindas Indurkhiya v. The State of Madhya Pradesh & Ors, [AIR 1967 SC 1170]***. Further, in ***Bishambhar Dayal Chandra Mohan & Ors. v. State of Uttar Pradesh & Ors. [AIR 1982 SC 83]***, the Hon'ble Supreme Court, while dealing with the

power of the executive in relation to a matter in Entry 33 of the Concurrent list, followed these earlier judgments and held as follows:

“In other words, the State in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the State. So long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power cannot be circumscribed. If there is no enactment covering a particular aspect, certainly the Government can carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. Otherwise, the administration would come to a standstill”

38. In *PH Paul Manoj v. P. Veldurai, [(2011) 5 SCC 214]*, the Hon'ble Supreme Court upheld the G.O. issued by the government of Tamil Nadu recognizing the jurisdiction of the state government to issue executive orders with respect to a subject matter not covered by legislation, provided they do not violate the provisions of the Constitution and are not repugnant to any enactment of the state and union legislatures and observed as follows:

“19.In a welfare state the functions of Executive are ever widening, which cover within their ambit various aspects of social and economic activities. Therefore, the executive exercises power to fill gaps by issuing various departmental orders. The executive power of the State is co-terminus with the legislative power of the State Legislature. In other words, if the State Legislature has jurisdiction to make law with respect to a subject, the State Executive can make regulations and issue Government Orders with respect to it, subject, however, to the constitutional limitations. Such administrative rules and/or orders shall be inoperative if the Legislature has enacted a law with respect to the subject.”

39. Very recently, the Hon'ble Supreme Court answered, whether the state

government has jurisdiction to issue a notification requiring doctors seeking admission to postgraduate and super speciality courses to execute a compulsory bond when the Medical Council of India Act, 1956 does not contain any provision related to compulsory bonds. In *Association of Medical Super Speciality Aspirants and Residents & Ors. v. Union of India & Ors.*, [(2019) 8 SCC 607], the Hon'ble Supreme Court held as follows:

“17. Entry 66 of List I of the 7th Schedule to the Constitution refers to coordination and determination of standards in institutions for higher education or research and scientific and technical institutions. Entry 25 of List III of the 7th Schedule deals with education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I. Legislations can be made by the State Legislature relating to medical education subject to the legislation made by the Parliament. The Medical Council of India Act governs the field of medical education in this country. Admittedly, there is no provision in the Medical Council of India Act touching upon the subject matter of compulsory bonds. Therefore, the States are free to legislate on the subject matter of medical bonds. Executive authority of the State Government is co-extensive with that of the legislative power of the State Legislature. Even in the absence of any legislation, the State Government has the competence to issue executive orders under Article 162 of the Constitution on matters over which the State legislature has the power to legislate. The Notifications issued by the State Governments imposing a condition of execution of compulsory bonds at the time of admission to postgraduate courses and super Speciality courses cannot be said to be vitiated due to lack of authority or competence. The field of bonds requiring compulsory employment is not covered by any Central Legislation. Therefore, the submissions made on behalf of the Appellants that the States lacked competence to issue the notifications as the field is occupied are rejected.”

40. The judgment in *Ram Jawaya Kapur case* has also been affirmed by another Constitution bench in the case of *Government of NCT of Delhi v. Union of India [(2018) 8 SCC 501]* where the executive power of the State and of the union has been discussed in detail. The principle that emerges out of these two judgements is that once the State Government has the legislative power on a subject, the executive power of the State is also co-extensive with that and the fact that there is a legislation already existing on the subject or that specific subject has not already been legislated upon would not limit the executive power of the State to exercise its executive function in this regard. The only exception to this would be, where the executive exercises its function in such a way that an executive order of the State would run contrary or repugnant to any of the existing legislative provisions whether of the State or of any legislation made by Parliament in respect of the same subject. Where there is no pregnancy or an executive order is not against or contrary to any of the provisions in respect of which legislation has been made expressly, an artificial fetter or limit cannot be placed upon the executive power of the State on the premise that an executive order issued by the State deals with an aspect with respect to

which there is no legislation or in respect of which the State has not already exercised its power of legislation.

41. Applying the above legal principle to the facts on hand, in the present case, while it is beyond dispute that the legislation governing the field with respect to maintenance and welfare of senior citizens and elders is the Act of 2007, it is equally beyond dispute that the Act does not make any provision with respect to the establishment, registration, administration or management of old age homes which are run privately. In this regard only two aspects need to be a certain, viz. (1) whether the State has the executive power coextensive with its legislative power to exercise its executive or legislative power in this regard; and (1) whether in the absence of any provision with respect to private old age homes in the Act, the State can independently exercise executive power and make an executive order with respect to the management of private old age homes as has been done under the impugned GO.

42. As already stated, the field of legislation under Entry 23 of List III of the Constitution under the Seventh Schedule deals with 'Social Security and social insurance' and the State therefore has the legislative as well as the

executive power to exercise its function with respect to any subject falling within the broad field of social security. On the next question that when the legislation concerned, viz. the Act of 2007 does not deal with privately managed old age homes, there is no question of any executive order running contrary to any provision of the Act and in such circumstances, when the State has the legislative power meaning thereby also the executive power coextensive with that legislative power, it will become clear as daylight that the State has the executive power under Article 162 to issue any executive instruction/order with respect to privately managed old age homes.

43. In the light of the above discussion *qua* the power of the State to issue an executive order in respect of privately managed old age homes vis-à-vis the provisions of the Constitution as well as the existing provisions under the central legislation, to which the impugned G.O. does not make any contrary provision and can at best be said to support the existing legislative provisions, this Court finds that the impugned G.O. is constitutionally valid and there are no grounds to interfere with the same. The desirability or otherwise to pass a legislation to incorporate the management of privately managed and owned old-age homes by the State Government is a matter to

be left to the legislature.

ii. On alleged violation of Article 19(1)(g)

44. Having tested the validity of the impugned G.O. from the stand point of the source of power, it is now appropriate to also test its validity on the alleged grounds of violation of Article 19(1) (g); and on the ground of conflict with the provisions of the Real Estate (Regulation and Development) Act, 2016 (RERA Act).

45. It has been argued that the contents of the impugned order would violate the fundamental right under Article 19 (1)(g) of the Constitution. Article 19 (1) (g) guarantees to citizens the fundamental right to practice any profession, or to carry on any occupation, trade or and business and the same has been made subject to reasonable restrictions under Article 19(6) in the interests of the general public. Thus, whether the restrictions imposed by the impugned G.O. on the right of the writ petitioners, who run the retirement/old age homes can be said to be reasonable, must be tested on the anvil of the doctrine of proportionality.

46. The Hon'ble Supreme Court has interpreted and applied the doctrine of proportionality in the context of Article 19(1)(g) in *Modern Dental*

College and Research Centre vs State of Madhya Pradesh, [(2016) 7 SCC 353]. This test was later affirmed in multiple judgments of the Supreme Court. The test of proportionality as propounded by the Constitution Bench in ***Modern Dental College & Research Centre*** requires the satisfaction of a four-limb test (paragraph 53):

- i. The restriction must be in pursuance of legitimate state aim*
- ii. Rational nexus between the restricting measures, facts and objects sought to be achieved.*
- iii. Necessity of the measure to achieve the said aim, i.e., it should be a least restrictive measure*
- iv. Balancing of competing interests i.e., balancing the right under Article 19(1)(g) and the social control/restriction imposed on the same.*

47. Further, with reference to earlier jurisprudence, the Court noted that while examining the reasonableness of the limitation, one must keep in mind the following:

“(1) The Directive Principles of State Policy.

(2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of the general public.

(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed

and the social control envisaged by Article 19(6).

(5) Prevailing social values as also social needs which are intended to be satisfied by the restrictions.

(6) There must be a direct and proximate nexus or reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions, and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise.”

48. The four-limb test of proportionality that was propounded in ***Modern Dental College*** was followed by the Constitution Bench of nine judges of the Supreme Court in ***K.S. Puttaswamy v. Union of India, [(2017) 10 SCC 1]*** and subsequently summarized and followed in ***K.S. Puttaswamy v. Union of India, [(2019) 1 SCC 1]***. The Hon'ble Supreme Court in ***K.S. Puttaswamy case***, adopted the “legitimate state interest” test as the first limb of the four limbs in the proportionality test.

49. Further, specifically in the context of Article 19(1)(g), this test was followed in ***Anuradha Bhasin v. Union of India & Ors., [(2020) 3 SCC 637]***, where it was reiterated that the doctrine of proportionality must be followed before passing any order intending to restrict the fundamental rights of the individuals. Any obstruction with fundamental rights without any proper justification will thus be rendered disproportionate. Here, the court also referred to the decision in ***Om Kumar & Ors. v. Union of India,***

[(2001) 2 SCC 386] which explained the application of proportionality to an administrative order in the following manner:

“28. By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the Court will see that the legislature and the administrative authority 'maintain a proper balance between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the Court. That is what is meant by proportionality.”

50. In *Internet and Mobile Association of India v. Reserve Bank of India*, **[(2020) SCC OnLine SC 275]**, the Circular issued by the Reserve Bank of India was tested against the proportionality doctrine. Here, the regulations were held to be in the nature of statutory regulations necessitating a similar level of regard given to executive and parliamentary policy. The most recent judgment on the application of proportionality doctrine is *Akshay N. Patel v. Reserve Bank of India & Anr.*, **[2021 SCC OnLine SC 1180]**. Here, the Hon'ble Supreme Court also reiterated that a regulated economy is in fact critical to ensure balance between private interests and ensuring a just polity for citizens and observed as under:

“Regulating the economy is reflective of the compromise between the interests of private commercial actors and the democratic State that represents and protects the interests of the collective. Scholars across the world have warned against the judiciary constitutionalising an unregulated marketplace⁶¹. This Court must be bound by a similar obligation, in order to preserve its fidelity to the Constitution. With the transformation in the economy, the Courts must also be alive to the socio-economic milieu. The right to equality and the freedom to carry on one’s trade cannot inhere a right to evade or avoid regulation. In liberalized economies, regulatory mechanisms represent democratic interests of setting the terms of operation for private economic actors. This Court does not espouse shunning of judicial review when actions of regulatory bodies are questioned. Rather, it implores intelligent care in probing the bona fides of such action and nuanced deference to their expertise in formulating regulations. A casual invalidation of regulatory action in the garb of upholding fundamental rights and freedoms, without a careful evaluation of its objective of social and economic control, would harm the general interests of the public.”

51. Similar view justifying the necessity of interference with contractual relations of private parties was also taken as early as in 1986 by the European Court of Human Rights in ***James & Ors. v. The United Kingdom [(1986) ECHR 2]***. Here, leasehold reform that conferred rights on the “long lease” (21 years) holders to compulsorily purchase the freehold of the property from the owners was challenged. The Act that was challenged sought to right the ills of the long leasehold system and the interference with contractual relations was held to be in pursuance of a legitimate aim in the following manner:

“47. The aim of the 1967 Act, as spelt out in the 1966 White Paper,

was to right the injustice which was felt to be caused to occupying tenants by the operation of the long leasehold system of tenure (see paragraph 18 above). The Act was designed to reform the existing law, said to be "inequitable to the leaseholder", and to give effect to what was described as the occupying tenant's "moral entitlement" to ownership of the house (ibid.). Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large. In principle, therefore, the aim pursued by the leasehold reform legislation is a legitimate one."

52. In the case on hand, it is clear as daylight that the restrictions imposed have been done in the interests of the larger public, i.e. the senior citizens of this country who constitute nearly 13.8 crores or about nearly 10 percent of the population (as per the 2020 National Commission on Population Report). As already stated, the impugned order was passed in pursuance of the orders of this Court and the earlier PIL which brought to light the prevailing sorry state of affairs about the dismal quality of life being led by the senior citizens of this country.

53. Applying the four-limb test of proportionality as mentioned above, it is clear that the State has tried its best to balance the competing interests of the parties while protecting the life, dignity and interests of the senior

citizens in all practical aspects of their daily life. Management of such old age homes cannot be said to be a purely commercial activity with no control or regulation by the State. On the contrary, senior citizens being one of the vulnerable sections of society need utmost care and protection by the State and inspite of the best efforts of the State to establish old age homes that would be enough for the population, and to directly cater to their needs, the need for privately managed homes are a reality that cannot be denied. In these circumstances, there can be no two opinions that the State must regulate these homes with detailed guidelines to be followed. Infact, the Societies and Trusts managing these private retirement homes must work in tandem with the State Government in order that the quality of life of the senior citizens is elevated to the desired level. Therefore, the restrictions imposed by the impugned order cannot be said to be violative of Article 19(1)(g), and this ground of attack fails accordingly.

iii. On alleged inconsistency with RERA Act

54. This leaves us with the only question as to whether there is any inconsistency between the impugned G.O. Ms. No.83 and the provisions of the RERA Act?

55. The Real Estate (Regulation and Development) Act, 2016 (“the RERA”) was enacted with the objective to balance the interests of consumers with the necessity to promote the real estate sector. It seeks to protect the interests of consumers in the real estate sector and provides for a system for speedy redressal of grievances. It establishes the Real Estate Regulatory Authority to achieve the said objectives to ensure efficiency and transparency in the real estate sector. Under Section 88 of the RERA, the application of other laws are not barred.

56. Having held that the impugned G.O. has been issued pursuant to the executive power of the State under Article 162 of the Constitution, the question whether the provisions of RERA would override the Senior Citizens Act, 2007 in case of any overlapping areas, would be academic. In any case, a three judge bench of the Hon'ble Supreme Court in *KSL & Industries Ltd., v. Arihant Threads Ltd. [(2015) 1 SCC 166]*, considered the scope of section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 which is similarly worded as section 88 of RERA and considered the effect of “not in derogation of” in the following

manner:

“36. Sub-section (2) was added to Section 34 of the RDDB Act w.e.f. 17-1-2000 by Act 1 of 2000. There is no doubt that when an Act provides, as here, that its provisions shall be in addition to and not in derogation of another law or laws, it means that the legislature intends that such an enactment shall coexist along with the other Acts. It is clearly not the intention of the legislature, in such a case, to annul or detract from the provisions of other laws. The term “in derogation of” means “in abrogation or repeal of”. The Black's Law Dictionary sets forth the following meaning for “derogation”:

“derogation.—The partial repeal or abrogation of a law by a later Act that limits its scope or impairs its utility and force.”

It is clear that sub-section (1) contains a non obstante clause, which gives the overriding effect to the RDDB Act. Sub-section (2) acts in the nature of an exception to such an overriding effect. It states that this overriding effect is in relation to certain laws and that the RDDB Act shall be in addition to and not in abrogation of, such laws. SICA is undoubtedly one such law.

37. The effect of sub-section (2) must necessarily be to preserve the powers of the authorities under SICA and save the proceedings from being overridden by the later Act i.e. the RDDB Act.”

48. In view of the observations of this Court in the decisions referred to and relied on by the learned counsel for the parties we find that, the purpose of the two enactments is entirely different. As observed earlier, the purpose of one is to provide ameliorative measures for reconstruction of sick companies, and the purpose of the other is to provide for speedy recovery of debts of banks and financial institutions. Both the Acts are “special” in this sense. However, with reference to the specific purpose of reconstruction of sick companies, SICA must be held to be a special law, though it may be considered to be a general law in relation to the recovery of debts. Whereas, the RDDB Act may be considered to be a special law in relation to the recovery of debts and SICA may be considered to be a general law in this regard. For this purpose we rely on the decision in LIC v. Vijay Bahadur [(1981) 1 SCC 315 : 1981 SCC (L&S) 111] . Normally the latter of the two would prevail on the principle that the legislature was aware that it had enacted the earlier Act and yet chose to enact the subsequent Act with a non obstante clause. In this case, however,

the express intendment of Parliament in the non obstante clause of the RDDB Act does not permit us to take that view. Though the RDDB Act is the later enactment, sub-section (2) of Section 34 thereof specifically provides that the provisions of the Act or the Rules made thereunder shall be in addition to, and not in derogation of, the other laws mentioned therein including SICA.

49. The term “not in derogation” clearly expresses the intention of Parliament not to detract from or abrogate the provisions of SICA in any way. This, in effect must mean that Parliament intended the proceedings under SICA for reconstruction of a sick company to go on and for that purpose further intended that all the other proceedings against the company and its properties should be stayed pending the process of reconstruction. While the term “proceedings” under Section 22 of SICA did not originally include the RDDB Act, which was not there in existence. Section 22 covers proceedings under the RDDB Act.”

57. Therefore, “not in derogation” was considered to mean that the Parliament did not intend to abrogate the earlier laws all together but sought for a harmonious application of other laws. This decision was considered by another three judge bench in ***Pioneer Urban Land and Infrastructure Limited v. Union of India [(2019) 8 SCC 416]***. The Hon'ble Supreme Court departed from the principle of later enactment prevailing over the earlier one (in presence of non-obstante clauses in both the enactments) while considering section 238 of the Insolvency and Bankruptcy Code, 2016 and sections 88 and 89 of the RERA. It was held as follows:

“24. It is significant to note that there is no provision similar to that of Section 88 of RERA in the Code, which is meant to be a complete and exhaustive statement of the law insofar as its subject matter is.

concerned. Also, the non-obstante clause of RERA came into force on 1st May, 2016, as opposed to the non-obstante clause of the Code which came into force on 1st December, 2016. Further, the amendment with which we are concerned has come into force only on 6th June, 2018. Given these circumstances, it is a little difficult to accede to arguments made on behalf of learned senior counsel for the Petitioners, that RERA is a special enactment which deals with real estate development projects and must, therefore, be given precedence over the Code, which is only a general enactment dealing with insolvency generally. From the introduction of the explanation to Section 5(8)(f) of the Code, it is clear that Parliament was aware of RERA, and applied some of its definition provisions so that they could apply when the Code is to be interpreted. The fact that RERA is in addition to and not in derogation of the provisions of any other law for the time being in force, also makes it clear that the remedies under RERA to allottees were intended to be additional and not exclusive remedies. Also, it is important to remember that as the authorities under RERA were to be set up within one year from 1st May, 2016, remedies before those authorities would come into effect only on and from 1st May, 2017 making it clear that the provisions of the Code, which came into force on 1st December, 2016, would apply in addition to the RERA.”

58. Here, it was concluded that RERA has to be harmoniously constructed with the IBC and that the amendment to IBC will prevail over the RERA only in case of conflict. The entire line of precedents on the meaning of “not in derogation of” was considered in ***Forum for People’s Collective Efforts & Anr. v. State of West Bengal [(2021) 8 SCC 599]*** while considering the RERA and a similar state enactment - West Bengal Housing Industry Regulation Act, 2017. The Hon'ble Supreme Court held that section 88 of the RERA is indicative of the parliamentary intention to

not “preclude altogether the exercise of legislative authority whether under the Central or State enactments”. However, here, the identical state legislation that created a parallel regime in the state attracted the test of repugnancy and was thus struck down.

59. Therefore, the effect of sections 88 and 89 of the RERA is that all laws that are not inconsistent with the RERA will continue to operate in their own sphere, while the ones that are inconsistent will not prevail over the RERA. The same principle would be applicable to the impugned G.O. as well. As long as it is not repugnant to any of the statutory provisions, there can be no inconsistency between the impugned G.O. and the provisions of the RERA Act. Also, as already stated, that the RERA Act does not preclude the application of other laws unless they are inconsistent with the RERA.

60. On behalf of the retirement homes, it was contended that G.O. Ms.No.83 would not apply to them on the ground that they are solely covered under the RERA and the “Model” Guidelines for Development and Regulation of Retirement Homes formulated by the Ministry of Housing and Urban Affairs (MoHUA). The model guidelines recognize that the retirement homes are real estate projects that come under the RERA and

these were formulated, as the introduction to the guidelines notes:

“to enable the State Governments and Union Territories to make appropriate provisions in their respective Acts and Regulations to protect the rights of the senior citizens and retirees, who are residents of Retirement Homes”

The model guidelines acknowledge that the retirement homes sector is inadequately protected from cheating, exploitation and other forms of harassment, even though the occupants do have affluence and financial capacity to pay for the services. The Ministry seeks to enable the regulation of the retirement home sector in order to ensure senior citizens' well being. The document itself envisages that state governments and union territories will be implementing the model guidelines in order to develop the retirement homes sector as well as ensure a dignified life for senior citizens.

61. It is to be noted that on the limited aspect covered by the RERA Act, the same would apply to the retirement homes while the impugned G.O. with a broader objective of protecting the rights of senior citizens covers many aspects of their day-to-day practical life and as such, it cannot be said that the provisions of the RERA Act and the impugned G.O. must be mutually exclusive to be valid. They must be read harmoniously as the object of the laws are obviously different and have been made pursuant to

different fields of legislation, with no apparent conflict or repugnancy between the two.

62. Therefore, the model guidelines must be taken into account while framing regulations or guidelines for retirement homes considering the framework that the RERA has given, specifically, the provisions relating to ‘functions and duties of the promoter’ and ‘rights and duties of the allottee’.

Further, the guidelines recognize the following responsibilities of the state government in regulating retirement homes:

i. The rules/regulations governing the roles and responsibilities of service provider/retirement home operator are to be framed by the respective state governments. Service provider/retirement home operator is defined as:

“any person/entity, which is capable of and/or specializes in the operation and management of Retirement Homes, which may include on-site monitoring, personal care services and any other relevant services, including the basic maintenance services.”

The Urban Local Bodies (ULBs) and development authorities are to frame necessary provisions and regulations under the applicable laws to ensure the service provider/retirement home operator is mandatorily registered.

ii. Basic rights of the allottee/resident of a retirement home are provided in Annexure A to the model guidelines. However, these are not exclusive and the state governments can elaborate/add to these rights in their respective rules and policies of the state in tune with specific local demands. The promoter/developer and the service provider/retirement home operator are bound to ensure these rights which can also be mandated to form a part of the ‘Agreement of Sale’. The basic rights mentioned in the Annexure are also in addition to those prescribed under all other laws, contractual

documents.

63. The introduction to G.O. Ms. No.83 notes that “old age homes” includes “retirement living solutions which fall under 3 broad categories, outright buys, leased homes, and rental homes for elderly which are purely commercial models”. Further, Office Memorandum of the MoHUA attached to the G.O. Ms. No.83 states “in case a developer collects money with the intent to pass on ownership of old age homes to buyers, then such a development would come within the purview of the Real Estate Act”. Therefore, it has been acknowledged that the compliances under the RERA and rules, regulations under the RERA will be in addition to the standards prescribed by the state government, and where the provisions of the RERA Act have direct application, the impugned G.O. does not make any contradictory provisions, and as such, the ground of inconsistency with the RERA Act fails accordingly.

IV. ‘DOCTRINE OF PARENS PATRIAE’ AND WELFARE OF SENIOR CITIZENS

64. The case at hand is one where this Court has, at the instance of one of its public-spirited citizens, exercised its *parens patriae* jurisdiction, and on

some positive nudging by the court, the State Government also realizing its role towards the elderly and the senior citizens of the State, while recognizing the void in the existing legislation on the management of private old age homes, has come out with the impugned Government order, the validity of which this Court has upheld.

65. The question relating to the effective implementation of the Act as well as the enforcement of the rights of elderly persons under Article 21 of the Constitution has already been examined in detail by the Supreme Court in the case of *Ashwini Kumar v. union of India [(2019) 2 SCC 636]* where the Supreme Court has examined the entire issue in the backdrop of social justice which is one of the important ideals mentioned in the Preamble to our Constitution. The following paragraphs of the said judgement throw immense light on the subject and are usefully extracted hereunder-

“3. The rights of elderly persons is one such emerging situation that was perhaps not fully foreseen by our Constitution framers. Therefore, while there is a reference to the health and strength of workers, men and women, and the tender age of children in Article 39 of the Constitution and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want in Article 41 of the Constitution, there is no specific reference to the health of the elderly or they are sheltered in times of want and indeed to their dignity and sustenance due to their age.

4. Eventually age catches up with everybody and on occasion, it renders some people completely helpless and dependent on others,

either physically or mentally or both. Fortunately, our Constitution is organic and this court is forward looking. This combination has resulted in pathbreaking developments in law, particularly in the sphere of social justice which has been given tremendous importance and significance in a variety of decisions rendered by this court over the years. The present petition is one such opportunity presented before this court to recognize and enforce the rights of elderly persons-rights that are recognized by Article 21 of the Constitution as understood and interpreted by this court in a series of decisions over a period of several decades, and rights that have gained recognition over the years due to emerging situations.

....

16. In view of the various decisions of this court, there cannot now be any doubt that the right to live with dignity is, in effect, a part of the Right to life as postulated in Article 21 of the Constitution. Such a right would be rendered meaningless if an aged person does not have the financial means to take care of his basic necessities and has to depend for it on others. It is in this context that the petitioner submitted that all elderly persons must be granted adequate pension so that they are able to sustain themselves with dignity.

...

The right to shelter

21. It is about two decades since this court recognize the right to shelter or the right to reasonable accommodation is one of the basic needs of any human being. Unfortunately, while there has been some positive development in this regard, attention has not been paid to the needs of the elderly require special care and attention which, in many sections of society, is missing. With this in mind, the petitioner emphasize the right to shelter and referred to several decisions, many of which recognize the right to adequate shelter as a fundamental right, which we believe applies to the elderly as well

22. In Shantistar Builders v. Narayan Khimalal Totame MANU/SC/0115/1990 : AIR 1990 SC 630 this Court recognized the right to food, clothing and shelter as being a guarantee of any civilized society. As far as the right to shelter is concerned, it was observed that there is a right to reasonable accommodation. It was held in paragraph 9 of the Report as follows:

9. Basic needs of man have traditionally been accepted to be three -- food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable

accommodation to live in.....

23. *A much fuller discussion is to be found in Chameli Singh v. State of Uttar Pradesh MANU/SC/0286/1996 : (1996) 2 SCC 549 wherein this Court explained, in a sense, the requirements of the right to shelter. It was held in paragraph 8 of the Report that the right to shelter would include adequate living space but that does not mean a mere right to a roof over one's head. It was held that the right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right. It was held in paragraph 8 of the Report as follows:*

8. In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man..... Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right. As is enjoined in the Directive Principles, the State should be deemed to be under an obligation to secure it for its citizens, of course subject to its economic budgeting.....

24. *Finally, in Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan MANU/SC/0051/1997 : (1997) 11 SCC 121 this Court referred to and followed Chameli Singh. More importantly, reference was made to our obligations under international law, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. The Petitioner strongly relied upon our international obligations and submitted that apart from the law laid down by this Court in several judgments, we should respect and acknowledge our international obligations in regard to the right to shelter. Reference was made to paragraphs 12 and 25 of the Report which read as follows:*

12. Article 19(1)(e) accords right to residence and settlement in any part of India as a fundamental right. Right to life has been assured as a basic human right under Article 21 of the Constitution of India. Article 25(1) of the Universal Declaration of Human Rights declares

that everyone has the right to a standard of living adequate for the health and well-being of himself and his family; it includes food, clothing, housing, medical care and necessary social services. Article 11(1) of the International Covenant on Economic, Social and Cultural Rights lays down that State parties to the Covenant recognise that everyone has the right to standard of living for himself and his family including food, clothing, housing and to the continuous improvement of living conditions.

.....

25.....The right to life enshrined Under Article 21 has been interpreted by this Court to include meaningful right to life and not merely animal existence as elaborated in several judgments of this Court including Hawkers case [SLPs Nos. 47-51 of 1996], Olga Tellis case [MANU/SC/0039/1985 : (1985) 3 SCC 545] and the latest Chameli Singh case [MANU/SC/0286/1996 : (1996) 2 SCC 549] and a host of other decisions which need no reiteration.....

25. We are in full agreement with the view expressed by the Petitioner but we must be aware of the caution given by this Court to the effect that the right to shelter is subject to "economic budgeting" by the State. No blanket order can be prayed for by the Petitioner or even argued for overlooking the financial capacity of the State. No doubt, at some stage the Petitioner did contend that in matters of fundamental rights, financial issues take a backseat but it must be remembered at the same time that the resources of the country are not unlimited and when it comes to the Court directing the State to expend amounts, judicial restraint is necessary.

....

27. There can be no doubt that the right to shelter is an important constitutional right and therefore shelter must be made available to everybody and to the maximum extent possible. With this in view, the Government of India has framed schemes, inter alia, for homeless persons particularly in urban areas but it is time to recognize that there are a large number of elderly persons in several parts of the country, including rural India, who are rendered 'homeless' due to migration of their families to other parts of the country and even outside the country. While some of these elderly persons are certainly not destitute, but they do need assistance because of their age and are willing to pay and contribute for a roof over their head. In the

absence of a suitable number of old age homes, and homes as per their status, they are left to fend for themselves making them vulnerable to mishaps and other unforeseen events.

The right to health

28. It was submitted by the Petitioner that medical facilities and geriatric care are not given the due importance that they deserve. He submitted that, by and large, it is older persons who require medical care more frequently than younger persons and if they are not provided the necessary medical facilities, it would adversely impact on their right to health. In support of his contention that the right to health is a human right and a constitutional right, the Petitioner referred to a few decisions which we detail hereinbelow.

29. In Vincent Panikurlangara v. Union of India MANU/SC/0482/1987 : (1987) 2 SCC 165 this Court did not specifically deal with the right to health of the elderly but it did make reference to Article 21 of the Constitution and noted that it includes within it the right to live with human dignity. In fact , Article 21 derives its life breath from some Articles in the Directive Principles of State Policy, particularly, Articles 39, 41 and 42 of the Constitution. While these Articles do not directly deal with the right to health of the elderly, it is quite obvious that when they refer to the protection of the health and strength of men and women, it must include the elderly. It was said in paragraph 16 of the Report as follows:

16. ... "It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullin case [Francis Coralie Mullin v. Administrator, Union Territory of Delhi, [MANU/SC/0517/1981 : (1981) 1 SCC 608] to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.....

30. A similar view was expressed by this Court in Consumer

Education & Research Centre v. Union of India (paragraph 25) MANU/SC/0175/1995 : (1995) 3 SCC 42 and Kirloskar Brothers Ltd. v. Employees State Insurance Corporation (paragraph 10) MANU/SC/0873/1996 : (1996) 2 SCC 682.

31. In State of Punjab v. Mohinder Singh Chawla (paragraph 4) MANU/SC/0277/1997 : (1997) 2 SCC 83, Nagar Nigam v. AL Faheem Meat Exports (P) Ltd. (paragraph 26) MANU/SC/0858/2007 : (2006) 13 SCC 382 and in Occupational Health and Safety Association v. Union of India (paragraph 10) MANU/SC/0076/2014 : (2014) 3 SCC 547 the right to health was given the status of a fundamental right flowing from Article 21 of the Constitution. There is, of course, no going back on this.

32. It has been brought to our notice by the learned Additional Solicitor General that the Government of India has launched the National Programme for Healthcare of the Elderly during 2010-11. The objective of this National Programme is to provide dedicated healthcare facilities to senior citizens, that is, those above 60 years of age at the primary, secondary and tertiary healthcare delivery system. The basic aim of the National Programme is to provide separate and specialised comprehensive healthcare to senior citizens at various levels of the State healthcare delivery system including outreach services.

33. The Union of India has also pointed out that the activities relating to the implementation of the National Programme are ongoing and it is not as if the objectives and goals of the National Programme can be achieved overnight.

34. The Petitioner concedes that the National Programme has some positive components but it is submitted that they are not being implemented effectively or have not been fully operationalised in some Districts of the country. One of the gaps pointed out by the Petitioner is that there is no reliable information about the number of beds reserved for geriatric care in Government or private hospitals or information regarding specific geriatric centres. It is submitted that these details must be provided for all 719 Districts of the country.

35. We fully appreciate the view of the Union of India but at the same time, it must be emphasised that the National Programme is now about six or seven years old and it must be implemented with due earnestness, otherwise it will remain only a paper programme. There is undoubtedly a lot that has been achieved in the last few years but there is still a lot that is required to be achieved and we expect the

Union of India and all the State Governments and Union Territory Administrations to take an active interest in the implementation of the National Programme.

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007

36. While the Petitioner emphasized the constitutional rights available to everybody including the elderly, such as the right to live with dignity, the right to shelter and the right to adequate medical care and geriatric care, the Petitioner relied, has an alternative, on statutory provisions for the existence of these rights. It was submitted by the Petitioner that even if the Constitution was not to be given an expansive meaning, there are statutory rights which are enforceable by the elderly under a law made by Parliament and that is the Maintenance and Welfare of Parents and Senior Citizens Act , 2007 (MWP Act).

37. The Petitioner drew our attention to a few provisions of the MWP Act to substantiate his contention. In particular, he drew our attention to Section 19 of the MWP Act which deals with the establishment of old age homes and requires each State Government to establish and maintain at least one old age home in every District in the country with each old age home having accommodation for 150 senior citizens who are indigent. Section 19 reads as follows:

19. Establishment of old age homes-

1. The State Government may establish and maintain such number of old age homes at accessible places, as it may deem necessary, in a phased manner, beginning with at least one in each District to accommodate in such homes a minimum of one hundred fifty senior citizens who are indigent.

2. The State Government may, prescribe a scheme for management of old age homes, including the standards and various types of services to be provided by them which are necessary for medical care and means of entertainment to the inhabitants of such homes.

Explanation. - For the purposes of this section, "indigent" means any senior citizen who is not having sufficient means, as determined by the State Government, from time to time, to maintain himself.

38. The submission of the Petitioner and the learned Amicus is that though more than 300 old age homes have been established in

different parts of the country, the requirement is of many more considering the large population of indigent elderly. It was submitted that some homes are in a dilapidated condition, without adequate facilities including geriatric care. In other words, in several instances, the law laid down in Section 19 of the MWP Act is being complied with only in letter and certainly not in spirit.

....

40. The submission of the Petitioner and the learned Amicus is that there is a huge gap between the law and its implementation and it is submitted that even though the MWP Act came into force in 2007 and more than a decade has passed since then, serious efforts have not been made by the Government of India or by the State Governments to ensure that medical facilities for the elderly and geriatric care is made available.

41. It is further submitted by the Petitioner that assuming for the sake of argument that the provisions of the MWP Act are in place and are being implemented as they should be, the elderly are not aware of their human rights guaranteed not only by the Constitution but also by the MWP Act . It is pointed out that Section 21 of the MWP Act requires the State Governments to give publicity to the provisions of the said Act through all modes of public media. There is also a mandate for effective coordination between various ministries and departments of the State Government to address the issues relating to the welfare of the elderly and more importantly, a periodic review is required to be conducted.

42. The submission of the Petitioner is that there is hardly any publicity given to the provisions of the MWP Act and despite efforts by several organisations such as HelpAge India, the rights of the elderly to shelter and medical facilities as well as geriatric care remains only a pipe dream. It is submitted that the Government of India must come out with a workable plan to give publicity to the provisions of the MWP Act so that the elderly can live the remainder of their life with dignity.

Discussion

43. Having heard the Petitioner, the learned Amicus and others including the learned Additional Solicitor General, we are left in no doubt that the petition raises significant issues relating to the recognition and enforcement of the fundamental rights of the elderly. This is perhaps the first such petition on the subject and interestingly,

the submissions of the Petitioner are based entirely on Article 21 of the Constitution and other supporting constitutional provisions.

44. We accept that the right to life provided for in Article 21 of the Constitution must be given an expansive meaning. The right to life, we acknowledge, encompasses several rights but for the time being we are concerned with three important constitutional rights, each one of them being basic and fundamental. These rights articulated by the Petitioner are the right to live with dignity, the right to shelter and the right to health. The State is obligated to ensure that these fundamental rights are not only protected but are enforced and made available to all citizens.

45. The Petitioner has raised, alternatively, an equally significant issue namely that even if the constitutional rights are not enforceable due to difficulties in "economic budgeting" even then the law enacted by Parliament in the form of the MWP Act mandates the protection and enforcement of the rights of elderly persons. It is quite clear, submitted the Petitioner, that Parliament was fully aware of the financial impact of the law. Considerations of "economic budgeting" by the State both at the level of the Government of India and at the level of the State Governments must have been taken into account while enacting the legislation. Therefore, there cannot be any excuse of lack of finances either by the Government of India or by the State Governments in strictly implementing the provisions the MWP Act . In short, if not the constitutional then at least the statutory rights of elderly persons must be recognized and implemented.

46. The consensus that emerged during the submissions was that this Public Interest Petition should not and cannot be taken as an adversarial litigation. With this agreement we had put it to the learned Counsel and parties before us to suggest ways and means to ensure that the rights of the elderly are addressed keeping in view the financial requirements and the availability of finances with the Government of India and the State Governments. One solution proffered was that this Court should issue a continuing mandamus so that there is effective implementation of the constitutional rights of the elderly and the provisions of the MWP Act .

47. We are in agreement with the consensus view that emerged during the course of discussions and submissions and are of opinion that a set of directions issued by this Court will not fulfil the constitutional mandate or the mandate of the MWP Act . There is a need to continuously monitor the progress in the implementation of the constitutional mandate to make available to the elderly the right to live with dignity and to provide them with reasonable

accommodation, medical facilities and geriatric care. While this may take some time, the only available solution is a continuing mandamus which is a well-recognised practice and procedure adopted by this Court in several cases to ensure that the rights of the people are respected, recognized and enforced and that social justice as postulated by the Preamble in the Constitution is given meaning and teeth.

48. We wish to make it clear that we are not at all critical of the efforts made by the Government of India or by the State Governments, nor is this Public Interest Petition intended to undermine the efforts being made or contemplated. Nevertheless, we are of the view that given the constitutional importance of the issues raised, focused and perhaps more vigorous efforts are needed.

49. In this context, we may note that the learned Additional Solicitor General submitted that an evaluation study is contemplated on all aspects of the National Social Assistance Programme for use of best practices and to bring about uniformity in the implementation of the Scheme in all States. In addition, a social audit for the NSAP schemes is also contemplated and guidelines have been issued for a social audit as recently as on 30th November, 2018 for the launch of a social audit pilot in 21 States and Union Territory Administrations.

50. To take this forward, we are of opinion that it would be appropriate to issue some initial directions so that effective contributions are made to recognise and enforce the rights of elderly persons.

DIRECTIONS

51. Taking note of the submissions made by the parties before us and while complimenting them for a spirited support of the rights of the elderly, we issue the following directions for the time being:

- 1. The Union of India will obtain necessary information from all the State Governments and the Union Territories about the number of old age homes in each District of the country and file a Status Report in this regard.*
- 2. The Union of India will also obtain from all the State Governments the medical facilities and geriatric care facilities that are available to senior citizens in each District and file a Status Report in this regard.*
- 3. On the basis of the information gathered by the Union of India as detailed in the Status Reports, a plan of Action should be prepared for giving publicity to the provisions of the MWP Act and making senior citizens aware of the provisions of the said Act and the constitutional and statutory rights of senior citizens.*

4. Section 30 of the MWP Act enables the Government of India to issue appropriate directions to the State Governments to carry out and execute the provisions of the MWP Act . The Central Government must exercise its power in this regard and issue appropriate directions to the State Governments for the effective implementation of the provisions of the MWP Act . Alongside this, the Central Government must, in terms of Section 31 of the MWP Act , conduct a review for the purposes of monitoring the progress in implementation of the MWP Act by the State Governments.

5. Some of the schemes referred to hereinabove are comparatively dated. It is high time that the Government of India has a relook at these schemes and perhaps overhaul them with a view to bring about convergence and avoid multiplicity. In particular, the Government of India and the State Governments must revisit the grant of pension to the elderly so that it is more realistic. Of course, this would depend upon the availability of finances and the economic capacity of the Government of India and the State Governments.”

66. It is therefore beyond the pale of any doubt that the right to life as a fundamental right postulated under Article 21 of the Constitution of India would take within its broad sweep, the right to health, the right to shelter and the right to live with dignity. It has been elaborated in the extracted paragraphs of the judgement of the Supreme Court that without these the right to life would be rather meaningless as it has been emphasised several times that the right to life cannot mean mere animal existence. Taking forward the spirit of the judgement extracted supra, the impugned Government order can be said to have understood the spirit of these decisions and the specific provision under Rule IX (i) in the Annexure to the

G.O. which deals with 'management of governance', speaking of broadbasing the management of private old age homes with elected representatives of the fund providers constituting the majority as per this Rule, has to be interpreted as the progressive and conscious action on the part of the State Government in consonance with the principles of assuring dignity to elderly citizens in order that they may partake in the decision-making of the management of old-age homes where they specifically contribute to the funds of the private old-age homes. While it is the contention of the writ petitioners who have challenged the validity of the impugned G.O. that the security deposit made by the inmates of the old-age home cannot entitle them to participate in the administration of the old-age home as the term 'management' and the term 'fund providers' has not been defined in the impugned GO. It is clear that such a contention is without any substance for the very object and reason for such a Rule to be introduced by way of the impugned executive order is that these elderly persons who contribute a huge sum which infact works as a corpus for the management of the old-age home would definitely be included under the term 'fund providers' and the said Rule was introduced in response to the specific

grievance made by the petitioner in his original writ petition that the administration of these private old-age homes was not being run in a transparent manner, and that inspite of contributing heavily to the old-age homes, the services that were offered to the inmates were rather poor and not proportionate to the funds provided by these inmates. As such the technical contention that the term 'management' and the term 'fund providers' have not been defined cannot be used as a stumbling block in the implementation of the provision which contemplates the participation of the fund providing inmates in the administration of the private old-age homes. In the event that there are many number of such fund providers, such inmates can always choose their representatives who can represent them in the administrative body of the old-age homes.

67. As already stated above, in spite of the well intentioned steps taken by the State Government by way of coming out with subordinate legislation under the Act of 2007 as well as passing the executive order in the impugned GO, certain circumstances have not been completely foreseen and it is expected that the State Government will work tirelessly towards the upholding of the dignity of these elderly citizens by providing them access

to good health, medical facilities, food, shelter and all other basic amenities as well as other aspects that contribute to the making of a dignified life till the very end. The State Government may also do well in plugging the loopholes that have been pointed out by the writ petitioners and come up with further clarifications and details and also examine the desirability of incorporating certain provisions by way of legislation that will have greater force in law.

V. POSITION IN OTHER COUNTRIES

68. In this regard, a reference is also made to the legislations in the UK and USA in respect of social security, care for the elderly and the role played by the State in managing the standard of care provided to the elderly by private care homes. Both the Central and State Government may also use these details as a cue for further legislation and action in this regard.

A. Legal Position in the United Kingdom

69. The Care Standards Act 2000 and the Regulation of Care (Scotland) Act 2001 establish new regulatory frameworks for all care homes in the United Kingdom. The responsibility for formulating standards and

regulations will be retained by the Department of Health and the Scottish Executive. Standards are not legally enforceable, but failure to meet standards can be used as evidence in prosecutions for failure to comply with regulations.

70. Under this legislation, individual health authorities are responsible for initially registering and inspecting nursing homes, and local authorities are responsible for registering and inspecting residential care homes. (Nursing homes are for residents who primarily need skilled nursing care. Residential homes are for clients who primarily need social care.) Under the new legislation, which came into force in England and Scotland in 2002, the distinction between nursing homes and residential care homes has disappeared. Responsibility for registering and inspecting homes and enforcing regulations have been transferred from health authorities and local authorities to the Commission for Health Improvement and three other new central organisations: the National Care Standards Commission in England, the National Assembly for Wales, and the Scottish Commission for the Regulation of Care. The National Care Standards Commission has registration and enforcement powers that encompass not only care homes

but also independent hospitals and other forms of social care.

71. The responsibility for ensuring that the services are appropriate to individual needs and are of high quality remain with local authorities and NHS care trusts. Research in the United States and Australia has shown that having low numbers of staff is associated with poor quality care. The Regulation of Care (Scotland) Act 2001 allows local authorities to employ, fund, and determine the qualifications, skill mix, and number of nursing staff and to retain the ability to use publicly employed staff. In England local authorities may not fund, employ, or determine the number of nursing staff.

72. The government has adopted a “traffic light” system for NHS trusts under which they are reimbursed on the basis of both their financial performance and the quality of care provided, but this approach is not being implemented in contracts with private nursing homes. In the United States, patients are assigned by staff to up to 66 categories of dependency, and reimbursement is made using a measure of case mix.

73. The National Care Standards Commission's inspectorate will be responsible for monitoring and enforcing standards. Persuading errant providers to comply with standards requires a regime of credible sanctions.

Apart from education and persuasion, the Care Standards Act provides the National Care Standards Commission with four sanctions with which to threaten providers who don't comply: formal notice of non-compliance; fines of up to £5000 for specific offences, such as failing to comply with conditions of registration; withdrawal of licence; and the exclusion of individuals from the industry. Although an enforcement notice might shame a home, if it fails to do so inspectors may be reluctant to take action that would lead to a revocation of registration. The disruption that revocation would cause to residents makes it an unpopular step and unlikely, except in the most extreme circumstances. Intermediate sanctions—such as levying large financial penalties, barring new admissions, or taking over management—have not yet been made available to the care standards commission. These types of intermediate sanctions are considered essential tools for regulators in the United States, in other sectors in the United Kingdom, and in the NHS.

B. Legal Position in United States of America

74. In the USA, Independent living communities – sometimes also known as retirement communities, senior apartments or 55+ communities – cater to

people who require little to no assistance. These are seniors who are independent and have few medical concerns. These homes are paid for privately and include options like meal packages and social activities. Because these homes are private, there isn't much government funding except, for some, under Section 202 of the Supportive Housing for the Elderly Program. This U.S. Housing and Urban Development program finances housing for "very low-income elderly persons, including the frail elderly," and provides rent subsidies.

75. Assisted living communities are specifically designed for people who can no longer live on their own but do not need the high-level care of nursing homes. Assisted living facilities help residents with daily routines like eating and taking medications. These facilities also provide social activities, provide transportation and have staff available 24 hours a day. Assisted living facilities are mostly paid for privately, but some do accept Medicaid. If a nursing home is receiving funds from Medicare or Medicaid, it must comply with federal regulations established in the 1987 Nursing Home Reform Act.

76. In general, assisted living facilities and senior housing are regulated by the states. Each state issues a license to a facility after an inspection, typically conducted annually or semi-annually. This process is overseen by a state's department of health, department of social services or, in some instances, a combination of these departments. Inspection teams typically comprise nurses, social workers, sanitarians and public health officials. The teams survey staff, residents and family members; examine facility records, and make observations. These surveys are then used to identify compliance and quality improvement issues.

77. Most state regulations address essential services that a senior living facility must provide. These services include assistance with activities of daily living (help with dressing, eating, etc.), meals, housekeeping and resident assessments. Some states have additional regulations for services such as money management, making medical appointments and taking residents shopping.

VI. CONCLUDING REMARKS

78. In view of the above discussion upholding the validity of the impugned G.O. and taking into consideration the fact that the cases challenging the validity of the G.O. have been taken up for hearing along with the contempt petition alleging non-implementation of the G.O., and while simultaneously placing on record appreciation for the State Government for its efforts in passing the impugned executive order addressing the grievances of the public interest writ petitioners, it is appropriate that the contempt petition is to be closed without further orders.

79. In the above background, this Court would deem it fit to issue the following guidelines:

i. The State Government shall take steps to inspect all old age homes within the State and ensure implementation of the spirit of the impugned GO, which has now been upheld.

ii. After inspection, the State Government may issue directives to be complied with, and deficiencies, if any, to be rectified by the old age homes/retirement homes in order to comply with the spirit of the Government Order as well as the orders passed herein. The State Government shall take steps to monitor the day-to-day functioning of the homes, with more focus on nutrition, hygiene and medical needs of inmates, such as food, round the clock security, clean drinking water, ambulance

services, medical care, amusement and entertainment, religious activities, etc., to suit their needs.

iii. The non-compliance of the directives/non-rectification of the deficiencies as pointed out, must entail civil consequences for the retirement homes/old age homes, including cancellation of registration.

iv. The State Government must ensure that every old age home/retirement home within the State is registered with it and the Government must maintain records of its inmates as well as the persons involved in the Management.

v. The State Government must ensure that non-registered homes do not continue to function within the State, and must act on any complaint by any person in this regard, after necessary inspection.

vi. The State Government must maintain a grievance cell for senior citizens, while ensuring compliance of the Government Order, now being upheld.

(The term “State Government” employed in the above guidelines shall include any authorized representative or officer of the Government).

vii. It is only appropriate that the substance of the impugned executive order may be well made part of a legislation either independently or as an addition to the existing legislation on the subject with more clarity in order that no further time is wasted on debating the validity and applicability of the welfare measures to senior citizens and old age homes/retirement homes, etc. on a universal scale.

80. To sum up,

(i) Contempt Petition is closed.

(ii) WP.Nos.16984 and 28237 of 2017 stand disposed of, with the aforesaid directives.

(iii) Other writ petitions viz., 30458, 30469, 30874 and 30884 of 2019 stand dismissed.

(iv) There is no order as to costs.

(v) Consequently, connected miscellaneous petitions are closed.

(R.M.D., J.)

(J.S.N.P., J.)

30.06.2022

rsh

Index : Yes/No

To

1. The Secretary to Government

Social Welfare and Nutritious Meal Programme Department

Ministry of Social Welfare and Nutritious Meal Programme

Department

Fort St. George, Chennai - 600 009

2. Director of Social Welfare

Chepauk, Chennai - 600 005

3. The District Collector
Office of the District Collector
Coimbatore - 641 041
- 4.The District Social Welfare Officer,
Coimbatore.

Cont.P.No.515 of 2018 and WP.No.16984 of 2017 etc. batch

R.MAHDEVAN, J.
and
J.SATHYA NARAYANA PRASAD, J.

rsh/rk

Contempt Petition No. 515 of 2018
and WP.Nos.16984 and 28237 of 2017
& 30458, 30469, 30874 and 30884 of 2019

30.06.2022