LAW MANTRA THINK BEYOND OTHERS
(I.S.S.N 2321- 6417 (Online)
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APPLICATION OF DOCTRINE OF "PARENS PARTIAE" IN INDIA : A CRITICAL STUDY *

INTRODUCTION

"Parens Partiae"doctrine is not a new concept but an old practice through the world. It means "assuming authority (state) to act as a guardian for those persons who unable to care for themselves. It is a right of the sovereign to exercise authority against others, who violates right of citizen. It imposes a duty on the sovereign in public interest to safeguard the interest of the persons under disability (having no protectors are to be protected). Although the connotation of the term differs from country to country, it is the obligation of the State to protect those persons. In England the king, in America the people likewise in India the State are duty bound to protect and to control persons under disability. During the feudal time the king was acting as "parens partiae" and in the modern time the "State" has taken over and act as a "parens partiae". In the present study an endeavor has been made to evaluate the role of in a welfare state. India is a welfare state, its position (the duty of the state) has been examined and explained in the dimension of Judicial decisions.

1. **Origin and Development of the concept**

Latin meaning parent of his or her country , the term "parens partiae"' originated under the British Law in 13th country. The king was regarded as the father of the country and obliged to look after the interest of the person who are unable to look after themselves. The principle behind the "parens partiae" is that .

If a person is in need of someone who can act as a parent, who can make decisions and take action for the welfare of the person. Where there is no any parent (so called) the State is best qualified to take the said role. The constitutional Bench, Supreme Court of India in Chmanlal Sahu v. Union of India (1), explained the term "parens partiae". "Referring the words and phrases" (Permanent addition vol.33 at page 99) the court observed that it is the interest power of the

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authority of a legislature to provide protection to the person and property of the persons non sui juris, such as minor, insane and incompetent person. The court further observed the sovereign has power of guardianship over persons under disability. The soverign in duty bound for public interest protect persons under disability who have no rightful protectors. Justice keneddy in Heller V. DOE (2) observed "the state has a legitimate interest under its "parens partiae" powers in providing care to its citizens who are unable to care for themselves.

"Parens Partiae" is a public policy power of the State to usurp the rights of the natural or legal guardian and to act as the parent of any child or individual who is in need of protection. The infants, idiots and lunatics are coming under the said group of individuals.

The federal court have accepted the doctrine of "parens partiae" in litigations for different tribes. As the tribal people far away from the concept of development and light of civilizations. Although no analysis has been provided with respect to the doctrine the courts have protected the tribal during litigations. (3).

In snapp. United States the Supreme Court articulated the test of "parens partiae"is standing and finding that a sovereign.

(a) must articulate an interest apart from the interests of particular parties i.e. the states must be more than a nominal party.
(b) must express a quasi sovereign interest.
(c) must have alleged injury to a sufficiently substantial segment of its population (4)

The common wealth of Puerto rico brought suit against east court apple growers against that the apple growers have violated the federal laws preferring domestic labourers of puero rico over foreign temporary workers.

The snapp. Courts identified two types of quasi sovereign interests such as :-

(1) Protecting the health and well-being of the residents and
(2) Securing observance of the terms under which (the state) participates in the federal system.
(3)

Effective access of justice is also right of the people and the state is under obligation to provide justice as "parens partiae" by using its quasi sovereign interest.

In State of Kerala v. N.M. Thomas Case (7) Justice Mathew observed "the court also is "state" within the meaning of Article 12 of the Indian Constitution". The court also act as "parens partiae" for the welfare of the people to protect and control the persons under disability like the state function.

2. **Euthanasia and "parens partiae".**

In a welfare state it is that duty of the State to provide a quality life to the people and the quality life includes quality health service (8). Right to health includes the basic right to food, clothing and shelter (9) for human existence. The court observed mere animal existence is not the life. Right to live with dignity also involves right to "protection of health". Article (21) of the constitution casts an obligation on the state to take every measure to preserve life of the people. In Vikram Deo Tomar v. State of Bihar (10) the court observed , we life in an age where this court has demonstrated, while interpreting Article 21 of the constitution, that every person is entitled to quality of life in consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen, right to life does not include right to die (11).

In India relating to 'mercy killing' or euthanasia is a growing subject of research and study. Euthanasia which may be active or passive it is not lawful (12). The Supreme Court of India referring the Airedale case (13) observed "Euthanasia could be made lawful by the legislature". As there is no specific legislation it has not been legalized in India. Although euthanasia is legally permitted under certain countries like Netherland, Switzerland, Holland. Belgium etc. in U.K. Spain, Austria, Italy, Germany, France etc. , euthanasia or physician assisted death is illegal for withdrawal of life support of a patient in permanent vegetative stage (PVS), there is no any statutory provisions available in our country. Referring the Visakha Case (14) the Supreme Court laid down certain principles relating to passive euthanasia in certain cases, the court held that "following the techniques used in Visakha's case, we are laying down the law in this connection which will continue to be the law until parliament makes a law on the subject.

(i) A decision has to be taken to discontinue life support wither by the parents or the spouse or other close relatives or in the absence of any of them, such a decision can be even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision to be taken bonafide in the best interest of the patient.

(ii) Hence, even if a decision is taken by the near relatives or doctors or next friends to withdraw life support, such a decision requires approval from the high court as laid down in Airedales case (supra) (15).

Here the doctrine of "parens partiae" has been applied, when the patient has no family members or the near relatives then the treating doctors can taken decision for withdrawal of life support system with the approval of the High Court and the High Court here is the State within the meaning of Article 12 of the Constitution. The Supreme Court in Aruna

Ramchandra Shanbaug case (16) observed that Article 226 of the constitution gives sample powers to the High Court to suitable orders on the application filed by the near relatives or next friend or the doctors / hospital staff seeking permission to withdraw the life support to an incompetent patient. In this regard the Medical Treatment of Terminally ill patients (Protection of Patients and Medical Practitioners) Bill 2006 is still pending for enactment by our parliament.

In Aruna Shanbaug case (Supra) the Supreme court of India recommended to abolish section 309 I.P.C. as Euthanasia could be made lawful by the legislature only.

3. **Cases in brain death**

Death means cessation of breathing or, more scientifically a cessation of heart – beat. This definition of death is now obsolete after development of medical science. The American court referring (the blacks Dictionary, 4th Edition) in Schmidt. V. Pierce Case (17) expressed. "The cessation of life, the ceasing to exist; defined by physician as a total stoppage of the circulation of the blood, and cessation of the animal and vital functions, consequent thereon, such as respiration pulsation etc. In India the Transplantation of Human Organs Act, 1994 under section 2(d) defines brain stem death as "the stage at which all functions of the brain stem have permanently and irreversibly ceased and is so certified under sub section 6 of the section 3. This definition although is restricted for the purpose of transplantation of human organs but gives a clear definition of 'brain death'. The person who is already under the stage and nobody is to take decision, then the state and the treating physicians act as "parens partiae" for such patients.

4. **Industrial Catastrophe and "parens partiae"**

Industrial catastrophe & environmental degradation some times affect the life of the people. The common man even can not afford the expenditure for the recival of the good health nor in a condition to seek justice before the court of law for the prolonged trial before the court or the complexities of the system. The best example in this aspect is the Union carbide v. Union of Indian case (18) . In order to avoid multiplicity of parties and cases the parliament passed the Bhopal Gas Leak Disaster (Processing of claims) Act, 1985 (Bhopal Act). The power conferred to the Union of India is the responsibility of "parens partiae" on behalf of the victim. The intention of the legislature is speedy and equitable disposal of claims arising out of the Bhopal disaster. Any person real or artificial who is incapacitated to take up the case before judiciary, in those case for effective presentation before the court and to protect the rights of

victims the state worked as "parens partiae". As a welfare state, the Union of India took the responsibility to make the deficiency and safeguard the interest of the victims.

5. **Parens Patriae under different legislation.**

The doctrine of "parens partiae" has been adopted in different legislkation in India. Some of the legislations are given below .

1. **The Medical Termination of Pregnancy Act, 1971**

The Act provides that a woman who is a minor and not attained the age of eighteen years or a lunatia their pregnancy can not be terminated without written consent of her guardian (19). Although there is no specific provision has been made in the Act. For the minors and lunatic woman but the word guardian implied by adopts the doctrine of "parens partiae" for the minors and lunatics and the medical practitioners shall obtain written consent of guardian as enumerated in the Aruna's case (Supra) for the welfare of the Child or the lunatic.

2. The Indian Lunacy Act. 1912

The lunatics were guided by the Act. And power was given to the District judge to pass appropriate order for the welfare of the lunatic by appointing manager / guardian or entrusting person of the lunatic to the institutions licensed under the Act. When the lunatic has no any estate provisions made that the lunatic shall be admitted to a licensed asylum under reception order under section 25 and the state shall bear the cost of maintenance (20) and pay to the person change of asylum. In the Act the doctrine of "parens partiae" was incorporated which the state born all the expense for maintenance of the lunatic and where the lunatic having any estate the court passed order for maintenance or welfare of the person by appointing a manager or guardian. Here also the court functioned as a "parens partiae" for the welfare of the lunatic. In the mental Health Act. 1987 similar provisions have been made by the legislature for the mentally ill person which is the new substituted legislation, as the (ILA) is out dated and advancement of medical science brought the new legislation. The State is duty bound to see the welfare of the mentally ill persons, their treatment establishing guardianship or custody, regulate and

establish psychiatric hospitals or nursing homes at state expenses including maintenance and legal aid.

3. **The Legal Services Authorities Act, 1987.**

The Ambit of life has been widened under Article 21 of the Constitution which includes 'legal aid' to the poor. Every person who has to file or defend a case shall be entitled to legal services under the Act. The persons who are entitled to get the legal services free of cost has been enumerated under section 12 of the Act. The members of schedule caste or schedule tribe, victims of human trafficking including beggars, women and children etc. are entitled for free legal services. The principles behind this section under the Act. is the doctrine of "parens partiae". The 'State' is legally and constitutionally bound to act as a guardian which is the duty in a welfare state. The Act. Covers the persons with disabilities (equal opportunities, protection of Rights and full participation) Act, 1995, the Immoral Traffic (Prevention) Act., 1956, the Juvenile Justice, Act. 1986 , the Mental Health Act. 1987 etc.

6. **Conclusion :**

In a welfare state the 'state' is the guardian of the people. The doctrine of "parens partiae" is not only restricted to person under disability but it has been extended to every sphere of human life. Every person has a right to good environment and a healthy life. Accordingly, the state being the guardian of the people should be vigilant and wherever or whenever there is any violation of human rights or any encroachment in 'life' the state should come forward as a protector for the welfare of the people.

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