

WP(C).No.33655/2024

1



2024:KER:76182

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

MONDAY, THE 14TH DAY OF OCTOBER 2024 / 22ND ASWINA, 1946

WP(C) NO. 33655 OF 2024

PETITIONERS :

- 1 JILLET.K.T.
AGED 50 YEARS
S/O.THOMAS.K.S., KAVALAMKUZHY, GOTHURUTH,
MOOTHAKUNNAM, ERNAKULAM, PIN - 683516
- 2 SUNIL.T.K.
AGED 43 YEARS
S/O.KUMARAN, THOTTUPURATHU HOUSE,
SANTHIPURAM.P.O., ALA, THRISSUR, PIN - 680668

BY ADVS.
C.A.CHACKO
C.M.CHARISMA
BABU V.P.

RESPONDENTS :

- 1 STATE OF KERALA
REPRESENTED BY ITS SECRETARY, DEPARTMENT OF
HEALTH AND FAMILY WELFARE, SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001



2024:KER:76182

- 2 DISTRICT LEVEL ORGAN TRANSPLANTATION
AUTHORIZATION COMMITTEE
GOVERNMENT MEDICAL COLLEGE, KALAMASSERY,
ERNAKULAM, REPRESENTED BY ITS CHAIRMAN,
PIN - 682033
- 3 THE CHAIRMAN
DISTRICT LEVEL ORGAN TRANSPLANTATION
AUTHORIZATION COMMITTEE, GOVERNMENT MEDICAL
COLLEGE, KALAMASSERY, ERNAKULAM, PIN - 682033
- 4 DEPUTY SUPERINTENDENT OF POLICE
KODUNGALLUR, THRISSUR, PIN - 680669
- 5 RAJAGIRI HOSPITAL
CHUNANGAMVELI, ALUVA, ERNAKULAM DISTRICT,
REPRESENTED BY ITS MEDICAL SUPERINTENDENT, PIN -
683112

OTHER PRESENT:

SMT. DEEPA NARAYANAN, SR. GP.
SRI. THOMAS. J. ANAKKALLUNKAL FOR R5.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 8.10.2024, THE COURT ON 14.10.2024 DELIVERED
THE FOLLOWING:



2024:KER:76182

V.G.ARUN, J

=====

W.P.(C) No.33655 of 2024

"CR"

=====

Dated this the 14th day of October, 2024

JUDGMENT

The first petitioner is a chronic kidney patient, advised to undergo renal transplantation surgery to save his life. The second petitioner has volunteered to donate his organ for conducting the transplantation surgery. As the petitioners are not near relatives, they submitted a joint application, as provided under 9(5) of the Transplantation of Human Organs and Tissues Act, 2012 (the Act for short). The District Level Organ Transplantation Authorisation Committee under the Act rejected the application, suspecting commercial dealing behind the human organ donation and the Appellate Authority upheld the rejection. Hence, this writ petition.

2.Heard Adv.C.A.Chacko for the petitioners, Government Pleader Adv.Deepa Narayanan for respondents 1 to 4 and Adv.Thomas J.Anakkallunkal for the 5th respondent.



2024:KER:76182

3. The writ petition calls for a decision on the correctness of the decision taken by the authorities under the Act, as to the genuineness or otherwise of the altruistic organ donation. The issue has to be decided bearing in mind the fact that the Act is intended to strike a balance between two conflicting needs, viz; the need to prohibit commercial dealings in human organs and the need to bring in a legislation, providing for removal of organs from persons suffering from brain stem death and for altruistic donation by living persons. Section 3 of the Act deals with the authority for removal of human organs or tissues or both. By virtue of Sub section (1) of Section 3, any donor may, in such manner and subject to such conditions as may be prescribed, before his death, authorise the removal of any organ or tissue or both of his body for therapeutic purposes. The restrictions on removal and transplantation of human organs is contained in Section 9, the relevant portion of which reads as under;



2024:KER:76182

“ **Section 9(1)** Save as otherwise provided in sub-section (3), no human organ or tissue or both removed from the body of a donor before his death shall be transplanted into a recipient unless the donor is a near relative of the recipient.

xxx

xxxx

xxx

(3) If any donor authorises the removal of any of his human organs or tissues or both before his death under sub-section (1) of Section 3 for transplantation into the body of such recipient not being a near relative as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ or tissue or both shall not be removed and transplanted without the prior approval of the Authorisation Committee.

(4)(a) The composition of the Authorisation Committees shall be such as may be prescribed by the Central Government from time to time.

(b) The State Government and the Union territories shall constitute, by notification, one or more Authorisation Committees consisting of such members as may be nominated by the State Governments and the Union territories on such terms and conditions as may be specified in the notification for



2024:KER:76182

the purposes of this section.

(5) On an application jointly made in such form and in such manner as may be prescribed, by the donor and the recipient, the Authorisation Committee shall, after holding an inquiry and after satisfying itself that the applicants have complied with all the requirements of this Act and the rules made thereunder, grant to the applicants approval for the removal and transplantation of the human organ.

(6) If, after the inquiry and after giving an opportunity to the applicants of being heard, the Authorisation Committee is satisfied that the applicants have not complied with the requirements of this Act and the rules made thereunder, it shall, for reasons to be recorded in writing, reject the application for approval.”

4. A conjoint reading of Sections 3(1) and 9 shows that, while any donor can authorise the removal of a human organ from his body for therapeutic purposes, if the donor is not a near relative of the recipient, reasons, such as affection or attachment towards the recipient or other special reasons, if any, that had prompted the donor



2024:KER:76182

to volunteer for the donation, ought to be specified and a joint application under sub-section (5) of Section 9 submitted by the donor and the recipient, seeking the Authorisation Committee's approval for removal and transplantation of the human organ. The Authorisation Committee should thereupon conduct an enquiry and satisfy itself whether the applicants have complied with all the requirements under the Act and the Rules thereunder. The rules in this context means the Transplantation of Human Organs and Tissues Rules, 2014 ('the Rules' for short). The factors to be considered by the Authorisation Committee for arriving at its satisfaction is detailed in Rule 7(3) as under;

"7. Authorisation Committee.

(3) When the proposed donor and the recipient are not near relatives, the Authorisation Committee shall,—

(i) evaluate that there is no commercial transaction between the recipient and the donor and that no payment has been made



2024:KER:76182

to the donor or promised to be made to the donor or any other person;

(ii) prepare an explanation of the link between them and the circumstances which led to the offer being made;

(iii) examine the reasons why the donor wishes to donate;

(iv) examine the documentary evidence of the link, e.g. proof that they have lived together, etc.;

(v) examine old photographs showing the donor and the recipient together;

(vi) evaluate that there is no middleman or tout involved;

(vii) evaluate that financial status of the donor and the recipient by asking them to give appropriate evidence of their vocation and income for the previous three financial years and any gross disparity between the status of the two must be evaluated in the backdrop of the objective of preventing commercial dealing;

(viii) ensure that the donor is not a drug addict;

(ix) ensure that the near relative or if near relative is not available, any adult person related to donor by blood or marriage of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ or tissue, the authenticity of the link between the donor and the recipient, and the reasons for donation, and any strong views or



2024:KER:76182

disagreement or objection of such kin shall also be recorded and taken note of.”

5. The burden of satisfying the Authorisation Committee that no element of commercialisation is involved and the altruistic donation is prompted by the donor’s affection or attachment towards the recipient or for some other special reason is upon the applicants. Therefore, it is for the applicants to produce proof of the various factors mentioned in Rule 7(3), which are meant to aid the Authorisation Committee in reaching the right conclusion. Based on the available materials, the Authorisation Committee has to take a judicious decision, after considering all facts and circumstances. The following observations of the Supreme Court in **Kuldeep Singh v. State of Tamil Nadu**, [(2005) 11 SCC 122] should guide the Authorisation Committee;

“Where the donor is not “near relative” as defined under the Act the situation is covered by sub-section (3) of Section 9. As Form 1 in terms of Rule 3 itself shows, the same has to be filed in both the cases where the donor is a near relative and where he is not, so far as the recipient is concerned. In case the donor is not a near relative the



2024:KER:76182

requirement is that he must establish that removal of the organ was being authorised for transplantation into the body of the recipient because of affection or attachment or for any special reasons to make donation of his organ. As the purpose of enactment of the statute itself shows, there cannot be any commercial element involved in the donation. The object of the statute is crystal clear that it intends to prevent commercial dealings in human organs. The Authorisation Committee is, therefore, required to satisfy that the real purpose of the donor authorising removal of the organ is by reason of affection or attachment towards the recipient or for any other special reason. Such special reasons can by no stretch of imagination encompass commercial elements. Above being the intent, the inevitable conclusion is that the Authorisation Committee of the State to which the donor and the donee belong have to take the exercise to find out whether approval is to be accorded. Such Committee shall be in a better position to ascertain the true intent and the purpose for the authorisation to remove the organ and whether any commercial element is involved or not. They would be in a better position to lift the veil of projected affection or attachment and the so-called special reasons and focus on the true intent. The burden is on the applicants to establish the real intent by placing relevant materials for consideration of the Authorisation Committee. Whether there exists any affection or attachment or special reason is within the special knowledge of the applicants, and a heavy burden lies on them to establish it. Several relevant factors like relationship if any (need not



2024:KER:76182

be near relationship for which different considerations have been provided for), period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors and bonds can throw light on the issue.”

6.Thus, as held by the Apex Court, paramountcy in the decision making process is vested with the Authorisation Committee. This casts an onerous responsibility on the Committee, since, in most cases, life of the recipient is dependent on the decision of the Committee. Therefore, the Committee has to decide each application based on the materials produced, the attendant circumstances and other relevant factors and not on surmises, conjectures or personal opinion of the members.

7.In this context it becomes essential to consider the provisions dealing with the constitution of the Authorisation Committee, as defined by Section 2(c) of the Act. As per Section 9(4)(b), the responsibility of constituting the Authorisation Committees, by nominating members, is that of the State Government. Going by Section 9(4), composition of



2024:KER:76182

the Authorisation Committees shall be as prescribed by the Central Government from time to time. Composition of Authorisation Committees is dealt with in Rule 11 extracted hereunder;

11. Composition of Authorisation Committees.—(1) There shall be one State level Authorisation Committee.

(2) Additional Authorisation Committees in the districts or Institutions or hospitals may be set up as per norms given below, which may be revised from time to time by the concerned State Government or Union territory Administration by notification.

(3) No member from transplant team of the institution should be a member of the respective Authorisation Committee.

(4) Authorisation Committee should be hospital based if the number of transplants is twenty-five or more in a year at the respective transplantation centres, and if the number of organ transplants in an institution or hospital are less than twenty-five in a year, then the State or District level Authorisation Committee would grant approval(s)."

8. A close scrutiny of the above provision makes it clear that there are three types of Authorisation Committees; Hospital Based Authorisation Committee, State level



2024:KER:76182

Authorisation Committee and Additional Authorisation Committees in the Districts. Approval of the State or District Level Authorisation Committee becomes essential only in the absence of a hospital based Committee, which is mandatory for hospitals where the number of transplants in a year is twenty five or more. While on the subject, it would be profitable to understand the composition of the Committees as stipulated in Rules 12 and 13. For ease of reference, the relevant provisions are extracted hereunder;

“12. Composition of hospital based Authorisation Committees.— The hospital based Authorisation Committee shall, as notified by the State Government in case of State and by the Union territory Administration in case of Union territory, consist of,—

- (a) the Medical Director or Medical Superintendent or Head of the institution or hospital or a senior medical person officiating as Head - Chairperson;
- (b) two senior medical practitioners from the same hospital who are not part of the transplant team - Member;
- (c) two persons (preferably one woman) of high integrity, social standing and credibility, who have served in high ranking Government positions, such as in higher



2024:KER:76182

judiciary, senior cadre of police service or who have served as a reader or professor in University Grants Commission approved University or are self- employed professionals of repute such as lawyers, chartered accountants, doctors of Indian Medical Association, reputed non-Government organisation or renowned social worker - Member;

- (d) Secretary (Health) or nominee and Director Health Services or nominee from State Government or Union territory Administration – Member.

13.Composition of State or District Level Authorisation Committees.— The State or District Level Authorisation Committee shall, as notified by the State Government in case of State and by the Union territory Administration in case of Union territory, consist of,—

- (e) a Medical Practitioner officiating as Chief Medical Officer or any other equivalent post in the main or major Government hospital of the District – Chairperson;
- (f) two senior registered medical practitioners to be chosen from the pool of such medical practitioners who are residing in the concerned District and who are not part of any transplant team– Member;
- (g) two persons (preferably one woman) of high integrity, social standing and credibility, who have served in



2024:KER:76182

high ranking Government positions, such as in higher judiciary, senior cadre of police service or who have served as a reader or professor in University Grants Commission approved University or are self- employed professionals of repute such as lawyers, chartered accountants, doctors of Indian Medical Association, reputed non-Government organisation or renowned social worker - Member;

- (h) Secretary (Health) or nominee and Director Health Services or nominee from State Government or Union territory Administration—Member :

Provided that effort shall be made by the State Government concerned to have most of the members ex-officio so that the need to change the composition of Committee is less frequent.”

9. Surprisingly, in Kerala, all applications for approval under Section 9(5) are being considered by the District Level Authorisation Committee (DLAC), since Hospital Based Committees, as mandated by Rule 11(4), are yet to be notified. This is resulting in the process of approval being delayed indefinitely. Yet another aspect of concern is the failure to include persons with experience and knowledge in different fields in the Authorisation Committees, as envisaged in Rules



2024:KER:76182

12 and 13 above. Inclusion of such members is intended to bring about a balance in the committee. Therefore, it is imperative for the State Government to constitute Hospital Based Committees and ensure induction of the members in accordance with Rules 12 and 13. The needful in this regard ought to be done without further delay, so that the laudable objectives of the Act are not defeated.

10. Learned Counsel for the petitioners submitted that, since the donor had expressed willingness to donate his organ out of love and affection towards the recipient, he cannot be expected to produce proof of those intangibles. According to the Counsel, mere absence of photographs cannot lead to a conclusion that the donor and recipient are strangers. The letter of the police, stating that the transaction involves commercial elements is assailed by pointing out that the recipient is an auto driver and the amount required for the transplantation surgery is being raised through crowdfunding.



2024:KER:76182

11. Countering the contentions, learned Government Pleader submitted that the police had clearly found commercial elements in the transaction. Moreover, the petitioners had failed to provide proof regarding their friendship over the years. In such circumstances, the Authorisation Committee and the Appellate Authority had rightly rejected their application.

12. As rightly contended by the counsel for the petitioners, it is extremely difficult, rather impossible, to provide proof of feelings like love and affection. Absence of photographs featuring the donor and recipient cannot also be the reason for negating the donor's version that he had volunteered to donate his organ out of love and affection. The communication of the police stating that commercial elements are suspected has to be tested against the admitted fact that the recipient is an auto-rickshaw driver and the transplantation is being done by collecting funds from the public. The afore factors not having been taken into consideration, the impugned orders are liable to be interfered with.



2024:KER:76182

In the result, the writ petition is allowed and the impugned orders are quashed. The 2nd respondent shall reconsider the application submitted by the petitioner and pass a reasoned order, within ten days of receipt of a copy of this judgment, adverting to all relevant factors and uninfluenced by the earlier orders of rejection.

Sd/-

V.G.ARUN, JUDGE



APPENDIX OF WP(C) 33655/2024

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF CERTIFICATE DATED
13/6/2024 ISSUED FROM 5TH RESPONDENT
- Exhibit P2 TRUE COPY OF CERTIFICATE DATED 8/5/2024
ISSUED FROM FAMILY HEALTH CENTRE,
GOTHURUTH
- Exhibit P3 TRUE COPY OF MEDICAL CERTIFICATE ISSUED
FROM DON BOSCO HOSPITAL, NORTH PARAVUR
DATED 28/11/2023
- Exhibit P4 TRUE COPY OF NOTARIZED LETTER SENT BY
PETITIONER'S BROTHER, MR.ANDRUES THOMAS
FROM SINGAPORE TO THE ADMINISTRATOR OF
5TH RESPONDENT DATED 13/5/2024
- Exhibit P5 TRUE COPY OF NOTARIZED CONSENT LETTER
DATED 26/4/2024 GIVEN BY 2ND PETITIONER
- Exhibit P6 TRUE COPY OF CONSENT LETTER DATED
26/5/2024 GIVEN BY 2ND PETITIONER'S
FATHER KUMARAN
- Exhibit P7 TRUE COPY OF CONSENT LETTER DATED
26/5/2024 GIVEN BY 2ND PETITIONER'S
MOTHER SOBHANA
- Exhibit P8 TRUE COPY OF NOTARIZED CONSENT LETTER
DATED 26/4/2024 GIVEN BY 2ND
PETITIONER'S SON DEEPAK.T.S.



2024:KER:76182

- Exhibit P9** TRUE COPY OF IDENTIFICATION CERTIFICATE OF DONOR AND RECIPIENT ISSUED BY VILLAGE OFFICERS, CHENDAMANGALAM AND ALA
- Exhibit P10** TRUE COPY OF LETTER DATED 24/4/2024 ISSUED FROM 5TH RESPONDENT HOSPITAL TO THE 4TH RESPONDENT
- Exhibit P11** TRUE COPY OF COMMUNICATION DATED 14/6/2024 ISSUED BY 4TH RESPONDENT
- Exhibit P12** TRUE COPY OF REPORT SUBMITTED BY SHO, MATHILAKAM POLICE STATION DATED 8/6/2024
- Exhibit P13** TRUE COPY OF ORDER DATED 24/6/2024 IN WP(C)NO. 22165/2024 OF THIS HON'BLE COURT
- Exhibit P14** TRUE COPY OF ORDER DATED NIL ISSUED BY THE 3RD RESPONDENT
- Exhibit P15** TRUE COPY OF PETITIONERS' APPEAL DATED 9/8/2024
- Exhibit P16** TRUE COPY OF JUDGMENT OF THIS HON'BLE COURT IN WP(C)NO.28405/2024 DATED 13/8/2024
- Exhibit P17** TRUE COPY OF GO(RT)NO.2248/2024/ H&FWD DATED 20/9/2024