

CR

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 27TH DAY OF AUGUST 2021 / 5TH BHADRA, 1943

WP(C) NO. 16216 OF 2021

PETITIONERS:

- 1 RADHAKRISHNA PILLAI,
AGED 54 YEARS
S/O. GOPINATHAN PILLAI,
MADATHILAZHIKATHU VEEDU,
NALLILA P.O, NEDUMPANA VILLAGE,
KOLLAM DISTRICT.

- 2 SAJEEV R,
AGED 38 YEARS
S/O. RAVINDRAN,
PUTHUVAL PUTHEN VEEDU,
MANIKKAMVILAKAM, POONTHURA P.O,
MUTTATHARA VILLAGE,
THIRUVANANTHAPURAM DISTRICT.

BY ADV C.M.MOHAMMED IQUABAL

RESPONDENT:

THE DISTRICT LEVEL AUTHORIZATION COMMITTEE FOR
TRANSPLANTATION OF HUMAN ORGANS,
ERNAKULAM, ERNAKULAM MEDICAL COLLEGE HOSPITAL,
KALAMASSERY, PIN-683 104,
REPRESENTED BY ITS CHAIRMAN.

SMT. DEEPA NARAYANAN, SR.GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
27.08.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

CR

P.V.KUNHIKRISHNAN, J.

=====

WP(C) No. 16216 OF 2021

=====

Dated this the 27th day of August 2021

J U D G M E N T

According to the District Level Authorization Committee for transplantation of Human Organs, Ernakulam, a person who came forward to donate his kidney to a needy patient cannot donate the same because he is involved in multiple criminal offences! I perused the entire provisions in Transplantation of Human Organs and Tissues Act, 1994 (for short 'Act 1994') and The Transplantation of Human Organs and Tissues Rules, 2014 (for short 'Rules 2014'). I see no provision in the Act and Rules to support the stand of the respondent. The Government Pleader also conceded the same. If this stand of the respondent is allowed, I apprehend that, the respondent will

reject such applications for permission to donate organs even on the ground that, the donor is a murderer, thief, rapist, or involved in minor criminal offences. I hope, they will not reject the applications because the donor is a Hindu, Christian, Muslim, Sikh, or person in a lower caste after comparing with the religion and caste of the recipient.

2. The short facts of the case are like this;

The 1st petitioner is a kidney patient. He is undergoing treatment for his kidney problem at the Medical Trust Hospital, Ernakulam. It is declared by the medical officers that, both the kidneys of the 1st petitioner spoiled and it needs urgent transplantation. It is the case of the 1st petitioner that, the kidneys of the close relatives of the first petitioner are not suitable for transplantation. His parents are no more. His wife is suffering from diabetes and hypertension. His two children are in their tender age. His three brothers are also diabetic patients. Apart from the above, the 1st petitioner has no other close relatives to donate a kidney. Ext.P1 is the certificate

issued by the Assistant Surgeon, Community Health Centre, Nedumankavu showing the seriousness of the illness of the 1st petitioner. The 2nd petitioner was the driver of the 1st petitioner and according to him, he is in close relationship with the first petitioner. He is ready to donate his kidney to the 1st petitioner. Ext.P2 is the certificate issued by the Mayor, Thiruvananthapuram Municipal Corporation certifying that, on inquiry, it is found that the donation of the kidney by the 2nd petitioner to the first petitioner is because of their friendly relationship for the last several years. Ext.P3 is the certificate issued by the President of Nedumpana Grama Panchayat, which is also in tune with Ext.P2. Ext.P4 is the joint affidavit of the petitioners dated 23.02.2021 giving their consent. Ext.P5 is the consent of the wife and brother of the 2nd petitioner, who is the donor. The petitioners submitted Ext.P6 application before the authority concerned in Form 11 for getting permission. Ext. P7 is the application in the prescribed form by the second petitioner. This Court in Ext.P8 judgment, directed the

authorities to consider the applications. Even then orders were not passed. Then a contempt case was filed for the non-compliance of the directions in Ext.P8 judgment. Thereafter, as per Ext.P9, the authorisation committee concerned rejected permission with the reasoning that, "*the donor is involved in multiple criminal offences*". Aggrieved by Ext.P9 order, this writ petition is filed.

3. Heard the learned counsel for the petitioners and the learned Government Pleader.

4. The learned counsel for the petitioners submitted that Ext.P9 order is unsustainable. The learned counsel submitted that the findings in Ext.P9 that, a person who is involved in multiple criminal offences cannot be a donor is unsustainable in the light of the fact that, there is no prohibition for the same as per the Act 1994 and Rule 2014. The learned counsel submitted that, as per Rule 7(3), the authorization committee needs to consider only the situation narrated in Clause (i) to (ix) in it. There is no prohibition for

accepting the organ of a person, who is involved in criminal offences. The learned counsel submitted that the earlier Rule which was in force from the year 1994 was substituted by Rule 2014. In the earlier Rule, there was a specific provision that says that a donor should not have any criminal antecedents. Such a stipulation is not there in Rule 2014. The only embargo in Rule 2014 is that the donor should not be a drug addict. The learned counsel submitted that Ext.P9 order is unsustainable.

5. The learned Government Pleader fairly conceded that there is no provision in the Act 1994 and Rules 2014, prohibiting the donation of organs by a person, who is involved in criminal offences. But the Government pleader submitted that there is an alternative remedy to the petitioners against Ext.P9 and they can file an appeal under Section 17 of the Act 1994.

6. I considered the contentions raised by the petitioners and the Government Pleader. A reading of the provisions in Act 1994, it is clear that it is an Act to provide the

regulation of removal, storage, and transplantation of human organs and tissues for therapeutic purposes and for the **prevention of commercial dealings in human organs and tissues** and for the matters connected therewith or incidental thereto. Therefore the intention of the Legislature is only to prevent commercial dealings in human organs and tissues. Section 9(5) of the Act 1994 says that, when 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 requirements of the Act and the Rules made thereunder, grants the applicants approval for the removal and transplantation of the human organs. Section 9(6) says that the permission can be rejected, only if the requirements of the Acts and the rules made thereunder are not complied. Rule 7(3) of Rule 2014 is extracted hereunder.

"7(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 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 disagreement or objection of such kin shall also be recorded and taken note of."

7. Rule 7(3) says about the duties of the authorisation committee. When the proposed donor and recipient are not near relatives, the authorisation committee shall evaluate that there is no commercial transaction between

the recipient and the donor and that no payment has been made to the donor or promised to be made to the donor or any other persons. It is also the duty of the authorisation committee to prepare an explanation of the link between them and the circumstances which led to the offer being made. It is also the duty of the authorisation committee to examine the reason why the donor wishes to donate. The authorization committee shall examine the documentary evidence of the link, e.g., proof that they have lived together etc. The authorisation committee shall also examine old photographs showing the donor and the recipient together. It is also the duty of the authorisation committee to evaluate that there is no middle man or tout involved. The authorisation committee shall evaluate the 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. The authorisation committee must ensure that the donor is not a drug addict. It is further stated in Rule 7(3)(ix) that the authorization committee shall ensure that the near relative or if a near relative is not available, any adult person related to the 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 disagreement or objection of such kin shall also be recorded and taken note of. These are the main duties of the authorisation committee. There is no provision either in the Act 1994 or in Rule 2014, which says that the organ of a person, who is involved in criminal offences cannot be accepted by the recipient. According to my opinion, there is no logic to the finding of the committee in Ext.P9 for rejecting the application. If these types of reasons are taken for rejecting the applications by the Authorisation committee, a murderer or a thief or a person who

is involved in some minor criminal offences cannot donate their organs voluntarily. In other words, if the reasoning of the authority is accepted, the only conclusion that is possible about such reasoning of the Authorisation Committee is that the committee believes that the criminal behaviour of the donor will percolate to the person who accepts the organs! What sort of reasoning is this? No person with common sense can agree with the same. These are flimsy reasons. A man is on a death bed and his friend is coming forward to donate his organ. The competent authority rejecting the application observing that the donor is involved in criminal cases when there is no such prohibition as per the Act 1994 and Rule 2014. The Authorisation Committee can not go beyond their jurisdiction and reject the application. There is no organ in the human body like a criminal kidney or criminal liver or criminal heart! There is no difference between the organ of a person without a criminal antecedent and the organ of a person who has no criminal antecedents. Human blood is passing through all of us.

Here I remember the "thottam Pattu" of "pottan theyyam", which is the traditional art form of theyyam in north malabar. "Pottan" in malayalam means 'idiot'. Some believe that "pottan daivam" earns the tag of "pottan" because the verbal chatting of "pottan theyyam" is a mixture of sarcasm and funny dialogues. But it is believed that "pottan Theyyam" is a manifestation of God "Siva" as "Pulapottan". The myths of theyyam are verbally chanted and folks are reminded of the lord's manifestation to eradicate the social evils and plant the idea of secularism and equality in the society. It will be worthy to quote a small portion of the "Thottam pattu" of "pottan theyyam". It is in colloquial language and it is a conversation of a person in the lower caste to a person in the upper caste. It is like this:-

" നീക്കളെ കൊത്തുവാലും ചോരല്ലേ ചൊവ്വൻ ?
നാക്കളെ കൊത്തുവാലും ചോരല്ലേ ചൊവ്വൻ ?
പിന്നെന്തെ ചൊവ്വൻ കുലം പിശക് ന് ?
തീണ്ടിക്കൊണ്ടല്ലേ കുലം പിശക് ന് !"

The situation is that, a person in the lower caste telling the above version to a person in the upper class. He says that, if I

cut my body, human blood will come and if the body of you the upper caste person is cut, the same human blood will come. Then the lower caste person begging the upper caste person that, since human blood passing through the body of us is similar, why there is caste discrimination? These are the words written centuries back. Where are we now? I leave it there. Let the people know about the myths and stories of "pottan Theyyam" of North Malabar. According to me, this "theyyam" should be played at least all over Kerala. Similarly, let the Act 1994 become a path breaker for communal harmony and the idea of secularism. Let the Hindus, Christians, Muslims, Sikhs and even persons with criminal backgrounds donate their organs to needy people irrespective of their caste or creed or religion, or criminal background. That will be a day, that was dreamed by the founding fathers of our constitution.

8. Therefore a great care is necessary while considering an application by an Authorisation Committee constituted as per the Act 1994. Of course, it is a divine duty

also. The main duty of the Committee is to see that there are no commercial dealings in human organs. It is the subjective satisfaction of the Committee. A pragmatic approach is necessary from the side of the Committee. Rule 23(2) of Rule 2014 says that, the committee shall use its discretion judiciously and pragmatically while taking decisions. The intention of the legislature while enacting the Act 1994 is only to prevent commercial dealing in human organs. If there is no evidence for the same, the Authorisation Committee should take a human approach. If there is no evidence to show that there is no commercial dealing, pragmatism should overtake technicalities, because a man is on death bed. The decisions of the Authorisation Committee should inspire people to donate their organs to needy people. Awareness is necessary to increase the organ donation ratio in India. Some studies in the internet show that, India remains a country with one of the lowest organ donation rates in the world. Some statistics says that, organ donation in India is very poor around 0.3/million

population, as compared to some western countries where it is as high as 36/million. It also shows that in the US, it is around 26/million population. So the motivation and inspiration for organ donation are necessary from all sides.

9. The learned Government Pleader submitted that, as per Section 17 of the Act 1994, the petitioners can challenge Ext.P9 order before the appellate authority. The learned Government Pleader also submitted that, the petitioner has not availed that remedy. I cannot agree with the learned Government Pleader. As I said earlier, the man is on the death bed. He already approached this Court with a grievance. The reasoning given in Ext.P9 cannot be accepted by a person with common sense. Therefore, I reject the contention of the learned Government Pleader that, the petitioner should approach the appellate authority by filing an appeal against Ext.P9 at this distance of time.

10. If a person dies, he will be buried and he will rot. If a person is burned he will become ash but if the organs

of his body are donated, he will give life and happiness to many. Therefore, according to me, the finding in Ext.P9 to the effect that, since the donor is involved in multiple criminal cases, he can not donate his kidney is liable to be set aside.

11. Moreover, in ***Shoukath Ali Pullikuyil vs. the District Level Authorization Committee (2017(2) KLT 1062)*** a division bench of this Court observed that, even a police verification report is not mandatory for taking a decision by the Authorisation Committee. The relevant portion is extracted hereunder;

" 2. The short issue is whether Rule 7, and in particular Rule 7(3), of the Transplantation of Human Organs and Tissues Rules, 2014, framed under Section 24 of the Transplantation of Human Organs and Tissues Act, 1994, contemplates involvement of a third agency like the police to conduct verifications. For convenience, we may quote below Rule 7(3) as a whole:

"7(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 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 disagreement or objection of such kin shall also be recorded and taken note of."

3. Learned counsel for the appellants submits that primarily in terms of Rule 7, it is the obligation cast upon the Authorisation Committee to satisfy itself on the various aspects as mentioned in Rule 3 which are predominantly to avoid commercialisation of donation of organs. We cannot dispute the submission.

4. Learned counsel for the appellants further submits that if we compare the provision of the Transplantation of Human Organs Rules, 1995, and in particular Rule 4A (4)(v) thereof, a distinction would be seen. The aforesaid provision reads as follows:

"4A(4)(v) that the donor is not a drug addict or known person with criminal record;

5. A comparison of Rule 7(3)(viii) of the Transplantation of Human Organs and Tissues Rules, 2014, and Rule 4A (4)(v) of the Transplantation of Human

Organs Rules, 1995, would show that "person with criminal record" is an expression which is not found in the present rules. It is submitted that this clearly shows that enquiry by police is not intended to be there. It is submitted that predominantly, it is the Authorisation Committee which has to come to a satisfaction that none of the norms as specified in the Act and Rules are violated.

6. We have considered the matter and in our view, the submission is correct, but not only so. The reference to the Rules would show that it is the Authorisation Committee that has to take the decision. It has to devise ways and means to come to those findings. In order to reduce bureaucratic delay and red-tapism, they have to directly take decisions and not delegated to others. This goes a long way in reducing the time taken to take a decision as they are dealing with a situation where a person is virtually on deathbed and time is of essence.

7. But we do not agree to the submission that under no circumstances, police help can be taken. If we refer to various sub-rules, different considerations have to be enquired into. But, normally the Authorisation Committee devises ways and means by way of affidavits and certifications that those satisfactions are arrived at. Police can only be or rather police should only be involved, if the Authorisation Committee doubts the genuineness of the claims or bona fides of the persons or genuineness and bona fides of the documents produced and not otherwise. Verification through police as a routine manner in all cases should generally be avoided. That would save time and harassment to already harassed people. The prime consideration being that, there is no commercialisation in matters of organ donation. The organization committee can surely discover those by various certificates and documents that it requires to be filed before decisions are taken.

8. Thus to the extent above, we do not agree with the views of the learned single Judge. While it is so, we may also note that a learned single Judge of this Court in an earlier decision in *Ahamed Noushad v. District Level Authorization Committee for Transplantation of Human Organs, Thrissur and Ors.* [2016 (3) KHC 969] had after looking to the Rules allowed the writ petition holding that

police cannot be asked to enquire into the matter by the Authorisation Committee.”

12. In the light of the above judgment also, it is clear that the criminal antecedents of a donor is not criteria to be considered by the authorization committee.

13. Moreover, delay in convening meetings and taking decisions by the Authorisation Committee in applications for organ donation is also to be deprecated. Exts.P6 is the application submitted by the petitioners for getting permission as per the provisions of Act 1994 and Rule 2014. Exts.P6 is dated 18.03.2021. The final order in Exts.P6 was passed by the respondent only on 08.07.2021 and that also after filing a contempt case before this court. This should not be allowed to continue in the future. The Chief Secretary of the State should issue appropriate orders directing all the authorities concerned to convene meetings to consider the applications submitted as per Act 1994 and Rule 2014, as expeditiously as possible, at any rate, within one week from the date of receipt of such applications. In urgent cases, the authority concerned should

convene the meeting and consider the applications forthwith. It is to be noted that, in Rule 23(3), it is stated that the final decision in an application is to be taken within 24 hours of holding the meeting by the Authorising committee. A time limit is necessary for convening the meeting also. If there is any delay happened beyond 1 week for convening the meeting from the date of receipt of the application by the Authorisation Committee, the Committee concerned should mention the reason for the delay in the order. The Registry will send a copy of this judgment to the Chief Secretary forthwith for issuing appropriate common directions in this regard to all the Authorisation Committees constituted as per Act 1994 and Rule 2014.

14. In the light of the discussion above, according to me, this is a case in which Ext.P9 is to be set aside and the matter is to be reconsidered by the respondent, in the light of the observations in this judgment. Hence this writ petition is allowed with the following directions:

1. Ext.P9 order is set aside.
2. The respondent will reconsider the applications of the petitioners as evident by Exts. P6 and P7 as expeditiously as possible, at any rate, within one week from the date of receipt of a copy of this judgment, neglecting the findings in Ext.P9, if the application is otherwise in order,
3. The Registry will forward a copy of this judgment to the Chief Secretary, State of Kerala forthwith for issuing appropriate directions as directed in paragraph-12 of this judgment. The Chief Secretary will issue necessary orders in this regard and produce a copy of the same before the Registrar General of this Court within one month from the date of receipt of a copy of this judgment.

(Sd/-)
P.V.KUNHIKRISHNAN
JUDGE

LU

APPENDIX OF WP(C) 16216/2021

PETITIONER EXHIBITS

- EXHIBIT P1 THE TRUE COPY OF THE CERTIFICATE ISSUED BY THE ASSISTANT SURGEON, COMMUNITY HEALTH CENTRE, NEDUMANKAVU DATED NIL.
- EXHIBIT P2 THE TRUE COPY OF THE CERTIFICATE ISSUED BY THE MAYOR, THIRUVANANTHAPURAM MUNICIPAL CORPORATION DATED 16.2.2021.
- EXHIBIT P3 THE TRUE COPY OF THE CERTIFICATE ISSUED BY THE PRESIDENT OF NEDUMPANA GRAMA PANCHAYATH DATED 20.02.2021.
- EXHIBIT P4 THE TRUE COPY OF THE JOINT AFFIDAVIT OF THE PETITIONERS DATED 23.2.2021.
- EXHIBIT P5 THE TRUE COPY OF THE CONSENT OF THE WIFE AND BROTHER OF THE DONOR DATED 23.2.2021.
- EXHIBIT P5 THE TRUE COPY OF THE CONSENT OF THE WIFE AND BROTHER OF THE DONOR DATED 23.2.2021.
- EXHIBIT P6 THE TRUE COPY OF THE FORM 11 APPLICATION SUBMITTED BY THE PETITIONERS DATED 18.3.2021.
- EXHIBIT P7 THE TRUE COPY OF FORM 3 APPLICATION SUBMITTED BY THE PETITIONERS DATED 23.2.2021.
- EXHIBIT P8 THE TRUE COPY OF THE JUDGMENT IN W.P.C NO. 7373/2021 OF THIS HON'BLE COURT DATED 25.3.2021.
- EXHIBIT P9 THE TRUE COPY OF THE ORDER ISSUED BY THE RESPONDENT DATED 8.7.2021.

// True Copy //

PA To Judge