

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE N.NAGARESH

THURSDAY, THE 11TH DAY OF NOVEMBER 2021/20TH KARTHIKA,1943

WP(C) NO. 23509 OF 2021

PETITIONERS:

- 1 MOIDEENKUTY, AGED 57 YEARS,
S/O PARAMBAN VEERAN,
MEKKAT HOUSE, MUTHUVALLUR P.O.,
MUTHUVALLUR, MALAPPURAM-673 638.
- 2 JAMEELA SALEEM, AGED 43 YEARS,
W/O SALEEM, CHOLAYIL, NELLIPPARA,
ALAKODE, KANNUR-670 571.
- 3 SALEEM, AGED 49 YEARS,
S/O MUHAMMAD, CHOLAYIL HOUSE,
NELLIPPARA P.O.,ALAKODE,
KANNUR DISTRICT-670 571.
- 4 UMMER FAROOQUE K.P., AGED 50 YEARS,
S/O.MOIDEEN, KUTTIPULIYAN,
MAKKARAPARAMBU, VADAKENGARA,
MALAPPURAM-676 507.

BY ADVS.
T.P.SAJID
SHIFA LATHEEF

RESPONDENTS:

THE DISTRICT LEVEL AUTHORISATION
COMMITTEE FOR TRANSPLANTATION OF
HUMAN ORGANS, NORTH ZONE,
GOVERNMENT MEDICAL COLLEGE,
KOZHIKODE-673 008,
REPRESENTED BY ITS CHAIRMAN

SMT.PRINCY XAVIER, SR.GOV'T.PLEADER

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 11.11.2021, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

[CR]

J U D G M E N T

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Dated this the 11th day of November, 2021

The petitioners are before this Court, aggrieved by the non-consideration of their Ext.P15 and Ext.P36 applications on merits. The petitioners seek to set aside Ext.P39 order of the Authorisation Committee for Transplantation of Human Organs.

2. There are four petitioners in the writ petition. Petitioners 1 and 3 are patients with Kidney problems. They require urgent transplantation of Kidneys. Petitioners 2 and 4 are ready to donate their Kidneys. The 2nd petitioner is the wife of the 3rd petitioner. The 4th petitioner is the father-in-law of the son of the 1st petitioner. In view of the mismatch of blood groups of 2nd and 3rd petitioners and of 1st and 4th petitioners, they submitted application for swap

transplantation. Ext.P15 is the Form-3 and Form-11 applications submitted by the 1st petitioner. Ext.P36 is the Form-3, Form-4 and Form-11 applications submitted by the 3rd petitioner.

3. The Authorisation Committee, however, rejected both sets of applications holding that the petitioners do not come under the purview of 'near relative' as per the Transplantation of Human Organs and Tissues Act and Guidelines for altruistic and exchange donation issued as per G.O. (MS) No.26/2018/H&FWD dated 15.02.2018. The learned counsel for the petitioners argued that the 1st and the 3rd petitioners require urgent kidney transplantation and rejection of their applications would offend their right guaranteed under Article 21 of the Constitution of India.

4. The learned Government Pleader, on the other hand, submitted that though the 2nd petitioner, being wife of the 3rd petitioner, would be a near relative, the 4th petitioner cannot be treated as a near relative as defined under the Transplantation of Human Organs and Tissues Act. Therefore,

the Authorisation Committee rightly rejected the applications holding that the petitioners do not come under the purview of 'near relative' as per the Transplantation of Human Organs and Tissues Act and Guidelines for altruistic and exchange donation issued as per G.O. (MS) No.26/2018/H&FWD dated 15.02.2018.

5. Heard the learned counsel for the petitioners and the learned Senior Government Pleader representing the respondent-District Level Authorisation Committee.

6. The Transplantation of Human Organs and Tissues Act, 1994 (Act No.42 of 1994) is enacted to provide for 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 matters connected therewith or incidental thereto. The Act permits and regulates near relative organ transplantation as well as non-near relative transplantation subject to the provisions of the Act, 1994 and the Rules made thereunder.

7. Rule 2(i) defines “near relatives” as spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter. Section 9 of the Act, 1994 reads as follows:

“9. Restrictions on removal and transplantation of human organs or tissues or both - (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.

(1A) Where the donor or the recipient being near relative is a foreign national, prior approval of the Authorisation Committee shall be required before removing or transplanting human organ or tissue or both:

Provided that the Authorisation Committee shall not approve such removal or transplantation if the recipient is a foreign national and the donor is an Indian national unless they are near relatives.

(1B) No human organs or tissues or both shall be removed from the body of a minor before his death for the purpose of transplantation except in the manner as may be prescribed.

(1C) No human organs or tissues or both shall be removed from the body of a mentally challenged person before his death for the purpose of transplantation.

Explanation—For the purpose of this sub-section,—

(i) the expression “mentally challenged person” includes a person with mental illness or mental retardation, as the case may be;

(ii) the expression “mental illness” includes dementia, schizophrenia and such other mental condition that makes a person intellectually disabled;

(iii) the expression “mental retardation” shall have the same meaning as assigned to it in clause (r)

of section 2 of the Persons With Disabilities (Equal Opportunities, Protection of Right and Full Participation) Act, 1995 (1 of 1996).

(2) Where any donor authorises the removal of any of his human organs or tissues or both after his death under sub-section (2) of section 3 or any person competent or empowered to give authority for the removal of any human organ or tissue or both from the body of any deceased person authorises such removal, the human organ or tissue or both may be removed and transplanted into the body of any recipient who may be in need of such human organ or tissue or both.

(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.

(3A) Notwithstanding anything contained in sub-section (3), where—

(a) any donor has agreed to make a donation of his human organ or tissue or both before his death to a recipient, who is his near relative, but such donor is not compatible biologically as a donor for the recipient; and

(b) the second donor has agreed to make a donation of his human organ or tissue or both before his death to such recipient, who is his near relative, but such donor is not compatible biologically as a donor for such recipient; then

(c) the first donor who is compatible biologically as a donor for the second recipient and the second donor is compatible biologically as a donor of a human organ or tissue or both for the first recipient and both donors and both recipients in the aforesaid group of donor and recipient have entered into a single agreement to donate and receive such human organ or tissue or both according to such biological compatibility in the group, the removal and transplantation of the human organ or tissue or both, as per the agreement

referred to above, shall not be done without prior approval of the Authorisation Committee.

(4) (a) The composition of the Authorisation Committee 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 Committee consisting of such members as may be nominated by the State Government and the Union territories on such terms and conditions as may be specified in the notification for 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."

In view of sub-section (1) of Section 9, 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, save as otherwise provided in sub-section (3).

8. A reading of sub-section (3) to Section 9 would show that a donor can authorise the removal of any of his human organs before his death under sub-section (1) of Section 9 for transplantation into the body of such recipient, not being a near relative, for a specific reason (of affection or attachment towards the recipient or for any other special reasons), but such human organ shall not be removed and transplanted without the prior approval of the Authorisation Committee. Therefore, it is perspicuous that the Act contemplates non-near relative organ transplantation and the condition is that the donor should have a special reason for giving authorisation for transplantation and prior approval should be obtained from the Authorisation Committee.

9. Section 9(3A) permits swap transplants to solve the issue of biological incompatibility of organ of the donor to the recipient. Incertitude arises out Section 9(3A) (a) and (b) which sub-sections use the word 'near relative'. The complexity worsens as Section 9(3A) starts with a *non obstante* clause. But, a reading of Section 9(3) and Section

9(3A) together as a whole, would indicate that the *non obstante* clause in Section 9(3A) would indicate that the clause is intended only to ensure that the swap transplants are carried out with the prior approval of the Authorisation Committee.

10. Section 9(3) unambiguously permits any donor to authorise the removal of any of his human organs under sub-section (1) of Section 9(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, but such human organ shall not be removed and transplanted without the prior approval of the Authorisation Committee. If the relative is not a near relative, the donor then should have special reason like affection, attachment. etc. for donating and prior approval of the Authorisation Committee should be obtained.

11. The question is whether the words 'near relative' used in Section 9(3A) can crib and confine swap transplants

only where donor and recipient of each pair are near relatives as defined under Section 2(i) of the Act, 1994. The Transplantation of Human Organs and Tissues Act, 1994 is enacted to provide for 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. The prime purpose of the enactment is facilitating transplantation of human organs for therapeutic purpose.

12. In a case where a citizen's life can be protected and preserved only by transplant of human organ or tissue, the citizen has a fundamental right under Article 21 of the Constitution to undergo organ transplantation, which right is subject only to the procedure established by law. Any law prescribing procedure for organ transplantation should therefore satisfy the test of reasonableness. When Section 9(3) permits transplant of organs to persons not being a near relative, with the prior approval of the Authorisation Committee, there is no logic or rationale to say that swap

transaction will not be allowed when members of each pair are not near relatives, even if the Authorisation Committee approves such transaction. Therefore, Section 9(3A) should be read down so as to give full effect to Section 9(3) under which non-near relative transplants are allowed with the approval of the Authorisation Committee. It may be noted that in the present case, the Authorisation Committee declined prior permission solely based on these provisions of the Act, 1994 and the Guidelines contained in the Government Order dated 15.02 2018.

13. Rule 7 of the Transplantation of Human Organs and Tissues Rules, 2014, especially sub-rule (3) thereto, provides safe, strong and sufficient safeguards to ensure that commercial intention is not the motivation of a given proposal for organ transplantation and enables the Authorisation Committee to scrutinise the proposals in an effective manner.

Rule 7 reads as follows:

“7. Authorisation Committee — (1) The medical practitioner who will be part of the organ transplantation team for carrying out transplantation

operation shall not be a member of the Authorisation Committee constituted under the provisions of clauses (a) and (b) of sub-section(4) of section 9 of the Act.

(2) When the proposed donor or recipient or both are not Indian nationals or citizens whether near relatives or otherwise, the Authorisation Committee shall consider all such requests and the transplantation shall not be permitted if the recipient is a foreign national and donor is an Indian national unless they are near relatives.

(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.

(4) Cases of swap donation referred to under subsection (3A) of section 9 of the Act shall be approved by Authorisation Committee of hospital or district or State in which transplantation is proposed to be done and the donation of organs shall be permissible only from near relatives of the swap recipients.

(5) When the recipient is in a critical condition in need of life saving organ transplantation within a week, the donor or recipient may approach hospital in-charge to expedite evaluation by the Authorisation Committee.”

Again, sub-rule (4) directs that swap donations shall be permissible only from near relatives. It must be noted that sub-rule (4) of Rule 7 in effect curtails the power conferred on the Authorisation Committee to give prior approval to organ transplantation in cases of non-near relative organ transplantation, even when such transplantation is supported by reasons of the nature indicated in Section 9(3) of the Act, 1994. To the said extent, Rule 7(4) cannot stand the scrutiny of law.

14. The Government of Kerala, Health and Family Welfare Department, has framed Guidelines for Altruistic and Exchange Donation as per G.O.(MS) No.26/2018/H&FWD

dated 15.02.2018. The said Guidelines, under the head 'Swap Donation' provide that the cases of Swap Donations referred to in sub-section (3A) of Section 9 of the Transplantation of Human Organs and Tissues Act shall be approved by the Authorisation Committee of Hospital or District or State in which transplantation is proposed to be done and the donation of organs shall be permissible only from near relatives of swap recipients. As I have already held that Section 9(3A) should be read in consonance with Section 9(3) so as to permit non-near relative swap organ transplant with the approval of the Authorisation Committee for special reasons contemplated under Section 9(3), the provision in the G.O. dated 15.02.2018, which is based on Section 9(3A), also cannot be sustained.

15. For the reasons stated above, this Court comes to the following conclusions:

(1) Sub-section (3A) (a) and (b) of Section 9 of the Transplantation of Human Organs and Tissues Act, 1994 to the extent it permits Swap Transplants only in cases of near

relatives and curtails the powers of Authorisation Committees to approve such non-near relative transplants even for special reasons as contemplated in Section 9(3), have to be read down, to be in consonance with Section 9(3).

(2) It is therefore held that Swap Transplants will be permissible even if each pair of donor-recipients are not near relatives, provided there exists special reason for the donor to donate his/her organ as contemplated in Section 9(3) and the Authorisation Committee gives prior approval for the swap transplants after scrutinising the applications on the parameters provided in Rule 7(3) of the Transplantation of Human Organs and Tissues Rules, 2014.

(3) The provision under the head 'Swap Donation' contained in the Guidelines for Altruistic and Exchange Donation framed by the Government of Kerala, Health and Family Welfare Department, as per G.O.(MS) No.26/2018/H&FWD dated 15.02.2018, to the extent it permits Swap Donations only between near relatives, will be inoperative, as it goes against the provisions of Section 9(3) of

the Act, 1994 as stated hereinabove.

In view of the afore findings, the writ petition is allowed. Ext.P39 order of the respondent is set aside. The respondent is directed to reconsider Exts.P15 and P36 applications of the petitioners and approve the same forthwith without any further delay, if the petitioners are otherwise eligible, in the light of the observations and findings contained hereinabove.

Sd/-
N. NAGARESH, JUDGE

aks/15.11.2021

APPENDIX OF WP(C) 23509/2021

PETITIONERS' EXHIBITS

Exhibit P1	TRUE COPY OF INCOME CERTIFICATE OF THE 1ST PETITIONER ISSUED BY THE MUTHUVALUR VILLAGE OFFICE DATED 3.6.2021
Exhibit P2	TRUE COPY OF THE CERTIFICATE OF ALTURISM ISSUED BY THE DEPUTY SUPERINTENDENT OF POLICE DATED 18.6.2021 TO THE 2ND PETITIONER
Exhibit P3	TRUE COPY OF THE BANK ACCOUNT STATEMENT OF FEDERAL BANK OF THE 2ND PETITIONER
Exhibit P4	TRUE COPY OF THE BANK STATEMENT OF THE 1ST PETITIONER OF CHEKKODE SERVICE CO-OPERATIVE BANK
Exhibit P5	TRUE COPY OF THE RATION CARD OF THE 2ND PETITIONER
Exhibit P6	TRUE COPY OF THE NATIVITY CERTIFICATE DATED 28.5.2021 OF THE 2ND PETITIONER
Exhibit P7	TRUE COPY OF THE LETTER DATED 5.6.2021 ISSUED BY THE MLA TO THE 2ND PETITIONER
Exhibit P8	TRUE COPY OF THE ELECTION ID CARD OF MOHAMMED ASLAM THE SON OF PETITIONER NOS 2 &3
Exhibit P9	TRUE COPY OF THE SSLC CERTIFICATE OF THE SON OF PETITIONER NOS 2 &3
Exhibit P10	TRUE COPY OF THE AFFIDAVIT OF CHOLAYIL MUHAMMED ASLAM DATED 3.6.2021 OF THE DONORS NEAREST KIN
Exhibit P11	TRUE COPY OF THE AFFIDAVIT DATED 3.6.2021 OF THE 2ND PETITIONER
Exhibit P12	TRUE COPY OF THE AFFIDAVIT OF THE 1ST PETITIONER DATED 9.6.2021
Exhibit P13	TRUE COPY OF THE APPLICATION DATED 17.8.2021 SUBMITTED BY THE 1ST PETITIONER BEFORE THE RESPONDENT
Exhibit P14	TRUE COPY OF THE REPLY OF THE STATE PUBLIC INFORMATION OFFICER OF THE RESPONDENT MEDICAL COLLEGE

Exhibit P15	TRUE COPY OF THE FORM 3 ALONG WITH FORM 11 DATED 23.6.2021
Exhibit P16	TRUE COPY OF THE LETTER DATED 30.8.2021 ISSUED DR.ISMAIL NA NEPHROLOGIST ASTER MIMS
Exhibit P17	TRUE COPY OF THE REPRESENTATION DATED 23.6.2021 SUBMITTED BY THE 1ST PETITIONER BEFORE THE CHAIRMAN OF THE AUTHORIZATION COMMITTEE
Exhibit P18	TRUE COPY OF THE INCOME CERTIFICATE DATED 17.5.2021 ISSUED BY THE VILLAGE OFFICER, ALAKKODE TO THE 3RD PETITIONER
Exhibit P19	TRUE COPY OF THE RELATIONSHIP CERTIFICATE OF THE 2ND AND 3RD PETITIONER DATED 3.6.2021
Exhibit P20	TRUE COPY OF THE CERTIFICATE ISSUED BY THE NELLIPPARA JUMA MASJID AND IZZATHUL ISLAM MADRASSA TO PROVE THE MARRIAGE BETWEEN THE 2ND PETITIONER AND 3RD PETITIONER DATED 7.3.2013
Exhibit P21	TRUE COPY OF THE AFFIDAVIT OF THE 3RD PETITIONER SALEEM DATED 3.6.2021
Exhibit P22	TRUE COPY OF THE AFFIDAVIT OF DONOR UMMER FAROOK DATED 9.6.2021
Exhibit P23	TRUE COPY OF THE AFFIDAVIT DATED 9.6.2021 OF THE DONOR OF THE NEAREST KIN OF THE 3RD PETITIONER
Exhibit P24	TRUE COPY OF THE BANK STATEMENT OF 3RD PETITIONER WITH FEDERAL BANK
Exhibit P25	TRUE COPY OF THE INCOME CERTIFICATE OF 4TH PETITIONER DATED 4.6.2021 ISSUED BY VADAKKANGARA VILLAGE OFFICER
Exhibit P26	TRUE COPY OF THE BANK STATEMENT OF THE 4TH PETITIONER
Exhibit P27	TRUE COPY OF THE CERTIFICATE OF ALTRUISM TO THE 4TH RESPONDENT ISSUED BY THE DEPARTMENT OF SUPERINTENDENT OF POLICE, PERINTHALMANNA DATED 12.6.2021
Exhibit P28	TRUE COPY OF THE LETTER ISSUED BY MANJALANKUZHI ALI MLA DATED 6.6.2021 SEND TO THE DISTRICT POLICE CHIEF MALAPPURAM REQUESTING TO ISSUE CERTIFICATE OF ALTRUISM

Exhibit P29	TRUE COPY OF THE SSLC CERTIFICATE OF THE SON OF 1ST PETITIONER
Exhibit P30	TRUE COPY OF THE SSLC CERTIFICATE OF THE DAUGHTER OF 4TH PETITIONER
Exhibit P31	TRUE COPY OF THE MARRIAGE CERTIFICATE OF THE SON 1ST PETITIONER AND DAUGHTER OF 4TH PETITIONER
Exhibit P32	TRUE COPY OF THE RELATIONSHIP CERTIFICATE OF 1ST AND 4TH PETITIONERS ISSUED BY THE VILLAGE OFFICER, VADAKKANGARA DATED 16.6.2021
Exhibit P33	TRUE COPY OF THE APPLICATION DATED 17.8.2021 SUBMITTED BY THE 3RD PETITIONER
Exhibit P34	TRUE COPY OF THE REPLY DATED 1.9.2021 ISSUED BY THE RESPONDENT TO THE 3RD PETITIONER
Exhibit P35	TRUE COPY OF THE APPLICATION DATED 23.6.2021 SUBMITTED BY THE 3RD PETITIONER BEFORE THE CHAIRMAN
Exhibit P36	TRUE COPY OF THE APPLICATION DATED 23.6.2021 ALONG WITH FORMS 3,4,& 11
Exhibit P37	TRUE COPY OF THE JUDGMENT DATED 24.9.2021 PASSED BY THIS HON'BLE COURT IN WPC NO 18776/2021
Exhibit P38	TRUE COPY OF THE JUDGMENT IN WPC NO 1621/2021 DATED 27.8.2021 PASSED BY THIS HON'BLE COURT
Exhibit P39	TRUE COPY OF THE ORDER DATED 16.10.2021 PASSED BY THE RESPONDENT