

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF JULY, 2020

BEFORE

THE HON'BLE MR. JUSTICE NATARAJ RANGASWAMY

WRIT PETITION NO.8148 OF 2020 (GM-RES)

BETWEEN:

1 . SMT. SHAILAJA MADATHIL VALAPPIL,
W/O NALAPADAM PADMANABHAN,
AGED ABOUT 51 YEARS,
R/O THANAL, PUTHIYAKANDAM,
ANANDASRAM POST, AJANUR VILLAGE,
HOSDURG TALUK, KASARAGOD-671531
KERALA.

2 . SMT.SASIDHA M.P,
W/O SURENDRAN. R,
AGED ABOUT 36 YEARS,
R/O.NECHIYADUKLKAM HOUSE,
KOLATHUR POST,
CHENGALA-VIA KOLATHUR VILLAGE,
KASARAGOD-671451
KERALA

...PETITIONERS

(BY SRI : RAVI S.K, ADVOCATE)

AND

1 . THE STATE LEVEL AUTHORIZATION COMMITTEE FOR
TRANSPLANTATION OF HUMAN ORGANS,
HEALTH AND FAMILY WELFARE DEPARTMENT,
REPRESENTED BY ITS CHAIRMAN,
K.C.GENERAL HOSPITAL,

O.P.D. BLOCK, FIRST FLOOR, MALLESHWARAM,
BENGALURU-560 003.

2. THE PRINCIPAL SECRETARY,
DEPARTMENT OF HEALTH AND FAMILY WELFARE
GOVERNMENT OF KARNATAKA,
NO.105, 1ST FLOOR, 1ST FLOOR,
VIKASA SOUDHA,
BENGALURU-560 001.

RESPONDENTS

(BY SMT. JYOTHI BHAT, HIGH COURT GOVERNMENT
PLEADER)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226
AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO
ISSUE APPROPRIATE WRIT, ORDER OR DIRECTION IN THE
NATURE OF CERTIORARI QUASHING THE CERTIFICATE IN
FORM 18 ISSUED BY THE 1ST RESPONDENT AT ANNEXURE
- F DATED 12.12.2019 BEARING NO.HOT/25/2018-19
WITHHOLDING THE PERMISSION FOR TRANSPLANT.

THIS PETITION HAVING BEEN HEARD AND
RESERVED FOR JUDGMENT on 08.07.2020 AND COMING
ON FOR PRONOUNCEMENT OF ORDER THROUGH VIDEO
CONFERENCING THIS DAY, THE COURT MADE THE
FOLLOWING:

ORDER

The petitioners have sought for a Writ in the nature
of Certiorari to quash the certificate dated 12-12-2019
issued by the respondent no.1 withholding the permission

for organ donation by the petitioner no.2 to the petitioner no.1. The petitioners have also sought for a direction to the respondent no.1 to consider the case of the petitioner no.2 for donation of one of her kidneys without insisting the consent of her father.

2. The petitioner no.2 is a Donor and the petitioner no.1 is a recipient of a human organ - kidney while the respondent no.1 is the State Committee constituted under Section 9(4)(b) of the Transplantation of Human Organs and Tissues Act, 1994 (henceforth referred to as 'the Act of 1994').

3. The assertions in the writ petition disclose that the petitioner no.1 suffered a renal failure which aggravated to end stage and she is on haemodialysis from the last three years. The petitioner no.1 was treated by Dr.Janardhan Kamath at Justice K.S.Hegde Charitable Hospital, Deralakatte at Mangaluru, which is a hospital registered under Section 14 of the Act of 1994 (henceforth referred to as 'the Hospital'). The petitioner no.1 was

advised to undergo transplantation of kidney to arrest further deterioration of her health. However, the near relatives of the petitioner no.1 such as her husband, daughters, brothers and sister were either medically not fit or their blood groups did not match with the petitioner, which hurtled the chances of the petitioner no.1 effortlessly receiving the organ in donation. It is stated that the cousin of the petitioner no.1 volunteered to donate his kidney to the petitioner no.1 and they filed the prescribed application for sanction by the respondent no.1. The petitioner no.1 and all her near relatives attended the personal interview convened by the respondent no.1 during January 2019 following which the respondent no.1 permitted the donation in terms of a Certificate dated 21-01-2019. The Hospital fixed the date of surgery for extraction of the organ on 07-03-2019. However, when a final check was conducted on the scheduled date, the cousin of the petitioner no.1 was diagnosed as Type II diabetic and thus the transplantation was abandoned. Thereafter, the petitioner no.1 scouted for a donor which

went in vain. It was then that the petitioner no.2, who is the wife of the cousin of the petitioner no.1 and who had natural love and affection towards the petitioner no.1, offered to donate her kidney. Thus, the petitioners complied all the preliminaries and submitted an application through the Hospital in the prescribed form enclosing therewith the reports for sanction by the respondent no.1 on 31-07-2019. The husband of the petitioner no.2 furnished an affidavit consenting to the donation. The petitioner no.2 did not mention about her parents in the affidavit filed by her. The respondent no.1 summoned the petitioners and their near relatives for a personal interview on 12-12-2019 whereat, the petitioner no.2 disclosed that though her father was alive, she could not secure his consent as her father had deserted her and her mother about three decades ago and that he had contracted another marriage and was living separately for more than three decades. The respondent no.1 after a personal interview with the petitioners and their near relatives

issued a certificate in Form 18 withholding the permission due to the following reasons:

i). Why the "near relatives" can't be a Donor - Medical certificates to be produced by the concerned treating Surgeon/ Physician of the hospital, to prove unsuitability of the husband, children and also siblings of the recipient.

ii) To produce the consent of Mr.Madhava Achari who is the father of the donor.

4. The Hospital replied that the near relatives of the petitioner no.1 were either of a different blood group or were medically not fit to donate. The related medical reports were placed by the registered Hospital before the respondent no.1 on 27-01-2020. Yet the respondent no.1 had not considered and disposed off the application which compelled the petitioners to seek the intervention of this Court by this writ petition.

5. The learned counsel for the petitioners contended that the petitioner no.1 was terminally ill and when the petitioner no.2 had volunteered to donate the

kidney, the respondent no.1 was placing conditions that were impossible to comply. He contended that the intendment of the Act of 1994 is though undoubtedly designed to prevent commercial dealings in human organs but it contemporaneously permitted donation of organs by persons who were not near relatives under Section 9(3) of the said Act. He contended that the whole purpose of the Act of 1994 would be defeated if the respondent no.1 does not respond appropriately to a human crisis and cannot admit any further delay. He also contended that the husband of the petitioner no.2 had consented for the extraction of the organ and therefore there was sufficient compliance of the provisions of the Act of 1994. He also urged that the near relatives of the petitioner no.1 were medically not fit to donate the organ for transplantation and contended that the lab reports establish the same. He therefore contended that the respondent no.1 should be directed to expeditiously consider and dispose off the application.

6. The learned High Court Government Pleader contended that a statutory appeal is provided under Section 17 of the Act of 1994 against rejection of an application for approval under sub-section (6) of Section 9 and therefore sought the dismissal of this writ petition. He further contended that the Act intends to curb commercial exploitation of organs and therefore onerous stipulations are prescribed in the Act. He contended that Rule 22 of the Transplantation of Human Organs and Tissues Rules, 2014 (hereinafter referred to as "the Rules of 2014") mandates that where the donor is a woman, greater precautions should be taken and her identity and independent consent should be confirmed by a person other than the recipient. She claimed that the petitioner no.2 did not disclose the details of her father in her affidavit and it was in that background that the consent of the father of the petitioner no.2 was sought by the first respondent.

7. The Apex Court in the case of ***Kuldeep Singh and another vs. State of Tamilnadu and others***

reported in 2005 (11) SCC 122 held "The object of the statute is crystal that it intends to prevent commercial dealings in human organs. The Authorization Committee is, therefore, required to satisfy that the real purpose of the donor authorizing 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."

8. In so far as the present case is concerned, the certificate in Form 18 which is impugned in this writ petition is not an Order rejecting the application filed by the petitioners but is in the nature of an intimation requiring the petitioners to furnish additional documents namely (a) laboratory reports of the near relatives of the petitioner no.1 so as to justify as to why the near relatives have not offered to donate and (b) the consent from the father of the petitioner no.2. The respondent no.1 while requisitioning additional documents has issued the impugned certificate in Form 18, though a certificate in

Form 18 which corresponds to Rule 23 of the Rules of 2014 must have been issued upon a final decision of the application filed under sub-section (3) of Section 9 of the Act of 1994. It therefore follows that the respondent no.1 has not taken a final decision on the application filed by the petitioners. An appeal under Section 17 of the Act of 1994 would arise only when a final decision is passed by the respondent no.1. A remedy of an appeal is only against a Judgment or an Order passed liquidating a cause of action brought before a Court or a Tribunal/Authority which crystallizes the rights of the contesting parties. Since the respondent no.1 has not taken a final decision, the threshold contention of the learned Government Pleader that the writ petition is not maintainable in view of the alternative remedy, is rejected.

9. It is seen that the respondent no.1 which had examined the application filed by the petitioners did not find anything to suspect the *bona fides* of the intended transplantation. It did not find anything amiss in the

relationship of the petitioners and/or that the intended transplantation was driven by any commercial consideration. It did not find that the petitioner no.2 was under any medical disability to donate. It also did not doubt the need of the petitioner no.1 to undergo a transplantation. The fact that the petitioners and their near relatives were personally interviewed is borne from the certificate in Form-18 which is impugned in this writ petition. If that be so, the reason for withholding the sanction of permission by the respondent no.1 and requiring the petitioners to establish why the near relatives of the petitioner no.1 could not donate, is not without any purpose but is definitely to ensure that the intended transplantation is honest and not driven by any commercial consideration. However, what needs to be seen is that under Rule 23 (2) of the Rules of 2014, every Authorization Committee should expedite its decision making process and use its discretion judiciously and pragmatically in all such cases where, the patient requires transplantation on urgent basis.

10. In so far as the present case is concerned, the respondent no.1 has required the petitioner no.1 to disclose as to why her near relatives have not offered to donate the organ. This cannot be found fault with, as the whole purpose and the intendment of the Act of 1994 is to ascertain and rule out commercial consideration for the intended transplantation. But at the same time, the respondent no.1 should take cognizance of the fact that it had earlier granted the permission for the husband of the petitioner no.2 to donate the kidney at which point in time, the respondent no.1 must have ascertained the question as to why the near relatives of the petitioner no.1 were not donating the kidney. The petitioner no.1 has claimed that her near relatives as defined under Section 2(i) of the Act of 1994 are medically not fit to donate and had placed the corresponding lab reports before the respondent no.1. The issue is now within the domain of the respondent no.1 to consider the application of the petitioners based on the fresh information/lab reports placed on record before it.

11. However, in so far as the second requirement insisted by the respondent no.1 to produce the consent from the father of the petitioner no.2, it is noted that the petitioner no.2 had already placed on record an affidavit filed by her husband which satisfied the requirement of Rule 22 of the Rules of 2014. Therefore the impugned action of the respondent no.1 requiring the petitioner no.2 to furnish the consent from her estranged father tantamount to imposing an onerous condition which cannot perhaps be complied. Under the circumstances, the requirement insisted by the respondent no.1 to produce the consent of the father of the petitioner no.2 for the intended transplantation is liable to be set aside.

12. In view of the above, this writ petition is allowed and the respondent no.1 is directed to consider the application of the petitioners dated 31-07-2019 in the light of the lab reports of the near relatives of the petitioner no.1 placed before it on 27-01-2020 and while doing so, the respondent no.1 shall take into consideration

that it had earlier granted the permission for donation by the husband of the petitioner no.2 at which point it must have ascertained the question as to why the near relatives of the petitioner no.1 had not offered to donate the kidney. The respondent no.1 shall reassess the medical condition of the petitioner no.1 to ascertain whether the transplantation would be beneficial or fruitful. However, the respondent no.1 shall not insist for the consent of the father of the petitioner no.2 for the intended transplantation. Having regard to the fact that the petitioner no.1 is stated to be on dialysis for more than three years, the respondent no.1 is requested to expedite the decision within seven days from the date of the receipt of a copy of this Order from the petitioners. The learned Government Pleader shall inform the respondent about the Order passed today at the earliest.

Sd/-
JUDGE

sma