

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 24TH DAY OF NOVEMBER 2017/3RD AGRAHAYANA, 1939

W.P(C) .No.33801 of 2017 (A)

PETITIONER(S) :

MOIDEEN E.M., S/O. MUHAMMED, AGED 48 YEARS,
EANGATH HOUSE, VARAVOOR,
PILAKODE P.O., THRISSUR DISTRICT.

BY ADV. SRI.C.M.MOHAMMED IQUBAL

RESPONDENT(S) :

1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO
THE HEALTH AND FAMILY WELFARE DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN-695 001.
2. THE SECRETARY,
HEALTH AND FAMILY WELFARE DEPARTMENT,
GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001.
3. THE DISTRICT LEVEL AUTHORIZATION COMMITTEE
FOR TRANSPLANTATION OF HUMAN ORGANS, THRISSUR,
THRISSUR MEDICAL COLLEGE HOSPITAL,
POST THRISSUR-680 020,
REPRESENTED BY ITS CHAIRMAN.
4. LOCAL APPROVAL COMMITTEE OF ORGAN TRANSPLANTATION,
WESTFORT HI-TEC HOSPITAL, THRISSUR,
PIN-680 002, REPRESENTED BY ITS CHAIRMAN.
5. PRESS COUNCIL OF INDIA,
SOOCHNA BHAVAN, 8-C.G.O COMPLEX,
LADHI ROAD, NEW DELHI-110 003,
REPRESENTED BY ITS SECRETARY.
- Addl. 6. THE NODAL OFFICER,
KNOS, DECEASED DONOR MULTI ORGAN TRANSPLANTATION PROGRAMME,
GOVERNMENT OF KERALA.

ADDITIONAL 6TH RESPONDENT IS IMPEADED AS PER ORDER
DATED 08.11.2017.

R1 TO R4 & R6 BY SENIOR GOVERNMENT PLEADER SMT.K.R.DEEPA.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
23-11-2017, ALONG WITH WPC.34533/2017(N) AND CONNECTED CASES,
THE COURT ON 24-11-2017 DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS:-

- EXHIBIT P1 THE TRUE COPY OF THE CERTIFICATE ISSUED BY THE
DEPARTMENT OF NEPHROLOGY, WESTFORT HI-TEC HOSPITAL,
THRISSUR, DATED 18.10.2017.
- EXHIBIT P2 THE TRUE COPY OF THE JUDGMENT IN WPC NO 4403/2017 OF
THIS HON'BLE COURT DATED 2.6.2017.
- EXHIBIT P3 THE TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE
PETITIONER DATED 13.10.2017 BEFORE THE 2ND RESPONDENT.

RESPONDENT(S) ' EXHIBITS:-

NIL.

Vku/-

[true copy]

K. Vinod Chandran, J

W.P.(C).Nos.33801 of 2017-A, 34533 of 2017-N,
34764 of 2017-U, 34995 of 2017-Y, 35057 of 2017-F,
35239 of 2017-D, 35505 of 2017-K, 35544 of 2017-P,
35561 of 2017-U, 35747 of 2017-P, 36077 of 2017-H,
36080 of 2017-H, 36087 of 2017-I, 36120 of 2017-M,
36236 of 2017-D & 36409 of 2017-A

Dated this the 24th day of November, 2017

JUDGMENT

In conflict is the law; when the petitioners attempt to bring into confluence the profoundest of all human emotions: “sacrifice” and the urge innate in every living being; to live on. The petitioners in these 16 writ petitions are all persons who are disabled with renal complaints and need, according to their doctors, kidney transplantation. The writ petitions seek permission to make publications in print media, seeking a kidney from willing altruistic donors from the public. This Court has been permitting such publications by orders looking into the provisions of the Transplantation of Human Organs and Tissues Act, 1994 [for brevity “the Act”]; finding that such publication is not prohibited by law so long as it does not invite 'supply for payment' or 'offers such supply' or 'indicate willingness to initiate or negotiate any arrangement'; looking at Section 19 (1)(f).

2. I was cautioned by the submission, of a learned Government Pleader in one of such cases; relating to transplant of organs, that though the publications may not have an indication explicitly; it could lead to a payment or arrangement; which by law has been prohibited by the Act. There are no safeguards to prohibit commercial dealings in human organs and tissues once the publication has been permitted; was the compelling argument. Looking into the orders passed, this Court finds that there is no declaration of law and if there had been, there was no requirement for the subsequent, frequent petitions.

3. On being so cautioned, this Court had proposed a hearing on the aspect, and had also impleaded the Nodal Officer, Kerala Network for Organ Sharing (KNOS), which is in charge of the Deceased Donor Multi Organ Transplantation Programme, Government of Kerala. This Court also had interaction with the State Nodal Officer of the KNOS and Deputy District Medical Officer, Ernakulam; the District Nodal Officer. A statement has also been placed on record by the Nodal Officer KNOS.

4. While so in the last one week, there are 17 writ petitions filed, which were posted together and heard on

15.11.2017. Quite tragically, one of the petitioners died in the meanwhile and that writ petition was dismissed as infructuous. Expediency, either way, is the need of the hour and hence the learned Counsel for the petitioners and the learned Government Pleader were heard.

5. The learned Counsel were unanimous in their submission that there is no prohibition in the Act from making publication. Section 19 was specifically referred to and it was pointed out that only publications inviting donors for consideration is prohibited by legislation. Even the Legislature recognized the fact that there will be willing donors in the society who would sacrifice their organ; willingly to sustain another person's life. The petitioners herein beseech such donation on altruistic motives alone; which is a special reason as spoken of in the Act. They do not propose any consideration to be paid or any arrangement to be made, for such transplant. They pin their last hopes on altruistic persons who would willingly so sacrifice their organs to sustain the life of another. The publications only seek a response from the innate goodness of human beings; which this Court cannot ignore nor can the law makers.

6. It is submitted that there is a prevalence of renal complaints; especially with the changing life style. The deceased donor transplant scheme formulated by the State is unable to meet the demands of the rising number of patients; who are the expectant recipients. It is also submitted that a transplantation from a living donor is more advisable than one from a cadaver. The donors also have a support system in the form of societies and associations formed to help and assist them and it is a proved fact that a live donor still has a life expectancy of 15-20 years. A centralized system of organ transplant from living persons, as proposed by this Court at the time of hearing, with anonymity of the donor and recipient being the standard, is unworkable insofar as there could be totally unrelated persons who would come forward for a donation to a particular (directed) individual for reasons other than genetic or legal relationships. There should be more education of the masses as to organ transplantation and the benefits derived therefrom as has been done in the case of blood donations. There is no prohibition as such from making publications and the media refuse; more for fear of prosecution, especially in the context of a Circular issued by the Government. The Circular, which goes against the

provisions of the Act cannot be sustained, argue petitioners.

7. The statement filed by the KNOS asserts that there can be no permission granted for publication since it would definitely lead to commercial arrangements. The gullible and the poor; who are a majority, could be easily tempted and if agreeing to a transplant on an arrangement, would have absolutely no remedy to realize whatever the arrangement be, since commercial dealings in human organs are prohibited by law. It is stated that dialysis is an effective alternate treatment and a patient could survive for many years on regular dialysis. The statistics of kidney transplant in the period 2011-2017 in the various hospitals show that unrelated transplant is on the increase. Due to this the deceased organ transplants have come down considerably; to 16, upto October of 2017, while it was 72 in 2016. Yet again while 605 patients in the waiting list of deceased organ transplantation died; in the period 2011-2017 the unrelated kidney donation was 1692. The statistics are alarming and disturbing in so far as an additional 1692 persons; the living donors, are put at risk medically. The public notices hence are not desirable and would go against the spirit of the enactment prohibiting commercial dealings in organs and it would only aid

exploitation of the poor and gullible; who would also be rendered physiologically impaired.

8. Addressing the contention that the media houses do not accept any requests for publications for reason of a Circular issued by the Government and for fear of penal action; the learned Government Pleader produced the Circular which reads as under:

“30.12.2016

നോട്ട്

അവയവ ട്രാൻസ്ഫർ നിയന്ത്രിക്കുന്ന “Transplantation of Human Organ Acts, 1994 [42 of 1994]” എന്ന ആക്ട് പ്രകാരം വാണിജ്യപരമായ ഇടപാടുകൾ വഴി അവയവങ്ങൾ ലഭ്യമാക്കുന്നത് നിയമവിരുദ്ധമാണ്. പല പത്രങ്ങളിലും ക്ലാസ്സിഫൈഡ് പരസ്യ കോളങ്ങളിൽ “വൃക്ക ആവശ്യമുണ്ട്” എന്ന് കാണിച്ചുകൊണ്ട് വാണിജ്യപരമായ ഉദ്ദേശ്യത്തോടെ പരസ്യം നൽകുന്നതായി കണ്ടുവരുന്നു. ഇവ നിയമവിരുദ്ധവും, അധർമ്മികമായതിനാൽ ഇത്തരം പരസ്യങ്ങൾ പ്രസിദ്ധീകരിക്കുന്നത് എല്ലാ പത്രങ്ങളും നിർത്തലാക്കണം.

Sd/-

രാജീവ് സദാനന്ദൻ

ഡയറക്ടർ

പി & എ. ആർ ഡി”

9. This Court finds the Circular to be in tandem with the legislation. One often sees financial help being sought for, by patients living in impecunious circumstances through proper press releases. There cannot be any commercial transactions inferred, for

reason of the very financial state of the patient. The media presumably, are resisting for fear of penal action or it could also be on ethical issues. If either be the case it would not be proper for this Court to direct publication. To prevent a penal action or to absolve a person from the consequences of a crime, it will not be proper for this Court to exercise the discretionary extra ordinary jurisdiction. Nor could it overstep the ethical concerns of a group or individual, especially when it is difficult for the person seeking invocation of such remedy, as in this case, to assert a right conferred on him to make a publication. There is no law permitting publication of advertisements with transplantation requests.

10. This Court has to pertinently notice that there is a rise in organ donation for purely altruistic motives. They willingly sacrifice their organs for the survival of another, but ideally it is not to a known person. These are called non-directed donations and is covered by the “special reasons”; though the term is not specifically defined, under S. 9(3). Also under 9(3) is covered the directed donation which is to a known person, by reason of “affection or attachment”. I am not called upon to examine the motivation behind such donations; which definitely is not for material benefits.

Approval for such a transplantation is also to be given by the Authorization Committee. The Transplantation of Human Organs Rules, 1998 (for short Rules) prescribe an elaborate procedure to ensure *inter alia* that there is no consideration passed. The issue dealt with here is of publications, inviting donors with altruistic motives to donate an organ to an identified individual.

11. The law specifically prohibits commercial dealings in human organs and that is how the Preamble of the Act speaks. Emphatically it is to be observed that it is not an enactment against exploitation. That is to say, however large or generous the compensation is, it is not to be permitted, since there can be no sale of organs. When the legislation intends to prohibit every commercial transaction, then the provisions are to be interpreted to serve that which is intended.

12. It is pertinent that even in the case of deceased donors, for removal of organs for therapeutic purposes, the law intends a consent from the deceased, during his life time or his death bed, {S.3 (1A) & (2)} which should not have been revoked before death. If there is no consent expressed, then, if the deceased had never objected, nor are any of his relatives objecting; only then

could the removal be effected {S.3(3)}. The authority to give consent on behalf of a deceased minor are the parents {S.3 (7)}. Even in the case of unclaimed bodies, if there is a possibility of anybody claiming the body, there is an interdiction on the authorized officer from permitting removal of organs {S.5}. In the case of a living donor a transplant of an organ removed can only be done, if the recipient is a near relative {S. 9 (1)}. When the recipient is not a near relative, consent alone cannot be a ground since the Parliament prescribed that it can only be on an approval of the Authorization Committee constituted under the Act and Rules. The law makers were aware of the misuse that could be perpetrated on the mere consent of a living donor. The law hence does not permit transplant from a live donor on a mere consent or even an informed consent; on altruistic motives; it would have to be approved by the Authorized Committee.

13. This Court cannot ignore the plight of the petitioners nor can it shut its eye to an evil that could be perpetrated by providing a field to overstep the law. When permitting publications seeking altruistic donors, it cannot be ensured that; what the law prohibits will not be occasioned. Developments in aspects of human life bring within its wake, problems arising from misuse,

abuse and flagrant violations of accepted civilized social ethics; especially in the field of medicine. Though a minority, there is a sizable human population who, are born with or by accident have, one or more of their faculties impaired. The developments in the medical field have done wonders for them. Coupled with their will to overcome their adversities, they have excelled in life and their chosen vocation; bettering their more fortunate fully rounded brethren. The possibility of extending life on another mans vitals; but has opened up new possibilities and equally deadly consequences.

14. It was argued that a live donor has life expectancy for 15 to 20 years. Essentially the argument accepts that a healthy man's life is put at risk. It is to say that in the prime of youth or in middle age, the life expectancy is reduced and confined to a maximum of 15 to 20 years. However there is no material placed before me as to any reduced life expectancy nor the contrary. Suffice it to say, the argument is not worthy. Be that as it may, it cannot be ignored that the removal of an organ from a living person will also bring within its wake psychological problems. This together with the physiological, would have its impact in the family and will slowly spread into the society. When it is for a commercial

consideration, it is definitely actuated by life's immediate adversities; to tide over which, the donor consents to organ donation. This cannot be termed to be a proper consent on free will nor is it one for affection or attachment as spoken of in S. 9(3). It is also not a 'special reason' as understood from the general tenor of the Act. Even when considering removal of organs after death, if it comes to the knowledge of the Appropriate Authority that the deceased in his life time had objection to transplantation after death; then it cannot be done. This is the rigor brought in by law. In that context if publications are permitted without any explicit offer of consideration or an arrangement; can it be prevented, when the live donor contacts the expectant recipient directly, is the vexing question the answer to which is an emphatic 'NO'. The enactment is a perfect example of social engineering and it is not for this Court to interfere with such a law on misplaced sympathies without looking at the consequences and the possible evil it could unleash.

15. Altruistic donations are on a higher plane and reaffirms the faith in humanity. There is an argument addressed on educating society as to the benefits behind organ transplantation. Yes, there has to be more awareness, mostly on deceased donation

of organs; the benefits of which are overwhelming. There can be no equation to an act of blood donation, which permissible quantity, studies reveal, is replaced in four hours. The procedure for blood donation and transplantation of an organ has no similarity. While the risk in blood donation is negligible, the risk of an invasive surgery is much more in transplantation.

16. Can it be authoritatively stated, that out of the two, one kidney is a surplus? The renal parameters of a donor are assessed at the time of transplant and it does not take into account the medical complications that may arise in future due to the stress on the remaining organ. There is also an element of risk to the donor who is subjected to a surgical procedure and recovery therefrom. Quests in life are many and varied, for the haves, but for most; the have-nots, it is “a better tomorrow”. To loose hope in life and to sell ones own organ to achieve better living conditions is not a happy situation. Live organ transplantation for consideration, other than love, affection or a willing sacrifice, is abhorrent to the concept of a healthy, civilized society.

17. In the present batch there is one petitioner who had one transplantation and is now seeking another. The batch also

disclose four petitioners in the age group of 20 to 30 and four between 30 to 40. The majority, eight, are above 45. Statistically the sample is 1% (16) of the live transplants that occurred in the 6 year period between 2011-2017, which is 1692. Definitely there is an increase in the demand for transplantation. Publications inviting live donors is prohibited under the Act to prevent commercial transactions or arrangements. Even if there is no explicit offer of any benefits, before the issue reaches the Authorization Committee there could be an arrangement arrived at. There can be no publication to precipitate altruism, which has to come from within and cannot be directed, against a particular individual whom the donor has never come across in life. The prayer for permitting publications; for the reasons stated above, cannot be allowed.

18. Altruistic donations to maintain its purity, according to World Health Organization should be non-directed. The World Health Organization [for brevity "WHO"] has issued the Guiding Principles [for brevity "GP"] for Organ Donation, of which those relevant are extracted hereunder :-

GP 3

Donation from deceased persons should be developed to its maximum therapeutic potential, but adult living persons may

donate organs as permitted by domestic regulations. In general living donors should be genetically, legally or emotionally related to their recipients.

Live donations are acceptable when the donor's informed and voluntary consent is obtained, when professional care of donors is ensured and follow-up is well organized, and when selection criteria for donors are scrupulously applied and monitored. Live donors should be informed of the probable risks, benefits and consequences of donation in a complete and understandable fashion; they should be legally competent and capable of weighing the information; and they should be acting willingly, free of any undue influence or coercion.

GP 5

Cells, tissues and organs should only be donated freely, without any monetary payment or other reward of monetary value. Purchasing, or offering to purchase, cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned.

The prohibition on sale or purchase of cells, tissues and organs does not preclude reimbursing reasonable and verifiable expenses incurred by the donor, including loss of income, or paying the costs of recovering, processing, preserving and supplying human cells, tissues or organs for transplantation.

GP 6

Promotion of altruistic donation of human cells, tissues or organs by means of advertisement or public appeal may be undertaken in accordance with domestic regulation.

Advertising the need for or availability of cells, tissues or organs, with a view to offering or seeking payment to individuals for their cells, tissues or organs, or, to the next of kin, where the individual is deceased, should be prohibited. Brokering that involves payment to such individuals or to third parties should also be prohibited.

GP 9

The allocation of organs, cells and tissues should be guided by clinical criteria and ethical norms, not financial or other

considerations. Allocation rules, defined by appropriately constituted committee, should be equitable, externally justified, and transparent.

GP 10

High-quality, safe and efficacious procedures are essential for donors and recipients alike. The long-term outcomes of cell, tissues and organ donation and transplantation should be assessed for the living donor as well as the recipient in order to document benefit and harm.

The level of safety, efficacy and quality of human cells, tissues and organs for transplantation, as health products of an exceptional nature, must be maintained and optimized on an ongoing basis. This requires implementation of quality systems including traceability and vigilance, with adverse events and reactions reported, both nationally and for exported human products.

GP 11

The organization and execution of donation and transplantation activities, as well as their clinical results, must be transparent and open to scrutiny, while ensuring that the personal anonymity and privacy of donors and recipients are always protected”.

These are the guiding principles which should regulate any live transplant. This Court is of the opinion that any publication permitted could lead to negotiations and merely because there is no explicit offer in the advertisements, it cannot be inferred that there would not be any passing of consideration or an arrangement negotiated. Truly altruistic motives will also not be directed against an individual and life of one is as precious of yet another.

19. The factors favouring donation to a particular individual is purely medical. The age of a potential recipient, his medical condition, the compatibility with the donor termed medically as 'matching', the family situation, and any other relevant factor. As far the donor, anonymity rules out the consent being on account of anything other than free will. This would have to be done by an impartial, qualified body of people. As to the deceased donations there is a body in existence, the KNOS, who decide on the recipient when an organ is made available in the unfortunate circumstance of a life extinguished. The Government has formulated the procedure for Transplantation of Human Organs to carry out its Cadaver Organ Transplantation Programme by G.O.(M.S.)No.37/2012/H&FWD dated 04.02.2012. The G.O provides for registration of intending recipients through the hospitals and a prioritization based on the condition of the patient. This shall be followed in the case of live donations also till the Government brings out separate procedures for living altruistic donations. The KNOS can be entrusted with this onerous responsibility also, for the present, in view of the prevalent requests for transplantation.

20. The petitioners can register themselves with the KNOS, through the hospitals indicating their blood type or whatever details are required for organ transplantation. The KNOS shall make periodic press releases seeking willingness for donation of organs on purely altruistic motives. Any application received shall be processed, initially with a psychological evaluation and then finding a suitable registered individual requiring donation. The identification of the recipient and the cross match for deciding compatibility shall be done with a team of Doctors as decided by the Nodal Officer and the expenses incurred shall be reimbursed by the intended recipient. The entire procedure shall be carried out ensuring anonymity of the donor and the expected recipient and eventually with approval from the Authorization Committee. Authorization Committees have been constituted by the State at the State and District level who shall deal with the individual cases referred to it. The Guidelines for Authorization Committees brought out by Notification No. 14931/S2/2009/H&FWD dated 19.11.2010 shall apply in these cases also. The State can bring out fresh procedure and guidelines, in consultation with the Advisory Committee as constituted under G.O.(M.S.)No.37/2012/H&FWD dtd.04.02.2012.

The Chief Secretary shall take expeditious steps to formulate a procedure and bring out guidelines for altruistic non-directed donations; with anonymity maintained of the donor and the recipient. The State Government shall also ensure that there is a regular follow up of the donor and the recipient, for statistical purposes and also to provide a support system for the donor. A fund could also be created to accept donations from the public or under Corporate Social Responsibility to provide a support system for those donors who are motivated only by altruism.

The writ petitions are disposed of, declining the permission sought to make publications; but with the alternate measure of registration with the KNOS as directed herein above. No order as to costs.

Sd/-
K.Vinod Chandran
Judge.

vkul/-

[true copy]