

(2004) 12 KAR CK 0002

In the Karnataka High Court

Case No : Writ Petition No's. 51324 and 51400 of 2004

Smt. R. Shailaja and Another

APPELLANT

Vs

State of Karnataka and Another

RESPONDENT

Date of Decision : 30-12-2004

Acts Referred:

Constitution of India, 1950 — Article 21

Transplantation of Human Organs Act, 1994 — Section 17, 22, 9 (5), 9 (6)

Citation : (2005) ILR (Kar) 953 : (2005) 4 KarLJ 133 : (2005) 1 KCCR 496

Hon'ble Judges : K. Bhakthavatsala, J

Bench : Single Bench

Advocate : Humayun and Shivaraj Patil, for the Appellant; Tajuddin, HCGP, for the Respondent

Judgement

K. Bhakthavatsala, J.—The Petitioners are before this Court praying for quashing the order dated 16.11.2004 made in KTAC 54/2004 (Annexure-D) on the file of the 2nd Respondent, and also direct the 2nd Respondent to grant permission to the 1st Petitioner to undergo kidney transplantation.

2. The Respondent Nos. 1 and 2 are represented by Sri Tajuddin, learned High Court Government Pleader.

3. With the consent of the learned Counsels for the parties, heard arguments for final disposal.

4. For the purpose of convenience, the Petitioner Nos.1 and 2 are hereinafter referred to as the Recipient and "the Donor" respectively.

5. The brief facts of the case leading to the filing of the Writ petitions may be stated as under:-

Since both the kidneys failed, the Recipient and the Donor jointly made an application under Sub-Section (5) of Section 9 of The Transplantation of Human Organs Act, 1994 (in short, "the Act"). The Authorisation Committee, after

recording their statements on 16.11.2004, rejected their application seeking grant of permission to undergo kidney transplantation. This is an order passed by the Authorisation Committee under sub-section (6) of Section 9 of the Act. This is impugned in this batch of Writ Petitions on the ground that the impugned order is arbitrary and without any sound reasoning.

6. During the course of argument, the learned Counsel appearing for the Petitioners submitted that in identical cases, the Division Bench of this Court, by dated 17.11.2004 passed in, (S. Malligamma @ Malligavva and Anr. v. State of Karnataka and Anr., W.A.Nos. 4650 and 4651/2004 (GM-RES) disposed off on 17.11.04), has allowed the Writ Appeals and the order of the Committee was set aside.

7. It is pertinent to mention that the advance of science and technology in the field of surgery it has become possible to remove organs from living as well as deceased persons and to transplant such organs to save the lives of suffering human beings. This advancement has brought evils as well. Commercial dealings in human organs especially kidneys started increasing. Therefore, a compressive legislation for regulating the removal of organs from cadavers and living persons and prohibiting commercial dealings in human organs, was felt. But, the Parliament has no power to make laws for the States with respect to the above said matters except as provided in Articles 249 and 250 of the Constitution. Therefore, all the Houses of the Legislature of States of Goa, Himachal Pradesh and Maharastra passed resolutions to the effect that the matters aforesaid should be regulated in those states by Parliament by law. Thus, the Act came to be passed giving an option to other States to adopt by notification. Accordingly, the State Government have adopted the Act and as per Section 9(4)(b) of the Act constituted the Authorisation Committee/Respondent No. 2, which is headed by law Secretary as Chairman along with 3 members viz., Urologist, D C P (Crime) and Director H8FW Department.

8. Section 17 of the Act provides that the person aggrieved by an order of the Authorisation Committee rejecting an application for approval under sub-Section 6 of Section 9, may within thirty days from the date of receipt of the order, prefer an Appeal as against such order to the State Government, where the Appeal is against the order of the Authorisation Committee constituted under Clause (b) of sub-section (4) of Section 9. But, in the instant case, the Petitioners have not exhausted their statutory remedy available u/s 17 of the Act. The learned Government Pleader has not taken contention in that regard. Since the Division Bench of his Court has already set aside identical type of order of the Authorisation Committee in W. A. Nos. 4650 and 4651/2004, there is no impediment to entertain the present Writ Petitions. It is pertinent to mention that the learned Single Judge of this Court, by his order dated 15.10.2004, in W P Nos. 35640 and 35641/ 2004 (G M-Res) (S. Malligamma @ Malligavva and Another Vs. State of Karnataka and Another, , rejected the Writ Petitions directing the Director General of Police to enquire into all the files submitted by

the Applicants seeking permission to donate their kidneys and find out how many of the Donors are from Ramanagaram and surrounding Taluks and whether the kidneys have been donated out of love and affection or for any other consideration and submit report within two months. Feeling aggrieved of the order of the learned Single Judge, the Petitioners in those Petitions preferred Writ Appeal Nos. 4650 and 4651/2004, supra. The Division bench of this Court, by order dated 17.11.2004, disagreed with the learned Single Judge and held that it was not practical and possible to expect the Donor and the Recipient to be from the same caste, religion and place, and the paramount criteria that the Authorisation Committee was to find out regarding commercial object, if any between the Donor and the Recipient.

9. In the instant case also, the Authorisation Committee has rejected the petitioners' application on the ground that the Donor has not produced proof to show that he has been residing with the Recipient, and therefore held that the Donor is not the servant in the house of the Recipient, and there is no affinity between them, for the Donor to part with his vital organ-kidney, and there is monetary consideration for the Donor's offer to donate his kidney to the Recipient, without any material on record and it is nobody's case. Further, if the conclusion reached by the Committee is correct, it is an offence punishable u/s 19 of the Act.

10. It is necessary to state that Section 2(k) of the Act defines the term "payment", which reads as under:-

"Payment" means payment in money or money's worth but does not include any payment for defraying or reimbursing-

(i) the cost of removing, transporting or preserving the human organ to be supplied: or

(ii) any expenses or loss of earnings incurred by a person so far as reasonably and directly attributable to his supplying any human organ from his body."

11. According to the Act, a Donor shall be a major. If a near relative viz, spouse, son, daughter, father, mother, brother or sister were to donate kidney, no such permission for removal of the organ is required from the Authorisation Committee. Such permission is required, where the Donor is not a near relative. Section 19 of the Act prescribes punishment for commercial dealings in human organs. Section 22 of the Act says that no Court shall take cognizance of an offence under the Act except as provided in the Act. According to Section 19, whoever makes or receives any payment for the supply of, or for an offer to supply, any human organ, shall be punishable. In *Smt. Gian Kaur Vs. State of Punjab*, a five judge Constitution Bench of the Supreme Court has overruled the *P. Rathinam*'s case and held that "right to life" under Article 21 of the Constitution does not include "right to die" or "right to be killed". Thus, "right to life" is fundamental right of a citizen. In the instant case, the Recipient is suffering from renal failure and she required dialysis twice a week which costs

Rs. 25,000/- per month. The Almighty has provided vital organs-eyes and kidneys in double. Probably, if one fails, the other will serve the purpose and if both were to fail, another person can provide one. Normally, people do not offer eyes during life time for various reasons, but people offer to donate one of their kidneys as by donating one of the kidneys, their normal life is not affected. There was a hue and cry by legal and social experts for regularisation of removal of human organs for therapeutic purpose as kidneys were being removed by some of the Medical practitioners without consent of the Donor, and middlemen made money out of the transaction and therefore an Act was required to ban such commercial dealings in human organs.

12. In view of Section 19 of the Act, no stranger would come forward to donate in the absence of something in return. In view of the facts of the case and the law on the subject, the following questions occur to my mind:-

(i) What is the remedy available for the Petitioner No. 1, aged about 32 years, who has no relative to offer suitable kidney, and there is none to donate kidney in consideration of love and affection?

(ii) Whether the State Government has collected the data as to how many persons in the State suffer from renal failure?

(iii) Is it not Section 19 of the Act infringes Article 21 of the Constitution?

(iv) Whether the law on the subject serves the purpose of the person suffering from renal failure?

13. At the cost of repetition, I must mention that the Authorisation Committee rejecting the application solely on the ground that there is no proof to show that the Donor is residing with the Recipient is a ground invented by the Committee for the purpose of rejecting the- application ignoring the human problems. Therefore, the impugned order is liable to be quashed and the matter has to be remitted to the Committee for re-consideration.

14. Consequently, the Writ Petitions are partly allowed and the impugned order dated 16.11.2004 made in Application No.KTAC 54/2004 (Annexure-D) on the file of Authorisation Committee is quashed and the Respondent No. 2-Committee is directed to reconsider the same within two weeks from the date of receipt of copy of this order.