

(2014) 12 J&K CK 0037

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1218 of 2014 and CWP No. 1900 of 2014

Syed Arifa and Others

APPELLANT

Vs

State of JandK and Others

RESPONDENT

Date of Decision : 11-12-2014

Acts Referred:

Citation : AIR 2015 JK 48 : (2015) 1 JKJ 95

Hon'ble Judges : Ali Mohd. Magrey, J.

Bench : Single Bench

Advocate : G.R. Tantray, for the Appellant; M.I. Dar, for the Respondent

Final Decision : Allowed

Judgement

Ali Mohd. Magrey, J.â?"Petitioners have filed this writ petition for quashing the decision taken by the Authorization Committee constituted by the

Government under Section 9(4) of the Jammu and Kashmir Transplantation of Human Organs Act, 1997, communicated to the petitioners vide

communication dated 31.07.2014 read with communication dated 12.08.2014 on the joint application of the petitioners filed by them under

Section 9(5) read with Rule 6 of the Rules framed under the aforesaid Act. The simple and short facts of the case are that the petitioner No. 1 has

been diagnosed as a case of Chronic Kidney Disease (CKD) Grade-III, Hypertension, patient and is registered with the Department of

Nephrology, SKIMS, Soura, Srinagar, under Registration No. 834132. She is on life saving drugs and Hemodialysis. The petitioner has been

advised kidney transplantation. Her near relatives, who had offered to donate kidney, did not match. However, petitioner No. 2, stated to be a

family friend of petitioner No. 1, offered to donate her one kidney to her, consequent upon which the two underwent necessary medical tests, which revealed that the two match.

2. On completion of necessary formalities, petitioners jointly moved an application before the Authorization Committee constituted for the purpose under Section 9(4) of the Jammu and Kashmir Transplantation of Human Organs Act, 1997 (hereinafter, for short, the Act) for grant of approval for the removal of one kidney of petitioner No. 2 and its transplantation in petitioner No. 1.

3. The Authorization Committee held its meeting on 02.07.2014, but rejected the application of the petitioners with the following observations:

The Committee after deliberations decided that it was not proved beyond reasonable doubt that prospective donor namely Raja Bano is donating her kidney to Syed Arifa on compassionate grounds.

The decision so taken by the Committee was communicated to the petitioners vide No. SIMS-301-46-2014-299 dated 31.07.2014.

4. When this writ petition was filed, it was noticed that the aforesaid decision had not been taken by the Authorisation Committee as constituted by the Government. Accordingly, pursuant to order dated 08.08.2014 passed with consensus of learned counsel for the parties, the Authorisation Committee considered the case of the petitioners afresh on 07.08.2014 but again rejected the application observing as under:

The Committee held a detailed interview with the Donor (Raja), husband of the Donor (Shabir Ahmad) potential recipient (Arifa) and husband of

the recipient (Mehraj-ud-Din) separately. The Committee after interacting with the above said family members observed a number of discrepancies

in the statements made by the interviewees which led the committee to conclude that there was a poor mutual knowledge of the 2 families

regarding basic queries related to the history of mutual interaction, time of the marriage of the children, attendance of the family members in the

marriages, knowledge of the family fabric on both the sides etc. The Committee concluded that based on an assessment of the 2 families there is

poor evidence of a link of the 2 families and as such there seems to be an inadequate compassionate ground for kidney transplantation. The

committee as such rejects the donor for the transplantation in the instant case.

The aforesaid decision was communicated to the petitioners under endorsement No. SIMS/301-01-46-2014-315 dated 12-8-2014. The

petitioners sought amendment of their writ petition to seek quashment of the aforesaid decision and communication as well.

5. Though respondents have filed their reply/objections to the amended writ petition, yet, in view of the requirement of the law on the subject, I feel

it unnecessary to give the detailed narrative of the pleadings of either of the parties.

6. I have heard learned counsel for the parties and considered the matter.

7. It is to be borne in mind that the Act has been basically enacted to regulate removal, storage and transplantation of human organs for therapeutic

purposes and for prevention of commercial dealings in human organs, and for matters connected therewith or incidental thereto. The words

therapeutic purposes"" has been defined in Section 2(p) to mean systematic treatment of any disease or the measures to improve health according

to any particular method or modality. In the instant case, it is nobody's case that the organ would not be used for therapeutic use or that petitioner

No. 2 was donating the organ to be used not for therapeutic purposes but for any other purpose. However, that is not the sole consideration for

grant of the approval contemplated by the Act. The considerations requisite for accord of such approval are contained in Section 9 of the Act.

8. Sub-section (1) of Section 9 of the Act says that, save as otherwise provided in sub-section (3), no human organ 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. In the instant case, petitioner No. 2

is not a near relative of petitioner No. 1. However, sub-section (3) of Section 9 provides that if any donor authorizes the removal of any of his

human organs 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 organs shall not be

removed and transplanted without the prior approval of the Authorisation Committee. Sub-rule (3) of Rule 9 thus recognizes the reason of

affection or attachment as a ground for accord of approval by the Authorisation Committee.

9. Sub-section (4) of Section 9 provides that the Government shall constitute, by notification, one or more Authorisation Committees, consisting of

such members as may be nominated by the Government on such terms and conditions as may be specified in the notification.

10. Sub-section (5) provides that 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 organs.

11. The Government, pursuant to sub-section (4) of Section 9 of the Act has constituted the requisite committee. However, the provisions of the

Act or the Rules framed thereunder do not make reference to any specific requirement on the part of the donor or the recipient which they would

have to fulfill to the satisfaction of the Authorisation Committee. Again, sub-section (5) provides that the Authorisation Committee shall hold an

enquiry. The provisions of the Act or the Rules again do not specify the areas into which the inquiry has to be conducted by the Authorisation

Committee. Nonetheless, Rule 3 of the Jammu and Kashmir Transplantation of Human Organ Rules, 1999, provides that any donor may authorize

the removal, before his death, of any organ of his body for therapeutic purposes in the manner and on such conditions as specified in Form 1.

12. Form 1 prescribed under Rule 3 of the Rules provides two formats, one concerning donation of an organ for a near relative and the other with

regard to donations made out of affection or attachment. Here we are concerned with the second type of format. It reads thus:

I, ... aged ... s/o. D/o. W/o. Mr. ... Resident of ... hereby authorise to remove for therapeutic purposes/consent to donate my organ, namely, ... to

Mr./Mrs. ... S/o. D/o. W/o. Mr. ... aged ... Resident of ... towards whom I possess special affection or attachment or for any special reason (to be specified).

I certify that the above authority/consent has been given by me out of my own free will without any undue pressure, inducement, influence or all

allurement and that the purpose of the above authority/donation and of all possible complications, side-effects, consequences and options have

been explained to me before giving this authority or consent or both.

Signature of the Donor.

13. The field of enquiry as contemplated by sub-section (5) of Section 9 of the Act is thus specified in Form 1 and it is in respect of these factors

that the Authorisation Committee has to hold an inquiry and satisfy itself that the applicants have complied with all the requirements of the Act and

the rules made thereunder. It is to be borne in mind that the Act does not prohibit donation of human organs. The object of the Act is only to

regulate the procedures and to prevent commercial dealings. Therefore, the most important factor to be determined during the course of enquiry is

to see whether there is a commercial dealing involved in the donation and that it is not motivated by commercial object.

14. Now the question is how the Authorisation Committee would come to a conclusion that there is no commercial dealing or object involved in an

offer to donate. In this connection, the Supreme Court in *Kuldeep Singh and Another Vs. State of Tamil Nadu and Others*, , has laid down the

following guidelines:

Since the object of the Statute is to rule out commercial dealings, it would be desirable to require the donor and recipient to give details of their

financial positions and vocations. It would be appropriate for the Legislature to accordingly amend the Rules and the Form I, so that requirement

for disclosing incomes and vocations for some previous financial years (say 3 years) gets statutorily incorporated. This would help the

Authorisation Committees to assess whether any commercial dealings is involved or not. Until Legislative steps are taken, all Authorisation

Committees shall, in terms of this judgment require the applicants to furnish their income particulars for the previous three financial years and the

vocations.

15. In the instant case the Authorisation' Committee has rejected the request of the petitioners on the ground of lack of compassion or inadequacy

thereof behind the offers to donate. The Act or the Rules framed thereunder do not recognize compassion as the ground for seeking or rejecting

authorization in question. The grounds recognized are either near relation or affection and attachment. Compassion is a feeling of pity and

sympathy; whereas affection and attachment connote feelings of fondness and

liking. Though both conditions relate to emotional aspect of a human nature, yet affection and attachment may evoke a strong and sustained response so much so to sacrifice one's own body organ, compassion would not. In any case, since the impugned decisions have been taken on the misconceived ground of compassion, the same do not withstand the test of judicial scrutiny, being not governed by the provisions of the Act.

16. It also needs to be observed here that the ultimate authority to accord approval for the removal and transplantation of the human organ is the Authorisation Committee constituted by the Government and their decision taken in accordance with law would prevail. Therefore, it is expected of the members of the Committee to take the requisite decision taking all the relevant aspects into consideration so as to rule out any element of commercial dealings. In cases where the donations are offered on the grounds of affection and attachment, it is not far fetched that the decision of the concerned may be motivated by false hope of converting misfortunes of life into glittering grandeur at the altar of personal well being.

17. This petition is, accordingly, allowed on the ground that the decision taken by the Authorisation does not fall in line with the grounds envisaged by law. The impugned decisions are, therefore, quashed. The Authorisation Committee is directed to consider the request of the petitioners afresh on the basis of the grounds recognized by law keeping in view the contents of Form I quoted hereinabove, within a period of seven days from the date a copy of this order is served on the Convener of the Committee. No order as to costs. CD produced is returned to Mr. Dar Id. counsel in open court.