

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

OWP no.1218/2014
CMP no.1900/2014

Date of decision: 11.12.2014

Syed Arifa & anr.

v.

State of J&K & ors.

Coram:

Hon'ble Mr. Justice Ali Mohammad Magrey, Judge

Appearing counsel:

For Petitioners: Mr. G. R. Tantray, Advocate;

For Respondents: Mr. M. I. Dar, Advocate.

1. Petitioners have filed this writ petition for quashing the decision taken by the Authorisation 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.

2. 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 Haemo-dialysis. 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.

3. On completion of necessary formalities, petitioners jointly moved an application before the Authorisation 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.

4. The Authorisation 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.

5. 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 12.08.2014. The petitioners sought amendment of their writ petition to seek quashment of the aforesaid decision and communication as well.

6. 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.

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

8. 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.

9. 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.

10. 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.

11. 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.

12. 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 authorise the removal,

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

13. 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 allurements 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.”

14. 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.

15. 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 v. State of Tamil Nadu***, Case no. Appeal (Civil) 156 of 2005, decided on 31.03.2005, 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.”

16. 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 offer to donate. The Act or the Rules framed thereunder do not recognize compassion as the ground for seeking or rejecting authorisation 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.

17. 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.

18. 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 Convenor of the Committee.

19. No order as to costs. CD produced is returned to Mr. Dar Id counsel in open court.

(Ali Mohammad Magrey)
Judge

Srinagar,
11.12.2014
Syed Ayaz, Secretary