

**CASE COMMENT**  
**MOINDEEN E.M. v. STATE OF KERALA**  
**[2017 SCC Online Ker. 2121]**  
**(DECIDED ON NOVEMBER 24, 2017)]**

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**I. Introduction**

RECENTLY, THE KERALA High Court decided a case concerning the publication of the need for donation of organs. The decision in this case highlights the existing lacunae within the legislation dealing with the donation of organs in India, *i.e.*, the Transplantation of Human Organs and Tissues Act, 1994.<sup>1</sup> The present day lifestyle related problems are causing the number of many major diseases to rise. Many diseases are curable through organ transplants and hence the Act was legislated to “provide for the regulation of removal, storage, and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs”

**II. Background**

The present case arose through a writ petition filed by sixteen petitioners from the State of Kerala, who are suffering from renal failures and are in need of an organ transplant. The petition sought permission from the Court to publish the requirement of ‘altruistic’

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<sup>1</sup> Hereinafter ‘the Act’.

organ donors. The Act allows the publication of such requirement but imposes a condition that such publication should not invite “supply for payment” or “offer such supply” or indicates willingness to initiate or negotiate any arrangement.<sup>2</sup> The Act clearly does not impose any prohibition on the publication of the requirement of an organ donor.

The reasons cited by the petitioners for filing the petition for the grant of permission was the fact that the scheme evolved by the Kerala state government for deceased donor transplants<sup>3</sup> was not really able to meet the growing needs of the constantly rising number of patients suffering from renal problems, making it more and more difficult for such patients to find a donor. Further, it alleged that the media refuses to publish such requests for organ donations due to the fear of prosecution.

The Kerala Network for Organ Sharing<sup>4</sup> is a government organization that takes care of organ donations and is the representative from the State in the petition.<sup>5</sup> KNOS argues that publications should never be allowed by the court as there exists a probability of misuse of such publications by having the provision of ‘payment’ in organ donations, even if not explicitly mentioned in the publications. Further, KNOS is of the view that donations from the live donors should not be encouraged too much; rather people should be encouraged to donate organs post death and that alternate measures to renal failures, such as dialysis should be resorted to. Statistics provided by KNOS stated that the live donations are on a

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<sup>2</sup> Sec. 19(1) (f) of the Act.

<sup>3</sup> Deceased Donor Multi Organ Transplantation Programme.

<sup>4</sup> *Hereinafter* KNOS.

<sup>5</sup> See <http://knos.org.in/> for details.

rise as compared to cadaver donations since the past few years. KNOS also contended that organ donations from persons alive, leads to a number of psychological issues amongst the donors, the families and also has an impact on the kind of work that is pursued by the donors.

On hearing both sides, the Court concluded that

- i. The petition would be dismissed and the permission sought through the way of the petition for the publication of advertisement would not be allowed.
- ii. The Court suggested an alternative to the publication of requirement of organ donors by the patients. It was suggested that the need for an organ donor by any patient or relative should be registered with the KNOS so that the publication gets a centralized source which would in turn that the publication does not include any aspect of 'consideration' within it.

### III. Criticism

On an analysis of the case at hand, it is felt that that the decision should have been a little more liberal towards the petitioners in case who are patients awaiting organ transplantation. It is often seen that while going through a centralized system of publication, unexplained delay may occur. Delay in cases where the life of the patient is dependent upon undergoing an organ transplant, often leads to grave consequences such as loss of life. The Act clearly states that publication of a requirement for organ donation cannot be made along with an offer for some consideration in return.<sup>6</sup> The Act also provides for the establishment of an

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<sup>6</sup> *Supra* note 2.

‘Authorisation Committee’<sup>7</sup> that would finalize the status of ‘organ donations’. The decision seems to be unfair to the patients because the Act already provides for a basic system of checks through the establishment of an ‘Authority’ which shall grant the final permission for the organ donation to go through.

#### **IV. Conclusion**

It is felt that the Act provides a system of checks at a basic level through the establishment of an ‘Authorisation Committee’ that checks the authenticity of organ donations. The Committee ensures that donations cannot be made for monetary considerations or otherwise. It is felt on an analysis of the case at hand that the Court has been too stringent with the petitioners by not granting them the permission to publish for ‘altruistic’ donations.

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<sup>7</sup> Sec. 9, of the Act.