

(2025) 07 GAU CK 0434
In the Gauhati High Court
Case No : WP(C) Of 4048 Of 2025

Dewan Waliul Islam

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 23-07-2025

Acts Referred:

Transplantation of Human Organs Act, 1994 — Section 3, 9, 24

Citation : (2025) 07 GAU CK 0434

Hon'ble Judges : Arun Dev Choudhury, J

Bench : Single Bench

Advocate : K N Choudhury, N Baruah

Final Decision : Disposed Of

Judgement

Arun Dev Choudhury, J

1. Heard Mr. K. N. Choudhury, learned Senior Counsel assisted by Mr. N. Baruah, learned counsel for the petitioner. Also heard Mr. D. P. Borah, learned Standing Counsel for the Health and Family Welfare Department.

2. The petitioner is aggrieved by non finalization/verbal denial of No Objection Certificate (NOC) by the State Level Authorization Committee, Gauhati Medical College & Hospital, Assam, to propose donation of a Kidney by proforma respondent No. 7, who is stated to be first cousin brother of the petitioner. Accordingly, the petitioner has approached this Court.

3. This Court sought for an instruction under its order dated 22.07.2025 from the authorities through Mr. D. P. Borah, learned Standing Counsel for the Health and Family Welfare Department and the same has been received today.

4. The instruction goes to show that the proposed transplantation is not considered for the reason of bar under Rule 18 of the Transplantation of Human Organs and Tissues Rules, 2014 (hereinafter referred to as Rules, 2014) made in exercise of power under Section 24 of the Transplantation of Human Organs Act,

1994 (hereinafter referred to as Act, 1994).

5. According to the respondent/authority, as reflected in the instruction, Rule 18 of the Rules, 2014 only permits near relatives namely, grand-mother, grand-father, mother, father, brother, sister, son, daughter, grand-son and grand-daughter above the age of 18 years to donate their organs and admittedly, the donor in the present case being cousin brother of the petitioner, shall not come within the definition of aforesaid "near relatives" and therefore, they cannot grant such NOC.

6. On the other hand, Mr. K. N. Choudhury, learned Senior Counsel for the petitioner submits that the Rule 18 of the Rules, 2014 is a procedure mandated in a case when the donor is near relative and Rule 19 of the Rules, 2014 prescribes the procedure, in a case when the donor is other than near relatives and therefore, the reasons advanced by the authority are misconceived and not sustainable in the face of the aforesaid Rules.

7. Mr. Choudhury, learned Senior Counsel for the petitioner further submits that such proposition is clear from the Section 9 of the Act, 1994, which though prescribes restriction on removal and transplantation of human organs and tissues or both, however, donation of human organ is permissible even from person who are other than "near relatives" subject to restrictions imposed under Sub Section 3 of Section 9 of the Act, 1994 and according to the petitioner, the petitioner fulfills all such conditions.

8. This Court has given anxious consideration to the submissions advanced by the learned counsel for the parties.

9. The Act, 1994 was enacted to provide for regulation of removal, storage and transplantation of human organs and tissues for therapeutic purposes and for prevention of commercial dealing in human organs and tissues.

10. Section 9 of the Act, 1994 restrains removal of human organs or tissues from the body of a donor before his death and transplanting the same into a recipient, unless the donor is a "near relative" of the recipient, subject to the other condition provided in the said Act. Sub Section 3 Section 9 of the Act, 1994 provides that, any donor which is not a "near relative", can also donate such organ for transplantation for the reason of affection or attachment to the recipient or for any other reason, however, same shall not be done without prior approval of Authorization Committee. Therefore, what is seen is that when donor is "not a near relative", authorization from Authorization Committee is mandatory.

11. The power of the Authorization Committee, is enumerated under Rule 7 (3) of the Rules, 2014. Sub Rule 3 of Rule 7 of the Rules, 2014 puts certain consideration, based on which the Authorization Committee should consider case of a person who is "not a near relative". Rule 7 of the Rules, 2014 being relevant is quoted herein below:-

"7 Authorisation Committee. (1) The medical practitioner who will be part of the

organ transplantation team for carrying out transplantation operation shall not be a member of the Authorisation Committee constituted under the provisions of clauses (a) and (b) of sub-section(4) of section 9 of the Act.

(2) When the proposed donor or recipient or both are not Indian nationals or citizens whether near relatives or otherwise, the Authorisation Committee shall consider all such requests and the transplantation shall not be permitted if the recipient is a foreign national and donor is an Indian national unless they are near relatives.

(3) When the proposed donor and the recipient are not near relatives, the Authorisation Committee shall.-

i. evaluate that there is no commercial transaction between the recipient and the donor and that no payment has been made to the donor or promised to be made to the donor or any other person;

ii. prepare an explanation of the link between them and the circumstances which led to the offer being made;

iii. examine the reasons why the donor wishes to donate,

iv. examine the documentary evidence of the link, e.g. proof that they have lived together, etc.;

v. examine old photographs showing the donor and the recipient together,

vi. evaluate that there is no middleman or tout involved:

vii. evaluate that financial status of the donor and the recipient by asking them to give appropriate evidence of their vocation and income for the previous three financial years and any gross disparity between the status of the two must be evaluated in the backdrop of the objective of preventing commercial dealing.

viii. ensure that the donor is not a drug addict,

ix. ensure that the near relative or if near relative is not available, any adult person related to donor by blood or marriage of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ or tissue, the authenticity of the link between the donor and the recipient, and the reasons for donation, and any strong views or disagreement or objection of such kin shall also be recorded and taken note of".

12. Rule 18 of the Rules, 2014 prescribes for the procedure when the donor is a "near relative". "Near relative" in the context of the Act and Rule 18, shall mean a person who is a near relative and related genetically i.e. grand-mother, grand-father, mother, father, brother, sister, son, daughter, grand-son and grand-daughter above the age of 18 years.

13. In the case in hand, it is an admitted position that the donor will not come within the definition of "near relatives" under Rule 18 of the Rules, 2014.

However, from the reading of Section 9 of the Act, 1994 and Rule 7 of the Rules, 2014, this Court is having no doubt in the mind that there is no bar for a person who is "not a near relative" to donate his organ, however, such donation is subject to the condition enumerated under Section 9(3) of the Act, 1994 and also subject to fulfillment of the conditions made under Rule 7(3) of the Rules, 2014. Such view is also supported by the provision of Rule 19 of the Rules, 2014, which prescribes procedure in case of transplantation, when it is other than near relatives.

14. Therefore, it is clear that there is no absolute mandate that the donor and recipient must always be "near relatives". What the law prescribe is that donor and recipient may not also be "near relatives" but such transplantation shall be subject to restrictions imposed under Section 9 of the Act, 1994 and subject to fulfillment of the conditions prescribed under Section 9(3) of the Act, 1994 and subject to fulfillment of procedure laid under Rule 19 of the Rules, 2014.

15. For the reasons recorded hereinabove, it is the opinion of this Court, that the decision of the Authority in not considering the case of the petitioner only for the reason that the donor is not a near relative, cannot withstand judicial scrutiny. Accordingly, such decision is held to be in derogation of Section 9 of the Act, 1994 and Rules 7(3) & 19 of the Rules, 2014.

16. Mr. D. P. Borah, learned Standing Counsel for the Health and Family Welfare Department on instruction from the Member Secretary of the Authorization Committee submits that the Authorization Committee can hold their meeting in an urgent manner on 25.07.2025 (Friday) at 10:30 AM as the proposed transplantation is fixed on 26.07.2025 (Saturday) and they can intimate their decision on Friday itself i.e. 25.07.2025.

17. In view of the aforesaid, the writ petition stands disposed of directing the Authorization Committee to held their meeting on 25.07.2025 at 10:30 AM and take a decision on the same date having due regards to the determinations made hereinabove, and such decision be communication to the petitioner. The petitioner is permitted to send one of his authorized representatives to collect such decision from the office of the Member Secretary of the Authorization Committee in the evening of 25.07.2025. Parties to bear their own cost.

18. While parting with this record, this Court appreciates the assistance rendered by Mr. D. P. Borah, learned Standing Counsel for the Health and Family Welfare Department, in providing the due instruction at a very short notice inasmuch as the determination is required to be made at the earliest.