(2012) 05 KL CK 0023

In the High Court Of Kerala

Case No : Writ Petition (C) No. 9483 of 2012

Kiranlal APPELLANT

Vs

State of Kerala RESPONDENT

Date of Decision : 04-05-2012

Acts Referred:
Transplantation of Human Organs and Tissues Act, 1994 — Section 24

Citation : (2012) 3 ILR (Ker) 67 : (2012) 2 KLT 761

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : Kaleeswaram Raj, for the Appellant; Viyayaraghavan, M.R. Jayalatha, R.S. Kalkura M.S. Kalesh, A.V. Priya and Haris Gopinath, for the Respondent

Judgement

P.R. Ramachandra Menon

1. The clearance to be given by the 5th respondent/State Level Authorisation Committee for Renal Transplantation under the Transplantation of Human Organs Act, 1994 (''Act'' in short) and Transplantation of Human Organs Rules, 1995 (''Rules'' in short) is the subject matter involved. The challenge stands is more as to the vires of the Rules 4A(4)(v) or/and Rule 6F(d)(iv) and seeks for a declaration that the conviction of 8th respondent/donor in Dime No. 258/01 of Payyangadi Police Station in respect of offence u/s 55(a) of the Kerala Abkari Act (pending in appeal before the Sessions Court, Thalasserry) is not an impediment for giving clearance for the kidney transplantation surgery to be performed in the 6th respondent''s hospital.

2. This matter was heard yesterday and since the Court felt the need to have some more clarification, it was posted today as "to be spoken to". Heard Mr. Kaleeswaram Raj, the learned Counsel for the petitioner, Mr. Vijayaraghavan, the State Attorney on behalf of the concerned respondents, particularly, respondent Nos. 2, 5 and 6 and also Mr. R.S. Kalkura on behalf of the 7th respondent Hospital, at length. It is stated that there is no much factual dispute and that the issue is more related to the scope and object of the relevant Act/Rules and also

as to the contents /observation in Ext. P16 Certificate issued by the Asst Superintendent of Police, i.e., the 4th respondent, referring to the conviction of the donor in the Sessions case.

3. The petitioner, a minor boy aged 15 years represented by his father Kishore Kumar, is suffering from serious renal problems. It has been identified that kidney transplantation is essential to save the patient. Transplantation of human organs is governed by the aforesaid Act/Rules and the first respondent has infact issued Ext. P1 Circular on 16.8.2011, specifying the particulars of documents to be produced for kidney transplantation, one among which is a certificate to be issued from the office of the Superintendent of Police. The petitioner contends that, all such documents as required under the relevant provisions of law and as specified, in particular Ext. P1 Circular, have been procured and submitted before the concerned authority along with Ext. P4 application. However, no clearance has been given by the 5th respondent/State Level Authorisation Committee constituted in this regard and the delay is causing a threat to the life of the petitioner, which made him to approach this Court by filing this Writ Petition for appropriate reliefs.

4. It is stated that the petitioner has been given to understand that the adverse observation made by the 4th respondent in Ext. P16 certificate, referring to the conviction of the donor in a criminal case u/s 55(a) of the Abkari Act, (which is stated as pending in appeal) stands against the processing of the application and in giving clearance. The petitioner''s specific contention is that the relevant rules, particularly Rules 4A(4)(v) and 6F(d)(iv) as aforesaid, stipulating onerous terms are quite alien to the scheme of the ''Act'' and are ultra vires. It is also stated that, even otherwise, the said rules cannot bar the way of the petitioner in availing the benefit conferred under the Act to have the kidney transplantation to save his life. Reference is also made to various judicial pronouncements including that of the Apex Court in Pt. Parmanand Katara Vs. Union of India (UOI) and Others, pointing out that no law or regulation can be permitted to delay or deny the treatment to a patient, who is fighting for his life in the hospital. There is a further contention that the scope of the Rules is also something different and its object is not to debar an accused or convict from being a donor or to deny the benefit of the Act to the patient/recipient. It is stated that the criminal case u/s 55(a) of the Abkari Act against the 8th respondent/donor itself is a false and fabricated one; that the conviction and sentence is not correct or sustainable either on facts or in law; that the same is pending in appeal and hence not final and that there is every chance for winning the appeal. It is also pointed out that the life of the petitioner/patient cannot be left in lurch till finalisation of the appeal and seeks for immediate intervention of this Court.

5. Mr. Vijayaraghavan, the learned State Attorney and Mr. R.S. Kalkura the learned Counsel for the 7th respondent Hospital invited the attention of the Court to the relevant provisions, both under the Act as well as the Rules. It is pointed out that the intention of the law making authority is to prevent the ''trade'' in

human organs and to permit organ transplantation strictly for ''therapeutic purpose''; subject to the specific parameters specified therein. Every provision has been incorporated to safeguard this object and that the Act and Rules have to be read together as a whole.

6. During the course of hearing, this Court came across various doubts which required further clarification, including as to why the stipulation under Rule 6F(d)(iv) is repeated when the very same provision is available under Rule 4A(4)(v) of the Rules. Further such a stipulation, as to the necessity for the Authorisation Committee to evaluate that the donor is "not a drug addict or a known person with criminal record", is insisted only in cases where the donor and recipient are not near relatives. In other words, when the donor and recipient are near relatives, the recipient is at liberty to receive organ from the donor, even if the latter is a notorious criminal or a drug addict. In what way the filial relationship of the recipient and the donor with reference to the criminal background or drug addiction does attain significance or importance is not clearly discernible. Equally or more obscure is the position, whether the Act or Rules does/do actually intend to prevent or deny the benefit of organ transplantation between two convicts or two known persons with criminal records, if they are not relatives.

7. While considering the challenge as to the vires of the Rules, as raised in Ground ''G'' of the Writ Petition, it has to be borne in mind that the Transplantation of Human Organs Rules, 1995 have been framed not by the State, but by the Central Government itself, in exercise of the power conferred under sub-section (1) of Section 24 of the Transplantation of Human Organs Act, 1994. In spite of the fact the Rules have been framed by the Central Government, the petitioner has not chosen to implead the rule making authority i.e., the Union Government in the party array and as such the challenge against the Rules without impleading the Union Government as a respondent, is not liable to be entertained. The learned Counsel for the petitioner submits that he would confine him self to the contents of Ext. P16 certificate issued by the 4th respondent and its applicability to deny clearance to the kidney transplantation, in the context of the existing rules.

Sub-rule (4) of rule 4A reads as follows:

(4) When the proposed donor and the recipient are not "near relatives", as defined under clause (i) of section 2 of the Act, the Authorisation Committee shall evaluate that,-

(i) there is no commercial transaction between the recipient and the donor and that no payment or money or moneys worth as referred to in the Act, has been made to the donor or promised to be made to the donor or any other person;

(ii) the following shall specifically be assessed by the Authorisation Committee:--

(a) an explanation of the link between them and the circumstances which led to the offer being made;

(b) reasons why the donor wishes to donate;

(c) documentary evidence of the link, e.g., proof that they have lived together, etc.;

(d) old photographs showing the donor and the recipient together;

(iii) that there is no middleman or tout involved;

(iv) that financial status of the donor and the recipient is probed by asking them to give appropriate evidence of their vocation and income for the previous three financial years. Any gross disparity between the status of the two must be evaluated in the backdrop of the objective of preventing commercial dealing;

(v) that the donor is not a drug addict or known person with criminal record;

(vi) that the next of the kin of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ, the authenticity of the link between the donor and the recipient and the reasons for donation. Any strong views or disagreement or objection of such kin shall also be recorded and taken note of.

Similarly, clause (d) of Rule 6F reads as follows:

(d) Where the proposed transplant is between individuals who are not "near relatives" the Authorization Committee shall evaluate;--

(i) that there is no commercial transaction between the recipient and the donor. That no payment of money or moneys worth as referred to in the Act, has been made to the donor or promised to be made to the donor or any other person. In this connection the Authorisation Committee shall take into consideration;--

(a) an explanation of the link between them and the circumstances which led to the offer being made;

(b) documentary evidence of the link, e.g., proof that they have lived together, etc;

(c) reasons why the donor wishes to donate; and

(d) old photographs showing the donor and the recipient together;

(ii) that there is no middleman or tout involved;

(iii) that financial status of the donor and the recipient is probed by asking them to give appropriate evidence of their vocation and income for the previous three financial years. Any gross disparity between the status of the two, must be evaluated in the backdrop of the objective of preventing commercial dealing;

(iv) that the donor is not a drug addict or a known person with criminal record;

(v) that the next of kin of the proposed unrelated donor is interviewed regarding awareness about his/her intention to donate an organ, the authenticity of the link between the donor and the recipient and the reasons for donation. Any strong views or disagreement or objection of such kin may also be recorded and taken note of; and

8. Taking the relevant rule as it is, i.e. without considering the merit as to the challenge raised, it casts a liability upon the Authorisation Committee to ensure that the donor is ''not a drug addict'' or a ''known person with criminal record''. The question whether the donor in the instant case is a drug addict does not come to the picture at all, as the reference made in Ext. P16 certificate is, only in respect of the conviction in a sessions case involving the offence u/s 55(a) of the Abkari Act (which is pending in appeal); wherein, any offence in respect of ''intoxicating drug'' has been excluded from the purview of the Abkari Act (having been separately taken care of as per the NDPS Act), by virtue of the explanation given thereunder.

9. Since Section 55(a) deals with the import, export, transport, possession etc. of liquour or any intoxicating drug and further since the term intoxicating drug means an intoxicating substance other than a narcotic drug or psychotropic drug regulated by the NDPS Act, 1985, which the Government by way of notification declared to be intoxicating drug, the offence concerned here in can only be in connection with export/import/possession etc. of liquor. The above offence is of course punishable with imprisonment for a term, which may extend to 10 years and with a fine of not less than Rs. 1,00,000/- (Rupees One lakh only). On conviction, the 8th respondent has been sentenced to undergo imprisonment for six months and to pay a fine of Rs. 1,00,000/-, against which appeal is stated as pending before the District Court as shown by the 4th respondent in Ext. P16 certificate. Whether this conviction (pending in appeal) should be a bar or should deter the Authorization Committee from giving clearance for the transplantation of kidney, with reference to Rule is the question.

10. It has to be borne in mind that, nowhere in the Act does it say, that the donor of the human organ shall never be an accused or convict in a criminal case; nor is there any such stipulation under the Rules as well, but for the duty cast upon the Authorization Committee to ensure that the donor is ''not a drug addict'' or ''not a known person with criminal record'', where the proposed donor and recipient are not near relatives, as defined u/s 2(i) of the Act. As per Section 2(i) "near relative" means spouse, son, daughter, father, mother, brother or sister."

11. With regard to the first limb of Rule 4A (4) (v) or 6F (d) (iv) i.e. as to being of a drug addict, meaning of the word ''addict'' is much important. The terms ''addict'' and ''addiction'' as given in Black''s Law Dictionary (English Edn.) read as follows :

Addict : A person who habitually used a substance, esp. a narcotic drug.

Addiction : The habitual and intemperate use of a substance, esp. a potentially harmful one such as a narcotic drug. The usual requisites are (1) an emotional dependence that leads to compulsiveness; (2) an enhanced tolerance of the substance, leading to more potent doses; and (3) physical dependence such that withdrawal symptoms result from deprivations.

It denotes the conduct of a particular person to have frequent/habitual interaction because of repeated and obsessive compulsion. When the person becomes addicted to something, it means, he cannot leave or pull on without the said substance, whether it be a drug in the case of drug addict or alcohol in the case of liquor addict or otherwise. The element of indispensability is in-borne and the person cannot be normally separated from the addiction. The duty cast upon the Authorization Committee is to see that the donor is not'' a drug addict, which means that, previous history of a drug addict, if he has got reformed and realized the values of life and is no more a drug addict, is not a taboo for organ transplantation.

12. The next limb of the relevant rule is that, the Authorization Committee has to ensure that the donor is ''not a known person with criminal record''. As mentioned already, the Rule does not say that the donor shall not be an accused or a convict. The words used by the law making authority are specific, to the extent that should not be a "known person" with criminal record. Here the history as to involvement in criminal activities is relevant The object of incorporation might be to see that provisions under the Act enabling the human organ transplantation are not misused or frustrated, in view of the possibility of involvement of commercial dealings.

13. The object of the Act is as discernible from the ''preamble'' which reads as follows:

An Act to provide for the regulation of 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 background of a person having criminal record in this context, particularly to assess, whether he could be a person who may be doing anything for getting money or such other consideration or whether the organ transplantation is sought to be made on free will without compulsion, fraud or threat or such other circumstances etc., may be relevant to be looked into. It may be with this intent that such a stipulation has been made to safeguard the interest of all concerned in genuine cases and to promote the scope and object of the Statute in extending the benefit flowing therefrom, in deserving cases. When the Rule says that the donor, except in the case of ''near relatives'' as defined u/s 2(i), should not be a "known person with criminal record", it rather seeks to project a persistent track record of the donor as to the criminal background. The accused or convict may not be a "known person" with criminal record, unless he pursues/ indulges in any heinous crimes or repeated crimes, by virtue of which he becomes ''known'' to all concerned, including the police. Unless there is an ''adverse entry'', that the donor is such a known person with criminal record, it can hardly be said that a solitary instance of being an accused in crime as involved herein or the conviction made in such a case (which itself is pending in appeal) is liable to be reckoned to brand the donor as a ''known person with criminal record'' as contemplated under the Rules, to be excluded by the Authorization Committee in the process of evaluation.

14. Considering the given case in the above background, as to whether 8th respondent donor can be considered as either a ''drug addict'' or a ''known person with a criminal record'', Ext. P16 certificate has been obtained from the 4th respondent (in tune with Ext. P1 Circular) and it forms part of Ext. P4 application preferred by the petitioner for getting necessary clearance. It has been specifically averred in the Writ Petition that the 8th respondent/donor is an employee of the father of recipient minor boy, right from the year 2003; the steps taken to identify a matching kidney to be transplanted to the person from the near relatives turned to be a failure; that the donor has agreed to donate one of his two kidneys on his own free will and because of the love and affection in the course of the employer and employee relationship between him and father of the recipient; that the said fact is known to the members of the donor''s family and necessary consent letters have been given by him and his wife; that there is absolutely no commercial interest in this regard and that it is only to save the life of the ailing minor boy. The purpose of a certificate to be issued by the Superintendent of Police, as instructed in Ext. P1 Circular, is mostly to ascertain the correctness of the above aspects., which in turn have been enquired into and certified by the 4th respondent vide Ext P16, wherein reference is also made to the conviction and sentence in the Sessions Case bearing No. 322 of 2002, involving offence u/s 55(a) of the Abkari Act and the pendency of the appeal.

15. Coming to the contents of Ext. P16 certificate issued by the 4th respondent, it has been certified :

- that the donor has voluntarily consented to donate one of his kidneys to the minor recipient,

- that the donor is working under the father of the recipient patient

- that the consent has been given by the donor on his free will without any compulsion, influence or intend of reward consideration and his altruism is genuine,

- that the readiness of the donor is known to his wife Nandini, his son and daughter,

From the above, it is clear that, the specific averments made by the petitioner as to the genuineness of the case, the nature and circumstance in giving consent given by the 8th respondent donor, and the absence of any commercial interest etc., have been enquired and certified as genuine by the Assistant Superintendent of Police, vide Ext P16.

16. It is relevant to note, when a mention is made in Ext. P16 as to the conviction in the Sessions Case involving an offence u/s 55(a) of the Abkari Act and the pendency of the appeal, no where has it been stated by the 4th respondent therein, that the 8th respondent donor is either a drug addict or a known person with criminal record. To put it more clear, Ext. P16 certificate issued by the 4th respondent certifies the genuineness of the case involved and rules out any element of commercial interest or compulsion or such other influence in giving the consent, but for the solitary instance as to the involvement in the concerned crime. There is no reference to any other criminal case or such other incriminating circumstances branding the donor as a "known person with criminal record". In the absence of any entry, that the 8th respondent/donor is a known person with criminal record, the authenticity and acceptability of Ext. P16 certificate issued by the 4th respondent, certifying the genuineness, cannot be doubted by the 5th respondent/State Level Authorization Committee while considering Ext. P4 application for clearance. In other words, the stipulation under Rule 4A(4)(v) or Rule 6F(d)(iv) of the Transplantation of Human Organs Rules, 1995 does not place a bar to the case in hand and Ext. P16 certificate is not liable to be treated as detrimental to the interests of the beneficiary and the donor, merely for the reference made therein, as to the conviction of the donor, in the Sessions case involving an offence u/s 55(a) of the Abkari Act, which however is pending in appeal. In the above circumstances, this Court finds that the reference made to the Sessions case in Ext. P16 certificate shall not be a bar for the 5th respondent in considering Ext. P4 application, in so far as Rule 4A(4)(v) or Rule 6F(d)(iv) is concerned. The 5th respondent is directed to consider Ext. P4 application preferred by the petitioner for kidney transplantation, in the light of all the supporting documents produced and finalize the proceedings for granting clearance certificate, if the same is otherwise in order, keeping in mind that the conviction of the 8th respondent as referred to in Ext. P16 shall never be treated as detrimental to the rights and interests of the petitioner or the donor to have the benefit of organ transplantation under the Act/ Rules. The proceedings as above shall be finalized in accordance with law, as expeditiously as possible, at any rate within ''two weeks'' from the date of receipt of a copy of this judgment.

It is for the petitioner to produce copy of the judgment before the 5th respondent for further steps. The Writ Petition is disposed of leaving all other issues open.

