

(2016) 09 DEL CK 0042

In the Delhi High Court

Case No : Writ Petition (Civil) No. 7742 of 2016

Mohammad Sulaiman (Pakistani National)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 16-09-2016

Acts Referred:

Transplantation of Human Organs and Tissues Act, 1994 — Section 2(1), 9

Citation : (2017) 1 ADDelhi 669 : (2017) 169 AIC 798 : (2017) AIR(Delhi) 9 : (2016) 233 DLT 620 : (2017) 1 JCC 343 : (2017) 1 RCRCivil 248 : (2017) 1 RCRCriminal 83

Hon'ble Judges : Sanjeev Sachdeva, J.

Bench : Single Bench

Advocate : Mr. Manmohan and Mr. Prakash Verma, Advocates, for the Petitioners; Mr. Kirtiman Singh, CGSC with Mr. Pranav Agrawal, Mr. Prateek Dhanda, Mr. Waize Ali Noor and Mr. Karan Jain, Advocates, for the Respondents No. 1; Mr. Mudit Sharma and Ms. Bhavna Dhami, A

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J.(Oral)—The petitioners have filed the present petition impugning the order dated 24.08.2016 passed by the Authorisation Committee under the Transplantation of Human Organs and Tissues Act, 1994 (hereinafter referred to as the Act) rejecting the application of the petitioners.

2. Both the petitioners are Pakistani Nationals. Petitioner no. 1 is the proposed Recipient and Petitioner no. 2 is proposed Donor. As per the petitioners, the petitioner No. 1 immediately requires transplantation of liver tissue and may also require transplantation of kidney. Whether the petitioner would require transplantation of a kidney would be dependent on the condition of the petitioner after the transplantation of liver tissue.

3. The petitioners filed an application before the Authorisation Committee on 17.08.2016. The Authorisation Committee has rejected the application on the ground that there is no relationship between the Donor and the Recipient and no

connection could be established between the two. The rejection is also on the ground that there is great financial disparity between the income of the proposed Donor and the proposed Recipient.

4. Pending the present petition, the petitioner filed an appeal before the Appellate Authority under the Act. The Appellate Authority by its order dated 09.09.2016 has rejected the appeal of the petitioner primarily on the same grounds. Copy of the order of the Appellate Authority has been filed by the counsel for the Respondents.

5. Since the matter required an urgent hearing, on the request of the petitioners, the petitioners were permitted to impugn the order of the Appellate Authority without moving any formal application for amendment.

6. Arguments of both the parties have been heard.

7. Learned counsel for the respondents submits that both the Authorisation Committee as also the Appellate Authority could not find any link between the Donor and the Recipient. Both are admittedly foreign nationals. The Authorisation Committee examined the Donor as well as the Donor's husband, who stated that for the first time the Donor and her husband met the Recipient on 06.08.2016 i.e. just 11 days before filing of the application. The Authorisation Committee did not find any good reason for the Donor to agree to donate her liver tissue. The Authorisation Committee was also of the view that because there is no connection or link between the Donor and the Recipient, the possibility of commercial transaction could not be ruled out. The Appellate Authority has rejected the appeal of the Petitioners on the same grounds.

8. Section 2 sub-section (1) of the Act defines "near relatives" as under: -

2. Definitions. - In this Act, unless the context otherwise requires,-

(i) "near relative" means spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter;

9. Admittedly, the Donor and the Recipient are not related to each other.

10. Section 9 of the Act reads as under: -

9. Restrictions on removal and transplantation of human organs or tissues or both. - (1) Save as otherwise provided in sub-section (3), no human organ or tissue or both 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.

(1A) Where the Donor or the Recipient being near relative is a foreign national, prior approval of the Authorisation Committee shall be required before removing or transplanting human organ or tissue or both:

Provided that the Authorisation Committee shall not approve such removal or transplantation if the Recipient is a foreign national and the Donor is an Indian national unless they are near relatives.

(3) If any Donor authorises the removal of any of his human organs or tissues or both 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 organ or tissue or both shall not be removed and transplanted without the prior approval of the Authorisation Committee.

11. As per section 9 of the Act, no human organ or tissue or both removed from the body of the Donor before his death can be transplanted into a Recipient unless the Donor is a near relative of the Recipient. In case the Donor and the Recipient are not near relative no such transplantation can take place without prior approval of the Authorisation Committee constituted under the Act.

12. Rule 7 of the Transplantation Of Human Organs and Tissues Rules, 2014 (hereinafter referred to as the Rules) reads as under:-

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.

13. Sub-rule 3 of Rule 7 of the Rules stipulate that when the proposed Donor and the Recipient are not near relatives, the Authorisation Committee shall, inter-alia take into account the parameters mentioned therein. The Authorisation Committee is to 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. The Authorisation Committee has to prepare an explanation of the link between them and the circumstances which led to the offer being made. The documentary evidence of the link has to be examined. The financial status of the Donor and the Recipient has also to be examined by the Authorisation Committee.

14. In the present case, the Authorisation Committee examined the Donor, her husband as also the submissions made on behalf of the Recipient who was represented through a doctor.

15. The Authorisation Committee on examination of the above, has given to the following grounds for rejection:

"1. There is no relationship between Donor and the Recipient. As per information given in various forms the Donor claims to be a family friend of the Recipient and they are not related with each other in any way.

2. As per the prescribed procedure in case of foreign nationals given under rule 20 THOA rules, a senior embassy official of the country of origin has to certify the relationship between the Donor and the Recipient as per form 21 and in case a country does not have an embassy in India, the certificate of relationship, in the same format, shall be issued by the Government of that country. As per rule 20 there is no provision to permit donation of a foreigner to another foreigner, if the Donor and Recipient are not relatives.

3. The Recipient is telecom engineer and his annual income is rupees 24 lakh. The Donor is teacher (Online Islamic study) and her annual income is rupees 5 lakh. This shows there is great financial disparity between the Donor and the Recipient.

4. As per the information provided by the Donor and Donor husband they met the Recipient and his wife for the first time on 06.08.2016 i.e. just two week back only in New Delhi, India when they came for transplant. As per the details

given in the Family Tree of the Recipients wife is O +ve and Recipient is also O+ve. There appears to be no good reason for wife not to donate to her husband.

5. As per rule 7, 3(i) of THOA, commercial transaction cannot be ruled out in this case, as such present case violates rule 7.3(i) of THOA.

6. As per rule 7.3 (iii) of THOA the committee has not been able to find any good reason for the Donor to donate her liver.

7. There is no document/evidence to show that the Donor and the Recipient ever lived together. This violates rule 7.3 (iv) of THOA.

8. There is no old photograph to show the Donor and Recipient together. This violates rule 7.3(v) of THOA.

9. The present case also violate rule 7.3 (vii) of THOA."

16. The Authorisation Committee referring to rule 20 has held that there is no provision to permit the donation of a foreigner to another foreigner if the Donor and Recipient are not relatives. Even if assuming Rule 20 has no application, the other grounds which led to the rejection of the application of the petitioner are material.

17. The Authorisation Committee has noted that the Recipient is a Telecom Engineer having an annual income of Rs. 24 lakhs whereas the Donor claims to be a Teacher with an annual income of Rs. 5 lakhs. The Authorisation Committee has noted that there is great financial disparity between the Donor and the Recipient. The Authorisation Committee has noted that Donor and the Donor's husband met the Recipient and his wife for the first time on 06.08.2016 i.e. 11 days before the application was filed. There is no link between the Donor and the Recipient. The committee could not find any good reason for the Donor to agree donate her liver tissue to the Recipient. No document/evidence was produced before the Authorisation Committee to establish a link between the Donor and the Recipient. The Authorisation Committee could not rule out the possibility of a commercial transaction between the Donor and the Recipient.

18. The Appellate Authority by its order dated 09.09.2016, rejecting the appeal, has held as under:-

i. The immediate requirement is liver transplantation and if required kidney transplant at a later date.

ii. As per the statements of appellants, doctors have recommended transplantation of kidney and liver in one surgery on urgent basis. Being a foreigner case, the kidney Donor, which is claimed to be wife is also required to be approved by the Authorisation Committee as per Rule 19 of the Transplantation of Human Organs and Tissue Rules. No information has been received regarding approval of Donor for kidney transplant. However, it was confirmed from Chairperson of the Authorisation Committee that the case for kidney transplantation has not been presented before the Authorisation

Committee. Obviously, the appellants have not disclosed the full facts in their appeal.

iii. Donor is unrelated to the Recipient, nor there has been an association between the two to consider from the point of affection and attachment. There is no relation and no past association between Donor and Recipient and the Donor has met the Recipient family first time in India in August, 2016. The claimed association of family friend (as also mentioned in Form 21 received from Embassy) is based on the online teaching group connection with sisters of Recipient's wife of maximum claimed duration of one year where also as per her own statement she has never met the sisters or her children in person or even face to face on skype. There is even no documentary proof of this online claimed association with sisters of Recipient's wife. Clearly affection and attachment between the Donor and Recipient is not established in this case.

iv. The association that exists is between Donor and Recipient's sister and that too online contents of which are not in record. The financial disparity does exist between Donor and Recipient as stated in their own affidavits.

v. The Donor wants to donate in the name of religion. There is no provision under the Transplantation of Human Organs and Tissues Act 1994 to allow donation from other than near related Donor on the grounds of religious belief/traditions."

19. It may be noted that Appellate Authority gave personal hearing to the Recipient's wife as well as the Donor and the Donor's husband. Personal hearing of the Recipient could not be held as he was admitted in hospital and could not appear before the Appellate Authority.

20. Though the Appellate Authority has opined that there is recommendation for requirement of transplantation of kidney and liver but no information has been received regarding approval of Donor for liver and kidney transplantation. In my view, this would not be relevant as the submissions of the petitioner is that requirement of kidney transplant can only be assessed after the transplantation of liver tissue.

21. The Appellate Authority has also found that there is no association between the Donor and the Recipient to establish any point of affection or attachment. No relation or past association between the Donor and Recipient could be established. They claimed association of the family friend based on online teaching connection with the sister of Recipient's wife which also was claimed for about one year. This claim was also not accepted. No documentary proof for such online association could be produced before the Appellate Authority. The Appellate Authority also noted the financial disparity between the two. The contention that the Donor wanted to donate in the name of religion was not accepted since the Act does not make such a provision.

22. The Supreme Court in *Kuldeep Singh & Anr. v. State of Tamil Nadu & Ors.* 2005(11) SCC 122 may be referred to, wherein the Supreme court has held as

under:

"12. Where the Donor is not "near relative" as defined under the Act, the situation is covered by Sub-Section (3) of Section 9. As the Form I in terms of Rule 3 itself shows the same has to be filed in both the cases where the Donor is a near relative and where he is not, so far as the Recipient is concerned. In case the Donor is not a near relative the requirement is that he must establish that removal of the organ was being authorised for transplantation into the body of the Recipient because of affection or attachment or for any special reasons to make donation of his organ. As the purpose of enactment of the Statute itself shows, there cannot be any commercial element involved in the donation. The object of the Statute is crystal clear that it intends to prevent commercial dealings in human organs. The Authorisation Committee is, therefore, required to satisfy that the real purpose of the Donor authorising removal of the organ is by reason of affection or attachment towards the Recipient or for any other special reason. Such special reasons can by no stretch of imagination encompass commercial elements. Above being the intent, the inevitable conclusion is that the Authorisation Committees of the State to which the Donor and the Recipient belong have to take the exercise to find out whether approval is to be accorded. Such Committee shall be in a better position to ascertain the true intent and the purpose for the authorisation to remove the organ and whether any commercial element is involved or not. They would be in a better position to lift the veil of projected affection or attachment and the so called special reasons and focus on the true intent. The burden is on the applicants to establish the real intent by placing relevant materials for consideration of the Authorisation Committee. Whether there exists any affection or attachment or special reason is within the special knowledge of the applicants, and a heavy burden lies on them to establish it. Several relevant factors like relationship if any (need not be near relationship for which different considerations have been provided for), period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors and bonds can throw light on the issue. It is always open to the Authorisation Committee considering the application to seek information/materials from Authorisation Committees of other States/State Governments as the case may be for effective decision in the matter. In case any State is not covered by the operation of the Act or the Rules, the operative executive instructions/Government orders will hold the field. As the object is to find out the true intent behind the Donor's willingness to donate the organ, it would not be in line with the legislative intent to require the Authorisation Committee of the State where the Recipient is undergoing medical treatment to decide the issue whether approval is to be accorded. Form I in terms requires the applicants to indicate the residential details. This indication is required to prima facie determine as to which is the appropriate Authorisation Committee. In the instant case, therefore, it was the Authorisation Committee of the State of Punjab which is required to examine the claim of the petitioners.

13. We may note here that there is a provision for appeal in terms of Section 17

of the Act in case of refusal by the Authorisation Committee. But taking into account the urgency involved and the grey area projected by the two States regarding the proper Authorisation Committee, we have entertained the Writ Petition and decided the issues involved. In the normal course, it would be for the Appellate Authority constituted in terms of Section 17 who has to consider the appeal to be preferred by the aggrieved party.

14. 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 dealing 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. The petitioners are directed to furnish the aforesaid details within ten days from to-day before the Authorisation Committee."

23. In cases where Donor and Recipient not near relatives, the Supreme Court in *Kuldeep Singh (Supra)* has laid down that it has to be established that removal of organ was being authorised for transplantation into the body of the Recipient because of affection or attachment or for any special reason to make donation of his organ. There could not be any commercial element involved in the donation. The Supreme Court has noted that the object of the statute is to prevent commercial dealings in human organs. The Authorisation Committee has been mandated to satisfy itself that the real purpose of Donor authorising removal of the organ is by reason of affection or attachment towards the Recipient or for any other special reasons. Such reason cannot encompass commercial element. The Supreme Court has also held that whether there exists any affection or attachment or special reason would be within the special knowledge of the applicants, and a heavy burden lies on them to establish it. Relevant factors like relationship if any (need not be near relationship for which different considerations have been provided for), period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors and bonds would throw light on the issue.

24. It is clear that the object of the Act is to prevent any commercial dealings. The strict parameters laid down by the statute have to be strictly complied with. The Supreme Court in *Kuldeep Singh (Supra)* has categorically laid down that the Authorisation Committee shall strictly comply with the requirement of establishing a link between the Donor and Recipient where they are not related. This has been laid down to ensure that there are no commercial angles or motives involved in the Donor agreeing to donate an organ or tissue.

25. The Authorisation Committee as well as the Appellate Authority had held that they could not rule out the possibility of a commercial transaction between the

two. The petitioner has not been able to establish any link or connection or any affection or attachment or special reason as to why the Donor has consented to donate the liver tissue to the Recipient. Though it may be a hard case from the point of view of the petitioner no. 1 but the statute has to be strictly complied with to ensure that there is no trafficking or commercial angle involved in the transplantation of human organs or tissue.

26. In my view there is no error or infirmity in the orders of the Authorisation Committee dated 24.08.2016 and the Appellate Authority dated 09.09.2016.

27. The writ petition is dismissed with no orders as to costs.

28. The Authorisation Committee as well as the Appellate Authority have noted that wife of the petitioner no. 1 is of the same blood group (O +ve) and they have rather noted that the wife could have but has not come forward to donate her liver tissue to the petitioner no. 1. It is clarified that, in case any application is filed by the wife of the Petitioner No. 1 seeking to donate her liver tissue to the petitioner, such application would be considered by the respondents in accordance with law without being influenced by anything stated in this order.

29. Dasti under signatures of Court master.