

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.8889 OF 2013

Mr Dinesh Shantilal Badiani & Ors.

...Petitioners

VS

The State of Maharashtra & Ors.

...Respondents

.....

Mr Uday P. Warunjikar for Petitioners.

Mr S.R.Shinde Govt. Pleader a/w Mr J.S.Deo, AGP for Respondent No.1

**CORAM : A.S.OKA AND
S.C. GUPTE, JJ.**

Date of reserving the order : 18/12/2013

Date of pronouncing the order : 24/12/2013

ORAL JUDGMENT : (PER S.C.GUPTE J.)

1. The Petitioners have challenged an order passed by the Secretary, Medical Education & Drug Department, State of Maharashtra, under Section 17(2) of the Transplantation of Human Organs Act, 1994 rejecting the Petitioner's appeal from an order of the Regional Authorization Committee for Approval of Unrelated Transplant, Sasoon General Hospital, Pune.

2. The first Petitioner has been suffering from chronic renal failure since December 2008. He already had one transplant of kidney from his father. Later he again developed kidney related complications and started looking for another transplant. The Petitioner approached various hospitals including Respondent No. 3 – Ruby Hall Clinic for cadaver transplantation. He also approached Respondent No. 2 – Authorization Committee of Sasoon General Hospital for cadaver kidney transplant. Aggrieved by the lack of response from the

Respondents, he filed a writ petition before this court, being Writ Petition No. 9742 of 2012. He was joined by the Second Petitioner, who was willing to donate his kidney for the transplant. They prayed for directions to Respondent Nos. 1 and 2 herein to consider their joint application for transplant of kidney to be donated by the Second Petitioner. By its order dated 17 December 2012, this court permitted the Petitioners to make a joint application to the Second Respondent in regard to the transplantation of kidney under Section 9(5) of the Transplantation of Human Organs Act, 1994. Respondent No. 3 was directed to process the application and give its positive or negative recommendation, as the case may be, and Respondent No. 2 was asked to take a decision on the recommendation in a time – bound manner. The Petitioners made that application. Respondent No. 3 gave a negative recommendation. Respondent No. 2 rejected the application based on the recommendation, finding no case made out for the transplantation requested for under the provisions of the Transplantation Act. Respondent No. 2, in particular, held that the Petitioners, i.e. the donor and recipient, could not prove close association between them, or love and affection towards each other, which was the requirement of Section 9(3) of the Act. The order of rejection was confirmed in appeal by Respondent No. 1. Hence, the present petition.

3. Mr. Warunjikar, the learned Advocate for the Petitioners, submitted that the authorities below did not consider the evidence of love and affection between the Petitioners in the form of affidavits filed by them; that such statements on oath would be the only, or at any rate, a settled, method of proving love and affection; that Respondent No. 2 (the Authorization Committee) simply went by the recommendation of Respondent No. 3 (the Hospital) and did not itself

independently consider the matter; that Respondent No. 1 (the Appellate Authority) also endorsed the view of Respondent No. 2 without considering the additional material, namely, the affidavits filed by and on behalf the Petitioners. Mr. Warunjikar relied on the decision of this court in **Master Siddhant Pal Vs. Authorization Committee**¹ in support of his contentions. The learned Government pleader supported the decision of Respondent Nos. 1 and 2. We have also perused the documents submitted by the learned Government Pleader forming part of the record of the case before the Authorization Committee.

4. The Transplantation of Human Organs Act, 1994 (“the Transplantation Act”) was enacted by the Parliament with the object of providing for the removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs. Section 9 of the Transplantation Act, which provides for restrictions on removal and transplantation of human organs, reads thus:

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

(1B) No human organs or tissues or both shall be

¹ Writ Petition Nos. 10 of 2013, 1485 of 2013, 2719 of 2013 & 3220 of 2013 decided on 21st June, 2013

removed from the body of a minor before his death for the purpose of transplantation except in the manner as may be prescribed.

(1C) No human organs or tissues or both shall be removed from the body of a mentally challenged person before his death for the purpose of transplantation.

Explanation. - For the purpose of this sub-section, -

(i) the expression “mentally challenged person” includes a person with mental illness or mental retardation, as the case may be;

(ii) the expression “mental illness” includes dementia, schizophrenia and such other mental condition that makes a person intellectually disabled;

(iii) the expression “mental retardation” shall have the same meaning as assigned to it in clause (r) of section 2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996.)

(2) Where any donor authorises the removal of any of his (human organs or tissues or both) after his death under sub-section (2) of section 3 or any person competent or empowered to give authority for the removal of any (human organ or tissue or both) from the body of any deceased person authorises such removal, the (human organ or tissue or both) may be removed and transplanted into the body of any recipient who may be in need of such (human organ or tissue or both).

(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.

(3A) Notwithstanding anything contained in sub-section (3), where -

(a) any donor has agreed to make a donation of his human organ or tissue or both before his death to a recipient, who is his near relative, but such donor is not compatible biologically as a donor for the recipient; and

(b) the second donor has agreed to make a donation of his human organ or tissue or both before his death to such recipient, who is his near relative, but such donor is not compatible biologically as a donor for such recipient; then

(c) the first donor who is compatibly biologically as a donor for the second recipient and the second donor is compatibly biologically as a donor of a human organ or tissue or both for the first recipient and both donors and both recipients in the aforesaid group of donor and recipient have entered into a single agreement to donate and receive such human organ or tissue or both according to such biological compatibility in the group,

the removal and transplantation of the human organ or tissue or both, as per the agreement referred to above, shall not be done without prior approval of the Authorisation Committee.

(4) (a) The composition of the Authorisation Committee shall be such as may be prescribed by the Central Government from time to time.

(b) The State Government and the Union territories shall constitute, by notification, one or more Authorisation Committees consisting of each members as may be nominated by the State Governments and the Union territories on such terms and conditions as may be specified in the notification for the purposes of this section.

(5) 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 organ.

(6) If, after the inquiry and after giving an opportunity to the applicants of being heard, the Authorisation Committee is satisfied that the applicants have not complied with the requirements of this Act and the rules made thereunder, it shall, for reasons to be recorded in writing, reject the application for approval”

In exercise of the power conferred by sub-section (1) of Section 24 of the Transplantation Act, the Central Government has framed the Transplantation of Human Organ Rules, 1995 (“the said Rules”). Rules 6F of the said Rules provides for matters on which the Authorization Committee is required to focus its attention, whilst granting approval to the application, inter alia, for removal and transplantation of human organs between individuals who are not “near relatives”. Clause (d) of Rule 6F read thus:

6F. The Authorisation Committee shall focus its attention on the following namely:-

(a).....

(b).....

(c).....

(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

5. The ordinary rule is that transplantation of a human organ into the body of a recipient by removal thereof from the body of a living donor is permitted only if the donor is a near relative of the recipient. The only exception is in a case covered by Sub-section (3), namely, where the non-relative donor has a special reason for such donation in terms of that Sub-section. The ingredients of Sub-section (3) are as follows:

(i) The donor and recipient specified by him are not near relatives;

(ii) The donor authorizes removal of his organ before his death for transplantation into the body of such recipient;

(iii) Such authorization is by reason of affection or attachment towards the specified recipient or for any other special reason; and

(iv) The prior approval of the authorization committee is obtained for such removal and transplantation.

6. As for the mandate of the Authorization Committee when an application for approval of transplant between individuals who are not “near relatives” is made to it, the following is what the Supreme Court had to say in the case of **Kuldeep**

Singh and Another Vs. State of Tamil Nadu and Others²

“12. Where the donor is not “near relative” as defined in 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 authorized 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 authorizing removal of the organ is by reason of affection or attachment towards the recipient or for the 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 donee 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 Committee of other States/ State Governments as the case may be for effective decision in the matter”

7. The above discussion makes it clear that what is crucial is the '*satisfaction*' of the Authorization Committee that the donor's authorization for removal of the organ is '*by reason of affection or attachment towards the recipient or for any other special reason*'. This special reason can never contain a commercial element. In a case, there could be a projection of affection or attachment or so called special reason for the authorization. The Committee has to lift the veil and ascertain the true intent and purpose behind such authorization. Secondly, whether there exists any 'affection or attachment or special reasons' is a matter within the special knowledge of the applicants, and the burden to establish such a case is on the applicants. Relationship (other than 'near'), the period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors are some of the matters, on the basis of which the case of affection or attachment or special reason may be established. The burden is, however, heavy.

8. Let us now examine whether that burden is discharged in this case by the Petitioners, who are admittedly not “near relatives”, and whether the decisions of the Authorization Committee and the Appellate Authority, holding that burden as not discharged, are perverse or arbitrary and unreasonable, calling for the intervention of this court in its writ jurisdiction.

9. Firstly, apart from the bare statement that the donor is willing to donate his kidney to the recipient by reason of love, affection and attachment to him,

there is practically nothing to show 'affection or attachment or special reason' for the donor's authorization of removal his organ for transplantation into the body of the recipient. The affidavits of the donor (Petitioner No. 2) and his mother, father and brother, which talk about this 'love, affection and attachment' are stereotyped drafts. The only circumstances mentioned therein for such love, affection and attachment are the following:-

- (i) the donor is working with the patient as a delivery boy at the latter's office for the last three years;
- (ii) the donor is regularly assisting the patient and his family in various functions and ceremonies celebrated at the patient's house;
- (iii) the donor has been assisting the patient in the process of dialysis at the Hospital for the last three years;
- (iv) the donor's father, when he was in need of medical treatment, was helped by the father of the patient on a reference by the patient;
- (v) every year the patient and his family arranged family tours, on which the donor used to accompany them and take care of the patient; and
- (vi) the patient and his family treated the donor as their family member and the latter had good relationship with the patient and his family.

These circumstances hardly show a case of love and affection or a special reason to inspire the donor to donate his kidney in his lifetime to the recipient patient. An unmarried delivery boy working with his master and helping out the master and his family in their domestic chores or medical treatment of the master is hardly a candidate fulfilling the rigorous requirements of Section 9(3) of the Transplantation Act read with clause (d) of Rule 6F of the said Rules, as discussed above. That apart, there are other circumstances which caste a

serious doubt on the purported 'affection, attachment or special reason' as claimed in the affidavits. The donor and the recipient were interviewed by the Authorization Committee. The donor said in the interview that he received monthly payment in cheque from the recipient on his maternal uncle's name, whereas the recipient said he gives payment to the donor in cash. The donor could not properly name the floor on which the recipient stayed or the colour of the recipient's car or what kind of business the recipient was doing. Considering these points, in the light of the huge gap in the income slabs of the donor and the recipient and the master-servant relation between them, the Authorization Committee felt that the Petitioners could not prove close association between them or love and affection towards each other. The Authorization Committee rightly refused to give permission for removal and transplantation of the organ, exercising its powers under clause (6) of Sub-section (4) of Section 9 of the Transplantation Act.

10. The Appellate Authority also went over the entire material. It went through the video-graphed interview. It found, among other things, that during the interview of the mother of the donor, the mother told the Authorization Committee that there was a possibility of a monetary transaction between the donor and the recipient; that whereas the affidavits filed mention that the donor works as office boy in the recipient's office at Santacruz in Mumbai, the donor told the Authorization Committee that he stays at Deopur in Dhule District and not at Mumbai; that having regard to the frequency of hemodialysis of the recipient in Mumbai, i.e. twice week, it was not possible to the donor to work at Dhule and be in Mumbai at the same time; no proof could be submitted by the parties of any family function of the recipient attended by the donor in the form of

photograph or any other proof, or of the cheques received by him in the name of his maternal uncle or otherwise, for verification of the Committee. The Appellate Authority considered these circumstances in the light of the judgment of the Supreme Court in **Kuldeep Singh's** case (Supra) and affirmed the findings of the Committee.

11. We do not find any error in the assessment of the Appellate Authority of the circumstances and the application of law to them. Firstly, there is no adequate proof tendered by the Petitioners that there was any relation between them even as they alleged. The facts that the donor worked for three years with the recipient or attended his family functions or helped in his dialysis, are not clearly established. Secondly, even if they were established, they are hardly sufficient to make out a case of affection or attachment or any other special reason. On the other hand, there is a tangible suspicion of a monetary dealing between the two. It is precisely these circumstances, which the law seeks to guard against.

12. There is, thus, no case made out for a writ to be issued by this court. The Writ Petition is, accordingly, rejected.

13. Before we conclude, we must mention that the Petitioners, during the pendency of the Petition, amended the petition and included a prayer for directions to newly added Respondents Nos. 4 and 5 (Zonal Transplantation Co-ordination Committee and Hinduja Hospital) to consider the case of the first Petitioner on a priority basis for cadaver transplantation in the light of the facts and circumstances stated in the petition. These Respondents have their own

waiting lists and the Petitioner is duly registered with them. Accordingly as the first Petitioner's name figures on these lists, Respondents Nos. 4 and 5 may consider his case in accordance with law. In the meantime, we can do no better than hope that the first Petitioner's medical needs are attended to at the earliest.

(S.C.GUPTE J.)

(A.S.OKA J.)