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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 10111/2017**

DR. JASJIT SINGH & ANR.

..... Petitioners

Through: Mr Sunil Agarwal with Mr S. D. Sharma, Advocates alongwith petitioner no.2 in person.

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr Bhagwan Swaroop Shukla, CGSC with Mr Bipin Bihari Singh and Mr Kamaldeep, Advocates for UOI. Ms Kajri Gupta, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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28.11.2017

CM No.41327/2017

1. Allowed, subject to all just exceptions.

W.P.(C) 10111/2017

2. The petitioners have filed the present petition impugning an order dated 18.10.2017 (hereafter 'the impugned order') passed by the Appellate Authority under Section 17 of the Transplantation of Human Organs & Tissues Act, 1994 (hereafter 'the Act'). The petitioners further prayed that respondent no.3 (Indraprastha Apollo Hospital) be directed to permit petitioner no.1 to undergo the operation of a kidney transplantation and permit petitioner no.2 to donate one of her kidneys to petitioner no.1.

3. Petitioner no.1 is a doctor by profession and is suffering from renal

failure for both his kidneys. Petitioner no.1 had undergone a kidney transplantation in March, 2015 and his wife had donated one of her kidneys for the said operation. The kidney donated by the petitioner no.1's wife earlier has developed organ dysfunction and thus, petitioner no.1 is required to undergo another kidney transplantation operation.

4. The petitioners claim that petitioner no.2 is the daughter-in-law of petitioner no.1's maternal uncle (mama – brother of petitioner no.1's mother).

5. The petitioners had applied to the Authorization Committee for permission for petitioner no.2 to donate one of her kidneys. However, the said application was rejected by an order dated 22.02.2017 as the Authorization Committee was of the view that since the children of the petitioner no.1 had not shown any willingness to donate one of their kidneys, the possibility of a financial aspect could not be ruled out.

6. The petitioners appealed against the order dated 22.02.2017 passed by the Authorisation Committee before the Appellate Authority (Director General of Health Services, Government of India). The said appeal was disposed of by an order dated 26.07.2017, whereby the Appellate Authority remanded the matter to the Authorization Committee to consider afresh.

7. The Authorization Committee once again considered the request of the petitioners and rejected the same by an order dated 11.08.2017, whereby the Authorization Committee merely reiterated its earlier decision rejecting the permission for petitioner no.2 to donate one of her kidneys to petitioner no.1.

8. The petitioners once again filed a joint appeal under Section 17 of the Act, which was rejected by the impugned order. The only ground on which

the petitioners appeal has been rejected is because the Appellate Authority found that there was some statement with regard to some payments mentioned by petitioner no.2 during her interview before the Authorization Committee.

9. By virtue of Section 9(1) of the Act, no human organ or tissue or both removed from the body of a donor before his death is permitted to be transplanted into a recipient unless the donor is a “*near relative*” of the recipient. The expression “*near relative*” is defined under Section 2(i) of the Act to mean spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson and granddaughter. Thus, in the present case, petitioner no.2 is not a near relative of petitioner no.1 and, therefore, in terms of Section 9(3) of the Act, no organ or tissue can be transplanted from petitioner no.2 to petitioner no.1 without prior approval of the Authorization Committee.

10. Sub rule (3) of Rule 7 of the Transplantation of Human Organs and Tissues Rules, 2014 (hereafter 'the Rules') sets out the matters required to be considered by the Authorization Committee while evaluating whether to grant permission under Section 9(3) of the Act. Sub rule (3) of Rule 7 of the Rules is set out below:-

“(3) When the proposed donor and the recipient are not near relatives, the Authorization 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.”

11. In the present case, there is no allegation that any middleman or tout is involved. A bare perusal of the order dated 22.02.2017 passed by the Authorization Committee indicates that it had interviewed the petitioners and the Authorization Committee had in the order dated 22.02.2017 observed as under:-

- “• There is absolutely no documentary or genetic proof to establish the claimed relationship or association between recipient and donor.
- There is no apparent difference of financial status between donor and recipient and the status of recipient is much higher than that of the donor.
- Passports of recipient and recipient’s son show a lot of foreign trips to different countries indicating their high income.
- There is contradiction in the statements between the recipient, donor and the donor’s husband with respect to the area of the land owned by the donor’s husband.
- During the interview the donor accepted that the recipient helped them financially, however, the donor’s husband denied the same.
- Also, the donor conveyed that post surgery she will accept whatever is offered by the recipient and his family as financial help.”

12. The Committee had further expressed that the “altruistic nature of donation” was not established as it was not satisfied about the unwillingness on the part of the children of petitioner no.1 not to donate one of their kidneys to their father. The Committee had observed that it appeared that none of the children of petitioner no.1 had shown willingness because a non relative could be made a donor.

13. The Appellate Authority re-examined the matter and culled out the facts necessary to address the question whether the permission as requested by the petitioners ought to be granted, in its order dated 26.07.2017.

14. The undisputed facts that emerge from the pleadings and the

observations made by the Appellate Authority in its order dated 26.07.2017 are as under:

- (i) That petitioner nos.1 & 2 are related inasmuch as petitioner no.2 is a wife of the first cousin of petitioner no.1 (petitioner no.2 is petitioner no.1's maternal uncle's daughter-in-law).
- (ii) That petitioner no.1 had produced photo albums of the marriage of petitioner no.1 and also photo album of the marriage of one of the sons of petitioner no.2. These photographs clearly established that petitioner no.2 had participated in the functions.
- (iii) That the families of petitioner no.1 & petitioner no.2 stay at a distance of about 15 to 30 kms. and they stated that they meet each other atleast once or twice a month.
- (iv) That the husband of petitioner no.2, Shri Sarabjit Singh, had also assisted petitioner no.1 at his clinic for a period of 8 years from 1983 to 1990.
- (v) That the husband of petitioner no.2 was also willing to donate one of his kidney but he was not found fit for donation.

15. The above facts clearly establish that there is a longstanding association between petitioner no.1 and petitioner no.2 and their respective families.

16. Insofar as the question whether there is any commercial transaction between the parties is concerned, the record indicates that petitioner no.2 had stated that she had received certain financial help during the marriage of a second daughter but she claimed that the same was returned back. Petitioner no.2's husband had stated that only a normal *shagun* amount was

exchanged between the relatives and no financial help was taken.

17. The above does not indicate that there was any financial transaction between the petitioners in connection with petitioner no.2 agreeing to donate one of her kidneys and the Appellate Authority had rightly rejected any such inference.

18. The order of the Authorization Committee and the Appellate Authority indicates that although, there is certain economic disparity between the family of petitioner no.2 and petitioner no.1, the family of petitioner no.2 is of sufficient means. The husband of petitioner no.2 owns a truck and his passbook indicates that there is an average monthly balance of around ₹50,000-60,000/-. The passbook also indicated a entry relating to a fixed deposit of ₹3 lacs. There are two LIC policies in the name of petitioner no.2 of about ₹7 lacs. The son of petitioner no.2 is working in Dubai as a driver and his bank passbook also indicates a monthly balance of ₹60,000-70,000/-. Petitioner no.2's family also owns immovable lands, which are used for farming. There is some discrepancy as to the extent of land owned; according to petitioner no.2's husband it is around 4-5 acres but according to petitioner no.1 the land is around one and a half Kila.

19. In view of the above, there does not appear to be any monetary need that would warrant petitioner no.2 to enter into a transaction to donate one of her kidneys for any monetary consideration.

20. During the course of the interview, petitioner no.2 had stated that she would accept whatever is offered by petitioner no.1 and his family as financial help and this is the statement which has weighed with the Appellate Authority in passing the impugned order. This Court is of the view that the aforesaid observation by itself does not establish that there is

any commercial transaction between petitioner no.1 and petitioner no.2 in connection with donation of a kidney. The said observation must be read in the context in which it was made. Further, petitioner no.2 had repeatedly reiterated that there was no financial transaction relating to donation of the kidney.

21. In order to further examine the issue, this court had also interviewed petitioner no.2 in chambers (without the presence of any of the petitioner's counsel) with the assistance of Ms Kajri Gupta, Advocate who was requested to assist this Court. Petitioner no.2 had empathically reiterated that she had a longstanding relationship that went back over three decades and was fond of petitioner no.1 and his family. This Court spent considerable time to explain to her that there were significant risks involved in donating an organ and undergoing an invasive surgery.

22. There is no manner of doubt that the petitioner no.2 is fully aware of the risks of surgery and has fully understood that it is possible that she would never enjoy the same health again. But, she is firm that she wants to donate her kidney out of the longstanding relations with petitioner no.1's family. The petitioner was also asked whether there were any monetary transactions and she had emphatically denied the same.

23. It is also relevant to mention that the Appellate Authority by its order dated 26.07.2017 remanded the matter to the Authorization Committee in view of the observations made therein. It appears that the Authorization Committee did not address the observations made by the Appellate Authority but simply reiterated its earlier decision.

24. In the second round, the Appellate Authority also did not consider any of the relevant aspects as were highlighted by it in its earlier order. The

Appellate Authority merely rejected the appeal preferred by the petitioners on the ground that the Authorization Committee had made some observations that she would accept whatever would be given by petitioner no.1's family. In view of petitioner no.2's emphatic denial that there was no monetary transaction involved, the Appellate Authority ought to have considered the relevant facts as noticed in its order dated 26.07.2017.

25. The petition is, accordingly, allowed. The impugned order passed by the Appellate Authority is set aside. The Authorization Committee is directed to reconsider the application of the petitioners for grant of approval for kidney transplantation keeping in view the totality of the circumstances as indicated above. In the event the Authorization Committee fails to pass the order within a period of four weeks from today, it would be deemed that a formal approval has been granted.

26. Order *dasti* under signatures of the Court Master.

VIBHU BAKHRU, J

NOVEMBER 28, 2017
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