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

*Judgment reserved on: 23.03.2018*
*Judgment pronounced on: 06.04.2018*

\+ W.P.(C) No.1405/2018

SMT. HUMA QAMAR AND ANR. .....Petitioners
Through: Mr. Ajay Sharma with Mr. Sheetanshu Shekhar, Mr. Ananya Misra with Mr. Gautam Polanki, Advocates.

versus

AUTHORIZATION COMMITTEE,
SIR GANGA RAM HOSPITAL
THROUGH: CHAIRMAN AND ANR. ……..Respondents
Through: Mr. Subhash Kumar, Advocate for R-1.
Mr. Anil Panwar, CGSC with Mr. Gaurav Rohilla, Advocates for R-2.
Dr. (Brig.) Satyendra Katoch, Addl. Director (Medical), Sir Ganga Ram Hospital.

**CORAM:**
**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**RAJIV SHAKDHER, J.**

Preface

1. The petitioners seek to assail order dated 25/27.07.2017, passed by respondent no.1 and order dated 22.11.2017, passed by respondent no.2.

1.1 Respondent no.1 is the Authorization Committee constituted pursuant to a notification issued by the Central Government in that behalf in consonance with the provisions of the Transplantation of Human Organs

and Tissues Act, 1994 (hereafter referred to as the "1994 Act"). Respondent no.2 is the Appellate Authority, also constituted under the 1994 Act.

1.2 Petitioner no.1 is the donee, that is, the person who wishes to receive an organ, while petitioner no.2 is the prospective donor.

2. The petitioners, as indicated above, are aggrieved by the fact that the authorities below have failed to apply their minds to relevant factors in coming to the conclusion that organ transplantation cannot be permitted in this case.

Background

3. In this context, it would be important to note the following facts which are necessary for adjudication of the matter.

3.1 Petitioner no.1 is an End Stage Renal Disease (ESRD) patient; which in lay terms means that both her kidneys have stopped functioning. Petitioner no.1 is currently on dialysis, which is taken by her twice a week.

3.2 It is averred that in past one year petitioner no.1 was being treated in a hospital, located in Bareilly; the name and particulars of this hospital are not alluded to in the writ petition. The record, though, shows that petitioner no.1 indicated to the doctors at Sir Ganga Ram Hospital, Delhi (SGRH) that she was put on dialysis at Sai Hospital situate in Bareilly.

3.3 Prior to this, petitioner no.1 was being treated at SGRH. Petitioner no.1 was evidently discharged on 24.5.2015, and thereafter, her follow up treatment was being carried out in SGRH OPD, till December, 2016.

3.4 It appears that in and about September 2016 a decision was taken by and on behalf of petitioner no.1 to seek permission for transplantation of a

kidney, which petitioner no.2 had offered to donate. Necessary statutory forms i.e., Form No.3, 18 and 20 were filed. The forms are dated 14.09.2016.

3.5 In this behalf, an application was also made to the Senior Superintendent of Police, Bareilly for issuance of a character certificate qua petitioner no.2. The concerned Senior Superintendent of Police, Bareilly, issued a certificate on 06.11.2016 which is indicative of the fact that in so far as petitioner no.2 was concerned, no case was pending or registered against her in any court of law.

3.6 Likewise, an application, it appears, was also made to the District Magistrate, Janpad, Bareilly. The record shows that the District Magistrate had submitted a report dated 8.11.2016 to the Medical Superintendent, SGRH, to the effect that an inquiry had been made as to whether any pressure had been brought on petitioner no.2 to donate her kidney to petitioner no.1. The report concludes that the enquiry revealed that petitioner no.2, of her own volition, had offered to donate her kidney as she had known petitioner no.1 for the past 10 to 12 years. A copy of the enquiry report dated 15.02.2016 was, apparently, enclosed by the District Magistrate, Bareilly, for reference, with his report, which was submitted to SRGH.

3.7 On 08.02.2017, petitioner no.1 received a recommendatory letter from the treating doctor as well.

3.8 Furthermore, besides the aforesaid statutory forms, to which I have made reference, on 25.11.2016, the husband of petitioner no.1 made a formal application to the Medical Superintendent, SGRH for granting approval for transplantation of kidney. The application adverted to the fact

that none of his near relatives were in a position to donate a kidney either on account of lack of compatibility or due to debilitative health parameters. It was further stated that, one, Ms. Bhagwan Devi i.e., petitioner no.2 had agreed to donate her kidney to petitioner no.1. A reference was made to the blood parameters of petitioner no.2 and also to the fact that she had known petitioner no.1 for the past 10 to 12 years and that their relationship was akin to that of siblings. In the application, a reference was also made to the District Magistrate's Enquiry, to which I have already adverted to above.

3.9 The matter was accordingly placed before the Authorization Committee. The Authorization Committee, however, after considering the matter vide order dated 25.07.2017, rejected the application for organ transplantation on the following short grounds: -

> *"1. Factual disparity in statements of all (donor, recipient, son of donor, husband of recipient) in respect of stated close association over a period of time.*
> *2. There is divergence/ variation in the timelines/ events as stated by the various interviewees.*
> *3. Exhibit 'A' and 'B' (photographs) at the time of interview appear to be Photoshoped.*
> *4. Long association and love and affection could not be established.*
> *5. Hence, Not Approved."*

3.10 Being aggrieved, an appeal was preferred. The Appellate Authority sustained the order of the Authorization Committee. While rejecting the appeal, the Appellate Authority relied upon the recommendations of its Appellate Committee; which read as under: -

> *"i. There is no relation between donor and recipient and they also belong to different communities. The donor has been claimed to be friend of the recipient before her marriage,*

*however no documentary proofs or photographs are available. It is also noted that recipient is about 13 year older to donor who is unlikely to be in a friendly relationship.*

*ii. The donor is a widow and works as maid in different households. Her husband expired 2 years back and she has a son and a daughter. The husband used to do loading and unloading work of building material. Her son is also doing odd labour jobs.*

*iii. The husband of recipient is a head constable in UP Police and has secured job and good salary.*

*iv. Disparities were observed in statements of donor and husband of recipient. For example the husband of recipient stated that he is now not posted in Bareilly but posted in Bulandshahar, while donor told that he is posted in Bareilly.*

*v. No near relative of donor was present during the interview by Appellate committee.*

*vi. Donor and husband are not able to explain the claimed relationship and also no fresh evidence was presented.*

*vii. The originals of exhibit Aand B (photographs) were not available as mentioned in the order of Authorization committee. So no comments can be made on these.*

*The committee is in agreement with the grounds of rejection as at number 1 and 2, mentioned by Authorization committee of Sir Ganga Ram Hospital.*

*Appellate Committee thus recommended that "proposed donation by Sh. Mrs. Bhagwan Devi to Mrs. Huma Qamar is not borne out of the reasons of love and affection. Accordingly the appeal is declined." "*

4. It is in this background that petitioners approached this Court via the captioned writ petition.

5. Notice in this petition was issued on 16.02.2018, when, a direction was issued to have petitioner no.2, that is, the prospective donor remain present in Court. Notice was made returnable on 20.02.2018.

Furthermore, Ms. Anil Panwar, learned CGSC was directed to place on record by way of affidavit as to whether Government of India had formulated a policy for regulation of a patient's request for organ donation.

6. On 20.02.2018, Mr. Anil Panwar drew my attention to Rule 31(4)(d) of the Transplantation of Human Organs and Tissue Rules, 2014 (2014 Rules). Based on this Rule, it was sought to be contended that if a patient was to register his/ her request for organ transplantation it would be processed.

7. Not being satisfied, I directed Mr. Panwar to file an affidavit of the concerned authority to demonstrate as to how the rule(s), in fact, operate on ground. It was indicated in the order that the affidavit would not only state as to how petitioner no.1 would get her request for organ transplantation registered but also as to what would be her tentative priority if her request were to be registered.

8. The matter was, thereafter, posted on 23.02.2018.

8.1 On 23.02.2018, Professor Vimal Bhandari, Director, National Organ & Tissue Transplant Organisation (NOTTO), made himself available in Court. On that date, Prof. Bhandari was requested to interface with the Authorization Committee as to how organ transplantation could be facilitated in petitioner no.1's case.

8.2 This, though, was a parallel exercise, being carried out, de hors the merits of the case to ascertain whether petitioner no.1 could be assisted in any manner to obtain an organ from a cadaver under the existing guidelines for organ transplantation.

8.3 Furthermore, the Authorization Committee was directed to file an affidavit as to the state of health of petitioner no.1. Both, Chairperson of

the Authorization Committee and Prof. Bhandari were asked to remain present in Court on the next date of hearing as well. The matter was posted for further proceedings on 27.02.2018.

8.4 On 27.02.2018, inputs were obtained from Dr. Satyendra Katoch, Chairman of the Authorization Committee attached to SGRH, and Prof. Bhandari. The deliberation had with them revealed that the petitioner no.1 could be sustained on dialysis for at least for ten (10) years.

8.5 Since, both experts were of the view that petitioner no.1's current health status should be evaluated, with consent of the husband of petitioner no.1, a direction was issued in that behalf. Accordingly, petitioner no.1 was requested to make herself available at SGRH on 05.03.2018. The matter was fixed for further proceedings on 08.03.2018.

8.6 On 08.03.2018, an affidavit was filed by Dr. Satyendra Katoch which was suggestive of the fact that a re-evaluation had to be done to rule out the possibility of petitioner no.1's body rejecting the kidney that she proposed to receive from petitioner no.2, given the fact that petitioner no. 1 had a history of having tested positive for Hepatitis-C virus and that no post-treatment evaluation had been carried out thereafter. Since, the test result could be obtained only after a gap of 10 days, the matter was posted for hearing on 22.03.2018.

8.7 On 22.03.2018, it was discovered that the affidavit filed by Dr. Satyendra Katoch was incomplete in certain respects, whereupon, the matter was taken up the following day i.e., 23.03.2018.

8.8 The affidavit dated 23.03.2018 of Dr. Satyendra Katoch revealed that there was a "medium risk" in petitioner no.1's body rejecting the kidney offered by petitioner no.2 for transplantation.

8.9 The affidavit was also suggestive of the fact that a further confirmatory test had to be carried out which, however, could not be carried out due to paucity of time.

9. Given the fact that the matter required urgent attention, arguments were heard and judgment was reserved as the Court was closing for a short vacation.

**Submission of Counsels**

10. It is important to note that arguments in the matter were advanced on several dates. The main thrust of the arguments advanced on behalf of the petitioners was that the authorities below had taken into account irrelevant factors and, at the same time, had excluded relevant factors in coming to the conclusion that the approval for transplantation could not be granted.

10.1 Mr. Sharma, who argued in support of the petitioners' case, particularly, made the following submissions: -

(i) That both, the Authorization Committee and Appellate Authority had without any basis come to the conclusion that the offer of petitioner no.2 to donate her kidney to petitioner no.1 was not propelled by love and affection. It was submitted that there was no material on record which would suggest that either money had changed hands or threat or even coercion had been employed in having petitioner no.2 give consent for donation of her kidney.

(ii) The Authorization Committee and the Appellate Authority had to appreciate that the relationship between petitioner no.1 and petitioner no.2 was akin to that of siblings and that they had known each other for over a decade. The emphasis placed by the Appellate Authority on the fact that they belonged to different communities

was an example of having taken into account an irrelevant factor in reaching what was, even otherwise, a flawed conclusion.

(iii) The difference in age noted by the Appellate Authority was not based on cogent evidence. This conclusion had been reached by the Appellate Authority based on date of birth given in petitioner no.2's aadhar card. Had the Appellate Authority looked at the voter ID card, it would have reached a correct conclusion, which is, that age gap between petitioner no.1 and 2 was only 4 years.

(iv) The rejection of the application for grant of approval for organ transplantation on account of absence of petitioner no.2's son was erroneous, as the record included the son's affidavit wherein he had given his consent to petitioner no.2 for donating her kidney to petitioner no.1.

(v) The members of the Authorization Committee were biased and, therefore, the decision taken by them should be set at naught.

10.2 In support of his submissions, Mr. Sharma relied upon the following judgments *Rajinder Kumar v. State of Punjab* & Ors, AIR 2005 P&H 172 and *Jaswinder Singh vs. State of Punjab,* (2008) 5 AIR Kant R (NOC 770) 280.

11. Mr. Subhash Kumar and Mr. Panwar, who appeared on behalf of respondent no.1 and 2 respectively, relied upon the record in support of their submissions.

**Reasons**

12. Given the foregoing, two issues arise for consideration:

(i) First, did the authorities below wrongly conclude that the offer for organ donation made by petitioner no.2 was not motivated by affection or attachment to the recipient/petitioner no.1?

(ii) Second, did the authorities below have the current status of petitioner no.1 on record before coming to the conclusion either way as to whether approval ought to be given for organ donation in this case?

ISSUE (i)

13. This issue needs to be examined in the context of findings returned by authorities below. The Authorization Committee rejected the application on the ground that there was discrepancy in statements of the donor, the recipient, the son of the donor and the husband of the donor; and that there was divergence and variation in timelines *vis-a-viz* portrayed events which, presumably, were etched out to establish bonding and closeness between the petitioners.

14. The Appellate Committee sustained the view of the Authorization Committee by, *inter alia*, noting that friendship between the donor and donee could not be established; there was disparity in economic and social status between the families of the donor and donee; and the fact that no near relative of petitioner no.2 was present at the time of hearing.

15. The question is: Do the authorities below have any other tool to sift grain from the chaff, so to speak, in such like cases?

15.1 To my mind, there is none, except the surrounding circumstances and real life experiences. Therefore, the argument advanced on behalf of the petitioners that there was nothing on record to suggest that consideration of any kind had changed hands or that threat or coercion had

been employed to have petitioner no.2 give her consent, in my opinion, misses the point and purpose of scrutiny by the Authorization Committee under Section 9(3) of the 1994 Act.

15.2 The onus to establish that an offer to donate an organ was made on account of affection and attachment to the donee is on the applicant. The fact that there was lack of material, is quite obvious on a bare reading of the Authorization Committee's order. In fact, the order of the Authorisation Committee went to the extent of saying that Exhibit A & B appear to be photoshopped.

15.3 These photographs, though, were not produced before the Appellate Committee.

15.4 The fact that there was a 13 year gap in age between the donor and donee was also sought to be looked at by the Appellate Committee as one of the indices, in coming to the conclusion that approval for transplantation could not be granted. The petitioners sought to refute this finding by suggesting that the age difference was worked out on the basis of the aadhar card whereas in the voter ID card, petitioner no.1 was shown as being born in 1975 and, therefore, the difference in age would be 4 years and not 13 years as noted in the order of the Appellate Authority.

15.5 In my view, neither the aadhar card nor the voter ID card is a substantive piece of evidence which can be relied upon to establish the age of a person. A more robust evidence would be a certificate issued by the Birth and Death Registration authority or a School Certificate; in cases where the person concerned has passed through a schooling system.

15.6 That being said, no fault can be found with the observation of the Appellate Authority as the evidence by way of aadhar cards was produced,

it appears, by the petitioners themselves. Furthermore, a perusal of the copy of Form-18 would show that petitioner no.1's age is given as 45 years, whereas the age of petitioner no.2 is given as 32 years. This position obtains in Form 20 as well. The application made by petitioner no.2 with the Senior Superintendent of Police for issuance of a character certificate also shows her date of birth as 1.1.1984. This application is dated 06.11.2016. Therefore, clearly, petitioner no.2 was aged approximately 32 years at that point. The affidavit appended to the writ petition, which shows petitioner no.2's age as 43 years, is clearly, incorrect as in her statement made before me on 20.2.2018, she said she was aged approximately 35 years. This statement appears to be consistent with what was stated in the statutory Forms referred to above.

15.7 Therefore, no error could be found in what the Appellate Committee has recorded insofar as the factum of age gap between petitioner no.1 and petitioner no.2 is concerned if the record as placed before it is to be relied upon.

16. The other argument advanced on behalf of the petitioners that the Members of Authorization Committee were biased is, to my mind, completely baseless. For one, the Authorization Committee is attached to SGRH. If nothing else, had the Authorization Committee approved the organ transplantation request, SGRH would have gained monetarily. To their credit, the Members of the Authorization Committee came to an independent view. The Members of the Authorization Committee would have had no occasion to interact with the petitioners and/or their family members except in the course of the hearing conducted in connection with the application for approval of organ transplantation placed before them. There being no assertions to the contrary in the writ petition, the allegation

that bias crept in the conduct of the proceedings or in passing of the order is completely groundless.

17. To drive home the point that the Appellate Authority had taken into account irrelevant factors, reference was made to the observation made in its order to the fact that the petitioners belonged to different communities.

17.1 At first blush, this submission would appear to be correct. Persons with an altruistic bent of mind exist in every community. Because persons have unselfish concern for others it transcends faith, caste, language and ethnic divide.

17.2 A good example is the armed services. But then, there is bonding amongst armed services personnel, which is pivoted on common goals and aspirations, and commonality of thought and principles.

17.3 These are attributes which the Appellate Authority could not, perhaps, find in the relationship ostensibly obtaining between petitioner no.1 and 2. A closer look at the order of the Appellate Authority would show that a collation of various facts and circumstances made it reach the conclusion that the offer of petitioner no.2 to donate her kidney was not propelled by affection and/or attachment.

18. That being said, this is a not case where there can be room for doubt. Declining the request for transplantation of organ could mean denying a lifeline to a patient.

18.1 Having said so, the interest of the donor would also have to be borne in mind, especially, where the donor comes from an economically weaker section of the society. Being deprived of opportunities, money does play an important role in their lives. This fits in with Maslow's hierarchy of needs theory, which is often portrayed as a pyramid. At the base of this

pyramid are the need for physiological well being and economic security, while self-actualization is at the top.

18.2 Such donors succumb to promise of monetary gains at the cost of their health. The Court, in such cases, needs to step-in and act as *parens patraie*.

18.3 Before I close my discussion on issue no.(i), I must advert to two judgments cited by Mr. Sharma. As allowed above, these are judgments delivered in *Rajinder Kumar's* case and *Jaswinder's* case. The latter case merely follows the *ratio decidendi* propounded in *Rajinder Kumar's* case. A close examination of the facts obtaining in the two cases would show, that the Court overturned the orders of the Authorisation Committee and the Appellate Authority, on the ground that they had declined the request for organ transplantation on a mere suspicion that money had changed hands.

18.4 In my opinion, the ratio of these judgments is not what has been professed by Mr. Sharma, that is, wherever there is a report submitted by the concerned Senior Superintendent of Police or the District Magistrate, that he has found no material as to the fact that money has changed hands, it should automatically be concluded that the proposal to donate the organ emanates from affection and/ or attachment of the prospective donor with the donee.

18.5 While the report of the Senior Superintendent of Police may be one of the facets which would have to be taken into account by the Authorisation Committee and/or the Appellate Authority in reaching a conclusion one way or the other, it cannot be said that other surrounding circumstances are not to be looked at at all. If that were the ratio, I would

have to respectfully differ from the view taken in the aforementioned judgments, which, in my opinion is not the ratio of the judgments.

18.6 The reason for this is also that if the Authorization Committee and the Appellate Authority were to simply rely on the report of the Senior Superintendent of Police or the report of the District Magistrate, they would be failing in their duty to discharge the obligation placed upon them by the statute. Such an interpretation would be, in my opinion, in the teeth of provisions of Section 3 read with Section 9(3) of the 1994 Act.

ISSUE (ii)

19. This brings me to the second issue. Before I touch upon this issue, I need to refer to two important provisions in the 2014 Rules. Rule 22 provides that where the donor is a woman, greater precaution is required to be taken. Her identity and independent consent is required to be confirmed by a person other than the recipient. Likewise, Rule 23(ii), which, though not gender specific, places an obligation on the Authorization Committee to make a physical and mental evaluation of the donor before taking a decision either way.

19.1 While there are, on record, documents showing that physical evaluation of the petitioner no.2 was carried out, there is nothing to show that her mental evaluation was done out by a trained Psychologist. What is on record is the recommendatory letter of the treating doctor which almost perfunctorily says that "possible complications of major surgery of kidney transplantation and donor nephrectomy have been explained to both the recipient and donor and the same have been well understood by them". There is no documentation on record, firstly, to demonstrate as to what was explained to the patient/ petitioner no.1 and the donor/ petitioner no.2.

Secondly, whether, in particular, the physiological changes and the complications that could arise, pursuant to proposed surgery, were explained in a lay persons language to petitioner no. 2. The conversations, if any, in this behalf had to be suitably documented; as is the need to record the physical and mental health of the donor.

19.2 The treating doctor's recommendation letter, as noticed above, is dated 08.02.2017. Since then, nearly a year has passed, and therefore, should a fresh evaluation not have been done. Evaluation done on the direction of the Court revealed that the petitioner no.1 case falls in "medium risk" category. In other words the chances of the petitioner no.1's body rejecting the kidney donated by petitioner no.2, carried with it a "medium risk". This conclusion is, evidently reached, based on the Panel Reactive Antibodies of petitioner no.1 having been quantified at 29%. SGRH has in fact recommended another test to be carried out on petitioner no. 1. This test is referred to as, "Single Bead Luminex Assay". This test is required to be carried out to ascertain quantitative specific reactivity to the donor kidney.

20. What has emerged, therefore, is that there are several loose ends which needed to be tied up by the Appellate Authority to come to a definitive conclusion either way. For instance:

(i) Whether the age gap was actually 13 years? Opportunity to produce relevant material should have been given. And if opportunity was not asked for, it should be given to my mind, even at this stage.

(ii) Whether the photographs produced were photoshopped?

(iii) Whether the petitioner no.2's son was willing to stand by his affidavit?

(iv) Whether petitioner no.2's consent was truly an informed consent?

(iv)(a)In this behalf, what is required to be seen is whether her mental evaluation had been carried and documented.'

20.1 Besides this, the Appellate Authority should carry out a cost and benefit analysis of the intended surgery. That is, physiological and psychological damage to petitioner no.2 in donating her kidney and the benefit to petitioner no.1's given her health parameters. The fact that petitioner no.1's case falls in the medium risk category, the Appellate Authority would do well to assess as to whether any purpose would be served in approving the transplant. In other words, the probability of rejection of the organ by petitioner no.1's body would have to be balanced against long and medium term physiological changes that would be brought about post-surgery in petitioner no.2's body. The fact that petitioner no. 1 as of now is listed at 68$^{th}$ position on a priority list maintained by SGRH for Cadaveric Kidney donation, which is dynamic and is amenable to fast tracking depending on the health parameters of petitioner no. 1 and is presently maintained on dialysis requires deliberation by the Appellate Authority.

21. In sum, the Appellate Authority would have to look into in the foregoing aspects and then arrive at a considered decision in the matter, bearing in mind that it is not only looking at the interest of the donee/ patient but also at the well being of the donor.

22. Resultantly, the order of the Appellate Authority is set aside. The appeal is remanded to the Appellate Authority for a re-examination in the light of what is stated above. The Appellate Authority would hear the matter en banc i.e. while sitting together as a body. Thereafter, the Appellate Authority would pass a speaking order and not simply rely on recommendation of the Appellate Committee. The evidence/ material placed before the Authorisation Committee will also be analysed and discussed by the Appellate Authority while passing its order.

23. The writ petition is disposed of in the aforesaid terms. No costs.

**RAJIV SHAKDHER**
**(JUDGE)**

**April 06, 2018**
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