

**IN THE HIGH COURT OF PUNJAB AND HARYANAAT
CHANDIGARH**

Criminal Writ Petition No. 1845 of 2019(O&M)

Date of Decision: June 15 , 2020.

Karamjit Kaur

..... PETITIONER (s)

Versus

State of Punjab and others

..... RESPONDENT (s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. APS Mann, Advocate, Amicus Curiae.

Mr. PPS Tung, Advocate
for the petitioner.

Mr. Ramdeep Pratap Singh, DAG, Punjab.

Mr. R.S.Randhawa, Advocate
for respondent No.2.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

LISA GILL, J.

This matter is being taken up for hearing through video conferencing due to outbreak of the pandemic, COVID-19.

CRM-W No.347 of 2020

Prayer in this application is for early of the main writ petition, which is listed for 17.07.2020.

Learned counsel for the petitioner submits that the application is rendered infructuous as mentioning of the case was made on 29.05.2020 and the same was allowed for 02.06.2020. Accordingly, the main case was listed on 02.06.2020.

Application is accordingly disposed of as infructuous.

CRWP No.1845 of 2019

Prayer in this petition is for a direction to respondent No.2 to allow the petitioner to donate her kidney to Lovepreet Singh, her legally wedded husband.

Brief facts as mentioned in the petition are that, the petitioner is major, her date of birth being 05.02.1998. The petitioner and Lovepreet Singh, being fond of each other, solemnized marriage on 29.04.2019 without the consent of their parents. Date of birth of Lovepreet Singh is 01.10.1996. Thereafter, CRM-M No.20242 of 2019 was filed by them before this High Court seeking protection of their life and liberty. The said petition was disposed on 03.05.2019 with a direction to the Senior Superintendent of Police, Barnala to take appropriate action in accordance with law. Copy of order dated 03.05.2019 is attached as Annexure P1. After solemnization of their marriage, the petitioner and Lovepreet Singh started residing at village Dhanaula alongwith the parents of Lovepreet Singh. Their marriage was registered on 26.07.2019. Copy of the marriage certificate is attached as Annexure P2 with the petition. It is averred that Lovepreet Singh had a kidney problem and his medical treatment was underway for the last one year. He had been advised a renal transplant by the doctors on

01.11.2018. The petitioner being the legally wedded wife of Lovepreet Singh expressed her desire to donate one of her kidney. The petitioner, it is submitted, fulfilled all the conditions for donation of the kidney transplantation as per The Transplantation of Human Organs and Tissues Act, 1994 (hereinafter referred to as the 'Act of 1994'). Copy of Form 4 dated 09.09.2019 issued by respondent No.2 is attached as Annexure P5.

It is further averred that all the necessary formalities were completed by the petitioner. She has given authorization for removal of her kidney after the entire position was duly explained to her. As per Form 4 dated 09.09.2019, Annexure P5, it is certified that the petitioner's kidney can be donated. Transplantation of the kidney, it is submitted, is not being carried out by respondent No.2 in an arbitrary manner. It is averred that it is out of pure love and affection for her husband that the petitioner is donating her kidney. There is no element of greed or any illegality involved in this case. Parents of the petitioner i.e., respondents No.3 and 4, it is submitted, are not coming forward to give their consent for donation of the kidney as they are against the petitioner's marriage itself. It is, however, submitted that their consent is not required, as the present is a case of the petitioner, who is major, seeking donation of her kidney to her legally wedded husband. Learned counsel for the petitioner has argued that merely because marriage of the petitioner was solemnized with Lovepreet Singh on 29.04.2019 i.e., subsequent to rejection of the case of donation of kidney by Lovepreet Singh's mother, does not in any manner indicate that there is an extraneous consideration in respect to donation of kidney to Lovepreet Singh by the present petitioner. The petitioner being the legally wedded wife of Lovpreet

Singh seeks to donate her kidney to save Lovpreet Singh's life. To read any ulterior motive in the absence of any material on record, it is submitted, is highly irrational and arbitrary.

It is pertinent to note that the petitioner's husband, Lovepreet Singh, in fact, had a kidney problem earlier and he was recommended a kidney transplant on 01.11.2018. His mother, Davinder Kaur had agreed to donate her kidney on 12.12.2018. Treatment of the petitioner was carrying on at Ivy Hospital, respondent No.2. The CDC cross-match between Lovepreet Singh and his mother was found to be negative at the first instance on 26.12.2018 and transplantation of kidney was found to be possible. The CDC cross-match is a mandatory condition for renal transplantation and a negative result indicates that it would be safe to proceed with the transplant. Thereafter, the hospital based committee issued a No Objection Certificate on 11.01.2019. However, when the subsequent CDC cross-matches of Lovepreet Singh and Davinder Kaur, his mother were done on 05.02.2019 and 08.02.2019 before the renal transplantation, the result was found to be otherwise indicating that a kidney could not be donated by Lovepreet Singh's mother, Davinder Kaur.

As per the short reply by way of affidavit of Sawinder Singh, Convener of Hospital Based Committee, Ivy Hospital, SAS Nagar, Mohali filed on behalf of respondent No.2, the recipient was asked to find another donor. Thereafter, Lovepreet Singh submitted another application on 09.09.2019 for transplantation by submitting Form 11 alongwith the donor Karamjit Kaur, the present petitioner, claiming to be his wife. The CDC cross-match of Lovepreet Singh and the petitioner was found to be negative on 30.06.2019, indicating that

she is competent to donate her kidney to her husband, Lovepreet Singh.

However, the Authorisation Committee on a scrutiny of the matter could not reach any definite conclusion as is indicated in the minutes of the meeting dated 26.11.2019 attached as Annexure R2/1. It is observed in the minutes that marriage of the petitioner with Lovepreet Singh was solemnized when Lovepreet Singh was admittedly suffering from a kidney problem and he was on regular treatment. Furthermore, the petitioner was found to be donating her kidney without the consent of her parents and brother. In the short reply filed on behalf of respondent No.2, it is stated that a suspicion arose in the mind of Authorization Committee because Karamjit Kaur who is only 21 years old, performed marriage with Lovepreet Singh on 29.04.2019, after Lovepreet Singh's mother was found incompetent to donate her kidney and that the marriage was performed without the approval of Karamjit Kaur's parents. Moreover, greater care has to be taken under the Transplantation of Human Organs and Tissues Rules, 2014 (hereinafter referred to as the '2014 Rules') when the donor is a woman.

Mr. Randhawa, learned counsel for respondent No.2 submits that the Authorization Committee could not reach a conclusive decision and it required more material before recommending the donation of kidney by the petitioner. It is in this situation that consent of the petitioner's parents and brother was asked for. Learned counsel for respondent No.2 further points out that a communication dated 23.08.2019 was addressed by the hospital authorities to the Senior Superintendent of Police, Barnala for verification of the donor relationship. A reply thereto, was received on 28.08.2019 verifying the

relationship between the parties, but no information was forthcoming regarding independent consent of the petitioner. Therefore, the matter could not be finally decided and in the meantime, the present writ petition was filed.

It is to be noted that a coordinate Bench of this Court on 17.12.2019 directed the Senior Superintendent of Police, Barnala to look into the matter and submit his report. Order dated 17.12.2019 reads as under:-

“This petition has been filed for issuance of appropriate directions to respondent Nos. 1 and 2 to allow the petitioner to donate her kidney to Lovepreet Singh, who is her legally wedded husband.

Separate replies have been filed by the State and respondent No.2 (treating hospital).

Learned counsel for respondent No.2 submits that a procedure is required to be followed as prescribed under the Transplantation of Human Organs and Tissues Act, 1994 and Rules framed thereunder. Lovepreet Singh was advised a renal transplant on 01.11.2018. Thereafter he submitted an application for carrying out the transplant surgery with his mother namely Davinder Kaur as the donor. A crossmatch between the donor and donee was done on 26.12.2018, which was found negative and thus, the transplant was possible. The Authorization Committee of the Hospital granted approval on 11.01.2019 but before the surgery, crossmatch was done once again. At this juncture, the same was found positive and the transplant could not be done. Thereafter, an application dated 09.09.2019 was received for transplant surgery with the petitioner as the donor. It has come to light that the marriage of the petitioner and Lovepreet Singh was solemnized on 29.04.2019 and thus, there is an apprehension in the mind of the Authorization Committee that the marriage may be contrived and some monetary consideration is the motivating factor. Thus, the Authorization Committee is not willing

to recommend the donation from the petitioner until a member of her family comes forward to give his/her consent or some other evidence is brought on record regarding free consent of the petitioner.

Learned State counsel is directed to get the matter investigated from the concerned Senior Superintendent of Police. The investigation will be conducted by the concerned Senior Superintendent of Police personally regarding the issue of free consent of the petitioner. A report be submitted on or before the next date of hearing.

Adjourned to 10.01.2020.”

Report by way of affidavit dated 09.01.2020 of Harjeet Singh IPS, Senior Superintendent of Police, Barnala has been filed. It is specifically stated therein that no material has come forth to indicate any element of greed being involved in this case. The petitioner and Lovepreet Singh are stated to be living together at village in Jawanda Pindi, Dhanaula. Joint statements of respectable persons of the village, it is mentioned, were also recorded. It specifically stated in para 3 of the report as under:-

“3. In view of the facts stated above, as per the facts emerged during enquiry conducted by the answering deponent, nothing with regard to greed or any kind of pressure in transplantation of kidney has come forward, because Karamjit Kaur intend to transplant her kidney to save the life of her husband Lovepreet Singh. Accordingly, instant affidavits being filed, in compliance of order dated 12.12.2019 passed by this Hon'ble Court”

Mr. Anmol Pratap Singh Mann, Advocate, who was appointed Amicus Curiae in this case on 20.01.2020, has referred to the relevant statutory provisions and various judgments on this issue. He has rendered valuable

assistance which is appreciated.

I have heard learned counsel for the parties as well as learned Amicus Curiae at length through video conferencing.

It is relevant to note that the Act of 1994 was promulgated for regulation of removal, storage and transplantation of human organs and tissues for therapeutic purposes and for the prevention of commercial dealings in human organs and tissues and for matters connected therewith or incidental thereto. This legislation was promulgated to ensure that trafficking in human organs does not take place specifically due to the poverty, illiteracy and ignorance prevalent in our society and at the same time, to ensure the saving of lives by donations of human organs/tissues. In the year 2014 various changes were incorporated in the statutory provisions with counselling being made mandatory and penalties becoming more stringent. The authorization committees included hospitals conducting more than twenty five (25) transplants annually among the other changes incorporated.

At the outset, it would be useful to refer to some of the statutory provisions. 'Donor' is defined in Section 2(f) of the Act of 1994 as any person, not less than eighteen years of age, who voluntarily authorises the removal of any of his human organs for therapeutic purposes under sub-section (1) or sub-section (2) of section 3.

'Near relation' is defined in Section 2(i) as spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter.

'Authorization Committee' is defined in Section 2(c) of the Act as the committee constituted under clause (a) or clause (b) of sub-section (4) of Section 9.

'Competent Authority' as per Rule 2(c) of the Rules of 2014 is defined as the Head of the institution or hospital carrying out transplantation or committee constituted by the head of the institution or hospital for the purpose. Section 3 of the Act of 1994 deals with the authority of a donor for removal of his organs/tissues before his death for therapeutic purposes. Section 9 of the Act deals with restriction on removal and transplantation of human organs or tissues or both. The relevant part 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.

(1B) No human organs or tissues or both shall be 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 challenge person before his death for the purpose of transplantation.

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(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.”

Thus as per Section 9 above, prior approval of the authorization committee is not required in case of donation by a near relative when both the donor and recipient are not foreign nationals.

As per rule 10 of the 2014 Rules a joint application has to be moved by the donor and the recipient before the competent authority as specified in Form 11. Rule 10 reads as under:-

“10. Application for living donor transplantation.— (1) The donor and the recipient shall make jointly an application to grant of approval for removal and transplantation of a human organ, to the competent authority or Authorisation Committee as specified in Form 11 and the papers for approval of transplantation would be processed by the registered medical practitioner and administrative division of the Institution for transplantation.

(2) The competent authority or Authorisation Committee shall take a decision on such application in accordance with rule 18.”

Rule 18 of the Rules of 2014 provides for the procedure in case of the donor being a near relative. Rule 18 is reproduced as hereunder:-

“18. Procedure in case of near relatives.— (1) Where the proposed transplant of organs is between near relatives related genetically, namely, grandmother, grandfather, mother, father, brother, sister, son, daughter, grandson and granddaughter, above the age of eighteen years, the

competent authority as defined at rule 2(c) or Authorisation Committee (in case donor or recipient is a foreigner) shall evaluate;

- (i) documentary evidence of relationship e.g. relevant birth certificates, marriage certificate, other relationship certificate from Tehsildar or Sub-divisional magistrate or Metropolitan Magistrate or Sarpanch of the Panchayat, or similar other identity certificates like Electors Photo Identity Card or AADHAAR card; and
- (ii) documentary evidence of identity and residence of the proposed donor, ration card or voters identity card or passport or driving license or PAN card or bank account and family photograph depicting the proposed donor and the proposed recipient along with another near relative, or similar other identity certificates like AADHAAR Card (issued by **Unique Identification Authority of India**).

(2) If in the opinion of the competent authority, the relationship is not conclusively established after evaluating the above evidence, it may in its discretion direct further medical test, namely, Deoxyribonucleic Acid (DNA) Profiling.

(3) The test referred to in sub-rule (2) shall be got done from a laboratory accredited with National Accreditation Board for Testing and Calibration Laboratories and certificate shall be given in Form 5.

(4) If the documentary evidences and test referred to in sub-rules (1) and (2), respectively do not establish a genetic relationship between the donor and the recipient, the same procedure be adopted on preferably both or at least one parent, and if parents are not available, the same procedure be adopted on such relatives of donor and recipient as are available and are willing to be tested, failing which, genetic relationship between the donor and the recipient will be deemed to have not been established.

(5) Where the proposed transplant is between a married couple the competent authority or Authorisation Committee (in case donor or recipient is a foreigner) must evaluate the factum and duration of marriage and ensure that documents such as marriage certificate, marriage photograph etc. are kept for records along with the information on the number and age of children and a family

photograph depicting the entire family, birth certificate of children containing the particulars of parents and issue a certificate in Form 6 (for spousal donor). (*Emphasis added*)

(6) Any document with regard to the proof of residence or domicile and particulars of parentage should be relatable to the photo identity of the applicant in order to ensure that the documents pertain to the same person, who is the proposed donor and in the event of any inadequate or doubtful information to this effect, the Competent Authority or Authorisation Committee as the case may be, may in its discretion seek such other information or evidence as may be expedient and desirable in the peculiar facts of the case.

(7) The medical practitioner who will be part of the organ transplantation team for carrying out transplantation operation shall not be a competent authority of the transplant hospital.

(8) The competent authority may seek the assistance of the Authorisation Committee in its decision making, if required. (*Emphasis added*)”

Perusal of rule 18 clearly provides that where the proposed transplant is between a married couple, it is for the competent authority to evaluate the factum and duration of marriage and to ensure that the donation of the organ/tissues is in order. A certificate in Form 6 has to be issued. It is clearly provided in Rule 18(8) that the competent authority may seek the assistance of authorization committee in its decision making, if required. The position which thus emerges from a perusal of the provisions is that as per Rule 10 of 2014 Rules, a joint application has to be moved by the donor and recipient for removal and transplantation of a human organ to the Competent Authority or Authorization Committee as the case may be (Competent Authority in this case) in Form 11. An application has to be submitted by the donor in Form 2. The

matter would have to be considered by the medical practitioner whose duties are found defined in Rule 5 of the 2014 Rules. The medical practitioner on being satisfied regarding the donation, would then issue the certificate of medical fitness of the living donor as per Form 4. In the present case, Form 4 has been issued (Annexure P5) certifying that the petitioner is fit for donation of the kidney. As per Rule 18.8, it is provided that in a given case, the competent authority may seek assistance of the authorization committee in its decision making, if required. Special care and precautions are mandated regarding the identity and independent consent in terms of Rule 22 inasmuch as it is provided that a female donor's identity and independent consent should be confirmed by a person other than the recipient as well. Ultimately, the competent authority would then issue Form 6 i.e., the form provided under the 2014 Rules for 'Spousal Living Donor'. It is thereafter that the process of donation and transplantation of the organ can take place.

The present is a case wherein the petitioner's husband Lovepreet Singh was recommended a kidney transplant on 01.11.2018. Admittedly, marriage of the petitioner was solemnized with Lovepreet Singh on 29.04.2019 after it had been found that Lovepreet Singh's mother was not a competent donor. The hospital authorities have failed to take a conclusive stand on account of a suspicion of a commercial element or an element of greed due to the marriage being solemnized subsequent to Lovepreet Singh's mother, being declared not competent to donate her kidney. Furthermore, consent of the parents was not forthcoming.

However, in the present case, the matter has now been inquired into

by the Senior Superintendent of Police, Barnala and as per his report dated 09.01.2020, no element of greed or any kind of pressure on the petitioner to donate her kidney has come to fore. It has been held by a Division Bench of this court in **Jaswinder Singh v. State of Punjab and others, 2008(3) RCR (Criminal) 93** that rejection of donation of kidney by a person who was not even a relative of the recipient, merely because of an apprehension of a monetary transaction, without any conclusive material on record, is not sustainable. It is specifically observed in the said order that human conduct in this regard cannot be measured in any mathematical terms. A Division Bench of Orissa High Court in **Manoranjan Rout and another v. State of Orissa and others, 2010(4) RCR(Civil) 760** has also held that necessary approval cannot be denied on account of mere suspicion.

Needless to say, the statutory provisions have been promulgated to prevent trafficking and commercial practices. Every care has to be taken to prevent exploitation of any kind. In the present case, the petitioner is verified to be the legally wedded wife of Lovepreet Singh, the recipient. There is no material on record to indicate any malpractice or an element of greed or pressure upon the petitioner, at this stage. Merely because the parents or sibling of the petitioner have not come forward to give consent for transplant of the organ, is not a ground to reject the donation in the peculiar facts and circumstances of the case. The identity and consent of the donor have been verified by a senior officer of the rank of Senior Superintendent of Police, Barnala and there is no reason or basis to view the same with suspicion.

Keeping in view the facts and circumstances of the case, I am of the

considered view that the competent authority of respondent No.2 is required to consider the case of the petitioner and her husband, Lovepreet Singh for donation of her kidney to Lovepreet Singh in the light of the facts which have emerged and have been discussed in the foregoing paras. Form 4 i.e., the certificate of medical fitness of living donor has already been issued on 09.09.2019, Annexure P5. The petitioner and the recipient being spouse, are included in the definition “near relative” as defined under Section 2 of the Act of 1994. Though their marriage was solemnized on 29.04.2019 after recommendation of the transplantation of kidney, there is no material on record to suggest any foul play or extraneous consideration or commercial transaction. The identity and consent of the petitioner, as required under rule 22 of the Rules of 2014, has been verified by Senior Superintendent of Police, Barnala as is evident in his report/affidavit dated 09.01.2020. The inquiry has been conducted by the Senior Superintendent of Police, Barnala personally, while associating the petitioner, the donee as well as residents of village Jawanda Pindi, Dhanaula. In such a situation, insistence upon consent of the parents of the petitioner or her sibling is not called for. It is relevant to note that the matters like the present are of emergent nature and should be dealt with pragmatically and expeditiously in accordance with the provisions of the statute to maintain the delicate balance between saving of lives and prevention of exploitation or commercialization. It is vital for the Competent Authority/Authorization Committee as the case may be, to conclude its decision expeditiously once a matter is presented before it, for donation of an organ or tissue.

Keeping in view the facts and circumstances as above, the

Competent Authority is directed to conclusively decide the application submitted by the petitioner and her husband, Lovepreet Singh for donation of the kidney by the petitioner and its transplantation. Needless to say, the Competent Authority is at liberty to take assistance of the Hospital Authorization Committee as was done on the earlier occasion. As the matter is of emergent nature, the entire exercise shall be completed within ten days as has been submitted by learned counsel for respondent No.2.

Needless to say, the Competent Authority shall take into consideration the observations of this Court in the foregoing paras. It is clarified that in case at a later stage, concrete evidence is forthcoming in respect to any malpractice involved in the present case amounting to an offence under the Act of 1994, the appropriate authority as defined under Section 13 of the Act or any officer authorized in this behalf shall investigate the allegations and initiate necessary proceedings. Any other person may also move an appropriate application with the relevant facts and material. It is relevant to note that in case of emergence of any malpractice, element of greed or monetary benefit, it is imperative to deal with the same swiftly and stringently without exception.

Petition is accordingly disposed of.

June 15 , 2020
'om'

(LISA GILL)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No