

IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH

284

CWP NO.26361 OF 2022
DATE OF DECISION:06.12.2022

Ajay Mittal and Others

.....Petitioners

Vs.

Union of India and Another

.....Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ

Present: Mr. Molly A. Lakhanpal, Advocate
for the petitioners.

Mr. Satya Pal Jain, Ad. SG with
Mr. Sudhir Nar, Sr. Panel Counsel
for the respondents-UI

VINOD S. BHARDWAJ, J. (ORAL)

All advancement in science has so far not been successful to generate human organ. Mankind still relies on humans to donate human organs for saving human lives. Government has been promoting awareness in society to voluntary donate bodies and organs after death so that life goes on for others. This society led to people profiteer and indulge in organ trade which went alarming when organs of gullible people were removed without their knowledge or consent or by taking advantage of huge socio-economic disparity and exploiting people and their circumstances to indulge in trade keeping largest part for themselves and minuscule remittances for the donor. Such scandals and practices necessitated legislation to regulate organ transplantations and to prohibit commercial organ transplantation.

The object of the Transplantation of Human Organs and Tissues Act, 1994 is not to prohibit an organ transplant but to regulate transplant and to rule out a commercial monetary transaction. The Act

intends to mitigate the hardships and to prohibit commercial exploitation of the organ market while recognizing transplant and donation out of love and affection or care and concern. It also permits swapping of organs where different sets of willing donors but mismatching blood profile intend to swap their organs for mutual good and for saving the lives of their near and dear ones, instead of having to pay for costly medical treatments and yet a slow but definite end. The gap, however, arose from the use of word 'near relation' used in the statute, where even though an undisputed relationship does not fall in the definition. The statute recognizes only the blood relatives or the relation by matrimony but not the extended family from the blood relations or the matrimony who may share the same love, affection, concern and care, yet, law regards them as distant and suspects such donors. This gap between socio-reality and legislation is the cause of present case.

The present petition seeks issuance of writ in the nature of mandamus to grant approval to the petitioners to engage in 'Swap Transplantation' and donation of kidneys as per the Transplantation of Human Organs and Tissues Act, 1994 read with the Transplantation of Human Organs and Tissues Rules, 2014.

Briefly summarized, the facts and circumstances of the present case are that petitioner No.1-Ajay Mittal and petitioner No.2 Saiyaduzzama are suffering from various ailments of the kidneys. They approached respondent No.2 i.e. Post Graduate Institute of Medical Education and Research, Chandigarh (hereinafter referred to as PGIMER, Chandigarh) for medical assistance and treatment. They have been advised to undergo the kidney transplantation as their own

kidneys were damaged, beyond repair and were rendered dysfunctional. Petitioner No.3 is Irfana Khatoon, the wife of petitioner No.2 while petitioner No.4 is Aruna Rani, mother-in-law of petitioner No.1. They have voluntarily and out of natural love and affection agreed to donate their kidneys to petitioner Nos.1 and 2. The table showing the blood groups and relationships between the petitioners is extracted as under:-

Petitioner	Status	Blood Group	Relationship
Petitioner No.1	Recipient	B+	Son-in-law/Mother-in-law (Respondent No.4)
Petitioner No.2	Recipient	O+	Husband/Wife (Petitioner No.3)
Petitioner No.3	Donor	B+	Husband/Wife (Petitioner No.2)
Petitioner No.4	Donor	O+	Son-in-law/Mother-in-law (Petitioner No.1)

It is, thus, apparent that the blood group of petitioner No.2 matches the blood group of petitioner No.4 while blood group of petitioner No.1 matches the blood group of petitioner No.3.

Considering the medical condition of the petitioners and their emergent need for a kidney transplantation coupled with an absence of matching blood groups within family of petitioner Nos.1 and 2, the petitioner(s) submitted an application for “Swap Transplantation” under the Transplantation of Human Organs and Tissues Act, 1994 read with Transplantation of Human Organs and Tissues Rules, 2014. The Authorization Committee of respondent No.2 i.e. PGIMER, Chandigarh, however, disapproved the case of the petitioners by citing the following reasons:-

“For Petitioner No.1:

The members of the Committee interviewed the recipient and donor in detail and deliberated.

The recipient is Ajay Mittal. The donor is Mrs. Irfana Khatoon (wife of Saiyaduzzama). Aruna Rani (w/o Pawan Kumar Bansal) who is mother-in-law of Ajay Mittal and prospective donor for Saiyaduzzama. The Committee members were of the unanimous opinion that according to “The Transplantation of Human Organs and Tissues Rules, 2014” Rule 7 (4) which states that “Cases of swap donation referred to under sub section (3A) of Section 9 of the Act shall be approved by Authorization Committee of Hospital or District or state in which transplantation is proposed to be done and donation of organs shall be permissible only from near relatives of the swap recipients” and Rule 18(1) states “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 age of 18 years, the competent authority as defined at Rule 2(C)”, hence the case was disapproved collectively by the Authorization Committee members.

For Petitioner No.2:

The members of the committee interviewed the recipient and donor in the detail and deliberated.

The recipient is Saiyaduzzama. The donor is Mrs. Aruna Rani (wife of Pawan Kumar Bansal). Aruna Rani who is mother-in-law of Ajay Mittal and prospective donor for Saiyaduzzama. The Committee members were of the unanimous opinion that according to “The Transplantation of Human Organs and Tissues Rules, 2014” Rule 7(4) which states that “Case of swap donation referred to under Sub Section (3A) of Section 9 of the Act shall be approved by Authorization committee of Hospital or District or State in which transplantation is proposed to be done and donation of organs shall be permissible only from near relatives of the swap

relative” and Rule 18(1) states “Where the proposed transplant of organs is between near relative related genetically, namely, grandmother, grandfather, mother, father, brother, sister, son, daughter, grandson and granddaughter above age of 18 years, the competent authority as defined at Rule (2)”, hence the case was disapproved collectively by the Authorisation Committee members.”

It is evident that the members of the Committee have placed reliance upon the provisions of the Act as well as Rules and contend that “Swap Transplantation” is permissible only from near relatives and that in case where the transplant of organs between unrelated persons is concerned, the same cannot be allowed.

Aggrieved thereof, the present petition has been filed.

Written statement on behalf of respondent Nos.1 and 2 has been filed wherein they have reiterated the stand incorporated in the decision of the Committee and contended that the same is impermissible by the Authorisation Committee as per the provisions of the Act of 1994 and the Rules of 2014.

Learned counsel appearing on behalf of the petitioners argued that the decision taken by the Authorisation Committee has not taken into consideration the authoritative pronouncement of the Hon'ble Supreme Court in the case of **Kuldeep Singh and Others Vs. State of Tamil Nadu reported as (2005) 11 SCC 122** wherein the Hon'ble Supreme Court noted that the object of the Act is to provide for the regulation of removal, storage and transplantation of human organs for therapeutic purposes and for the prevention of commercial dealings in human organs and for matters connected therewith or

incidental thereto. She further contends that the Authorisation Committee has nowhere suggested or alleged that the swap between the petitioners herein is a commercial transaction. In the absence of any commercial element and the arrangement being purely humane as well as for the betterment of the patients alongwith which such arrangement subserves larger good to both the parties, there was no reason why the Authorization Committee should not have taken a practical approach especially when there is no provision in law against such consideration.

She further places reliance on the judgment in the **Parveen Begum Vs. Appellate Authority 189 (2012) DLT 427** and in the matter of **Ratnakar Peddada and Another Vs. State of Telangana reported as 2018 SCC OnLine Hyd 538**. The relevant extract of the above-said judgment is reproduced hereinafter:-

“49. From the above statutory provisions and the scheme of the Act, it becomes clear that the Act and the Rules do not seek to prohibit, but to only regulate the transplant of organs and tissues from cadavers and living human beings. What is prohibited is the commercial transaction in the giving and taking of organs and tissues. However, donations offered out of love and affection - even amongst those who are not near relatives, is permitted. The aforesaid scheme under the Act recognizes two of the greatest human virtues of love and sacrifice, and also the fact that such intense love and affection need not necessarily be felt only for one’s own blood or spouse, but could also extend to those not so closely related, or for those not related at all.

50. From the scheme of the Act and the Rules it appears that organ/tissue donation by a person before his death can be made not only for the therapeutic purposes of a

recipient who is a near relative, i.e., son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter, but also for therapeutic purposes of persons/recipients who do not fall within the definition of the expression "near relative".

Section 9(1) of the Act, while generally providing that 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, saves from application of this general rule, cases which fall under sub-section (3) of section 9. Therefore, a donor, who is not a near relative of the recipient may by reason of "affection, or attachment towards the recipient or for any other special reasons" authorize the removal of his human organ or tissue or both for transplantation in a recipient for therapeutic reasons. The caveat is that in such circumstances prior approval, before removal and transplantation, would be required of the Authorization Committee.

51. It also needs to be emphasized that an approval of the Authorization Committee is necessary and required to be obtained only in such cases, where the donor and recipient are not near relatives, or in cases where the donor or the recipient, being near relatives, is a foreign national (see Section 9(1A)). The role of the Authorization Committee comes into play primarily in cases where the donor and the recipient are not near relatives, and it is the function of the Authorization Committee to ascertain and evaluate, by applying the guidelines/yardsticks and tests provided in Rule 4A(4) and 6F(d) of the Rules, whether there is a commercial transaction between the recipient and the donor, and to ensure that no payment of money or monies worth has been made to the donor, or promised to be made to the donor or any other person on account of the fact that the

donor has agreed to donate an organ or tissue to the recipient. The Authorization Committee is required to enquire whether the donor is offering his organ/tissue by reason of affection or attachment towards the recipient or for any other special reasons. The law also mandates that the approach of the Authorization Committee in such matters has to be pragmatic and its discretion has to be used judiciously, particularly in cases which require immediate transplantation.”

Further, reliance is placed on the judgment of Kerala High Court in Writ Petition (Civil) No.23509 of 2021 decided on 11.11.2021 titled as **Moideen Kutty and others Vs. The District Level Authorization Committee** for Transplantation of Human Organs, North Zone, wherein the Kerala High Court has held as under:-

- “(1) Sub-section (3A) (a) and (b) of Section 9 fo the Transplantation of Human Organs and Tissues Act, 1994 to the extent it permits Swap Transplants only in cases of near relatives and curtails the powers of Authorization Committees to approve such non-near relative transplants even for special reasons as contemplated in Section 9(3), have to be read down, to be in consonance with Section 9(3).*
- (2) It is therefore held that Swap Transplants will be permissible even if each pair of donor-recipients are not near relatives, provided there exists special reason for the donor to donate his/her organ as contemplated in Section 9(3) and the Authorization Committee gives prior approval for the swap transplants after scrutinizing the applications on the parameters provided in Rule 7(3) of the Transplantation of Human Organs and Tissues Rules, 2014.*

(3) *The provision under the head 'Swap Donation' contained in the Guidelines for Altruistic and Exchange Donation framed by the Government of Kerala, health and Family Welfare Department, as per G.O.(MS) No.26/2018/H&FWD dated 15.02.2018, to the extent it permits Swap Donations only between near relatives, will be inoperative, as it goes against the provisions of Section 9(3) of the Act, 1994 as stated hereinabove."*

While placing reliance on the aforesaid authoritative pronouncements, it is argued that Sub Section (3A)(a) and (3A)(b) of Section 9 permits 'Swap Transplantation' in cases of near relatives and curtails the powers of the Authorization Committee to approve such transplants in only those cases which are against the provisions of Section 9(3A) of the Act, 1994. She contends that a rigid and dogmatic approach in matters related to transplantation of human organs and tissues cannot be adopted or promoted and that the larger public cause and concern is to be taken into consideration.

Refuting the arguments advanced by the counsel for the petitioners, it has been averred by the counsel for the respondents that there is no illegality, perversity or impropriety in the order passed by the Authorization Committee and that the Committee has acted within the strict compliance of the statute.

I have heard the learned counsel appearing for the respective parties and have gone through the documents along with the pleadings as also the provisions relied upon by the respective parties. The relevant provisions are reproduced for the facility of reference:-

“Section 9 :-Restriction on removal and transplantation of Human Organs or Tissues or both.

xxx xxx xxx

(3) If any donor authorizes 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 Authorization 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 compatible biologically as a donor for the second recipient and the second donor is compatible 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 Authorization Committee.]

xxx xxx xxx

- 5) *On an application jointly made, in such form and in such manner as may be prescribed, by the donor and the recipient, the Authorization 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 Authorization 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.*

Rule – 7:- Authorization Committee – (1) *The medical practitioner who will be part of the organ transplantation team for carrying out transplantation operation shall not be a member of the Authorization Committee constituted under*

the provisions of Clauses (a) and (b) of Sub Section (4) of Section 9 of the Act.

- (2) *When the proposed donor or recipient or both are not Indian nationals or citizens whether near relatives or otherwise, the Authorization Committee shall consider all such requests and the transplantation shall not be permitted if the recipient is a foreign national and donor is an Indian national unless they are near relatives.*
- (3) *When the proposed donor and the recipient are not near relatives, the 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 reason 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.*

(4) Cases of swap donation referred to under the sub section (3A) of section 9 of the Act shall be approved by Authorization committee of hospital or district or State in which transplantation is proposed to be done and the donation of organs shall be permissible only from near relatives of the swap recipients.

(5) When the recipient is in a critical condition in need of life saving organ transplantation within a week, the donor or recipient may approach hospital in-charge to expedite evaluation by the Authorization Committee.”

A perusal of the Act of 1994 clearly shows that the objective of the Act is to provide for the regulation of the human organs or tissues for therapeutic purposes and prevention of commercial dealings. The long object and reasons of the Act show that the underlying legislative intent was to curb commercial dealings in human organs.

Section 9 of the Act and Rule 7 of the Rules of 2014 contemplate the procedure as well as restrictions on removal and transplantation of human organs or tissues or both. Sub Section 3A stipulates a situation where the biological compatibility of two donors, who had originally agreed to make donation of their organ in favour of near relative is not matching and that such donated organ is compatible *inter se*, the same can be permitted by the Authorization Committee. The language of the aforesaid statutory provision clearly shows that swapping is permissible with the approval of the Authorization Committee where the donors had agreed to make donation of their organs to the recipient, who is their 'near relative' but the same cannot be effected on account of biological incompatibility, in case they can enter into a single agreement to donate and receive such human organ or tissue or both according to such biological compatibility. Hence, the act of swapping is not a prohibited act under the Transplantation of Human Organs and Tissues Act, 1994 and the Rules of 2014 notified by the Government of India.

The provision which has led the Authorisation Committee to decline the request of swapping submitted by the petitioners herein, is the definition of 'near relative' as prescribed under Section 2(i) which reads thus:-

“As per Section 2(i) of the act, ‘near relative’ means spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter.”

A perusal of the aforesaid definition shows that the 'near relative' has been defined as an immediate, lineal, ascendant/descendant; a blood collateral or a spouse. Such definition although comprehensive, however, is not aimed to defeat the object of the Act. Once the spouse is recognized as a relative within the definition under Section 2(i), the object of Section 9 (3)(A) should not be permitted to be defeated merely by adopting such rigid, dogmatic and stigmatic interpretation and not to include people who get related by matrimony and would have same love and affection.

Loss of human life should not be permitted merely at the alter of technicalities and more so when the possibility of commercial transaction in such swapping has been completely ruled out. The Donor for petitioner No.1 is his mother-in-law and as such, it cannot be construed that the said donor has agreed to donate her kidney for commercial reasons. The social family bonds; the social fabric and family structure in the Indian Sub Continent is also required to be kept in consideration and such relatives from the family of the spouse cannot be isolated as completely distant or wholly unrelated.

The power of writ Court extends to do substantial justice. Even though the definition of 'near relative' is provided in the Act, such definition should not be interpreted to restrict any other donor out of love and affection. The law recognized relation mentioned therein as 'near relative' and did not intend to impose any condition that no person other than a near relative can be a donor, if all other parameters prescribed in Rule 7 of the Rules of 2014 are satisfied. A pragmatic approach is required to be taken by the Court which

advances the object of the statute without promoting the mischief required to be curtailed.

Loss of human life is irreparable and where legislative intent is not prohibitory, Article 21 would step in and come to the aid of justice. A gap in law can be examined under the equitable jurisdiction, which is not confined by legislative letter.

EQUITY

Equity is a phrase that is not legally defined. As per the meaning shown in the **Black's Law Dictionary**, 10th Edition, the word 'equity' has been explained thus:-

*“Equity, - Fairness; impartiality; evenhanded dealing.
2. The body of principles constituting what is fair and right.”*

As per the meaning shown in the **Oxford Advanced Learner's Dictionary**, New 7th Edition, the word 'equity' has been explained thus:-

“Equity - a system of natural justice allowing a fair judgement in a situation which is not covered by the existing laws.”

As per the meaning shown in the **Chambers 21st Century Dictionary**, the word 'equity' has been explained thus:-

“Equity - “fair or just conditions or treatment. 2 law the concept of natural justice, as opposed to common law or statute law, often invoked to support an interpretation, or the complete waiving, of a law.

While adverting to the doctrine of equity, it may in a technical sense be defined as a portion of natural justice, however, while exercising equity, the Courts have exercised a latitude in

stretching it to cover cases not expressly dealt with by law. 'Equity' is loosely used to denote a system of justice which is administered by a particular Court in a particular case. Equity thus empowers a Court to exercise its judicial discretion in furtherance to interests of justice and to do substantial justice amongst the contesting parties by taking stock of the totality of circumstances. Equity does not suffer a wrong merely for want of a remedy but is to be exercised where a person comes to the Court/Authority with clean hands. It aims to do what ought to be done with an object to fulfilling obligations. Thus, the aforesaid principle cannot be summarized and has to be exercised, only as it cannot remain confined to the strict confines of statutory or proclaimed limitations. The principle answers are accountable to sound judicial conscience and fine judicial discretion.

The test for the Court is to rule out the possibility of a Commercial Transaction and satisfying the regulatory requirements.

It is apparent from perusal of the response filed by the respondent(s) as well as the stands taken by the Authorisation Committee that the denial of permission/approval was only for a technical reason i.e. from petitioner No.4 does not fall under the definition of 'near relative' of petitioner No.1 as stipulated in Sub Section 2(i). There is no suggestion or reference that such a transaction is being executed between the willing donors or the willing recipients due to commercial transaction or for an object which runs contrary to Scheme of the Act and the Rules framed therein.

Thus, in exercise of the inherent and equitable jurisdiction of this Court, the present petition is allowed and the order

passed by the Authorisation Committee denying approval is set aside. Permission is, accordingly granted to the petitioners herein to swap their kidneys as reflected in the table extracted above, subject to satisfaction of other regulatory requirements.

Petition is accordingly allowed in terms of aforesaid.

06.12.2022
NainaRajput

[VINOD S. BHARDWAJ]
JUDGE

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



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