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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 7th December, 2022

+ **W.P.(C) 15294/2022**

ADITI GOSWAMI

..... Petitioner

Through: Ms. Shyl Trehan and Mr. Vigesh Raj,
Advocates. (M:7204236360)

versus

GOVT. OF NCT OF DELHI & ORS.

..... Respondents

Through: Mr. Vijay K. Sharma and Ms. Megha,
Advocates for R-2 & 3.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioner under Article 226 being aggrieved by the conduct of the Respondents in not processing her application for kidney transplant. By way of the present petition, the Petitioner / Recipient (*hereinafter 'Recipient'*) seeks expeditious processing and disposal of her application for kidney transplant from the Donor, Mrs. Mani who is her Maternal Aunt/ *Maasi* (*hereinafter 'Donor'*)
3. The background facts of the case are that the Recipient is an advocate who has graduated from Amity Law School, New Delhi in the year 2019. She is also enrolled with the Bar Council of Delhi from 2019. The case of the Recipient is that in March, 2021 she experienced facial puffiness, poor appetite and galactorrhoea due to which she consulted with Dr. Sandeep Mahajan in the Nephrology Department at AIIMS Hospital, New Delhi. Initially, she was prescribed oral medication for her medical condition which she continued to take till December, 2021. However, her health started to

deteriorate in January, 2022 due to which she had to be admitted in Max Hospital, Saket- Respondent No.3 on 25th January, 2022. Upon further tests being conducted, the Recipient was diagnosed with Chronic Kidney Disease stage 5 / End Stage Renal Disease. Since then, the Recipient was required to undergo dialysis twice a week. From March- April, 2022, she was advised to undergo 'K-free' dialysis to ensure that the potassium and creatinine levels in her body remain under control. At that point, she was advised to undergo a kidney transplant. Currently she is on dialysis thrice a week.

4. She and her family, thereafter, explored the possibility of finding a donor from a 'near relative' to donate a kidney but it was not possible as all her near relatives were either unfit or unwilling to donate. However, her Maternal Aunt/ *Maasi* (*hereinafter 'Maasi / Donor'*) purely on love and affection basis, agreed to donate one of her kidneys to the Recipient. In July, 2022, the Donor underwent tests for donating her kidney and was cleared for surgery by Max Hospital, Saket for transplant. An application dated 23rd September, 2022 in the requisite form was filed by the Recipient for kidney transplant. The following documents were attached to the application:

- i. DNA reports confirming the relationship between the Recipient with her mother & the Recipient's mother with the Donor.
- ii. The details of the Petitioner's near relatives as specified under the Act and their reason not to donate.
- iii. Family tree of the Petitioner's family.
- iv. Affidavit of the Donor.
- v. Affidavit of the Petitioner's maternal grandmother / Donor's mother giving a 'NOC'.
- vi. Form 3 and Form 11 as per Transplantation of Human Organs

and Tissues Rule, 2014.

5. The said application was submitted to the concerned Authorisation Committee in Max Hospital, Saket- Respondent No.2. However, the Recipient did not receive any decision in writing from Respondent No.2. As per the Recipient, when enquiries were made, it was intimated by the Hospital via phone call that the application could not be processed due to lack of NOC from the husband of the Donor. According to the Petitioner, the Donor has been estranged from her husband for several years and she has been living separately for the last 20 years. Thus, according to the Recipient, her application deserves to be considered on merits without the NOC from her husband. It is the case of the Recipient that her health is deteriorating constantly and she is currently stated to be undergoing dialysis at least thrice a week. The prayers in the writ petition are:

“In light of the above, the Petitioner humbly prays that this Hon'ble Court be pleased to:

- a) Direct the Respondent Nos. 2 and 3 to. not insist that NOC from estranged husband of Donor be procured;*
- b) Direct that the application dated 23,09.2022 filed by the Petitioner to Respondent No. 3 be processed expeditiously and placed before the Authorisation Committee;*
- c) Pass any other Order(s) that this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”*

6. The writ petition was first listed on 4th November, 2022. On the said date, a status report was sought from Respondent No.3 indicating the first impression gathered by the Authorisation Committee. The said status report dated 15th November, 2022 was considered by the Court on 23rd November, 2022, on which date the following order was passed:

“1. Having considered the submissions addressed by learned counsels for respective parties and having interacted with Dr. Pranav who chairs the Authorization Committee, the Court notes that certain doubts were harboured and have also been conveyed by the said Committee in the Status Report of 15 November 2022. Having gone through the reservations which were expressed in paragraph ‘c’ of that report, the Court notes that it would appear to be expedient to permit the recipient as well as the donor to produce further material for the consideration of the Authorization Committee so that the doubts, if any, are allayed. This would include them being permitted to produce further photographic evidence to establish the close familial connect which is stated to exist between the recipient and the donor.

2. The donor may also provide her financial statements as well as other title documents in support of her assertion of properties being owned and held by her in the State of Rajasthan. The Court further directs the donor to produce her son as well as any of her parents before the Authorization Committee.

3. The Authorization Committee may reconvene and reassess the entire matter within a period of 48 hours after the submission of the required documentation and produce a further Status Report on the record of these proceedings.

4. Let the matter be called again on 29.11.2022.”

7. Pursuant to the said order, the Recipient further placed further material including photographs, financial documents before the Authorisation Committee. The Authorisation Committee also heard the Donor, Donor’s son and her family and again considered the matter. It then placed its observations before the Court vide report dated 26th November, 2022. The said Report reads as under:

“Report: The meeting of authorization committee is held on 26/11/2022 at 3 PM. In terms of the last meeting of Authorization Committee dt. 11/11/2022 the recipient has submitted some documents on 24th Nov. at 6 PM and Recipient, Donor son and donor father were interviewed by the committee and the observation of the committee is as under:

1) During the interview donor admitted and stated that she is the Masi of recipient and donating one of her kidney out of her own free will. Even the donor’s son Lakshay and Father Mr. Kuldeep Garg also interviewed.

2) Financial status of Donor: Donor admitted that she runs a small business of wool and fancy dress and manages the financial requirements of herself and her son whereas she was unable to produce GST statement saying that she files ITR every year.

3) Association: Both donor and recipient stated that donor recipient mother are in close association but they could not produce any of the relevant document except recipient wedding of 2013 where there were the marriage gathering. Also failed to produce whatsapp/Facebook/SMS exchange between them. Donor, Recipient and Donor son admitted that they are living in close proximity and visit very often to each other.

4) Property: The Jaipur property document submitted by donor on record is incomplete as it is not signed by the Donor.

*5) The ITR’s status: which has been submitted on record by the donor does not show very sound financial status and it transpired during the course of interview that donor’s son is a school drop out and incapable of taking independent decision. **The Donor being the single parent burdened with***

responsibility of maintaining her child and at the same time looking after her business seems to be in a vulnerable position to donate if god forbids anything happen to him who would look after her son.

6) *The recipient stated that her brother could not donate because he got married recently in last December and her sister working in US and could not travel to India for donation But both her brother and sister can be the prospective donor and could be evaluated for giving donations accordingly. The committee submits the above report to the Hon'ble court and the Hon'ble court may pass the suitable directions."*

8. The said report was considered by this Court on 29th November, 2022. On the said date, the Court also interacted with the Donor and also met the Recipient and her family.

9. Considering the concerns raised by the Authorization Committee, and the interaction that the Court had with the Donor, the Court deemed it appropriate to appoint Ms. Tara Narula, Advocate as a Local Commissioner to visit and interact with the Donor. The mandate of the Local Commissioner was as under:

"3. Pursuant to the last order, the Authorization Committee has interacted with the Donor and her son, and has submitted a Report which has been handed over to the Court today. While it is not disputed by either of the parties that the Donor is the Maasi of the Recipient, some concerns have been raised by the Authorization Committee.

*4. The Court has interacted with the Donor today. **In order for this Court to decide this matter, it is deemed appropriate to appoint Ms. Tara Narula, Advocate [M: 9810037337] as a Local Commissioner in this matter to visit the premises of the Donor- Ms. Mani at C-605,***

Antriksh Golf View-1, Sector-78, Noida-201301 tomorrow, i.e., 30th November, 2022 and interact with both, the Donor and her son as well as ascertain their living conditions. Ms. Narula, Id. Local Commissioner shall visit the said premises at any convenient time mutually agreed between the Donor and the Id. Local Commissioner.”

10. Mr. Vijay Sharma, Id. Counsel submits that broadly the Authorisation Committee does not have any objection to the organ donation. However, some concerns were raised as to the financial status of the Donor. Since, the Donor is a single parent, looking after the business on her own, if any complication were to arise as a result of the surgery, in that eventuality there would be no one to look after the son of the Donor which makes the Donor a vulnerable person.

11. Ms. Shyel Trehan, Id. Counsel for the Recipient on the other hand submits that DNA reports have been submitted to establish that the Donor is the *Maasi* of the Recipient. Further, the various photos of the Donor, the Recipient and the Recipient’s family together from as far back as 1982, including photos from the Recipient’s wedding in 2013, have been submitted to the Authorisation Committee to prove the proximate relationship between the Donor and the Recipient. It is her further submission that the Donor is a financially independent women and merely because the Donor and Recipient come from different financial background, cannot be a valid ground to reject the application of the Recipient for kidney transplant.

12. Heard Id. Counsel for the parties and perused the record. Transplantation of human organs in India is governed and regulated by the Transplantation of Human Organs and Tissues Act, 1994 (*hereinafter ‘THOT Act’*). Although the THOT Act, has been passed by the Indian parliament

under Article 252 of the Constitution of India, presently it is applicable to all States and Union Territories, including Delhi, except for the States of Andhra Pradesh and Jammu and Kashmir. The THOT Act provides for the 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. Section 9(1) provides that no human organ removed from the body of a donor shall be transplanted into the recipient unless the donor is a 'near relative' of the recipient. Section 2(i) of THOT Act defines 'near relative', post the Amendment in 2011, to mean the spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson, or granddaughter. However, Section 9(3) stipulates the conditions in which organ transplant can be made by a donor to a recipient who is not a near relative. They are as under:

1. The donation of organ has to be by reason of affection or attachment towards the recipient or for any other special reason.
2. Prior approval of Authorisation Committee is required.
13. The Authorisation Committee under the THOT Act is required to hold an inquiry and satisfy itself that the applicants have complied with all the requirements under the Act. As per section 9(6), if after providing an opportunity to the applicants of being heard, if the Authorisation Committee is of the view that the applicants have not complied with the requirements of the Act, it can, for reasons to be recorded in writing, reject the application.
14. In the present case, from the report of the Authorisation Committee, three concerns can be deciphered. First, that there is some disparity in the financial position of the Donor and the Recipient. Second, the Authorisation Committee was not satisfied about the motivation of the Donor for donating

a kidney to the Recipient. Third, that the Donor is a single mother who is also taking care of the business.

15. It was in order to clarify these concerns that the local commissioner was appointed by this Court. Today, the Id. Local Commissioner's report has been submitted and the same has been perused by the Court. The Id. Local Commissioner has visited the Donor, both at her place of business, as also at her own residence and her parents' residence. She has stated various facts, which show that there is no doubt as to the relationship between the Petitioner and the Donor. Even her financial standing has been confirmed by the Local Commissioner. The Court notes that the Donor has one child, who is 21-22 years old. He is also supporting the Donor in her business. The Id. Local Commissioner also confirms that the Donor is making an informed decision and has made plans for her care and recovery from the transplant surgery.

16. The Court is also concerned of the young age of the Recipient and her life/future. While confirming that the conditions as required in law are satisfied, the Court has to balance speed with caution. In the present case, multiple levels of detailed examination have been done qua the Donor. Some of the concerns that existed have now been addressed. On an overall conspectus of the matter, on the basis of interactions held with the parties including the Donor, and on the basis of the report of the Id. Local Commissioner the Court observes the following:

- (1) That the Donor is the maternal aunt (*maasi*) of the Recipient.
- (2) That the Donor with the help of her father and son is running two shops, one boutique shop under the name 'Wonder World Garments' and one shop for selling wool under the name 'Kamal Collection'. Thus, the Donor has her own earnings and is

financially independent.

- (3) That the family of the Recipient may be rendering some moral and logistic support to the Donor, her being the maternal aunt of the Recipient. However, that by itself cannot disqualify the Donor from donating her kidney. The Supreme Court in ***Kuldeep Singh v. State of Tamil Nadu 2005 (11) SCC 122*** has observed that the Authorisation Committee is required to ascertain the true intent and purpose for the authorisation to remove the organ and whether any commercial element is involved as a part of the transaction. To arrive at the conclusion, the Committee can take into consideration factors such as period of acquaintance, degree of association, reciprocity of feelings, and similar human factors.

The relevant extract is as under:

*“12. Where the donor is not "near relative" as defined under the Act, the situation is covered by Sub-Section (3) of Section 9. As the Form I in terms of Rule 3 itself shows the same has to be filed in both the cases where the donor is a near relative and where he is not, so far as the recipient is concerned. In case the donor is not a near relative the requirement is that he must establish that removal of the organ was being authorized for transplantation into the body of the recipient because of affection or attachment or for any special reasons to make donation of his organ. As the purpose of enactment of the Statute itself shows, there cannot be any commercial element involved in the donation. The object of the Statute is crystal clear that it intends to prevent commercial dealings in human organs. **The Authorisation Committee is, therefore, required to satisfy that the real purpose of the donor authorizing removal of the organ is by reason of affection or attachment towards the recipient or for***

any other special reason. Such special reasons can by no stretch of imagination encompass commercial elements. Above being the intent, the inevitable conclusion is that the Authorisation Committees of the State to which the donor and the donee belong have to take the exercise to find out whether approval is to be accorded. Such Committee shall be in a better position to ascertain the true intent and the purpose for the authorisation to remove the organ and whether any commercial element is involved or not. They would be in a better position to lift the veil of projected affection or attachment and the so called special reasons and focus on the true intent. The burden is on the applicants to establish the real intent by placing relevant materials for consideration of the Authorisation Committee. **Whether there exists any affection or attachment or special reason is within the special knowledge of the applicants, and a heavy burden lies on them to establish it. Several relevant factors like relationship if any (need not be near relationship for which different considerations have been provided for), period of acquaintance, degree of association, reciprocity of feelings, gratitude and similar human factors and bonds can throw light on the issue.** It is always open to the Authorisation Committee considering the application to seek information/materials from Authorisation Committees of other States/State Governments as the case may be for effective decision in the matter. In case any State is not covered by the operation of the Act or the Rules, the operative executive instructions/Government orders will hold the field. As the object is to find out the true intent behind the donor's willingness to donate the organ, it would not be in line with the legislative intent to require the Authorisation Committee of the State where the recipient is undergoing medical treatment to decide the issue whether approval is to be accorded. Form I in terms requires the applicants to

indicate the residential details. This indication is required to prima facie determine as to which is the appropriate Authorisation Committee. In the instant case, therefore, it was the Authorisation Committee of the State of Punjab which is required to examine the claim of the petitioners.

13. We may note here that there is a provision for appeal in terms of Section 17 of the Act in case of refusal by the Authorisation Committee. But taking into account the urgency involved and the grey area projected by the two States regarding the proper Authorisation Committee, we have entertained the Writ Petition and decided the issues involved. In the normal course, it would be for the Appellate Authority constituted in terms of Section 17 who has to consider the appeal to be preferred by the aggrieved party.

14. Since the object of the Statute is to rule out commercial dealings, it would be desirable to require the donor and recipient to give details of their financial positions and vocations. It would be appropriate for the Legislature to accordingly amend the Rules and the Form I, so that requirement for disclosing incomes and vocations for some previous financial years (say 3 years) gets statutorily incorporated. This would help the Authorisation Committees to assess whether any commercial dealing is involved or not. Until Legislative steps are taken, all Authorisation Committees shall, in terms of this judgment require the applicants to furnish their income particulars for the previous three financial years and the vocations. The petitioners are directed to furnish the aforesaid details within ten days from to-day before the Authorisation Committee.

In the opinion of the Court, difference in financial position of the

Donor and the Recipient, by itself, cannot be a reason strong enough to establish commercial element. To allay the doubt as to any involvement of commercial element, interaction has been done with the Donor by the Id. Local Commissioner as also by the Court itself, and there is no doubt in the mind of the Court that the motivation for donating kidney is love and affection and there is no commercial element involved as a consideration for donating kidney in the present case.

(4) The Court is satisfied that the donor has made an informed decision. The Id. Local Commissioner's report has assuaged the concerns raised in the Authorization Committee's report dated 26th November, 2022.

17. Today, it has been submitted by Ms. Trehan, Id. Counsel that the Recipient and her family is willing to give undertaking that they would provide medical care, including an attendant, which may be required for the Donor during and post the transplant. The Donor is living in the same building as that of the Recipient and her family. In case any support is required for the Donor's son, the undertaking of the Recipient and her family is recorded and accepted by the Court. It is further submitted by Ms. Trehan, Id. Counsel, that the family would not be hesitant in rendering all the support possible to the son as well.

18. The Court is satisfied that there is no commercial transaction involved in the donation of the kidney in the case at hand. Accordingly, the application filed by the Petitioner before the Authorization Committee for transplant of the Donor's kidney to the Recipient is allowed subject to above conditions.

19. The Recipient/ Petitioner is free to approach Respondent No.3- Max

Hospital, Saket for conducting the transplant procedure.

20. No further orders are called for in this writ petition and the same is disposed of along with all the pending applications.

**PRATHIBA M. SINGH
JUDGE**

DECEMBER 7, 2022/dk/sk

