

CASE NO.:
Appeal (civil) 156 of 2005

PETITIONER:
Kuldeep Singh & another

RESPONDENT:
State of Tamil Nadu & Ors.

DATE OF JUDGMENT: 31/03/2005

BENCH:
ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T

(Arising out of D.No. 6606/2005)

ARIJIT PASAYAT, J.

In this petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution') some questions of seminal importance have been raised. Factual position as indicated by the petitioners needs to be noted in a nutshell as the issues are pristinely legal.

Petitioner No.1 is undergoing treatment at Devaki Hospital Ltd. at Chennai for renal disorder. The hospital in question is duly approved by the authorities under the Transplantation of Human Organs Act, 1994 (in short the 'Act') read with Transplantation of Human Organs Rules, 1995 (in short the 'Rules') and is permitted to undertake Kidney transplantation. Doctors treating petitioner No.1 were of the view that both the kidneys of petitioner No.1 have failed to function. Petitioner No.2 wanted to donate one kidney to petitioner No.1 to save his life. The gesture was actuated by love and affection and there is no other consideration involved.

An application was made under the Act before respondent No.2- the Director of Medical Education, Govt. of Tamil Nadu, Chennai for issuance of 'No Objection Certificate' (in short the 'NOC'). The respondent No.2 by letter dated 10.3.2005 indicated to the petitioners that the NOC is to be issued by the Authorisation Committee of the Punjab State (respondent No.3) as the Authorization Committee of the State of Tamil Nadu cannot issue such a certificate. It was indicated that since both the petitioners belong to the State of Punjab, only the Authorisation Committee of the said State had competence to issue the NOC. When request was made to respondent No.3 through respondent No.4 i.e. the Director, Research and Medical Education, Punjab, it was indicated to the petitioners by said respondents that it is only the Authorisation Committee of the State of Tamil Nadu which can issue the certificate, as the transplantation was intended to be done in the said State.

The petitioners have made a grievance that because of the ticklish issue as to which State has the competence to issue the NOC, the life of petitioner No.1 is in peril.

We had issued notice to both the State Governments who are represented by their learned counsel. The State of Tamil Nadu reiterated its stand that only the Authorisation Committee of the State of Punjab was competent to issue the NOC as both petitioners belong to

that State. The contrary stand is taken by the State of Punjab on the ground that since the transplantation is to be done in the State of Tamil Nadu, only the Authorisation Committee of the said State was competent to issue the NOC.

In order to appreciate the rival submissions, purpose for enactment of the Act and a few provisions of the Act need to be noted.

The Act was promulgated 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.

The Act has come into force w.e.f. 4.2.1995 in certain States and in all Union Territories. It is provided in Section 1 of the Act that it shall apply to such other States which adopt the Act by resolution passed in that behalf under clause (1) of Article 252 of the Constitution. It is further submitted at the Bar that executive instructions and/or government orders in line with the object of the Act have been issued in such States. We need not go into that question in the present dispute as both the States of Tamil Nadu and Punjab are covered by the provisions of the Act and the Rules.

Section 9 deals with "Restriction on removal and transplantation or human organs". The same reads as follows:

"Restrictions on removal and transplantation of human organs \026

(1) Save as otherwise provided in sub-section (3), no human organ 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.

(2) Where any donor authorizes the removal of any of his human organs after his death under sub-section (2) or Section 3 or any person competent or empowered to give authority for the removal of any human organ from the body of any deceased person authorizes such removal, the human organ may be removed and transplanted into the body of any recipient who may be in need of such human organ.

(3) If any donor authorizes the removal of any of his human organs 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 shall not be removed and transplanted without the prior approval of the Authorisation Committee.

(4)(a) The Central Government shall constitute, by notification, one or more Authorisation Committees consisting of such members as may be nominated by the Central Government on such terms and conditions as may be specified in the notification for each of the Union territories for the purposes of this section.

(b) The State Government shall constitute, by notification, one or more Authorisation Committees consisting of such members as may be nominated by the State Government on such terms and conditions as may be specified in the notification for the purposes of this

section.

(5) On an application jointly made in such form and in such manner as may be prescribed, by the donor and the recipient, the Authorisation 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 Authorisation 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."

The provision refers to donors who are not "near relatives" of the recipient. The expression 'near relatives' is defined in Section 2(i) to mean 'spouse, son, daughter, father, mother, brother or sister'. Chapter II deals with "Authority for the removal of human organs". Sub-section (2) of Section 3 deals with removal of the organs after death for therapeutic purposes. Sub-section (1) however deals with authorization by any donor for removal of any human organ before his death for therapeutic purposes. Sub-section (4) of Section 9 deals with constitution of Authorisation Committee consisting of such members as may be notified by the Central Government or the State Government, as the case may be. Under Sub-Section (5) of Section 9 application is required to be jointly made by the donor and the recipient in the prescribed manner. The Authorisation Committee is required to hold an enquiry and if after such an enquiry it is certified that the applicants have complied with the requirements of the Act and the Rules, it can grant the applicants approval for the removal and transplantation of the concerned human organs. If on the contrary, after enquiry and after giving an opportunity to the applicants of being heard, the Authorisation Committee is of the view that the applicants have not complied with the requirements of the Act and the Rules, the application for approval may be rejected for reasons to be recorded in writing. Section 11 prohibits removal or transplantation of human organs for any purpose other than therapeutic purposes. Chapter VI deals with "Offences and Penalties". Section 18 provides for removal of human organ without authority. Section 19 provides for punishment for commercial dealings in human organs. The shocking exploitation of abject poverty of many donors for even small sums of money, appears to have provided the foundation for enacting the Act. The Authorisation Committee has to be satisfied that the authorization for removal is not for commercial consideration. Since some amount of urgency has to be exhibited because of the need for transplantation, expeditious disposal of the application would be appropriate. But the matter should not be dealt with in a casual manner as otherwise the intent and purpose of the Act shall be frustrated.

Rule 3 deals with "Authority for Removal of Human Organ". The conditions for removal before death are incorporated in the Form I. The same reads as follows:

"Authority for Removal of Human Organ \026 Any donor may authorize the removal, before his death, of any human organ of his body for therapeutic purposes in the manner and on such conditions as specified in Form 1."

Form I reads as follows:

"I, _____ aged _____ S/o, D/o, W/o,
Mr. _____ resident of _____
hereby authorize to remove for therapeutic
purposes/consent to donate my organ, namely, _____
to:

(i) Mr./Mrs. _____ s/o, d/o, w/o Mr. _____
aged _____ resident of _____ who happens to be my
near relative as defined in clause (i) of Section 2
of the
Act.

OR

(ii) Mr./Mrs. _____ s/o, d/o, w/o Mr. _____
aged _____ resident of _____ towards whom I
possess special affection or attachment, or for any
special reason (to be specified)

I certify that the above authority/consent has
been given by me out of my own free will without any
undue pressure, inducement, influence or allurements
and that the purposes of the above authority/donation
and of all possible complications, side-effects,
consequences and options have been explained to me
before giving this authority or consent or both.

Signature of the Donor"

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.

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.

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.

We find that in certain States administrative officials are nominated as members of the Authorisation Committee. That appears to be the proper course as the Authorisation Committee has to decide both on the medical angle regarding need for transplantation, and the existence or otherwise of the essential ingredients to be established under Sub-Section (3) of Section 9 of the Act. Presence of an administrative official in the Authorisation Committee would be helpful in deciding the issues more effectively.

Though we are told that the present Authorisation Committee of the State of Punjab consists of only doctors, in view of urgency we direct the existing Committee to examine the matter without awaiting the induction of an administrative official. We request the Committee to examine the application of the petitioners on the basis of materials to be placed by the petitioners and to decide whether the applicants have established the requirements necessary for according approval. If it accords approval, the same may be transmitted to the State of Tamil Nadu immediately so that the Authorisation Committee of the said State can also consider on the therapeutic angles. In case approval is not accorded, it shall be open to the applicants to avail such remedies as are available in law. We make it clear that we have not expressed any opinion on the issue as to whether approval is to be accorded or not as the same is to be considered by the Authorisation Committee.

Before parting with the case, we may indicate that with a view to

effectuate the laudable object of the Act, it would be appropriate for States which have not yet adopted the Act, to do so immediately.

Copies of our order be sent to the Ministry of Health and Law, Union of India and Chief Secretaries of all States and Union Territories for doing the needful as indicated in our judgment.

The writ petition is disposed of accordingly. No costs.

JUDIS