



Human organ trafficking with special reference to women and the legal perspectives

KEYWORDS

•Transplantation of Human Organs Act, 1994 •Deceitful removal of kidney •Justice

Anshika Juneja

Symbiosis Law School, Pune Symbiosis International University

ABSTRACT Organ trade is the trade involving inner human organs(heart, liver, kidneys, etc.) for organ transplantation. According to WHO, an estimated of 10,000 black market operations involving purchased human organs takes place annually. Moreover, this amounts up to only 10 percent of the global demand; organ trade has been termed as the 'crime of the 21st century'. India has always been at the center of this trade the current law to combat this 'Transplantation of Human Organs Act, 1994' has undergone many amendments but lacks in implementation. IRAC Analysis including jurisprudential aspect and inference using secondary sources such as books and journals both online and offline ,has been drawn on the case *Shyam Sundar Prasad v State of Bihar (now Jharkhand)*

INTRODUCTION TO THE TOPIC

An organ transplant is a surgical operation which involves removing of an organ from one person (donor) and transferring it to another (recipient) on the free will of the person on ethical grounds. Organs which are commonly traded are kidneys, liver and also uterus, heart etc. Trafficking in humans is of three types: Firstly, deceiving victims for organs by traffickers. Secondly, victims formally or informally agree to sell an organ for money and are cheated. Thirdly, vulnerable persons are treated for an ailment, and thereupon organs are removed without the victim's knowledge and consent. The vulnerable categories of persons are illiterate persons, migrants majorly the poor strata of the society. It is known that trafficking for organ trade could occur with persons of any age.

It is a fact that the entire racket is rarely exposed and therefore, the dimensions are yet to be appropriately fathomed.

In India for a long time there was no specific legislation regulating organ transplantation due to which many number of kidney scams were reported leaving thousands of poor people exploited by the middlemen and the unscrupulous doctors in the country which led to initiation of the enactment of a law that could punish and curb this practice. A committee was appointed by the Central Government to draft legislation on the subject and thus came into force the trafficking of human organs act, 1994 which is a modified replica of the U.K. legislation.

HYPOTHESIS

Due to illegal trafficking of organs the Indian Government has come up with Transplantation of Human Organs Act, 1994 laying down certain rules and regulations that are to be followed while conducting organ transplant. But till now not even a single person has been prosecuted under this act.

INRODUCTION TO THE CASE

Citation: 2007(1)BLJR 382, 2007CriLJ1989, [2007(1)JCR481(Jhr)]

Case-IN THE HIGH COURT OF JHARKHAND AT RANCHI
Decided On: 14.09.2006

Parties-

Appellants: Dr. Shyam Sundar Prasadvs.Respondent: State-of Bihar(now Jharkhand)

Hon'bleJudges:

Rakesh Ranjan Prasad,j.

Subject: Human organ trafficking act 1994(criminal)

This is the case of a person who had an ardent desire to go to Saudi Arab and for that he paid a price to an agent and instead they fraudantly removed his kidney and also he never got to go to Saudi Arab. Moreover, even after the supporting facts and the proofs and also been given justice in the trial court he lost his case against them.

FACTS OF THE CASE

Nasir Ali has been residing in Bombay since last 14 years. In May, 1997,Bombay he came across Deepak to whom he expressed his desire to go to Saudi Arab, who promised to fulfill his desire provided Rs. 40,000/- is paid, to which he agreed and then he introduced him to a man named as Lalia (Shyam Kumar Sharma) who asked for Rs. 40,000/- for the work to be done. After 8 days he took him to the airport and introduced him to Dr. Tabrej and a nurse Mery, who brought him to Ranchi and took him to a Nursing home where blood sample was taken because if everything is found to be normal in the test, only then he could be sent to Saudi Arab. Subsequently he was told that since his blood report is not normal he cannot be sent to Saudi Arab. Dr. Tabrez told him that the issue can be solved if blood transfusion is done and for that he will have to undergo a small operation to which he agreed and they injected him. Thereafter he became senseless and after a week he found himself in a bed of a Hospital named Hurkisandas Nurrotumdas Hospital and Research Center, Bombay, where he was kept for about 7-8 months and in that course of time nurse Mery disclosed to him that after removing his kidney it has been sold to some foreign national and he has been duped by the accused persons. He reported the matter to the police station and thereafter lodged a complaint in the court. On investigating Hurkisandas Nurrotumdas Hospital and Research Center, as to whether a person named as Nasir Ali has been operated open in the Hospital as a kidney donor was replied in negative by the Hospital and it was informed that Nasir Ali had been tested for HLA typing on 13.3.1997. Thereafter in order to get the matter regarding removal of the kidney verified Nasir Ali was referred to J.J. Hospital, Bombay and on being examined it was reported by the Hospital as "left kidney not visualized".

IRAC ANALYSIS ISSUE

Under Transplantation of Human Organs Act, 1994—Sections 18, 19 and 20, is the appellant liable for causing an illegal act of Deceitful removal of human organs, commercializing of organs and thus exploiting the right of a person?

RULE

Indian law-

- Original act- Transplantation of Human Organs Act, 1994(came into force in 1995)
- Transplantation of Human Organs Act, 1994(Amendment in 2008 and 2011)²
- Human Tissue Amendment (Trafficking in Human Organs) Bill 2013

International law-

- UK Human Organ Transplantation Act 1989
- United States, the National Organ Transplant Act of 1984
- 'Human Tissue Transplantation Crime' (1998) of Australia
- The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons³
- Optional Protocol on the sale of children, child prostitution and child pornography (2000) to the UN Convention on the Rights of the Child (1989).
- Human Organ Transplantation (1991) of WHO.⁴
- An Additional Protocol to the European Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin (2002).

Comparative law- It has an important role in the evolution of a system of jurisprudence. It enables a country to improve and develop its law on a subject by amending or revising it in context to the provisions laid down in any international law which one country waqnts to adopt.

In this case- Under Sections 18, 19 and 20 of the Transplantation of the Human Organs Act

Section 18: Punishment for removal of a human organ without authority

(1)Any person who renders his services to or at any hospital and who, for purposes of transplantation, conducts, associates with, or helps in any manner in, the removal of any human organ without authority, shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to ten thousand rupees.

Section 19: Punishment for commercial dealings in human organs

Provided that the court may, for any adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than two years and a fine less than ten thousand rupees and defining the nature of activities requiring prosecution

Section 20: Punishment for contravention of any other provision of this Act

ANALYSIS

On the basis of the evidence, the trial court did hold that Nasir Ali got his kidney removed on his own volition and sold it to someone for its transplantation in another human being and that the kidney of Nasir Ali was removed under the

supervision of the appellant in the Nursing Home belonging to the appellant. The trial court, did refer the case of other accused namely, Qamar Alam, Shyam Kumar Sharma @ Lalia and Deepak Kumar Jaiswal to the court at Bombay and did find the appellant guilty under Sections 18, 19 and 20 of the Transplantation of the Human Organs Act, and the appellant was convicted and sentenced as aforesaid.

On appeal by the appellant, submitted that though there has been absolutely no legal evidence on the record to establish that the appellant got the kidney of Nasir Ali removed in his Nursing Home, but no change whatsoever was framed either under Sections 18, 19, and 20 of the Transplantation of the Human Organs Act and hence, the order of conviction and sentence should be barred.

Criticism to the judgment- Nasir Ali got operated in 1997 and the judgment was passed in 2006, i.e., nine years of sufferings and finally his justice were curtailed. Even after the present legislation and the supporting facts the appeal is allowed in the court and the responsible people are acquitted of all charges. Transplantation of Human Organs Act, 1994 was applicable in this case the amendments took place after this judgment but still not even one has been prosecuted by the court of law. The historical school of law states the evolution and development of law and gives primacy to the social institutions, similarly the legislation in respect to human organ trafficking is developing and taking a rigid course of action, and is even getting amended on constant basis that the punishments are becoming more stringent but it needs to be improved further.

Jurisprudence analysis-

Analytical school vs. Sociological school- Analytical Positivism lays emphasis on command and power of law, it confines itself to the study of law as it actually exists, and as in the case stated above the societal influence was set aside and the evidence of the operation taking place was absent, which is the most important factor to base any case law, so under the law and its strict guidelines the judgment was passed in favor of the appellant which supports the analytical school.

It is in perfect contrast to the sociological school as it takes into consideration social phenomenon, it believes law is designed on the basis of human experience in order to meet the needs of the society as in this case removal of the kidney of the person took place. Neither the societal interest is served nor is it protected by law. General security, morals are questionable which this theory promises to provide in the eye of law.

Ethical school- It states the manner in which the law fulfills its purpose of attainment of justice, law is the only instrument towards the fulfillment of the objective of justice. Relating it to the case stated above a person lost his kidney deceitfully of which the facts prove but because of no evidence of the act not occurring in the said premises the appellant is acquitted of the charge and the justice to the man of hopes is not rendered. A person undergoing removal of kidney suffers from many ailments physiologically, mentally and physically. The fraudulent conduction of the act and moreover he is barred from justice by law.

Precedents-According to Salmond " precedents are the case laws which not only has a great binding authority but must also be followed". The precedents on the human organ trafficking are in many number but not even one person involved in this crime was ever prosecuted. The in-

dustry has always had the support of those in power, and those in power have ways for corruption, as illustrated by the story of Kumar's career. Senior Delhi police officials have confessed to picking up one of Kumar's associates in January, but letting him free in exchange for Rs 20 lakh – handed over by Kumar himself. So there is no such precedent established by law in India which holds a superior value in the eyes of law as they come under the ambit of authoritative precedents. There are international cases as precedents but they do not hold any binding authority as they are persuasive precedents.

CONCLUSION

Judgment- The order of conviction and sentence passed by the trial court is hereby set aside: Consequently, the appeal is allowed and the appellant is hereby acquitted of the charges levelled against him and is discharged from the liability of the bail bonds.

INFERENCE

Needs amendments – The frequent amendments and the laws in whose sequence the law relating to human organ trafficking is developing itself which are the exponents of the Historical School of Law and now the act provides that anyone involved in illegal organ transplant or trafficking could get from five to ten years in prison and a fine of two to ten million rupees. Donations between unrelated people are now allowed.

Role of government- The need of the hour is to protect those who want to legally and legitimately transplant organs; the donors, the recipients and the doctors. The very first step here is to ensure that the law be such which can provide us with a structured approach towards encouraging ethical retrieval and transplantation. Providing justice to the people who suffer from any fraudulent illegal act and punishing the accusers under law.

Legislation- The law for various reasons failed in its objective and implementation giving scope to make the ground fertile for organ scandals. It is also creating hurdles for various philanthropic agencies which are working to further the cause of transplantation.

REFERENCE

- Online Database: | 1.) Manupatra | 2.) SCC Online | 3.) India Kannon | Books | 1.) Studies in Jurisprudence and Legal Theory, by Dr. N.V.Paranjape, eighth edition | 2.) Salmond on Jurisprudence | Legislation | 1. Transplantation of Human Organs Act, 1994(also further amendments) | | Journals and sites | 1.) Indian Journal of Urology, Legal and ethical aspects of organ donation and transplantation, Sunil Shroff, 2009 Jul-Sep; volume 25(3), < www.ncbi.nlm.nih.gov > [4th November, 18:19 pm] | 2.) WHO | The state of the international organ trade: a provisional picture based on integration of available information, Yosuke Shimazono, 12th December 2007< www.who.int> [4th November, 18:30] | 3.) The global problem of kidney trafficking - Health News - NHS Choices, Monday May 28 2012< www.nhs.uk>, [4th November, 18:37] | 4.) Mohsin N. Transplantation in Saudi Arabia and Oman. Consultation on Cell, Tissue and Organ Transplantation; 2005 Nov 26-28; Karachi. | 5.) Amendment to the Transplantation of Human Organs Act, 1994, posted in Justice, Kidney Racket by NNLRJ on September 19, 2009< indialawyers.wordpress.com>, [4th November, 18:32] | 6.) Stanford Encyclopedia of Philosophy, The Sale of Human Organs, First published Mon Oct 17, 2011; substantive revision Mon Jan 5, 2015 < http://plato.stanford.edu/entries/organs-sale/> [3rd November, 10:36] | 7.) American Journal of Transplantation, Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities by D. A. Budiani-Saberi and F. L. Delmonico Article first published online: 14 APR 2008, < http://onlinelibrary.wiley.com/doi/10.1111/j.1600-6143.2008.02200.x/full> [3rd November 10:35] |