
(2010) 01 OHC CK 0033
In the Orissa High Court

Manoranjan Rout and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-01-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Transplantation of Human Organs and Tissues Act, 1994 — Section 2, 3, 9

Citation : AIR 2010 Ori 99 : (2010) 109 CLT 225

Hon'ble Judges : I.M. Quddusi, Acting C.J.; Sanju Panda, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sanju Panda, J.—Petitioners have challenged the order passed by the Authorization Committee which was communicated vide letter No. 12210 dated 16.11.2009 as the same violates the direction of this Court dated 30.10.2009 passed in W.P.(C) No. 14344 of 2009.

2. Petitioner No. 1, a doctor working as the Chief Medical Officer, Ispat Hospital, Mecon, Ranchi in the district of Jharkhand, is suffering from Renal Failure & being treated at Appolo Hospital, Chennai. The doctor of the Appolo Hospital recommended for Kidney Transplantation as soon as possible & his case was referred for Kidney Transplantation to the Kalinga Hospital (P) Ltd., Chandrashekharpur, Bhubaneswar. The view of the doctors of Kalinga Hospital is that there is no other alternative than to transplant the Kidney to save his life. Therefore, Petitioner No. 1 searched for kidney from his near relatives. As his wife & other family members' blood group did not match, he searched for a kidney from his other relatives & finally Petitioner No. 2 agreed to donate one of his kidneys which matched with Petitioner No. 1. Petitioner No. 2 is the father's sister's son of Petitioner No. 1. They applied to the Authorization Committee through Kalinga Hospital for Issuance of No objection Certificate so that Petitioner No. 2-doner can donate one of his kidneys to No. 1. The said Committee did not consider the application & called for some further document

though the Petitioners had complied with all the requirements. However, on 11.5.2009 the Committee refused to issue NOC. The said order was challenged before this Court in W.P.(C) No. 11750 of 2009 which was disposed of on 12.8.2009 with a direction to the Authorization Committee to examine whether transplantation of human organ is absolutely necessary or not & whether the donor is the father's sister's son of Petitioner No. 1. No Objection Certificate was refused by the Secretary to Government, Health & Family Welfare Department all the ground that the emotional bond or relationship between the donor & the donee had not been established. Challenging the refusal, Petitioner No. 1 filed W.P. (C) No. 14344 of 2009 which was disposed of on 30.10.2009. This Court while quashing the order of refusal to grant NOC specifically observed that there is no provision in the Act, which prohibits a person, "who is not a near relative" from donating a Kidney for transplantation. This Court further observed that when the blood group of the near relatives did not match, Petitioner No. 2 volunteered to donate his kidney out of affection & attachment with Petitioner No. 1 & directed the Committee to take a decision as early as possible preferably within a week of production of copy of the Judgment. Accordingly, Petitioner No. 1 submitted the certified copy of the Judgment on 10.11.2009 before the Directorate of Medical Education & Training, Orissa (in short, "DMET"). On 12.11.2009 the DMET instructed over telephone to the Superintendent of Kalinga Hospital that the applicant may be present along with his donor at 3.30 P.M. on 12.11.2009. Even though- Petitioner No. 1 had undergone dialysis on the same day, he appeared before the DMET at about 8.30 PM in the night & prior to that also the Committee sat on 16.10.2009 & directed the Superintendent, Kalinga Hospital to produce the documentary evidence of relationship between Petitioner No. 1 & Petitioner No. 2. Even though everything was submitted before the Committee, vide Order Dated 16.11.2009 it again refused to grant NOC observing as follows:

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In respect of Dr. Manoranjan Rout, it is stated that, this case was taken up for consideration in pursuance of the orders dt. 30.10.2009 of the Hon"ble High Court, Orissa in W.P.(O) No. 14344/09. During pendency of this Writ Petition in the Hon"ble High Court, the case of Dr. Rout was also review again by the Authorization Committee in its last meeting dt. 16.10.2009. In pursuance to another orders of Hon"ble High Court dt. 24.09.2009 in W.P.(C) No. 14344/09& views of the Authorization Committee communicated to you in this Directorate letter No. 11112 dt. 21.10.2009 this time also the committee vie we a the same thing & thus N.O.C. not issued.

3. Petitioners challenging the said rejection order of the Committee have filed this Writ Petition.

4. Learned Counsel appearing for the Petitioners submitted that from observation made by the Committee it would appear that the Committee did not consider the application of Petitioner No. 1 as per the direction given by this Court. Rather, the

Committee repeated its earlier decision taken on 21.10.2009. He submitted that the Committee did not apply its mind as per the direction given by this Court to consider the application of Petitioner No. 1 afresh. He further submitted that as the condition of Petitioner No. 1 is very serious & deteriorating day by day, he has approached this Court by invoking the jurisdiction under Article 226 of the Constitution of India for a direction to the Committee to grant NOC in order to save his life. In support of his submission, the Learned Counsel for the Petitioner cited an unreported decision of the Punjab & Haryana High Court at Chandigarh dated 10th April, 2008 rendered in CWP No. 5389 of 2008 (Jaswinder Singh v. State of Punjab and Ors.) wherein a division Bench of the said Court directed the Authorisation Committee to grant necessary approval to the Petitioner therein forthwith to receive the kidney proposed to be donated by the donor on the ground that the donor knew the recipient as they had visiting terms in the family & it was because of sheer love & affection & humanitarian grounds.

5. The Learned Government Advocate submitted that what is relevant such matters is the subjective satisfaction of the Authorization Committee. Since the Petitioners have not established the same, the Committee rightly did not take into consideration his application.

6. From the contentions made by the Learned Counsel for the as the Learned Government Advocate & on perusal of the doctor's report, it is crystal clear that the transplantation of kidney of Petitioner No. 1 is necessary. This Court on 4.12.2009 directed the State Counsel to produce the relevant records. On perusal of the said records, it appears that the Committee did not consider the case of Petitioner No. 1 as per the direction given by this Court earlier in W.P.(C) No. 11750 of 2009 disposed of on 12.8.2009.

7. With a view to provide the Transplantation of Human Organs Act, 1994 & the Transplantation of Human Organs Rules, 1995 (hereinafter referred to as "the Act" & "the Rules") are enacted to regulate the removal of organs from living as well as deceased persons & transplantation of such organs. The intention of the said Act is to provide for regulation of removal, storage & transplantation of human organs for therapeutic purposes & for prevention of commercial dealings in human organs & for matter connected therewith or incidental thereto. For better appreciation, the relevant provisions of "Donor" & "recipient" have been defined u/s 2 of the Act:

2. Definitions,- In this Act, unless the context otherwise requires-

(a) to (e) xxx xxx

(f) "donor" means any person, not less than eighteen years of age, who voluntarily authorizes the removal of any of his human organs for therapeutic purposes under Sub-section (1) or Sub-section (2) of Section 3;

(g) to (1)xxx xxx xxx

(m) "recipient" means a person into whom any human organ is, or is proposed to

be, transplanted;

8. Transplantation of by the regulated human organs is Transplantation of Human Organs Act, 1994. The said Act provides for removal of human organs & also imposed on restriction removal & has transplantation of human organs. For better appreciation, Sections 3 & 9 of the Act are extracted below:

3. Authority for removal of human organs.-(1) Any donor, may, in such manner & subject to such conditions as may be prescribed, authorize the removal, before his death, of any human organ of his body for therapeutic purposes.

(2) If any donor had, in writing & in the presence of two or more witnesses (at least one of whom is a near relative of such person), unequivocally authorized at any time before his death, the removal of any human organ of his body, after his death, for therapeutic purposes, the person lawfully in possession of the dead body of the donor shall, unless he has any reason to believe that the donor had subsequently revoked the authority aforesaid, grant in a registered medical practitioner all reasonable facilities for the removal for therapeutic purposes, of that human organ from the dead body of the donor.

(3) Where no such authority as is referred to in Sub-section (2), was made by any person before his death but no objection was also expressed by such person to any of his human organs being used after his death for therapeutic purposes, the person lawfully in possession of the dead body of such, person may, unless he has reason to believe that any near relative of the deceased person has objection to any of the deceased person's human organs being used for therapeutic purposes, authorize the removal of any human organ of the deceased person for its use for therapeutic purposes.

(4) The authority given under Sub-section (1) or Sub-section (2) or, as the case may be, Sub-section (3) shall be sufficient warrant for the removal, for therapeutic purposes, of the human organ; but no such removal shall be made by any person other than the registered medical practitioner.

(5) Where any human organ is to be removed from the body of a deceased person, the registered medical practitioner shall satisfy himself, before such removal, by a personal examination of the body from which any human organ is to be removed, the life is extinct in such body or, where it appears to be a use of brain-stem death, that such death has been certified under Sub-section (6).

(6) Where any human organ is to be removed from the body of a person in the event of his brain-stem death, no such removal shall be undertaken unless such death is certified, in such form & in such manner & on satisfaction of such conditions & requirements as may be prescribed, by a Board of Medical Experts consisting of the following, namely:

(i) the registered medical practitioner in charge of the hospital in which brain-stem death has occurred:

(ii) an independent registered medical practitioner, being a specialist to be nominated by the registered medical practitioner specified in Clause (i), from the panel of names approved by the Appropriate Authority;

(iii) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner specified in Clause (i), from the panel of names approved by the Appropriate Authority; &

(iv) the registered medical practitioner treating the person whose brain-stem death has occurred.

(7) Notwithstanding anything contained in Sub-section (3), where brain-stem death of any person, less than 18 years of age, occurs & is certified under Sub-section (6), any of the parents of the deceased person may give authority, in such form & in such manner as may be prescribed, for the removal of any human organ from the body of the deceased person.

9. Restrictions on removal & transplantation of human organs.- (I) 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 an) donor authorises the removal of any of his human organs after his death under Sub-section (2) of 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 authorises such removal, the human organ may be removed & 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 & transplanted without the prior approval of the Authorisation Committee,

(4)(a) The Central Government shall constitute, by notification, one or more Authorization Committees consisting of such members as may be nominated by the Central Government on such terms & 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 & conditions as may be specified in the notification for the purposes of this Section.

(5) On an application jointly made, in such form & in such manner as may be prescribed, by the donor & the recipient, the Authorisation Committee shall, after holding an inquiry & after satisfying itself that the applicants have complied with

all the requirements of this Act & the rules made thereunder, grant to the applicants approval for the removal & transplantation of the human organ.

(6) If, after the inquiry & after giving an opportunity to the applicants of being heard, the Authorization Committee is satisfied that the applicants have not complied with the requirements on his Act & the rules made thereunder, it shall, for reasons to be recorded in writing, reject the application for approval.

9. Apart from the above, Rule 6 & 6F of the Rules which has been instituted by G.S.R 571. (e), dated 31st, July, 2008 (w.e.f. 4-8-2008) provides for the different aspects on which the Authorization Committee shall fix its attention. The relevant portions of the said Rule are quoted hereunder:

6. The donor & the recipient shall make jointly an application to grant approval for removal & transplantation of a human organ, to the concerned competent authority or Authorization Committee as specified in Form 10. The Authorisation Committee shall take a decision on such application in accordance with the guidelines in the rule 6A.

6A to 6E. xxx xxx xxx

6F. The Authorisation Committee shall focus its attention on the following, namely:

(a) Where the proposed transplant is between persons related genetically, Mother, Father, (Brother, Sister, Son or Daughter above the age of 18 years) the concerned competent authority shall evaluate-

(ii) documentary evidence of relationship, e.g., relevant birth certificates & marriage certificate, certificate from Sub-Divisional Magistrate/Metropolitan Magistrate/or Sarpanch of the Panchayat;

(b) The papers for approval of transplantation would be processed by the registered medical practitioner & administrative division of the Institution for transplantation, while the approval will be granted by the Authorisation Committee.

(d) Where the proposed transplant is between individuals who are not "near relatives", the Authorization Committee shall evaluate)-

(i) that there is no commercial transaction between the recipient & the donor. That no payment of money or moneys worth as referred to in the Act has been made to the donor or promised to be made to the donor or any other person. In this connection the Authorization Committee shall take into consideration.

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10. On a plain reading of the aforesaid provisions, it is clear how a person will prove the relationship between the donor & the recipient. In the present case, the Petitioners stated on affidavit that the Sarpanch of Kuamara Grama Panchayat has certified the relationship between Petitioner No. 1 & Petitioner No.

2. Sarpanch of Kuamara Grama Panchayat has given the certificate dated 2.11.2009 annexed to the memo filed on 18.12.2009 wherein she has certified that late, Ramahari Rout & Ratnamani Rout have one son & one daughter, namely, Dinabandhu Rout & Madhuri Rout. Dinabandhu had three sons, namely, 1, Dr. Manoranjan Rout, 2) Gyanaranjan Rout & 3) Nihar Ranjan Rout. Madhuri Rout married to late Sagarash Ray of village Purusottampur, Po-Remuna, Dist. Balasore, about 60 years back. Therefore, this Court on 18.12.2009 directed the Sarpanch of Kuamara Grama Panchayat to appear in person before this Court. Accordingly, Mrs. Ramadei Singh, Sarpanch of Kuamara Grama Panchayat appeared in person before this Court on 23.12.2009 & her statement was recorded in separate sheet wherein she has stated that late Dinabandhu Rout was the son of late Ramahari Rout. Late Dinabandhu Rout has 3 sons, namely, Dr. Manoranjan Rout, Gyanaranjan Rout & Nihar Ranjan Rout & one daughter, namely, Shantilata Rout. Madhuri Rout is Dr. Manoranjan Rout's father's sister. Present Petitioner No. 2 is the son of said Madhuri Rout. Since the relationship of the donor & the recipient is substantiated as per the statement of Mrs. Ramadei Singh, Sarpanch of Kuamara Grama Panchayat in accordance with the Rules, the DMET should have accepted the same. There is no material on records also regarding any chance of commercial transaction between the two cousin brothers & out of affection Petitioner No. 2 wants to donate his organ to save the life of his brother-Petitioner No. 1. There is also no material placed on records to doubt about the relationship between the donor & the recipient.

It is true that human conduct & the reactions with regard to save life of another close relation or person cannot be measured in any mathematical term. Human conduct, what Bhagabat Gita calls "Guna" & Prakruti", contains a measure of dark & light, of good & bad. All have the potential to love as much as potential to hurt & also the potential for kindness, generosity & selflessness. How does one ensure that is inter-personal, Lord Krishna drew attention to the crucial & significant link that runs through the entire creation wherein all created beings are inter-dependant & sustain one another with their action. What mankind needs is social order which will be preserved through selfless & constant action. It is the human nature to take tough decisions. Hence, one is prompted to rise above selfish purpose & work for the mankind & the society.

11. In the present case, there is no material on record to disprove the relationship between the donor & the recipient. Therefore, the necessary approval cannot be denied on the ground of a mere suspicion. The question that the applicants have not produced relevant documents, establishing their relationship, as stated by the Committee, also does not arise when Mrs. Ramadei Singh, Sarpanch of Kuamara Grama Panchayat has certified the relationship between the donor & the recipient as per the Rules, 1995. After all, law is not cast in stone, nor is it that judicial interpretation remains unchanged over time.

12. In Jaswinder Singh's case (supra), the Punjab & Haryana High Court had granted permission to transplant the human organ as there was no material on

records contrary to the Act & Rules. In the present case also there is no material on record to deny such permission. The Authorisation Committee is directed to grant necessary. No Objection Certificate to the Petitioners. Accordingly, the Writ Petition is allowed.

I.M. Quddusi, A.C.J.

13. I agree.