

(2013) 04 OHC CK 0036
In the Orissa High Court
Case No : Writ Petition (C) No. 5554 of 2013

Mrs. Indu Behera

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 16-04-2013

Acts Referred:

Constitution of India, 1950 — Article 14

Transplantation of Human Organs and Tissues Act, 1994 — Section 2(i), 9, 9(1)

Citation : AIR 2013 Ori 133 : (2013) 116 CLT 429 : (2013) 1 OLR 1076

Hon'ble Judges : S.K. Mishra, J; Pradip Mohanty, J

Bench : Division Bench

Advocate : Ajit Ku. Choudhury and K.K. Das, for the Appellant;

Final Decision : Allowed

Judgement

S.K. Mishra, J.—In this writ petition, the petitioner seeks a direction from the Court to the opposite parties for according necessary permission for kidney transplantation of her husband from a unrelated donor. The petitioner's husband namely Dillip Kumar Behera belongs to Scheduled Caste community. He is suffering from bilateral chronic medical renal diseases since 2010. He is also suffering from paralysis and other multiple diseases. He is under constant dialysis and under Intensive Care Unit of different hospitals including Apollo Hospital, Bhubaneswar. Due to non-functioning of both the kidneys, the petitioner's husband is in serious condition and is under constant treatment of Dr. Nitish Kumar Mohanty, who is the Senior Consultant, Nephrology and Transplant Consultant of Apollo Hospital, Bhubaneswar. Doctor has advised him for immediate kidney transplantation. The petitioner therefore approached the doctors of the Apollo Hospital, Bhubaneswar and the S.C.B. Medical College & Hospital, Cuttack for transplantation of kidney, but however despite her request the treating doctor has not forwarded the application of the petitioner's husband for approval of the Authorisation Committee constituted under the Transplantation of Human Organs and Tissues Act, 1994 (hereinafter referred to

as "the Act" for brevity).

2. When the matter came up before this Bench on 15.3.2013 after hearing parties this Court directed the Managing Director, Apollo Hospital, Bhubaneswar, opposite party no. 4, to process the application forthwith and send it to the Authorisation Committee. It was further directed that the Authorisation Committee shall process the same and take a decision within twenty-four hours from receipt of such application and report to this Court on 20.3.2013. On 25.3.2013 the matter was again taken up wherein this Court was informed that the Apollo Hospital, Bhubaneswar is only authorized to take up transplantation in respect of near relatives in terms of Section 2(i) of the Act and there is non-compliance of Rule 6F(d) of the Transplantation of Human Organs Rules, 1995. That apart pursuant to the proceeding dated 19.3.2013, the Authorisation Committee asked for nine documents for the decision in this matter. This Court perused the files produced by learned Addl. Government Advocate and directed the petitioner to submit the documents asked by the Authorisation Committee within three days. It was further directed that the Authorisation Committee will take a decision in the matter within three days thereafter and give its report to this Court with a copy of the same to the petitioner.

3. The Authorisation Committee met in an emergent meeting on 3.4.2013 at 4.30 P.M. in the office Chamber of Director Medical Education and Training, Odisha (hereinafter referred to as the "DMET(O)") under the Chairmanship of Prof. (Dr.) Sonamali Bag. After considering the matter in a cryptic order the Committee resolved as follows:-

As per the kind orders of the Hon'ble High Court dated 25.3.2013 in W.P. (C) No. 5554/2013 an emergent meeting of Authorisation Committee was held under the Chairmanship of Prof. (Dr.) Sonamali Bag, DMET(O) on 3.4.2013 at 4.30 P.M. During this meeting Sri Dillip Ku. Behera (Recipient) was absent. The donor Smt. G. Vijayalaxmi and wife of the recipient Smt. Indu Behera were present. The Committee interacted with them and on such interaction the Committee is of the opinion that no cogent reasons have been given as to why the donor wishes to donate her kidney. Further Domicile/Residence proof of the donor is not supported by relevant documents. Hence, the Committee unanimously resolved not to grant NOC.

On such resolution the petitioner filed an additional affidavit, inter alia, contending that the Authorisation Committee under Rule-6F(d) of the Transplantation of Human Organs Rules, 1995 (hereinafter referred to as "the Rules" for brevity) refused to accord permission on the ground that the Apollo Hospital is only authorized to take up kidney transplantation in respect of near relatives in terms of Section 2(i) of the Act. Being satisfied with the order, on 25.3.2013 this Court directed the petitioner to submit documents before the Authorisation Committee. This Court further directed the Committee to take a decision in the matter within three days as per Rule-6F(d) of the Rules. The Authorisation Committee again conducted enquiry on 3.4.2013 and declined to

grant "No Objection Certificate" for kidney transplantation as there was no cogent reasons given as to why the donor wishes to donate the kidney, even though the committee did not dispute that there was any commercial transaction between the recipient and the donor. The deponent further brought to the notice of the Court that the Authorisation Committee vide Officer Order No. 3733 dated 15.3.2013 has accorded permission by issuing "No Objection Certificate" in case of Mr. Jena Aditya Pratap Baghsingh, Bhagatpur and Surendra Kumar Sahu of Keuta Sahi, Old Town, Nayagah in allowing kidney transplantation at Apollo Hospital from the unrelated donors, but in the petitioner's case the said Authorisation Committee refused to accord permission and to issue No Objection Certificate with regard to kidney transplantation from unrelated donor. Thus, according to the petitioner the action of the Authorisation Committee is unreasonable, arbitrary and in equal treatment has been meted out to them, hence it is violative of Article 14 of the Constitution of India.

4. The Act does not prohibit the transplantation of organs from unrelated donors. In fact Rule-6F(d) of the Rules provides the procedure to be adopted where the proposed transplant between individuals who are not "near relatives". It reads as follows:-

6F(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 and 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-

(a) an explanation of the link between them and the circumstances which led to the offer being made;

(b) documentary evidence of the link, e.g., proof that they have lived together, etc.;

(c) reasons why the donor wishes to donate; and

(d) old photographs showing the donor and the recipient together.

(ii) that there is no middleman or tout involved;

(iii) that financial status of the donor and the recipient is probed by asking them to give appropriate evidence of their vocation and income for the previous three financial years. Any gross disparity between the status of the two, must be evaluated in the backdrop of the objective of preventing commercial dealing;

(iv) that the donor is not a drug addict or a known person with criminal record;

(v) that the next of kin of the proposed unrelated donor is interviewed regarding awareness about his/her intention to donate an organ, the authenticity of the link between the donor and the recipient and the reasons for donation. Any strong

views or disagreement or objection of such kin may also be recorded and taken note of.

5. In interpreting this provision, the Delhi High Court in the case of Parveen Begum and Another Vs. Appellate Authority And anr, has observed as follows:

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.

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 grand daughter, 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 Authorisation Committee.

6. The aforesaid case has also been taken note of by Delhi High Court in W.P. (C) No. 6105/2011 which was disposed on 1st September, 2011. This Court in W.P. (C) No. 17447 of 2012 disposed of on 21.9.2012 has also given specific direction to the Authorisation Committee to grant permission for transplantation of organ/kidney from an unrelated donor.

7. From the above, it is clear that the Authorisation Committee is required to examine the individual case and assess whether there has been a commercial transaction between the donor and the recipient. This aspect has been determined from the various provisions of the Act and the Rules. In this case, though the Authorisation Committee has rejected the application filed by the recipient and the donor, it does not say that there has been a commercial transaction between the parties.

8. In addition to the above, the Authorisation Committee is also required to take

greater precaution in case of a woman donor. Rule-6F(g) of the Rules reads as follows:

In case where the donor is a woman greater precautions ought to be taken. Her identity and independent consent should be confirmed by a person other than the recipient. Any document with regard to the proof of residence or domicile and particulars of parentage should be relatable to the photo identity of the applicant in order to ensure that the documents pertain to the same person, who is the proposed donor and in the event of any inadequate or doubtful information to this effect, the Authorisation Committee may in its discretion seek such other information or evidence as may be expedient and desirable in the peculiar facts of the case.

9. The provisions quoted are in fact safeguards built in the Act and the Rules to exclude commercial transaction and to ensure that there is no exploitation of any poor or woman. Organ transplantation without one's independent consent is to be stopped. In this case, since the Authorisation Committee did not record its minute nor the interviews of the donor and her relations have been videographed, as required in law, this Court called the DMET(O) as well as the donor and her daughter to the Court. They were present on 9.4.2013. On our query, the donor and her daughter stated that out of own volition, the donor is willing to donate her kidney to the husband of the petitioner. They also state that the donor is staying with the petitioner at Cuttack since last three years. Prior to that, the donor was staying with the family of the petitioner at Rourkela. The petitioner's paternal house and the house of the donor are at same place at Tata Nagar and both of them are neighbour. Miss. G. Laxmi, the daughter of the donor, who is present in the Court, stated that they came in contact of the petitioner and her husband at Tata Nagar and the recipient is looking after her family after death of her father. The donor states that her family is part and parcel of the petitioner's family. It is further noted that Miss. G. Laxmi, the daughter of the donor, is a student of Diploma in Mechanical Engineer at Tata Nagar and she seems to be aware of her mother's intention to donate a kidney to the recipient, i.e. the petitioner's husband. As far as provision of Rule Rule-6F(g) of the Rules is concerned the donor did not have a photo identity card, but the Corporator of Ward No. 36 of Cuttack Municipal Corporation has identified her and issued a certificate to that effect, so that the identity of the donor and her independent consent are confirmed. Moreover, the Authorisation Committee do not even suggest that there has been any commercial transaction between the donor and the recipient. There is no finding that the donor is being exploited. Therefore, this Court finds no reason to uphold the decision of the Authorisation Committee to refuse "No Objection Certificate" to the donor and the recipient for transplantation of kidney. In that view of the matter the writ petition is allowed. We direct opposite party No. 2, the DMET(O), to issue "No Objection Certificate" for performance of surgery for transplantation of kidney in Apollo Hospital, Bhubaneswar in favour of the husband of the petitioner, who is to receive a kidney on donation from Smt. G. Vijayalaxmi.

Pradip Mohanty, J.

I agree