

\$~58

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 8671/2022

NEHA DEVI

..... Petitioner

Through: Mr. Mahesh Verma, Adv. alongwith
petitioner in person.

versus

GOVT OF NCT OF DELHI & ORS.

..... Respondents

Through: Mr. Karan Bhardwaj, ASC for R-1
and 2.

Mr. Sidharth Panda, Adv. for R-3

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

30.05.2022

%

1. This writ petition has been preferred seeking the following reliefs:-

“i) Directing the respondents no.1 to 3 to permit the petitioner to give her Kidney to her father Sh. Gulab Singh without obtaining consent, permission and authorization from her husband Sh. Dharmender;

ii) Directing the respondents no.1 to 3 to conduct the operation of Sh. Gulab Singh on an early date as the given date 03.06.2022 is too long;”

2. The petitioner seeks to donate her kidney to her ailing father. Along with the writ petition, the relevant medical records have also been placed and which suggest that a transplant is recommended. The petitioner alleges that although she is ready and willing to donate her organ to her ailing father, her application is not being processed since the respondent hospital is insisting on a submission of a No Objection Certificate from her husband.

3. It is further alleged that the relationship between the petitioner and her husband are presently estranged and consequently it would not be

practical or possible to obtain the same.

4. In the considered view of this Court, the question which stands posited would have to be essentially answered on the anvil of Rule 18 of the **Transplantation of Human Organs and Tissues Rules, 2014** which reads thus:-

18. Procedure in case of near relatives. — (1) Where the proposed transplant of organs is between near relatives related genetically, namely, grandmother, grandfather, mother, father, brother, sister, son, daughter, grandson and granddaughter, above the age of eighteen years, the competent authority as defined at rule 2(c) or Authorization Committee (in case donor or recipient is a foreigner) shall evaluate: -

(i) documentary evidence of relationship e.g. relevant birth certificates, marriage certificate, other relationship certificate from Tehsildar or Sub-divisional magistrate or Metropolitan Magistrate or Sarpanch of the Panchayat, or similar other identity certificates like Electors Photo Identity Card or AADHAAR card; and

(ii) documentary evidence of identity and residence of the proposed donor, ration card or voters identity card or passport or driving license or PAN card or bank account and family photograph depicting the proposed donor and the proposed recipient along with another near relative, or similar other identity certificates like AADHAAR Card (issued by Unique Identification Authority of India).

(2) If in the opinion of the competent authority, the relationship is not conclusively established after evaluating the above evidence, it may in its discretion direct further medical test, namely, Deoxyribonucleic Acid (DNA) Profiling.

(3) The test referred to in sub-rule (2) shall be got done from a laboratory accredited with National Accreditation Board for Testing and Calibration Laboratories and certificate shall be given in Form 5.

(4) If the documentary evidences and test referred to in sub-rules (1) and (2), respectively do not establish a genetic relationship between the donor and the recipient, the same procedure be adopted on preferably both or at least one parent, and if parents are not available, the same procedure be adopted on such relatives of donor and recipient as are available and are willing to be tested, failing which, genetic relationship between the donor and the recipient will be deemed to have not been established.

(5) Where the proposed transplant is between a married couple the competent authority or Authorization Committee (in case donor or recipient is a foreigner) must evaluate the factum and duration of marriage and ensure that documents such as marriage certificate, marriage photograph etc. are kept for records along with the information on the number and age of children and a family photograph depicting the entire family, birth certificate of children containing the particulars of parents and issue a certificate in Form 6 (for spousal donor).

(6) 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 Competent Authority or Authorisation Committee as the case may be, may in its discretion seek such other information or evidence as may be expedient and desirable in the peculiar facts of the case.

(7) The medical practitioner who will be part of the organ transplantation team for carrying out transplantation operation shall not be a competent authority of the transplant hospital.

(8) The competent authority may seek the assistance of the Authorisation Committee in its decision making, if required. “

5. As is manifest from a reading of Rule 18, where the proposed transplant is to be made by a close relative, which would include a daughter, documentary evidence which is required to be submitted is clearly set forth in clauses (i) and (ii) of the Rule.

6. The Court also takes note of Rule 22 which reads as follows:-

“22. Precautions in case of woman donor.- In case where the donor is a women, greater precautions ought to be taken and her identity and independent consent should be confirmed by a person other than the recipient.”

7. As this Court views Rule 18, it is evident that the statute does not contemplate or mandate spousal consent being obtained. At least such a stipulation does not stand expressly engrafted in the Rules. Rule 18 also does not envisage or mandate a No Objection Certificate being obtained from the spouse of the proposed donor. Rule 22, while prescribing that in

case where a donor is a woman greater precaution ought to be exercised, also does not mandate a No Objection Certificate being obtained from the spouse. All that the said Rule requires is her independent consent being confirmed by a person other than the beneficiary. The Court also bears in mind that in the case of a near relative, consideration is essentially liable to be accorded to ascertain whether the donor has come forward voluntarily and has offered the organ out of “affection and attachment with the beneficiary”. While in terms of Rule 22, a greater degree of scrutiny may be mandated in order to ascertain that the donor has willingly submitted a request, the provisions of that Rule also does not mandate consent of the spouse. All that the said provision mandates is the facet of independent consent being verified and confirmed “*by a person other than the beneficiary*”.

8. The Court further notes that Section 2(f) defines a donor to mean any person who voluntarily authorises the removal of his/her organ. The petitioner being a major, is clearly covered by the aforesaid provision. The petitioner would also clearly fall in the ambit of Section 2(i) as a near relative by virtue of being the daughter of the beneficiary.

9. On a more fundamental plane, the Court recalls the pertinent observations made by the Supreme Court in **Common Cause (A Regd. Society) vs. Union of India & Anr.**¹ where aspects of bodily autonomy, the right to life and privacy were lucidly explained. The Constitution Bench though in that decision dealing with the issue of euthanasia, had also recognised the right of an individual over his/her own body and the same being inextricably connected to the right to life itself and the constitutional

guarantee of dignified existence. The Court deems it apposite to reproduce paragraph 110 of the report which is set out hereinbelow:-

“110. As an autonomous person, every individual has a constitutionally recognised right to refuse medical treatment. The right not to accept medical treatment is essential to liberty. Medical treatment cannot be thrust upon an individual, however, it may have been conceived in the interest of the individual. The reasons which may lead a person in a sound state of mind to refuse medical treatment are inscrutable. Those decisions are not subject to scrutiny and have to be respected by the law as an essential attribute of the right of the individual to have control over the body. The state cannot compel an unwilling individual to receive medical treatment. While an individual cannot compel a medical professional to provide a particular treatment (this being in the realm of professional medical judgment), it is equally true that the individual cannot be compelled to undergo medical intervention. The principle of sanctity of life thus recognises the fundamental liberty of every person to control his or her body and as its incident, to decline medical treatment. The ability to take such a decision is an essential element of the privacy of the being. Privacy also ensures that a decision as personal as whether or not to accept medical treatment lies exclusively with the individual as an autonomous being. The reasons which impel an individual to do so are part of the privacy of the individual. The mental processes which lead to decision making are equal part of the constitutionally protected right to privacy.”

10. In the considered opinion of this Court, the insistence on spousal consent being obtained is clearly ultra vires the provisions of the Act. In the absence of any statutorily ordained requirement of spousal consent being engrafted in the Act, the Court finds itself unable to countenance the objection taken by the respondent hospital. More fundamentally, insistence on such a requirement would also impinge upon the right of the petitioner to be in control of her own body. That right which is personal and inalienable cannot be recognised as being subject to the consent of the spouse. A spouse, in any case, cannot be recognised in law to have a superior or supervening right to control a personal and conscious decision of the donor.

¹ (2018) 5 SCC 1

This would necessarily be subject to the caveat of the competent authority duly ascertaining that the consent has been given freely and is an informed choice and decision of the donor.

11. Accordingly and for all the aforesaid reasons, the writ petition shall stand disposed of with a direction to the respondent hospital to process the application and request as made by the petitioner in accordance with law bearing in mind the statutory provisions contained in Rules 18 and 22. The application of the petitioner may be duly examined and placed before the competent authority of the hospital. The Court only observes that the aforesaid application shall not be denied solely on the ground that it is not accompanied with a No Objection Certificate of the spouse of the petitioner.

YASHWANT VARMA, J.

MAY 30, 2022*/neha*