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**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE VINAY SARAF**

ON THE 4th OF APRIL, 2024

WRIT PETITION No. 5166 of 2024

BETWEEN:-

**ANNU BAI W/O SHRI ASHOK, AGED ABOUT 45 YEARS,
OCCUPATION: HOUSEWIFE R/O WARDNO 12
BHAISATOL NARSINGGARH DISTRICT RAJGARH
(MADHYA PRADESH)**

.....PETITIONER

(BY SHRI ANKIT SAXENA - ADVOCATE)

AND

- 1. THE STATE OF MADHYA PRADESH THROUGH
SECRETARY DEPARTMENT OF HEALTH VALLABH
BHAWAN BHOPAL (MADHYA PRADESH)**
- 2. BANSAL HOSPITAL SHAHPURA BHOPAL
THROUGH CHIEF EXECUTIVE OFFICER /
MEDICAL SUPERINTENDENT BHOPAL (MADHYA
PRADESH)**
- 3. ASHOK VANSHAKAR S/O LATE RAMCHARAN R/O
WARD NO.12 BHAISATOL NARSINGGARH
DISTRICT RAJGARH (MADHYA PRADESH)**
- 4. DISTRICT / STATE AUTHORIZATION COMMITTEE
DIRECTORATE OF HEALTH SERVICES SHYAMLA
HILLS BHOPAL THROUGH ITS CHAIRMAN
(MADHYA PRADESH)**

.....RESPONDENTS

***(SHRI LALIT JOGLEKAR - GOVERNMENT ADVOCATE FOR RESPONDENT
NO.1 & 4 AND SHRI R.N. CHATURVEDI - ADVOCATE FOR RESPONDENT
NO.2)***

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*This petition coming on for admission this day, the court passed the
following:*

ORDER

Petitioner, who is a proposed donor of kidney has approached this Court under Article 226 of the Constitution of India seeking following reliefs:-

"A. That this Hon'ble Court may kindly be pleased to issue writ in the nature of mandamus directing respondent no.2&4 to proceed with the Kidney Transplantation procedure pursuant to the medical fitness certificate of petitioner and the respondent no.4 may be directed to forthwith grant the permission to respondent no.2.

B. That this Hon'ble Court may kindly be pleased to issue writ in the nature of mandamus directing respondent no.2 & 4 to proceed with transplantation without demanding NOC/affidavit of respondent no.3 i.e. the husband of petitioner.

C. Any other relief or orders which this Hon'ble Court deemed fit and proper under the facts and circumstances in the interest of justice.

2. The short facts of the case are that, brother of petitioner named Ashok Pawar, aged about 63 years is suffering from CKD stage 5-D and is on Dialysis. Doctors have suggested for kidney transplantation and the petitioner has undergone all the required test, whereby she is found competent and fit to donate her one kidney to her brother. The family members of the petitioner have given their consent for the same but her husband who is respondent No.3 in the present petition has not issued no objection. Respondent No.2/Bansal Hospital, Shahpura, Bhopal is not ready to process the documents of the petitioner for the purpose of approval by the competent authorization committee formulated under the Transplantation of Human Organs and Tissues Rules, 2014, on the ground that the petitioner's/husband has not issued NOC or Affidavit.
3. By the present petition, petitioner has complained the inaction of the respondent/Hospital to process the matter before the competent authorization committee. The case of petitioner is that if the Kidney Transplant is not done promptly, the life of brother of the petitioner will be at high risk.
4. Learned counsel appearing on behalf of petitioner submits that there is no

provision either in Transplantation of Human Organs and Tissues Act, 1994 or in the Rules of 2014 formulated under the provisions of the Act that the Kidney may be donated only after the written NOC/consent of the spouse. He further submits that other family members have already consented and the competent doctor has also issued certificate of medical fitness of living donor issued upon Form-4 as per Rule 5(3) (b) of the Rules, 2014 and therefore, respondents/hospital be directed to place the matter before the competent authorization committee and the competent authorization committee be also directed to take decision at the earliest, without insisting upon filing of the NOC/Affidavit of the husband of petitioner.

5. Learned counsel for petitioner relied on the judgment passed by Delhi High Court in **W.P.C. 8671/2022 on 30.5.2022 (Neha Devi vs. Govt. of NCT of Delhi and others)**, whereby after considering the provisions of Rules 18 and 22, Delhi High Court opined that there is no requirement to obtain the NOC/Affidavit of the spouse of petitioner for the purpose of donation of kidney to her ailing father . The relevant paras of the judgment reads as under:-

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 woman, 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) v. Union of India¹ 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 herein below:—*

“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. 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.

6. He further relied on the order passed by the coordinate Bench in **W.P. No.235/2022 on 15.2.2022 in the matter of Meena Devi vs. State of M.P. and others**, wherein the coordinate Bench held as under:

5. The perusal of the schemes under the Act and the Rules as referred above shows that the Authorization Committee has to record its satisfaction that the applicants have complied with all the requirements of the Act and Rules made there under. Under such circumstances, the rejection of the request by the respondent/Hospital on the ground of non-issuance of the NOC by the husband of the petitioner is not sustainable and therefore, the same is set aside. The respondent/Hospital is directed to immediately comply with all requirement at its end and sent the matter to the Authorization Committee for taking appropriate decision in accordance with the mandates of the Act and the Rules made there under. Let the Hospital send recommendation by 17-2-2022. The Authorization Committee is also directed to take the decision on the request of petitioner as early as possible as the issue is related to the life of the son of the petitioner.

7. He further relied on the order passed by the coordinate Bench in **W.P. No.870/2024 (Vikas Agrawal and another vs. State of M.P. and others)** decided on **5.2.2024**, whereby coordinate Bench has issued direction to ignore the objection raised by the wife of donor and permitted the petitioner to proceed with the Transplantation of liver from petitioner No.1 to his brother/patient, after completing all the necessary formalities.

8. Learned counsel for the petitioner prays for allowing the present petition in the aforesaid facts and circumstances.

9. Learned counsel appearing on behalf of respondent No.2/Bansal Hospital submits that as per Rule 22 of Transplantation of Human Organs and Tissues Rules, 2014, if the donor is woman greater precaution ought to be taken and her identity and independent consent should be confirmed by a person other than the recipient. He submits that in compliance of Rule 22, a format has been prescribed and as per check list of the documents, respondent/hospital has asked for NOC/Affidavit of the husband of the petitioner. He further submits that if all the required documents will not be forwarded along with the case before the competent authorization committee, it will not be possible for the committee to take decision and that will delay the process of grant of permission. He further submits that respondent/hospital has no objection if this Court issues direction to place the matter before competent authorization committee, without obtaining NOC/Affidavit of the husband.

10. Learned Government Advocate appearing on behalf of respondent No.1 and 4 submits that as per Rule 18 and 22 of the Rules, 2014, it is desirable to obtain the independent consent of the close relative of a woman, who has proposed to donate his organ to any near relative. Rules 18 and 22 reads as under:-

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 Authorisation 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 Authorisation 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.

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

recipient.

11. He further submits that authorization committee has to decide the application on the basis of available materiel and for the purpose of considering the independent consent, NOC/Affidavit of the husband of a woman donor is required as precautionary major.

12. Notice of this petition has been issued to respondent No.3 through Humdust mode, but respondent No.3 has refused to accept the notice.

13. After considering the averments of the petition, arguments of the rival parties and orders passed by coordinate Benches, it appears that petitioner who is sister of ailing patient aged about 45 years is interested to donate her one kidney to her brother for the purpose of saving his life and after completing the medical formalities, registered medical practitioner of Bansal Hospital has issued medical fitness certificate to living donor in Form-4 by which he has certified that the donor is competent and fit to donate the kidney. As per the provision of Act, 1994, the permission for removal of one kidney from the body of the petitioner and transplant the same in the body of her brother is required to be obtained from authorization committee constituted under clause (a) or clause (b) of sub section (4) of Section 9 of the Act. The authorization committee, upon the joint application of the donor and recipient will decide the issue for grant of approval to remove organ from the body of donor and transplantation of the human organ in the body of recipient, after holding an inquiry and after being satisfied that the applicant have complied with all the requirement of the Act.

14. Sub Section (3) of Section 9 of the Act, 1994 prescribed that any human organ removed from the body of living donor shall not be transplanted into the body of recipient, unless donor is near relative of the recipient however, there is

no provision in the Rules to insist upon the filing of NOC/Affidavit of the husband of a woman donor. Any other person, except the recipient, may confirm the independent consent of the donor and that will suffice the compliance of Rule 22 of Rules, 2014.

15. In the considered opinion of this Court, insistence of consent of spouse, without any requirement in the Act or Rules, cannot be given seal of approval and is liable to be quashed and the Hospital cannot insist upon NOC/Affidavit of husband of donor. Any other close relative of a woman donor, except recipient, may execute the document as required by the check list.

16. In the above factual and legal position, the present petition is allowed. Respondent No.2/Bansal Hospital, Shahpura, Bhopal is directed to process the application/request of the petitioner in accordance with law, by forwarding the same after completing all the formalities to the competent authorization committee, at the earliest, preferably within three days from the receipt of the copy of this order and thereafter the competent authorization committee shall decide the issue of grant of permission as per the provisions of Act/Rules, without insisting upon filing of NOC/Affidavit of the husband of petitioner, within further period of fifteen days.

17. With the aforesaid, present petition is disposed of. No order as to costs.

(VINAY SARAF)
JUDGE