

THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

W.P.NO.31335 OF 2018

O R D E R

This writ petition is filed for a writ of mandamus declaring the orders of the 3rd respondent – State Authorization Committee for Organ Transplant, Telangana State, represented by its Chairman, in Rc.No.19711/MAK/2018 dated 18.05.2018, in rejecting the case of the petitioner for approval of kidney transplantation though all the ingredients are satisfied as per law and the further inaction of the 2nd respondent – State of Telangana, represented by its Principal Secretary, Health, Medical and Family Welfare Department – the Appellate Authority, in not passing orders on the appeal dated 20.05.2018, though the 1st petitioner's health is deteriorating day by day, as illegal and arbitrary and consequently, directing the respondents 2 and 3 to immediately grant approval for the kidney transplantation from petitioner No.2 to petitioner No.1, forthwith.

2. The case of the petitioner No.1 is that he is working in transport department and is the sole breadwinner and is a diabetic patient for the past twenty five years and due to renal failure, has been undergoing dialysis thrice a week at Centry Hospital, 8-2-2703, Road No.12, Banjara Hills, Hyderabad, for the last ten months from August, 2017. The doctors, who have been treating him regularly, for the three years, have strongly recommended surgical extraction and transplantation of a new kidney in

its place. Due to prolonged dialysis from August, 2017, the petitioner is experiencing the side effect, which he detailed in the affidavit filed in support of the writ petition.

3. The further case of the petitioner No.1, is that his wife is suffering my psychosis and that his brother and his aged father are diabetic patients and hence, not in a position to donate their kidney. The 2nd petitioner is his cousin. It is stated that the father of the 2nd petitioner Mr. Narayana Swamy and father of the petitioner No.1, are brothers related by blood and thus the 2nd petitioner is his cousin. In the material papers filed along with the writ petition, petitioner No.1 has filed copy of the genealogy of the family tree issued by Tahsildar, Kadiri mandal, to show that she is his blood relative. It is stated that due to strong outstanding association with the 1st petitioner and his family, for the past over 20 years, and seeing his suffering in undergoing dialysis, the 2nd petitioner, on account of love and affection and without there being any monetary consideration or any pressure, has come forward to donate her kidney.

4. It is stated that Dr.Kamal Kiran Nephrologist, Dr. Ravi Kiran, Nephrologists and Dr. K.V.R. Prasad, Urologist at Century Hospital, Hyderabad, interviewed the petitioners 1 and 2 on 26.04.2018 and the same was videoed, which is of a duration of 25 minutes, and sent to the 3rd respondent. In the said video, the doctors have explained the nature of surgeries, which the 1st and 2nd petitioners have to undergo and the

precautions they have to take. The said doctors also interviewed the wife of the petitioner No.1 and the sons of petitioner No.2 and submitted the same to the 3rd respondent - Committee.

5. In the interview before the doctors, the petitioner No.1 has categorically stated that the 2nd petitioner has voluntarily come forward out of sheer love and affection and seeing his misery and deteriorating health condition and that he has not pressurized her, nor promised or paid any monetary consideration to anybody. Similarly the 2nd petitioner has also stated about the long association with the family of the 1st petitioner and her love and affection for donating the kidney to the 1st petitioner. The video prepared by the hospital along with the affidavits of petitioners 1 and 2 and the medical record, were sent to the committee for approval.

6. The 3rd respondent – authorization committee, vide proceedings dated 18.05.2018 rejected to grant approval. Aggrieved by the same, petitioners preferred appeal to the 2nd respondent. As no orders are being passed and the health condition of the petitioner No.1 is deteriorating, present writ petition is filed for a direction to respondents 2 and 3 to grant approval for transplantation of kidney.

7. Learned counsel for the petitioners reiterating the above averments made in the affidavit filed in support of the writ petition submits

that the 2nd petitioner, who is the cousin of the petitioner No.1, by seeing the plight of petitioner No.1, has voluntarily come forward to donate her kidney, without any coercion or for any monetary consideration and while passing the order dated 18.05.2018, the 3rd respondent, which is the authorization committee under Section 2 (c) of the Transplantation of Human Organs and Tissues Act, 1994 (for short 'the Act'), has not considered the material evidence produced by the petitioners, and that though there is no commercial transaction, on mere suspicion, rejected to grant approval. He further submits that though the petitioners have filed appeal on 20.05.2018, the 2nd respondent - appellate authority, is not disposing of the appeal and that the health of the petitioner No.1 is deteriorating day by day and the hospital also addressed letter to the 2nd respondent dated 13.08.2018 informing the health condition of the petitioner and sought for approval of kidney transplantation, without any further delay. But no orders have been passed. Therefore, the learned counsel seeks for a direction to respondents 2 and 3 to grant approval forthwith.

8. On the other hand, learned Government Pleader for Medical and Health, while not disputing the kidney and other ailments pleaded by the petitioner No.1, produced paragraph-wise remarks, wherein it is stated that during the interview of the 2nd petitioner before the 3rd respondent – authorization committee, it revealed that she belongs to low socio

economic status as per her statement. Learned Government Pleader submits that in view of the said circumstance, the 3rd respondent – committee, was not convinced and accordingly rejected to grant approval. He submits that as the petitioners filed appeal, the said authority will consider the material on record and pass appropriate orders.

9. The facts noted above, needs no reiterating, suffice it note that the petitioner No.1 is suffering from diabetics and due to renal failure, has been on dialysis thrice a week at Century Hospital from August, 2017 and the doctors have advised for surgical extraction and transplantation of a new kidney in its place and in the writ affidavit, he has stated the side effects. The 2nd respondent, who is the cousin of the petitioner No.1, has voluntarily come forward out of love and affection, without there being any monetary consideration to donate her kidney. The 3rd respondent rejected the approval. The relevant portion of the order of rejection of approval dated 18.05.2018, passed by the 3rd respondent reads as under:

“The Committee is “Not convinced” regarding altruistic nature of donation. Hence, permission is “Not Granted” for kidney transplantation in respect of Mr.C.Seshadri (Recipient).”

From a reading of the above portion of the order, it goes to show that no reasons have been recorded. In the paragraph-wise remarks, the respondents sought to explain the reasons, by stating that as the 2nd petitioner belong to low socio economic status as per the statement

given by her before the authorization committee, the committee is not convinced and hence the approval was not granted.

10. It is well settled that the impugned order itself shall contain reasons and the same cannot be supplemented by way of affidavits or by other material.

11. This court considering similar facts and circumstances, in W.P.No.20452 of 2018 dated 22.06.2018, while noting the objects and the reasons of the Act and the relevant provisions, held that the object of the legislation is not to prohibit, but to regulate the removal and transplantation of human organs and to prevent commercial dealing in allowing transplantation of organs. This court, further considering various judgments, held that the approach of the committee, shall be pragmatic and its discretion has to be used judiciously, and that mere suspicions or economic disparity, cannot be a ground for rejection of approval. The relevant portion of the order is as under:

“Before considering the contentions of the learned counsel, first it is necessary to note the object of the Act; and the relevant provisions under Section 9(3) of the Act and Rule 7(3) of the Rules, since the donor is not the relative of the recipient.

Paragraph No.3 of the Statement of Objects and Reasons of the Act, reads thus:

“Against this background, it is considered necessary to enact a comprehensive law for regulating the removal and transplantation of human organs and for preventing commercial dealings in organs by providing punishment for such dealings.”

9. Restrictions on removal and transplantation of human organs or tissues or both:

(3) If any donor authorizes the removal of any of his human organ or tissues or both 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 or tissue or both shall not be removed and transplanted without the prior approval of the Authorisation Committee.

Rule (7) Authorisation Committee:

(3) When the proposed donor and the recipient are not near relatives, the Authorisation Committee shall, --

- (i) evaluate that there is no commercial transaction between the recipient and the donor and that no payment has been made to the donor or promised to be made to the donor or any other person;
- (ii) prepare an explanation of the link between them and the circumstances which led to the offer being made;
- (iii) examine the reasons why the donor wishes to donate;
- (iv) examine the documentary evidence of the link, e.g. proof that they have lived together, etc.;
- (v) examine old photographs showing the donor and the recipient together;
- (vi) evaluate that there is no middleman or tout involved;
- (vii) evaluate that financial status of the donor and the recipient by asking them to give appropriate evidence of their vocation and income for the previous three financial years and any gross disparity between the status of the two must be evaluated in the backdrop of the objective of preventing commercial dealing;
- (viii) ensure that the donor is not a drug addict;
- (ix) ensure that the near relative or if near relative is not available, any adult person related to donor by blood or marriage of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ or tissue, the authenticity of the link between the donor and the recipient, and the reasons for donation, and any strong views or disagreement or objection of such kin shall also be recorded and taken note of.

From a reading of statement of objects and reasons of the enactment and the provisions, it is clear that the object of the legislation is not to prohibit, but to regulate the removal and transplantation of human organs and to prevent commercial dealings in allowing transplantation of organs. Section 9 of the Act, provides certain restrictions and under sub section 3 of the said provision, where the donor is not a near relative of the recipient, such human organ or tissue or both, shall not be removed and transplanted without the prior approval of the Authorization Committee, and Rule 7(3) of the Rules mandates the Authorization Committee to satisfy with regard to conditions enumerated therein before granting approval for removal of the human organ or tissue.

Sub rule (3) of Rule 7 contemplates that the Authorization Committee before approving the transplantation, shall evaluate that there is no commercial transaction between the recipient and the donor and that no payment is either made or promised to be made; prepare an explanation of the link between them and the circumstances leading to such donation of human organ; reasons for such donation of organ; examine the documentary evidence of their link with proof viz., photographs; to evaluate that there is no middleman or tout involved; evaluate the financial status of the donor to ensure that there is no commercial transaction and; to interview near relative, or if no near relative is available to interview one adult person related to the donor by blood or marriage of the proposed unrelated donor.

....

The quintessence of the above judgments is that the Authorization Committee has to inquire whether there has been a commercial transaction between the donor and the recipient. If the result of the inquiry is in the negative, then evaluating the evidence on record, it has to grant approval for transplantation. The approach of the Committee shall be pragmatic and its discretion has to be used judiciously, and that mere suspicion or economic disparity cannot be a ground for rejection of approval.

12. In the present case, the 3rd respondent, which is the primary authority, has not considered the affidavits of the petitioners 1 and 2, their statements before the doctor, which was videoed, and the material evidence relied on by the petitioners, was also not referred to and the impugned order of rejection was passed in a cryptic manner, which amounts to flagrant violation of principles of natural justice.

13. The 3rd respondent passed the order of rejection on 18.05.2018 and the petitioners have filed appeal on 20.05.2018 and the same is not disposed of even after lapse of about four months.

14. The submission of the learned counsel for the petitioner is that the condition of the petitioner No.1 is deteriorating day by day and any delay in granting approval would further affect his condition. In this regard, he produced letter dated 13.08.2018 addressed by the hospital to the 2nd respondent – appellate authority. The said letter reads as under:

“This is to certify that Mr. Seshadri C. is suffering from renal failure and situation arisen such that he needs to undergo immediately renal transplant. Side effects such as infections due to prolonged dialysis started deteriorating his health from bad to worse.

So, I humbly request to approve for kidney transplantation without further delay considering his health before going out of control.”

15. Writ petition was filed on 30.08.2018. On 05.09.2018, matter was adjourned at the request of learned Government Pleader for Medical and Health, for instructions. On 10.09.2018, this court passed the following interim order:

“Learned counsel for the petitioners submit that though the petitioners filed appeal on 20.05.2018 against the proceedings passed by the 3rd respondent on 18.05.2018 and though personal hearing of the petitioners was done on 30.07.2017, no orders are passed in the appeal till date; and that meanwhile 1st petitioner’s health is deteriorating day by day.

It is not known when the petitioners are expressing urgency in the matter, why the 2nd respondent has not passed any orders after hearing the petitioners personally.

In view of the same, the 2nd respondent is directed to take action on the appeal filed by the petitioners dated 20.05.2018, after considering various contentions raised by the petitioners, in accordance with law, keeping in view the object and the spirit of the Transplantation of Human Organs and Tissues Act, 1994, within a period of three days from today.

Learned Government Pleader for Medical and Health is to inform the 2nd respondent about the same.

Post after one week in the motion list.”

16. Material on record show that copy of the above said interim order was furnished to the respondents and to the Government Pleader for Medical and Health and Family Welfare (TS), on the same day.

17. Today, learned Government Pleader for Medical and Health could not inform the action taken by 2nd respondent in pursuance of the above interim directions of this court and he again seeks time for instructions.

18. At the cost of repetition it is to be seen that the claim of the petitioners is that petitioner No.2, who is the cousin of petitioner No.1, out of sheer love and affection and without there being any pressure or monetary or commercial transaction, is intending to donate the kidney and as per the medical record, the condition of the petitioner No.1 is critical and as already noted above, economic disparity, cannot be ground for rejection of approval. Moreover, as already noted above, the

3rd respondent, which is the primary authority, without recording any reasons and considering the material evidence produced by the petitioners, merely noted that it is 'not convicted' and rejected the approval, which is in violation of principles of natural justice. Further, though the appeal before the 2nd respondent was filed on 20.05.2018 and the hospital also addressed letter dated 13.08.2018, informing the health condition of the petitioner No.1, no action has been taken. After filing of the writ petition on 30.08.2018, this court granted time on 5.09.2018 for instructions and as no instructions were reported, by interim order dated 10.09.2018, specifically directed the 2nd respondent to take action on the appeal filed by the petitioners within three days, but till date this court is not reported about the action taken by the 2nd respondent and the learned counsel for the petitioners submit that no orders have been passed in the appeal. These circumstances suggest the recalcitrant and callous attitude on the part of the 2nd respondent in considering the appeal filed before him and in complying with the directions of this court.

19. In view of these facts and circumstances, and in order to prevent miscarriage of justice, this court, in exercise of jurisdiction under Article 226 of the Constitution of India, is inclined to direct the 3rd respondent to grant approval forthwith.

20. In similar facts and circumstances a learned single Judge of High Court of Delhi in *PRAVEEN BEGUM vs. APPELLATE AUTHORITY*¹ relying on the judgment of the Apex Court in *COMPTROLLER AND AUDITOR GENERAL OF INDIA GIAN PRAKASH, NEW DELHI & ANR v. K.S. JAGANNATHAN AND ANR*², held that in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or given directions which the Government or a public authority should have passed or exercised its discretion at a proper level. The relevant portion is thus:

“83. In the light of the aforesaid facts, circumstances, discussion and the law, in my view, the impugned decision of the Authorization Committee as well as the appellate authority are wholly unsustainable and, accordingly, they are quashed. The question is, at this stage, what should be the approach of the Court – whether the matter should be remanded back to the Authorisation Committee or the appellate authority for consideration, or whether the court would be justified in directing the Authorization Committee to grant its approval without any further examination of the matter by it.

84. The Supreme Court in *Comptroller and Auditor General of India Gian Prakash, New Delhi* (supra) held in para 20 that in an appropriate case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or given directions which the Government or a public authority should have passed or exercised its discretion at a proper level.

85. In the present case, the petitioner No.1 has been in need of a kidney replacement since June, 2011. The joint application for seeking the approval of the Authorisation Committee was submitted by the petitioners in August, 2011. Over this period of time, the condition of the petitioner No.1 has only deteriorated and she requires dialysis thrice a week. Even from the interviews of petitioner No.1 conducted on different dates, her deteriorating condition of her health is evident.

86. Considering these facts and circumstances, and the urgency of the matter, I am inclined to require the Authorization Committee to forthwith grant its approval to the case of the petitioners for donation of one kidney by petitioner No.2 to petitioner No.1 in terms of their application. The formal approval should be granted within two days, failing which it shall be deemed that the said formal approval stands granted.”

21. For the foregoing reasons, order dated 18.05.2018, passed by the 3rd respondent is set aside and the said respondent is directed to

¹ 189(2012) DLT 427

² (1986)2 SCC 679

forthwith grant approval for the kidney transplantation from petitioner No.2 to petitioner No.1.

22. Writ petition is accordingly allowed.

23. Interlocutory applications pending, if any, shall stand closed.

No costs.

A.RAJASHEKER REDDY,J

DATE:17—09—2018

Note:
C.C. by tomorrow.
B/O
AVS

