IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8533 OF 2024

1. Shrikant Hanmantrao Beedkar
Age 65 years, Occu: Business,
R/o Flat No. 402, Digambar Residency,
Behind Tiny Angles School, Laxminagar,
Shivajinagar, Nanded Dist. Nanded

2. Sunita Shrikant Beedkar, ... **Petitioners**
Aged 40 years, Occu: Household,
R/o as above.

VERSUS

1. The State of Maharashtra,
Through its Secretary,
Public Health Department,
Mantralaya, Mumbai-32

2. The Secretary and Appropriate Authority
and Director of Medical Education,
Maharashtra State, Mumbai

3. The Chairman,
Authorization Committee and Dean,
Government Medical College, Sasoon
Hospital, Pune, District Pune

4. The Competent Authority, ... **Respondents**
Shri Ganga Hospital,
Department of Nephrology,
Wadia Factory Area, Shivaji Nagar,
Nanded, Dist. Nanded

Mr. Y. K. Bobde a/w Mr. A. B. Shinde, Advocates for the Petitioners
Mr. V. M. Kagne, AGP for Respondent Nos. 1 to 3
Mr. A. R. Tapse, Advocate for Respondent No.4.

CORAM : RAVINDRA V. GHUGE &
Y. G. KHOBRAGADE, JJ.

DATE : 23rd August, 2024

ORAL JUDGMENT (Per: Ravindra V. Ghuge, J.):

1. **Rule.** Rule made returnable forthwith and heard finally by the consent of the parties.

2. The Petitioners are a married couple. Petitioner No.1 husband has separated from his first wife and the marriage has been dissolved vide judgment dated 15.11.2008 delivered in Petition No.F-25/2008, by the learned Family Court, Aurangabad. Petitioner No.1, thereafter, married Petitioner No.2 and the Certificate of Registration of Marriage dated 12.09.2016, is issued by the Marriage Registration Office (wrongly printed as Marriage Regestion Office), Hingoli. The couple is married for over eight years.

3. The issue brought up before this Court is with regard to Respondent No.4 Hospital, refusing to process the case of the Petitioners for donation of one Kidney, by Petitioner No. 1 to Petitioner No.2. Petitioner No.1 is the proposed donor and Petitioner No.2 is the proposed recipient. The insistence of the Hospital for 'consent' of two close relatives, is on the basis of Section 3(2) of the Transplantation of Human Organ and Tissues Act, 1994. According to the Hospital, unless two close relatives of the Petitioners give their consents, the Hospital

cannot process the case of Petitioner No.2 for a kidney transplantation surgery.

4. The learned Advocate for the Hospital is instructed to say that unless the close relatives give their consents, the Respondent Hospital would not accept the case of the Petitioners for kidney transplantation surgery. Reliance is placed on the definition of 'near relatives' as engrafted below Section 2(i).

5. The learned Advocate for the Petitioners submits that the biological son and daughter of Petitioner No.1, from his first marriage, have developed animosity towards their father only because, he divorced their mother and has remarried. He further submits that the biological brother of Petitioner No.1, also does not desire to give his consent as he is hurt on account of Petitioner No.1 marrying Petitioner No.2. The parents of Petitioner No.1 are not alive. Petitioner No.1 is circumspect as to whether any of his other close relatives would be extending their consents (at least 2 are required), keeping in view that that Petitioner No.1 divorced his first wife in 2008 and has married Petitioner No.2, in 2016.

6. The issue is, as to whether a patient as like Petitioner No.2, who has suffered chronic kidney failure, should be made to suffer the disease only because the close relatives of Petitioner No.1 are not

willing to give their consents. The reports of various nephrologists placed on record indicate that Petitioner No.2 has already suffered a chronic kidney failure and presently she is frequently required to undergo dialysis as is medically required.

7. The learned Advocate for the Petitioners submits that Petitioner No.2 is not only silently suffering her illness, but, dialyses is causing further agonies to her and as a 'kidney transplant' procedure is the only option available, there is no choice for the Petitioner No.2 to receive a kidney or wait for the inevitable to happen.

8. The learned Advocate for the Petitioners places reliance upon the judgment delivered by the Delhi High Court in the matter of **Neha Devi Vs. Government of NCT of Delhi,** dated 30.05.2022, in Writ Petition (Civil) No. 8671 of 2022. He refers to paragraph Nos. 5 to 11, which read thus:

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

9. He then places reliance upon a judgment delivered by the Madhya Pradesh High Court, dated 15.02.2022, in **Meena Devi Vs. State of M.P.** (Writ Petition No. 235 of 2022), wherein the Court has concluded in paragraph No.5 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 17.02.2022. 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."

10. He further places reliance upon the judgment delivered by the learned Single Judge of the Madhya Pradesh High Court in the matter of **Annu Bai Vs. The State of M.P., 2024 SCC Online MP 1925,** wherein, the learned Single Judge has drawn conclusions in paragraph Nos. 10 to 16, as under:

> *"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:-*
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> > *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. "

11. It is beyond debate that Petitioner no.2, cannot be made to suffer the illness and wait for disastrous effects to occur. Petitioner No.1 is legally married to Petitioner No.2. He is willing to donate his kidney to Petitioner No.2, subject to all the required tests, including DNA profiling and HLA cross match and other tests. If there is "negative cross match", it would indicate a zero risk for the donor as well as the recipient. However, if the said test returns a result of "doubtful negative cross match" (presence of significant antibody reactivity), it would indicate that there could be a serious concern about the recipient successfully receiving the kidney.

12. If a Patient's lymphocyte cross-match test report indicates a doubtful negative results, this would pose a significant risk for the success of the kidney transplant. A clear negative report is required for a successful transplant, as a doubtful report may result in rejection, including the possibility of hyper-acute rejection during the transplantation process. The possibility of proceeding with the transplant in such a case hinges on obtaining a clear negative report of lymphocyte cross-match within a specified time frame which is usually 72-96 hours prior to the kidney transplant. It is ultimately these tests

which would decide as to whether the Hospital can proceed to carry out surgery for donation of one kidney by Petitioner No.1 husband to be received by Petitioner No.2 wife.

13. In view of the above, **this Writ Petition is allowed** only to the extent of directing Respondent No.4 Hospital to proceed with the further tests for assessing whether the Kidney transplantation surgery is medically possible. For the said purpose, the consent forms would be signed by both the Petitioners and based on such consent forms, the Hospital shall proceed to deal with the case.

14. We make it clear that we do not have the expertise to draw any conclusion that the recipient is medically competent to receive the kidney. All this would depend upon the various medical tests and medical protocol to be followed and it is only after the Hospital is convinced that this would be a safe transplant surgery, that they may proceed to initiate such surgery.

15. **Rule is made absolute in the above terms**.

(Y. G. KHOBRAGADE, J.) **(RAVINDRA V. GHUGE, J.)**

JPChavan