

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

Date of decision: 1st September, 2011

+ **W.P.(C) 6105/2011**

% **SADHNA BHARDWAJ**Petitioner

Through: Mr. Dipak Bhattacharya, Adv.

Versus

**THE DEPARTMENT OF HEALTH
& FAMILY WELFARE**

..... Respondent

Through: Mr. Najmi Waziri with Ms. Neha Kapoor, Advs.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

RAJIV SAHAI ENDLAW, J.

1. The petition *inter alia* impugns the communication dated 14.07.2011 by the respondent Directorate of Health Services of the Government of NCT of Delhi intimating rejection of the request of the petitioner for issuance of a No Objection Certificate (NOC) for undergoing kidney transplantation at

Remedy Hospital, Kolkata.

2. The petitioner aged 52 years, a resident of Delhi is stated to be suffering from End Stage Renal Disease and has been advised a kidney transplantation as soon as possible. She further claims that one Smt. Kumkum Ganguly wife of Sri Narayan Ganguli R/o District Hooghly has agreed to donate her kidney to her. Upon the representation of the petitioner against rejection of her request not meeting with success, the present petition has been filed through the son of the petitioner seeking a mandamus to the respondent to consider the application in accordance with law.

3. On contention of the counsel for the petitioner that the medical condition of the petitioner is precarious, notice of the petition of a short date was issued and the counsels have been heard without the respondent filing a counter affidavit, the opposition of the respondent being purely legal.

4. The respondent has rejected the request of the petitioner for issuance of a NOC for the reason of (a) there being no relationship between the petitioner and the prospective donor; and, (b) there being no proof of

association / linkage between the petitioner and the prospective donor or their families.

5. The contention of the petitioner is that she had only sought an NOC from the respondent and the respondent, in the matter of grant of the said NOC was not required to consider the factors aforesaid and the said factors are required to be considered by the competent authority of the place of the intended transplant and which in the present case is Kolkata.

6. The petitioner refers to similar NOCs dated 11.08.2009 and 24.06.2009 issued in the past by the respondent to one Smt. Vandana Gupta and one Smt. Annu Malhotra. The petitioner contends that the respondent in those two cases granted NOCs subject to obtaining approval of the authorities having jurisdiction over the place of intended transplant and without going into the issues on which the NOC has been denied to the petitioner and is thus discriminating against the petitioner and is wrongfully denying the NOC to the petitioner.

7. The counsel for the respondent has fairly stated that in the past, the respondent was issuing such NOCs; it is however stated that the said practice has now been discontinued, finding commercial trade in human organs being involved and further finding that residents of Delhi were flocking to Remedy Hospital, Kolkata for such transplant. It is argued that the respondent has as such started scrutinizing the applications rather than leaving the same to be dealt with by the authorities at Kolkata who appear to be liberal in granting the permission.

8. No fault can be found with the change in the stand of the respondent, if permissible in law. Merely because the respondent has in the past issued NOCs without examining the issues on which NOC has been denied to the petitioner, cannot bind the respondent to issue such NOC to the petitioner also, unless the respondent is shown to be not entitled in law to examine such issues when approached merely for an NOC. A wrongful issuance by the respondent of NOC in the past cannot entitle the petitioner to NOC. The Apex Court in *UOI v. M.K. Sarkar* (2010) 2 SCC 59 has reiterated that there can be no claim based on negative equality. In the circumstances, need has

arisen to examine the law in this regard.

9. The Legislature enacted the Transplantation of Human Organs Act, 1994 to provide a comprehensive law for regulating the removal and transplantation of human organs for therapeutic purposes and for prevention of commercial dealings therein.

- (a) Section 3(1) of the said Act enables a living person to in the prescribed manner and subject to prescribed conditions authorize the removal of any organ of his body for therapeutic purposes.
- (b) Therapeutic purposes have been defined in Section 2(o) of the Act as systematic treatment of any disease or the measures to improve health.
- (c) Section 9 (1) of the Act prohibits (save as provided in Sub Section (3)) an organ removed from the body of any person being transplanted into the body of another person unless the two are “near relative” of each other.

- (d) Near relative is defined in Section 2(i) of the Act as spouse, son, daughter, father, mother, brother or sister.
- (e) Section 9(3) however permits donation of human organ and transplantation thereof amongst non near relatives but only for the reason of affection or attachment of the donor towards the recipient or for any other special reason and with the prior approval of the Authorization Committee.
- (f) Section 9(4)(a) & (b) mandates the Central Government and the State Governments to constitute Authorization Committee for each of the Union Territories and the States respectively.
- (g) Section 9(5) requires the Authorization Committee to, on an application jointly made by the donor and the recipient and after holding an enquiry and after satisfying itself that the applicants have complied with all the requirements of the Act and the Rules made thereunder, grant approval for removal and transplantation of the organ.
- (h) Section 9(6) requires the reasons to be recorded for rejection of

such application.

- (i) Section 10 prohibits hospitals and medical practitioners from conducting removal and transplantation of human organs without obtaining registration for said purposes and Section 14 requires the hospitals engaged in transplantation of organs to be registered with the Appropriate Authority to be constituted by the Central and the State Governments under Section 13 of the Act.
- (j) Section 11 prohibits donation of an organ for any purpose other than therapeutic and Section 12 requires the medical practitioners undertaking the removal or transplantation of organs to explain all possible effects, complications, hazards connected with the removal and transplantation to the donor and the donee respectively.
- (k) Section 17 provides for appeal against orders under Section 9(6) of the Act of the Authorization Committee of rejection of application for approval, to the Central Government or the State

Government constituting such Authorization Committee.

- (1.) Section 19 provides for punishment for commercial dealings in human organs and Section 20 provides for punishment for contravention of provisions of the Act.

10. The Transplantation of Human Organs Rules, 1995 were framed in exercise of powers under Section 24(1) of the Act.

a) Rule 4 requires a medical practitioner to, before removing a human organ from the body of a donor before the donor's death, satisfy himself that the donor has given his authorization in the prescribed form; that the donor is in a proper state of health and fit to donate the organ and the donor is a near relative of the recipient and in cases of donor who is not near relative of the recipient, that the permission from the Authorization Committee for the said donation has been obtained.

b) Rules 4A(4) and 6F(d) require the Authorization Committee to, in case of non near relatives, evaluate that there is no commercial transaction between the recipient and the donor and that there is sufficient explanation

of the link between them and the circumstances which led to the offer being made and the existence of sufficient reasons for donation and of the absence of middleman or tout and of their respective financial status etc; Rule 6F(g) requires the Authorization Committee to, while determining eligibility of prospective donor, to personally interview the donor and minutes of which meeting are to be recorded and meeting videographed.

c). Rule 6B is as under:

“6B. The State level committees shall be formed for the purpose of providing approval or no objection certificate to the respective donor and recipient to establish the legal and residential status as a domicile State. It is mandatory that if donor, recipient and place of transplantation are from different States, then the approval or no-objection Certificate from the respective domicile State Government should be necessary. The institution where the transplant is to be undertaken in such case the approval of Authorization Committee is mandatory.”

11. The question which has arisen in the present petition is dependent upon the interpretation *inter alia* of the aforesaid Rule 6B. While the

counsel for the respondent contends that the Authorization Committee of the place of domicile of the prospective recipient also when approached even for an NOC, is entitled to examine and evaluate in accordance with Rules 4A(4) and 6F(d) (supra), the contention of the counsel for the petitioner is that the Authorization Committee of the place of domicile of the recipient, if not the place of intended transplant, is not required to accord approval for transplant and only required to give NOC and hence not required to evaluate in accordance with Rules 4A(4) and 6F(d) and is only required to satisfy itself of the recipient being a resident within its jurisdiction and of the need of the recipient for a transplant and if so satisfied, to issue a NOC; he contends that the evaluation in accordance with Rules 4A(4) and 6F(d) is to be only by the Authorization Committee of the place where the intended transplant is to be undertaken.

12. Rule 6B (supra) uses two expressions i.e. “approval” and “NOC” with the word “or” between them. It envisages, the State Level Committees providing “approval” or “NOC” to the prospective donor and recipient. It also mandates that where the donor and the recipient and the place where the

transplant is to be undertaken are different, the “approval” or “NOC” from respective domicile State Governments will be necessary. It further makes mandatory the approval from the Authorization Committee having jurisdiction over the institution where the transplant is to be undertaken. It would thus be seen that, the Authorization Committee may be approached for and provide “approval” or “NOC”; when the domicile of donor and recipient is different from place of intended transplant, the “approval” or “NOC” from respective State Government is necessary; however “approval” only from the Authorization Committee of the place of intended transplant is mandatory. An “NOC” by the Authorization Committee of the place of intended transplant is not envisaged. However, when “approval” and when “NOC” is to be issued has not been clarified.

13. The first question which arises is whether NOC is anything different from approval. The expression NOC finds mention in Rule 6B only. As aforesaid, Section 9(3) of the Act requires prior approval of the Authorization Committee for removal and transplantation amongst non near relatives. However, Rules 4A(4) and 6F(d) talk of evaluation only without

using the expression approval or NOC but Rule 6F(h) makes it clear that such evaluation has to be for according or rejecting approval; Rule 6F(h) also does not mention NOC. The legislature in Rule 6B having intentionally used the expression NOC as distinct from the word approval elsewhere in the Act and the Rules, I am unwilling to hold that the two expressions mean the same thing particularly when Rule 6B envisages the Authorization Committees of the places of domicile of prospective donor and prospective recipient issuing either approval or NOC but the Authorization Committee of the place of intended transplant issuing approval and not an NOC. Moreover, while approval connotes a positive affirmation for an intended act, an NOC is a mere no-objection to the intended act. The Rules provide evaluation on the parameters prescribed in Rule 4A(4) and 6F(d) only before granting approval and not before granting NOC. The only evaluation for issuance of an NOC is prescribed in Rule 6B itself i.e. to establish the legal and residential status of the domicile of the State.

14. The Supreme Court in *State Level Committee Vs. M/s Morgardshammar India Ltd.* AIR 1996 SC 524 held that when two

expressions are used simultaneously it would not be reasonable or proper to construe the words “acquired for use” as meaning the same thing as “already in use”. It was further held that such a construction would make the words “acquired for use” superfluous and a surplusage and no such interpretation ought to be adopted by a Court. Moreover, the appearance of the word “or” between two things is meant to exclude one in favour of the other.

15. The petitioner in the present case had approached the respondent only for an NOC and not for an approval. Rule 6B makes the approval mandatory only from the Authorization Committee having jurisdiction over the place of intended transplant. Ofcourse, Rule 6B envisages the Authorization Committee of the place of domicile of recipient when different from the place of intended transplant issuing approval or NOC, but in my opinion the question of the Authorization Committee when not approached for approval, insisting on evaluating the application for NOC as an application for approval or refusing NOC for non-satisfaction of criteria required to be fulfilled for according approval does not arise. The provision for the Authorization Committee of a place of domicile of recipient and which is

not the place of intended transplant issuing approval appears to have been made merely to cover a contingency where the Authorization Committee of the place of intended transplant may require the Authorization Committee of the place of domicile of recipient also to carry out certain evaluation. However, without the recipient approaching the Authorization Committee for approval it cannot insist upon adopting the procedure for according approval. It is only the Authorization Committee of the place of intended transplant which has been empowered to accord approval. This also becomes evident from Clause 7 of Form 10 appended to the Rules being the Proforma of the application for approval and which clause is as under:

“7. As per the Supreme Court’s judgment dated 31.03.2005, the approval / No Objection Certificate from the concerned State/Union Territory Government or Authorization Committees is mandatory from the domicile State/Union Territory of donor as well as recipient. It is understood that final approval for transplantation should be granted by the Authorization Committee/Registered Medical Practitioner, i.e., Incharge of transplant centre (as the case may be) where transplantation should be done ”

The above also clarifies the finality of the decision of the Authorization Committee of the place of intended transplant.

16. At this stage, the judgment dated 31.03.2005 of the Supreme Court referred to in Clause 7 of Form 10 (supra) i.e. ***Kuldeep Singh Vs. State of Tamil Nadu*** (2005) 11 SCC 122 may be noticed. In that case, the prospective donor as well as recipient were from the State of Punjab while the place of intended transplant was in the State of Tamil Nadu. The question was, the approval of Authorization Committee of which State was to be taken. The Apex Court held that the object of the Act being to prevent commercial dealings in human organs, the Authorization Committee is required to satisfy the real purpose of the donor authorizing removal of his organ and concluded that the Authorization Committee of the State to which the donor and donee belong would be better equipped to ascertain the true intent and purpose and to lift the veil if any of projected affection or attachment and that the burden is on the applicants to establish the real intent by placing the relevant material for consideration of the Authorization Committee. It was further held that it is always open to the

Authorization Committee to seek information / material from Authorization Committees of other States.

17. However, after the aforesaid judgment, the Rules were amended with effect from 04.08.2008 and Rule 6B (supra) was inserted. The said Rule 6B makes mandatory either approval or NOC from the State of domicile but makes only the approval mandatory from the place of intended transplant. Thus, while at the time of the aforesaid judgment in ***Kuldeep Singh*** (supra), there was no provision and the Court of its own adjudicated as to which Authorization Committee would be better suited to accord approval, now there is a legislative mandate in the form of Rule 6B.

18. Moreover, in the case before the Supreme Court, both the donor and recipient were from the same State. In the present case, the donor is from the State of West Bengal. As aforesaid, Rule 6F(f) requires the Authorization Committee to personally interview the donor. If it were to be held that the Authorization Committee of Delhi were also to accord approval, it would require the donor to travel from West Bengal to Delhi and which appears avoidable inasmuch as the said task can be undertaken

by the Authorization Committee of the place of domicile of the donor in the present case. Rather Rule 6B clarifies that the purpose of NOC is to only establish the legal and residential status of the donor/recipient.

19. There is another reason for rejecting the interpretation of the respondent. If it were to be held that the Authorization Committee of each of the places i.e. of the place of domicile of the donor, of the place of domicile of the recipient and of the place of intended transplant were to be required to evaluate on the touchstone of Rules 4A(4) and 6F(d), the possibility of their arriving at different conclusions cannot be ruled out. The Act and the Rules have not provided any remedy therefor. The only inference can be that such an eventuality was not intended and only one Authorization Committee i.e. of the place of the intended transplant was required to evaluate the application for approval on the touchstone of Rules 4A(4) and 6F(d) and the occasion for Authorization Committee of place of domicile of donor/recipient to make such evaluation would arise only upon the Authorization Committee of place of intended transplant so requiring.

20. It cannot also be lost sight of that often, there is no time to waste in

cases of transplant. This Court in *Balbir Singh Vs. Authorization Committee* AIR 2004 Delhi 413 has also noticed the said aspect and commented on the long time taken by the authorities in dealing with the application. In spite of the observation by this Court, I am pained to see that there was a long delay in the present case also. Such delays can be fatal in cases of transplant. If it were to be held that the Authorization Committee of each of the places is required to evaluate on the touchstone of Rules 4A(4) and 6F(d), that would inevitably lead to delays.

21. It cannot be also lost sight of that it may not always be possible for the donor to appear before the Authorization Committee of the place of domicile of the recipient, to satisfy the Authorization Committee. In the present case also, though undoubtedly, the petitioner did not disclose any link with the prospective donor and / or circumstances which led to the offer being made and / or any special reason for the offer to be made but it appears that the petitioner owing to the past practice of the respondent, did not feel the need to do so. The counsel for the respondent has of course handed over in the Court documents to show that in cases where NOC was issued, documents

were placed before the Authorization Committee showing the linkage between the donor and the recipient. However, in view of the conclusion hereinabove, the same is immaterial.

22. Thus the stand of the respondent though well meaning and well intended and noble, does not satisfy the test of the law/Rules. Merely because the respondent entertains doubts of commercial trade in human organs, is no reason for the respondent to exercise power which under the Act and the Rules has not been vested in them. There are other remedies available to the respondent for curtailing the trade in human organs which they suspect but the respondent cannot be permitted to do the same by making applicants satisfy the tests which the applicants are not required to satisfy before the Authorization Committee of a place which is not the place of intended transplant.

23. I may notice that the High Court of Andhra Pradesh in judgment dated 30.03.2009 in W.P.(C) No.5618/2009 titled *Smt. Kamala Devi Vs. The Director of Medical Education & Chairman, Authorization Committee for Organ Transplantation, Hyderabad* and the High Court of Madras in

Dr. M. Anoop Vs. State of Tamil Nadu MANU/TN/2691/2009 have also held that prior approval within the meaning of Section 9(3) of the Act is necessary only from the Authorization Committee of the place of the intended transplant and not from the Authorization Committee of the place of domicile of donor or recipient.

24. The appeal under Section 17 having been provided only against an order rejecting approval and not against an order rejecting an application for NOC, it cannot be said that the remedy of appeal was in the present case available to the petitioner. Even otherwise, since the legal position was ambiguous till now, it was appropriate for this Court to deal with the matter rather than relegate the petitioner to the remedy of appeal.

25. Accordingly, the writ petition succeeds. The rejection dated 14.07.2011 by the respondent of the request of the petitioner for the NOC is set aside / quashed. The respondent is directed to within 48 hours of the petitioner producing a copy of this order before the respondent and after satisfying itself of the petitioner having a legal and residential status in Delhi and being in need of the transplant, grant the NOC to the petitioner. Such

NOC of course shall be subject to the Authorization Committee having jurisdiction over the place of intended transplant, according approval for the transplant.

No order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

SEPTEMBER 01, 2011
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