



Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (ST) NO. 9276 OF 2023

1. **PRASANNA LAXMIKANT JOSHI,**
Aged: 65 years, Occ: CA
Residing at Eashkrupa Lane No.4
Subhash Nagar, 1223, Shukrawar Peth,
Pune 411 002.
2. **DINESH VIDYADHAR DIXIT,**
Aged: 55 years Occ: Service
Residing at Vyankatesh, 41/2,
Rambaug Colony, Paud Road,
Kothrud, Pune 411 038.

... PETITIONERS

~ VERSUS ~

1. **STATE OF MAHARASHTRA,**
Through Secretary,
Medical Education and Drugs
Department, New Mantralaya,
9th Floor, Gokuldas Tejalpal Hospital
Complex, Lokmanya Tilak Marg,
Mumbai 400 001
Department of Public Health
2. **REGIONAL AUTHORIZATION
COMMITTEE,**
For Approval of Organ Transplant
Through Medical Superintendent

of BJ Govt Medical College & Sassoon
General Hospital, Pune 411 001.

3. **SHREYA DINESH DIXIT**,
Aged: 52 years Occ: Housewife
Residing at Vyankatesh, 41/2,
Rambaug Colony, Paud Road,
Kothrud, Pune 411 038.

... **RESPONDENTS**

APPEARANCES

FOR THE PETITIONER	Mr YS Jahagirdar, Senior <i>Advocate, with Sharvari</i> <i>Kanetkar, i/b Rahul Soman &</i> <i>SD Gadgil.</i>
FOR RESPONDENT- STATE	Mr PP Kakade, GP, with Ms PN Diwan, AGP.
PRESENT IN PERSON	Mr Dinesh V Dixit, Respondent <i>No.2.</i>

CORAM : G.S.Patel &
Neela Gokhale, JJ.

DATED : 26th April 2023

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** By consent, Rule returnable forthwith and the Petition is taken up for hearing and final disposal. The 3rd Respondent is served. She is not present. An Affidavit of Service is to be filed in the Registry by Tuesday, 2nd May 2023.

2. This is a case of an organ donation being opposed by the estranged spouse of the donor. The two Petitioners are brothers-in-law. Prasanna, the 1st Petitioner is the proposed organ recipient. His proposed donor is the 2nd Petitioner, Dinesh. The 3rd Respondent, Shreya is Dinesh's estranged spouse.

3. Prasanna is a senior citizen. He suffers from end-stage renal disease. The kidney issue was first diagnosed in 2018. The 2nd Respondent is the Regional Authorisation Committee for approval of organ transplants through the Medical Superintendent of the BJ Government Medical College and Sassoon Dental Hospital, Pune.

4. There is a governing statute for cases like these and this is the Transplantation of Human Organs and Tissues Act, 1994 ("**the Act**"). The Petition assails an appellate order of 15th March 2023 upholding an order of 24th February 2023 passed by the 2nd Respondent declining to approve the proposed kidney donation by Dinesh to Prasanna.

5. These are the prayers in the Petition:

“(a) That this Hon'ble Court be pleased to issue a writ of certiorari or any other Writ or Order in the nature of Certiorari and call for the record and proceedings of Appeal No. 1 of 2023 filed by the Petitioners before Respondent No.1 and after examining the legality, validity and propriety thereof, be pleased to quash and set aside the impugned Judgment and Order dated 15.03.2023 (Exhibit "R" to the Petition) passed by the Respondent No.1 in Appeal No.1 of 2023.

(b) That this Hon'ble Court be pleased to allow Appeal

No. 01 of 2023 filed by the Petitioner No.1 before the Respondent No.1;

(c) That this Hon'ble Court be pleased to issue a writ of certiorari or any other Writ or Order in the nature of Certiorari and call for the record and proceedings of the joint application filed by the Petitioners before Respondent No.2 and after examining the legality, validity and propriety thereof, be pleased to quash and set aside the impugned Judgment and Order dated 24.02.2023 (Exhibit "O" to the Petition) passed by the Respondent No.2 in Application bearing Reference No. SGH/Org Trans/110-1/2023.

(d) That this Hon'ble Court be pleased to allow joint Application bearing Reference No. SGH/Org Trans/110-1/2023 under Form No. 11 (Exhibit "I" to the Petition) filed by the Petitioners before Respondent No.2;

(e) That this Hon'ble Court be pleased to issue of Writ of Mandamus or a Writ, order or direction in the nature of Mandamus thereby directing the Respondent No. 1 to recall the Order dated 15.03.2023 (Exhibit "R" to the Petition) passed by the Respondent No.1 in Appeal No. 1 of 2023;

(f) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ, order or direction in the nature of Mandamus thereby directing the Respondent No. 1 to recall the impugned Judgment and Order dated 24.02.2023 (Exhibit "O" to the Petition) passed by the Respondent No.2 in Application bearing Reference No.SGH/Org Trans/110-1/2023.

(g) That this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ, order or direction in the nature of Mandamus thereby directing the Respondent Nos. 1 and 2 to permit the Petitioners to proceed with the transplantation of the kidney from Petitioner No.2 Donor to Petitioner No.1 Recipient."

6. Prasanna's condition was first diagnosed in 2018 and then deteriorated by May 2021. The Petition says that Prasanna's own spouse and children were not found to be suitable donors; their blood groups did not match. Prasanna has one sibling, but she is 73 years old and not in good health. An organ donation by her was not medically advisable. Prasanna's spouse is Dinesh's sister. Dinesh voluntarily wishes to donate his kidney to Prasanna. We have asked Dinesh to come to Court and he is present before us. He has confirmed to us personally that it is his desire to make the organ donation and that he has indeed instructed his Advocates to file the Petition. Dinesh is married. Shreya is his wife. They have two daughters. The elder daughter lives in New Zealand. The younger daughter is studying overseas in Nairobi. Shreya and Dinesh have been estranged for some time. One daughter is married, the other not.

7. As matters currently stand, Prasanna requires dialysis daily from June 2021. He has not found a suitable donor for a kidney transplant. On 22nd September 2022, both Prasanna and Dinesh underwent various tests for compatibility. Copies of some of these reports are annexed to the Petition. Dinesh's kidneys were found to be normal and by a later report of 6th October 2022, it was found that Dinesh was an appropriate match or a donor for Prasanna for receiving a kidney transplant.

8. On 19th October 2022, there was a report of the Deenanath Mangeshkar Hospital in Pune recommending that Dinesh could proceed with the necessary surgery. Prasanna, his wife, Dr Suvarna

Joshi, and Dinesh all affirmed three Affidavits on 17th November 2022 confirming their relationship and the arrangement that they were proposing to make for the kidney transplant.

9. On 5th December 2022, Prasanna and Dinesh made a joint application under the Act and its Rules. This was necessary to obtain approval for the transplantation of the kidney. The proposed surgery was to be done at the Deenanath Mangeshkar Hospital where all testes were to be conducted.

10. Chapter II of the Act deals with the authority for removal of human organ or tissue or both. Section 3(1) says that any donor may subject to conditions specified authorised the removal during his life time of any human organ or tissue or both for therapeutic purposes. The word “donor” is defined in Section 2(f) as an adult who voluntarily authorises the removal of his human organ or tissues or both for therapeutic purposes under sub-Section (1) or sub-Section (2) of Section 3. “Therapeutic purposes” under Section 2(o) means the systematic treatment of any disease or the measures to improve health according to any particular method or modality. Section 3(2) reads thus.

“3. Authority for removal of human organs or tissues or both.—

(1)

(2) If any donor had, in writing and in the presence of two or more witnesses (at least one of whom is a near relative of such person), unequivocally authorised at any time before his death the removal of any human organ or tissue or both of his body, after his death, for therapeutic

purposes, the person lawfully in possession of the dead body of the donor shall, unless he has any reason to believe that the donor had subsequently revoked the authority aforesaid, grant to a registered medical practitioner all reasonable facilities for the removal for therapeutic purposes, of that human organ from the dead body of the donor.”

11. We then come to restrictions that are stipulated by Section 9 in detail and they read as follows.

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

(1) Save as otherwise provided in sub-section (3), no human organ or tissue or both removed from the body of a donor before his death shall be transplanted into a recipient unless the donor is a near relative of the recipient.

(1-A) Where the donor or the recipient being near relative is a foreign national, prior approval of the Authorisation Committee shall be required before removing or transplanting human organ or tissue or both:

Provided that the Authorisation Committee shall not approve such removal or transplantation if the recipient is a foreign national and the donor is an Indian national unless they are near relatives.

(1-B) No human organs or tissues or both shall be removed from the body of a minor before his death for the purpose of transplantation except in the manner as may be prescribed.

(1-C) No human organs or tissues or both shall be removed from the body of a mentally challenged person before his death for the purposes of transplantation.

Explanation.— For the purpose of this sub-section,

—

(i) the expression “mentally challenged person” includes a person with mental illness or mental retardation, as the case may be;

(ii) the expression “mental illness” includes dementia, schizophrenia and such other mental condition that makes a person intellectually disabled;

(iii) the expression “mental retardation” shall have the same meaning as assigned to it in clause (r) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection Rights and Full Participation) Act, 1995 (1 of 1996).

(2) Where any donor authorises the removal of any of his human organs or tissues or both after his death under sub-section (2) of section 3 or any person competent or empowered to give authority for the removal of any human organ or tissue or both from the body of any deceased person authorises such removal, the human organ may be removed and transplanted into the body of any recipient who may be in need of such human organ or tissue or both.

(3) If any donor authorises the removal of any of his human organs 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 or 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.

(3-A) Notwithstanding anything contained in sub-section (3), where—

(a) any donor has agreed to make a donation of his human organ or tissue or both before his death to a recipient, who is his near relative, but such

donor is not compatible biologically as a donor for the recipient; and

(b) the second donor has agreed to make a donation of his human organ or tissue or both before his death to such recipient, who is his near relative, but such donor is not compatible biologically as a donor for such recipient; then

(c) the first donor who is compatible biologically as a donor for the second recipient and the second donor is compatible biologically as a donor of a human organ or tissue or both for the first recipient and both donors and both recipients in the aforesaid group of donor and recipient have entered into a single agreement to donate and receive such human organ or tissue or both according to such biological compatibility in the group,

the removal and transplantation of the human organ or tissue or both, as per the agreement referred to above, shall not be done without prior approval of the Authorisation Committee.

(4)(a) The composition of the Authorisation Committee shall be such as may be prescribed by the Central Government from time to time.

(b) The State Government and the Union territories shall constitute, by notification, one or more Authorisation Committees consisting of such members as may be nominated by the State Governments and the Union territories on such terms and conditions as may be specified in the notification for the purposes of this section.

(5) On an application jointly made in such form and in such manner as may be prescribed, by the donor and the recipient, the Authorisation Committee shall, after

holding an inquiry and after satisfying itself that the applicants have complied with all the requirements of this Act and the rules made thereunder, grant to the applicants approval for the removal and transplantation of the human organ.

(6) If, after the inquiry and after giving an opportunity to the applicants of being heard, the Authorisation Committee is satisfied that the applicants have not complied with the requirements of this Act and the rules made thereunder, it shall, for reasons to be recorded in writing, reject the application for approval.”

(Emphasis added)

12. With this, we note that Chapter V deals with the appropriate authority and its powers and then we come to the 2014 Rules framed under the Act. The relevant Rules are Rules 3, 5(3(g)), 7, and 10. There is also the concept of a “near relative”. The term “near relative” is defined in the Act itself in Section 2(i) to mean, spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter.

13. Rule 7 says:

7. Authorisation Committee.—

(1) The medical practitioner who will be part of the organ transplantation team for carrying out transplantation operation shall not be a member of the Authorisation Committee constituted under the provisions of clauses (a) and (b) of sub-section(4) of section 9 of the Act.

(2) When the proposed donor or recipient or both are not Indian nationals or citizens whether near relatives or otherwise, the Authorisation Committee shall consider all

such requests and the transplantation shall not be permitted if the recipient is a foreign national and donor is an Indian national unless they are near relatives.

(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.

(4) Cases of swap donation referred to under subsection (3A) of section 9 of the Act shall be approved by Authorisation Committee of hospital or district or State in which transplantation is proposed to be done and the donation of organs shall be permissible only from near relatives of the swap recipients.

(5) When the recipient is in a critical condition in need of life saving organ transplantation within a week, the donor or recipient may approach hospital in-charge to expedite evaluation by the Authorisation Committee.

(Emphasis added)

14. Rule 18 reads:

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.

15. Returning to our factual narrative, it seems that on 16th December 2022, Dinesh and Prasanna were interviewed by the Ethics Committee of the Deenanath Mangeshkar Hospital. Also called to that interview was Dinesh's mother, his brother and Prasanna's wife. Shreya refused to attend the interview although she was requested to do so.

16. On 22nd December 2022, following directions by the Ethics Committee of the Deenanath Mangeshkar Hospital, Dinesh filed an

affidavit and an indemnity to verify that he made adequate financial arrangements for his spouse and unmarried daughter.

17. On 28th December 2022, the Deenanath Mangeshkar Hospital sent all the papers to the 2nd Respondent. There was a noting Shreya had not granted her consent.

18. The Regional Authorisation Committee held an interview on 18th January 2023. Dinesh, his mother, Prasanna and Prasanna's wife attended this interview. Once again Shreya never came to the interview.

19. On 27th January 2023, the consent from Dinesh's elder brother was submitted to the 2nd Respondent with a written representation that Shreya and Dinesh and Shreya's unmarried daughter were not consenting. It was pointed out that no such consent was in fact required.

20. The 2nd Respondent wrote to the Deenanath Mangeshkar Hospital on 15th February 2023 demanding that a consent be obtained from Shreya and the unmarried daughter. This is the first part of the larger challenge mounted by Mr Jahagirdar for the Petitioner.

21. Both Petitioners wrote to the 2nd Respondent through the Hospital pointing out that nothing in the Act or the Rules required the affirmative consent from "near relatives" including spousal

consent. As long as there was a willing donor and a willing recipient, no question arose of a consent of a near relative.

22. On 24th February 2023, the 2nd Respondent rejected the joint application by Dinesh and Prasanna on the ground that Shreya and the unmarried daughter did not attend the interview and had not consented to the kidney donation.

23. Prasanna appealed to the 1st Respondent, the Appellate Authority under Section 17. Both Petitioners filed written submissions and written statements.

24. By the impugned order of 15th March 2023, a copy of which is at Exhibit "R", the Appeal was rejected and the order in original of 24th February 2023 was upheld.

25. On 21st March 2023, Dinesh underwent a test that said that he was medically fit for the procedure. On 23rd March 2023 Dinesh wrote to Shreya once again asking her to consent to the transplant procedure.

26. We do not know why Dinesh did this in view of his position that no such consent is required.

27. Two things stand out. The Act makes no provisions for a spouse withholding consent even unreasonably or for extraneous reasons. Dinesh has already filed an Affidavit and made a comprehensive statement that his estranged spouse and unmarried

daughter have been provided for. Before us he reiterates that, and we have no reason to disbelieve him. We cannot understand why the insistence on a spousal consent should literally come at the cost of Prasanna's life. It is not as if Prasanna is *demanding* the donation from Dinesh or that Dinesh is being pressured into making that organ donation. The essence of the Act in such cases is for a voluntary donation of an organ.

28. The emphasized portion of Rule 7 contemplates a situation where the donor and the recipient are *not* near relatives. It sets out what the Authorisation Committee is to do and item 9 of that list tells us that it must ensure that any adult person related to the donor by blood or marriage of the proposed unrelated donor is interviewed regarding awareness of the intention to donate an organ. This has been done.

29. We do not know how both authorities have read into the Act a mandatory requirement for spousal consent. There is no other suitable donor for Prasanna. His own immediate family is not compatible. He has been suffering from this condition since 2018 and since June 2021 is on daily dialysis. Thanks to Dinesh, this is his one chance to restore some semblance of normalcy to his life. Whatever be the marital issues between Shreya and Dinesh, we do not see how these can be allowed to come in the way of what is undoubtedly Prasanna's fundamental right to life under Article 21. This is an aspect that both authorities have completely overlooked and utterly lost sight of. They have chosen instead to give primacy to a private, unstated, unspecified concern of the spouse. Notably, as

the facts show Shreya was given every opportunity to attend the interview. She herself stood to lose nothing. She may say that she is concerned about her means but once Dinesh has made that statement and done so on Affidavit, clarifying that he has provisioned for the Shreya and the unmarried daughter, we do not believe that it is open to Shreya to defeat the entire process by simply staying away and staying silent and then somehow getting these authorities to believe that her affirmative consent is at all necessary.

30. Shreya's objection is astonishing. She claims to voice what is a medical opinion about Dinesh's state of health and general physical well-being. We are asked to believe that her opinion, evidently coloured by marital disputes, is to override a clinical diagnosis by a recognized affiliated and authorised hospital which has run every single scientific test required till as recently as December 2022 or even thereafter. Her complaint is that he has borderline diabetes. Then there is a remark of cholesterol and triglycerides. This is almost certainly true of the vast majority of people who live in Mumbai and, given what Pune has become, in that city as well. We may add to this hypertension while we are at it, but none of this, stated in generalities, detracts from a medically detailed clinical diagnosis going back to October 2022 and then again on 21st March 2023 (Exhibit "S" at page 120) which notes Dinesh's fitness to undergo the procedure.

31. Neither of these orders can be sustained. They are contrary to the Act. They are clearly arbitrary and do not take into account the

only relevant factors. They take into account something completely unnecessary not contemplated by the statute.

32. Rule is accordingly made absolute in terms of prayer clause (a), (b), (c), (d), (e), (f) and (g).

33. Many of these prayers are routine and operational. We clarify that we permit the Petitioners to proceed with the transplantation of the kidney from the 2nd Petitioner to 1st Petitioner at the Deenanath Mangeshkar Hospital in Pune.

34. The necessary permissions from the 2nd Respondent are a formality. No objection from the 3rd Respondent, Shreya is to be entertained by any of the authorities under any circumstances.

35. No costs.

(Neela Gokhale, J)

(G. S. Patel, J)