

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

BEFORE

HON'BLE SHRI JUSTICE RAJ MOHAN SINGH

ON THE 5th OF FEBRUARY, 2024

WRIT PETITION NO.870 OF 2024

BETWEEN:-

- 1 VIKAS AGRAWAL S/O SHRI OM PRAKASH AGRAWAL, AGED ABOUT 33 YEARS, R/O 105-E-8, GULMOHAR COLONY, ARERA COLONY, VINAYAK PARISAR BHOPAL DISTRICT BHOPAL (MADHYA PRADESH)**
- 2. ABHA AGRAWAL W/O SHRI VIVEK AGRAWAL, AGED ABOUT 38 YEARS, R/O E8/86 AMBA HOMES G2 TRILOCHAN SINGH NAGAR TRILANGA HUZUR BHOPAL DISTRICT BHOPAL (M.P.)**

....PETITIONERS

(BY SHRI PRAKASH UPADHYAY- ADVOCATE)

AND

- 1. STATE OF MADHYA PRADESH THROUGH PRINCIPAL SECRETARY, DEPARTMENT OF HEALTH AND FAMILY WELFARE VALLABH BHAWAN, BHOPAL (MADHYA PRADESH)**

2. **KOKILABEN DHIRUBHAI AMBANI HOSPITAL AND MEDICAL RESEARCH INSTITUTE THROUGH ITS CHIEF EXECUTIVE OFFICER KOKILABEN DHIRUBHAI AMBANI HOSPITAL RAO SAHEB ACUTRAO PATWARDHAN MARG ANDHERI (W) MUMBAI (MAHARASHTRA)**
3. **BHOPAL HOSPITAL AND RESEARCH CENTER SHIR RAM COLONY HOSHANGABAD ROAD BHOPAL (MADHYA PRADESH)**
4. **SHILPA AGRAWAL W/O SHRI VIKAS AGRAWAL, AGED ABOUT 34 YEARS, R/O 105 E 8 GULMOHAR COLONY ARERA COLONY VINAYAK PARISAR BHOPAL DISTRICT BHOPAL (M.P.)**

...RESPONDENTS

(SHRI S. RAIRADA-ADVOCATE FOR THE RESPONDENT NO.2 AND SHRI SWATANTA PANDEY- PANEL LAWYER FOR THE RESPONDENT/STATE)

Reserved on : 01-02-2024.
Pronounced on : 05-02-2024.

ORDER

The petitioners have preferred this writ petition under Article 226 of the Constitution of India for issuance of an appropriate writ, especially in the nature of mandamus, directing the respondent No.2 to proceed with the transplantation of liver subject

to satisfaction of medical fitness of the petitioner No.1. Any other appropriate order which this Hon'ble Court deems fit in the facts and circumstances of the case be also passed.

2. The present writ petition has been preferred against the letter/communication dated 26.12.2023 issued by the respondent No.2/Hospital, refusing to perform the liver transplant of the husband of the petitioner No.2 on account of objection raised by the respondent No.4, ignoring the fact that the petitioner No.1 is the real brother of the patient i.e., Shri Vivek Agrawal, husband of the petitioner No.2. The respondent No.2 is the competent authority under Section 3 of the Transplantation of Human Organs and Tissues Act, 1994 (for brevity **“Organs Transplantation Act, 1994”**) read with Rule 18 of the Transplantation of Human Organs and Tissues Rules, 2014 (for brevity **“Organs Transplantation Rules, 2014”**). Under the aforesaid Section 3 of the Organs Transplantation Act, 1994 and Rule 18 of the Organs Transplantation Rules, 2014, the petitioner No.1 alone is competent to take decision to give consent for removal/donation of part of his

liver tissue. The consent of the respondent No.4 i.e. wife of the petitioner No.1 is not at all required. The brother of the petitioner No.1, who is the husband of the petitioner No.2 is in critical stage of health and requires urgent transplantation of liver to save his life. The petitioner No.1 being brother of patient Shri Vivek Agrawal has come forward to donate part of his liver tissue to the patient voluntarily, without any misrepresentation or due influence.

3. Under Section 3 of the Organs Transplantation Act, 1994, the authority for removal of human organs or tissues or both is the hospital where any donor may, in such manner and subject to such conditions as may be prescribed, authorize the removal before his death, of any (human organ or tissue or both) of his body for therapeutic purposes. For ready reference Section 3 of the Organs Transplantation Act, 1994 is reproduced as under:-

“3. Authority for removal of human organs or tissues or both). (1) Any donor may, in such manner and subject to such conditions as may be prescribed, authorise the removal, before his death. of nny [human organ or tissue or both of his body for therapeutic purposes.

[(1A) For the purpose of removal, storage or

transplantation of such human organs or tissues or both, as may be prescribed, it shall be the duty of the registered medical practitioner working in a hospital, in consultation with transplant co-ordinator, if such transplant co-ordinator is available-

(i) to ascertain from the person admitted to the Intensive Care Unit or from his near relative that such person had authorised at any time before his death the removal of any human organ or tissue or both of his body under sub-section (2), then the hospital shall proceed to obtain the documentation for such authorisation;

(ii) where no such authority as referred to in sub-section (2) was made by such person, to make aware to that person or near relative for option to authorise or decline for donation of human organs or tissues or both;

(iii) to require the hospital to inform in writing to the Human Organ Removal Centre for removal, storage or transplantation of human organs or tissues or both of the donor identified in clauses (1) and (if) in such manner as may be prescribed

(1B) The duties mentioned under clauses (1) to (iii) of sub-section (14) from such date, as may be prescribed, shall also apply in the case of a registered medical practitioner working in an Intensive Care Unit in a hospital which is not registered under this Act for the purpose of removal, storage or transplantation of human organs or tissues or both.]

(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 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 or tissue or both] from the dead body of the donor.

(3) Where no such authority as is referred to in sub-section (2), was made by any person before his death but no objection was also expressed by such person to any of his (human organs or tissues or both] being used after his death for therapeutic purposes, the person lawfully in possession of the dead body of such person may, unless he has reason to believe that any near relative of the deceased person has objection to any of the deceased person's [human organs or tissues or both] being used for therapeutic purposes, authorise the removal of any [human organ or tissue or both] of the deceased person for its use for therapeutic purposes.

(4) The authority given under sub-section (1) or sub-section (2) or, as the case may be, sub-section (3) shall be sufficient warrant for the removal, for therapeutic purposes, of the human organ or tissue or both]; but no such removal shall be made by any person other than the registered

medical practitioner: [Provided that a technician possessing such qualifications and experience, as may be prescribed, may enucleate a cornea.]

(5) Where any [human organ or tissue or both] is to be removed from the body of a deceased person, the registered medical practitioner shall satisfy himself, before such removal, by a personal examination of the body from which any [human organ or tissue or both] is to be removed, that life is extinct in such body or, where it appears to be a case of brain-stem death, that such death has been certified under sub-section (6).

(6) Where any (human organ or tissue or both) is to be removed from the body of a person in the event of his brain-stem death, no such removal shall be undertaken unless such death is certified, in such form and in such manner and on satisfaction of such conditions and requirements as may be prescribed, by a Board of medical experts consisting of the following, namely:-

(i) the registered medical practitioner in charge of the hospital in which brain-stem death has occurred;

(ii) an independent registered medical practitioner, being a specialist, to be nominated by the registered medical practitioner specified in clause (1), from the panel of names approved by the Appropriate Authority;

(iii) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner

specified in clause (1), from the panel of names approved by the Appropriate Authority:

[Provided that where a neurologist or a neurosurgeon is not available, the registered medical practitioner may nominate an independent registered medical practitioner, being a surgeon or a physician and an anaesthetist or intensivist subject to the condition that they are not members of the transplantation team for the concerned recipient and to such conditions as may be prescribed;]

(iv) the registered medical practitioner treating the person whose brain-stem death has occurred.

(7) Notwithstanding anything contained in sub-section (3), where brain-stem death of any person, less than eighteen years of age, occurs and is certified under sub-section (6), any of the parents of the deceased person may give authority, in such form and in such manner as may be prescribed, for the removal of any [human organ or tissue or both] from the body of the deceased.”

Therapeutic purposes mean systematic treatment of any disease or the measures to improve health according to any particular method or modality. Tissue means a group of cells, except blood, performing a particular function in the human body. Transplantation means the grafting of any human organ from any living person or deceased person to some other living person for therapeutic purposes.

4. Petitioner No.1 is a donor, who is competent to donate his part of his liver being not less than 18 years of age and has voluntarily authorized the removal of his human organ for therapeutic purposes under sub-Sections 1 & 2 of Section 3 of the Organs Transplantation Act, 1994. Under Rule 2(c) of Organs Transplantation Rules, 2014, competent authority means the Head of the institution or hospital carrying out transplantation or a committee constituted by the head of the institute or hospital for the purpose. Rule 3 of the Organs Transplantation Rules, 2014 provides for authority for removal of human organs or tissue. According to the aforesaid rule, subject to the provisions of Section 3 of the Organs Transplantation Act, 1994, a living person may authorize the removal of any organ or tissue of his or her body during his or her lifetime as per prevalent medical practices, for therapeutic purposes in the manner and on such conditions as specified in Form 1, 2 and 3. Form 1 talks about organ or tissue donation from identified living near related donor. Form 2 provides for organ or tissue donation by living spousal donor, whereas Form 3 talks about organ or tissue donation by other than near relative living donor. In the present case the Form No.1 is applicable, which has been duly filled by the petitioner No.1. Rule 7 of the Organs Transplantation Rules, 2014 provides for authorization committee, which reads as under:-

“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 subsection(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.”

Rule 18 of the Organs Transplantation Rules, 2014 provides for procedure in case of near relatives, which 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.”

Rule 19 of the Organs Transplantation Rules, 2014 provides for procedure in case of transplant other than near relatives. Rule 7 read with Rule 19 of the Organs Transplantation Rules, 2014 would apply in case of donor not being relative.

5. In the present case, Rule 18 of the Organs Transplantation Rules, 2014 is applicable, as the donor is brother of the patient and the proposed transplant of liver is between the brothers i.e. near related genetically. After fulfillment of all the necessary compliance as per the procedure, the needful in the context of transplant has not been carried out due to the reasons that the respondent No.4, who is the wife of the petitioner No.1 has not

given her consent and she is not willing for the surgery of the donor. The patient/brother of the petitioner No.1 and husband of the petitioner No.2 has history of multiple hospital admissions in last 6 months. He has required ICU admission and non-invasive ventilation support due to life threatening infection and bleeding. His general condition is progressively worsening. The respondent No.2/hospital has diagnosed the ailment of brother of petitioner No.1 as “Decompensated Acute on chronic liver failure With Portal Hypertension With Ascites, Jaundice, G. I Bleed, HRS (Hepato-renal syndrome), Hepatic Encephalopathy, Coagulopathy, SBP (Spontaneous bacterial peritonitis)”. After diagnosing in the aforesaid manner, the hospital/respondent No.2, opined that in view of advanced liver disease and critical general condition, the patient needs an urgent liver transplant. The critical condition of the patient requiring urgent liver transplant was discussed with the family. The brother of the patient i.e. the petitioner No.1 is a willing blood compatible donor for the patient. The petitioner No.1 was evaluated and found to be fit as a Living liver donor. All the risks and complications associated with donor and recipient surgery have been explained to the family in detail. The respondent No.4 i.e. the wife of the petitioner No.1 is not willing for the surgery of the donor, therefore Living donor liver transplant could not be done. The hospital/respondent No.2 vide intimation dated 26.12.2023 informed the petitioners accordingly.

6. The issue arises for consideration in the present writ petition is whether the consent of respondent No.4 is required for Living donor liver transplant or not. On 18.1.2024 the following order was passed:-

“Let notice be issued to the respondents No. 1 to 4 on payment of process fee within three working days by RAD mode, returnable within three weeks.

Learned counsel for the petitioners seeks issuance of dasti/humdast mode qua the respondent no.4.

Learned counsel for the petitioner is also permitted to serve the respondent no.4 by Humdast mode on payment of requisite process fee within three working days.

Office is directed to prepare the Dasti notice and hand over to the learned counsel for the petitioner, who, after serving the respondent no.4 may file and affidavit of Dasti service.

List this case in the week commencing from 29.01.2024.”

In compliance with the aforesaid order, learned counsel for the petitioners has submitted the covering memo dated 29.1.2024 along with the affidavits of Vinay Agrawal son of Shri Omprakash Agrawal, Omprakash Agrawal son of late Shri Radheylal Agrawal and Smt. Meeta Agrawal wife of Shri Omprakash Agrawal, all residents of E-8/105, Vinayak Parisar, Gulmohar Colony, Tahsil-Huzur District Bhopal in the context of dasti service of the

respondent No.4 by means of Dasti/Humdast notice. Despite the aforesaid Dasti service, the respondent No.4 did not prefer to appear in this Court, and therefore the respondent No.4 is being proceeded ex-parte.

7. The respondent No.2 has taken a stand that the petitioner No.1 is fit and compatible in view of various tests conducted, which revealed that the Liver Tissue of the petitioner No.1 met the medical criteria for such a transplant, as the same was compatible in medical parlance for the same. The petitioner No.1 had volunteered to donate part of his liver to save his brother's life. On or about 18.1.2024, the relatives of the patient came to the hospital with the requisitioned papers as laid down in law, but mentioned that the wife of the petitioner No.1/donor was unwilling to allow her husband to donate part of his liver. This unfortunately goes against the tenets laid down in the Rules, which mandate an assent from the next of kin of the donor. In view of the unwilling of wife of the petitioner No.1, the respondent No.2/hospital expressed its inability to accept the request of the patient/relatives due to aforesaid limitations. In the light of the questions framed in the preceding para, this Court proceeds to answer the same on the basis of interpretation as laid by the Courts from time to time.

8. In **Prasanna Laxmikant Joshi and another Vs. State of Maharashtra, 2023 SCC OnLine Bom 926** the issue of organ donation being opposed by the estranged spouse of the donor was answered in favour of the donor and the recipient of the proposed organ donation. In that case, the organ donation was opposed by the wife of the donor, who was an estranged spouse of the donor. The Division Bench of the Bombay High Court, after discussing the relevant provisions of the Act, 1994 and Rules, 2014, held that the Act makes no provisions for a spouse withholding consent even unreasonably or for extraneous reasons. In the aforesaid case, two petitioners were brothers-in-law. Prasanna, the first petitioner was the proposed organ recipient. His proposed donor was the petitioner No.2 Dinesh. The respondent No.3 in that case was an estranged spouse of Dinesh i.e. Shreya. The Court proceeded to record the factual and legal position in paras No.27, 28, 29 and 30. The said paras are reproduced as under:-

“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."

The Court ultimately granted permission to the petitioners therein to proceed with the transplantation of the kidney from the petitioner No.2/donor to the petitioner No.1 in the concerned hospital. The consent of the estranged wife was held to be of no avail.

9. The societal norms cannot compel individual behavior to be in consonance with social expectations unless, the same is mandated through the *jus scriptum*. In case of retaining the dead body of the deceased and not subjecting it to last rites, the Court in **Shashimani Mishra and another Vs. State of MP and others, ILR [2019] MP 1397** had an occasion to deal with the concept at the threshold of right to privacy. It may be the norm to consign human remains to the corresponding last rites of the deceased. However, it cannot be held that failure to consign the human remains to last rites would result in a violation of the law. The protection of an individual's right to privacy is a human right. Article 12 of the Universal Declaration of Human Rights, 1948 provides that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks. In the said case, the Court considered the legality of the acts of the petitioners and examined the issue from point of view of the respondents. Even the deceased/corps has the right to respectable disposal in accordance with the rites and rituals of the religion or the community from which the person hailed. The Court, while relying upon the judgment of the Hon'ble Supreme Court in the case of **Pt. Parmanand Katara Vs. Union of India, (1995) 3 SCC 248** went on to record that it may be the norms to consign the human remains

but if the norms are pitted against the human right, then the human right has to prevail. The act of the petitioner No.2 in that case, who had kept the human remains of his father in his residential premises was not held to be illegal, warranting intrusive action by the State. In the facts and circumstances of the case the queries were raised by the Court in para 13 and 14 of the judgment, which are reproduced here as under:-

“13. The question here is if the act of the Petitioners in retaining the body of the deceased and not subjecting it to last rites is unlawful or illegal? It goes without saying that where a body retained in a residential premises by the inmates in a similar situation, starts putrefying, the health-related hazard to the public at large would make the continued retention of the cadaver unlawful and illegal, the same being an offence u/s. 268 (public nuisance) and 278 (fouling the air) of the Indian Penal Code, and in such a situation, the State would be empowered, if need be, to forcefully enter such a premise to remove the body in the interest of public health and wellbeing. However, the facts in this case do not disclose either public nuisance or fouling of the air. At the risk of repetition, admittedly, there are no complaints. No one who has come forward before any authority, empowered to take cognizance (sic cognizance), that the stench of death emanates from the residence of the Petitioners. In such a situation, assuming arguendo that Mr. Kulamani Mishra is no more and the Petitioners are retaining his lifeless body instead of disposing it with dignity, would that be an unlawful or an illegal act on the part of the Petitioners? If yes,

then the State would be authorised to use such necessary force to remove the body in question and if no, then the right to privacy of the Petitioners cannot be interfered with under the guise of wanting to unravel the truth.

14. The Court proceeds to examine as to what makes an act lawful or legal? and in the converse, what is unlawful or illegal? Where the law permits a certain act, there is no doubt that doing of that act would be legal. Similarly, where the law prohibits a particular act, the doing of that act would be illegal. However, where the law does not explicitly permit an act and neither prohibit it, or in other words, where the law of the land is completely silent about the legality or illegality of the act, would the doing of that act be unlawful, only because it is at conflict with the contemporary mores of the society and an overwhelmingly preponderant public perception of what is right? The liberty of an individual to act in any manner where such act is not prohibited under the law, is unfettered and unquestionable.”

10. After discussing the legal position in para No.18, 19, 20 and 21, the Court ultimately held in para 22 that India falls in the latter category, being a liberal democracy where a man is permitted to act in any manner he pleases, where such act is not prohibited under the law, irrespective of the fact that his act might be seen as galling by the society. For ready reference, para No. 18 to 22 are reproduced as under:-

“18. Societal norms cannot compel individual behaviour to be in consonance with social expectations unless, the same is mandated through the jus scriptum. It may be the norm to consign human remains to the corresponding last rites of the deceased. However, it cannot be held, as is submitted by the Ld. Counsel for the Respondent No.2, that failure to consign the human remains to last rites would result in the violation of the law laid down in Parmanand Katara's case and thus, violate the human rights of the deceased. If the said contention is taken to be correct, what happens in the cases of organ donation? Or, in such cases were the body of the deceased is donated to Medical Colleges for the purpose of introducing fledgling medical students to the subject of Human Anatomy? In the first instance, the human remains are subjected to partial mutilation to remove such vital organs that may give a new lease of life to the ailing after which the remains may be subjected to final rites. In the second instance, there is complete mutilation of the cadaver in the process of teaching medical students. As far as the society is concerned, both these instances are not in consonance with the preponderant public opinion on how human remains may be disposed of but the importance of both these instances to the society cannot be underscored enough.

19. Next, this Court examines the issue whether the Petitioner's right to privacy extends to preventing the authority of the State from entering his residential premises in order to ascertain the truth about his father's condition. A man's home is his castle and within its precincts, he is the

undisputed master of his will. What he does within is beyond the scrutiny of the State unless, there is reasonable cause to believe that the residential premise is a scene of crime or of unlawful activity whereby the law of the land empowers the relevant functionaries of the State to compel the occupier to give ingress to them.

20. The preamble of our Constitution has at its focal point, the liberty of the individual. In this regard, it would be relevant to briefly refer to the judgment of the Supreme Court in what is popularly known as the "Right to Privacy" case where the Supreme Court held "..... The individual lies at the core of constitutional focus and the ideals of justice, liberty, equality and fraternity animate the vision of securing a dignified existence to the individual. The Preamble envisions a social ordering in which fundamental constitutional values are regarded as indispensable to the pursuit of happiness. Such fundamental values have also found reflection in the foundational document of totalitarian regimes in other parts of the world. What distinguishes India is the adoption of a democratic way of life, founded on the Rule of Law. Democracy accepts differences of perception, acknowledges divergence in ways of life, and respects dissent" (Emphasis by the Court). The Judgment of the Constitution Bench of the Supreme Court makes it clear that in a democracy like ours there is no expectation from the citizens to act and behave like clones having the same perception and way of life. On the contrary, the Supreme Court has held that a democratic way of life accepts and respects dissent and allows the individual to think and act

in a manner that may be at complete divergence with the thoughts and expectations of the society.

21 The Conduct of the Petitioners may be at divergence from the established social norm. It may be based upon a perception which may not find the approval of many yet, the Petitioners have the right to be different in thought, perception and action. Keeping the dead body of Mr. Kulamani Mishra (as is perceived and so stated on behalf of the Respondent No.2) at their residence may be revolting and abhorrent, bringing the bile to the mouth of many, viewed as bohemian by those who are conventional and conformist and yet, under no circumstances can the State intervene and disturb the right to privacy of the Petitioners if the said act does not come within the ambit and scope of an offence or an illegality. Morality may be a source of law, but it is not law and neither does it have the force of law. Today's morality may become law tomorrow either by way of legislation or common law pronouncement but till then, moral indignation of the society or the State, acting at behest of the society, cannot curtail the actions and thoughts of an individual as long as such action is not violative of any existing law.

22. Thus, the act of the Petitioner No.2, even assuming arguendo that his father is no more and he has kept the human remains in his residential premises, by itself does not become an illegality warranting intrusive action by the State. "A regime, which forbids everything save only those things that are expressly allowed, would be regarded as a bullying power-structure, while a regime which permits everything save only those

things that are expressly forbidden, would be counted liberal by contrast India falls in the latter category being a liberal democracy where a man is permitted to act in any manner he pleases, where such act is not prohibited under the law, irrespective of the fact that his act might be seen as galling by the majority. In view of what has been observed and held by this Court hereinabove, the queries raised by this Court in paragraph 13 and 14 of this judgement stands answered accordingly.”

In the light of the aforesaid case law, the petitioner No.1, being master of his own choice cannot be put to intrusive action by anyone, including his wife. The caveat put by his wife cannot be taken to be a rider on the right of the petitioner No.1. The objection by the wife of the petitioner No.1 may be a societal norm to keep her marital status healthy and alive but by undergoing transplant of liver, the respondent No.4 cannot foresee that in every likelihood, her husband may die. The liver is such an organ, which glows with the passage of time. In these days of medical advancement, organ donations are being successfully operated and transplanted in other bodies. The perception of the respondent No.4 cannot be over weighed over and above the desire of the petitioner No.1, who intends to save the life of his brother by donating his part of the liver. In the facts and circumstances of the case, the act of the petitioner No.1 cannot be held to be illegal as per Albert Camus, a French Philosopher, Author, and a Nobel Laureate in Literature.

“The only way to deal with an unfree world is to become so absolutely free that your very existence is an act of rebellion.”

The aforesaid words, if read in conjunction with the facts and circumstances of the case, would lead to the conclusion that the act of the petitioner No.1 in donating his liver to his ailing brother does not become an illegality, warranting intrusive action by the State.

“A regime that forbids everything save only those things that are expressly allowed, would be regarded as a bullying power-structure, while a regime which permits everything save only those things that are expressly forbidden, would be counted liberal by contrast.”

India falls into the latter category, being a liberal democracy, where a man is permitted to act in any manner he pleases, where such an act is not prohibited under the law, irrespective of the fact that his act might be seen as galling by the majority.

11. In view of the aforesaid factual and legal position, the objection raised by the respondent No.4 may be based on some apprehension in the contest of societal norms of keeping her *Suhag* healthy, alive and free from any risk, but if the individual right of the petitioner No.1 is pitted against such a perception of the respondent No.4, then the individual right of the petitioner No.1 has to be given preference. Even though, as against the decision of the authorization committee, an appeal is provided under Section 17 of

the Organs Transplantation Act, 1994, but in the instant case, the case of the petitioners is not covered under Rules 7 and 19 Organs Transplantation Rules, 2014, therefore, no remedy is available with the petitioners. Even otherwise, keeping in view the medical conditions of the patient/brother of the petitioner No.1, alternative remedy, if any, would not be efficacious enough to answer the claim of the parties.

12. For the reasons recorded hereinabove, I deem it proper to issue a writ of mandamus that the objection raised by the respondent No.4 be not taken into consideration for the purpose of transplanting part of the liver between the petitioner No.1 and his brother/patient, who are genetically related. Accordingly, I permit the petitioners to proceed with the transplantation of liver from the petitioner No.1 to his brother/patient at the respondent No.2/the hospital, who has already completed all the necessary formalities. Let the procedure be conducted at the earliest.

13. Accordingly, petition stands **allowed** with no order as to cost.

(Raj Mohan Singh)
Judge
05/02/2024

Ansari