

# **In the High Court at Calcutta**

## **Constitutional Writ Jurisdiction Appellate Side**

**Present: The Hon'ble Justice Moushumi Bhattacharya.**

**W.P.A 3552 of 2022**

**Dr. Dilip Kumar Pahari**

**VS.**

**The State of West Bengal & Ors.**

**For the petitioners: Mr. Ranjan Bachawat, Adv. Mr. Soumya Majumder, Adv. Mr. Victor Chatterjee, Adv. Ms. S. Ghosh, Adv.**

**For the State: Mr. Samrat Sen, Ld. AAAG. Ms. Manali Ali, Adv.**

**Last Heard on :29.09.2022.**

**Delivered on :07.11.2022.**

### **Moushumi Bhattacharya, J.**

1. The petitioner is a renowned nephrologist with several achievements to his credit. The petitioner is aggrieved by a communication of the Directorate of Health Services (DHS), Government of West Bengal to the Director of the Ohio Hospital and Medical Centre, Kolkata dated 14th January, 2022, by which the registration of the Hospital for organ transplantation was kept in abeyance on several grounds including that of the petitioner's name being included in the transplant team of the Hospital.

The ground given was that certain litigations are pending against the petitioner on the issue of renal transplantation.

2. The petitioner seeks cancellation of this decision and protection from the Court in relation to the petitioner's association with any Hospital for the purpose of carrying out kidney transplantation.

3. Learned counsel appearing on behalf of the petitioner relies on The Transplantation of Human Organs and Tissues Act, 1994 (TOHO Act) and submits that the role of medical practitioners is regulated under the said Act including the responsibilities and obligations of clinical establishments where transplantation of human organs is carried out. Counsel submits that the petitioner has virtually been blacklisted from participating as a member of the kidney transplantation team not only in Ohio Hospital but also in other Hospitals including Medica. Counsel places the representations made to the Director of Health Services by the petitioner in December, 2021 and by AMRI in August, 2021 which have not been responded to by the authorities. Counsel submits that of the two criminal proceedings pending against the petitioner, this Court granted stay in one of such proceedings in 2016. Counsel submits that several other doctors who are

involved in the second criminal proceeding have been allowed to practice in the area of renal transplantation. Counsel denies the seriousness of the allegations levelled against the petitioner.

4. The learned AAAG appearing for the State takes the point of locus standi of the petitioner based on the provisions of the TOHO Act. According to counsel, the hospital is required to be registered under section 14 of the Act as a condition precedent for being entitled to commence any activity relating to transplantation of any human organ or tissue and is entitled for grant of a certificate of registration under section 15 of the Act. Since the registration is not issued in the name of any person or individual, the petitioner has no cause of action or locus standi to challenge the refusal by the concerned authority. Counsel submits that none of the hospitals including Ohio and Medica have expressed any grievance against denial of registration under the Act. Counsel further takes the point of alternative remedy available under section 17 of the Act which provides for appeal from an order of the Appropriate Authority rejecting an application for registration under section 15 (2) of the Act. Counsel submits that the petitioner is continuing with his profession of treating patients suffering from renal diseases and there is hence no interference with his fundamental right under Article 19 (1) (g) of the Constitution of India. Counsel submits that the petitioner is a charge-sheeted accused in a 2020 Raiganj P.S. case also involving fifteen other accused persons in relation to the offence of illegal kidney transplantation.

5. The relevant dates placed on behalf of the parties to the Court indicate that a complaint case was filed against the petitioner in 2014/2015 pursuant where to an order was passed on 25th April, 2016 staying the proceedings in the said Complaint Case pending before the learned Judicial Magistrate, Alipore. A subsequent order was passed on 6th July, 2017 in a writ petition filed by Medica Hospitals against an order of the Director of Health Services wherein the impugned order was set aside and the Director was directed to proceed with Medica's application for renewal of license.

The primary reason for the aforesaid order was the stay granted by the Court in the Complaint Case of 2014. A second police case at Raiganj was filed against the petitioner on 21st March, 2020. The petitioner did not challenge the charge-sheet filed in the said case. The petitioner in fact made a representation to the Director of Health Services in June and December, 2021 for permission to supervise the kidney transplantation. AMRI Hospital, Mukundapur thereafter sought the advice of the DHS as to whether the petitioner could be made a part of their kidney transplantation team. There has been no progress in the said matter.

6. On the other hand, the DHS informed Ohio Hospital on 14th January, 2022 that the petitioner's name could not be included in the transplant team by reason of pendency

of criminal proceedings against him. The aforesaid communication is the subject matter of challenge in the present writ petition.

7. The dates indicate that the earlier of the two pending criminal proceedings being of 2015, was stayed by an order of this Court. The other proceeding of 2020, arising out of an FIR dated 9th May, 2012, is pending. Significantly, several of the accused persons in the said criminal proceedings are presently actively engaged in almost all the hospitals in Kolkata dealing with renal transplantation. Documents forming part of the writ petition bear testimony to this fact. Hence, it is arguable whether the Director of Health Services could have singled the petitioner out with reference to the petitioner's association with Ohio and Medica Hospitals.

8. The argument of negative equality advanced on behalf of the State, namely, that an illegality cannot be perpetuated by extending a wrong decision in other cases is not acceptable for the following reason.

Unequal treatment of persons placed on an equal or similar footing forms the core of Article 14 of the Constitution which guarantees equal treatment to all persons within the legal framework of the country. A litigant can always seek appropriate redress if he has suffered discrimination in the hands of an authority which is amenable to Article 226 of the Constitution. Hence, the fact that other accused doctors in the pending proceedings have not been stopped from the work of renal transplantation is a relevant consideration for grant of relief to the petitioner.

9. The Transplantation of Human Organs and Tissues Act, 1994 was enacted for the purpose of regulating the removal, storage and transplantation of human organs and tissues for therapeutic purposes and for the prevention of commercial dealings in human organs and tissues. The duties and roles of medical practitioners are provided in sections 3 (1A), 10 (1) (b) and 12 of the Act. The responsibilities and obligations of an establishment for the purpose of transplantation and obtaining registration for carrying out transplantation of human organs are provided under sections 14, 15 and 16 of the Act which also deal with suspension or cancellation of registration. Section 18 provides for punishment for removal of human organs without authority and includes imprisonment for 10 years or removal of names from the register of the State Medical Council for a period of 3 years depending on the nature and degree of the offence. The Act also provides for an Authorisation Committee in every hospital dealing with application for transplantation where the composition, procedure and duties of such Authorisation Committee have been provided in the Rules of 2014.

10. The TOHO Act, 1994 and the TOHO Rules, 2014 make it clear that any offence of unauthorised and unregulated removal, storage and transplantation of human organs or tissues or both are to be governed by the said Act. The TOHO Act is a comprehensive

statute dealing with each and every facet of transplantation and also of commercial dealing in human organs. Hence, the designated authorities must also act within the framework of the statute in implementing the safeguards for prevention of any such illegal transplantation. Just as the State raises the point of the petitioner having to come under the provisions of the Act for approaching the Court, the State must also ensure that any act of suspension of registration or cancellation of license or punishment for commercial dealings in human organs is done within the framework of the 1994 Act and the 2014 Rules.

11. In the present case, the State has undertaken measures which are outside the statutory framework. These measures, taken together, have effectively penalised the petitioner without following the procedure provided for in the statute. What the State has done may be called a virtual blacklisting of the petitioner. Instead of taking recourse under sections 16, 18 and 19 of the Act (suspension/cancellation of registration, punishment for removal of human organs or commercial dealing of human organs), the DHS has kept the registration of Ohio Hospital in abeyance pending removal of the petitioner from the transplant team of the Hospital. The effective result is that the registrations of Ohio and Medica for carrying out organ transplantation have been made subject to the petitioner being removed from their respective transplantation teams.

The DHS has also kept a request made on behalf of AMRI in August, 2021 for grant of permission for the petitioner to be included in its kidney transplantation team, in a state of suspension.

12. Two further aspects are required to be noted. First, the TOHO Act provides for a specific mechanism for suspension/cancellation of registration of a hospital or punishment for illegal removal of human organs as also punishment for commercial dealings in human organs under sections 16, 18 and 19 of the Act. The mechanism involves issuing of a show-cause notice and providing reasons in the notice. The hospital shall also be provided with an opportunity of hearing before the appropriate authority takes the decision of suspending its registration. Indeed, none of the relevant provisions under the TOHO Act mention pendency of criminal proceedings or the effect of such pendency on a person's right to practice in the specified area covered under the Act. Hence, the condition given in the impugned communication by the DHS to the Ohio Hospital is ex-facie beyond the Act.

13. This brings the Court to the consequential issue of whether the petitioner could have availed of the alternative remedy under section 17 of the Act. Under section 17, any person aggrieved by an order of the Authorisation Committee rejecting an application for approval for transplantation or removal of human organs or an application for registration or an order of suspension or cancellation of registration may prefer an

appeal within 30 days to the Central Government or the State Government as the case may be. There is no question of the petitioner availing of such statutory remedy in the absence of an order of the Authorisation Committee as defined under section 2 ( c) and provided for under section 9 of the Act. An appeal under section 17 may be preferred if a person is aggrieved by an order of the Authorisation Committee and that too only in specific cases of rejection of approval, suspension or cancellation of registration or rejection of an application for registration.

Since none of the aforesaid situations arose from any order of the Authorisation Committee, the starting point for availing of the statutory route was not available to the petitioner.

14. The other point of locus raised on behalf of the State also suffers from a similar fallacy. Neither Ohio nor Medica could have sought for redress before this Court since there was and is no express order of rejection for registration by the authority in question. Although section 14 of the Act provides for registration of the hospital as condition precedent for any activity in relation to transplantation of any human organ, the impugned communication under challenge shows that the DHS kept the prayer for registration of Ohio Hospital in abeyance. The communication ends with the sub-textual threat of ".the ..... file will be moved further after receiving of your classification .....". The express condition stated in the impugned letter of 14th January, 2022 is that the petitioner's name cannot be included in the transplant team of the Hospital. Thus, the argument that the concerned Hospital could have come forward for relief against the communication draws a blank as the Hospital did not have a cause of action to come to the Court. The argument also does not find support from the relevant provisions of the TOHO Act, 1994.

15. Moreover, the inclusion of the condition in the impugned communication on the ground that criminal proceedings are pending against the petitioner is contrary to the fundamental canon of criminal jurisprudence, which is that every person is innocent unless proven guilty.

The State authorities are seeking to pre-judge the proceedings and penalise the petitioner for an offence which is yet to be proved beyond all reasonable doubt-refer *Brajendra Singh Vs. State of Madhya Pradesh*; (2012) 4 SCC289.

16. *Basawaraj vs Special Land Acquisition Officer*; (2013) 14 SCC 81 merely dealt with perpetuation of a wrong which had earlier been committed. The Supreme Court in that case was more on the effective functioning of administration. In the present case, the fact that other nephrologists have been permitted to work in leading hospitals of Kolkata despite being accused in the pending criminal proceedings is significant for noticing the discriminatory approach of the State towards the petitioner. The State cannot take

refuge in the argument of negative equality where it has positively discriminated against the petitioner.

17. The fact that the petitioner is continuing to practice as a nephrologist and is not deprived of earnings from his work is no defence. There is little doubt that the petitioner's fundamental right guaranteed under Article 19 ( 1) ( g) of the Constitution has been infringed in not being allowed to be part of the transplantation team of Ohio and Medica Hospitals. The deprivation leads to a loss not only of earnings but of reputation. Besides, the petitioner is in his mid-70s and cannot continue to remain under the shadow of pending criminal proceedings where the governing statute does not contain any such bar. After all, every person has the legitimate expectation to seek closure of a proceeding or charges levelled against the person (although not proved till date) and have a legitimate expectation of restorative justice and redemption.

The petitioner continues to suffer by reason of criminal cases of 2014/2015 and 2020 without seeing any closure to the same. The Hospitals have also been made to bear the consequences of intending to have the petitioner included in their transplantation teams.

18. WPA 3552 of 2022 is allowed in view of the above reasons. The impugned communication dated 14th January, 2022 is cancelled. The respondent authorities are directed to ensure that the petitioner can carry on his profession as a medical practitioner in hospitals and clinical establishments registered or licensed under the Transplantation of Human Organs and Tissues Act, 1994. The respondents shall also not penalise the hospitals and clinical establishments in any manner for having the petitioner in their respective transplantation teams.

19. The writ petition is disposed of accordingly.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

**(Moushumi Bhattacharya, J.)**