

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.14947 of 2019

-
-
1. Shambhu Nath @ Shambhoo Nath Son of Ram Baboo Ray resident of Dhobi Tola, Danapur Cantt, P.S.- Danapur, District- Patna.
 2. Ritesh Kumar Son of Dinesha Nand resident of House No. 1 Pakki Ghat, Pethia Bazar, Danapur Cantt, P.S.- Danapur, District- Patna.

... .. Petitioners

Versus

1. The State of Bihar through the Principal Secretary, Health Department, Government of Bihar, Patna.
2. The Director-in- Chief, Health Services, Government of Bihar, Patna.
3. Authorization Committee, through Dean, Patna Medical College Hospital (P.M.C.H.), Patna.
4. The Civil Surgeon-cum- Chief Medical Officer, Patna.
5. The Superintendent, P.M.C.H., Patna.
6. The Managing Director, Paras HMRI Hospital, Bailey Road, Patna.
7. Director, Department of Nephrology and Transplantation, Paras HMRI Hospital, Bailey Road, Patna.
8. Dr. Shashi Kumar, Consultant, Department of Nephrology and Transplantation, Paras HMRI Hospital, Bailey Road, Patna.

... .. Respondents

Appearance :

For the Petitioners	:	Mr. Krishna Kant Singh, Advocate Mr. Anil Kumar Sinha, Advocate
For the Respondent State:		Mr. S.D. Yadav, A.A.G.-9 Smt. Shama Sinha
For Respondents 6 to 8:		Mr. Sandeep Kumar, Advocate Mr. Alok Kumar @ Alok Kumar Shahi, Advocate

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date : 26-02-2021

This matter relates to transplantation of kidney, which the petitioner No.1 requires and petitioner No. 2, it has been claimed, is willing to donate for the said purpose. The petitioner No. 1 has accordingly been described as ‘the proposed Recipient’



and petitioner no.2 as 'the proposed Donor' for the purpose of present judgment and order.

2. This writ application under Article 226 of the Constitution of India has been filed jointly by the proposed Donor and the proposed Recipient seeking direction to the respondents for recommending/forwarding their case to the Authorization Committee of Patna Medical College and Hospital, Patna, for granting 'No Objection Certificate' for transplantation of kidney as the private hospital, namely, Paras HMRI Hospital, Bailey Road, Patna (Respondents No. 6 to 8), where the proposed Recipient was undertaking treatment for renal disorder, has refused the request for transplantation of kidney, which the proposed Donor has willingly agreed to donate. The petitioners also seek a direction to start pre-transplant treatment/medical test in respect of proposed Donor for donation of kidney in order to save the life of proposed Recipient. Parties have been heard.

3. The proposed Donor is, admittedly, not a near relative of the proposed Recipient within the meaning of Section 2(i) of the Transplantation of Human Organs and Tissues Act, 1994 (hereinafter to be referred to as the 'THO&T Act'). The proposed Recipient is a chronic patient of renal failure and undeniably requires kidney transplantation. He had been undergoing



haemodylysis regularly in Paras HMRI Hospital, Bailey Road, Patna, (hereinafter to be referred to as the 'Private Hospital'), which is duly approved by the authorities under the THO&T Act read with Transplantation of Human Organs and Tissues Rules, 2014 (hereinafter to be referred to as the 'THO&T Rules').

4. It has been alleged in the writ petition that the Private Hospital has refused to undertake the process of kidney transplantation despite unconditional willingness of the proposed Donor to donate for the sole reason that the proposed Donor is not the near relative of the proposed Recipient. It is the petitioners' case that the proposed Donor is willing to donate his kidney voluntarily, which is triggered by the affection and attachment which he has for the proposed Recipient. They have alleged that the Private Hospital has refused to forward the application of the petitioners before the State Authorization Committee for granting no objection, which is required under the Provisions of the THO&T Act.

5. When this application was taken up by this Court on 29.09.2020 through *on-line* video conference mode on a mentioning for urgent hearing, it was informed that a supplementary affidavit had been filed, which was unavailable on record. The matter was accordingly adjourned. Subsequently, the



matter was taken up on 08.10.2020 through *on-line* video conference mode, when the Court was informed that the proposed Donor had been asked to appear before a high powered statutory 'Authorization Committee', constituted under the THO&T Act and the Rules framed thereunder. The Court had recorded an assurance furnished by Mr. Sandeep Kumar, learned counsel appearing on behalf of the Private Hospital that the Hospital shall furnish all documents as per the norms to the Authorization Committee as and when required without any unnecessary delay.

6. For one reason or the other, the matter was adjourned on several dates as the Private Hospital was found refusing to undertake the desired surgery, as, according to them, donation of the organ by the proposed Donor was 'in suspicious circumstance' and not out of affection and attachment. The question had arisen as to whether this Court in such circumstance could and should issue directions or orders in the nature of writ of *mandamus* exercising power of judicial review under Article 226 of the Constitution of India. Extensive arguments have been made on behalf of the parties in relation to respective functions of the Authorization Committee under the THO&T Act and the Rules framed thereunder.



7. It has been pleaded in a supplementary affidavit filed on behalf of the petitioners that despite specific direction of the State Government, vide Memo. No. 1253(18) dated 02.08.2019, the Private Hospital was not acting and carrying out necessary steps under the provisions of THO&T Act and the Rules. A copy of the said letter dated 02.08.2019 has been brought on record by way of Annexure-3 to the supplementary affidavit, whereby the Health Department, Government of Bihar, referring to an earlier letter dated 29.06.2019 of the Department, had directed the Private Hospital to take regular steps as contemplated under Rule 5(3) (a), (b), (c), (d) and (e) so that a process could be initiated for considering grant of No Objection Certificate (NOC) for removal of the proposed Donor's kidney and its transplantation into the body of the proposed Recipient.

8. Another supplementary affidavit has been filed on 26.11.2020 on behalf of the petitioners stating that the Private Hospital through its letter dated 06.08.2020 has communicated to the Director-in-Chief, Health Services, that it appear to them to be a suspicious case and, therefore, they could not recommend for grant of NOC. The Private Hospital, however, mentioned in its letter dated 06.08.2020 as under : -

“On initial interview the proposed Donor admitted that he was the Priest in the temple established with



the help of Sri Shambhu Nath (proposed Recipient) who is an influential person in the locality. This raised the suspicion that is not a case of Altruism, but seems to be contravention of the Clause 19(a) of Transplantation of Human Organ Act, 1994 and Clause 6FC(111) of Transplantation of Human Organ Rules, 1995. We thus told the proposed Donor and proposed Recipient that it was beyond out preview to recommend for approval of the transplantation procedure of Authorization Committee of the State.

Since the Authorization committee is the final authority in this matter your approval shall be binding on us to carry on the transplantation with great pleasure.”

9. On 07.10.2020, the proposed Donor appeared before the Authorization Committee, whereupon he was asked to produce certain documents. It is the petitioners’ case that subsequently, under the directions of the Director-in-Chief, Department of Health, certain tests were conducted and directly sent to him recording as under : -

“As per your direction we have conducted primary investigation of proposed Donor and proposed Recipient through different physical, biochemical and pathological test which indicate suitable matching of the two for renal transplantation.

However, we are unable to proceed further for final matching of proposed Donor and proposed Recipient without authorization committee approval.”



10. It further appears that the proposed Donor submitted such documents as he was required to produce in the light of the decision of the Authorization Committee dated 07.10.2020.

11. Be it noted that the proposed Donor was asked by the Authorization Committee to produce before the Committee following documents : -

(i) Original copy of the recommendation made by the Paras Hospital;

(ii) Registration certificate of Paras Hospital;

(iii) Form-4 (which is to be given by the registered medical practitioner for certification of medical fitness of living proposed Donor in accordance with the proviso to Rule 5(3)(b).

12. The Authorization Committee, in its meeting held on 12.11.2020, considered the letter dated 04.11.2020 received from Paras Hospital. The Authorization Committee has recorded that for the purpose of suitable matching of the kidney for transplantation, no NOC was required from the Authorization Committee.

13. The aforesaid development resulted into a situation where the Private Hospital, after having conducted preliminary investigation of the proposed Donor and the proposed Recipient through different physical, biochemical and pathological tests, found that the said decisions indicated suitable match of the two



for renal transplantation, it expressed its inability ‘to proceed further for final matching of the proposed Donor and the proposed Recipient without Authorization Committee’s approval’. The Authorization Committee, took a stand that for the purpose of matching of proposed Donor and proposed Recipient for organ transplantation, there was no approval of Authorization Committee required. This created an impasse.

14. It is noteworthy that, initially, the Court had formed an opinion that in view of a high level statutory Authorization Committee constituted under the THO&T Act in place, the controversy, whether the transplantation can be permitted or not, shall be resolved at that level. Now, since the respondents have shown a technical, rather mechanical approach than humane towards a delicate issue like the present one, this Court has been made to address various statutory provisions to delineate respective duties and responsibilities of the statutory functionaries under the THO&T Act and the Rules.

15. Looking back to the history of the THO&T Act, it is noteworthy that it has been enacted in accordance with Clause (1) of Article 252 of the Constitution of India and resolutions passed by all the houses of legislatures of the States of Goa, Himachal Pradesh and Maharashtra as the Parliament did not have the



legislative competence to make laws for the States in respect of regulation of removal, storage and transplantation of human organs and tissues for therapeutic purpose and for prevention of commercial dealings in human organs and tissues.

16. Some doubts had arisen after this case was heard at length in respect of applicability of the provisions of the THO&T Act in the State of Bihar. My attention has been drawn to certain notifications issued by the Health Department, Government of Bihar, which indicate that the THO&T Act has been made applicable for the State of Bihar also, by resolutions passed by both the houses of the State Legislature. There appears to be no doubt, thus, in respect of application of the THO&T Act enacted by the Parliament in the State of Bihar in accordance with the provisions of Article 252(1) of the Constitution of India. It appears from the statement of objects and reasons in the Amendment Act 16 of 2011 also introducing amendment in the THO&T Act that it has been adopted by all the States except the State of Jammu and Kashmir and Andhra Pradesh, which have enacted their own legislations to regulate the removal, storage and transplantation of human organs for therapeutic purposes and to prevent commercial dealings in the human organs.



17. There does not appear to be any doubt on careful examination of the scheme of the THO&T Act read with statement of the objects and the reasons that it has been enacted to achieve two main purposes: -

(i) to regulate the removal, storage and transplantation of human organs for therapeutic purposes and

(ii) to prevent commercial dealings in the human organs.

18. It is not difficult to discern from the scheme of the THO&T Act that taking note of reports about thriving human organ trade in India and the consequential exploitation of economically weaker section of the society, certain amendments were introduced in the THO&T Act by Act 16 of 2011 with effect from 10.01.2014. Apart from expanding the definition of 'near relative' under Section 2(i) of the THO&T Act and adding 'tissues' in the definition clause and consequential addition of the word 'tissues' with 'human organs' in the cause title and other sections of the THO&T Act, some major amendments came to be introduced in Section 9 of the THO&T Act, by the aforesaid Amendment Act, visibly to prevent commercial dealings in human organs.

19. Concisely stated, the THO&T Act permits, with conditions and restrictions stipulated therein, removal of human



organs from the body of a person for therapeutic use before or after his death. There are provisions which deal with removal of organ after the death of a person for the said purpose, if such person had expressed his willingness and unequivocally authorized before his death, removal of any organ or tissue or both of his body, after his death for therapeutic purposes. The THO&T Act permits a person in rightful possession of the dead body of a person authorize the removal of any human organ or tissue or both of such deceased person for therapeutic purposes.

20. The situation when in case of a living person authorizes removal of his organ during his life time for being transplanted into the body of a near relative does not pose complex legal issues under the provisions of the THO&T Act. As has been noted above, present case pertains to the proposed Donor's request to permit removal of his organ (kidney) during his life time for being transplanted into the body of the proposed Recipient, which, according to the proposed Donor, is out of his affection and attachment for the proposed Recipient. In the absence of any material basis to suggest that a donor's willingness to donate is effectuated by any consideration or coercion, whether the THO&T Act restricts his right to donate his organ or not? This is one of the



questions of seminal importance, which the present writ application involves.

21. Sub-section (3) of Section 9 of the THO&T Act deals with the situation if the donor authorizes the removal of his human organ before his death for transplantation into the body of another person not being his near relative out of affection and attachment towards recipient or for any other special reasons. In such situation, the provision requires prior approval of an Authorization Committee. Sub-sections (5) and (6) of Section 9 of the THO&T Act provide the procedure for the Authorization Committee to consider an application for removal of a human organ. Section 9 of the THO&T Act read with relevant provisions under Section 3 thereof governs the circumstances when a donor is not a near relative of a recipient and he is willing to donate his organ during his life time for therapeutic purposes.

22. In order to understand the legislative intent, the Court has considered it apt to mention briefly important provisions under the THO&T Act. This exercise has been undertaken to appreciate whether the THO&T Act permits a person to treat his body/organs of his body to be a property which he owns and can, therefore, as a matter of right, permit transfer for therapeutic purposes to another person, in case there is complete absence of



any consideration for such transfer, which is prohibited under the provisions of the THO&T Act. As has been noted in the beginning, the THO&T Act has been enacted to achieve twin objectives of (i) regulating the removal, storage and transplantation of human organs for therapeutic purposes, and (ii) preventing commercial dealings in the human organs.

23. Sub-section (1) of Section 3 of the THO&T Act enables a person to authorize the removal before his death any human organ or tissue or both of his body for therapeutic purposes. Such liberty of a person, to authorize removal before his death, is, however, controlled by the 'manner' and subject to 'conditions' as prescribed under the THO&T Act or the Rules framed thereunder. Sub-section (1) of Section 3 of the THO&T Act deals with removal of organ of the donor before his death. A person, however, may authorize during his lifetime removal of his organ after his death for therapeutic purposes. This situation is governed by sub-section (2) of Section 3 of the THO&T Act, which states that if the donor had in writing and in presence of two or more witnesses (at least one of whom is a near relative of such person) unequivocally authorized at any time before his death, the removal of any human organ or tissue or both, of his body after his death and for therapeutic purposes; the person lawfully in possession of the dead



body of the donor shall grant to a registered medical practitioner all reasonable facilities for removal of that human organ from the dead body of the donor for therapeutic purposes. The person, lawfully in possession of the dead body, despite willingness of a deceased donor for removal of his organ, may not permit removal of the organ unless he has reason to believe that the donor had subsequently revoked such authority.

24. On careful reading of sub-section (1) and sub-section (2) of Section 3 of the THO&T Act, which substantially existed in the original enactment in 1994 (with the only change of addition of 'or tissues or both' with 'human organs' as and where present), the 'wish' or one can say 'will' of a person for removal of his organ for therapeutic purpose is to prevail. Sub-section (1) and sub-section (2) of Section 3 of the THO&T Act contemplates situations where a person had expressed desire and had authorized during his lifetime removal of his organ during his lifetime or after his death. Sub-section (3) of Section 3 of the THO&T Act conceives a situation where a person dies without making any authority as envisioned in sub-section (2) of Section 3 of the THO&T Act. In such circumstances, if the person, lawfully in possession of the dead body of such person, may authorize the removal of any human organ of the deceased for its use for therapeutic purposes.



The competence of the person, in possession of the dead body, to authorize removal of any human organ for therapeutic purposes is subject to following conditions : -

(i) No objection was expressed by the deceased to use of his human organs after his death for therapeutic purposes.

(ii) He does not have any reason to believe that any near relative of the deceased has any objection to removal of human organ of the deceased for therapeutic purposes.

25. Does dead body of a person becomes the property of the person who is in lawful possession of such dead body and, therefore, derives authority to authorize removal of any organ for therapeutic purposes? This is also a question to be pondered over. One has to be mindful of the fact that there must not be any trace of commercial dealings in human organ and is completely for any valid transaction under the THO&T Act.

26. Can transfer of a human organ from the body of a living person or from the deceased person in the form of donation or gift be equated with transfer of property by way of will, gift or donation? This question, in the Court's opinion, also needs to be addressed to decide the main issue involved in the present writ application in the wake of expressed willingness of the proposed Donor in this case to donate his organ for therapeutic purposes,



which can whether be ignored by the statutory Authorization Committee constituted under the THO&T Act.

27. Sub-section (4) of Section 3 of the THO&T Act declares that an authority given under sub-section (1) or sub-section (2) of Section 3 of the THO&T Act shall be 'sufficient warrant' for the removal for therapeutic purposes. It, however, proscribes removal of organ by any person other than a registered medical practitioner. For enucleating a cornea, a technician, possessing such qualification and experience as may be prescribed, is also competent by way of the proviso to sub-section (4) of Section 3 of the THO&T Act.

28. Sub-section (5) and sub-section (6) of Section 3 of the THO&T Act makes it obligatory for a registered medical practitioner to be satisfied before removal of human organ or tissue or both after death of a person that life is extinct in the such body or it is a case of 'brain-stem death', such death has been duly certified. The procedure for certification of brain-stem death has been laid down in sub-section (6) of Section 3 of the THO&T Act,

29. It is noteworthy that sub-section (7) of Section 3 of the THO&T Act, which is a *non obstante* clause, states that where the brain-stem death of any person of less than 18 years of age occurs, any of the parents of the deceased may give authority for



the removal of any human organ from the body of the deceased person. The expression, 'notwithstanding anything contained in sub-section (3)', in sub-section (7) of Section 3 of the THO&T Act, is of no less significance for a person less than 18 years of age has not been considered under the THO&T Act to be competent to take a decision and authorize removal of his organ for any purpose including therapeutic purposes. His either of the parents, however, acquire the ability to give authority under sub-section (7) of Section 3 of the THO&T Act for removal of the human organ. Can it, therefore, be said that the parents owe the dead body upon occurrence of brain-stem death of a person less than 18 years of age for the limited purpose of giving an authority for the removal of any human organ or tissue or both from the body of such person?

30. Section 4 of the THO&T Act takes away the competence to give the authority, under sub-section (2) or sub-section (3) of Section 3 of the THO&T Act, in case an inquest may be required to be held in relation to such body in pursuance of the provisions of any law for the time being in force. Apparently thus, the competence of the person, lawfully in possessing of the dead body of a donor under sub-section (2) of Section 3 of the THO&T Act, even, in case, the donor had, in writing, unequivocally



authorized removal of any human organ, diminishes by operation of Section 4 of the THO&T Act, which yields to requirement of inquest in pursuance of the provisions of any law for the time being in force.

31. A person, to whom the dead body of a deceased has been entrusted solely for the purposes of interment, cremation or other disposal, cannot authorize removal of any human organ from such dead body. This is visibly because such person is given possession over the dead body for the limited purpose of interment, cremation or other disposal.

32. Section 5 of the THO&T Act deals with a situation where a dead body lying in a hospital or prison not claimed by any of the near relatives of the deceased person within 48 hours of the time of the death of the concerned person. In such situation, the person in-charge of the management or control of the hospital or prison or an employee, duly authorized in this regard by the person in-charge, may give authority for removal of any human organ or tissue or both from the deceased. Sub-section (2) of Section 5 of the THO&T Act restricts the aforesaid ability to give authority under sub-section (1) of Section 5 of the THO&T Act, if the person empowered to give such authority has reason to believe that any near relative of the deceased person is likely to claim the dead



body, even though such near relative has not come forward to claim the body of the deceased person within the time specified in sub-section (1) of Section 5 of the THO&T Act.

Can it be said that for the limited purpose of authorizing removal of an organ, the dead body lying in a hospital or prison becomes a property of the hospital or a prison if the in-charge of the management of the prison or hospital has a reason to believe that no near relative of the deceased is likely to claim the dead body? Does sub-section (2) of Section 5 of the THO&T Act suggests that near relative of the deceased person, who may claim the dead body are the real owners of the dead body and because of the presence of reason to believe that such near relative is likely to claim the dead body, the permissibility, under sub-section(1) of Section 5 of the THO&T Act, of the person in-charge of the management or control of a hospital or prison extinguishes?

33. Section 6 of the THO&T Act is in relation to removal of human organ from the bodies sent for postmortem examination for medico legal or pathological purposes. The provision again reiterates the will of the deceased to be paramount and permits authorization of removal of organ for therapeutic purposes, if the person authorizing such removal is satisfied that the deceased person had not expressed before his death any



objection in this regard. It also reiterates that in case he had granted any authority for use of any of his human organs for therapeutic purposes after his death, such authority had not been revoked by him before his death.

On conjoint reading of relevant provisions of Section 3 and Section 6 of the THO&T Act, it can be easily noticed that the THO&T Act recognizes competence of a person to authorize removal of his organ for therapeutic purposes before his death or after his death. His willingness or otherwise for the removal of any of his organs after his death is a crucial factor. In the absence of any objection of a deceased person, his near relatives, persons in lawful possession of the dead body and in some other circumstances, as noted above, may authorize removal of a human organ from his dead body.

34. Do these provisions suggest that the THO&T Act recognizes ownership of a person over his body and, therefore, though for the limited purpose of removal of any human organ or tissue or both from his dead body for therapeutic purposes without any commercial dealings allow his willingness to prevail, such consent/willingness/permission resembles execution of a 'will' for a property? Does it convey in any manner that in the absence of a will of a person, his near relative, within the meaning of the



THO&T Act, acquire a right similar to the right of inheritance in the nature of *intestate* succession and thus have the ability to authorize in accordance with the provisions of the THO&T Act, removal of human organ for therapeutic purposes.

35. Section 7 of the THO&T Act obligates the registered medical practitioner to take such steps as may be prescribed for preservation of the human organ or tissue after the removal from the body of any person. Section 8 of the THO&T Act, which is a saving clause, postulates that nothing in the foregoing provisions of THO&T Act shall be construed as rendering unlawful in dealing with the body or with any part of the body of a deceased person, such dealing would have been lawful if the Act had not been passed.

36. Before moving forward to examine the provisions under Section 9 of the THO&T Act, the provisions under sub-sections (1-A), (1-B) need to be noticed at this stage, which were introduced by the Amendment Act 16 of 2011 and came into force with effect from 10.01.2014. Sub-section (1-A) casts duty on a registered medical practitioner working in a hospital to ascertain from the person admitted to the Intensive Care Unit (ICU) or from his near relative that such person has authorized at any time before his death the removal of any human organ or tissue or both of his



body as stipulated under sub-section (2). The hospital, sub-section (1-A) of Section 3 of the THO&T Act prescribes, shall proceed to authorize the documentation for such authorization in such manner as may be prescribed. It further casts duty on a registered medical practitioner to make aware to the person admitted in ICU or his near relative as may be prescribed about the option to authorize or decline for donation of human organ or tissue or both.

37. Sub-section (1-B) further clarifies that the duty mentioned under sub-section (1-A) shall also apply in case of a registered medical practitioner working in an ICU in a hospital which is not registered under the THO&T Act. The duty, which has been cast on a registered medical practitioner under sub-section (1-A) read with sub-section (1-B) of Section 3 of the THO&T Act, to make a person admitted in an ICU or his near relative aware of the availability of an option to authorize or decline for donation of human organ is for the purpose of 'removal, storage or transplantation of human organs'. The purpose of the THO&T Act is, thus, not only to permit removal of human organ for its transplantation into the body of a particular recipient, it permits removal of a human organ for the purpose of storage also, apparently for therapeutic purposes including transplantation in the body of a person in need. The purpose



behind introduction of sub-section(1-A) and sub-section (1-B) appears to encourage persons to authorize removal of human organs after death of the person. The provisions under sub-section (1-A) and (1-B), in fact, advance the purpose of having more human organs available from the body of deceased persons for therapeutic purposes. This is possibly because there has been substantial growth in demand for transplantation of human organs with advancement in biotechnology and consequential shortage of organs for the said purpose. Non-availability of human organs, in such circumstances, may create a commercial market dealing with organs. It is in this background, to encourage donation of human organs on the occurrence of death of a person, depending upon his/her willingness or the willingness of his/her near relative, sub-sections (1-A) and (1-B) appear to have been introduced.

38. Looking back to the statement of objects and reasons of Act of 16 of 2011, paragraph 4(iii) of which discloses the purpose of such amendment reads as under : -

“(iii) amendment of Section 3 with a view to make mandatory for the Intensive Care Unit or Treating Medical Staff to request relatives of brain dead patients for organ donation and to provide for the enucleating of corneas by a trained technician. Further to enable a surgeon or a physician and an anaesthetist or intensivist to be included in the medical board in the event of non-availability of a neurosurgeon or neurologist for certification of brain death;”



39. It is thus a mandatory duty which has been cast upon a registered medical practitioner to ascertain the facts as required under sub-section (1-A) of Section 3 of the THO&T Act.

40. Though this provision may not appear to be directly related to the issue involved in the present case, which, as has already been noticed, is governed by Section 9(3) of the THO&T Act, they have been noticed and discussed to perceive the purpose and objects of the THO&T Act and the context in which the provisions have been enacted. It is also meant for addressing the degree of sensitivity, which the authorities/functionaries/other stake holders are expected to function so as to make the legislative wisdom, the intent and purpose under the Act meaningful.

41. Section 9 of the THO&T Act is at the core of the issue, which reads as under : -

"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 proposed Donor before his death shall be transplanted into a proposed Recipient unless the proposed Donor is a near relative of the proposed Recipient.

[(1-A) Where the proposed Donor or the proposed 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 proposed Recipient is a foreign national and the proposed 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 purpose 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 of Rights and Full Participation) Act, 1995 (1 of 1996).]

(2) Where any proposed Donor authorises the removal of any of his [human organs or tissues or both] after his death under sub-section (2) or 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



or tissue or both] may be removed and transplanted into the body of any proposed Recipient who may be in need of such [human organ or tissue or both].

(3) If any proposed 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 proposed Recipient not being a near relative as is specified by the proposed Donor by reason of affection or attachment towards the proposed 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 proposed Donor has agreed to make a donation of his human organ or tissue or both before his death to a proposed Recipient, who is his near relative, but such proposed Donor is not compatible biologically as a proposed Donor for the proposed Recipient; and

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

(c) the first proposed Donor who is compatible biologically as a proposed Donor for the second proposed Recipient and the second proposed Donor is compatible biologically as a proposed Donor of a human organ or tissue or both for the first proposed Recipient and both proposed Donors and both proposed Recipients in the aforesaid group of proposed Donor and proposed 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 Committees 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 proposed Donor and the proposed 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.”

42. Sub-sections (1-A), (1-B), (1-C), sub-section (3-A)

of Section 9 of the THO&T Act were inserted by Act 16 of 2011



(supra). A close reading of Section 9 of the THO&T Act shows that sub-section (1) prescribes transplantation of an organ removed from the body of a donor before his death, into a recipient. Sub-section (1) itself carves out an exception by providing the expression 'save as otherwise provided in sub-section (3)'. Before referring to the provisions under sub-section (3), sub-section (2) of Section 9 of the THO&T Act may be noted, which provides that where any donor authorizes removal of any of his human organs after his death under sub-section (2) of Section 3 or any person competent/empowered to give authority for removal of any human organ from any deceased person authorizes 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 tissues or both. Sub-section (3) of Section 9 authorizes the donor for removal of his human organ 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 specified by the donor for the reason of affection or attachment towards the recipient or for any other reasons. Such removal of a human organ under sub-section (3) of Section 9 is subject to prior approval of an Authorization Committee constituted under Clause (a) or (b) of sub-section (4) of Section 9 of the THO&T Act.



43. On close comparative examination of various provisions under Section 3 and Section 9 of the THO&T Act, following is the picture which emerges : -

(i) Sub-section (1) of Section 3 of the THO&T Act is a general provision which enables a donor, authorize before his death, removal of his human organ or tissues or both for therapeutic purposes. This statutory liberty of a donor to authorize removal of human organ is subject to the conditions under the THO&T Act. It permits authorization of removal of organ before or after the death of a donor.

(ii) Section 3 of the THO&T Act deals with obtaining consent, availability or absence of consent, making a donor or his near relative aware about their option to authorize removal of a human organ for therapeutic purposes after the death of the person. The willingness or the consent under this provision for removal of human organ, tissues or both is from the body of a person, who has either died or in whose case brain-stem death has occurred.

(iii) The donation or human organ, tissues or both under sub-section (2) of Section 3 of the THO&T Act is not to a particular recipient. This is the purpose why expression 'storage' finds place in sub-section (1-A) of Section 3 of the THO&T Act.



(iv) Sub-section (2) and sub-section (3) of Section 3 Act and sub-section (2) of Section 9 of the THO&T need to be read together, where the removal of a human organ, tissues or both is authorized after the death of the donor, which can be transplanted into the body of any recipient who may be in need of such human organ, tissues or both. The donor authorizing removal of his organs under sub-section (2) and sub-section (3) of Section 3 of the THO&T Act cannot choose the recipient.

44. Removal of a human organ, tissue or both for being transplanted can be permitted only when the donor is near relative of the recipient under sub-section (1) of Section 9 subject to the provisions under sub-section (3) of Section 9 of the THO&T Act.

45. Sub-section (3) of Section 9 read with sub-section (1) of Section 3 indicates that a donor may authorize removal of his human organ of his body during his lifetime for transplantation into the body of a recipient who is not his near relative. The donor may authorize such removal under sub-section (3) of Section 9 by reason of (i) affection, (ii) attachment towards the recipient; or for any other special reason. As has been noticed, such removal and transplantation is not permitted without prior approval of the Authorization Committee.



46. Sub-section (4) of Section 9 of the THO&T Act deals with composition of Authorization Committee for the Central Government, State Government and the Union Territory to consider applications made seeking approval as required under sub-section (3) of the Section 9 of the THO&T Act.

47. Sub-section (5) of Section 9 of the THO&T Act stipulates an enquiry by the Authorization Committee for satisfying itself that the applicants have complied with all the requirements of the THO&T Act and the Rules made thereunder. Once the applicants are found to have complied with the requirement of the THO&T Act and the THO&T Rules for removal and transplantation of a human organ, the Authorization Committee is under obligation to grant requisite approval. If, however, the applicants are not found to have complied with the requirements, the Authorization Committee is required to reject the application for approval for the reasons to be recorded in writing.

48. Section 24 of the THO&T Act confers upon the Central Government power to make Rules for the purpose of carrying out the purposes of the THO&T Act including composition of Authorization Committee under sub-section (4) of Section 9 and the form and the manner in which an application



may be jointly made by donor and recipient under sub-section (5) of Section 9 of the THO&T Act.

49. Transplantation of Human Organs and Tissues Rules, 2014 have been framed. Rule 13 of the THO&T Rules deals with composition of State or District Level Authorization Committee. Be it noted at this stage and reiterated that the Authorization Committee referred to under sub-section (3) stands defined in sub-section (2)(c) of the THO&T Act as the Committees constituted under clause (a) or clause (b) of sub-section (4) of Section 9 of the THO&T Act. Authorization Committee under clause (a) of sub-section (4) of Section 9 of the THO&T Act is a committee constituted by the Central Government, whereas clause (b) of the said sub-section refers to constitution by notification of one or more Authorization Committees by the State Governments and Union Territories as the case may be.

50. I shall be referring briefly to the said provision of sub-section (3-A) of Section 9 of the THO&T Act for the limited purpose of addressing whether an organ can be treated to be a property because the law permits a person to authorize removal of his organ for transplantation into body of another person. For the present, the composition and functions of the State Level Authorization Committee under clause (b) of sub-section (4) of



Section 9 of the THO&T Act in the State of Bihar is being looked into to consider the grievance raised by the petitioners in the present writ application.

51. Rule 10 of the THO&T Rules mandates joint application to be filed by a living donor and the recipient in Form 11 of the THO&T Rules. Rule 11 of the THO&T Rules stipulates that there shall be one State Level Authorization Committee and additional authorization committees in the districts or institutions or hospitals may be set up as per norms given under the THO&T Rules. Sub-rule (3) of Rule 11 requires that no member from transplantation team of the institution should be a member of the respective Authorization Committee. Sub-rule (4) of Rule 11 prescribes that if the number of transplantation is 25 or more in a year at the respective transplantation centers, Authorization Committee should be hospital based and if such transplantation is less than 25, the State or the District Level Authorization Committee would grant approval. Rule 12 refers to hospital based Authorization Committee. Rule 13 of the THO&T Rules lays down composition of State/ District Level Authorization Committee.

52. In the present case the joint application was made by the State Level Authorization Committee. Once a joint application



is filed before the Authorization Committee, when the donor and recipient are not near relatives or where the donor or recipient belongs to State or Union Territory other than the State or Union Territory where the transplantation is proposed to be undertaken, verification of residential status by *Tehsildar* or any other authorized officer for the purpose with a copy marked to 'Appropriate Authority' of the State or Union Territory appointed under Section 13 of the THO&T Act of domicile of donor or recipient for their information is required in Form-20. In case, any doubt of organ trafficking arises, the Appropriate Authority or any other officer is required to inform the police department for investigation and action in accordance with the provisions of the THO&T Act. This is apparently to check commercial dealing with human organs. Rule 19 lays down that where the proposed transplantation is between other than the near relatives and all cases where the donor or recipient is foreign national (irrespective of them being near relative or otherwise), the approval will be granted by the Authorization Committee of the hospital or if Hospital Based Authorization Committee is not constituted then by the District or State Level Authorization Committee.

53. It is clearly evincible from the aforesaid that there has to be a Hospital Based Authorization Committee for such



hospitals where number of transplantation per year is more than 25 which can approve removal and transplantation of an organ from a living donor though not a near relative of the recipient.

54. It is significant to note that Rule 10 requires the papers for approval of transplantation to be processed by the registered medical practitioner and the administrative division of the institution for transplantation. On perusal of instructions prescribed in Form 11 appended to the Rules it transpires that the same is required to be submitted along with Form-1 or Form-2 or Form-3 as may be applicable. In the present case, Form-3 is applicable for organ donation by other than near relative living donor. It further requires submission of the doctor's advice recommending transplantation. In addition, in case the proposed transplantation is between unrelated person, proper evidence of vocation and income of the donor as well as the recipient for the last three years must be enclosed with the application. It has to be verified under the instructions that the evidence of income does not necessarily mean the proof of income tax returns, keeping in view the fact that the applicants in a given case may not be filing income tax returns. Instructions, thus, stipulate that the application shall be accepted for consideration by the Authorization Committee only if it is complete in all respects and any omission



of the documents or the information required in the forms mentioned shall render the application incomplete. The application has to bear the signature of the prospective donor and prospective recipient.

55. As has been noted above, there is requirement that the papers for approval of transplantation would be processed by the registered medical practitioner and the administrative division of the institution for transplantation. Sub-rule (3) of Rule 10 permits the State Governments to merge Form 11 with Form 1, Form 2 or Form 3, provided the contents of the recommended forms are covered with the merged form and the same is approved by the State Government concerned. It has not been brought to the Court's notice as to whether the forms have been merged or not. Sub-rule (2) of Rule 10 requires Authorization Committee to take a decision on such application in accordance with Rule 18 of the Rules. Rule 18 of the Rules, however, is confined to donation when the proposed transplantation of organ is between near relatives. In the Court's opinion, a definite procedure for taking decision on an application by the Authorization Committee where the proposed donor and recipient are not near relatives is prescribed under sub-rule (3) of Rule 7 of the THO&T Rules which reads as under :-



“(3) When the proposed donor and the recipient are not near relatives, the Authorization 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.”

56. Rule 23 of the THO&T Rules states that Authorization Committee (which is applicable only for living organ or tissue donor) should state in writing its reason for



rejecting or approving the application of the proposed living donor in the prescribed Form 18 and all such approvals should be subject to conditions laid down therein. Since Rule 23 of the THO&T Rules is relevant for the purpose of present adjudication, the same is being reproduced hereinbelow :-

“23. Decision of Authorisation Committee.-(1) The Authorisation Committee (which is applicable only for living organ or tissue donor) should state in writing its reason for rejecting or approving the application of the proposed living donor in the prescribed Form 18 and all such approvals should be subject to following conditions, namely:-

(i) the approved proposed donor would be subjected to all such medical tests as required at the relevant stages to determine his or her biological capacity and compatibility to donate the organ in question;

(ii) the physical and mental evaluation of the donor has been done to know whether he or she is in proper state of health and it has been certified by the registered medical practitioner in Form 4 that he or she is not mentally challenged and is fit to donate the organ or tissue;

Provided that in case of doubt for mentally challenged status of the donor the registered medical practitioner or Authorisation Committee may get the donor examined by psychiatrist;

(iii) all prescribed forms have been and would be filled up by all relevant persons involved in the process of transplantation;

(iv) all interviews to be video recorded.

(2) The Authorisation Committee shall expedite its decision making process and use its discretion judiciously and pragmatically in all such cases where, the patient requires transplantation on urgent basis.



(3) Every authorised transplantation centre must have its own website and the Authorisation Committee is required to take final decision within twenty four hours of holding the meeting for grant of permission or rejection for transplant.

(4) The decision of the Authorisation Committee should be displayed on the notice board of the hospital or Institution immediately and should reflect on the website of the hospital or Institution within twenty four hours of taking the decision, while keeping the identity of the recipient and donor hidden.”

57. Be it noted that Rule 16 of the THO&T Rules requires that format of the Authorization Committee approval should be uniform in all the institutions in a State and the format may be notified by the respective State Government as per Form 18. This is the reason why Rule 23 requires decision of Authorisation Committee to be in writing in prescribed Form 18. There appears to be a typographical error in Form 18 wherein ‘Form 10’ has been mentioned in place of ‘Form-11’. There are three stages thus under the THO&T Rules for finalising the approval for removal and subsequent transplantation of a human organ between persons who are not near relatives :-

(i) A joint application in Form-11 processed by a registered medical practitioner to be presented before the Authorisation Committee.

(ii) Evaluation by the Authorisation Committee of the application for grant of approval as prescribed in Rule 7(3) quoted above.



(iii) A reasoned decision of the Authorisation Committee, as contemplated under Rule 13, to be contained in the prescribed Form 18 of the Rules.

58. Situated thus, in the Court's opinion, if there is a doctor's advice recommending transplantation of an organ and a donor, who is not a near relative, expresses his willingness to donate his organ and donor and recipient are willing to make a joint application under Rule 10 of the THO&T Rules, the registered medical practitioner and the administrative division of the institution for transplantation cannot refuse to process the application for approval by the Authorisation Committee. Whether such donation is out of affection or attachment of the donor towards the recipient or for any other special reasons, as contemplated under Section 9(3) of the THO&T Act, is to be evaluated by the Authorisation Committee. It is the Authorisation Committee which is to 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. Sub-rule (3) of Rule 7 lays down extensively the points of examination/ evaluation for the Authorisation Committee to reach a conclusion that there has been no commercial dealing in the proposed donation of human organ.



59. Apart from evaluation that there is no commercial transaction between the recipient and the donor of any kind, the Authorisation Committee is obligated under the THO&T Rules to prepare an explanation of the link between them and the circumstances which led to the offer being made. The Authorisation Committee is required to examine the reasons why the donor wishes to donate and the documentary evidence of the link that they have lived together. Examination of old photographs showing the donor and the recipient together, evaluation that there is no middleman or tout involved and that donor is not a drug addict, are also certain aspects to be looked into by the Authorisation Committee while considering an application for approval. The Authorisation Committee is required to evaluate the 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'. The Rule casts an obligation on the Authorisation Committee to ensure that the near relative of the donor or if near relative is not available any adult person related to the donor by blood or marriage 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 to be taken note of. The factors for determination by the Authorisation Committee to reach a conclusion that donation by a living donor of his human organ for transplantation into the body of a person who is not his near relative is without any element of valuable consideration and satisfies the requirement of Section 9(3) of the THO&T Act, namely, affection or attachment towards the recipient or for any 'other special reasons', have been outlined in detail apparently to prevent commercial dealing in human organs, which is one of the salient features of the THO&T Act.

60. On close scrutiny of Rule 23 of the THO&T Rules, it can be noticed that if approval is granted by the Authorisation Committee in Form 18, such authorisation is subject to certain conditions mentioned thereunder, inasmuch as the approved proposed donor would be subjected to all such medical tests as required at the relevant stages to determine his/her biological capacity and compatibility to donate the organ in question. The physical and mental evaluation of the donor has to be done to know whether he/ she is in proper state of health and that he/she is not mentally challenged. The Authorisation Committee is required



to take a decision on a joint application made by a donor and recipient strictly in accordance with the provisions under the THO&T Act and the THO&T Rules. It has not to wait for the hospital or the registered medical practitioner to certify biological capacity and compatibility to donate the human organ. The Authorisation Committee cannot withhold its decision taking process under the THO&T Rules on an application made in Form 11 of the THO&T Rules. As as been noted hereinabove, in the present case, the hospital expressed his inability to proceed for matching of the donor and the recipient in the absence of approval by the Authorisation Committee. The Authorisation Committee in turn has replied to the hospital that for final matching no approval was required. Till date, it transpires, the Authorisation Committee has not taken any decision on the joint application made by the donor and the recipient, which is pending since long.

61. At this stage, from the perspective of the objects and purpose of the Act, I consider it proper to address the right of a living person to donate his organ for transplantation into the body of another. To address this aspect, I intend to consider whether there is any semblance of right of a person to owe his body comparable with his right to property. On deeper examination of the scheme of the THO&T Act it is not difficult to conclude that



the THO&T Act deals the dead bodies differently from the living bodies. For example, sub-section (3) of Section 3, as has been noted above, envisages a situation when death occurs of a person who had not authorised removal of his organ nor had he expressed any objection to such removal of organ after his death, for the purposes under the THO&T Act. Lawful possessor of the dead body or his near relatives, as the case may be, becomes a person having authority to take decision on the point of removal of organ from the dead body for therapeutic purposes. He acquires this limited right of taking a decision to allow movement of an organ from the dead body for search or transplantation (therapeutic purposes). Section 3(2) of the THO&T Act permits a living person to authorise removal, use of his organ after his death for therapeutic purposes. Section 3(1) allows controlled permission for a living being to donate his human organ even before his death. There is no hurdle for a living being donating his organ before his death if such donation is for the purpose of transplantation into a recipient, who is his near relative except in cases where the donor/recipient or both of them are foreign nationals. Sub-section (i) of Section 2 of the THO&T Act defines near relative as ‘spouse, son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or granddaughter’. A living person may



authorize removal of his organ when alive (a living donor to a person who is not his near relative also). This right of a person to donate his organ for transplantation into the body of a patient, which is medically required, is controlled in order to achieve one of the fundamental objects of the THO&T Act i.e. ‘prohibition of commercial dealings in human organs’. The element of affection or the attachment which should exist as mentioned in sub-section (3) of Section 9 of the THO&T Act for a person taking decision to part with his organ during his lifetime is a kind of guidance for the statutory authorities under the THO&T Act to determine with some degree of objectivity whether such donation is sans commercial dealings.

62. In one of the scholarly research papers of Alexandra Gorge captioned ‘Is ‘Property’ Necessary? On Owning The Human Body And Its Parts [Res Publica 10: 15-42, 2004 Kluwer Academic Publishers Printed in the Netherlands], he posed a question ‘is the body the property of the person seeking to control it, in the background of trade in human body parts from a property perspective?’

63. He has then attempted to define the ‘property’ as a “conclusion based on degree of control a law-maker wishes to bestow and it should be used only as a legal structure that is



available to law-makers who seek to enforce decisions about control”. Sir Ian Mc.Coll Kennedy, a British academic lawyer specialized in law and ethnics of health has commented in “Treat Me Right : Essays in Medical Law and Ethics” (Oxford : Clarendon Press, 1988) as under : -

“to deeper philosophical issues, such as, whether we as a society think it right to condone a traffic in human parts or regard it as fundamentally degrading; or, put another way, whether a society acting paternalistically should deny an individual his right to self-determination, to do with himself as he pleases, to engage in unorthodox, but perhaps profitable, commerce, when the exercise of such a right involves a mutilating operation”.

64. On deeper examination of the provisions under the THO&T Act and the Rules framed thereunder, I am of the view that the enactment and the Rules framed thereunder vindicate primarily the two well accepted legal maxims, namely, (i) *Salus populi suprema est*, regard for the public wefare is the highest law; and (ii) *parens patriae*, where the State assumes responsibilities to discharge its obligation under the constitution. *The parens patriae* doctrine has been lucidly explained in the [Broom’s Legal Maxims] (see Eleventh Edition, published by Universal Law Publishing Co. Pvt. Ltd.) “This plenary power is inherent in every soverign State to do all things which promote the health, peace,



morals, education and good order of the people and tend to increase for wealth and prosperity of the State.”

65. It has been noted at the outset that welfare of the human being, by making a provision for removal of a human organ for therapeutic purposes including its transplantation into the body of another human being is the goal, which the THO&T Act intends to achieve. The THO&T Act has, however, another most significant purpose to achieve, of prohibiting commercial dealings in human organs. If a human being of sound mind, qualified in terms of age without any undue influence, intends to offer his human organ for the welfare of a person during his life time without breaching any provision of law, his right to authorise removal of his human organ cannot be taken away lightly. It goes without saying that the enquiry/investigation that there has been no commercial dealings or undue influence for extracting/soliciting his consent or permission for removal of organs needs to be of high standard and foolproof.

66. The expression ‘property’ to qualify an organ of a person, which can be used for therapeutic purposes, in Court’s opinion, is not befitting for the reason that its value is unfathomable. The human organ, within the meaning of Section 2(h) of the THO&T Act defines “human organ” as part of human



body consisting of a structured arrangement of tissues, which, if wholly removed, cannot be replicated by the body. Such human organ, thus, if cannot be artificially created is too precious to be called a property, either belonging to a living human being during his life time or belonging to near relative of such person after his death, if he dies without expressing any willingness or authorization of removal of any of his human organs. A human organ, for the purposes of provisions of the THO&T Act, will have to be treated as such only for the limited purposes as stipulated under the provisions of the THO&T Act .

67. Coming back to the present case, as has been indicated in the foregoing paragraphs, the respondents, more particularly the Authorization Committee, has failed to discharge its obligation of determining permissibility of removal of organ of the proposed Donor for the purpose of transplantation into the body of the proposed Recipient. It was the statutory duty of the Authorization Committee to have recorded its conclusion on the basis of the materials which it had before it as to whether the institution could be authorized for carrying out the procedure for removal of human organ from the proposed Donor and its transplantation into the proposed Recipient. The statutory committee has a duty under Rule 23 of the THO&T Rules to reject



or approve the joint application filed by the proposed Donor and the Recipient. Sub-rule (3) of Rule 7 of the THO&T Rules lays down in clear words the procedure for the purposes of taking final decision under Rule 23 of the THO&T Rules. Merely on the ground that for the purpose of matching of the proposed Donor and the Recipient, no approval of the Authorization Committee was required and certain communication was made by the Private Hospital, the Authorization Committee could not have stopped its decision making process of granting or not granting the requisite approval under Rule 23 of the THO&T Rules.

68. To conclude the aforementioned discussions, in my opinion, under the provisions of the THO&T Act, willingness of a person to authorize removal of his human organs is paramount. Such willingness should be free from any consideration other than permitting utilization of his human organs for therapeutic purposes under the THO&T Act. The willingness can be for removal of his human organ during his life time or after his death. In the absence of any willingness expressed by a donor, near relative of a deceased person have the same right to decide as if the same was of the person when he was alive unless the deceased had expressed his willingness otherwise. A living person cannot authorize removal of his human organ after his death to be transplanted into



the body of a particular person and transplantation of a human organ into the body of a person of the choice of the donor can happen only during the life time of the donor.

69. At the cost of repetition, it is observed that the statutory functionaries and other functionaries under the THO&T Act have to ensure that there is no commercial dealings in human organ as has been noticed already. There can be three considerations for permitting donor to authorize removal of his human organ for transplantation into the body of a recipient, namely, (i) affection for the recipient or (ii) attachment with the recipient or (iii) special reasons. The expression 'special reason' is not defined under the THO&T Act. It does give the Authorization Committee a wider platform to appreciate the circumstance whether a donor is willing to authorize removal of his human organ for the purpose of transplantation. It is clear from the language of the THO&T Act that the Authorization Committee cannot refuse to grant approval only on the ground that there is no affection or attachment of the donor for/with the recipient as the expression 'special reason' is of significance, which is of wide connotation and cannot be rendered otiose, the same being one of the legislative intents.



70. As the Court has noticed, the persons are approaching this Court invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution of India in substantial number raising issues of inaction on the part of the statutory bodies including the hospitals in due implementation of various provisions under the THO&T Act, the Court has considered it appropriate to issue certain directions, general in nature, to be followed by the Authorization Committee (under the THO&T Act) as well as the Hospitals.

71. It is to be kept in mind that any application under the THO&T Act before the Authorization Committee within the meaning of Section 2(c) of the THO&T Act constituted under Clause (a) and (b) of sub-section (4) of Section 9 of the THO&T Act has to be disposed of with utmost expedition as the procedure impacts the life of a human being. Expeditious disposal of a joint application by the donor and the recipient is the mandate of the THO&T Act read with the Rules framed thereunder.

72. Commercial dealings in human organs is strictly prohibited under the THO&T Act. As has been discussed. Understandably, such provision has been made because of adequate number of human organs for therapeutic purposes are not



available and with the advancement in medical sciences, demand of human organs for the said purpose has substantially grown.

73. On close scrutiny of the provisions of the THO&T Act, the Court is of the opinion that the THO&T Act encourages donation or to say in other terms encourages persons to authorize removal of human organs of the deceased persons for the purpose of storage to be used for therapeutic purposes. The THO&T Act goes on to cast a duty upon registered medical practitioners to make aware the near relatives of a deceased person or where brain-stem death has occurred, about existence of an option for them to authorize removal of human organs for therapeutic purposes. This Court is of the tentative view that there is substantive lack of awareness among the people about the provisions of the THO&T Act. The persons, who could have thought of and considered it proper for myriads of reasons to authorize removal of human organs after death are unaware of such option available. It is the Court's opinion that generation of awareness among the people may reduce, to a considerable extent, the requirement of removal of human organ from a living persons, such organs being already available at least in some cases. It has accordingly been considered apt to issue necessary direction to the State respondents to propagate the aims and objects of the THO&T Act and the



facilities, which the statutory provisions as well as the statutory functionaries provide in this regard.

74. In the facts and circumstances, considering the statutory provisions in totality, as discussed above, following general directions are being issued for the present : -

(I) Once the Authorization Committee, within the meaning of Section 2(c) of the THO&T Act, constituted under Clause (a) and (b) of sub-section (4) of Section 9 of the THO&T Act, receives a joint application as contemplated under the THO&T Act and the THO&T Rules, it will be obliged to proceed expeditiously in accordance with the procedure prescribed under sub-rule (3) of Rule 7 of the THO&T Rules. In the event, the joint applicants are found to be unable to fully comply with requirements of making joint application, the concerned department of the State Government or the Hospital/medical practitioners should act proactively to facilitate submission of application in accordance with law.

(II) After having made evaluation in accordance with sub-rule (3) of Rule 7 of the THO&T Rules, the Authorization Committee shall take a decision as



expeditiously as possible, depending upon the requirements of a particular case, in accordance with Rule 23 of the THO&T Rules.

(III) Any such application must be disposed of finally within one month from the date it is made.

(IV) The Court would expect Authorization Committee to act with empathy and compassion in the matters which come to it under the provisions of the THO&T Act without compromising with the mandatory statutory requirements under the THO&T Act and the THO&T Rules.

(V) For the present, the Court has decided to monitor the cases which are coming to Authorization Committee and which are pending before it. The Authorization Committee of the State of Bihar is accordingly directed for the present to meet once every week, preferably on each Thursday. This is because the Court intends to know the number of cases, which are pending before it, considering the gravity of the situation, since delay in disposal of such application has potential to cause immense harm.



(VI) When a registered medical practitioner or medical institution, upon examination of a patient, comes to a conclusion that the cure of the ailment of the patient is by way of transplantation of a human organ, for which donation of human organ is needed, it shall be obliged to take all necessary steps and help, aid and assist the patient properly in making his application before the Authorization Committee or any other statutory committee constituted under the provisions of the THO&T Act and the THO&T Rules with the utmost expedition to facilitate making of an application.

75. Though this case is being disposed of by the present order, it shall again be listed on 08.03.2021 under the heading 'To Be Mentioned' for the State respondents to file an affidavit stating the number of such cases pending for decision at their end. If any District Level Authorization Committee has been constituted under the provisions of the THO&T Act, this fact should also be incorporated in the affidavit. The Court further needs to know as to whether there are Hospital Authorization Committees functioning in the State of Bihar and if such Hospital Authorization Committees are functioning, the list of such hospitals should be furnished to the Court in the said affidavit.



76. Let the affidavit must also contain a statement as to whether appeals are pending before the appellate authority under Rule 33 of the THO&T Rules and if so how many and at what stage.

77. I have further considered it appropriate to direct the Principal Secretary, Health Department, Government of Bihar, to state on affidavit as to steps which can be taken to propagate salient features of the THO&T Act among the people and the stake holders including the Doctors for useful and effective implementation of the provisions of the THO&T Act, in public interest.

78. Coming to the petitioner's case, the Authorization Committee is directed to take a final decision on the joint application filed by the proposed Donor and the Recipient within one week from today.

79. Before I part with, I have not been able to resist my temptation to refer to certain verses from *Srimad Bhagwat Gita*, which is quoted hereunder with English translation : -

“इदं शरीरं कौन्तेय क्षेत्रमित्यभिधीयते ।

एतद्यो वेत्ति तं प्राहुः क्षेत्रज्ञ इति तद्विदः ॥ १३-२॥

**The material body is known as the field of activity;
those who know this describe those who know this as knowers
of the field of activity.**



महाभूतान्यहङ्कारो बुद्धिरव्यक्तमेव च ।

इन्द्रियाणि दशैकं च पञ्च चेन्द्रियगोचराः ॥ १३-६ ॥

इच्छा द्वेषः सुखं दुःखं सङ्घातश्चेतना धृतिः ।

एतत्क्षेत्रं समासेन सविकारमुदाहृतम् ॥ १३-७ ॥

The major elements of earth, water, air, fire and ether; the false ego, spiritual intelligence, the unmanifest element in material nature, the ten senses along with the mind and the five objects of the senses as sound, sight, taste, touch and smell; desire, disdain, happiness, distress, the perceptual faculty of the mind, determination; all this is declared to be the field of activities modified by the six transformations of the physical body beginning with birth and ending with death.

दातव्यमिति यद्दानं दीयतेऽनुपकारिणे ।

देशे काले च पात्रे च तद्दानं सात्त्विकं स्मृतम् ॥ १७-२० ॥

Charity which is given without consideration of anything in return, at a sanctified and holy place and at an astrologically auspicious time, given as a matter of duty to one qualified; that charity is regarded as of the nature of goodness.

वासांसि जीर्णानि यथा विहाय नवानि गृह्णाति नरोऽपराणि ।

तथा शरीराणि विहाय जीर्णा-न्यन्यानि संयाति नवानि देही ॥ २-२२ ॥

Just as a man giving up old worn out garments accepts other new apparel, in the same way the embodied soul giving up old and worn out bodies verily accepts new bodies.”



80. The verses noted above are inspirational and physical body, referred to in 13.7 (supra), possibly signifies the part, which begins with the birth and ends with the death.

81. This application accordingly stands allowed with the aforesaid directions.

82. There shall, however, be no order as to cost.

(Chakradhari Sharan Singh, J)

Pawan-Rajesh/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	26.02.2021.
Transmission Date	N/A

