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W.P. No.27106 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.09.2023

Pronounced on : 09.10.2023

CORAM: JUSTICE N.SESHASAYEE

W.P. No.27106 of 2023

Dr.J.Kaja Moinudeen

... Petitioner

Vs.

1.The Authorization Committee (Transplantation)

Rep by its Chairman
Directorate of Medical Education
162, Poonamallee High Road
Kilpauk, Chennai - 600 010.

2.The State of Tamil Nadu

Rep by its Principal Secretary
Department of Health and Family Welfare
Secretariat, Fort.St.George
Chennai - 600 009.

3.The Tahsildar

Coimbatore South
Coimbatore District.

... Respondents

[R3 suo motu impleaded vide order dated
13.09.2023 in WP.No.27106 of 2023]

PRAYER: Writ petition filed under Article 226 of the Constitution of India for a Writ of Mandamus, directing the respondents herein to issue



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No Objection Certificate, considering the petitioner's pathetic case and grant approval for kidney transplantation on priority basis and save his life.

For Petitioner : Mr.S.Haja Mohideen Gisthi

For Respondents : Mr.C.Kathiravan
Special Government Pleader

ORDER

1. The petitioner herein has approached this Court for issuance of writ of mandamus to the respondents to issue an NOC to enable him undergo renal transplantation and to grant approval for the same on a priority basis. The facts giving rise to this petition are as under:

(a) The petitioner, a doctor by profession, was diagnosed with chronic kidney disease (CKD) in June, 2022 and was put on dialysis. It has been advised by a nephrologist to undergo a kidney transplant at the earliest. His attempts to have his wife and child as donors failed. Attempts made to find a donor from his relatives also failed on account of medical impediments. The petitioner contends that one well-wisher named Mrs. Ramayee offered to donate a kidney, out of “*love and affection.*”

(b) Between June, 2022 and October, 2022, the petitioner approached



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several multi-speciality hospitals in Tamil Nadu, but these hospitals did not entertain the idea of a non-relative as a donor. It is in this circumstances, the petitioner approached Lakeshore hospital at Cochin in Kerala. The doctors there, on cross matching the various parameters required, found that Ramayee's kidney is suitable for transplantation. The documentation process too was completed by May, 2023, except for a NOC under Sec.9(4) of the Transplantation of Human Organs and Tissues Act, 1994.

- (c) It appears that a proposal was sent to the 1st respondent for its approval and NOC. The 1st respondent is stated to have sent a communication to the Lakeshore Hospital that an NOC is not necessary. It appears that the hospital authorities sent this communication to the Authorization Committee in the State of Kerala who, however, reiterated the requirement of a NOC before the surgery. Ping-ponged that the petitioner is, he has approached this court, partly frustrated and partly with hope, for the relief sought.



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2. Heard Mr.S.Haja Mohideen Gisthi for petitioner, and Mr.C.Kathiravan,

learned Special Government Pleader for respondents.

3. This writ petition presents a spectre of what this Court may term it as bureaucratic reluctance familiar in our system that germinates out of administrative apprehensions. A doctor, who may have helped saving many lives, now finds himself in a state of helplessness to save his own life. The hospitals in Tamil Nadu appears to have pinned themselves to their committed reluctance to entertain a non-relative for an organ donor, when the Act does not insist that an organ donor should be a relative. This attitude is worrisome, as it holds the potential to undermine the objectives behind the Act and to defeat its purpose. Having regard to the importance of the issue, this Court thought it fit to examine it threadbare since clarity on the point is a desideratum .

4. The Transplantation of Human Organs and Tissues Act, 1994 was enacted in response to the demand from various national bodies, medical and social experts in the backdrop of infiltration of several rackets and unethical practices in dealing with human organs, particularly kidneys. As public health is a State subject under Entry 6 of List II of Schedule VII of the Constitution, Parliament had no power to enact a comprehensive



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law on the subject for the country. In 1994, the States of Maharashtra, Himachal Pradesh and Goa passed a resolution under Article 252 (1) of

the Constitution authorizing Parliament for making a law on transplantation of human organs. In response, Parliament enacted the Transplantation of Human Organs Act, 1994 (henceforth would be referred to as the Act) which has since been rechristened the Transplantation of Human Organs and Tissues Act, 1994 (vide Act 16 of 2011). The State of Tamil Nadu passed the requisite resolution under Article 252 of the Constitution adopting the unamended Act in this State.

5. Section 9 of the Act, as it originally stood, imposed restrictions on the removal and transplantation of human organs. Section 9(1) stipulates no human organ removed from the body of a donor before his death shall be transplanted into a recipient, unless the donor is a near relative of the recipient except in a case falling under sub-section 3. Sec.9(3) deals with donors who are not near relatives of the recipient of the organ. Section 9, to the extent it is relevant, is reproduced below :

"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 removed from the body of a donor before his death shall



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be transplanted into a recipient unless the donor is a near relative of the recipient.

(1-A)

(1-B)

(1-C)

(2). Where any donor authorizes the removal of any of his human organs after his death under sub-section (2) of section 3 of any person competent or empowered to give authority for the removal of any human organ from the body of 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. Restrictions on removal and transplantation of human organs.

(3) If any donor authorizes the removal of any of his human organs before his death under sub-section (1) of section 3 for transplantation into the body of such recipient, not being a near relative, as is specified by the donor by reason of affection or attachment towards the recipient or for any other special reasons, such human organ shall not be removed and transplanted without the prior approval of the Authorisation Committee.”

Sec.9(4) mandates the constitution of Authorisation Committees by the Central Government for the Union Territories and by the respective State Governments for the States. Sec.9 (5) requires the Authorisation



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Committee to hold an inquiry to satisfy itself of the compliance with the Act and the Rules, and then grant approval for removal and transplantation of human organs. Refusal to grant permission is covered under Sec.9(6). Now, Sec. 9 must be read in conjunction with the Rules framed under the Act.

6. Originally, the Central Government had framed the Transplantation of Human Organs Rules, 1995. These Rules were notified on 04.02.1995.

Rule 6 of the 1995 originally read as follows:

“6. The donor and the recipient shall make jointly an application to grant approval for removal and transplantation of a human organ, to the Authorisation Committee as specified in Form 10.”

The Rules were amended in 2008. More specifically, Rule 6 was recast and Rules 6A to 6F were inserted. Rule 6 was amended to read as under:

“6. The donor and the recipient shall make jointly an application to grant approval for removal and transplantation of a human organ, to the concerned competent authority or Authorisation Committee as specified in Form 10. The Authorisation Committee shall take a decision on such application in accordance with the guidelines in rule 6-A”



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Rule 6A contemplated the constitution of the Authorisation Committees at the State Level, with additional Authorisation Committees functioning at the Hospital/District Level. In a case where the donor, the recipient and the place of transplant are in different States, an NOC from the respective domicile State Government should be produced as mandated by Rule 6-B. It reads:

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

On a close reading of Rule 6-B, it could be seen that it speaks of “approval” or “no objection certificate”. The meaning of these two expressions were examined by the High Court of Delhi in ***Sadhna Bharadwaj v The Department of Health and Family Welfare*** [WP (C) 6105 of 2011]. It may not be necessary to explore this decision or the



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distinctions noted above, in view of the subsequent developments.

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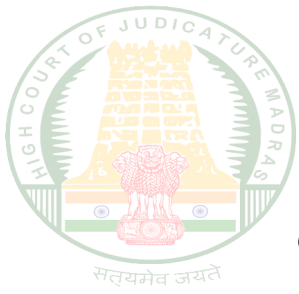
7.1 The 2008 Rules were repealed and replaced by the Transplantation of Human Organs and Tissues Rules, 2014 (THOT Rules, 2014) with effect from 27.03.2014. It is significant to note that though the Act was amended in 2011, and the 2008 Rules were superseded by the 2014 Rules, neither the 2011 amendment nor the 2014 Rules were enforced in Tamil Nadu till 2020, since the State had not adopted the same in terms of a resolution under Article 252(1) of the Constitution. It is in this setting, on 30.04.2020, the Government issued G.O.Ms.203 which reads as follows:

“HEALTH AND FAMILY WELFARE DEPARTMENT

Notification under the Transplantation of Human Organs (Amendment) Act, 2011 [G.O. Ms. No. 203, Health and Family Welfare (Z1), 30th April 2020, No. II(1)/HFW/9/2020 —

WHEREAS, the Transplantation of Human Organs Act, 1994 (Central Act 42 of 1994) enacted by the Parliament was adopted by the State of Tamil Nadu by passing a resolution by the Tamil Nadu State Legislature under clause (1) of Article 252 of the Constitution of India;

AND WHEREAS, in pursuance of clause (1) of Article 252 of the



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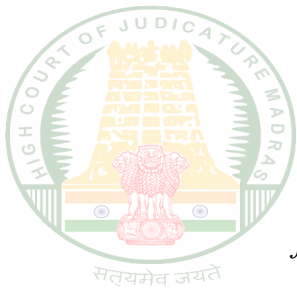
Constitution of India, resolutions have been passed by the Houses of the Legislatures of the States of Goa, Himachal Pradesh and West Bengal to the effect that the aforesaid Act should be amended by Parliament;

AND WHEREAS, in pursuance of the aforesaid resolutions passed by the States of Goa, Himachal Pradesh and West Bengal, the Parliament had enacted the Transplantation of Human Organs (Amendment) Act, 2011 (Central Act 16 of 2011) which provides for the regulation of removal, storage and transplantation of human organs and tissues for therapeutic purposes and for prevention of commercial dealings in human organs and tissues;

AND WHEREAS, sub-section(2) of Section 1 of the aforesaid Amendment Act provides that the said Act shall apply to a State which adopts that Act by resolution passed in that behalf under clause (1) of Article 252 of the Constitution;

AND WHEREAS, the Tamil Nadu Legislative Assembly considered that it is desirable to have a uniform Law throughout India on the subject matter referred to and hence, passed a resolution under clause (1) of Article 252 of the Constitution on the 24th March 2020 that the Transplantation of Human Organs (Amendment) Act, 2011 (Central Act 16 of 2011) be adopted by the State of Tamil Nadu; Now,

THEREFORE, the Transplantation of Human Organs (Amendment) Act, 2011 (Central Act 16 of 2011) has come into



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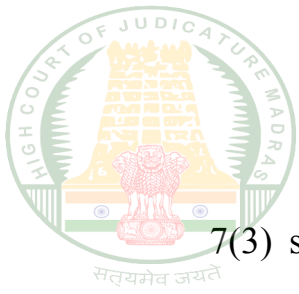
force in this State on and from 24th March 2020.

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*BEELA RAJESH,
Secretary to Government.”*

7.2 The 2014 Rules were notified in the State of Tamil Nadu vide G.O. Ms. No. 314, Health and Family Welfare (Z1), 28th August 2020, and ever since 2014 Rules hold the field in this State. It has become necessary to underscore this statutory evolution essentially because certain authorities in *Sadhna Bhardwaj Vs The Department of Health & Family Welfare* [W.P.(C) No.6105/2011 dated 01.09.2011] referred to supra, *M.Anoop Vs State of Tamil Nadu and Others* [W.P.No.18657 of 2009 dated 15.09.2009] and *Smt.Kamal Devi Vs The Director of Medical Education and Chairman, Authorization Committee for Organ Transplantation, Hyderabad and Another* [W.P.No.5618 of 2019 dated 30.03.2009], are cited at the Bar, which are pronouncements when Rule 6-B of 2008 Rule was in vogue, which to repeat has since been superseded by the 2014 Rules.

8. Turning to the 2014 Rules, it is significant that the equivalent of Rule 6-B of the 2008 Rules does not find a place in the 2014 Rules. Rule 7 sets out the guidelines to be followed by the Authorisation Committee. Rule



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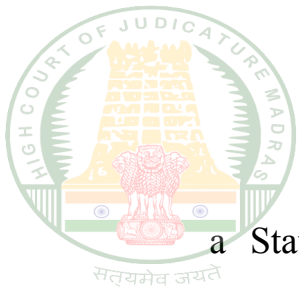
7(3) specifically sets out the procedure to be followed, and the factors

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that are to be examined in a case where the proposed donor and the recipient are not near relatives as in the present case. Rule 14 is another provision providing for verification of residential status in the case of unrelated living donors. Rule 14 reads as follows:

“Verification of residential status, etc.—When the living donor is unrelated and if donor or recipient belongs to a 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 authorised officer for the purpose with a copy marked to the Appropriate Authority of the State or Union territory of domicile of donor or recipient for their information shall be required, as per Form 20 and in case of any doubt of organ trafficking, the Appropriate Authority of the State or Union territory of domicile or the Tehsildar or any other authorised officer shall inform police department for investigation and action as per the provisions of the Act.”

It is apparent from the aforesaid Rule that what is now contemplated is only a verification of the residential status by the Tahsildar or other authorised officer of the donor or the recipient, if either of them resides in



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a State or Union Territory other than the State or UT where the transplantation is proposed to be done. Once this is done, this material

can be placed before the Authorisation Committee in terms of Rule 7(3) to take a call as to whether permission ought to be granted in terms of Rule 19 read with Section 9(3) of the Act. Rule 19 reads as follows:

“Procedure in case of transplant other than near relatives.— Where the proposed transplant is between other than near relatives and all cases where the donor or recipient is a foreign national (irrespective of them being near relative or otherwise), the approval will be granted by the Authorisation Committee of the hospital or if hospital-based Authorisation Committee is not constituted, then by the District or State level Authorisation Committee.”

9. It is very evident that the requirement of a NOC, which was incumbent under Rule 6-B of the 2008 Rules is no longer a requirement under the 2014 Rules. In fact, the requirement of a NOC is seen only in Form 21 which requires an NOC from a Senior Embassy Official in a case under Rule 20(a) of the 2014 Rules where the donor or recipient are foreigners.

10. Now may arise a question as to which Authorisation Committee



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must grant permission in cases such as the one at hand where the donor and recipient are from one State, and the hospital where the organ transplantation is proposed to happen is in another State. The issue is no longer *res integra*. Having regard to the scope and purpose of the Act, the Supreme Court in *Kuldeep Singh v. State of Tamil Nadu* [(2005) 11 SCC 122] has observed as under:

“The object of the statute is crystal clear that it intends to prevent commercial dealings in human organs. The Authorisation Committee is, therefore, required to satisfy that the real purpose of the donor authorising removal of the organ is by reason of affection or attachment towards the recipient or for any other special reason. Such special reasons can by no stretch of imagination encompass commercial elements. Above being the intent, the inevitable conclusion is that the Authorisation Committee of the State to which the donor and the donee belong have to take the exercise to find out whether approval is to be accorded. Such Committee shall be in a better position to ascertain the true intent and the purpose for the authorisation to remove the organ and whether any commercial element is involved or not. They would be in a better position to lift the veil of projected affection or attachment and the so-called special reasons and focus on the true intent. The burden is on the applicants to establish the real



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intent by placing relevant materials for consideration of the Authorisation Committee.”

“It is always open to the Authorisation Committee considering the application to seek information/materials from the Authorisation Committees of other States/State Governments, as the case may be for effective decision in the matter. In case any State is not covered by the operation of the Act or the Rules, the operative executive instructions/government orders will hold the field. As the object is to find out the true intent behind the donor's willingness to donate the organ, it would not be in line with the legislative intent to require the Authorisation Committee of the State where the recipient is undergoing medical treatment to decide the issue whether approval is to be accorded. Form 1 in terms requires the applicants to indicate the residential details. This indication is required to prima facie determine as to which is the appropriate Authorisation Committee. In the instant case, therefore, it was the Authorisation Committee of the State of Punjab which is required to examine the claim of the petitioners.”

The factual context in which the Hon'ble the Supreme Court has made the above pronouncement is that a NOC was sought from the Director of Medical Education, Tamil Nadu, by the petitioner who hailed from Punjab, on the premise that the operation was to be performed at a



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hospital in Chennai. The Supreme Court held that since the donor and the recipient were from the State of Punjab, it is the Authorisation Committee of that State which can issue approval for transplant, which can then be transmitted to the State of Tamil Nadu for necessary action.

11. The case at hand is a converse situation where the donor and recipient are from this State and the operation is to be performed in another State ie., the State of Kerala.

12. It is also clear that Rule 14 of the 2014 Rules embodies the principle laid down in *Kuldeep Singh case* as it requires the Appropriate Committee of the domicile of the donor/recipient to inform the police in case any organ-trafficking is suspected. Here it is required to be noted that the Appropriate authority is the one notified under Section 13 of the Act and that it should not be confused with the Authorisation Committee under the Rules.

13. Reverting to the facts of this case, admittedly the donor and the recipient are from the State of Tamil Nadu. Thus, applying the decision in *Kuldeep Singh v. State of T.N.*, [(2005) 11 SCC 122], it is the



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Authorisation Committee in the State of Tamil Nadu which must examine

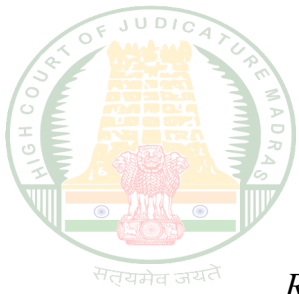
WEB COPY the case of the petitioner with reference to the parameters under Rule 7(3)

and decide whether approval can be granted in terms of Rule 19 of the 2014 Rules.

14. It is also the complaint of the petitioner that the hospitals in the State of Tamil Nadu are avoiding transplants if the donors are not relatives, though it was not substantiated. Suffice to say that the transplants from non-relative donors are contemplated under Section 9(3) of the Act, and Rules 14 and 19 of the 2014 prescribed the procedures too. Consequently, refusal by hospitals in the State of Tamil Nadu to perform transplants concerning unrelated donors would be plainly illegal. That apart, in the State of Tamil Nadu guidelines have been laid down for transplants from non-relative donors vide G.O Ms.175 dated 06.06.2008.

For better appreciation, the GO runs thus:

“ABSTRACT Health & Family Welfare Department - Organ Transplant – Authorization Committee Procedures – Additional responsibilities – Detailed instructions – orders issued Health and Family Welfare (ZI) Department ThiruvalluvarAandu, 2039 Vaigasi - 24 G.O. (Ms) No. 175 Dated : 6.6.2008



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Read : 1. G.O. (Ms) No. 287 Health and Family Welfare Department Dated 5.5.1995. 2. G.O.(Ms) No.341 Health and Family Welfare Department dated 29.10.2003, 3. G.O.(Ms) No.330, Health and Family Welfare Department dated 10.9.2007.

Order:-

In keeping with the Transplantation of Human Organs Act 1994, the authorization committee has been constituted/ expanded in the Government Orders read above. Accordingly, the authorization committee has functioned over the years and is involved in screening the donors who are not near relatives of the recipients. In order to streamline the functioning of the authorization committees and make it more effective, the following orders are issued.

2. (a) In the case of records to be submitted by the donor and the prospective recipient, proof of residence with photograph shall be submitted having been duly certified by local revenue authorities.

(b) In the event of submission of false records, criminal cases should be filed against the donor and/or recipient (in case of minors the parents or



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guardians signing the forms) submitting it. The authorization committee shall recommend to the appropriate authority to file a criminal case as and when the situation arises of false records being submitted.

(c) The authorization committee is also permitted to refer doubtful cases to the police or revenue department for further enquiry.

3. Considering that some donors / recipients are known to contradict earlier statements made before the authorization committee, all authorization committee sittings shall be video graphed.

4. Considering that doubts are raised about relationship claims made by some foreign nationals (who are not Indian citizens), all such donors/recipients shall appear before the authorization committee with relevant records.

5. The current practice of the authorization committee permitting a change in the hospital chosen by the recipient for transplant surgery shall continue. Considering that the patient's convenience is of primary importance, the authorization committee shall issue a fresh permission letter to the second



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hospital without insisting on No Objection Certificate from the previous hospital. Personal appearance of donor or recipient will not be necessary.

6. *The authorization committee shall ensure that clearances and rejections are uploaded on the website maintained for the purpose on the same day on which sitting was held.*

7. *A donor who is rejected by the Authorization committee shall be considered ineligible to appear again.*

8. *Considering that transplant hospitals wish to benefit from counseling professionals and the need for professional counseling being provided to live donors, the authorization committee is authorized to give recognition (certification) to counseling institutes in the State to provide additional counseling support to live donors.*

9. *Any form of paired donor exchange between near relatives shall necessarily be processed by the authorization committee in order to ensure that the arrangement is genuine.*

10. *In case of living donor who is not a near relative*



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of the recipient, the onus of responsibility in determining the motive of the donor to be that of affection or attachment towards the recipient or for any other special reason (Section 9 (3) of the Transplantation of Human Organs Act 1994), shall be solely that of the authorization committee.

*(BY ORDER OF THE GOVERNOR) V.K.SUBBURAJ,
SECRETARY TO GOVERNMENT”*

15. This Court has reasons to believe that the apprehensions and reluctance of the hospitals here to entertain organ transplantation between non-relatives is more due to inadequate awareness on the law on the topic. This Court trusts that the aforesaid discussion may help the physicians and hospitals in gaining in confidence in dealing with the issue. All it now requires is proper legal education on the subject to the physicians and the hospitals, and this Court expects the Govt. to take the lead in the matter.

16. In conclusion, this Court passes the following directions:

- a) The petitioner and his donor will present themselves before the Authorisation Committee for Approval of Cases for Renal



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Transplantation at Coimbatore within one week from today;

- b) The Tahsildar, 3rd respondent, shall conduct an inquiry in terms of Rule 14 of the Transplantation of Human Organs and Tissues Rules, 2014 (THOT Rules, 2014) and submit a report to the Authorisation Committee within one week thereafter ;
- c) The Authorisation Committee shall, thereafter, proceed to examine the case of the petitioner and his donor in line with the parameters prescribed in Rule 7(3) of Transplantation of Human Organs and Tissues Rules, 2014 (THOT Rules, 2014), and pass orders either approving the application in terms of Section 9(5) and Rule 19 of the Rules or rejecting the same under Section 9(6). The said exercise shall be completed within a period of four (4) weeks from the date on which the report of the Tahsildar is placed before the Committee.
- d) In case the Authorisation Committee grants approval under Section 9(5) it shall forward the same to the Authorisation Committee/Hospital Committee at the Lakeshore Hospital, Cochin so as to enable them to take appropriate steps to



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complete the transplant at the earliest.

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- e) In case the Authorisation Committee refuses to grant approval under Section 9(6) of the Act, it is left open to the petitioner to avail the remedy of an appeal under Section 17 of the Act.

17. With the aforesaid directions, the writ petition stands disposed of.

There will be no order as to costs.

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Index : Yes / No

Internet : Yes / No

Speaking order / Non-speaking orders

1.The Authorization Committee (Transplantation)

Rep by its Chairman

Directorate of Medical Education

162, Poonamallee High Road

Kilpauk, Chennai - 600 010.

2.The State of Tamil Nadu

Rep by its Principal Secretary

Department of Health and Family Welfare

Secretariat, Fort.St.George

Chennai - 600 009.

3.The Tahsildar

Coimbatore South

Coimbatore District.



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N.SESHASAYEE.J.,

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Pre-delivery order in
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