

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 18056 of 2022****With****R/SPECIAL CIVIL APPLICATION NO. 14029 of 2022****With****R/SPECIAL CIVIL APPLICATION NO. 8602 of 2022****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE BIREN VAISHNAV****sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

VIDYA RAMESH CHAND SHAH

Versus

STATE OF GUJARAT

Appearance:

MR GM JOSHI, SR COUNSEL assisted by **MR IG JOSHI, MR VYOM SHAH**, ADVOCATES (8726) for the Petitioner(s) No. 1 in SCA Nos.14029/2022 and 18056/2022.

MR KUNAN B. NAIK, ADVOCATE for the Petitioner(s) No. 1 in SCA Nos.8602/2022.

MR G H VIRK(7392) for the Respondent(s) No. 4 for the Respondent(s) No. 4 in SCA No.14029/2022.

MS MANISHA LAVKUMAR, SENIOR ADVOCATE assisted by Ms. S.S. PATHAK, ADVOCATE for the Respondent(s) No. 2 & 3 in all the Petitions.

MR ROHAN N. SHAH, AGP for the Respondent(s) No. 1 – STATE in all the Petitions.

MR VAIBHAV VYAS, ADVOCATE for the Respondent(s) No. 4 in SCA No.18056/2022.

MR RAJESH K KANANI, ADVOCATE for the Respondent(s) No. 4 in SCA No.8602/2022.

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CORAM:HONOURABLE MR. JUSTICE BIREN VAISHNAV

Date : 21/11/2022

CAV JUDGMENT

“The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”.

It has been 75 years now that these words were adopted in the Constitution of the World Health Organization and this court, through these petitions, is called upon to decide the issue of applicability of ‘Right to Health’ in terms of the petitioners.

Special Civil Application No.14029 of 2022

1. The prayer in the petition is as under:

“6(a). This Hon’ble Court be pleased to issue a writ of mandamus or in the nature of mandamus or any other writ that it may deem fit, quashing and setting aside the communication dated 01.06.2022 and 04.06.2022 and direct the respondent authority no.5 to issue the domicile certificate upon the petitioner and enter her name in the domicile quota for transplantation of kidney as organ recipient and consider her case from the date of her application.

2. Facts in brief indicate that the petitioner is a Canadian citizen and an overseas citizen of India. Her place of birth is Mumbai and she has completed her higher education in Mumbai. The petitioner got married to one Prashant Ajmera and shifted her base from Mumbai to Ahmedabad

on 27.04.1993. She resided with her husband in Ahmedabad till 1995. Thereafter, she moved to Montreal, Canada, where she resided with her husband and three children till the year 2009.

3. The petitioner moved back to Ahmedabad in the year 2009 with her husband. At the time of moving back from Canada, relevant fee as prescribed by the Indian Custom Authority under the head 'transfer of residence' was paid. The petitioner received her Overseas Citizen of India card (hereinafter referred to as 'OCI' for short) on 23.10.2009. Accordingly she also received her driving license and Aadhar card.

4. The petitioner was diagnosed with less than benchmark functioning of the kidney and is therefore required to undergo dialysis twice a week. She has been recommended a kidney

transplant. To undergo such transplant, the petitioner has to be registered as a recipient under the Transplantation of Human Organs and Tissues Act, 1994 and the Regulations thereunder (hereinafter referred to as 'the Act and the Rules' for short).

5. The State Government also notified guidelines to monitor as well as regulate the process of donation and transportation of human organs vide notification dated 14.03.2019. The petitioner when approached a registered hospital under the Act for registration i.e. Shallby Hospital, Ahmedabad, her request was turned down orally on the ground that she would require a domicile certificate. A request made for such certificate has been rejected by the impugned communication by the police authorities on the ground that the petitioner is a

Canadian national, not an Indian citizen and therefore not entitled to a domicile certificate.

Special Civil Application No.18056 of 2022

6. The prayer in the petition reads as under:

“6(a). This Hon’ble Court be pleased to issue a writ of mandamus or in the nature of mandamus or any other writ that it may deem fit, holding and declaring paragraph 13.1 and 13.10(C) of Gujarat Deceased Donor Organ and Tissue Transplantation Guideline (G-DOT GUIDELINES) as arbitrary, illegal, discriminatory, ultra-vires and in violation of fundamental rights of the petitioner as well as citizens of India and further be pleased to direct the respondent authorities to include the name of the petitioner in the State (Domicile) Register / Pool of Liver Transplant.”

7. Facts indicate that the petitioner is an Indian citizen, born and brought up in Madhya Pradesh but is Gujarati by descent. She is suffering from

serious liver disease known as 'CIRRHOSIS' in medical terms which has reached end stage and requires transplantation on urgent basis. The son of the petitioner was tested to be a donor but rejected on medical grounds, so was the daughter. Thus, the petitioner is left with no option but to go for cadaver donation. In order to be registered under the Act when she applied for registration, she has been registered in the non-domicile list citing paragraphs 13.1 and 13.10(C)(2) of the G-DOT Guidelines. The resolution dated 14.03.2019 provides that priority will be given to domicile residents and only after that list is exhausted, the organ will be offered to non-domicile list. Being aggrieved by paragraphs 13.1 and 13.10(C)(2) of the G-DOT Guidelines, the present petition is filed.

Special Civil Application No.8602 of 2022

8. The prayer in the petition is as under:

“10B. Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, holding and declaring that the paragraphs 13.1 and 13.10(C) of the Gujarat Deceased Donor Organ and the Tissue Transplantation Guidelines (G-DOT) are ultra-vires the provisions of the transplantation of Human Organs Act, 1994 and Transplantation of Human Organs and Tissues Rules, 2014.

10C. Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, holding and declaring that the paragraphs 13.1 and 13.10(C) of the Gujarat Deceased Donor Organ and the Tissue Transplantation Guidelines (G-DOT) are unconstitutional, illegal, unreasonable inequitable, discriminatory and in violation of fundamental rights of the petitioner and in direct conflict with the policy of Transplantation of Human Organs Act, 1994;

10D. Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondent to register the petitioner under State list for Cadaveric Kidney Transplant in Gujarat without the condition of submitting of domicile certificate.”

9. Facts would indicate that the petitioner is a national and citizen of India working as Assistant General Manager with Adani Ports and Special Economic Zone at Ahmedabad since 2015. He is permanently residing in State of Gujarat since then. The petitioner is suffering from a chronic kidney disease called Focal Segmental Glomeru Losclerosis - a serious condition and needs to undergo a dialysis twice a week. Upon advise of the doctor, petitioner inquired with the hospital for registering him for the purpose of kidney transplant where he was told that under the

guidelines, the petitioner would be entitled for surgery only after obtaining domicile certificate. On an application so made on 25.10.2021, the same was rejected by the competent authorities on 01.12.2021 on the ground that since the petitioner belongs to the State of Jharkhand and is in Ahmedabad since 2015, having not completed 10 years, is not entitled to a domicile certificate. The guidelines in particular, paragraphs 13.1 and 13.10C(2) are under challenge.

10. Learned Senior Advocate Mr.G.M.Joshi assisted by Mr.Ishan Joshi has appeared for the petitioners of Special Civil Application No.14029 of 2022 and Special Civil Application No.18056 of 2022. In context of the petitioner of Special Civil Application No.14029 of 2022, Mr.Joshi would submit that the communication rejecting the application for domicile on the ground that

the petitioner is a Canadian national is misconceived.

10.1 Mr.Joshi would submit that in light of the Government Resolution dated 08.08.1963 which provides for issuance of domicile certificate initially it was stated that the certificate would show age, nationality, citizenship, domicile etc. Thereafter, by a resolution dated 12.06.1964, the word 'Nationality' and the words 'that he/she is a CITIZEN OF INDIA' occurring in the certificate of age, nationality and domicile were deleted. He would therefore submit that once in accordance with the instructions dated 08.06.1989 issued by the General Administration Department which require a minimum continuous stay of 10 years at the time of application of the applicant, the

petitioner having so completed that period, she is entitled to domicile certificate.

10.2 Mr.Joshi would submit that the rejection is de-hors the Indian Citizenship Act, 1955. The petitioner is an OCI who has been conferred the same rights as a citizen by birth but not the rights which are excluded under Section 7B of the Indian Citizenship Act 1955.

10.3 Mr. Joshi would submit that there is a difference between 'Citizenship' and 'Domicile' as envisaged under Article 5 of the Constitution of India. He would extensively submit that domiciles are of two kinds; domicile of origin and domicile of choice.

10.4 Mr. Joshi would further submit that the Act and the Rules under which the petitioner is

desirous of being a recipient, does not specify any requirement of a domicile certificate. The petitioner cannot be put at a disadvantageous position even if, she is not claiming preference as she cannot register herself in light of guideline 13(C)(2) which is in violation of Article 21 of the Constitution of India.

10.5 Mr. G.M. Joshi learned Senior Advocate for the purposes of his submission with regard to deletion of the word 'citizen' would rely on a decision of the Supreme Court in case of ***Bombay Dyeing and MFG. Co. Ltd. v. Bombay Environmental Action Group and others*** reported in ***2006 (3) SCC 434***. He would rely on paragraphs 90 and 91 thereof and submit that deletion of words must receive serious consideration. In his submission therefore, once the requirement of 'nationality'

and 'citizenship' have been deleted for the purposes of domicile, the communication rejecting the application is bad.

10.6 Mr.Joshi would rely on a decision in case of ***State Trading Corporation of India Ltd. v. The Commercial Tax Officer and others*** reported in ***AIR 1963 SC 1811***, which indicates, according to Mr.Joshi that the expression 'nationality' and 'citizenship' are not interchangeable terms.

10.7 Mr.Joshi would further submit that Article 21 of the Constitution of India which deals with 'Right to Life' guarantees and includes right to live with human dignity and receive medical care. He would rely on the paragraphs of the decision in the case of ***Chairman Railway Board and others v.***

Chandrima Das (Mrs.) and others reported in **2000 (2) SCC 465** which provides that fundamental rights in part III of the Constitution are also available to persons 'who need not be citizens of India'. Mr. Joshi would rely on a decision of the Supreme Court in case of **Dr. Pradeep Jain and Ors. v. Union of India and Ors.** reported in **1984 (3) SCC 654**. He would submit that the Supreme Court in the aforesaid decision held that domicile is only one viz. 'Domicile in the Territory of India'.

10.8 Mr. Joshi would rely on a decision in the case of **D.P. Joshi v. State of Madhya Bharat and Another** reported in **AIR 1955 SC 334** to submit that the concept of domicile has to be taken in accordance with the area contemplated. He would submit that having paid transfer of residence fees, the petitioner

has a permanent intention of residing in Ahmedabad and therefore rejection of domicile is bad.

10.9 Mr. Joshi would further rely on a decision in the case of ***Sondur Gopal v. Sondur Rajini*** reported in ***2013 (7) SCC 426*** explaining the concept of domicile.

10.10 Mr. Joshi would rely on a decision in the case of ***State of Telangana and Another v. B. Subbarayudu and Ors*** reported in ***2022 SCC OnLine SC 1220***, by which the Supreme Court has held that every part of every state is an integral and inseverable part of India. The Rules and Regulations have to be in consonance with the fundamental rights guaranteed under Part-III. He would therefore submit that as far as the petitioners of Special Civil Application

No.14029 of 2022 is concerned, she is entitled to a domicile certificate being a resident of Ahmedabad since last 10 years.

11. As far as the petitioner of Special Civil Application No.18056 of 2022 is concerned, he would submit that the petitioner needs a liver transplant, is a descendant of Gujarat and therefore, entitled to be registered in Gujarat and the Regulation requiring domicile is in violation of Articles 14 and 21 of the Constitution of India.

12. Mr.Kunan Naik learned advocate for the petitioner in Special Civil Application No.8602 of 2022 made the following submissions:

12.1 That, the petitioner is a citizen of India,

permanently residing in the State of Gujarat since the year 2015. He is suffering from Chronic Kidney disease and when wanted to register himself, was told that he would have to obtain a domicile certificate.

12.2 Mr.Naik learned advocate for the petitioner would submit that the Act of 1994 subsequently amended, deals with regulating removal / storage and transplantation of human organs so as to prevent commercial dealings in such organs. The legislation has been made under Articles 249 and 250 of the Constitution of India.

12.3 He would submit that Article 21 of the Constitution of India which guarantees protection of life also includes preservation of human life and guarantees right to highest

attainable standards of physical and mental health. The State has a constitutional obligation to guarantee right to health which is an integral part of the 'Right to Life'. He would challenge the clauses of the G-DOT Guidelines and submit that they are beyond the rule making powers conferred under the Act. He would submit that the insistence for a domicile certificate strikes at the very root inasmuch as Rule 31 of the Rules provide that a patient or a recipient may get registered through any transplant center but only one center of a State or a region will be made available to such patient or a recipient. He would invite the attention of this Court to the provisions of the Act and would submit that the guidelines are bad.

12.4 According to Mr. Naik, the State's

insistence on domicile certificate would lead to making of two lists, one non-domicile and the other domicile and it is not the case where the petitioner wants any priority. He would extensively therefore submit that the stand of the State strikes at the very root of Article 21. In support of his submissions, Mr.Naik would rely on the following decisions:

(I) ***Pt. Parmanand Katara v. Union of India and others reported in 1989 (4) SCC 286.***

He would rely on paras 8 to 10 thereof to submit that healthcare facility and its access to a citizen is a right available under the Constitution and Article 21 imposes a duty. The State cannot avoid it.

(II) ***Paschim Banga Khet Mazdoor Samity and Ors. v. State of W.B. and Another***

reported in **1996 (4) SCC 37** was relied upon to submit that the constitution envisages a welfare state at the federal and the state level.

(III) In rejoinder to the submissions of the Government Pleader, Mr.Naik relied on the decision in case of **State of Uttar Pradesh and others v. Dinesh Singh Chauhan reported in 2016 (9) SCC 749**. Paras 30 and 34 were relied upon to submit that there cannot be two lists in a State when in accordance with the sequence of allocation under Rule 31 of the Rules, the State list is only one.

12.5 That when the essential provisions of the Act are appreciated, it is primarily for preventing commercial exploitation of human organs.

13. Ms. Manisha Lavkumar learned Senior Advocate

appearing with Ms.Shruti Pathak learned Assistant Government Pleader for the State Organ and Tissue Transplant Organization and the Advisory Committee would make the following submissions:

13.1 Adverting to the factual aspect of each of the petition, Ms.Lavkumar would submit that as far as Himali Ajmera - petitioner of Special Civil Application No.14029 of 2022 is concerned, though the petitioner was born in Mumbai and was married in Ahmedabad, she is a Canadian citizen and is now an Overseas Citizen of India card holder. She has three daughters. It was open for the petitioner to have applied for organ donation as a recipient from any of the donors or the near relatives viz. the three daughters.

13.2 As far as the petitioner of Special Civil

Application No.18056 of 2022 is concerned, Ms.Vidhya Rameshchandra Shah is a resident of Madhya Pradesh. The petitioner in the letter written to SOTO has admitted that there are more chances of cadaver donors in Gujarat. She has also admitted that she was born in Taloda, Maharashtra which was once a part of Gujarat. It is therefore clear that she too is not a resident of Gujarat.

13.3 As far as the petitioner of Special Civil Application No.8602 of 2022, Shri Himanshu Shekhar is concerned, the petitioner has admitted that he is a domicile of Jharkhand. He has been living in Gujarat for only 7 years and therefore not entitled to a domicile certificate in accordance with the recognized policy of the State.

13.4 Ms.Lavkumar learned Senior Advocate inviting the Court's attention to the Act of 1994 would submit that the Act has been enacted as there was large scale propensity of commercialization of human organs. It was so rampant that though 'Health' is a State subject, in accordance with the provisions of Articles 249 and 250 of the Constitution, the Parliament enacted a law which the State of Gujarat adopted in the year 1997. She would take the Court to the Statement of Objects and Reasons of the Act. Reading the provisions of Chapter-II, Ms.Lavkumar would submit that the authority for removal of organs is with the doctor and with the concerned hospital. She would then take the Court to Section 9 of the Act which provides for restrictions of removal of transplantation of human organs and tissues. She would submit that save as otherwise provided in Sub-Section

(3) of Section 9 though human organ removed from the body of the donor before his death shall be transplanted into a recipient unless a donor is a near relative of a recipient. In context of the petitioner of Special Civil Application No.14029 of 2022 therefore she would submit that it is open for the petitioner to opt for a near relative in case such a donation is available. When such a recipient is not a relative, the organ shall not be removed or transplanted without the approval of the Authorization Committee. Emphasis was made on sub-section (1A) of Section 9 to indicate that where the donor of a recipient is near relative and is a foreign national prior approval of the authorization committee shall be required before removing or transplanting human organ or tissue or both. Since Himani Ajmera the petitioner of Special Civil Application No.14029 of 2022 is a foreign national, in case of a near

relative, an authorization is necessary. Reading Section 9 with Rule 7 of the Transplantation Rules, she would submit that the Authorization Committee constituted under the Act and the provisions of Section 9 provides that when the proposed donor or recipient or both are not nationals or citizens whether near relative or otherwise, the authorization committee shall consider all such requests and the transplantation shall not be permitted if the recipient is a foreign national and the donor is an Indian national unless they are near relatives. She would therefore submit that human organ cannot be donated to a foreign national by a donor unless he is a near relative. Rule 20 of the Rules was also read in that context to submit that there is a separate procedure in case of foreigners and also Rule 19 provides that when a proposed transplant is between other than near

relative and all cases where the donor of the recipient is a foreign national, the approval will be granted by the authorization committee of the hospital. Reading Rule 20, she would submit that donation between Indian living donor and a foreigner other than near relative, cannot be considered. It is therefore the case of learned counsel Ms.Lavkumar that human organ between a donor and a foreign national is not permitted and therefore, the petitioner of Special Civil Application No.14029 of 2022 cannot be permitted to undertake the process as the only possible way that she can apply is through cadaveric donation and the restrictions in place are just and proper. She would also invite the Court's attention to sub-rule (5) of Rule 7 which indicates that if the recipient is in a critical condition, the donor or the recipient may approach hospital in-charge for expeditious

transplantation.

13.5 Ms.Lavkumar learned Senior Advocate appearing for the authority would invite the Court's attention to Rule 31 of the Rules and submit that the manner of establishing National or Regional or State Human Organs and Tissues Removal has been set out in the Rules. Rule 31 provides that there shall be an apex national networking organization at the center. There shall also be a regional and a State level networking organization where large number of transplantation of organs are performed. The State units would be linked to the hospitals. The broad principle of allocation of organs and sharing is prescribed under the rules. Sub-Clause (b) of Clause 4 of Rule 31 provides that a patient or a recipient may get registered through any transplant center but only one center of a

State or a region. She would submit that the power under Clause 13.10(C)(2) with regard to domicile flows from Rule 31C of Clause 4 which provides that the allocation of the organ to be shared is to be decided by the State Networking Organization and by the National Networking Organization, the priority is given and the sequence of allocation is the State list, the regional list, the national list, person of Indian origin and a foreigner. A foreigner therefore in the sequence of allocation comes last and therefore the petitioner of Special Civil Application No.14029 of 2022 cannot claim such a right. Sub-clause (F) of Clause 4 of Rule 31 also provides that the State Government can provide allocation criteria. Ms.Lavkumar would also read out Sub-Rule (10) of Rule 31 to indicate that reference or allocation criteria would develop an updated regularly by networking

organization in consultation with the State Government. Emphasis also would be led on the observations made in Rule 32 which include that an Organ Transplant Registry shall include demographic data implying the aspect of a residency in a particular state to serve the object of the Act. To the contention of the petitioner that there is no transparency of the organ availability, Ms.Lavkumar would submit that Sub-Rule (11) of Rule 32 provides that the identity of the people shall not be put in public domain measures shall be taken to ensure security of the collected information.

13.6 Ms.Lavkumar referred extensively to the resolutions of the State on the subject of domicile. Reading the resolution dated 27.09.1950 she would submit that the resolution considered the question of revising the form of

certificate of domicile. The Rules with relation to the provision for the determination of domicile provide in the explanation that a person is not to be considered as having taken up a fixed habitation in the country merely by reason of residing there. She also would refer to the resolutions of 08.08.1963 which initially provided in the format of the certificate regarding nationality of the citizenship which was then done away with by the resolution of the 12.06.1964. She would submit that reliance placed on these circulars by the learned Senior Advocate Mr.G.M.Joshi to submit that the aspect of citizenship and nationality now are related is misconceived. In that context Ms.Lavkumar would read the instructions dated 10.06.2018 issued by the office of the Commissioner of Police, Special Branch, Ahmedabad City to the Director General, which indicates that there is

no provision for issuance of a domicile certificate to OCI card holders in the Visa manual. Instructions placed on record indicate that it must be ensured that minimum stay of 10 years at the time of application is incumbent for a domicile certificate.

13.7 Adverting to the provisions of the Foreigners Act, 1956, Ms.Lavkumar would refer to the definition of the term 'foreigner' in Section 2(a) of the Act which means a person who is not a citizen of India. He would then fall back upon provisions of the Visa Manual which talks about the Overseas Citizen of India card holder in accordance with the provisions thereunder. The only benefit that an OCI card holder gets is a multiple entry, lifelong visa and other benefits received under the Visa manual. Certain other benefits have been amended by a subsequent

resolution.

13.8 Ms.Lavkumar then would read the provisions of Section 7B of the Citizenship Act, 1955, to indicate that in accordance with Sub-Section (1) of Section 7B, an OCI card holder may be entitled to such rights other than the rights specified in Sub-section (2). Rights specified under Sub-section (2) as the Central Government may by notification specify in this behalf. Sub-section (2) of Section 7B provides that an overseas card holder not entitled to the rights conferred to the citizens of India will be Articles 16, 58 and 66 etc. She would therefore submit that unless so notified an OCI card holder is not entitled to claim the benefit of human organ transplantation unless a domicile under the pretext of it being a right under Article 21 of the Constitution of India.

13.9 Ms.Manisha Lavkumar would then submit that there is a moral dilemma in world in the implementation of the National Organ and Tissue Transplant Program. That the highlights of the National Organ and Tissue Transplant Program and the guidelines thereunder records the moral dilemma faced with respect to the organs to the recipients, the problems of shortage of organs available for transplantation, commercialization of organ donation and emerging concerns regarding transplant tourism. She would invite the Court's attention to the statistics by WHO with regard to the region transplantations are done. She would submit that the guidelines of the 14.03.2019 framed by the State are just and proper. Taking the Court through the salient features of the guidelines, she would submit that the functions and

responsibilities of the State Appropriate Authorization Committee ('SAAC' for short) has been set out, so also of the State Organ and Tissue Transplant Organization ('SOTTO' for short). Amongst the responsibilities of SOTTO, one is to maintain a Gujarat network for cadaver organ sharing. When organs become available for sharing, SOTTO shall allocate to the participating hospitals in accordance with the guidelines issued. A Gujarat network for cadaver organ sharing has been established. The salient features and the minimum requirements of the portal would indicate security of information. She would also rely on the allocation of cadaver organs distribution system and the procedure which prescribes and takes care of urgent and standard category. She would submit that for enrollment of transplant waiting list, priority should be given to the patients residing in the

State and unless the recipient has a domicile certificate, he shall not be enrolled. If there is no suitable recipient in the State, only then patients from the other State should be considered. Cadaver allocation under Section 13.10 of the guidelines indicate that the first priority will be available for the list of Government hospital for liver, lung and transplant where the deceased donor is located. She would read out Clause - C of Para 13.10 to indicate that the patients have to produce domicile certificate at the time of registration only in order to be eligible for the benefit.

13.10 Ms.Manisha Lavkumar would refer to the affidavit in reply and submit that the guidelines are comprehensive guidelines for organizing a system of deceased organ and tissue procurement and they are only with

respect to cadaver patients. The rationale behind the requirement of a domicile certificate is explained by submitting that in India as also in the State of Gujarat there is a huge gap between recipients of organs and organ donors. The patients in need of organs outnumber the cadaver donors. It is therefore that the G-DAC guidelines prescribed various criteria like donor for types of hospitals and the sole purpose behind the criteria is to ensure that domiciles of State have access to medical health and infrastructure. She would submit that the marginal and poor people of the State of Gujarat who do not have the capacity to travel outside Gujarat for transplantation would benefit by clause 13.1 and 13.10 and therefore the same should not be set aside. That the verification of the status of residents or domicile is forming an integral part of the scrutiny for living donor or

cadaverous donors and it is not an alien condition imposed in the G-DAC guidelines. Even for living donors verification of residential status is mandatory under Rules 14 and 18. The Government has never restricted the petitioners to avail of organ transplantation through live donor. The statistical data indicates that under the Government hospitals, on an average 2500 dialysis procedures are undergone.

13.11 In support of her submissions, Ms.Lavkumar would rely on the following decisions:

(I) In case of ***Abdus Samad v. State of West Bengal*** reported in ***(1973) 1 SCC 451***, she would rely on para 7 of the decision and submit that every person must have a domicile. A person cannot have two domiciles and mere

residence is not a domicile, there must be an intention of a person to reside permanently.

(II) In case of ***Mohamed Reza Debstani v. State of Bombay*** reported in ***AIR 1966 SC 1436***, she would rely on para 5 of the decision to submit that all citizens are nationals of a particular State and when the real object of the person is to stay within the State, the domicile is accepted.

(III) ***Louis De Raedt v. Union of India*** reported in ***(1991) 5 SCC 554***. She would rely on paras 9 to 11 thereof that residence alone and accompanied by the state of mind is insufficient for acquisition of domicile.

(IV) In case of ***Karm Kumar v. Union of India and Ors.*** reported in ***2010 SCC Online Del 2579***, she would rely on para 20 and submit that

an OCI cannot be permitted to avail of the rights. Reading para 25 of the said decision at Sr. No.4 she would submit that the very wording of Section 7B of the Citizenship Act would indicate that the rights of an OCI are very limited. It is a statutory right and not a constitutional right and unless a notified right is so prescribed by the Central Government, an OCI will have no right.

(V) In case of ***Small Scale Industries Manufacturers Association (Regd.) v. Union of India & Ors.*** before the Hon'ble Supreme Court in Writ Petition (C) No.476 of 2020, she would rely on para 20 to submit that it is within the legitimate domain of the Court to determine whether a particular policy decision can be served better.

(VI) In case of ***Rajdeep Ghosh v. State of***

Assam and others reported in **(2018) 17 SCC 524**, she would rely on paras 17, 18 and 23 to 27 to submit that as decided in the case of D.P.Joshi v. the State of Madhya Bharat (supra), there is always possibility of enacting rules for the purposes of domicile. She would invite the court's attention to para 23 of the judgment which in the case of Saurabh Chaudhary v. Union of India considered the question of reservation for post graduate courses by providing an institutional preference.

(VII) ***Confederation of Ex-Servicemen Associations and Others v. Union of India and Ors.*** reported in **(2006) 8 SCC 399**. She would rely on paras 23 to 27 to submit that when there is a reasonable nexus with the objects sought to be achieved, the guidelines as set out must be accepted and affirmed in light of the

purpose of seeing that the poor within the State get an opportunity to be treated. She would distinguish the judgement cited by Senior Advocate Mr.Gautam Joshi and submit that those decisions especially one in case of **Chandrima Das** (supra) was not in context of Article 21. She would submit that the petitions therefore deserve to be dismissed and should accordingly be dismissed.

14. Having considered the submissions made by the learned counsels for the respective parties, as far as the petitioner of Special Civil Application No.14029 of 2022 is concerned, the challenge is to the decision of the competent authority by which the application for domicile certificate has been rejected on the ground that the petitioner is a Canadian citizen. She is an overseas citizen of India and admittedly a resident of Gujarat over

more than 10 years. Independent of the issue whether by virtue of being a resident of Ahmedabad for over a period of 10 years and whether the decision refusing domicile is wrong, essentially, the Court will have to consider it in light of paragraph 13.1 and 13(10)(C) of G-DOT guidelines which disqualify the petitioner to be registered as a recipient by virtue of the impugned communication.

15. In the other two petitions viz. Special Civil Application No.18056 of 2022 and Special Civil Application No.8602 of 2022, admittedly the petitioners are citizens of India but have been denied registration as recipients in light of paragraph 13.1 and 13(10)(C) of G-DOT guidelines which require the domicile certificate.

16. The Court will have to therefore first adjudicate

on the validity of these paragraphs.

17. The challenge to these paragraphs of the guidelines is on the test of they being violative of Article 21 of the Constitution of India which deals with 'Right to Life'. In essence, the petitioners are suffering from a handicap due to a malfunction of an organ viz. kidney and liver in the respective cases, need a transplant, for which, the recipient petitioners will have to have a corresponding donor. The entire gamut of this donation of organs is governed by the the Transplantation of Human Organs and Tissues Act, 1994.

18. Reading the Statement of Objects and Reasons of the Act indicates that in order to bring out a comprehensive legislation to regulate removal of organs from living as well as dead persons and

transplantation of such organs the Act was enacted. This was to prevent and prohibit commercial dealings in human organs. The Act of 1994 was made in accordance with the resolutions passed by the State under Articles 249 and 250 of the Constitution of India for the Parliament to pass the law. The State of Gujarat adopted it in 1997. The relevant provisions for our purpose read as under:

“9 Restrictions on removal and transplantation of [human organs or tissues or both].-त्यमव जयत

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

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

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

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

(1-C) No human organs or tissues or both shall be removed from the body of a mentally challenged person before his death for the 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 donor authorises the removal of any of his [human organs or tissues or both] after his death under sub-section (2) of section 3 or any person competent or empowered to give authority for the removal of any [human organ or tissue or both] from the body of any deceased person authorises such removal, the [human organ or tissue or both] may be removed and transplanted into the body of any recipient who may be in need of such [human organ or tissue or both].

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

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

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

(b) the second donor has agreed to make a donation of his human organ or tissue or

both before his death to such recipient, who is his near relative, but such donor is not compatible biologically as a donor for such recipient; then

(c) the first donor who is compatible biologically as a donor for the second recipient and the second donor is compatible biologically as a donor of a human organ or tissue or both for the first recipient and both donors and both recipients in the aforesaid group of donor and recipient have entered into a single agreement to donate and receive such human organ or tissue or both according to such biological compatibility in the group, the removal and transplantation of the human organ or tissue or both, as per the agreement referred to above, shall not be done without prior approval of the Authorisation Committee.]

[[\(4\)](#) (a) The composition of the Authorisation 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 donor and the recipient,

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

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

10. Regulation of hospitals conducting the removal, storage or transplantation of [human organs or tissues or both].—

(1) On and from the commencement of this Act,—

(a) no hospital, unless registered under this Act, shall conduct, or associate with, or help in, the removal, storage or transplantation of any [human organ or tissue or both;]

(b) no medical practitioner or any other person shall conduct, or cause to be conducted, or aid in conducting by himself or through any other person, any activity relating to the removal, storage or transplantation of any [human organ or tissue or both] at a place other than a place registered under this Act; ***

(c) no place including a hospital registered under sub-section (1) of section 15 shall be used or cause to be used by any person for the removal, storage or transplantation of any [human organ or tissue or both] except for therapeutic purposes; [and]

[(d) no Tissues Bank, unless registered under this Act, shall carry out any activity relating to the recovery, screening, testing, processing, storage and distribution of tissues.]

(2) Notwithstanding anything contained in sub-section (1), the eyes or the ears may be removed at any place from the dead body of any donor, for therapeutic purposes, by a registered medical practitioner.

Explanation.—For the purposes of this sub-section, “ears” includes ear drums and ear bones.

10. Prohibition of removal or transplantation of 4 [human organs or tissues or both] for any purpose other than the therapeutic purposes.— No donor and no person empowered to give authority for the removal of any human organ shall authorize the removal of any 1 [human organ or tissue or both] for any purpose other than therapeutic purposes.

...

13. Appropriate Authority.—(1) The Central Government shall appoint, by notification, one or more officers as Appropriate Authorities for each of the Union territories for the purposes of this Act.

(2) The State Government shall appoint, by notification, one or more officers as Appropriate Authorities for the purposes of this Act.

(3) The Appropriate Authority shall perform the following functions, namely:—

(i) to grant registration under sub-section (1) of section 15 or renew registration under sub-section (3) of that section;

(ii) to suspend or cancel registration under sub-section (2) of section 16;

[(iii) to enforce such standards, as may be prescribed,—

(A) for hospitals engaged in the removal, storage or transplantation of any human organ:

(B) for Tissue Banks engaged in recovery, screening, testing, processing, storage and distribution of tissues;]

(iv) to investigate any complaint of breach of any of the provisions of this Act or any of the rules made thereunder and take appropriate action;

[(iva) to inspect Tissue Banks periodically;]
(v) to inspect hospitals periodically for examination of the quality of transplantation and the follow-up medical care to persons who have undergone transplantation and persons from whom organs are removed; and

(vi) to undertake such other measures as may be prescribed

..

13B. Powers of Appropriate Authority.—The Appropriate Authority shall for the purposes of this Act have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908 (5 of 1908) and, in particular, in respect of the following matters, namely:—

(a) summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made thereunder;

(b) discovery and production of any document or material object;

(c) issuing search warrant for any place suspected to be indulging in unauthorised removal, procurement or transplantation of human organs or tissues or both; and

(d) any other matter which may be prescribed.

13C. National Human Organs and Tissues Removal and Storage Network.—The Central Government may, by notification, establish a National Human Organs and Tissues Removal and Storage Network at one or more places and Regional Network in such manner and to perform such functions, as may be prescribed.

13D. National registry.—The Central Government shall maintain a national registry of the donors and recipients of human organs and tissues and such registry shall have such information as may be prescribed to an ongoing evaluation of the scientific and clinical status of human organs and tissue.]

...

24. Power to make rules.—(1) The Central Government may, by notification, make rules for carrying out the purposes of this Act.

...

...

(i) the other measures as the Appropriate Authority shall undertake in performing its functions under clause (vi) of sub-section (3) of section 13;

[(ia) the qualifications of medical experts and the terms and conditions for appointment to Advisory committee under sub-sections (2) and (3) of section 13A;

(ib) the power of the Appropriate Authority in any other matter under clause (d) of section 13B;

(ic) the manner of establishment of a National Human Organs and Tissues Removal and Storage Network and Regional Network and functions to be performed by them under section 13C;

(id) the information in the national registry of the donors and recipients of human organs and tissues and all information under section 13D;]

19. The relevant Rules under the Transplantation of Human Organs and Tissues Rules, 2014, which are relevant for our purposes read as under:

2. Definitions:

...

(b) “cadaver(s)”, “organ(s)” and “tissue(s)” means human cadaver(s), human organ(s) and human tissue(s), respectively;

...

7 Authorisation Committee.—

(1) The medical practitioner who will be part of the organ transplantation team for carrying out transplantation operation shall not be a member of the Authorisation Committee constituted

under the provisions of clauses (a) and (b) of sub-section (4) of section 9 of the Act.

(2) When the proposed donor or recipient or both are not Indian nationals or citizens whether near relatives or otherwise, the Authorisation Committee shall consider all such requests and the transplantation shall not be permitted if the recipient is a foreign national and donor is an Indian national unless they are near relatives.

(3) When the proposed donor and the recipient are not near relatives, the Authorisation Committee shall,-

(i) evaluate that there is no commercial transaction between the recipient and the donor and that no payment has been made to the donor or promised to be made to the donor or any other person;

(ii) prepare an explanation of the link between them and the circumstances which led to the offer being made;

(iii) examine the reasons why the donor wishes to donate;

(iv) examine the documentary evidence of the link, e.g. proof that they have lived together, etc.;

(v) examine old photographs showing the donor and the recipient together; (vi) evaluate that there is no middleman or tout involved;

(vii) evaluate that financial status of the donor and the recipient by asking them to give

appropriate evidence of their vocation and income for the previous three financial years and any gross disparity between the status of the two must be evaluated in the backdrop of the objective of preventing commercial dealing;
(viii) ensure that the donor is not a drug addict;

(ix) ensure that the near relative or if near relative is not available, any adult person related to donor by blood or marriage of the proposed unrelated donor is interviewed regarding awareness about his or her intention to donate an organ or tissue, the authenticity of the link between the donor and the recipient, and the reasons for donation, and any strong views or disagreement or objection of such kin shall also be recorded and taken note of.

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

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

...

10. Application for living donor transplantation.

(1) The donor and the recipient shall make jointly an application to grant approval for

removal and transplantation of a human organ, to the competent authority or Authorisation Committee as specified in Form 11 and the papers for approval of transplantation would be processed by the registered medical practitioner and administrative division of the Institution for transplantation.

(2) The competent authority or Authorisation Committee shall take a decision on such application in accordance with the rule 18.

(3) If some State wants to merge Form 11 with Form 1, Form 2 or Form 3, they may do so, provided the content of the recommended Forms are covered in the merged Form and the same is approved by the State Government concerned.

10. Composition of Authorisation Committees.—

(1) There shall be one State level Authorisation Committee.

(2) Additional Authorisation Committees in the districts or Institutions or hospitals may be set up as per norms given below, which may be revised from time to time by the concerned State Government or Union territory Administration by notification.

(3) No member from transplant team of the institution should be a member of the respective Authorisation Committee.

(4) Authorisation Committee should be hospital based if the number of transplants is twenty five or more in a year at the respective

transplantation centers, and if the number of organ transplants in an institution or hospital are less than twenty-five in a year, then the State or District level Authorisation Committee would grant approval(s).

12. Composition of hospital based Authorisation Committees.— The hospital based Authorisation Committee shall, as notified by the State Government in case of State and by the Union territory Administration in case of Union territory, consist of,—

(a) the Medical Director or Medical Superintendent or Head of the institution or hospital or a senior medical person officiating as Head - Chairperson;

(b) two senior medical practitioners from the same hospital who are not part of the transplant team - Member;

(c) two persons (preferably one woman) of high integrity, social standing and credibility, who have served in high ranking Government positions, such as in higher judiciary, senior cadre of police service or who have served as a reader or professor in University Grants Commission approved University or are self-employed professionals of repute such as lawyers, chartered accountants, doctors of Indian Medical Association, reputed non-Government organisation or renowned social worker - Member;

(d) Secretary (Health) or nominee and Director Health Services or nominee from State Government or Union territory Administration -

Member.

13. Composition of State or District Level Authorisation Committees.— The State or District Level Authorisation Committee shall, as notified by the State Government in case of State and by the Union territory Administration in case of Union territory, consist of,—

(a) a Medical Practitioner officiating as Chief Medical Officer or any other equivalent post in the main or major Government hospital of the District - Chairperson;

(b) two senior registered medical practitioners to be chosen from the pool of such medical practitioners who are residing in the concerned District and who are not part of any transplant team- Member;

(c) two persons (preferably one woman) of high integrity, social standing and credibility, who have served in high ranking Government positions, such as in higher judiciary, senior cadre of police service or who have served as a reader or professor in University Grants Commission approved University or are self-employed professionals of repute such as lawyers, chartered accountants, doctors of Indian Medical Association, reputed non-Government organisation or renowned social worker - Member;

(d) Secretary (Health) or nominee and Director Health Services or nominee from State Government or Union territory Administration- Member :

Provided that effort shall be made by the State

Government concerned to have most of the members' ex-officio so that the need to change the composition of Committee is less frequent.

14. 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.

...

... THE HIGH COURT

17. Scrutiny of applications by Authorisation Committee.—

(1) Secretariat of the Authorisation Committee shall circulate copies of all applications received from the proposed donors and recipients to all members of the Committee along with all annexures, which may have been filed along with the applications.

(2) At the time of the meeting, the Authorisation Committee should take note of all relevant contents and documents in the course of its

decision making process and in the event any document or information is found to be inadequate or doubtful, explanation should be sought from the applicant and if it is considered necessary that any fact or information requires to be verified in order to confirm its veracity or correctness, the same be ascertained through the concerned officer(s) of the State Government or Union territory Administration.

18. Procedure in case of near relatives.—

(1) Where the proposed transplant of organs is between near relatives related genetically, namely, grandmother, grandfather, mother, father, brother, sister, son, daughter, grandson and granddaughter, above the age of eighteen years, the competent authority as defined at rule 2(c) or Authorisation Committee (in case donor or recipient is a foreigner) shall evaluate;

(i) documentary evidence of relationship e.g. relevant birth certificates, marriage certificate, other relationship certificate from Tehsildar or Sub-divisional magistrate or Metropolitan Magistrate or Sarpanch of the Panchayat, or similar other identity certificates like Electors Photo Identity Card or AADHAAR card; and

(ii) documentary evidence of identity and residence of the proposed donor, ration card or voters identity card or passport or driving license or PAN card or bank account and family photograph depicting the proposed donor and the proposed recipient along with another near relative, or similar other identity certificates like AADHAAR Card

(issued by Unique Identification Authority of India).

(2) If in the opinion of the competent authority, the relationship is not conclusively established after evaluating the above evidence, it may in its discretion direct further medical test, namely, Deoxyribonucleic Acid (DNA) Profiling.

(3) The test referred to in sub-rule (2) shall be got done from a laboratory accredited with National Accreditation Board for Testing and Calibration Laboratories and certificate shall be given in Form 5.

(4) If the documentary evidences and test referred to in sub-rules (1) and (2), respectively do not establish a genetic relationship between the donor and the recipient, the same procedure be adopted on preferably both or at least one parent, and if parents are not available, the same procedure be adopted on such relatives of donor and recipient as are available and are willing to be tested, failing which, genetic relationship between the donor and the recipient will be deemed to have not been established.

(5) Where the proposed transplant is between a married couple the competent authority or Authorisation Committee (in case donor or recipient is a foreigner) must evaluate the factum and duration of marriage and ensure that documents such as marriage certificate, marriage photograph etc. are kept for records along with the information on the number and age of children and a family photograph

depicting the entire family, birth certificate of children containing the particulars of parents and issue a certificate in Form 6 (for spousal donor).

(6) Any document with regard to the proof of residence or domicile and particulars of parentage should be relatable to the photo identity of the applicant in order to ensure that the documents pertain to the same person, who is the proposed donor and in the event of any inadequate or doubtful information to this effect, the Competent Authority or Authorisation Committee as the case may be, may in its discretion seek such other information or evidence as may be expedient and desirable in the peculiar facts of the case.

(7) The medical practitioner who will be part of the organ transplantation team for carrying out transplantation operation shall not be a competent authority of the transplant hospital.

(8) The competent authority may seek the assistance of the Authorisation Committee in its decision making, if required.

...

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31. Manner of establishing National or Regional or State Human Organs and Tissues Removal and Storage Networks and their functions.—

(1) There shall be an apex national networking organisation at the centre, as the Central Government may by notification specify.

(2) There shall also be regional and State level networking organizations where large number

of transplantation of organ(s) or tissue (s) are performed as the Central Government may by notification specify.

(3) The State units would be linked to hospitals, organ or tissue matching laboratories and tissue banks within their area and also to regional and national networking organizations.

(4) The broad principles of organ allocation and sharing shall be as under,—

(a) The website of the transplantation center shall be linked to State or Regional cum State or National networks through an online system for organ procurement, sharing and transplantation.

(b) patient or recipient may get registered through any transplant centre, but only one centre of a State or region (if there is no centre in the State) and his or her details shall be made available online to the networking organizations, who shall allocate the registration number, which shall remain same even if patient changes hospital;

(c) the allocation of the organ to be shared, is to be decided by the State networking organization and by the National networking organization in case of Delhi;

(d) all recipients are to be listed for requests of organs from deceased donors, however priority is to be given in following order, namely:-

(i) those who do not have any suitable living donor among near relatives;

(ii) those who have a suitable living donor available among near relatives but the donor has refused in writing to donate; and

(iii) those who have a suitable living donor available and who has also not refused to donate in writing;

(e) sequence of allocation of organs shall be in following order: State list----Regional List----- National List---- Person of Indian Origin ---- Foreigner;

(f) the online system of networking and framework and formats of national registry as mentioned under rule 32 shall be developed by the apex networking organisation which shall be followed by the States Governments or Union territory Administrations and the allocation criteria may be State specific which shall be finalised and determined by the State Government, in consultation with the State level networking organisation, wherever such organisation exists: Provided that the organ sharing and networking policy of States or locations of hospitals shall not be binding on the Armed Forces Medical Services (AFMS) and the armed forces shall be free to have their own policy of organ or tissue allocation and sharing, and the Director General Armed Forces Medical Services shall have its own networking between the Armed Forces Medical Services hospitals, who shall be permitted to accept organs when available from hospitals with in their State jurisdiction.

(5) The networking organisations shall coordinate retrieval, storage, transportation,

matching, allocation and transplantation of organs and tissues and shall develop norms and standard operating procedures for such activities and for tissues to the extent possible.

(6) The networking organisations shall coordinate with respective State Government for establishing new transplant and retrieval centres and tissue banks and strengthening of existing ones.

(7) There shall be designated organ and tissue retrieval teams in State or District or institution as per requirement, to be constituted by the State or Regional networking organisation.

(8) For tissue retrieval, the retrieval teams shall be formed by the State Government or Union territory Administration where ever required.

(9) Networking shall be e-enabled and accessible through dedicated website.

(10) Reference or allocation criteria would be developed and updated regularly by networking organisations in consultation with the Central or State Government, as the case may be.

(11) The networking organisation(s) shall undertake Information Education and Communication (IEC) Activities for promotion of deceased organ and tissue donation.

(12) The networking organisation(s) shall maintain and update organ or tissue Donation and Transplant Registry at respective level.

32. Information to be included in National Registry regarding donors and recipients of human organ and tissue.— The national registry shall be based on the following, namely:-

Organ Transplant Registry:

(1) The Organ Transplant Registry shall include demographic data about the patient, donor, hospitals, recipient and donor follow up details, transplant waiting list, etc., and the data shall be collected from all retrieval and transplant centers.

20. The State of Gujarat has framed the Gujarat Deceased Donor Organ and Tissue Transplantation Guidelines (G-DOT Guidelines) vide a resolution dated 14.03.2019. Thus, according to the resolution, the same is done to address various issues relating to declaration of brain-stem death, infrastructure, coordination and public awareness. The aim is 'to improve access to life transforming transplantation for needy citizens by promoting deceased organ donation under the guidelines the State Organ

and Tissue Transplantation Organization (SOTTO). It has to design and maintain a computerised waiting of all the potential organ recipients for the heart, the lung, the liver, the pancreas, the kidney and other organ as received from the participating hospitals of the State by maintaining Gujarat Network for Cadaver Organ Sharing (GNCOS). When organs become available for sharing, SOTTO shall allocate them to the participating hospitals in accordance with the guidelines of the Government for this purpose. The GNCOS portal will have an online central registry. The salient features are as under:

“The following shall be the salient features and minimum functional requirements of the proposed Portal:

...

...

(iv) Online central registry of patients by the hospitals requiring organ transplantation along with details of hospitals where they are currently receiving the treatment and basic

details for cross-matching of compatibility of the donor's organs.

(v) Facility for the OTRH/OTTH for updating the availability of organs from cadaver.

(vi) Online workflow for allocation of organs to the registered patients strictly observing the priority prescribed under rules;

(vii) Security of information”

21. Paragraph no.13 of the Guidelines deals with allocation of Cadaver Organ Distribution System

Procedure and the same reads as under:

13. Allocation of Cadaver Organ Distribution System - Procedure:-

13.1 All hospitals, approved for transplantation of human organs have to participate in the arrangements for cadaver organ transplant program as dictated by this Government Order. All participating hospitals will provide their waiting list of prospective cadaver organ recipient for kidneys in point system, for Heart, Lungs, Liver, Pancreas and other organs in Urgent and Standard category in print and electronic format (Annexure I and II) to the office of the Convener of Cadaver Organ Transplant Program, Gujarat state.

For enrollment in transplant waiting

list/priority should be given/to patients residing in the state (domicile certificate mandatory). If there is no suitable recipient in the state then only patients from other state should be considered.

When an organ is allotted to the hospital list, it is to be allocated to the person residing in the Gujarat State waiting on the list. If no match is found for the organ in that hospital, followed by other hospitals in the State. If there is no suitable recipient in state, it will then be allotted to Indian nationals as per rules of ROTTO and NOTTO.

...

...

13.10

(C) Common Pool:

(1) The first cum-first serve basis will be apply to the common demand register of the Transplant.

(2) Every patient who are in need of organ has to be register in common though hospital for each organ. Convener has to maintain demand register separately for each organ. The charges for the registration of Rs. 5000/- per organ has to be paid by patient at time of registration. Patient having domicile of Gujarat state (domicile certificate of Gujarat State) will get priority/ Patient has to produced domicile certificate at a time of registration only and patient

who have produced domicile certificate at time of registration only eligible to get this benefit.”

22. Reading the provisions of the Act indicates that it was devised to prevent trading of human organs. The Act regulates the transplantation of human organs and tissues by placing certain obligations and duties on the actors involved in the process. Reading Section 9 of the Act indicates that no organ shall be removed from the donor before his death and shall be transplanted into a recipient unless the donor is a near relative of the recipient. In case a donor or a recipient is a foreign national, prior authorization is required. In case of a recipient being a foreign national and the donor an Indian national when not related, no approval is given. In other words, a live donor cannot donate his/her organ to a foreign national who is not related. The other

kind of donation is donation of organs from cadaver or what is called cadaveric transplantation. Therefore, there are two kinds namely Living Donor Transplants, one after death or before death. When a donor wants to donate after death, he/she can authorize the removal of organs after death. Living donors who want to donate before death can do so by a donation to a near relative and/or to a near relative who is a foreign national. This has to be done after prior approval of the Authorisation Committee. The person may also donate to another person who is not a near relative for special reasons.

23. The second kind of transplants are cadaver transplants where a donor has either consented before death or did not consent before death. In the latter, consent of the family is necessary.

24. The Gujarat Guidelines are in connection with cadaver transplantations.

25. The argument of Ms. Manisha Lavkumar that the petitioner of Special Civil Application No. 14092 of 2022 being a foreign national can have a live donor from her near relative three daughters and therefore need not opt for cadaveric donation. The argument to support the requisite of domicile certificate to correlate a complete embargo on organ donation to a foreign national by an India donor is of no help as even otherwise the guidelines of a prerequisite possession of domicile certificate is not related to the concept of a living donor which is one which prevents a foreign national recipient. Therefore the restriction of Section 9 in no manner can justify making of guidelines in Paras 13.1 and 13(10)(C)

(2) with regard to cadaveric donation. Then comes the test of denial of such a benefit to the person who is an overseas citizen of India.

26. Section 7B of the Citizenship Act, 1955 reads as under:

7B. Conferment of rights on overseas citizens of India.—

(1) Notwithstanding anything contained in any other law for the time being in force, an overseas citizen of India shall be entitled to such rights [other than the rights specified under sub-section

(2)] as the Central Government may, by notification in the Official Gazette, specify in this behalf.

(2) An overseas citizen of India shall not be entitled to the rights conferred on a citizen of India—

(a) under article 16 of the Constitution with regard to equality of opportunity in matters of public employment;

(b) under article 58 of the Constitution for election as President;

(c) under article 66 of the Constitution for election of Vice-President;

(d) under article 124 of the Constitution for appointment as a Judge of the Supreme Court;

(e) under article 217 of the Constitution for appointment as a Judge of the High Court;

(f) under section 16 of the Representation of the People Act, 1950 (43 of 1950) in regard to registration as a voter;

(g) under sections 3 and 4 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the House of the People or of the Council of States, as the case may be;

(h) under sections 5, 5A and 6 of the Representation of the People Act, 1951 (43 of 1951) with regard to the eligibility for being a member of the Legislative Assembly or a Legislative Council, as the case may be, of a State;

(i) for appointment to public services and posts in connection with the affairs of the Union or of any State except for appointment in such services and posts as the Central Government may by special order in that behalf specify.

(3) Every notification issued under sub-section (1) shall be laid before each House of Parliament.]

27. Sub-section (2) of Section 7B of the Citizenship Act, 1955 provides or enlists such rights which an Overseas Citizen of India cardholder shall not be entitled to vis-a-vis the rights conferred on an Indian Citizen. Reading of those rights indicates that such rights are not available to a 'citizen' (OCI) but such rights cannot be read to restrict availability of rights to a 'person' under Articles 14 and Article 21 of the Constitution of India. Articles 14 and 21 of the Constitution of India read as under:

Article 14: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

Article 21: Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law

28. Both these Articles say that the State shall not

deny to any person equality before the law or the equal protection of the law and no person be deprived of his life except according to procedure established by law.

29. It is therefore misconceived for the State authorities to contend that only such rights other than specified under sub-section (2) will be available only if so notified. This cannot be sustained when it comes to "Right to Life" under Article 21 of the Constitution of India.

30. Before we get into the larger concept of whether the guidelines prescribing a domicile certificate being a prerequisite for a recipient to be registered at a hospital in Gujarat violates the 'Right to Life' enshrined under Article 21 of the Constitution of India, a look at the other provisions of the Act of 1994 and the Rules is

necessary.

31. Apart from the restrictions of donations as enshrined under Section 9 of the Act, Section 13C of the Act provides for establishment of a National Human Organs and Tissues Removal and Storage Network and Regional Network, Section 13D provides for a Central Government to maintain a National Registry of the donors and recipients of human organs and tissues. Section 24 of the Act provides for power to make rules. Under this Section, the Central Government may, by notification make rules for carrying out the purposes of the Act 24(ic) and 24(id) respectively provide for making of Rules regarding the manner and establishment of a National Human Organs and Tissues Removal and Storage Network and Regional Network and functions to be performed by them. Similarly Rules can be

provided regarding the information in the national registry of donors and recipients human organs and tissues and all information.

32. Rule 7 of the Rules specifically restricts the Committee's power suggesting that it shall not approve requests for transplantation when recipient is a foreign national and donor is an Indian national and they are not near relatives. This would therefore indicate a foreign national or a 'Foreigner' as defined under the Foreigners Act will not be eligible to be a recipient from a live donor unless such a live donor is a near relative even when in such a case aspects of evaluation whether it is a commercial transactions, evaluation whether there are middlemen or touts is done. Evaluation is expedited if the recipient is in a critical condition.

33. All these suggest that the Rules do empower an authority to make provisions for restrictions in line donor situation in respect of foreign national recipients and not when cadaveric transplantations are involved. The concept of 'domicile' comes into play only for verification of residential status when a living donor and he is unrelated and the donor or recipient belong to a state or Union Territory other than the State of Union Territory where the Transplant is proposed to be undertaken. Again therefore this is something that the Rule provides for live donors under Rule 14. The manner of establishing National or Regional or State Human Organs and Tissues Removal and Storage Network and their functions is provided under Rule 31 of the said Rules under this Rule there shall be an apex national networking

organization at the center and there shall also be regional and State level networking organizations where large number of transplantation of organs or tissues are performed Rule 31(4)(b) provides that a patient or a recipient may get registered through any transplant center but only one center of a State or region and his or her details shall be made available online to the networking organizations who shall allocate the registration number, which shall remain same even if patient changes hospital. Therefore, registration is available only at one center.

34. Rule 31(4)(d) deals with a priority not to be maintained for requests of organs from deceased donors nowhere priority is given in the order prescribed. The least priority is given to a recipient those who have a suitable living donor

available among relatives but who has also not consented to donate in writing. Therefore, even in case of cadaveric donations the petitioners would have a priority in the last or the third category and this has nothing to do with an eventuality of a non-domicile stealing a march amongst similarly situated recipients where nationality, citizenship or domicile will have no role to play in as much as merely because of one being a foreign national would enable such a recipient to jump the queue. This when read with the sequence of allocation of organs in the order also indicates that the sequence of allocation of organs will be in the order - state list - regional list - national list - person of Indian origin - Foreigner. Therefore, even when it comes to allocation the person of Indian origin and Foreigner fall back in queue. The idea therefore to bring in the concept of a domicile

certificate by way of a guideline by the State, an executive information, under the pretext of protecting the needs of the needy fails the test on two counts. Firstly an executive instruction cannot supplant a Rule and secondly such an instruction has no reasonable nexus with the object sought to be achieved. The whole object of making of the Act and the Rules is to stem the propensity of commercialization of organ transplantation and by bringing in a requisite of being a domicile of a State cannot in any manner foster the purposes of the Act and therefore, on the touchstone of this test such a requirement, as set out in paragraph 13(1) and 13(C)(2) of the G-DOT Guidelines by the State violate the constitutional guarantee enshrined to any person under Article 14 of the Constitution of India. No power to frame such guidelines, as canvassed by the learned Senior Advocate, Ms.Manisha

Lavkumar, can be read into the Rules by the provisions of Rule 31(4)(f) of the Rules. The concept of the Organ Transplant Registry to include information providing a demographic data under Rule 32(1) cannot be a tool to support need for a domicile certificate as the intention of the need of a demographic data is for an efficient need based statistic of the National Registry Pan India. All these yardsticks set out herein above therefore indicate that a State guidelines, which is in the nature of executive instructions cannot be made to operate in absence of any such sanction under the Act and the Rules and also when such a guideline of having a domicile certificate of the State has no nexus to the object sought to be achieved i.e. to prevent commercialization of organ trade and misuse of the machinery under the set for such purposes.

35. Coming to the main plank of the petitioners i.e. that the paragraph 13(1) and 13(10)(C)(2) of the G-Dot Guidelines violate the fundamental right under Article 21 of the Constitution of India i.e. the Right to Life needs to be dealt with.

36. Article 21 of the Constitution of India is at the heart of the Constitution. Right to life therefore is a fundamental right available to a person. It extends to natural persons and not just citizens. In the case of **Francis Goralie Mullin v. The Administrator**, the Supreme Court in AIR 1981 SC 746 has said that Article 21 embodies a constitutional value of supreme importance in a democratic society and it has also been said to be as 'the procedural magna carta protective of life and liberty'. In the case of **Khanak Singh v. Uttar Pradesh** reported in **AIR 1963 SC 1295** the Supreme Court has held that by the term

‘life’ as here used something more is meant than mere animal existence. The inhibitions against its deprivation extends to all limbs and faculties by which life is enjoyed.

37. In ***Maneka Gandhi v. Union of India*** reported in ***AIR 1978 SC 1675*** the Supreme Court held that the right to live is not merely a physical right but includes within its ambit the right to live with human dignity and all that goes with it. When Article 21 is used in tandem with Articles 38, 19(2) and Articles 41 and 47 of the Constitution of India what is evident is that it includes within its broad sweep the right to good health. In ***P.T. Parmanand Katara*** (supra) in paragraph 8 of the judgment, the Supreme Court has held as under:

“8. Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasized and

reiterated with gradually increasing emphasis that position. A doctor at the Government hospital positioned to meet this State obligation is, therefore, duty-bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way. On this basis, we have not issued notices to the States and Union Territories for affording them an opportunity of being heard before we accepted the statement made in the affidavit of the Union of India that there is no impediment in the law. The matter is extremely urgent and in our view, brooks no delay to remind every doctor of his total obligation and assure him of the position that he does not contravene the law of the land by proceeding to treat the injured victim on his appearance before him either by himself or being carried by others. We must make it clear that zonal regulations and classifications cannot also operate as fetters in the process of discharge of the obligation and irrespective of the fact whether under instructions or rules, the victim has to be sent elsewhere or how the police shall be contacted, the

guideline indicated in the 1985 decision of the Committee, as extracted above, is to become operative. We order accordingly.”

38. In ***Paschim Banga Khet Mazdoor Samiti***

(supra) the Supreme Court in paragraph 9 held as under:

“9. The Constitution envisages the establishment of a welfare state at the federal level as well as at the state level. In a welfare state the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail those facilities. [Article 21](#) imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under [Article 21](#). In the present case there was breach of the said right of Hakim Seikh guaranteed

under [Article 21](#) when he was denied treatment at the various Government hospitals which were approached even though his condition was very serious at that time and he was in need of immediate medical attention. Since the said denial of the right of Hakim Seikh guaranteed under [Article 21](#) was by officers of the State in hospitals run by the State the State cannot avoid its responsibility for such denial of the constitutional right of Hakim Seikh. In respect of deprivation of the constitutional rights guaranteed under Part III of the Constitution the position is well settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Articles 32 and 226 of the Constitution. [See : [Rudal Sah v. State of Bihar](#), 1983 (3) SCR 508 [Nilabati Behara v. State of Orissa](#). 1993 (2) SCC 746: [Consumer Education and Research Centre v. Union of India](#), 1995 (3) SCC 42]. Hakim Seikh should, therefore, be suitably compensated for the breach of his right guaranteed under [Article 21](#) of the Constitution. Having regard to the facts and circumstances of the case, we fix the amount of such compensation at Rs. 25,000/-. A sum of Rs. 15,000/- was directed to be paid to Hakim Seikh as interim compensation under the orders of this Court dated April 22, 1994. The balance amount should be paid by respondent No. 1 to Hakim Seikh within one month.”

39. Article 25 of the Universal Declaration of Human

Rights, ratified by India, which is considered as having the force of customary international law declares that 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, widowhood, old age or other lack of livelihood in circumstances beyond his control'. The Division Bench of the Madhya Pradesh High Court while considering the law, in the case of ***In Reference (Suo Motu) vs. Union of India and Others*** in ***W.P. No. 8914 of 2020*** in paras 13 to 22 has held as under:

"13. We have given our thoughtful consideration to the submissions made by the learned counsel for the parties at the Bar.

14. Article 38, Article 39(e), Article 41 and Article 47 in Part-IV of the Constitution of

India as well as the fundamental right guaranteed vide [Article 21](#) of the Constitution of India deal with potent and substantive contents of the right to life which in its broad sweep also includes right to good health. The Supreme Court of India in catena of judgments has given dynamic interpretation to [Article 21](#) of the Constitution of India thereby expanding the meaning of right to life to also include the right to health. Thus, the right to health forms an integral component of right to life enshrined under [Article 21](#) of the Constitution of India. The right to health can be secured to the citizens only if the State provides adequate measures for their treatment, healthcare and takes their care by protecting them from calamities like Coronavirus. A reference in support of this proposition can be made to the judgments of Supreme Court in [Pt. Parmanand Katara vs. Union of India](#) (1989) 4 SCC 286; [Consumer Education and Research Centre vs. Union of India](#) (1995) 3 SCC 42; [Paschim Banga Khet Mazdoor Samity vs. State of West Bengal](#) (1996) 4 SCC 37; [M.C. Mittal vs. Union of India](#) (1999) 6 SCC 9 and [Murli S. Devda vs. Union of India](#) (2000) 8 SCC 765. The Supreme Court WP No.8914/2020 & Linked Matters [30] in all these cases has held that preservation of one's life is the necessary concomitant of the right to life enshrined under [Article 21](#), fundamental in nature, secured, precious and inviolable.

15. [Article 25](#) of the Universal Declaration of Human Rights, ratified by India, which is

considered as having the force of customary international law declares that "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". Similarly, [Article 12](#) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which also has been ratified by India, details out the different facets of the right to health and provides that "(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and that "(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a).....; (b).....; "(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases" and "(d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness". [The Protection of Human Rights Act, 1993](#) recognizes all the above conventions as part of human rights law, WP No.8914/2020 & Linked Matters [31] therefore above referred to international human rights norms, as contained in the Conventions, which have been ratified by India, are binding on India to the extent they are not

inconsistent with the domestic law norms. Section 2(d) of the Act of 1993 (supra) defines "human rights" to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India". In view of above, it must be held that right to health and medical care is one of the facets enshrined under Article 21 of the Constitution of India.

16. The Supreme Court in *Association of Medical Superspeciality Aspirants and Residents and others v. Union of India and others*, (2019) 8 SCC 607 with regard to effect of ratification of the aforementioned declaration/covenants by the country, made the following observations in para-32 of the judgment:-

"32. The Universal Declaration of Human Rights (UDHR) recorded in the Preamble its recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace. The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of every person to the enjoyment of the highest attainable standard of physical and mental health. ICESCR mandates the States Parties to achieve full realization of the aforementioned right through the creation of conditions which would

assure to all, medical service and medical attention in the event of sickness, inter alia."

17. The Supreme Court in *Pt. Parmanand Katara vs. Union of India*, (1989) 4 SCC 286 has recognised the obligation of the WP No.8914/2020 & Linked Matters [32] Government to preserve life. In the said case, the victim of a scooter accident was denied treatment as the hospital did not attend him and told that he be taken to another hospital, which was authorised to handle medico-legal cases. The failure to receive treatment, eventually led to victim's death. While interpreting the ambit of the right to life under *Article 21* of the Constitution, the Supreme held that "*Article 21* of the Constitution casts the obligation on the State to preserve life..... The obligation being total, absolute and paramount, laws of procedure whether in statute or otherwise, which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way."

18. The Supreme Court in *Paschim Banga Khet Mazdoor Samiti vs. State of West Bengal*, (1996) 4 SCC 37 dealing with a case of member of the petitioner Samiti, who suffered a brain injury after falling from train and was denied treatment at several hospitals due to lack of expertise and non-availability of bed was forced to avail treatment at a private hospital. The Supreme Court way back in the year 1996 made certain observations which continue

to be relevant even for the present purpose. While dealing with a claim of compensation and the expenses incurred, the Supreme Court in that case further observed that the obligation to provide medical care was an obligation of welfare State and in para 9 of the report held that "The Constitution envisages the establishment of a welfare State at the federal level as well as State level. In a welfare State the primary WP No.8914/2020 & Linked Matters [33] duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligation undertaken by the Government in a welfare State. The government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail these facilities. [Article 21](#) imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under [Article 21](#).".....Their Lordships then in para 16 of the report further held that "It is no doubt true that financial resources are needed for the providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to

provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints...."

19. The Supreme Court in *Devika Vishwas vs. Union of India*, (2016) 10 SCC 726 while reiterating the settled law held that "right to WP No.8914/2020 & Linked Matters [34] health" is a facet of the "right to life" guaranteed vide [Article 21](#) of the Constitution. The Court in paras 107, 108 and 109 held as under:-

"107. It is well established that the right to life under [Article 21](#) of the Constitution includes the right to lead a dignified and meaningful life and the right to health is an integral facet of this right. In *CESC Ltd. V. Subhash Chandra Bose*, (1992) 1 SCC 441 dealing with the right to health of workers, it was noted that the right to health must be considered an aspect of social justice informed by not only [Article 21](#) of the Constitution, but also the Directive Principles of State Policy and international covenants to which India is a party. Similarly, the bare minimum obligations of the State to ensure the preservation of the right to life and health were enunciated in *Paschim*

Banga Khet Mazdoor Samity v. State of W.B.

108. *In Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161 this Court underlined the obligation of the State to ensure that the fundamental rights of weaker sections of society are not exploited owing to their position in society.

109. That the right to health is an integral part of the right to life does not need any repetition."

20. The Supreme Court in the case of *Union of India Vs. Moolchand Kharaiti Ram Trust* (2018) 8 SCC 321 held as under:-

"65. The State has to ensure the basic necessities like food, nutrition, medical assistance, hygiene etc. and contribute to the improvement of health. Right to life includes right to health as observed *In State of Punjab v. Mohinder Singh Chawla* (1997) 2 SCC 83. Right to life and personal liberty under *Article 21* of the Constitution also includes right of patients to be treated with dignity as observed by this Court in *Balram Prasad v. Kunal Saha* (2014) 1 SCC 384. Right to health i.e. right to live in a clean, hygienic and safe environment is a right under *Article 21* of the Constitution as observed in *Occupational Health and Safety Association v. Union of India* (2014) 3 SCC 547=AIR 2014 SC 1469. The concept of emergency medical aid

has been discussed WP No.8914/2020 & Linked Matters [35] by this Court in *Pt. Parmanand Katara v. Union of India* (1989) 4 SCC 286. In *Paschim Banga Khet Mazdoor Samity and others v. State of W.B.* (1996) 4 SCC 37, right to medical treatment has been extended to prisoners also."

21. The Constitution Bench of the Supreme Court in *Navtej Singh Johar and others Vs. Union of India* (2018) 10 SCC 1, upon survey of previous case law held that right to health and health care is one of the facets of right to life under [Article 21](#) of the Constitution of India. It was held that "the right to life is meaningless unless accompanied by the guarantee of certain concomitant rights including, but not limited to, the right of health. The right of health is understood to be indispensable to a life of dignity and well-being, and includes, for instance, the right of emergency medical care and the right to the maintenance and improvement of public health". (See para 483 of the report).

22. The Supreme Court in *Association of Medical Superspeciality Aspirants and Residents (supra)* held that the primary duty of the State is to "provide all facilities to make right of a citizen to secure his health meaningful." The relevant discussion is to be found in paras 25 and 26 of the judgment, which are reproduced hereunder:-

"25. It is for the State to secure health to its citizens as its primary duty. No doubt the Government is rendering this obligation by opening Government hospitals and health centers, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities to employ best of talents and tone WP No.8914/2020 & Linked Matters [36] up its administration to give effective contribution, which is also the duty of the Government.

26. Right to health is integral to the right to life. Government has a constitutional obligation to provide health facilities 21. The fundamental right to life which is the most precious human right and which forms the ark of all other rights must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may endure for years to come and enhance the dignity of the individual and the worth of the human person. The right to life enshrined in [Article 21](#) cannot be restricted to mere animal existence. It means something much more than just physical survival. The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter, and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and the restriction would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

40. Even in the context of a foreign national in the case of **Chandrima Das** (supra) in paras 19 to 37 held as under:

"19. It was next contended by the learned counsel appearing on behalf of the appellants, that Smt. Hanuffa Khatoon was a foreign national and, therefore, no relief under Public Law could be granted to her as there was no violation of the Fundamental Rights available under the Constitution. It was contended that the Fundamental Rights in Part III of the Constitution are available only to citizens of this country and since Smt. Hanuffa Khatoon was a Bangladeshi national, she cannot complain of the violation of Fundamental Rights and on that basis she cannot be granted any relief. This argument must also fail for two reasons; first, on the ground of Domestic Jurisprudence based on Constitutional provisions and secondly, on the ground of Human Rights Jurisprudence based on the Universal Declaration of Human Rights, 1948, which has the international recognition as the "Moral Code of Conduct"

having been adopted by the General Assembly of the United Nations.

20. We will come to the question of Domestic Jurisprudence a little later as we intend to first consider the principles and objects behind Universal Declaration of Human Rights, 1948, as adopted and proclaimed by the United Nations General Assembly Resolution of 10th December, 1948. The preamble, inter alia, sets out as under:

"Whereas recognition of the INHERENT DIGNITY and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

Whereas it is essential to promote the development of friendly relations between nations.

Whereas the people of the United Nations have in the Charter affirmed their faith in

fundamental human rights, IN THE DIGNITY AND WORTH OF THE HUMAN PERSON AND IN THE EQUAL RIGHTS OF MEN AND WOMEN and have determined to promote social progress and better standards of life in larger freedom. Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge."

21. Thereafter, the Declaration sets out, inter alia, in various Articles, the following:

"1 All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

2 -- Every one is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, NATIONAL OR SOCIAL ORIGIN, PROPERTY, BIRTH OR OTHER STATUS.

Furthermore, NO DISTINCTION SHALL BE MADE ON THE BASIS OF THE POLITICAL, JURISDICTIONAL OR

INTERNATIONAL STATUS OF THE COUNTRY OR TERRITORY to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

3 -- Everyone has the right to life, liberty and security of person.

5 -- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

7 -- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

9 -- No one shall be subjected to arbitrary arrest, detention or exile."

22. Apart from the above, the General Assembly, also while adopting the Declaration on the Elimination of Violence against Women, by its Resolution dated 20th December, 1993, observed in [Article 1](#) that,

"violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."

In [Article 2](#), it was specified that,

"violence against women shall be understood to encompass, but not be limited to:

(a) Physical, sexual and psychological violence occurring in the family including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

23 In [Article 3](#), it was specified that "women are entitled to the equal enjoyment and protection of all human rights, which would include, inter alia,:

(a) the right to life,

(b) the right to equality, and

(c) the right to liberty and security of person.

24 The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the above words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence.

25 Lord Diplock in Salomon v. Commissioners of Customs and Excise [1996] 3 All ER 871 said that there is a, prima facie, presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. So also, Lord Bridge in Brind v. Secretary of State for the Home Department [1991] 1 All ER 720, observed that it was well settled that, in construing any provision in domestic legislation which was ambiguous in the sense that it was capable of a meaning which either conforms to or conflicts with the International Convention, the courts would presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

26 The domestic application of international human rights and norms was

considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the Colloquia that it was the vital duty of an independent judiciary to interpret and apply national constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those Colloquia, the question of domestic application of international and regional human rights specially in relation to women, was considered. The Zimbabwe Declaration 1994, inter alia, stated :

"Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women."

But this situation may not really arise in our country.

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27. Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the Fundamental Rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the

political parties who, by virtue of their majority, may come to form the Govt. at the Centre or in the State.

28. The Fundamental Rights are available to all the "citizens" of the country but a few of them are also available to "persons". While [Article 14](#), which guarantees equality before law or the equal protection of laws within the territory of India, is applicable to "person" which would also include the "citizen" of the country and "non-citizen" both, [Article 15](#) speaks only of "citizen" and it is specifically provided therein that there shall be no discrimination against any "citizen" on the ground only of religion, race, caste, sex, place of birth or any of them nor shall any citizen be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort on the aforesaid grounds. Fundamental Right guaranteed under [Article 15](#) is, therefore, restricted to "citizens". So also, [Article 16](#) which guarantees equality of opportunity in matters of public employment is applicable only to "citizens". The Fundamental Rights contained in [Article 19](#), which contains the right to "Basic Freedoms", namely, freedom of speech and expression; freedom to assemble peaceably and without arms; freedom to form associations or unions; freedom to move freely throughout the territory of India; freedom to reside and

settle in any part of the territory of India and freedom to practice any profession, or to carry on any occupation, trade or business, are available only to "citizens" of the country.

29. The word "citizen" in [Article 19](#) has not been used in a sense different from that in which it has been used in Part II of the Constitution dealing with "citizenship". It has also been held in this case that the words "all citizens" have been deliberately used to keep out all "non-citizens" which would include "aliens". It was laid down in [Hans Muller of Nurenborg vs. Superintendent Presidency Jail Calcutta](#), AIR 1955 SC 367 (374) = 1955 (1) SCR 1284, that this Article applies only to "citizens". In another decision in [Anwar vs. State of J & K](#), AIR 1971 SC 337 = 1971 (1) SCR 637 = (1971) 3 SCC 104, it was held that non-citizen could not claim Fundamental Rights under Article 19. In [Naziranbai vs. State](#), AIR 1957 M.B. 1 and [Lakshmi Prasad & Anr. vs. Shiv Pal & Others](#), AIR 1974 Allahabad 313, it was held that [Article 19](#) does not apply to a "foreigner". The Calcutta High Court in [Sk. Md. Soleman vs. State of West Bengal and Another](#), AIR 1965 Calcutta 312, held that [Article 19](#) does not apply to a Commonwealth citizen.

30. In [Anwar vs. State of J & K](#), AIR 1971 SC 337 = 1971 (1) SCR 637 = (1971) 3 SCC 104 (already referred to above), it was held that the rights under Articles 20, 21 and 22

are available not only to "citizens" but also to "persons" which would include "non-citizens".

31. [Article 20](#) guarantees right to protection in respect of conviction for offences. [Article 21](#) guarantees right to life and personal liberty while [Article 22](#) guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with [Article 3](#), [Article 7](#) and [Article 9](#) of the Universal Declaration of Human Rights, 1948.

32. The word "LIFE" has also been used prominently in the Universal Declaration of Human Rights, 1948. [See: [Article 3](#) quoted above]. The Fundamental Rights under the Constitution are almost in consonance with the Rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, Social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in [Kubic Darusz vs. Union of India & Ors.](#) (1990) 1 SCC 568 = AIR 1990 SC 605. That being so, since "LIFE" is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to [Article 21](#) of the Constitution. The meaning of the word "life" cannot be narrowed down. According to the tenor of the language used in [Article 21](#), it will be available not only to every

citizen of this country, but also to a "person" who may not be a citizen of the country."

41. In a decision in the case of **B. Subbarayudu and Ors** (supra) referring to the decision of the Supreme Court in the case of **Dr. Pradeep Jain** (supra) in paras 59 to 68, the Court held as under:

"59. Under the Constitution, India is a Union of States. Every part of every State is an integral and inseverable part of India. Admittedly, the Respondent was born in India. He has his domicile in the territory of India. As held by this Court in Dr. Pradeep Jain v. Union of India under the Indian Constitution, there is only one domicile i.e. domicile of the country and there is no separate domicile for a State.

60. The power to admit and include States into the Union under Article 2 of the Constitution, and to form new States and/or reorganize State, is in its very nature of the power, wide and its exercise necessarily guided by political issues of considerable complexity, many of which may not be judicially manageable.

61. Article 3, empowers Parliament to enact law and form a new State by separation of territory from any State or by granting two or more States or parts of States or by

uniting any territory to a part of any State. The principles relating to change of sovereignty in international law are not applicable to reorganisation of the territory of the State under Article 3 of the Constitution of India.

62. When such an adjustment or reorganisation of territory takes place, the existing law as well as administrative orders in a particular territory continue to be in force and continue to be binding upon the successor State so long as they are not governed, changed or repudiated by the successor State.

63. It is not in dispute that the respondent has his domicile in the Territory of India and was born in the territory of India. Admittedly, he is a citizen of this country. As a citizen of India, the respondent has a fundamental right under Article 19(1)(e) to reside and settle in any part of the territory of India.

64. Under Article 13 (2) of the Constitution of India prohibits the State from making any law which takes away or infringes the rights conferred by Part III of the Constitution of India and any law made in contravention of Article 13(2), to the extent of the contravention would be void.

65. All statutes and all rules, regulations and byelaws framed by the Government,

which constitute law have to be construed harmoniously with the fundamental rights guaranteed under Part III of the Constitution of India.

66. The Andhra Pradesh State Reorganisation Act, 2014 or any other guidelines framed thereunder, including the guidelines circulated on 30.10.2014 cannot take away from citizens, the right to reside and settle in any part of the country.

67. It is true that when a State is divided and the employees and officers of the State Government have to be allotted to the two states, such allocation has to be done on the basis of the Rules and Regulations and by guidelines.

68. However, such rules, regulations and guidelines have to be construed harmoniously with the fundamental rights guaranteed under the Constitution of India. It is true that the respondent may have been born in an area which now forms part of Andhra Pradesh and may have received a substantial part of his education in areas which now form part of the State of Andhra Pradesh. However, admittedly, he cleared all Board and University examinations from areas within the State of Telangana. At the time of bifurcation, he was posted in Hyderabad, which is now part of Telangana.”

42. Coming to the contentions and the judgments cited by Ms.Manisha Lavkumar, learned Senior Advocate namely, the definition of 'foreigner' under Section 2(a) of the Foreigners Act, 1946, which defines the term as a 'foreigner' means a person who is not a citizen of India and the provisions of the VISA manual which deals with the OCI Card Holder Scheme and the benefits available to such OCIs as laid down in the manual, obviously when this Court has on the basis of the fundamental right of "Right to Life" under Article 21 held that such a right is available to "person" and not necessarily only citizens, the contentions are negated. As far as the case law cited by her in the case of Abdus Samad (supra) there can be no dispute. In fact, if the resolutions of the State on the aspect of award of Domicile are to be considered,

independently of having held paragraphs 13.1 and 13(10)(C)(2) to be bad on the test of Articles 14 and 21 of the Constitution of India, the petitioner of Special Civil Application No.14029 of 2022 is entitled to a domicile certificate and the denial thereof, once the requisite of 'nationality' and 'citizenship' has been deleted. Admittedly she has completed 10 years of residence in Ahmedabad and even on this count the communication declaring her as ineligible to apply for a domicile certificate is held to be bad and therefore non-existent.

43. The case of **Karn Kumar** (supra) a U.K. Passport holder dealt with a case where he was denied participation in a sporting event. This judgement therefore cannot be put on the higher pedestal when it comes to violation of a right to health set out under Article 21 of the Constitution of India.

As far the decision in the case of **Small Scale Industries** (supra) is considered, it pertains to policy decisions and economic policy providing a relief package to small industries which was found inadequate by the Small Scale Manufacturers Association. This also therefore is unrelated to the concept of 'Right to Life' The case of **Rajdeep Ghosh** (supra) deals with the concept of 'domicile' in admissions, again standing incomparable when it comes to the 'Right to Life'. The decision in the case of **Confederation of Ex-Servicemen** (supra), the Court has dealt with the classification having a rational nexus sought to be achieved.

44. Reading the Act of 1994 and the Rules thereunder indicate that the purpose of the Act is to stem commercialization in organ trade and therefore a mechanism to monitor absence of

commercial consideration between recipient and donor are sought to be controlled. For the purposes of the Act, the powers to curb such transactions cannot be extended to formulate executive instructions giving only a domicile of a State to be able to register himself or herself for organ donation, as a recipient as there is no nexus sought to be achieved. When the purpose of the Act and the Rules is as to prevent commercial dealings in human organs and tissues as well as to regulate transplantation of human organs for therapeutic use, the purpose of the Act and the Rules was never to restraint medical treatment to the domicile of a State. When while interpreting Article 21 of the Constitution of India, the Apex Court has held that the 'Right to Health' is an integral part of the 'Right to Life' and the State has a constitutional obligation to provide health

facilities. Denial of medical treatment to the petitioners who are not domiciles of Gujarat is illegal and unconstitutional. By way of paragraph No.13(1) and 13(10)(C), the State has tried to introduce a new criterion of requirement of a domicile certificate for registration of a patient for enrolling him on the State List for organ transplant. The Rules nowhere provide for such criterion. At the cost of repetition in fact Rule 31(4)(6) provides that a patient may get registered through any transplant center but only one center of a State or a region. The introduction of such criteria by a guideline, in the nature of executive instructions is in colorable exercise of powers.

45. For all the aforesaid reasons, the petitions are allowed. Paragraph 13.1 and 13.10 (C) of the Gujarat Deceased Donor Organ and Tissue

Transplantation Guidelines (G - DOT) are held to be ultra-vires the provisions of the Transplantation of Human Organs Act, 1994, and Transplantation of Human Organs and Tissues Rules 2014. They are held to be unconstitutional, unreasonable and in violation of fundamental rights under Articles 14 and 21 of the Constitution of India.

46. In light of the paragraphs 13.1 and 13.10(C) of G-DOT guidelines being so declared illegal, the need to have a domicile certificate in order to be registered as a recipient on the State list for cadaveric transplant of an organ in Gujarat is held to be illegal and unconstitutional and the respondent State is directed to register the petitioners and such other recipients for cadaveric transplant of organs without the conditions of submitting a domicile certificate.

47. Orders accordingly. Rule is made absolute in all the petitions.

ANKIT SHAH

sd/-

(BIREN VAISHNAV, J)

