

Serial No.01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

PIL No.6/2021

Date of Order: 23.06.2021

Registrar General,
High Court of Meghalaya

Vs.

State of Meghalaya

Coram:

Hon'ble Mr. Justice Biswanath Somadder, Chief Justice
Hon'ble Mr. Justice H.S. Thangkhiew, Judge

Appearance:

For the Petitioner/Appellant(s) : –
For the Respondent(s) : Mr. A Kumar, Advocate General with
Mr. S Sen Gupta, Addl.Sr.GA,
Mr. AH Kharwanlang, GA,
Mr. Chetan Joshi, Adv
Mr. Shaurya Sahay, Adv
Mr. Aditya Shankar Pandey, Adv

- | | | |
|-----|--|--------|
| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

ORDER: (per Biswanath Somadder, the Hon'ble, the Chief Justice)

It has been brought to the notice of this High Court that the State of Meghalaya, through various orders of the Deputy Commissioners, has made it mandatory for shopkeepers, vendors, local taxi drivers and others to get themselves vaccinated before they can resume their businesses. Whether vaccination can at all be made mandatory and whether such mandatory action can adversely affect the right of a citizen to earn his/her livelihood, is an issue which requires consideration.

At the outset, it must be stated clearly and unequivocally that vaccination is need of the hour – nay, an absolute necessity – in order to overcome this global pandemic which is engulfing our world. However, the issue, as stated in the earlier paragraph, requires to be clearly answered.

In order to answer the issue, at first, we need to look at certain fundamental principles which govern the field.

Article 21 encompasses within its fold, right to health, as a fundamental right. By that same analogy, right to health care, which includes vaccination, is a fundamental right. However, vaccination by force or being made mandatory by adopting coercive methods, vitiates the very fundamental purpose of the welfare attached to it. It impinges on the fundamental right(s) as such, especially when it affects the right to means of livelihood which makes it possible for a person to live. As held in *Olga Tellis & Ors vs. Bombay Municipal Corporation & Ors* reported at AIR 1986 SC 180 = (1985) 3 SCC 545, right to life includes right to the means of livelihood. Any action of the State which is in absolute derogation of this basic principle is squarely affected by Article 19(1)(g). Although, Article 19(6) prescribes “reasonable restrictions” in the “interest of general public”, the present instance is exemplary and clearly distinguishable. It affects an individual’s right, choice and liberty significantly more than affecting the general public as such or for that matter, the latter’s interests being at stake because of the autonomous decision of an individual *human being* of choosing not to be vaccinated. It is more about striking the right balance between an individual’s right vis-à-vis the right of the public at large. However, in substantiation of Mill’s theory of the liberty to exercise one’s right until it impinges on the right of another; here too, the “welfare State” is attempting to secure the rights of others, which – though legitimate – is palpably excessive owing to the procedure adopted by it. Another pivotal question emerges as to whether any notification/order published by the State Government and/or its authority can be understood as a prescription by “law” for the purposes of prohibiting a greater degree of rights; i.e., fundamental rights. In other words, can a State Government and/or its authority issue any notification/order which is likely to have a direct effect on the fundamental rights of its citizens especially on a subject matter that concerns both public health and the fundamental rights of the individual person.

The issue here essentially centres around a question on the lawmaking power of the State Government, which, even though permitted by Entry 6, List II of the Seventh Schedule, has to be in consonance with the

fundamental right to life and livelihood of an individual. In this case, there is a clear lack of legitimacy in prohibiting freedom of carrying on any occupation, trade or business amongst a certain category or class of citizens who are otherwise entitled to do so, making the notification/order ill-conceived, arbitrary and/or a colourable exercise of power. A notification/order of the State certainly cannot put an embargo and/or fetter on the *fundamental* right to life of an individual by stripping off his/her right to livelihood, except according to the procedure established by law. Even that procedure is required to be reasonable, just and fair (see *Olga Tellis*, supra). Till now, there has been no legal mandate whatsoever with regard to coercive or mandatory vaccination in general and the Covid19 vaccination drive in particular that can prohibit or take away the livelihood of a citizen on that ground.

In the “frequently asked questions” (FAQs) on COVID-19 vaccine prepared and uploaded by the Ministry of Health and Family Welfare, Government of India, in its official website, the question which appears under serial number 3 reads, “Is it mandatory to take the vaccine?” The “potential response”, which is provided in the official website reads, “Vaccination for COVID-19 is voluntary. However, it is advisable to receive the complete schedule of COVID-19 vaccine for protecting oneself against this disease and also to limit the spread of this disease to the close contacts including family members, friends, relatives and co-workers.”

In this context, around one hundred and seven (107) years ago, in *Schloendorff v Society of New York Hospitals* reported at (1914) 211 NY 125 = 105 NE 92; 1914 NY Justice Cardozo ruled that ‘every human being of adult years and sound mind has a right to determine what shall be done with their body’. Thus, by use of force or through deception if an unwilling capable adult is made to have the ‘flu vaccine would be considered both a crime and tort or civil’ wrong, as was ruled in *Airedale NHS Trust v Bland* reported at 1993 AC 789 = (1993) 2 WLR 316 = (1993) 1 All ER 821, around thirty years (30) ago. Thus, coercive element of vaccination has, since the early phases of the initiation of vaccination as a preventive measure against several diseases, have been time and again not only

discouraged but also consistently ruled against by the Courts for over more than a century.

There are several ambiguities on the procedural and substantive aspects of the concerned notification/order. Doubts are cast on whether *coercive* assertion of one's fundamental right can tend to abrogate another's equally placed fundamental right. Question also arises whether fundamental right can be forcefully imposed even if the beneficiary is not inclined to its exercise, because, if the latter is undertaken, then there is a risk of running into infringing on the fundamental right to privacy and exercise of personal liberty. Furthermore, whether to subject oneself to an intrusion of his/her body, even if of minor intensity, e.g., through a needle, concerns issues of personal and bodily autonomy and bodily integrity, similar to abortion rights or non-sterilization rights or even sex reassignment surgeries, irrespective of what consequences the individual might be inviting. This finds mention in decisions of the European Commission and Court of Human Rights [X vs. Netherlands of 1978 (decision rendered on 4th December, 1978); X vs. Austria of 1979 (decision rendered on 13th December, 1979)] which has become truer in the present times across the world than ever before. Compulsory administration of a vaccine without hampering one's right to life and liberty based on informed choice and informed consent is one thing. However, if any compulsory vaccination drive is coercive by its very nature and spirit, it assumes a different proportion and character.

In our view, the burden lies on the State to disseminate and sensitize the citizens of the entire exercise of vaccination with its pros and cons and facilitate informed decision making particularly in a situation where the beneficiaries are skeptical, susceptible and belonging to vulnerable/marginalised section of the society, some of whom are also gullible members of the indigenous communities who are constantly being fed with deliberate misinformation regarding the efficacy of vaccination by some persons/organisations with oblique motives. The welfare nature of the State isn't for coercive negative reinforcement by seizing their right to livelihood, proscribing them to earn from their occupation and/or profession without any justification in the garb of public interest, but lies in walking

together with concerted efforts attempting to effectuate a social order as mandated under Article 38 by approaching the people directly by engaging them in one-to-one dialogues and dwelling on the efficiency and the positive aspects of administering of the vaccine without compromising its duty under Article 47 nor abrogating its duty to secure adequate means of livelihood under Article 39(a). Therefore, right to and the welfare policy for vaccination can never affect a major fundamental right; i.e., right to life, personal liberty and livelihood, especially when there exists no reasonable nexus between vaccination and prohibition of continuance of occupation and/or profession. A harmonious and purposive construction of the provisions of law and principles of equity, good conscience and justice reveals that mandatory or forceful vaccination does not find any force in law leading to such acts being liable to be declared *ultra vires ab initio*.

At this stage, learned Advocate General draws our attention to certain guidelines issued by the Principal Secretary to the Government of Meghalaya, Health and Family Welfare Department, yesterday, i.e., 22nd June, 2021, to all the Deputy Commissioners of the districts of Meghalaya on the measures required to be taken by the districts for addressing the issue of vaccine hesitancy. Perusing the same, it appears that the Principal Secretary to the Government of Meghalaya, Health and Family Welfare Department, has observed inter alia that for public health administration, indigenous States like Meghalaya poses distinct challenges while mobilising people and introducing any new interventions. In such situations, the approach towards effecting any kind of behavioural change needs to be '*adaptive*' in nature, meaning thereby that the people need to be mobilised and convinced to see the impact of the new intervention for greater acceptance among the communities. It has also been advised by the Principal Secretary to the Government of Meghalaya, Health and Family Welfare Department, in the said guidelines that the orders in the districts have to be seen as a "**persuasive advisory**" and *not as a coercion* with regards to the issue of vaccination.

The Principal Secretary to the Government of Meghalaya, Health and Family Welfare Department, while issuing the guidelines dated 22nd June,

2021, has also laid down 7(seven) points that are required to be considered for effecting change in the COVID vaccine compliance in the respective districts of Meghalaya. The Principal Secretary has clearly stated that the existing orders on vaccine compliance may be modified in the light of the new policy directions as spelt out in the guidelines dated 22nd June, 2021 and requirement of vaccination should be directory and not mandatory.

This, in our view is a step in the right direction.

The learned Advocate General has further placed an order issued by the Deputy Commissioner, East Khasi Hills District, Shillong, yesterday, i.e., 22nd June, 2021, following the new guidelines issued by the Principal Secretary to the Government of Meghalaya, Health and Family Welfare Department, yesterday. A plain reading of this order reveals the same to be quite in sync with the observations made hereinbefore by this Court read with new guidelines issued yesterday by the Principal Secretary, Government of Meghalaya, Health and Family Welfare Department. We are of the view that this order is required to be complied with by all shops/establishments/local taxis/auto-rickshaws/maxi cabs and buses, forthwith.

In addition thereto, we issue the following directions so that the public at large are provided with an option of making an informed choice:-

(i) All shops/establishments/local taxis/auto-rickshaws/maxi cabs and buses should display prominently at a conspicuous place, a sign, “VACCINATED”, in the event all employees and staff of the concerned shop/establishment are vaccinated. Similarly, in the case of local taxis/auto-rickshaws/maxi cabs and buses where the concerned driver or conductor or helper(s) are vaccinated.

(ii) All shops/establishments/local taxis/auto-rickshaws/maxi cabs and buses should display prominently at a conspicuous place, a sign, “NOT VACCINATED”, in the event all the employees and staff of the concerned shop/establishment are not vaccinated. Similarly, in the case of local taxis/auto-rickshaws/maxi cabs and buses where the concerned driver or conductor or helper(s) are not vaccinated.

The actual dimension of the signs, “VACCINATED” or “NOT VACCINATED” and the conspicuous place where such sign is required to be affixed/displayed shall be decided by the concerned authority of the State. In the event, any shops/establishments/local taxis/auto-rickshaws/maxi cabs and buses flouts the above directions, the concerned authority of the State shall immediately direct its closure/stoppage of plying.

So far as vaccine hesitation issue is concerned, the same is required to be dealt with by the State Government in the manner specified in its new guidelines issued yesterday by the Principal Secretary, Health and Family Welfare Department, Government of Meghalaya, read with the observations made by us hereinbefore. This Court shall monitor this issue closely so that the State Government is able to overcome the vaccine hesitation problem at the earliest and all eligible persons in the State of Meghalaya are vaccinated well within the timeframe as may be specified by the State.

In the event, there is any attempt made by any person/organisation to spread misinformation regarding the efficacy of vaccination amongst the people of this State, the concerned authority of the State shall immediately step in and proceed against such person/organisation in accordance with law. The concerned authority of the State shall also bring such instances to the notice of this Court.

So far as the other issue with regard to the method of implementation of the Government Welfare Schemes meant for the marginalised section of the society is concerned, the learned Advocate General has placed an order dated 22nd June, 2021, issued by the Chief Secretary to the Government of Meghalaya. We request the learned Registrar General to intimate the Member Secretary of the Meghalaya State Legal Services Authority, Shillong, with regard to the said order dated 22nd June, 2021. The Member Secretary of the Meghalaya State Legal Services Authority, Shillong, shall bring the said order to the notice of all the Secretaries of the District State Legal Services Authorities in the State of Meghalaya who shall enquire and find out as to whether the concerned departments are actually taking steps to ensure that the Government Welfare Schemes for the marginalised section of the society are being properly and effectively implemented in a time

bound manner in accordance with the guidelines of the respective schemes. The Secretaries of all the District State Legal Services Authorities shall submit their respective reports to the Member Secretary, Meghalaya State Legal Services Authority, Shillong, within a period of four weeks from date so that the Member Secretary can compile the same and place the compilation before this Court through the learned Registrar General.

List this matter next Wednesday, i.e., 30th June, 2021 for further consideration.

(H.S. Thangkhiew)
Judge

(Biswanath Somadder)
Chief Justice

Meghalaya
23.06.2021
"Lam AR-PS"

