

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

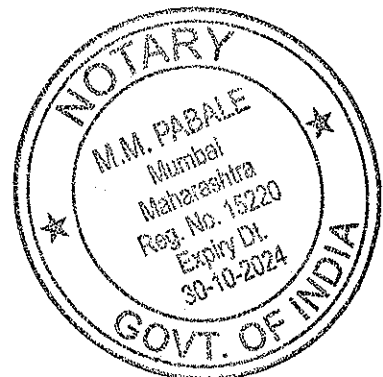
WRIT PETITION (CRI.) NO. OF 2021

DIST: MUMBAIIn the matter of Article 226 of the
Constitution of India.

Feroze Mithiborwala)
Aged: 53, Occu: Social Worker)
Flat No. 201, al-Duvairat,)
Saifee Park Colony, Church Road,)
Marol, Andheri (E), Mumbai 400059)
Mobile No.9029277751,)...Petitioner

Versus

1. The State of Maharashtra)
Through Chief Secretary)
The Government of Maharashtra)
Mantralaya, Mumbai-400 023)



2. **Under Secretary**)

Disaster management Unit,)

Mantralaya, Mumbai-400 023)

3. **Shri. Iqbal Chahal**)

Municipal Commissioner ,)

M.C.G.M. Annex Building,)

Mahapalika Marg No 1, Fort,)

Mumbai - 400001,)

4. **Shri. Shrirang Gholap**)

Under Secretary ,)

Disaster management Unit,)

Govt. of Maharashtra.)

5. **Shri. Sitaram Kunte**)

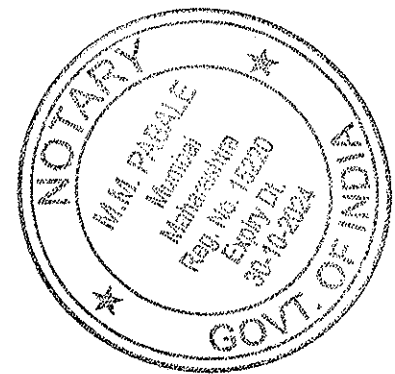
Chief Secretary,)

Maharashtra State.)

6. **Ministry of Railways**)

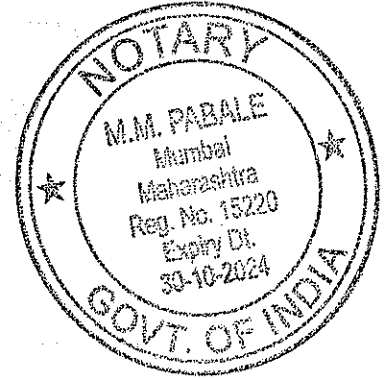
Rail Bhawan, Rafi Marg,)

New Delhi – 110001.)



7. **The Union of India**)
 Through Chief Secretary)
 To the Government of India)
 New Delhi) ... Respondents

To,
**The Hon'ble Chief Justice and
 Hon'ble Judges of the High Court
 of Judicature at Bombay.**



**The humble petition of the petitioner above
 named**

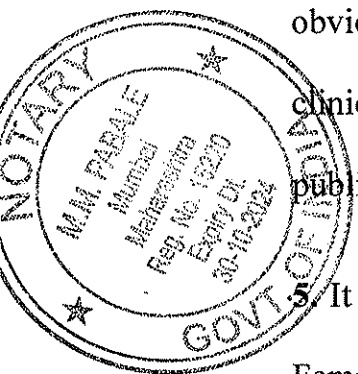
MOST RESPECTFULLY SHOWETH AS UNDER:

1. The instant Writ is being filed to question the constitutional defensibility of the SOP dated **10.8.2021** and Notification dated **11.8.2021**.
2. The Right to life, so guaranteed under Article 21 of the Constitution of India, is, the most fundamental of all human rights, and anything affecting human life, or which may put an individual's life at risk, must call for the most anxious scrutiny.
3. The Covid19, has been declared as pandemic by WHO in view of the fact that it has reportedly spread over the Globe. India is no exception. The

Governments, both Central and State, took measures to contain the pandemic in exercise of powers under two Acts namely 1) Epidemic Diseases Act 1897 and 2) Disaster Management Act, 2005. The measures taken included lockdown, closure down, testing temperature, pulse rate, RTPCR Test etc. Needless to state that the aforesaid two statutes fall in the second layer according to Kelson's Law theory while the Constitution falls into the first layer, meaning that the Constitution is supreme. The Constitution has enjoined or empowered the Constitutional Courts to maintain the supremacy of the Constitution through its power of judicial review.

4. In India, the 2nd wave of pandemic reportedly started around in the month of March 2021. The Indian Government approved emergency use of vaccines namely **Covishield** and **Covaxin** followed by Sputnik V. Since it is being issued under **Emergency use Authorization (EUA)**, it could not be obviously made mandatory. Needless to mention that, the trial data and clinical data of said experimental vaccines is not made available to the public.

5. It is pertinent note that the Minister of State in the Ministry of Health & Family Welfare, Government of India in an answer given on 19.03.2021 in the Lok Sabha to an Unstarred Question No. 3976, **stated that there is no provision of compensation for recipients of Covid-19 Vaccination**

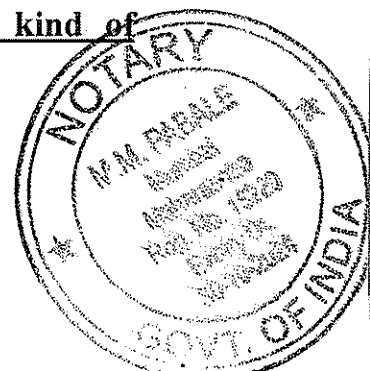


against any kind of side effects or medical complication that may arise due to inoculation. The Covid-19 Vaccination is entirely voluntary for the beneficiaries. [Exhibit -A]

6. In a reply dated 23rd March 2021 to the RTI filed by Mr. Dinesh Bhausahab Solanke, RTI number A.60011/06/2020 -CVAC, the Ministry of Health and Family Welfare, stated that, "the Covid-19 Vaccine being voluntary, there is no provision for compensation as of now." [Exhibit-B]

7. In a reply to RTI application dated 9th March, 2021 filed by Anurag Sinha of Jharkhand, the Central Ministry of Health and Family Welfare has clearly stated that "taking the Covid Vaccines was entirely voluntary and there is no relation whatsoever to provision of government facilities, citizenship, job etc to the vaccine". A copy of the RTI reply dated 09.03.21 is enclosed to the memo of this Petition and marked as [EXHIBIT-C].

8. In a reply to RTI filed by Mr. Tarun, dated 16-04-2021 file number MOHFW/R/E/21/01536, the Ministry of Health and Family Welfare, replied to the 1st question, "Is Covid Vaccine Voluntary or Mandatory?", thus: "Vaccination for Covid-19 is Voluntary". Further when the applicant asked in his subsequent questions, "Can any government or private organization hold our salary or terminate us from job in case of not taking Covid vaccine?" and "Can government cancel any kind of



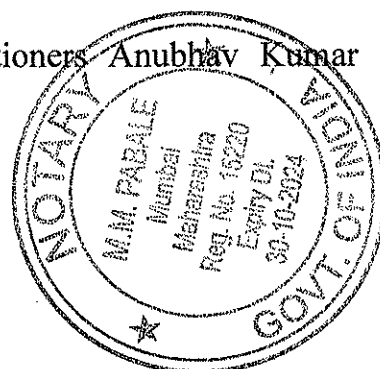
government facilities such as subsidies, ration and medical facilities in case of not taking covid vaccine?” the reply was, “In view of above reply, these queries do not arise”.

9. Thus, the above RTI information also makes it clear that it is purely individual decision either to get vaccinated or not. Hence, any kind direct or indirect method to coerce the citizens to get vaccination is not only illegal but also violative of fundamental right guaranteed under article 14, 19 and 21 of Constitution of India.

10. It is worth to state that in Common Cause Vs. Union of India (2018) 5 SCC 1, the Apex Court held that a person has a right to choose medication of his choice.

11. In the case of Writ Petition (C.) 36065 of 2017 the Parents Teachers Association, Government Higher Secondary School, Kokkur, Kerala vs the State of Kerala, the Hon’ble High Court of Kerala observed and held that “If at all any parent has an objection, it has to be necessarily brought before the authorities, and there need not be any vaccination administered to such children whose parents object to the Vaccination”.

12. While dealing with the issue of MR vaccines in the case of Master Haridaan Kumar (Minor through Petitioners Anubhav Kumar and Mr.

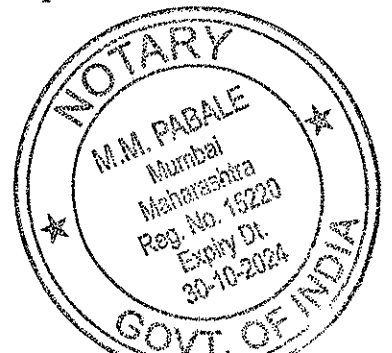


Abhinav Mukherji) Versus Union of India, W.P.(C) 343/2019 & CM Nos.1604-1605/2019, the Hon'ble High Court of Delhi directed that;

“MR vaccines will not be administered to those students whose parents/guardians have declined to give their consent. The said vaccination will be administered only to those students whose parents have given their consent either by returning the consent forms or by conforming the same directly to the class teacher/nodal teacher and also to students whose parents/guardians cannot be contacted despite best efforts by the class teacher/nodal teacher and who have otherwise not indicated to the contrary”.

Recently, there have been few judgments regarding vaccine coercion being illegal and to stop discrimination between vaccinated & unvaccinated people. **In Re: Dinthar Incident Aizawl Vs. State of Mizoram 2021 SCC OnLine Gau 1313**, the Division Bench of Hon'ble Gauhati High Court vide its order dated **02.07.2021**, has categorically held as follows:

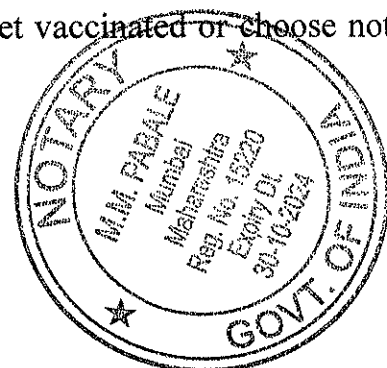
*“14. It has been brought to our notice that even persons who have been vaccinated can still be infected with the covid virus, which would in turn imply that vaccinated persons who are covid positive, can also spread the said virus to others. It is not the case of the State respondents that vaccinated persons cannot be infected with the covid virus or are incapable of spreading the virus. Thus, even a vaccinated infected covid person can be a **super spreader**. If vaccinated and un-vaccinated persons can*



be infected by the covid virus and if they can both be spreaders of the virus, the restriction placed only upon the un-vaccinated persons, debarring them from earning their livelihood or leaving their houses to obtain essential items is unjustified, grossly unreasonable and arbitrary."

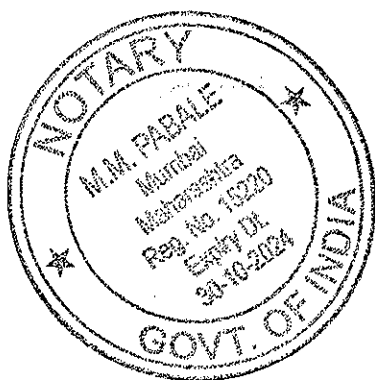
The above fact is now proven in the State of Kerala where 40000 breakthrough (double vaccinated with 14 days after 2nd vaccination) cases have been found recently. A copy of the order dated **02.07.2021** is annexed hereto and marked as **[EXHIBIT-D]**.

13. The High Court of Manipur at Imphal, vide its Order dated **13.7.2021** in **Osbert Khaling Vs State of Manipur 2021 SCC OnLine Mani 234**, held that, the **State cannot seek to impose conditions upon the citizens so as to compel them to get vaccinated, be it by holding out a threat or by putting them at a disadvantage for failing to get vaccinated.** Restraining people who are yet to get vaccinated from opening institutions, organizations, factories, shops, etc., or denying them their livelihood by linking their employment, be it NREGA job card holders or workers in Government or private projects, to their getting vaccinated would be illegal on the part of the State, if not unconstitutional. Such a measure would also trample upon the freedom of the individual to get vaccinated or choose not



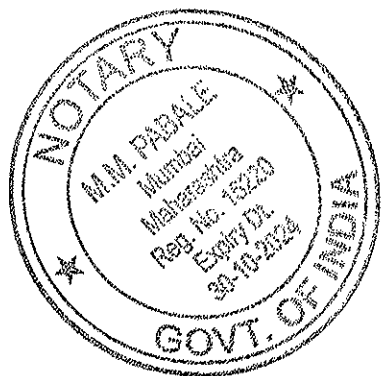
to do so. A copy of the order dated 13.7.2021 is annexed hereto and marked as [EXHIBIT-E].

14. The High Court of Guwahati, Itanagar Bench, vide its Order dated 19.07.2021 in Madan Mili Vs. UOI 2021 SCC OnLine Gau 1503, held that there was no evidence available either in the record or in the public domain that Covid-19 vaccinated persons cannot be infected with Covid-19 virus, or he/she cannot be a carrier of a Covid-19 virus and consequently, a **spreader of Covid-19 virus**. In so far as the spread of Covid-19 Virus to others is concerned, the Covid-19 vaccinated and unvaccinated person or persons are the same. With regard to the contention of the learned Additional Advocate General that the State Government can make restrictions curtailing the Fundamental Rights of the citizens under the Disaster Management Act, 2005 (hereinafter referred to as the "Act"), by way of the SOP, the same in considered view of the Court is clearly not sustainable, as the said clauses in the SOP which are in issue in the present case cannot be said to be reasonable restrictions made in terms of Article 19(6). The requirement of Article 19(6) of the Constitution is that the restriction has to be made in the form of a law and not by way of an executive instruction. The High Court went on to hold that the action of the State was in violation of right to freely move anywhere as provided under



Article 19 and the state action was not reasonable one as required by Article 19. The relevant para reads thus;

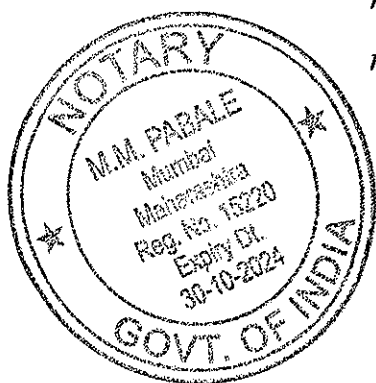
“13. In the instant case, the classification sought to be made between the vaccinated and unvaccinated persons for Covid-19 by Clause 11 of the Order dated 30.06.2021 for the purpose of issuing a temporary permit for developmental works in both public and private sector in the State of Arunachal Pradesh is undoubtedly to contain Covid-19 pandemic and its further spread in the State of Arunachal Pradesh. There is no evidence available either in the record or in the public domain that Covid-19 vaccinated persons cannot be infected with Covid-19 virus, or he/she cannot be a carrier of a Covid-19 virus and consequently, a spreader of Covid-19 virus. In so far as the spread of Covid-19 Virus to others is concerned, the Covid-19 vaccinated and unvaccinated person or persons are the same. Both can equally be a potential spreader if they are infected with Covid-19 Virus in them. This aspect of the matter came up for consideration by this Court in WP(C)/37/2020 (In Re Dinthar Incident Aizawl v. State of Mizoram Aizawl; in which case, this Court vide Order dated 02.07.2021, in paragraph 14 thereof, had observed as follows -



“14. It has been brought to our notice that even persons who have been vaccinated can still be infected with the covid virus, which would in turn imply that vaccinated persons who are covid positive, can also spread the said virus to others. It is not the case of the State respondents that vaccinated persons cannot be infected with the covid virus or are incapable of spreading the virus. Thus, even

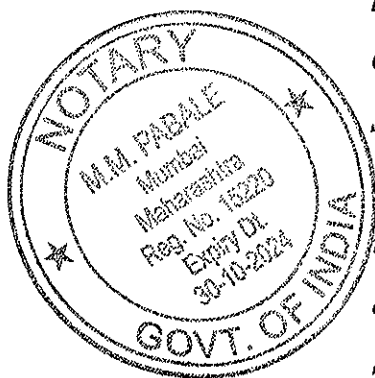
a vaccinated infected covid person can be a super-spreader. If vaccinated and un-vaccinated persons can be infected by the covid virus and if they can both be spreaders of the virus, the restriction placed only upon the un-vaccinated persons, debarring them from earning their livelihood or leaving their houses to obtain essential items is unjustified, grossly unreasonable and arbitrary. As such, the submission made by the learned Additional Advocate General that the restrictions made against the un-vaccinated persons vis-à-vis the vaccinated persons is reasonable does not hold any water. As the vaccinated and un-vaccinated persons would have to follow the covid proper behavior protocols as per the SOP, there is no justification for discrimination.”

14. Thus, if the sole object of issuing the Order dated 30.06.2021, by the Chief Secretary cum Chairperson-State Executive Committee, Government of Arunachal Pradesh, vide Memo No. SEOC/DRR&DM/01/2011-12, is for containment of the Covid-19 pandemic and its further spread in the State of Arunachal Pradesh, the classification sought to be made between vaccinated and unvaccinated persons for Covid-19 virus for the purpose of issuing temporary permits for developmental works in both public and private sector, vide Clause 11 thereof, prima facie, appears to be a classification not founded on intelligible differentia nor it is found to have a rational relation/nexus to the object sought to be achieved by



such classification, namely, containment and further spread of Covid-19 pandemic.

15. For the reasons stated hereinabove, it prima facie appears to this Court that Clause 11 of the Order dated 30.06.2021, issued by the Chief Secretary cum Chairperson-State Executive Committee, Government of Arunachal Pradesh, vide Memo No. SEOC/DRR&D M/01/2011-12, in so far it makes a classification of persons who are Covid-19 vaccinated and persons who are Covid-19 unvaccinated for the purpose of issuance of temporary permits for developmental works in both public and private sector in the State of Arunachal Pradesh violates Articles 14, 19 (1) (d) & 21 of the Constitution of India calling for an interim order in the case. Accordingly, till the returnable date, Clause 11 of the Order dated 30.06.2021, issued by the Chief Secretary cum Chairperson-State Executive Committee, Government of Arunachal Pradesh, vide Memo No. SEOC/DRR&DM/01/2011-12, in so far it discriminates between Covid-19 vaccinated persons and Covid-19 unvaccinated persons for issuance of temporary permits for developmental works in both public and private sector in the State of Arunachal Pradesh, shall remain stayed.”



A copy of the order dated 19.7.2021 is annexed hereto and marked as **[EXHIBIT-F]**.

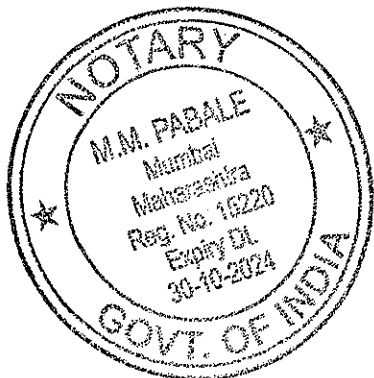
15. It is a settled legal position that a person has the fundamental right to choose medication as per his choice.

16. On 23rd June, 2021 in the case between Registrar General, High Court of Meghalaya Vs. State of Meghalaya 2021 SCC OnLine Megh 130, it is ruled by High Court as under;

"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.

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.

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.



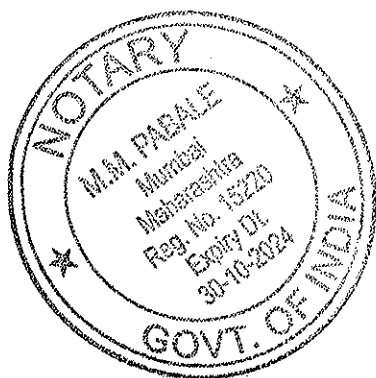
In the “frequently asked questions” (FAQs) on COVID-19 vaccine prepared and uploaded by the Ministry of Health and Family Welfare, Government of India, in its official website, the question which appears under serial number 3 reads, “Is it mandatory to take the vaccine?” The “potential response”, which is provided in the official website reads, “Vaccination for COVID-19 is voluntary.

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”.

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. Compulsorily 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.

However, vaccination by force or being made mandatory by adopting coercive methods, vitiates the very fundamental purpose of the welfare attached to it.”



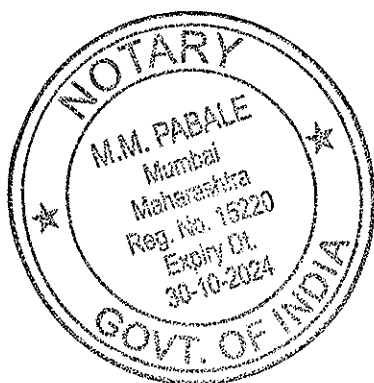
17. In Common Cause Vs. Union of India (2018) 5 SCC 1, it is ruled as under;

169. In the context of health and medical care decisions, a person's exercise of self-determination and autonomy involves the exercise of his right to decide whether and to what extent he/she is willing to submit himself/herself to medical procedures and treatments, choosing amongst the available alternative treatments or, for that matter, opting for no treatment at all which, as per his or her own understanding, is in consonance with his or her own individual aspirations and values.

Q. Conclusions in seriatim

202. In view of the aforesaid analysis, we record our conclusions in seriatim:

202.8. An inquiry into Common Law jurisdictions reveals that all adults with capacity to consent have the right of self-determination and autonomy. The said rights pave the way for the right to refuse medical treatment which has acclaimed universal recognition. A competent person who has come of age has the right to refuse specific treatment or all treatment or opt for an alternative treatment, even if such decision entails a risk of death. The "Emergency Principle" or the "Principle of Necessity" has to be given effect to only when it is not practicable to obtain the patient's consent for treatment and his/her life is in danger. But where a patient has already made a valid Advance Directive which is free from reasonable doubt



and specifying that he/she does not wish to be treated, then such directive has to be given effect to.

202.9. Right to life and liberty as envisaged under Article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum of Article 21 to include within it the right to live with dignity as component of right to life and liberty.

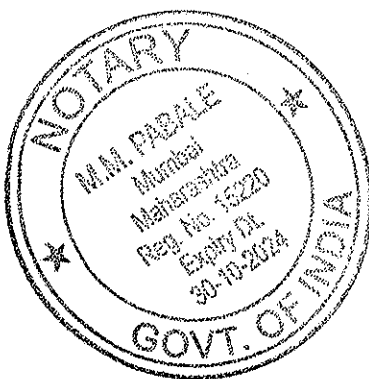
202.12. Though the sanctity of life has to be kept on the high pedestal yet in cases of terminally ill persons or PVS patients where there is no hope for revival, priority shall be given to the Advance Directive and the right of self-determination.

202.13. In the absence of Advance Directive, the procedure provided for the said category hereinbefore shall be applicable.

202.14. When passive euthanasia as a situational palliative measure becomes applicable, the best interest of the patient shall override the State interest.

306. In addition to personal autonomy, other facets of human dignity, namely, "self-expression" and "right to determine" also support the argument that it is the choice of the patient to receive or not to receive treatment.

517. The entitlement of each individual to a dignified existence necessitates constitutional recognition of the principle that an individual possessed of a free and competent mental state is entitled to decide whether or not to accept medical treatment.



The right of such an individual to refuse medical treatment is unconditional. Neither the law nor the Constitution compel an individual who is competent and able to take decisions, to disclose the reasons for refusing medical treatment nor is such a refusal subject to the supervisory control of an outside entity;

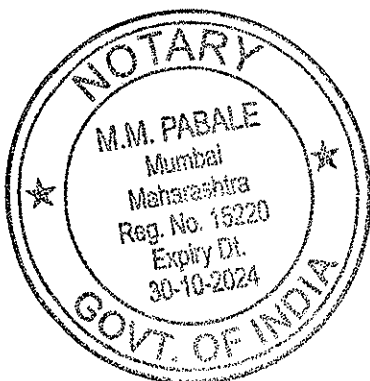
18. On the similar line there is a judgment in Mantgomery's case [2015] UKSC 11, where it is ruled as under;

"77. These developments in society are reflected in professional practice. The court has been referred in particular to the guidance given to doctors by the General Medical Council, who participated as interveners in the present appeal. One of the documents currently in force (Good Medical Practice (2013)) states, under the heading "The duties of a doctor registered with the General Medical Council":

"Work in partnership with patients. Listen to, and respond to, their concerns and preferences. Give patients the information they want or need in a way they can understand. Respect patients' right to reach decisions with you about their treatment and care."

78. Another current document (Consent: patients and doctors making decisions together (2008)) describes a basic model of partnership between doctor and patient:

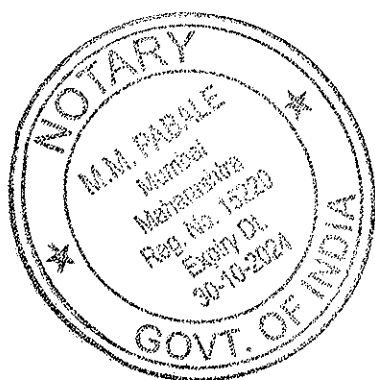
"The doctor explains the options to the patient, setting out the potential benefits, risks, burdens and side effects of each option, including the option to have no treatment. The doctor may recommend a particular option which they believe to be



best for the patient, but they must not put pressure on the patient to accept their advice. The patient weighs up the potential benefits, risks and burdens of the various options as well as any non-clinical issues that are relevant to them. The patient decides whether to accept any of the options and, if so, which one." (para 5)

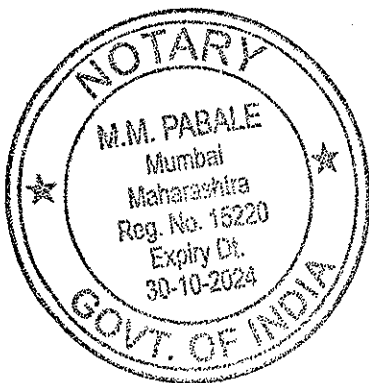
In relation to risks, in particular, the document advises that the doctor must tell patients if treatment might result in a serious adverse outcome, even if the risk is very small, and should also tell patients about less serious complications if they occur frequently (para 32). The submissions on behalf of the General Medical Council acknowledged, in relation to these documents, that an approach based upon the informed involvement of patients in their treatment, rather than their being passive and potentially reluctant recipients, can have therapeutic benefits, and is regarded as an integral aspect of professionalism in treatment.

80. In addition to these developments in society and in medical practice, there have also been developments in the law. Under the stimulus of the Human Rights Act 1998, the courts have become increasingly conscious of the extent to which the common law reflects fundamental values. As Lord Scarman pointed out in *Sidaway's case*, these include the value of self-determination (see, for example, *S (An Infant) v S* [1972] AC 24, 43 per Lord Reid; *McCull v Strathclyde Regional Council* 1983 SC 225, 241; *Airedale NHS Trust v Bland* [1993] AC 789, 864 per Lord Goff of Chieveley). As well as underlying aspects of the common law, that value also underlies the right to



respect for private life protected by article 8 of the European Convention on Human Rights. The resulting duty to involve the patient in decisions relating to her treatment has been recognised in judgments of the European Court of Human Rights, such as *Glass v United Kingdom* (2004) EHRR 341 and *Tysiac v Poland* (2007) 45 EHRR 947, as well as in a number of decisions of courts in the United Kingdom. The same value is also reflected more specifically in other international instruments: see, in particular, article 5 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, concluded by the member states of the Council of Europe, other states and the European Community at Oviedo on 4 April 1997.

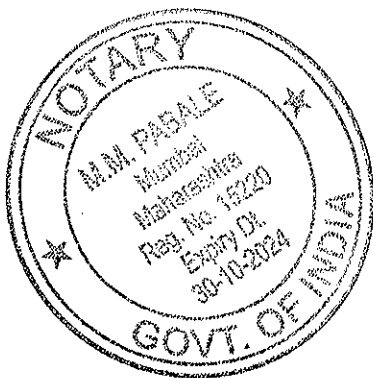
82. In the law of negligence, this approach entails a duty on the part of doctors to take reasonable care to ensure that a patient is aware of material risks of injury that are inherent in treatment. This can be understood, within the traditional framework of negligence, as a duty of care to avoid exposing a person to a risk of injury which she would otherwise have avoided, but it is also the counterpart of the patient's entitlement to decide whether or not to incur that risk. The existence of that entitlement, and the fact that its exercise does not depend exclusively on medical considerations, are important. They point to a fundamental distinction between, on the one hand, the doctor's role when considering possible investigatory or treatment options and, on the other, her role in discussing with the patient any recommended treatment and



possible alternatives, and the risks of injury which may be involved.

83. The former role is an exercise of professional skill and judgment: what risks of injury are involved in an operation, for example, is a matter falling within the expertise of members of the medical profession. But it is a non sequitur to conclude that the question whether a risk of injury, or the availability of an alternative form of treatment, ought to be discussed with the patient is also a matter of purely professional judgment. The doctor's advisory role cannot be regarded as solely an exercise of medical skill without leaving out of account the patient's entitlement to decide on the risks to her health which she is willing to run (a decision which may be influenced by non-medical considerations). Responsibility for determining the nature and extent of a person's rights rests with the courts, not with the medical professions.

87. The correct position, in relation to the risks of injury involved in treatment, can now be seen to be substantially that adopted in *Sidaway* by Lord Scarman, and by Lord Woolf MR in *Pearce*, subject to the refinement made by the High Court of Australia in *Rogers v Whitaker*, which we have discussed at paras 77-73. An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or

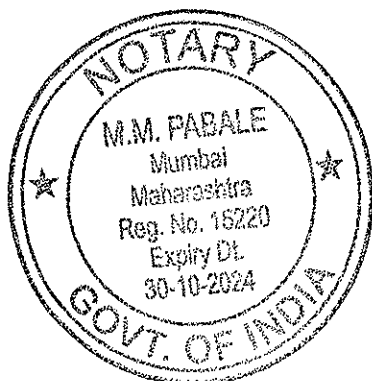


variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

89. Three further points should be made. First, it follows from this approach that the assessment of whether a risk is material cannot be reduced to percentages. The significance of a given risk is likely to reflect a variety of factors besides its magnitude: for example, the nature of the risk, the effect which its occurrence would have upon the life of the patient, the importance to the patient of the benefits sought to be achieved by the treatment, the alternatives available, and the risks involved in those alternatives. The assessment is therefore fact-sensitive, and sensitive also to the characteristics of the patient.

90. Secondly, the doctor's advisory role involves dialogue, the aim of which is to ensure that the patient understands the seriousness of her condition, and the anticipated benefits and risks of the proposed treatment and any reasonable alternatives, so that she is then in a position to make an informed decision. This role will only be performed effectively if the information provided is comprehensible. The doctor's duty is not therefore fulfilled by bombarding the patient with technical information which she cannot reasonably be expected to grasp, let alone by routinely demanding her signature on a consent form.

116. As NICE (2011) puts it, "Pregnant women should be offered evidence-based information and support to enable them



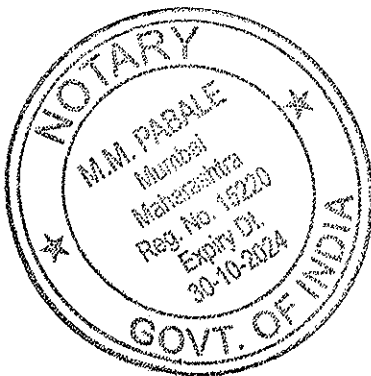
to make informed decisions about their care and treatment” (para 1.1.1.1). Gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being.

19. Also, in the case (W.P.(C) 343/2019 & CM Nos.1604-1605/2019) between Master Haridaan Kumar (Minor through Petitioners Anubhav Kumar and Mr. Abhinav Mukherji) Versus Union of India, & W.P.(C) 350/2019 & CM Nos. 1642-1644/2019 between Baby Veda Kalaan & Others Versus Director of Education & Others.

The Hon’ble High Court of Delhi had observed that the authority is bound to advertise the side effects of the vaccines before getting their consent.

It is ruled as under;

“The contention that indication of the side effects and contraindications in the advertisement would discourage parents or guardians from consenting to the MR campaign and, therefore, the same should be avoided, is unmerited. The entire object of issuing advertisements is to ensure that necessary information is available to all parents/guardians in order that they can take an informed decision. The respondents are not only required to indicate the benefits of the MR vaccine but also indicate the side effects or contraindications so that the parents/guardians can take an informed decision whether the vaccine is to be administered to their wards/ children.”



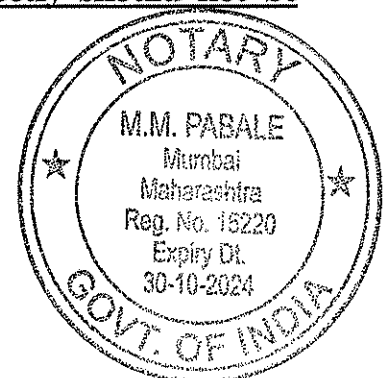
The Hon'ble High Court of Delhi thus passed the following orders;

“MR vaccines will not be administered to those students whose parents / guardians have declined to give their consent. The said vaccination will be administered only to those students whose parents have given their consent either by returning the consent forms or by conforming the same directly to the class teacher/nodal teacher and also to students whose parents/guardians cannot be contacted despite best efforts by the class teacher/nodal teacher and who have otherwise not indicated to the contrary”.

01- Further on the issue of informed consent, the Hon'ble High Court had clearly directed that:

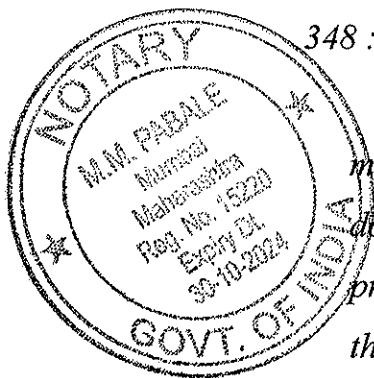
“Directorate of Family Welfare shall issue quarter page advisements in various newspapers as indicated by the respondents... The advertisements shall also indicate that the vaccination shall be administered with Auto Disable Syringes to the eligible children by Auxiliary Nurse Midwifery. The advertisement shall also clearly indicate the side effects and contraindications as may be finalized by the Department of Preventive Medicine, All India Institute of Medical Sciences”.

In Noida Entrepreneurs Assn. v. NOIDA, (2011) 6 SCC 508, it is ruled that, “Whenever a thing is prohibited, whether done directly or indirectly and authority cannot be permitted to evade law by Shift or Contrivance” what is not allowed to be done directly should not be allowed to be done indirectly. It is ruled as under;



25. It is a settled proposition of law that whatever is prohibited by law to be done, cannot legally be affected by an indirect and circuitous contrivance on the principle of *quando aliquid prohibetur, prohibetur at omne per quod devenitur ad illud*, which means “whenever a thing is prohibited, it is prohibited whether done directly or indirectly”. (See *Swantraj v. State of Maharashtra* [(1975) 3 SCC 322 : 1974 SCC (Cri) 930 : AIR 1974 SC 517] , *CCE v. Acer India Ltd.* [(2004) 8 SCC 173] and *Sant Lal Gupta v. Modern Coop. Group Housing Society Ltd.* [(2010) 13 SCC 336 : (2010) 4 SCC (Civ) 904 : JT (2010) 11 SC 273])

26. In *Jagir Singh v. Ranbir Singh* [(1979) 1 SCC 560 : 1979 SCC (Cri) 348 : AIR 1979 SC 381] this Court has observed that an authority cannot be permitted to evade a law by “shift or contrivance”. While deciding the said case, the Court placed reliance on the judgment in *Fox v. Bishop of Chester* [(1824) 2 B&C 635 : 107 ER 520] , wherein it has been observed as under: (*Jagir Singh case* [(1979) 1 SCC 560 : 1979 SCC (Cri) 348 : AIR 1979 SC 381] , SCC p. 565, para 5)



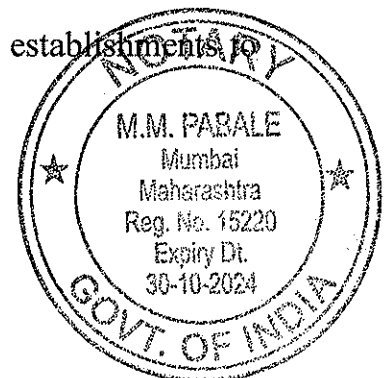
“5. ... ‘To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined.’ [Ed.: As observed in *Maxwell on the Interpretation of Statutes*, 11th Edn., p. 109. See SCC p. 565, para 5 of *Jagir Singh case*, (1979) 1 SCC 560.] ”

20. In a recent judgment dated 29th September 2020 passed by Hon'ble Karnataka High Court in the matter between A. Varghese Vs. Union of India 2020 SCC OnLine Kar 2825, it is ruled as under;

"2. The petition proceeds on the footing that the Standard Operating Procedures / Guidelines prescribed by the State Government as well as the Government of India compel a person suffering from Covid-19 to take treatment only by use of Allopathic drugs.

At least from the Standard Operating Procedures, which are placed on record, we do not find anything therein which shows that the Government can compel a patient to take only Allopathic drugs. We cannot go into the question whether Covid-19 can be successfully treated either by Ayurvedic drugs or by Allopathic drugs. It is for the experts in the field of medicine to decide that question."

21. Thus, it is clear that the action of the Respondents in forcing the people to be vaccinated is not conforming to the requirements of Constitutional mandate, moreover when the respondents or the Government, are/is not taking any responsibility by way of providing the compensation on account of the side effects of the vaccine. Despite this, the Respondent No.1 and 2 issued the impugned SOP dated 10.8.2021 and Notification dated 11.8.2021 and thereby made it clear that only those who are vaccinated shall be permitted to travel by the local trains in the MMRDA region. Secondly, it also made it mandatory for all the shop, offices and other establishments to



ensure that their staff was vaccinated. The copies of the impugned SOP dated **10.8.2021** and impugned Notification dated **11.8.2021** are annexed hereto and marked as **Exhibit-G** and **H** respectively.

22. The aforesaid impugned SOP dated **10.8.2021** and Notification dated **11.08.2021** are clearly violative of the fundamental right to livelihood of the people and are also violative of the right to be treated equality. Thus, they violate the fundamental rights under article 14, 19 and 21 of the Constitution of India.

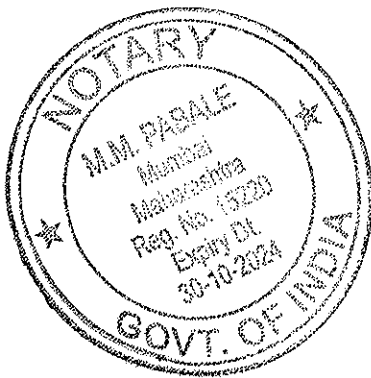
23. The relevant articles of **Universal Declaration on Bioethics and Human Rights, 2005 (UDBHR)** are as under;

“Article 3 – Human dignity and human rights

1. *Human dignity, human rights and fundamental freedoms are to be fully respected.*
2. *The interests and welfare of the individual should have priority over the sole interest of science or society.*

Article 6 – Consent

1. *Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice.*
2. *Scientific research should only be carried out with the prior, free, express and informed consent of the person concerned.*



The information should be adequate, provided in a comprehensible form and should include modalities for withdrawal of consent. Consent may be withdrawn by the person concerned at any time and for any reason without any disadvantage or prejudice. Exceptions to this principle should be made only in accordance with ethical and legal standards adopted by States, consistent with the principles and provisions set out in this Declaration, in particular in Article 27, and international human rights law.

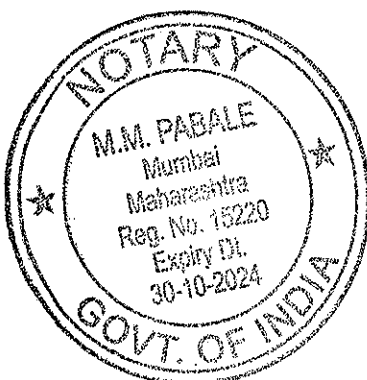
3. In appropriate cases of research carried out on a group of persons or a community, additional agreement of the legal representatives of the group or community concerned may be sought. In no case should a collective community agreement or the consent of a community leader or other authority substitute for an individual's informed consent.

Article 7 – Persons without the capacity to consent

In accordance with domestic law, special protection is to be given to persons who do not have the capacity to consent:

(a) authorization for research and medical practice should be obtained in accordance with the best interest of the person concerned and in accordance with domestic law. However, the person concerned should be involved to the greatest extent possible in the decision-making process of consent, as well as that of withdrawing consent;

(b) research should only be carried out for his or her direct health benefit, subject to the authorization and the protective conditions prescribed by law, and if there is no research alternative of comparable effectiveness with research participants able to consent. Research which does not have



potential direct health benefit should only be undertaken by way of exception, with the utmost restraint, exposing the person only to a minimal risk and minimal burden and, if the research is expected to contribute to the health benefit of other persons in the same category, subject to the conditions prescribed by law and compatible with the protection of the individual's human rights. Refusal of such persons to take part in research should be respected.

Article 8 – Respect for human vulnerability and personal integrity

In applying and advancing scientific knowledge, medical practice and associated technologies, human vulnerability should be taken into account. Individuals and groups of special vulnerability should be protected and the personal integrity of such individuals respected.

Article 10 – Equality, justice and equity

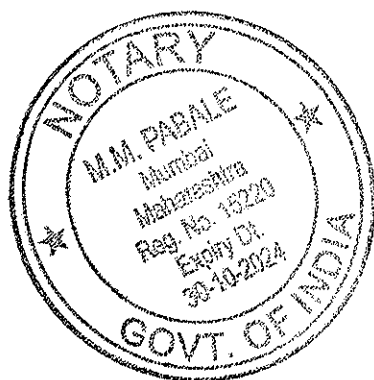
The fundamental equality of all human beings in dignity and rights is to be respected so that they are treated justly and equitably.

Article 11 – Non-discrimination and non-stigmatization

No individual or group should be discriminated against or stigmatized on any grounds, in violation of human dignity, human rights and fundamental freedoms.

Article 16 – Protecting future generations

The impact of life sciences on future generations, including on their genetic constitution, should be given due regard.



Application of the principles

Article 18 – Decision-making and addressing bioethical issues

1. *Professionalism, honesty, integrity and transparency in decision-making should be promoted, in particular declarations of all conflicts of interest and appropriate sharing of knowledge. Every endeavour should be made to use the best available scientific knowledge and methodology in addressing and periodically reviewing bioethical issues.*
2. *Persons and professionals concerned and society as a whole should be engaged in dialogue on a regular basis.*
3. *Opportunities for informed pluralistic public debate, seeking the expression of all relevant opinions, should be promoted.”*

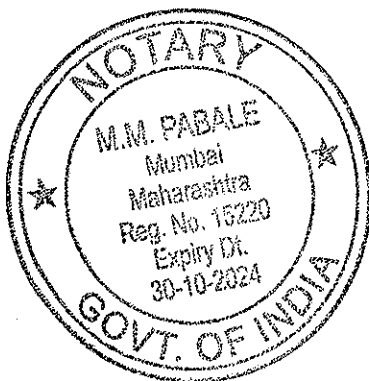
24. Respondent State of Maharashtra is also guilty of Article 253 & 256 of the Constitution of India. Which reads thus;

“Article 253 in The Constitution Of India

253. Legislation for giving effect to international agreements Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

Article 256 in The Constitution Of India

256. Obligation of States and the Union The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply



in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

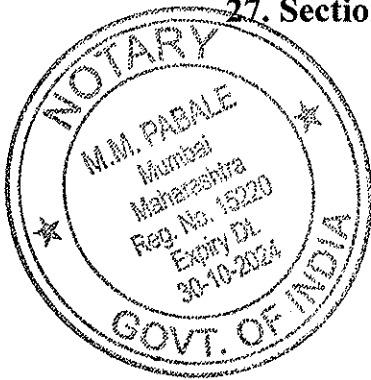
25. That, the State of Maharashtra acted illegally and without having any respect for the Constitution of India and the binding precedents laid down by Hon'ble Supreme Court.

26. That, the recommendation sent by the Respondent No. 3 Iqbal Chahal the Municipal Commissioner of M.C.G.M, on _____ [**Exhibit - ___**] is without any basis, logic, rationale or any scientific data. It was done without any case or caution.

27. Section 52 of Indian Penal Code reads thus;

“Section 52 of Indian Penal Code

52. “Good faith”.—Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention.”



28. Hence, it is clear that, the State authorities i.e. Respondent No. 1, 3, 4, 5 have not acted in good faith while issuing the above SOP/Circular/Guidelines.

29. Therefore, the Respondent No. 1 & concerned officials are liable for action under Section 188 etc. of Indian Penal Code and provisions of

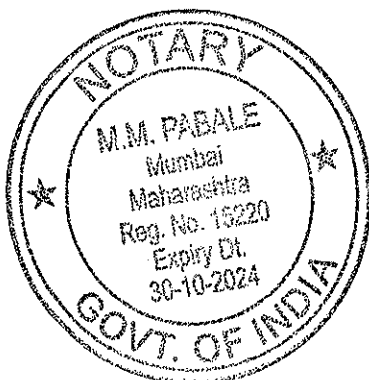
Disaster Management Act, 2005. The relevant provisions of Disaster Management Act, 2005 reads thus;

51. Punishment for obstruction:-

(b) refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act, shall on conviction be punishable with imprisonment for a term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years. notes on clauses Clauses 51 to 58 (Secs. 51 to 58) seeks to lay down what will constitute an offence in terms of obstruction of the functions under the Act, false claim for relief, misappropriation of relief material or funds, issuance of false warning, failure of an officer to perform the duty imposed on him under the Act without due permission or lawful excuse, or his connivance at contravention of the provisions of the Act. The clauses also provide for penalties for these offences.

55. Offences by Departments of the Government:-

(1) Where an offence under this Act has been committed by any Department of the Government, the head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of

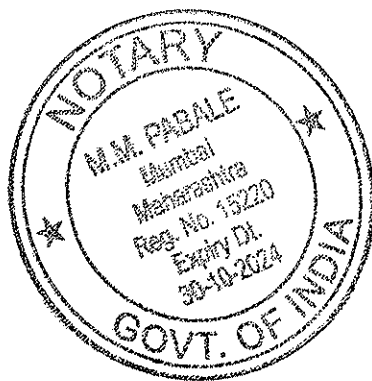


such offence. (1) Where an offence under this Act has been committed by any Department of the Government, the head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence."

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a Department of the Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer, other than the head of the Department, such officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

61. Prohibition against discrimination:-

While providing compensation and relief to the victims of disaster, there shall be no discrimination on the ground of sex, caste, community, descent or religion.

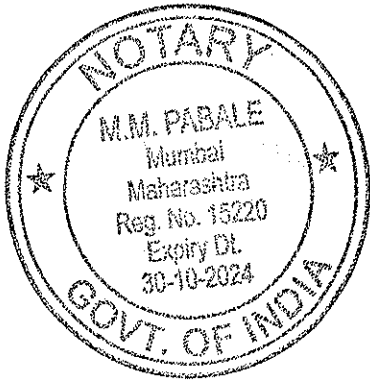


62. Power to issue direction by Central Government:-

Notwithstanding anything contained in any other law for the time being in force, it shall be lawful for the Central Government to issue direction in writing to the Ministries or Departments of the Government of India, or the National Executive Committee or the State Government, State Authority, State Executive Committee, statutory bodies or any of its

officers or employees, as the case may be, to facilitate or assist in the disaster management and such Ministry or Department or Government or Authority, Executive Committee, statutory body, officer or employee shall be bound to comply with such direction.

56. Failure of officer in duty or his connivance at the contravention of the provisions of this Act.—Any officer, on whom any duty has been imposed by or under this Act and who ceases or refuses to perform or withdraws himself from the duties of his office shall, unless he has obtained the express written permission of his official superior or has other lawful excuse for so doing, be punishable with imprisonment for a term which may extend to one year or with fine. —Any officer, on whom any duty has been imposed by or under this Act and who ceases or refuses to perform or withdraws himself from the duties of his office shall, unless he has obtained the express written permission of his official superior or has other lawful excuse for so doing, be punishable with imprisonment for a term which may extend to one year or with fine."



3. NATURE AND EXTENT OF INJURY CAUSED/

APPREHENDED: Almost all the inhabitants of MMRDA Region, are subjected to discrimination by the Respondents' impugned action and therefore being deprived of their fundamental rights under Art 14, 19 and 21.

4. ANY REPRESENTATION ETC, MADE: - The petitioner says that the petitioner didn't make any representation to the Respondents. Since the

issue involved in the present petition is a constitutional issue as to legality and validity of the impugned action of the State, which could be only examined by either Hon'ble Apex Court or the Hon'ble High Courts including this Court, making a representation to Respondents would not serve the purpose.

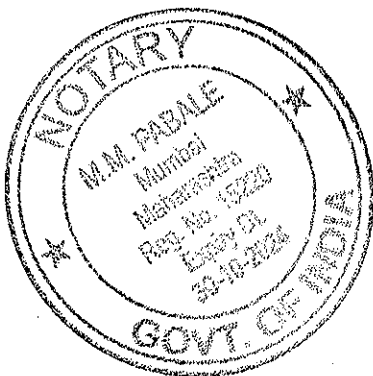
5. DELAY IF ANY IN FILING THE PETITION AND

EXPLANATION THEREFOR: - The petitioner submits that the instant petition is in reasonable time and there is no delay or laches.

6. DOCUMENTS RELIED UPON: All the exhibits annexed to the Petition are relied upon by the petitioner.

7. RELIEFS PRAYED FOR:

- a. This Hon'ble Court be pleased to issue writ of certiorari, order, direction or any other appropriate, writ, order, direction thereby striking down the impugned SOP dated 10.8.2021 and impugned Notification dated 11.8.2021 issued by the Respondent, No.1 to 5 or any other notifications in so far as they discriminate with the people on account of their not being vaccinated, holding that the same are violative of Article 14, 19 and Article 21 of the Constitution of India.
- b. Pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to issue writ of mandamus, order, direction or any other appropriate, writ, order, direction mandating the respondents herein to modify the impugned SOP dated 10.8.2021 and impugned



Notification dated 11.8.2021 so as to allow the people or inhabitants of MMRDA region, to travel by local trains without any discrimination on account of vaccination.

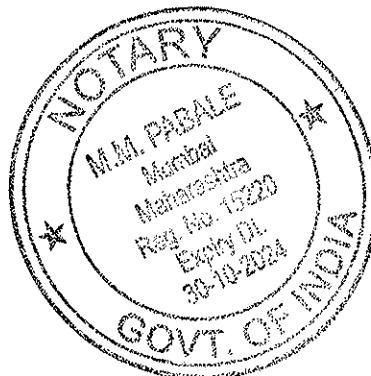
- c. Direct the Respondent No. 7 i.e. Union of India to take appropriate action under section 51(b), 55, 56 etc. of the Disaster Management Act, 2005 and section 166, 188, 120(B) etc. of Indian Penal Code against the persons/officers of state of Maharashtra who are responsible for acting in utter disregard and defiance of the lawful directions of central government regarding no forceful vaccination.
- d. Ad-interim and/or interim relief in terms of prayer clause (c) above may kindly be granted.
- e. This Hon'ble Court be pleased to pass any other order which this Hon'ble Court may deem to be just, fair and reasonable.

PLACE: MUMBAI

This day of August, 2021

Advocate for Petitioner

Petitioner



VERIFICATION

I, **Feroze Mithiborwala**, the petitioner do hereby on solemn affirmation state and declare that what is stated in paragraphs No. 1 to 9 is true to my own knowledge and belief and what is stated in paragraphs is based on the information and legal advice which I believe to be true and correct.

Solemnly affirmed at Bombay)

This day of August, 2021)

BEFORE ME

F. H. M. Mithiborwala

Shri. Feroze Mithiborwala

(Petitioner)

ADV. ABHISHEK MISHRA (I-23675)

Email: adv.abhishekmishra1@gmail.com

Mob: +91- 7208456902

BEFORE ME

Manish M. Pabale

MANISH M. PABALE

B.Sc. LL.M.

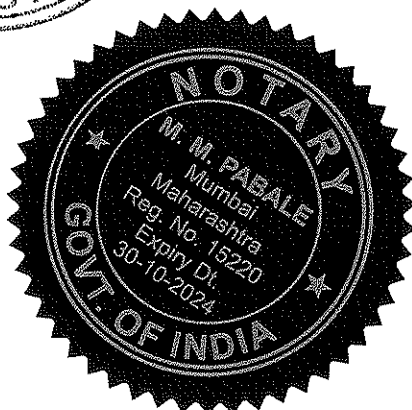
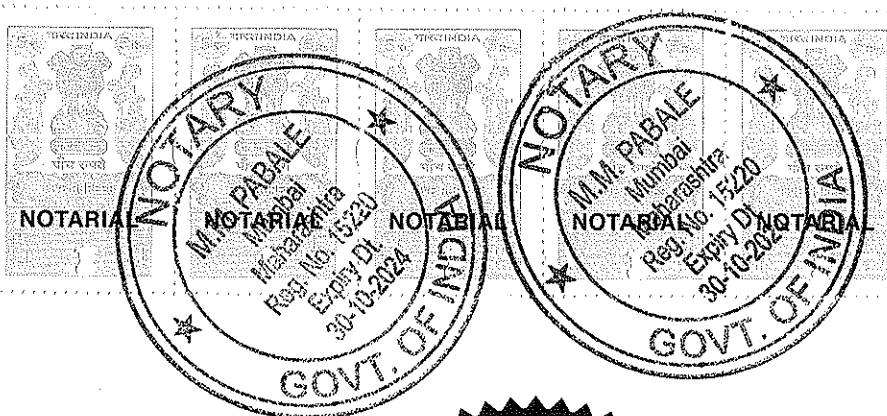
ADVOCATE & NOTARY (GOVT. OF INDIA)

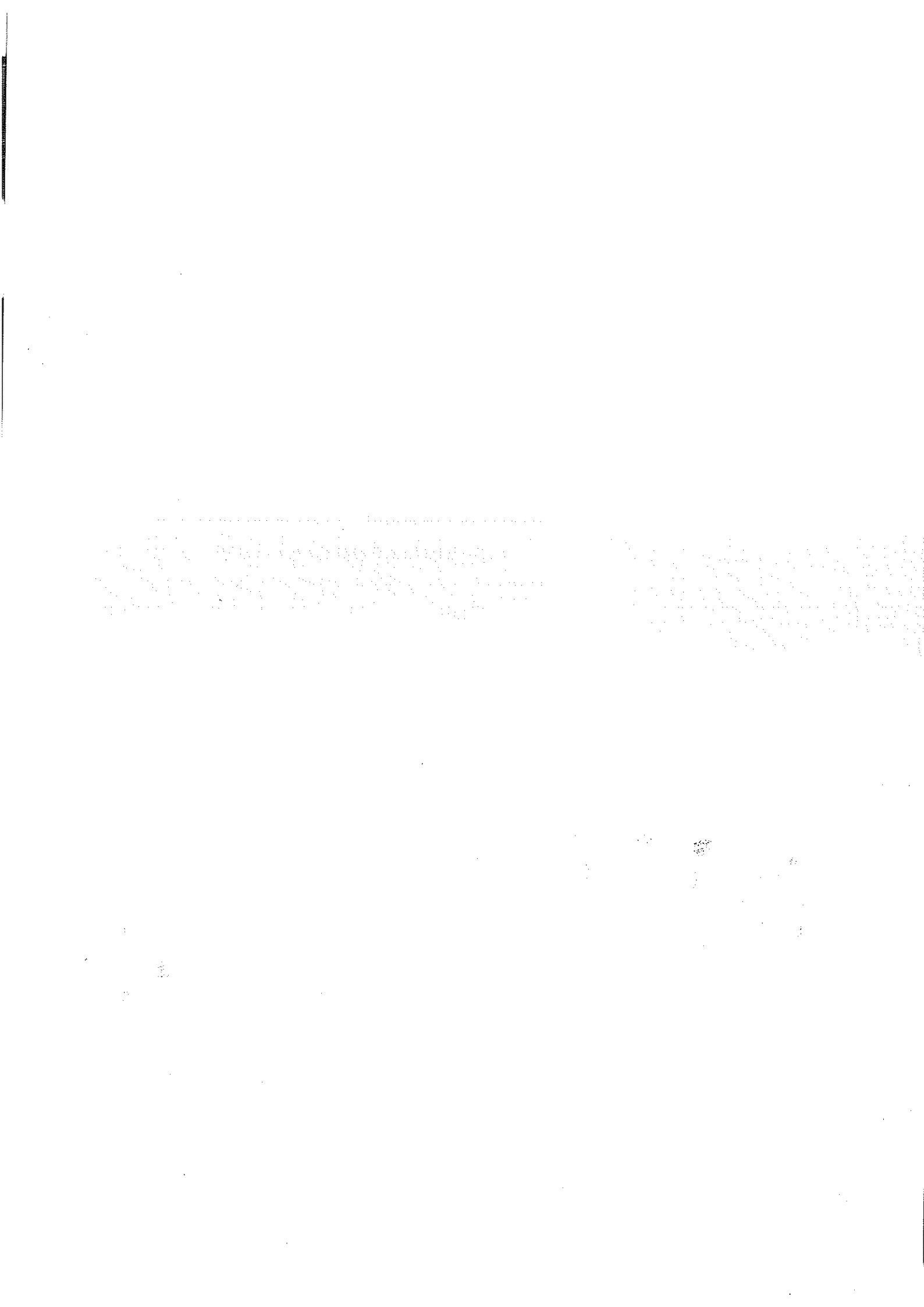
104, Natwar Chambers,
94 Nagindas Master Road,
Fort, Mumbai - 400 001

NOTED & REGISTERED

Page No. 2/24 Sr No. 8

Date. 14 AUG 2021





IN THE HIGH COURT OF JUDICATURE AT
BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION (CRL.) NO. OF
2021

Feroze Mithiborwala Petitioner

Versus

The State of Maharashtra & Ors Respondents

CRIMINAL WRIT PETITION

Dated this _____ day of August, 2021

ADV. ABHISHEK MISHRA (I-23675)

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Email: adv.abhishekmishra1@gmail.com

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