

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.17132 OF 2021**

1. Deepak Kumar Radheshyam Khurana
Age 47 years old, R/O Old B.P.T. Colony,
40/36 Wadala (East), Mumbai – 400 037
 2. Mohammad Ziyaur Rahman
Age 55 years old, R/O Balaji Bhavan,
Flat No.202, Plot No.89,
Sector 21, Nerul, Navi Mumbai.
 3. Ramesh R. Kurhade,
Age 51 years old, C-5/7/0:3,
Sahyadri Aptt., Sector 1A,
CBD Belapur, Navi Mumbai – 400 614
 4. Mohd. Naeem Suleman Pawaskar,
age 57 years old, R/O 1/33 BPT Colony Nagar,
Tankbunder Road,
Mazgaon Mumbai – 400 010.
 5. Nisar Ahmed A. Latif Kondkar
Age 59 years old,
R/O 21/378 M.B.P.T. Colony,
Tejas Nagar, Reynolds Road,
Wadala (East) Mumbai – 400 037.
 6. Irfan Ahmed Mukadam,
Age 50 years, R/o A/202, Shelter Plaza CHS
Ltd., Sector 50, Plot – 53,
Seawoods Nerul, Navi Mumbai – 400 707
 7. Harishchandra Charansingh Hadale,
Age 58 years old,
R/O 22/447, New B.P.T. Colony,
Nadkarni Park Road, Wadala (East),
Mumbai – 400 037.
- ... Petitioners

Versus

1. Mumbai Port Trust
through Chairman, Port Bhavan,
Mumbai – 400 001
 2. Union of India
Through Ministry of Ports,
Shipping and Waterways,
Transport Bhavan, Sansad Marg,
New Delhi – 110001
- ... Respondents

Ms. Aditi Saxena, for Petitioners.

Mr. Rajul Jain with Ms. Aasiya Khan i/by HSA Advocates, for Respondent No.1.

Mr. D.P.Singh, for Union of India.

Mr. Shiraz Rustomjee, Senior Advocate, Amicus Curiae, present.

**CORAM: S.J. KATHAWALLA &
ABHAY AHUJA, JJ.
(VACATION COURT)**

**RESERVED ON : 10th NOVEMBER, 2021
PRONOUNCED ON : 21st DECEMBER, 2021**

(ORAL JUDGMENT : PER S.J.KATHAWALLA & ABHAY AHUJA, JJ.)

1. The Petitioners are employees of the Mumbai Port Trust (“MPT”).

The Petitioners have impugned MPT’s Circular dated 15th June, 2021 which *inter alia* reads as under:

“(ii) Employees who have not registered for vaccination/Registered but not taken any dose of vaccine so far, will not be permitted to attend office without production of RT-PCR test conducted by a recognised hospital at their own cost w.e.f. 16.6.2021.

(iii) The RT-PCR test report will be valid for ten days only and thereafter the

employees have to again submit fresh RT-PCR Report, for every 10 days, so as to take them to duty.

(iv) Further, the above facts will also be taken into consideration for payment of Rs. 50 lakh compensation announced by the Ministry.

(v) Further, the employees who have not registered for vaccination/employees who have registered but have not taken vaccine so far, will be given treatment in Port Hospital on payment basis only for COVID-19 treatment. Further, no referral / reimbursement of bills will be entertained in their cases in respect of COVID-19 related treatment hospitalization.”

(“Impugned Circular”)

2. It is common ground that a majority of the Petitioners are not fully vaccinated against Covid-19 and they have chosen not to owing to personal reasons.

3. The Petitioners contend that MPT’s imposition of a vaccine against Covid-19 is discriminatory between vaccinated and non-vaccinated employees. That vaccination is a voluntary act and that they cannot be compelled to vaccinate themselves. Reliance is placed on a response of the Ministry of Health & Family Welfare, Government of India dated 9th March 2021 to an RTI Application wherein it has been made clear that taking a vaccine against Covid-19 is a voluntary act. In this regard, reliance is also placed on the decision in *Common Cause (A Registered Society) vs. Union of India*¹. The Petitioners further contend that no meaningful distinction can be made between vaccinated and unvaccinated persons and that both stand on the same footing in terms of their likelihood to transmit Covid-19. Reliance is placed on

1 [(2018) 5 SCC Page 1]

decisions of other High Courts to support this contention. Accordingly, the Petitioners contend that the distinction which is sought to be drawn between vaccinated and unvaccinated employees and the differential treatment provided to these categories of persons by the MPT is discriminatory and violative of the Petitioners' fundamental rights. It is also alleged that the classification of persons into vaccinated and unvaccinated categories has no rational nexus with the object sought to be achieved i.e. protection of employees from contracting Covid-19.

4. As opposed to this, MPT contends that in the light of the established medical position, which is that vaccination provides a strong measure of protection against infection by, and transmission of Covid-19, it is certainly preferable that all of MPT's employees be vaccinated. MPT has therefore made every effort to provide free vaccinations to its employees, and the vast majority of the employees, recognizing the importance of being vaccinated, have got themselves vaccinated. However, MPT accepts the position that vaccination is voluntary and therefore is not compelling the Petitioners or any other employees to vaccinate themselves. As an alternative to vaccination, MPT has only stipulated that employees who are not vaccinated must periodically produce test certificates certifying that the employee is free of Covid-19. Further, since the employees refusing to vaccinate themselves are effectively insisting on placing themselves at a much higher risk of contracting Covid-19, MPT has stipulated that it will not bear the cost of the treatment of such persons. According to

MPT, these stipulations are reasonable in the prevailing circumstances and are aimed at protecting its employees and preventing the spread of Covid-19. As regards, the issue of the Rs. 50 Lakh compensation to families of persons dying because of Covid-19, MPT has submitted that it is not concerned with this matter and that it falls within the purview of the Central Government.

5. By our order dated 10th November, 2021 we appointed Mr. Shiraz Rustomjee, Senior Advocate as Amicus Curiae to assist us in the Writ Petition. Mr. Rustomjee has provided immensely valuable assistance by taking us through various orders passed by other Courts in our Country on the issue of vaccination. Further, he has also invited our attention to the medical research and material on vaccinations. In conclusion, he submitted that the requirement of producing periodic RT-PCR Reports is reasonable and that MPT's refusal to provide free treatment to unvaccinated employees is also reasonable.

6. We have considered the rival submissions before us and the material placed before us by the Ld. Amicus Curiae.

7. Whilst it is the Petitioners' case that they cannot, in law, be compelled to take a vaccine, this issue does not arise for our consideration since MPT has itself stated that it is not insisting on all its employees being vaccinated if they wish to attend work. The only issue which therefore arises for our consideration is that of the mandatory production of a RT-PCR Report.

8. The Petitioners' have placed reliance on the following decisions:

(i) Order of the Gauhati High Court in Re Dintar Incident Vs. State of Mizoram & Ors.²

In this decision, the challenge was to a provision in the Standard Operating Procedure ("SOP") framed by the State of Mizoram requiring all persons in the State to be vaccinated, failing which, they would not be allowed to leave their houses to procure essential items or to earn livelihood. The SOP therefore contemplated a complete ban on persons leaving their homes unless they were vaccinated. Whilst dealing with the said challenge, the Court observed that this clause virtually put persons under house arrest. It held that unvaccinated citizens could not be faulted due to the State's failure to complete the vaccination of the targeted population. The Court accordingly struck down the impugned clauses. It also observed that there was nothing to show that vaccinated persons (first dose) could not be infected with Covid-19 or could not be spreaders and that even a vaccinated infected person could be a super-spreader.

(ii) Interim Order of the Gauhati High Court in Madan Mili Vs. Union of India & Ors.³

In this matter, the challenge was to an order issued by the Government of

2 Order dated 2nd July, 2021 in WP(C) No.37 of 2020

3 Order dated 19th July, 2021 in PIL No.13 of 2021

Arunachal Pradesh which provided that temporary permits for developmental work in the public and private sector could only be issued to vaccinated persons. The Court observed that there was no evidence that vaccinated persons could not be carriers of Covid-19 and that insofar as the spread of Covid-19 was concerned, vaccinated and unvaccinated persons were the same. The classification between unvaccinated and vaccinated persons was therefore held *prima facie* not to be founded on intelligible differentia or to have a rational relation/ nexus to the object sought to be achieved. On this basis, an interim stay was granted of the provision.

(iii) Order of the Meghalaya High Court in Registrar General, High Court of Meghalaya Vs. State of Meghalaya⁴

The State of Meghalaya had made it mandatory for shopkeepers, vendors, taxi drivers and others to get themselves vaccinated before resuming their business post Covid-19. The Court noted at the outset that vaccination was the need of the hour and the absolute necessity to overcome the global Covid pandemic. However, on a consideration of the scope of Articles 19 and 21 of the Constitution of India, the prohibition on carrying out an occupation, trade or business on the basis of vaccination was set aside. The court also issued directions to the effect that shops, establishments, taxis, etc. should display a sign reading "VACCINATED" or "NON-VACCINATED" depending on whether they were manned by vaccinated

4 Order dated 23rd June, 2021 in PIL No.6 of 2021

or unvaccinated persons.

(iv) The Interim Order of the Manipur High Court in Osbert Khaling Vs State of Manipur & Ors.⁵

The challenge in this matter was to a notification issued by the Government of Manipur which prioritized opening of institutions, organizations, factories, shops, etc. where employees and workers had been vaccinated. It was held that this amounted to compelling persons to get vaccinated by putting them at a disadvantage insofar as their livelihood would be denied to them.

(v) The Interim Order of the Gauhati High Court in the case of Dr. Aniruddha Babar Vs State of Nagaland & Anr.⁶

The challenge was to an order of the State of Nagaland regarding attendance in office and requirement for vaccination of employees/ staff in certain government services (beyond this description, the order does not provide any details as to the contents of the Government Order). The court was *prima facie* of the view that the office memorandum was not in consonance with other orders of the Court and the rights of employees under the Constitution of India. It was directed that till the returnable date, fees should not be charged for testing from government employees and their salaries should not be stopped for reason of not being vaccinated.

5 Order dated 13th July, 2021 in PIL No.34 of 2021

6 Order dated 28th July, 2021 in PIL No.6 of 2021

9. We have carefully analysed each one of the aforesaid decisions most of which are interim orders. In our considered opinion, the extent of the sweeping bans / impositions placed before the Courts in the aforesaid case cannot be extended to apply to the present *lis*. None of the aforesaid decisions pertain to the issue before us i.e. an imposition to produce a periodic RT-PCR Report as an alternative to being vaccinated. In the present case, MPT has not imposed a ban or drastic restriction which would effectively prevent unvaccinated employees from working. It has only stipulated that employees who are not vaccinated must periodically produce test reports certifying that the employee is free of Covid-19. In our considered opinion, the aforesaid decisions cannot lend support to the Petitioners' case.

10. That in some of the decisions referred to by the Petitioners, the Courts have observed that there is no evidence that vaccinated persons cannot be carriers of Covid-19 and that insofar as the spread of Covid-19 is concerned, vaccinated and unvaccinated persons stand on the same footing. These decisions, however, make no reference to any material on which these observations, which are general in nature, are based. However, these observations appear to have been arrived at without considering the medical material placed before us by the Ld. Amicus.

11. During the course of hearing the Writ Petition, Mr. Rustomjee referred to and tendered various material *inter alia* published by the World Health Organisation

(“WHO”). On the basis of the material it was demonstrated that the WHO states that vaccinated persons are far less likely to contract and/or to transmit Covid-19. The material is as under:

(a) **The World Health Organization’s Article dated 8th December 2020 titled ‘*How do vaccines work?*’.**

This article, which discusses how vaccines work, *inter alia*, states as follows:

“Herd Immunity

When someone is vaccinated, they are very likely to be protected against the targeted disease. But not everyone can be vaccinated. People with underlying health conditions that weaken the immune systems (such as cancer or HIV) or who have severe allergies to some vaccine components may not be able to get vaccinated with certain vaccines. **These people can still be protected if they live in and amongst others who are vaccinated. When a lot of people in a community are vaccinated the pathogen has a hard time circulating because most of the people it encounters are immune. So the more that others are vaccinated, the less likely people who are unable to be protected by vaccines are at risk of even being exposed to the harmful pathogens. This is called herd immunity.**

This is especially important for those people who not only can’t be vaccinated but may be more susceptible to the diseases we vaccinate against. No single vaccine provides 100% protection, and herd immunity does not provide full protection to those who cannot safely be vaccinated. **But with herd immunity, these people will have substantial protection, thanks to those around them being**

vaccinated.

Vaccinating not only protects yourself, but also protects those in the community who are unable to be vaccinated. If you are able to, get vaccinated." (Emphasis supplied)

(b) **The transcript of the podcast of the World Health Organization dated 13th August 2021 (Episode #49) titled 'Can I get infected after vaccination?'**

This podcast discusses the possibility of "breakthrough infections" of vaccinated persons and the effect of the same. The relevant portions of the transcript are set out below:

"Dr. Katherine O'Brien

The vaccines that we have against COVID are incredibly effective vaccines, And people have seen the results from the clinical trials of, you know, anywhere in the 80 percent range, 90 percent range of efficacy. But that doesn't mean that 100 percent of people, 100 percent of the time are going to be protected against disease. There is no vaccine that provides that level of protection for any disease. So we do expect in any vaccine program that there will be rare, but there will be cases of disease among people who were fully vaccinated and certainly among some people who were partially vaccinated. This doesn't mean that the vaccines aren't working. It doesn't mean that there's something wrong with the vaccines. What it does mean is that not everybody who receives vaccines has 100 percent protection. **What we do want to really emphasize for people is that it's so important to get vaccinated because these vaccines are really effective and it**

gives you a really good chance of not developing disease.

.....

So we're learning a couple of things about breakthrough infections, Vismita. The first is that the degree of severity of disease among people who have a breakthrough infection is less severe than the severity of disease among people who aren't vaccinated. **So vaccines are operating in a couple of different ways. First, of course, they're preventing people from getting disease at all. And even when disease does occur among a person, people who are fully vaccinated, the severity of that disease is less.**

.....

Vismita Gupta Smith

So people may be wondering if they can still catch covid-19 even after being fully vaccinated and if they can still infect others, then why vaccinate?

Dr. Katherine O'Brien

So this is a question that lots of people are asking. And I really want to emphasize that vaccines do a number of different things to protect you and to protect others.

So we've already talked about how the main function of vaccines is to protect you against getting disease. We've also talked about the fact that if you were to get disease, a rare event among vaccinated people, but it does occur, that disease will be less severe than it would have been if you weren't vaccinated. And the third thing that vaccines do is they reduce the transmission of the infection of the virus from one person to the next. And the way that vaccines do that is in a number of different ways. The first is they can protect you

against getting infected at all. The second way that they work is if you become infected, you're actually shedding that virus for a shorter period of time than if you weren't vaccinated. And the third way that vaccines work is, again, if you happen to get infected, the amount of virus that you have in your nose, in the back of your throat that you are shedding and potentially transmitting to somebody is less of the virus. There's less density of the virus in you and so less risk that you transmit it to somebody else." (Emphasis supplied)

(c) **The Technical Paper of the Department of Health & Family Welfare, Government of Kerala titled VACCINE BREAKTHROUGH SARS-CoV-2 INFECTIONS'.**

While, inter alia, dealing with breakthrough infections in respect of the 'Delta' variant of Covid, this technical paper states:

"COVID-19 vaccines are effective and are a critical tool to bring the pandemic under control. However, no vaccines are 100% effective at preventing illness in vaccinated people. There will be a small percentage of fully vaccinated people who might get moderate-severe COVID 19 despite full vaccination. Majority of the vaccine breakthrough infections are mild or asymptomatic and hence from May 1, 2021, CDC USA transitioned from monitoring all reported vaccine breakthrough cases to focus on identifying and investigating only hospitalized or fatal cases due to any cause.

.....

Reports of how the vaccines fared against delta in Canada, Qatar, Israel and England plus Scotland shows that vaccine effectiveness at preventing infection with delta variant ranged from about 40 percent upto nearly 80 percent. Effectiveness against severe illness was consistently higher, in the ballpark of 90 percent for vaccine recipients overall.

.....

Even in countries with very high vaccination coverage, vaccine breakthrough infections are reported however the hospitalization, severe infections and death are far less compared to pre-vaccine era.

CONCLUSIONS

1. Real world data from countries with very high vaccination rates like Israel, UK, Malta, Iceland, etc clearly prove that vaccination is not 100% effective in preventing COVID 19 infection especially with delta variant. However vaccinations are very effective in preventing disease severity and death due to COVID 19. Majority of the vaccine breakthrough infections are mild or asymptomatic and hence from May 1, 2021 ,CDC USA transitioned from monitoring all reported vaccine breakthrough cases to focus on identifying and investigating only hospitalized or fatal cases due to any cause.

4. Of the vaccine breakthrough infections in kerala, 82% were due to Delta variant. Majority of the breakthrough infections were of mild severity clearly demonstrating the fact that vaccination can prevent severe disease and death.

Discussion-

Breakthrough infection is being discussed in all scientific communities and forums to assess efficacy of vaccination and future approaches to tackle Covid pandemic. **However, at this point of time vaccination is of a great value as it is clear from the data analysis from various parts of the world that the vaccination reduces severity of the disease.** Therefore, it is very important to continue vaccination and also ensure covid appropriate behaviour not only at the individual level but at community and society level. This will need involvement of people and community to change behaviour and the way we do social interaction. Such

behavioural change takes time but it is not impossible."

12. The aforesaid material illustrates the position that the generally accepted medical opinion by International and State Agencies and Governments across the world is that a Covid-19 vaccination not only gives significant protection against contracting the disease, but also significantly reduces the risk of its transmission. It is therefore logical and reasonable to regard unvaccinated persons as posing a significantly greater risk of infection and transmission of Covid-19 than vaccinated persons. On the same basis, it is untenable to contend that vaccinated and unvaccinated persons stand on the same footing as far as the transmission of the disease is concerned.

13. The decisions of other High Courts mentioned above appear to largely proceed on the basis that even vaccinated persons can be infected with Covid and transmit the disease to others. This is certainly so - breakthrough infections can and do occur. No vaccination is 100% effective in preventing disease. However, what appears to have been overlooked in these decisions is that the risk of such infections occurring is greatly reduced in vaccinated persons and is significantly higher in unvaccinated persons. Further, for reasons set out above, even in the case of such breakthrough infections, the severity of the infection and the risk of transmission of the disease are significantly reduced in vaccinated persons. Hence,

it is erroneous to hold that because breakthrough infections are possible in vaccinated persons, they stand on the same footing as unvaccinated persons and that a classification into unvaccinated and vaccinated groups of persons is arbitrary or has no nexus with the object sought to be achieved, i.e., the prevention of the transmission of the disease.

14. Given that unvaccinated persons pose a greater risk of transmission of Covid-19 than vaccinated persons, it is reasonable for a large organization such as the MPT to require a higher degree of checking and monitoring of the Covid-19 status of unvaccinated persons. The requirement for unvaccinated employees to periodically produce RT-PCR test Reports certifying that they are free from Covid-19 is therefore a reasonable restriction on the fundamental rights of the Petitioners to carry out their occupation or trade. It also cannot be said to be arbitrary or to have no rational nexus with the object sought to be achieved by the measure. In fact, it appears that the Petitioners are willing to have themselves tested in this manner the only opposition is to having to bear the cost of the test themselves.

15. The Government of Maharashtra has, in its various 'Break the Chain' orders which have been annexed by the MPT in its Affidavit in Reply, imposed the same requirement for unvaccinated individuals to carry a negative RT-PCR/corona result certificate with a 15 day validity period in various situations, including inter-state travel, functioning of public and private offices, etc. For

instance, in its Order dated 4th April 2021, in the context of public transport, it was directed in paragraphs 4(d) and (e) as follows :

"(d) All public transport drivers and other staff coming into contact with the public to get vaccinated at the earliest as per criteria of GOI and till vaccinated completely to carry negative corona result certificate valid upto 15 days. This rule will come into effect from 10th April 2021. For taxis and autos, however, if driver isolates himself or herself through a plastic sheet or otherwise, he or she may be exempted from this requirement.

(e) In case any of the above are found to be without negative RTPCR Certificate/without being vaccinated as above, a fine of Rs 1000/- may be levied."

Again, in paragraph 5(f) in the context of functioning of Offices, it was directed as follows:

"(f) For government offices, in case of an exceptional circumstance, the HOD may be allowed to issue pass for visitors **subject to them having a negative RTPCR report of within 48 hours on entry into the office.**"

In the case of restaurants, bars and hotels, it was stated in paragraph 8(d) as follows:

"(d) All personnel belonging to home delivery services to be vaccinated at the earliest as per GOI guidelines. **However, in case the person is not vaccinated, he will have to carry a negative RTPCR report which will be valid for 15 days.** This rule will be applicable from 10th April 2021."

16. The requirement for unvaccinated persons to carry a negative RT-PCR Report is reiterated across a range of other situations and activities in the **Break the Chain** orders. In the present case, the same restriction has been imposed by the MPT, the only difference being that the validity period under the MPT Circular is 10 days. It was, however, stated on behalf of the MPT during the hearing that the MPT is willing to accept a validity period of 15 days if the Petitioners are willing to provide the RT-PCR Reports only twice a month at their own cost. If this were to be accepted, the expense to the employee would obviously be reduced.

17. The Petitioners contend that while they are willing to produce such periodic RT-PCR Reports, they are not willing to bear the cost of procuring them and that this cost should be borne by the MPT who are also running a hospital. MPT has informed the Court that RT-PCR test at the port hospital is outsourced and they are willing to perform the said tests on cost to cost basis without any profit. However, the petitioners have refused to pay a single rupee towards their RT-PCR tests and insist that the recurring costs be fully incurred by MPT. Hence, the real objection of the Petitioners appears to relate not to taking the test, but to bearing the cost involved. The Petitioners' argument that they should not have to bear the cost of the RT- PCR Reports is based only on the argument that vaccinated and unvaccinated persons stand on the same footing and must receive the same treatment in all contexts. For reasons set out above, this contention is untenable. In

view of the material placed before us, we are convinced that persons taking a conscious decision not to vaccinate themselves are effectively deciding to place themselves at a greater risk of contracting and/or transmitting the disease than a vaccinated person. While the Petitioners' decision not to take the vaccination is well respected, that does not mean that they are *ipso facto* entitled to the same treatment as that given to vaccinated persons by the MPT. It is reasonable on the part of the MPT to take the position that persons choosing not to vaccinate themselves must themselves bear the recurring cost of providing RT-PCR Reports, more so since MPT is willing to arrange for the test on actual cost basis. We also note that under the Break the Chain orders referred to hereinabove, the costs for providing a RT-PCR Report is required to be borne by the person required to produce it. We therefore see no arbitrariness and/or unreasonableness in the MPT's stand.

18. The Petitioners' have also submitted that they ought to be provided Covid-19 treatment by the MPT at the Port Hospital free of cost if they become infected and the cost of medication and treatment should be reimbursed by the MPT. This argument is also based on the premise that vaccinated and non-vaccinated persons must receive identical treatment by the MPT. In our considered opinion, MPT's stance can neither be said to be unreasonable nor arbitrary. The stance adopted by MPT is legitimate. It is reasonable to contend that

persons choosing to place themselves at a significantly higher risk of contracting Covid-19 should also assume the risk of having to pay for Covid-19 treatment in the event of contracting Covid-19. We see no reason in law as to why MPT should be compelled to bear the cost of such treatment (*free of cost*) when it is offering the alternative of vaccination free of charge and is also willing to bear the cost of treating breakthrough infections in such cases free of charge. In fact, it is the Petitioners' demands that now appear to us to be unreasonable and not the other way around.

19. In so far as the issue with respect to payment of compensation of Rs.50 Lakhs is concerned, we note that the Petitioners have not made any detailed submissions on this issue either during the course of the hearing or in their written submissions. Accordingly, this issue is not being dealt with in this Writ Petition. In any event, MPT has submitted that it is not concerned with this issue and that it would fall within the purview of the Central Government.

20. In view of the aforesaid, the Writ Petition is dismissed.

(ABHAY AHUJA, J.)

(S.J.KATHAWALLA, J.)