

GAHC030001062020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/37/2020

In Re Dinthar Incident
Aizawl

VERSUS

State of Mizoram and 11 Ors
Aizawl

Advocate for the Petitioner : Mr Zochhuana (Amicus Curiae)

Advocate for the Respondent : Mr C Zoramchhana

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MR. JUSTICE NELSON SAILO
ORDER

Date : 02.07.2021

The proceeding is conducted via remote Video Conference.

- 2.** Heard Mr. Zochhuana, the learned Amicus Curiae and Mr. C. Zoramchhana, learned Additional Advocate General for the State of Mizoram.
- 3.** The case has been listed today as opportunity had been given to the learned Additional Advocate General to obtain instructions with regard to Clause 5(2), 6(1) and 6(5) of the Standard Operating Procedure (SOP) dated 29.06.2021. The above clauses requires all persons in the State of Mizoram to be vaccinated or else they would not be allowed to leave their houses to procure/obtain essential items/goods or earn their livelihood by working in

shops/stores, driving public/commercial transport vehicles etc. The other issue to be taken up today is with regard to the requirement of obtaining a pass or permit from the Deputy Commissioner, Aizawl for travelling outside Mizoram in terms of the notice No.C.16011/298/2020-DC(A)/PT-II dated 26.06.2021.

4. With regard to the requirement of obtaining a pass or permit from the Deputy Commissioner, Aizawl for travelling outside Mizoram in terms of the notice No.C.16011/298/2020-DC(A)/PT-II dated 26.06.2021, the learned Additional Advocate General has submitted Notice No.C.16011/298/2020-DC(A)/Misc dated 01.07.2021 issued by the Deputy Commissioner, Aizawl, the content of which is as follows:-

“NOTICE

Movement of vehicles have been restricted in some parts of Assam due to the area being declared as a containment zone/area. And it is learnt that due to this restriction some people used to have difficulties moving around. Therefore, in an effort to facilitate easy movement of travelers passing through Assam from Mizoram (by road) to Exit Permit may be issued on being applied as stated below.

This will supersede the earlier Notification issued vide No.C.16011/298/2020-DC(A)/Pt-II Dt. 26.06.2021.

1. The application may be submitted to the Deputy Commissioner, Aizawl through mcovid19.mizoram.gov.in (mPASS Exit Permit)

2. The applicant shall specify his/her name, address, phone number, final destination and the date and time of his/her proposed journey along with the reason for his/her journey and vehicle Registration number as prescribed in the Permit application form.”

5. On perusal of the above Notice dated 01.07.2021 issued by the Deputy Commissioner, Aizawl, which has been made in supercession of the earlier notification dated 26.06.2021, we are of the view that the Notice dated 01.07.2021 has clarified the earlier notification dated 26.06.2021, besides showing that Exit Permit is not a mandatory requirement for people wanting to leave the State. Accordingly, the said issue is closed. However, the State respondents will ensure that if similar notifications, like the earlier notification dated 26.06.2021, has been issued by other Deputy Commissioners from other Districts, the Deputy Commissioners in the other Districts should also issue a similar Notice dated 01.07.2021, which is reproduced above.

6. For a better understanding of the other issue involved, i.e. the legality of Clause 5(2), 6(1) and 6(5) of the Standard Operating Procedure (SOP) dated 29.06.2021, the Order dated 01.07.2021 passed by this Court is reproduced below:-

“The proceeding is conducted via remote Video Conference.

2. Heard Mr. Zochhuana, the learned Amicus Curiae as well as Mr. C. Zoramchhana, learned Additional Advocate General.

3. The learned Additional Advocate General submits that though he has received some instructions from the Deputy Commissioner, Aizawl with regard to the Notice dated 26.06.2021, he needs further instruction on the matter and in this regard, he will be communicating with the concerned Deputy Commissioner today.

4. In view of the partial opening up of the current restrictions in place in the State, the Chief Secretary, Mizoram has issued Order dated 29.06.2021 along with the Standard Operating Procedure (SOP) to be implemented w.e.f. 4:00 AM of 30.06.2021 till midnight of 15.07.2021. The specific restrictions that had been brought to the notice of this Court is with respect to Clause 5(2) which in effect does not allow non-vaccinated individuals to go outside their house/compound. Clause 6(1) and 6(5) restricts non-vaccinated individuals from manning shops, stores, undertaking any works and driving of public transports and commercial vehicles.

5. Clause 5(2), 6(1) and 6(5) of the latest SOP dated 29.06.2021 are reproduced below:-

“5. Other restrictions

*2) Persons going outside shall mandatorily cover their faces (with face mask or other materials). **In case of compelling circumstances, only vaccinated individuals of the family members may be detailed for errands within and around localities having significant COVID-19 active cases.***

6. Permitted And Regulated Activities

*1) **Only vaccinated individuals should be engaged for manning shops and stores or undertaking any works. Shop/stores attendants and other employees should be able to produce proof of vaccination, which will be regularly checked by the police/LLTF/VLTF/COVID-19***

executive duty.

5) Commercial passenger vehicles (city bus, taxi and two wheeler taxi) allowed to resume operation shall mandatorily provide hand-sanitizer for their passenger and they shall not exceed their seating capacity. Only Drivers and conductors who had been vaccinated should be allowed to operate public transports.”

6. A perusal of the above clauses implies that all persons would require to be vaccinated or else they cannot leave their houses or earn their livelihood with regard to activities mentioned in the said clauses.

7. The question that would arise for consideration with regard to the above clauses is whether a person can be vaccinated against his will and whether the non-vaccination of the said individual can debar him from earning his livelihood, keeping in mind the fundamental right of a person to practice any profession, or to carry on any occupation or trade or business under Article 19(1)(g) and his right to livelihood in terms of Article 21 of the Constitution. Though the State can make a law imposing reasonable restrictions in the exercise of any of the rights conferred under Article 19, so long as the said restriction is a reasonable restriction, no such law has been made by the Government and in any event, the above mentioned clauses do not appear to be reasonable.

8. In the case **Registrar General, High Court of Meghalaya Vs. State of Meghalaya**, PIL No. 6/2021, the Division Bench was seized of a matter, wherein the State of Meghalaya, through various orders of the Deputy Commissioners, had made it mandatory for shopkeepers, vendors, local taxi drivers and others to get themselves vaccinated before they could resume their businesses. The Division Bench of the Meghalaya High Court in its Order dated 23.06.2021 in PIL No. 6/2021 held that vaccination cannot be mandatory and non-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.

9. In the meantime, it has also been brought to our notice that a notification was

issued by one association which allows the participation of only vaccinated individuals to participate in a particular sport. The said instructions seem to have been made in pursuance to the SOP dated 29.06.2021. There being a possibility of many interpretations of the above mentioned clauses being made by various Local Level Task Force/ Village Level Task Force (LLTFs/VLTFs) or associations etc, while issuing guidelines, directions and orders, it would be prudent to reconsider them, lest it causes chaos. Though the above mentioned clauses of the SOP have been made for the greater good, the authorities shall have to bear in mind the fact that executive instructions have to be issued in consonance with the fundamental rights of the citizens and the Constitution.

10. *Though we are prima facie inclined to stay the above clauses, the learned Additional Advocate General has submitted that he will take up the matter with the authorities today itself so that necessary amendments are made to the SOP issued on 29.06.2021.*

11. *In view of the undertaking given by the learned Additional Advocate General, the case be listed again tomorrow i.e., 02.07.2021."*

7. With respect to the validity of Clause 5(2), 6(1) and 6(5) of the SOP dated 29.06.2021, the learned Additional Advocate General has submitted a letter dated 01.07.2021 issued by the Under Secretary to the Government of Mizoram, Disaster Management & Rehabilitation Department, which is to the effect that the State Government can make restrictions under the Disaster Management Act, 2005, curtailing the fundamental rights of a citizen, for the purpose of preventing the spread of Covid-19 and for mitigation of disaster. It is also stated in the said letter dated 01.07.2021 that unless shopkeepers, drivers and their employees have been vaccinated, they could become a super spreader of the covid virus.

8. The learned Additional Advocate General also submits that the State Government has made arrangements for mass vaccination of the people of the State free of cost and the said vaccination process is under way. He submits that the first dose of Covishield vaccination has been given to 5,19,452 persons (i.e. 67% of the eligible persons) as on date. He submits that the target for Covishield vaccination (first dose) is 7,75,106 persons. However, he

submits that he cannot say as to how many more months would be required for completion of the first dose of the vaccine on the targeted eligible persons.

9. The learned Additional Advocate General submits that as the restrictions imposed are reasonable restrictions made in larger public interest, the State Government would like to retain the above clauses in question in the SOP dated 29.06.2021.

10. Mr. Zochhuana, the learned Amicus Curiae submits that restrictions made under Disaster Management Act, 2005 cannot be said to be reasonable restrictions, as provided under Article 19(2) of the Constitution. Further, the restrictions imposed in the SOP discriminates between vaccinated and un-vaccinated persons, thereby violating Article 14 of the Constitution. He further submits that the restrictions that are imposed against un-vaccinated persons in the above mentioned three clauses, being in violation of the fundamental right to life and livelihood, the said clauses should be set aside or modified. He further submits that besides the above three clauses, Serial Nos. 31 & 42 of Annexure-3 of the SOP dated 29.06.2021 would also have to be set aside or modified as un-vaccinated persons are being discriminated against.

11. We have heard the learned counsels for the parties.

12. As per Clause 5(2) of the SOP dated 29.06.2021, un-vaccinated persons cannot leave their houses vis-à-vis vaccinated persons (first dose). The submission made by the learned Additional Advocate General clearly shows that 33% of the targeted persons are still to be vaccinated. There can be any number of reasons for a person to leave their house, for example, it could be for the purpose of procuring essential supplies, like food-stuff, medicines, attending to their near and dear/sick ones etc. However, the said clause has virtually put them under house arrest in violation of Article 21 of the Constitution of India, while persons who have been given the first dose of vaccine are allowed to leave their houses/compounds. Thus, on the ground of discrimination alone, Clause 5(2) is arbitrary. When the SOP requires all persons to cover their faces and to adhere to covid protocols as mentioned in the above SOP, there should not be any discrimination against un-vaccinated persons, as the Covid protocols are also applicable to un-vaccinated persons.

13. With respect to Clause 6(1) and 6(5) of the SOP, there is discrimination at large, as persons who have been vaccinated with the first dose of the vaccine are allowed to earn their

livelihood, but not the un-vaccinated persons. There is nothing to show that vaccinated persons (first dose) cannot be infected with the corona virus or that they cannot be spreaders. If the vaccinated person and un-vaccinated person cover their face with a mask, as per the covid behavior protocols laid down by the State respondents, there is no reason to discriminate only against un-vaccinated persons.

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.

15. Due to the above reasons, we find that Clause 6(1) and 6(5) of the SOP are also violative of Article 14 of the Constitution, especially when achieving the target for vaccinating the targeted population may take many more months, in which case unvaccinated persons would be deprived of their right to livelihood, which would in turn violate their right to life, which are guaranteed under Article 21 of the Constitution. The above mentioned clauses in the SOP basically implies that all individuals should be vaccinated, thereby giving rise to an inference that an individual cannot be allowed to opt out from being vaccinated. As can be seen from the earlier Order dated 01.07.2021 which has been reproduced, the Division Bench of the Meghalaya High Court in **Registrar General, High Court of Meghalaya Vs. State of Meghalaya**, PIL No. 6/2021 held that though vaccination is an absolute necessity, "a harmonious and purposive construction of the provisions of law and the 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*.

16. The issue at hand is the embargo placed against un-vaccinated individuals from being employed in shops and driving public/commercial vehicles. The fact that the State Government has not achieved its target of vaccinating all the eligible persons as stated by the learned Additional Advocate General, the State respondents cannot debar un-vaccinated persons from being employed in shops or driving commercial/public transport vehicles. The un-vaccinated citizens of the State cannot be faulted, due to the States' failure in not completing the vaccination of the targeted population.

17. 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 our considered view 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). A restriction cannot be arbitrary or of a nature that goes beyond the requirement of the interest of the general public. Though no general pattern or a fixed principle can be laid down so as to be universal in application, as conditions may vary from case to case, keeping in view the prevailing conditions and surroundings circumstances, 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 preamble of the Act clearly states that it is an Act to provide an effective management of the disasters and for matters connected therewith or incidental thereto. There is nothing discernible in the Act, to show that the said Act has been made for imposing any restriction on the exercise of the rights conferred by Article 19 of the Constitution. Further, the SOP dated 29.06.2021 is only an executive instructions allegedly made under Section 22(2)(h) & Section 24(1) of the Act and not a law. The provisions of Sections 22 & 24 only provides for the functions and powers of the State Executive Committee in the event of threatening disaster situation or disaster. It does not give any power to the State Executive Committee to issue executive instructions discriminating persons with regard to their right to liberty, livelihood and life and violating the fundamental rights of the citizens, which is protected by the Constitution.

18. The SOP provides that vaccinated persons who are employed in shops/stores and

to drive transport/commercial vehicles should wear mask and adhere to all proper covid protocols. If an un-vaccinated person is to be made to adhere to the same protocols, there can be no difference in the work of a vaccinated or un-vaccinated person. As such, the restriction placed upon un-vaccinated persons only due to non-vaccination is unreasonable and arbitrary.

19. In view of the reasons stated above, we hold that the restrictions placed upon un-vaccinated individuals vis-à-vis vaccinated individuals in terms of Clause 5(2), 6(1), 6(5), Serial No. 31 & 42 of Annexure-3 of the SOP dated 29.06.2021 are arbitrary and not in consonance with the provisions of Article 14,19 & 21 of the Constitution. The said impugned clauses are interfered with, to the extent that the allowances available and given to vaccinated persons in the above clauses shall also be made equally applicable to un-vaccinated persons. The State respondents are accordingly directed to issue a corrigendum of the SOP dated 29.06.2021 at the earliest incorporating the above directions.

20. The Order dated 29.06.2021 issued by the Chief Secretary Mizoram with the enclosed SOP dated 29.06.2021, the letter dated 01.07.2021 issued by the Under Secretary to the Government of Mizoram, Disaster Management & Rehabilitation Department and the Notice dated 01.07.2021 issued by the Deputy Commissioner, Aizawl are made a part of the record and marked as Annexure-X, Y & Z respectively.

21. List the matter again on 14.07.2021.

JUDGE

JUDGE

Comparing Assistant