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COVID-19 VACCINATION, RT-PCR TEST, AND REASONABLE PRECAUTIONS: BOMBAY HIGH COURT RULES IN FAVOUR OF HIGHER DEGREE OF CHECKING AND MONITORING OF UNVACCINATED PERSONS

24 August 2021

Background

In its recent ruling in the case of Deepak Kumar Radheshyam Khurana and Others v Mumbai Port Trust and Another [Writ Petition (L) Number 17132 of 2021], the Bombay High Court (Court) ruled in favour of the Mumbai Port Trust (MPT) (the employer in this case) requiring and observing a higher degree of checking and monitoring in the case of employees who have not been vaccinated. The Court held that the classification of individuals on the basis of their vaccination status cannot be said to be arbitrary, or without nexus with the object sought to be achieved, i.e., the prevention of the transmission of Covid-19. Accordingly, a circular issued by MPT requiring unvaccinated employees to submit a negative RT-PCR test report periodically (i.e., every 10 days) and bearing the cost of such RT-PCR tests for attending office was held to be reasonable. The Court also upheld MPT's stance at not bearing / reimbursing the cost of medication and treatment for COVID-19 in the case of unvaccinated employees. The Court dismissed the writ petition.

Factual matrix and the parties' contentions

In the case at hand, MPT had issued a circular requiring unvaccinated employees to produce a negative RT-PCR test report issued by a recognized hospital at their own cost every 10 days. The circular also mentioned that MPT would not be bearing the cost for unvaccinated employees for COVID-19 treatment.

Petitioners' contentions: The abovementioned circular was challenged by certain employees who had chosen to remain unvaccinated due to personal reasons. They alleged that the circular is discriminatory between vaccinated and unvaccinated employees. They also alleged that the COVID-19 vaccination is a voluntary exercise and relied on a response of the Ministry of Health and Family Welfare, Government of India, dated 9 March 2021 to an RTI application to support their stance. They contended that vaccinated and unvaccinated persons could not be discriminated on the basis of their vaccination status as they stand on the same footing as regards the likelihood of transmission of COVID-19. They added that such classification of employees on the basis of the vaccination status has no rational nexus with the object sought to be achieved, i.e., protection of employees from contracting COVID-19.

Respondent's contentions: *Per contra*, the respondents argued that MPT respects individuals' discretion as regards the COVID-19 vaccination and, through its circular, only mandated submission of a negative RT-PCR test report as an alternative to taking the COVID-19 vaccine in order to protect its employees and curb the spread of COVID-19. The respondents also added that MPT would not bear the cost of treatment for

COVID-19 for employees who are refusing to take the vaccine as such employees are themselves insisting on placing themselves at a much higher risk of contracting COVID-19. According to MPT, such stipulations are reasonable in the light of the prevailing circumstances. The respondents also highlighted the efforts made by MPT to provide free vaccination to all employees and relied on the established medical position that supports the view that vaccination provides a strong measure of protection against infection by, and transmission of COVID-19.

Court's analysis and discussion

The Court while deciding on the reasonableness of the restrictions and requirements imposed on employees as regards the negative RT-PCR test in the absence of COVID-19 vaccination, discussed the judicial precedents from various High Courts relied on by the petitioner commenting on the restrictions/ bans imposed basis the vaccination status of individuals and ruling the COVID-19 vaccination to be a voluntary exercise. Pursuant to the discussion, the Bombay High Court held such judicial precedents to be inapplicable to the present factual matrix as they did not deal with or address the issue of production of a negative RT-PCR report as an alternative to being vaccinated.

The Court also went on to analyze the medical literature along with the judicial precedents and stated that: *"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... 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."*

The Court also highlighted various 'Break the Chain' orders of the Maharashtra Government requiring unvaccinated persons to carry a negative RT-PCR test report in various situations, such as inter-state travel, functioning of public and private offices, etc. to uphold MPT's requirement of a negative RT-PCR report for unvaccinated employees. Further, the Court upheld MPT's stance as regards refusal to bear the cost of RT-PCR tests and treatment for COVID-19 in the case of unvaccinated employees.

The Court did not comment on the mandatory nature of the COVID-19 vaccine as the same was not required by MPT in the challenged circular.

Comment

Given the current lack of specific jurisprudence around juxtaposition of an individual's decision to not get vaccinated against COVID-19 and the employer's common law and, in some cases, statutory duty to ensure health and safety at the workplace, the Bombay High Court's decision is welcome as it provides some guidance to employers regarding the restrictions and requirements that may be deemed reasonable from the standpoint of protection of the larger workforce in the workplace. The Court's reasoning and analysis of medical literature discusses the reduced chances / impact of COVID-19 in case of vaccinated individuals and allows for employers to distinguish between vaccinated and unvaccinated persons in the context of health and safety concerns by imposing reasonable restrictions such as periodic negative RT-PCR tests for entering office premises.

Having said that, more clarity is awaited in respect of situations where the employer imposes COVID-19 vaccination as a mandate on employees and seeks to enforce the same through appropriate disciplinary and other measures. This issue assumes significance when one looks at the recent orders issued by various state governments / local authorities in states such as Tamil Nadu, West Bengal, and Karnataka, requiring

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employers to ensure vaccination of employees against COVID-19. Nevertheless, until such clarity, the Court's ruling may help employers revisit their standard operating procedures for adequacy of Covid safety measures in the workplace.

- *Anshul Prakash (Partner), Deeksha Malik (Associate) and Divya Kumar (Associate)*

For any queries please contact: editors@khaitanco.com

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