

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 3RD DAY OF SEPTEMBER 2021 / 12TH BHADRA, 1943

WP(C) NO. 16501 OF 2021

PETITIONER:

1 KITEX GARMENTS LIMITED,
KIZHAKKAMBALAM P.O, POST BOX NO.5, ERNAKULAM-683
562, REPRESENTED BY ITS HR MANAGER, SATHEESH
KURUP.R.

2 KITEX CHILDRENSWEAR LTD,
KIZHAKKAMBALAM P.O, POST BOX NO.5, ERNAKULAM-683
562, REPRESENTED BY ITS HR MANAGER, SATHEESH
KURUP.R.

BY ADVS.
BLAZE K.JOSE
NIVEA LIZ PETER FERNANDEZ
URMILA ZACHARIA
JUDY JOSE

RESPONDENTS:

1 STATE OF KERALA
REPRESENTED BY PRINCIPAL SECRETARY, HEALTH AND
FAMILY WELFARE DEPARTMENT, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM-695 001

2 THE DIRECTOR,
STATE HEALTH MISSION, GENERAL HOSPITAL JUNCTION,
THIRUVANANTHAPURAM-695 035

3 DISTRICT MEDICAL OFFICER (HEALTH) ,
PARK AVE, MARINE DRIVE, ERNAKULAM-682 011.

W.P.(C) No.16501 of 2021

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4 ADDL.R4. SECRETARY TO GOVERNMENT,
 DEPARTMENT OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF
 INDIA, NEW DELHI.
 (ADDL. RESPONDENT NO.4 IS SUO MOTU IMPEADED AS PER
 ORDER DATED 12-08-2021 IN WP(C) .

BY ADV P.VIJAYAKUMAR
SRI.V.MANU SR GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON
03.09.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

W.P.(C) No.16501 of 2021

Dated this the 3rd day of September, 2021.

J U D G M E N T

The short, but interesting question that arises for consideration in this matter is whether a person covered by the National COVID Vaccination Program is entitled to make a choice between early protection and better protection from Covid-19 infection in the matter of accepting paid vaccine.

2. Petitioners are two companies employing more than 10,000 workers. With a view to protect the workers and their close family members from Covid-19 infection, the petitioners have taken upon themselves the task of vaccinating them without waiting for the Government to do so, and procured for the said purpose the required

quantity of Covishield vaccine by spending Rs.52,30,680/-, and administered the first dose to the beneficiaries through a medical institution on 12.6.2021. Later, the petitioners have purchased 12,000 more vaccine doses for administering the second dose to the beneficiaries for their better protection. Initially when the vaccination program of the Central Government began, the protocol of the said vaccine was that the second dose shall be administered only after 4 weeks, but within 6 weeks. Later, the said protocol was revised successively and the existing protocol is that the second dose shall be administered only after 12 weeks, but within 16 weeks. It is stated by the petitioners that the restriction aforesaid is being enforced by the Central Government by insisting registration for administration of vaccine in the portal, CoWIN. In the light of the said restriction, the petitioners are unable to administer the second dose of the vaccine to the beneficiaries. It is stated by the petitioners that in the meanwhile, the State Government felt that the time interval between the two doses of the Covishield vaccine needs to be reduced for certain classes

of persons and accordingly, requested the Central Government to make appropriate changes in the CoWIN portal so as to enable registration for the second dose of Covishield vaccine before 12 weeks. As the Central Government has not considered the said request of the State Government, the State Government issued Ext.P2 order on 28.5.2021, permitting those who want to go abroad to administer the second dose of Covishield vaccine after 4 weeks without registration in the CoWIN portal. In the light of Ext.P2 Order, the petitioners submitted Ext.P4 representation to the State Government, seeking permission to administer the second dose of the vaccine to the beneficiaries after four weeks. It is alleged by the petitioners that Ext.P4 representation is not being considered by the Government. The petitioners, therefore, seek directions to the respondents to accord them sanction to administer the second dose of the Covishield vaccine to the workers and their close family members who have completed 4 weeks of administering the first dose.

3. A statement has been filed by the Assistant Solicitor

General of India on behalf of the Secretary to Government, Department of Health and Family Welfare, Government of India stating, among others, that the COVID Vaccination Program is being implemented under the guidance of the National Expert Group on Vaccine Administration for COVID-19 (NEGVAC) and the Empowered Group on Vaccine Administration for Covid-19, and the interval between two doses of Covishield vaccine was introduced on the recommendations of NEGVAC based on scientific evidence for providing best protection against Covid-19.

4. Heard the learned counsel for the petitioners as also the learned Assistant Solicitor General of India.

5. The learned counsel for the petitioners did not dispute the fact that the interval of 12 weeks between two doses of Covishield vaccine would give better protection against Covid-19. But, according to him, insofar as the people have the right even to refuse to accept the vaccine and insofar as it is admitted that a second dose of the vaccine after the interval of 4 weeks would give a better protection

than a single dose of the vaccine, the people should necessarily have the right to make a choice as to the time interval within which they should accept the second dose of the vaccine. It is all the more so since the vaccine in respect of which the relief is sought is one procured by the petitioners, and not provided free of cost by the Government, submits the counsel. Placing reliance on the various orders issued by the State and Central Governments, the learned counsel for the petitioners has also contended that when the State and Central Governments have relaxed the interval between the two doses of the vaccine for various classes of persons who intend to go abroad, giving preference to their need over the quality of protection from the pandemic, there is absolutely no reason why the same privilege shall not be extended to people residing in India for their early protection from the pandemic.

6. Per contra, the learned Assistant Solicitor General of India submitted that the decision to administer the second dose of vaccine after an interval of 12 weeks was arrived at after considering

substantial scientific evidence and expert opinion to ensure best protection for the whole population and even if the petitioners do have a right to choose between best protection and early protection, the said right cannot be exercised, if the exercise of the said right by the petitioners would affect the right of the general public to secure maximum protection against Covid-19. It was also submitted by the learned Assistant Solicitor General of India that the time interval between the two doses of the vaccine was relaxed only to facilitate international travel for inevitable situations and the workers of the petitioners cannot claim the said privilege. It was also submitted by the learned Assistant Solicitor General of India that the court cannot issue a mandamus in the claims of the instant nature since they are to be considered at the first instance by the Government and the workers of the petitioners have not approached the Central Government for the said purpose.

7. The petitioners in the instant case maintain and agree with the Governments at the Central and State level that vaccination is

absolutely necessary to overcome the global pandemic, Covid-19. As indicated, the petitioners do not have a case that a second dose of Covishield vaccine after 12 weeks, but within 16 weeks would not give a better protection than a second dose of Covishield vaccine administered after 4 weeks. It is admitted in the statement filed on behalf of the Central Government that the immunity provided by the second dose of Covishield vaccine with time interval less than 12-16 weeks would be better than partial vaccination namely single dose. According to the petitioners, in a country like India, where a substantial part of the population is yet to be vaccinated and where large number of persons are infected with Covid -19 on a day-to-day basis and where the infection is leading to casualty in large number of cases, the need of the hour is not better protection or best protection, but early protection from infection. In other words, as indicated at the outset, what the petitioners claim is a right to make a choice on behalf of their workers, between early protection and better protection from Covid-19 infection in the matter of accepting vaccine. It is also the case of the

petitioners that at any rate, the people should certainly have a right to exercise a choice between early protection and better protection in the matter of accepting paid vaccine.

8. The principle that every human-being of adult years and sound mind has a right to determine what shall be done with his/her body, though not of Indian origin, has been widely accepted by the courts in India. It appears, it is in recognition of the said principle that the vaccination for Covid-19 is made voluntary. The fact that the vaccination is voluntary and there is no compulsion on anyone to accept the same is declared by the Government of India in the website of the Ministry of Health and Family Welfare. If that be so, the requirement to administer two doses of the vaccine and the time interval between the two doses for better protection from infection can only be considered as advisory. In other words, as pointed out by the petitioners, when the people have even the right to refuse to accept vaccine, there is absolutely no reason why the State should take the stand that they shall not be permitted to accept the second dose, if

they choose to do so after four weeks in terms of the original protocol of the vaccine for their early protection, especially when they themselves are procuring the vaccine by spending money from their pockets. It is all the more so since the policy of the Central Government itself is, as discernible from the website of the Ministry of Health and Family Welfare, that the people shall have the choice to get early vaccination, for the implementation of which vaccine is being distributed on payment of its cost through private hospitals as well. True, exercise of such a right by individuals cannot be said to be absolute and the same is subject to the rights of others, in the instant case, the fundamental right under Article 21 of the Constitution, viz, the right to health. In other words, it is open to the Government to treat such categories of persons as a class different from persons who have accepted vaccine in terms of its protocol, in the matter of imposing restrictions or relaxing restrictions, as the case may be, to contain the spread of the pandemic.

9. That apart, the materials on record indicate that the

Central Government has relaxed the time interval between the two doses of the Covishield vaccine initially, for students who have to undertake foreign travel for the purpose of education, for persons who have to take up jobs in foreign countries, and for athletes, sports persons and accompanying staff of Indian contingent attending the Olympic Games at Tokyo. The materials also indicate that later, the said privilege was extended to Indian Government officials mandated to attend official commitments abroad. The privilege was extended again later to those individuals who have to travel abroad for other purposes such as for availing treatment services for any health problems, foreign nationals who have to return to their native countries or to any other circumstances where such foreign travel may be unavoidable. Similarly, the State Government on its own, without the concurrence of the Central Government, has relaxed the time interval between the two doses of the Covishield vaccine to those who intend to go abroad for employment. These facts are not in dispute. In other words, the Government have permitted all those classes of

persons to exercise the choice between early protection and better protection from Covid-19 infection. All those are not persons who reside and settle permanently abroad. Most of them are persons who have to come back to India soon after their assignment. If the Government can permit persons who are intending to travel abroad to exercise a choice between early protection and better protection from Covid-19 infection, there is absolutely no reason why the same privilege shall not be extended to others who want early protection in connection with their employment, education, etc. Further, the stand taken by the Central Government that the court shall not grant the relief sought for by the petitioners, for they have not approached the Central Government, cannot be accepted, for, as indicated, the very premise on which the present writ petition is instituted is that the decision of the Government in providing relaxation in the protocol regarding administration of second dose of vaccine to certain classes of persons alone amounts to discrimination and the directions sought are directions to extend to the petitioners also the same relief. In cases

of this nature, according to me, the relief sought by the petitioners cannot be denied merely for the reason that the petitioners have not approached the Government for the same.

In the result, the writ petition is allowed and the fourth respondent is directed to make necessary provisions forthwith in the CoWIN portal, so as to enable scheduling of second dose of Covishield vaccine after four weeks of the first dose for those who want to accept the second dose after a period of four weeks in terms of the initial protocol of the vaccine. It is, however, made clear that I have not considered the question whether a person is entitled to make a choice between early protection and better protection from Covid-19 infection in the matter of accepting the free vaccine provided by the Government.

Sd/-

P . B . SURESH KUMAR

JUDGE

YKB

APPENDIX OF WP(C) 16501/2021

PETITIONER EXHIBITS

- Exhibit P1** A TRUE COPY OF THE CIRCULAR
NO.NHM/3821/ADMIN1/2020/SPMSU ISSUED BY
NATIONAL HEALTH MISSION DATED 29.05.2021
- Exhibit P2** A TRUE COPY OF THE ORDER NO.G.O(RT)
NO.1155/2021/H & FWD ISSUED BY THE HEALTH &
FAMILY WELFARE (F) DEPARTMENT DATED
28.05.2021
- Exhibit P3** A TRUE COPY OF THE REPRESENTED TO THE 3RD
RESPONDENT DATED 23.07.2021
- Exhibit P4** A TRUE COPY OF THE REPRESENTATION TO THE 1ST
RESPONDENT DATED 07.08.2021

RESPONDENT EXHIBITS

- ANNEXURE R4 (A)** A TRUE COPY OF THE LETTER FROM THE MINISTRY
TO ALL STATES ALONG WITH THE SOP DATED
07.06.2021 IS PRODUCED HEREWITH AS
- ANNEXURE R4 (B)** A TRUE COPY OF THE LETTER DATED 23-08-2021
ISSUED BY THE MINISTRY