
**4th SURANA & SURANA AND RAMAIAH COLLEGE OF LAW
NATIONAL TORT LAW MOOT COURT COMPETITION - 2022**

BEFORE THE HON'BLE HIGH COURT OF BADLAPUR

ORIGINAL SUIT PETITION NO. ____/2022

IN THE MATTER OF:

CHETRI and OTHERS*PLAINTIFF*

VERSUS

STATE OF BADLAPUR AND HEALTHONE*DEFENDANT*

BEFORE SUBMISSION TO HON'BLE JUSTICE OF THE HON'BLE HIGH COURT
OF BADLAPUR

MEMORANDUM ON BEHALF OF THE PLAINTIFF

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BOOKS

1. Ratanlal & Dhirajlal, Law of Torts, (24th Edn., 2002, edited by Justice G.P. Singh), pp.4418
2. Parthasarathi G, Karin N-H, Nahata MC. A textbook of Clinical Pharmacy Practice-essential concepts and skills, 1st Edition. Chennai: Orient Longman Private Limited; 2004.
3. Nand P, Khar RK. A text Book of Hospital and Clinical Pharmacy Theory & Practice, 14thEdition. Birla Publication Pvt. Ltd. Delhi..
4. Merchant SH. and Quadry JS. A textbook of Hospital pharmacy, 4th ed. Ahmadabad: B.S. Shah Prakakshan; 2001.

OTHER SOURCES

1. Vishavdeep Singh, Harwinder Singh, Sukhjeet Singh, Drug Inventory Management of A Pharmacy Store by Combined Abc-Ved Analysis, International Journal on Mechanical Engineering and Robotics (IJMER), 2015, Volume-3, Issue-5.
2. Fabián Silva-Aravena , Irlanda Ceballos-Fuentealba and Eduardo Álvarez-Miranda, Inventory Management at a Chilean HospitalPharmacy: Case Study of a Dynamic Decision-Aid Tool, Mathematics 2020, 8, 1962; doi:10.3390/math8111962.

ONLINE DATABASE

1. SCC OnLine
2. Manupatra

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LIST OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Full Form</u>
&	<i>And</i>
AIR	<i>All India Reports</i>
Anr.	<i>Another</i>
Art.	<i>Article</i>
Bom	<i>Bombay</i>
Const.	<i>Constitution</i>
CrPc	<i>Criminal Procedure Code</i>
ed./edn.	<i>Edition</i>
Govt.	<i>Government</i>
Hon'ble	<i>Honourable</i>
ILR	<i>Indian Law Reports</i>
IPC	<i>Indian Penal Code</i>
Ltd.	<i>Limited</i>
Ors.	<i>Others</i>
Para	<i>Paragraph</i>
SC	<i>Supreme Court</i>
SCC	<i>Supreme Court Cases</i>
SCR	<i>Supreme Court Reports</i>
Sec	<i>Section</i>
UP	<i>Uttar Pradesh</i>
v.	<i>Versus</i>

STATEMENT OF JURISDICTION

Section 9 of CPC reads as:

The Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

There is no definition as to suits in civil nature. However, it means a suit can be said to be civil in nature if it involves the determination of civil rights.

There is no definition for civil rights. However, it means the rights and remedies vested in a citizen within the domain of private law as distinct from public law.

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STATEMENT OF FACTS

<p><u>INTRODUCTION AND BACKGROUND</u></p>	<p>The Laws & Constitution of Indus are <i>pari materia</i> to the Laws & Constitution of India. It is a country of dual polity, where the power is divided between the central and state. During year 2019- 2021, Indus witnessed a huge outbreak of corona virus disease. Owing to corona virus outbreak the Parliament of Indus adopted the Epidemic Diseases (Amendment) Ordinance, 2020 and Disaster Management Act, 2005. The Act gives the power and responsibility to the State of Indus with regard to management and control of any disaster.</p>
<p><u>PARTIES TO DISPUTE</u></p>	<p style="text-align: center;">A) Chetri and Others B) State of Badlapur and Healthone</p>
<p><u>CAUSE OF ACTION</u></p>	<p>Before the second wave of corona virus outbreak, top researcher and virologist advised government to have enough oxygen supply for the patients. But due to the shortage of oxygen supply at the Badlapur Covid recovery centre, thupden and seven others died. Chetri, who is the son of thupden along with others decided to file a suit for the negligence of the authorities.</p>
<p><u>ACTION TAKEN BY THE PARTIES</u></p>	<p>Mr Chetri and seven others filed a suit against the State and HealthONE in the Badlapur High Court, seeking compensation of Rs. 10 crores on the grounds of medical negligence and the State's failure to perform its statutory duties. The suit also claimed damages for the families of all those who died at the Covid Recovery Facility in Badlapur as a result of the facility's carelessness. HealthONE has issued a written statement claiming that its participation was limited to that of a service provider and that sole obligation must be borne by the government. It has also claimed that because it was solely working for the Government, it had no commitment to the Plaintiffs. The state has claimed that there was no carelessness on its side, that the government did everything possible to contain the outbreak, and that a second wave of the pandemic was not expected. In any case, providing medical care during a pandemic is a sovereign role of the state; so, the State of Indus is not accountable for the lives lost due to a lack of oxygen supply because the government did everything possible to combat the pandemic in such a big country.</p>

ISSUES RAISED

ISSUE 1: WHETHER THE SUIT IS MAINTAINABLE OR NOT?

[1.1] JURISDICTION REQUIREMENTS MET

[1.2] FOR FUNDAMENTAL RIGHT INFRINGEMENT, NO NEED TO APPROACH
CONSUMER FORUMS

[1.3] INTERNATIONAL CONVENTIONS

**ISSUE 2: WHETHER THE DEFENDANT OWES A LEGAL DUTY TO THE
PLAINTIFF?**

[2.1] BREACH OF CONSTITUTIONAL DUTY

[2.2] FINAL CONSTRAINTS NOT A VALID DEFENSE

[2.3] DISASTER MANAGEMENT ACT, 2005 AND EPIDEMIC DISEASE
ORDINANCE 2020

[2.4] CONCEPT OF WELFARE STATE

[2.5] PRINCIPLES OF SOCIALISM

**ISSUE 3: WHETHER THERE IS PRESENCE OF MEDICAL NEGLIGENCE, IF
DEFENDANT OWES A LEGAL DUTY TO THE PLAINTIFFS?**

[3.1] NEGLIGENCE

[3.2] BOLAM TEST

[3.3] INVENTORY CONTROL

**ISSUE 4: WHETHER THE STATE CAN BE MADE VICARIOUSLY LIABLE FOR
THE NEGLIGENCE ACT?**

[4.1] ARTICLE 300(1) OF THE CONSTITUTION OF INDIA

[4.2] HISTORY OF SOVEREIGN IMMUNITY

SUMMARY OF ARGUMENTS

ISSUE 1: WHETHER THE SUIT IS MAINTAINABLE OR NOT?

It is most humbly submitted that the present writ petition is maintainable as this was filed under the requisite jurisdiction. Further, there was no need to approach the Consumer forum in the instant case as there was fundamental right infringement. Finally, due recognition has to be given to the International Conventions.

ISSUE 2: WHETHER THE DEFENDANT OWES A LEGAL DUTY TO THE PLAINTIFF?

It is most humbly submitted that the defendant owes a legal duty in the present case to the plaintiff and there is a constitutional obligation on the part of the state to provide adequate medical facilities for which there is a breach of duty by the State. The financial constraints of the state can't stand a valid defence and considering the concept of welfare state and principles of socialism, the counsel submits that there is a legal duty and it has been violated by the State.

ISSUE 3: WHETHER THERE IS PRESENCE OF MEDICAL NEGLIGENCE, IF DEFENDANT OWES A LEGAL DUTY TO THE PLAINTIFFS?

It is humbly submitted that Oxygen is covered as a drug under the Drugs and Cosmetics Act, 1940. Inventory management is one of the essential methods in acquiring, and dispensing drugs by Pharmacy in a hospital and in the maintenance of buffer stocks too. The Health service provider has failed to maintain the buffer stock and the State also was negligent in responding to the purchase request made by the Health One Service provider. It is humbly submitted before this Hon'ble Court that the facts of the case clearly expounds the Negligent act of both the defendants and is humbly pleaded before this Hon'ble Court to declare that the defendants were Negligent for the legal duty owed to the plaintiffs.

**ISSUE 4: WHETHER THE STATE CAN BE MADE VICARIOUSLY LIABLE FOR
THE NEGLIGENCE ACT?**

It is humbly submitted that the defence of Sovereign Function of the doesn't hold as the age old doctrine from its root was abolished in its birth Country itself and the concept of Welfare State is the prime principle of India as enshrined in the Constitution of India, Though not expressly. The principle of "King can do no wrong" defeats the base of the Welfare State which is for the welfare of the people. Constitution is considered to be the supreme law of the land and the State is governed by the Rule of law as enshrined under Article 14 of the Constitution of India. The State is accountable to the people for its every activity. Though a partial immunity granted under the Article 300(1) of the Constitution to the State, the Act made by the Legislature is subject to the principles of the Constitution itself and thus it stands in conflict with the Concept of welfare state which is one of the basic structurea of the Constitution, where the Constitution (*suprema lex*) shall prevail.

ARGUMENTS ADVANCED

ISSUE 1: WHETHER THE SUIT IS MAINTAINABLE OR NOT?

1. It is most humbly submitted that the present writ petition is maintainable as this was filed under the requisite jurisdiction [A]. Further, there was no need to approach the Consumer forum in the instant case [B] and due recognition has to be given to the International Conventions.

[1.1] JURISDICTION REQUIREMENTS MET

2. The civil suit is filed under Section 9 of Civil Procedure Code, 1908. A civil court has jurisdiction to try a suit if two conditions are fulfilled:
 - (i) The suit must be of a civil nature
 - (ii) The cognizance of such a suit should not have been expressly or impliedly barred.

The expression "civil nature" is wider than the expression "civil proceeding"¹. Thus, a suit is of a civil nature if the principal question therein relates to the determination of a civil right and enforcement thereof. It is not the status of the parties to the suit, but the subject matter of it which determines whether or not the suit is of a civil nature. Both the conditions have been satisfied in the present case, which proves that the suit is maintainable.

[1.2] FOR FUNDAMENTAL RIGHT INFRINGEMENT, NO NEED TO APPROACH CONSUMER FORUMS

3. The existence of the alternative legal remedy is not a bar to the invocation of the High Court's Jurisdiction, when relief is sought in case of infringement of fundamental right. On midnight of July 7th 2021, the Covid Recovery facility at Badlapur ran out of oxygen and the hospital authorities told the relatives of the patients in the last minute to take care of the oxygen supply by themselves as the hospital ran out of oxygen. The Government engaged a company called HealthONE who was tasked with ensuring an adequate supply of required medical infrastructure and consumables.² The purpose of employing the company is to ensure the supply and if such a company can't provide the supplies, it is unclear as to how the hospital authorities expect the relatives of patients to take care of the oxygen supply.

¹ Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286 at pp.

² Moot proposition para 12

[1.3] INTERNATIONAL CONVENTIONS

4. A strategy adopted by the Supreme Court with a view to expand the ambit of Art 21, and to imply certain rights has been to interpret Art 21 along with international charters on Human Rights. For example, in PUCL, the Court has implied the right of privacy from Art. 21 by interpreting it in conformity with Art. 12 of the Universal Declaration on Human Rights and Art. 17 of the International Covenant on Civil and Political Rights, 1966. Both of these international documents provide for the right of privacy. India is a signatory to both and they do not go contrary to any part of Indian Municipal law. Likewise, Art. 25 of the Universal Declaration of Human Rights should be considered while deciding on the issues related to medical care. India being a signatory should not go contrary to these.
5. In the present case, no negligence was done on the part of doctor, if it was negligence on the part of doctor then consumer forum is the perfect body to sue, instead it was the hospital authorities who have failed to keep note of oxygen stock in the hospital. Therefore, from the above inferences, it is humbly submitted that the present suit is maintainable.

ISSUE 2: WHETHER THE DEFENDANT OWES A LEGAL DUTY TO THE PLAINTIFF?

It is most humbly submitted that the defendant owes a legal duty in the present case to the plaintiff and there is a constitutional obligation on the part of the state to provide adequate medical facilities

[2.1] BREACH OF CONSTITUTIONAL DUTY

6. The fundamental principle of English Law that wherever there is a right, there is a remedy (ubi jus ibi remedium) has been adopted by the Indian legal system also. Considering the issue from a constitutional perspective the following points have been observed
1. Right to health is an integral part of the Right to Life under Article 21 of the Constitution
 2. Constitution of Indus recognizes people of country as right holders and the state is duty bound and be the primary provider of all health related facilities.³
7. The Court in the present instance is dealing with violation of the right to health of the victims guaranteed and protected under Article 21 of the Constitution of India. After the judgment of the Supreme Court in *Pt. ParmanandKatara v. Union of India*⁴ and *Paschim*

³ Moot proposition para 5

⁴ 1989 AIR 2039

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*Banga Khet Mazdoor Samity v. State of West Bengal*⁵, no person can be denied adequate standard of medical care in Government health institutions. The excuse of lack of resources was never accepted by the Supreme Court of India.

8. In *PaschimBanga Khet Mazdoor Samity* (supra), it was specifically observed as under: “In a welfare state the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.

[2.2] FINANCIAL CONSTRAINTS NOT VALID DEFENSE

9. The Union of Indus being a founder member of the United Nations, it has ratified various international conventions including the Universal Declaration of Human Rights 1948 to secure health care right of every individual in the society⁶. Even though the subject of “public health, and sanitation, hospitals and dispensaries” were given under state list, the 15th Finance Commission report 2017 recommended that the subject of “public health” to be shifted to the Concurrent List.⁷
10. It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the Constitutional obligation of the State to provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints *Khatri (II) v. State of Bihar*⁸. The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view. It is necessary that a time-bound plan for providing these services should be chalked out keeping in view the

⁵ (1996)4 SCC 37

⁶ Moot proposition para 5

⁷ Moot Proposition para 3

⁸ 1981CriL J597

recommendations of the Committee as well as the requirements for ensuring availability of proper medical services in this regard as indicated and steps should be taken to implement the same. In addition to this, the present scenario also exposed the government's low priority over the health sector as only 1.3 % GDP was spent on public health care, while economically developed countries spend as much as 17% of the country's GDP.⁹

In the present case, the claim for compensation is for the violation of the fundamental rights of the seven victims and is fully supported by the above decisions of the Supreme Court of India.

[2.3]DISASTER MANAGEMENT ACT, 2005 AND EPIDEMIC DISEASE ORDINANCE, 2020

11. Top researchers and virologists had advised that patients recovering from Covid-19 would need oxygen support on priority and it is clearly an unreasonable contention that government claims this to be a situation that is not foreseeable¹⁰. Even after these warning Government of Indus decided to lower the restrictions imposed on the public which caused the covid 19 cases to surge again exponentially.
12. Epidemic Diseases (Amendment) Ordinance, 2020 under the section 2 and 2 A gives Central Government powers to take extraordinary measures and prescribe regulations for dangerous epidemic diseases.¹¹ Section 6 of the Disaster management act 2005 provides for the establishment of National Authority for Disaster management who are held responsible for laying down policies plans and guidelines for disaster management for ensuring timely and effective response to disaster.¹²

[2.4]CONCEPT OF WELFARE STATE

13. The Concept of Welfare state is further strengthened by the Directive Principles of State policy which set out the economic, social and political goals of the Indian Constitutional system. These Directives confer certain non-justiciable rights on the people, and place the government under an obligation to achieve and maximise social welfare and basic social values like health etc. Right to health inherent to right to dignity Article 21 to be read with article 38,42, 43 & 47¹³ It has been held in Mohammad Shafi v. Dr. Vilas¹⁴, that running of hospitals is not a part of the real functions of the State, and the State is liable for the negligence of such hospital employees.

⁹ Moot proposition para 4

¹⁰ Moot proposition para 14

¹¹ Moot proposition para 9

¹² Moot proposition para 10

¹³ Moot proposition para 6

¹⁴ A.I.R. 1982 Bom. 27.

[2.5] PRINCIPLES OF SOCIALISM

14. Democratic socialism aims to end disease and inequality of opportunity. Socialistic concept of society should be implemented in the spirit of the Constitution¹⁵. In *Samatha v. State of Andhra Pradesh*¹⁶ the Supreme Court has stated while defining socialism. “Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution” The Government’s claim on social media platform that, “no lives were lost due to a shortage of oxygen”¹⁷ proves the indifferent and insensitive attitude of the Government not taking into consideration the realities happening in the ground level. It is a vague contention on the part of the Government as the situation is not foreseeable. The private hospitals increased their orders for the supply of oxygen supply immediately¹⁸, no action was taken on the part of the Government and no explanation was provided in this regard.

Thus, the defendants humbly submit that in the present case there is a breach of the legal duty towards the plaintiff.

ISSUE 3: WHETHER THERE IS PRESENCE OF MEDICAL NEGLIGENCE, IF DEFENDANT OWES A LEGAL DUTY TO THE PLAINTIFFS?

[3.1] NEGLIGENCE

15. *Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. ... the definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former’s conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.*¹⁹

¹⁵ G.B. Pant University of Agriculture & Technology v. State of Uttar Pradesh (2000) 7 SCC 109

¹⁶ AIR 1997 SC 3297

¹⁷ Moot proposition para 18

¹⁸ Moot proposition para 14

¹⁹ Law of Torts, Ratanlal & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh), pp.441-442.

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16. Negligence has three meanings. They are:²⁰

- (i) a state of mind, in which it is, opposed to intention;
- (ii) careless conduct
- (iii) the breach of a duty to take care that is imposed by either common or statute law

The essential components of negligence, as recognised, are three: “duty”, “breach” and “resulting damage”, that is to say:²¹

- (1) the existence of a duty to take care, which is owed by the defendant to the complainant;
- (2) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and
- (3) damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant.

17. If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.²² The term “negligence” is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law.

Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt.²³

18. Negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.²⁴

*where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.*²⁵

²⁰ Charlesworth & Percy on Negligence (10th Edn., 2001), para 1.01.

²¹ *Ibid.*, para 1.23

²² *Ibid.*, para 1.24.

²³ Syad Akbar v. State of Karnataka.

²⁴ Bhalchandra Waman Pathe v. State of Maharashtra

²⁵ In Michael Hyde and Associates v. J.D. Williams & Co. Ltd. Sedley, L.J, from (Charlesworth & Percy, *ibid.*, para 8.03.)

[3.2] BOLAM TEST

19. The summarisation of the **Bolam Test** are as follows;

- I. *A professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession.*
- II. *He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field.*
- III. *He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill.*
- IV. *He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert.*
- V. *He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average.*²⁶

20. Res ipsa loquitur is a rule of evidence which in reality belongs to the Law of Tort. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence.²⁷

[3.3] INVENTORY CONTROL

21. Drug store management is based on principles of inventory control. Mismanagement of stores and non-applicability of Scientific and Modern techniques has been identified as the root cause of material storage in majority of hospitals.²⁸

Objective of Inventory Control²⁹

- (i) To supply drug in time.
- (ii) To reduce investment in inventories and made effective use of capital investment.
- (iii) Efforts are made to procure goods at minimum price without bargaining the quality.

²⁶ Bingham, L.J. in his speech in *Eckersley v. Binnie* from, (Charlesworth & Percy, *ibid.*, para 8.04)

²⁷ *Jacob Mathew v. State of Punjab*.

²⁸ Vishavdeep Singh, Harwinder Singh, Sukhjeet Singh, Drug Inventory Management of A Pharmacy Store by Combined Abc-Ved Analysis, *International Journal on Mechanical Engineering and Robotics (IJMER)*, 2015, Volume-3, Issue-5.

²⁹ Fabián Silva-Aravena, Irlanda Ceballos-Fuentealba and Eduardo Álvarez-Miranda, *Inventory Management at a Chilean Hospital Pharmacy: Case Study of a Dynamic Decision-Aid Tool*, *Mathematics* 2020, 8, 1962; doi:10.3390/math8111962.

(iv) To avoid stock out and shortage.

(v) Wastage are avoided

22. Buffer Stock: ³⁰

Buffer stock is used in emergency to meet the unforeseen demands . in other words it refers to minimum quantity of a particular item which must be kept in the stores of all time. Buffer stocks can be calculated using the following formula,

Buffer stocks= (Maximum consumption rate / day average- consumption rate / day)X lead time

Buffer stocks needs following factors to be taken into consideration like;

(i) Lead time

(ii) Nature of item and rate of consumption

(iii) Availability of substitutes

(iv)Re-order level

(v) Stock out cost

23. In light of the above authorities cited, it is humbly submitted in relation to the facts of the case, that,

I. The HealthONE had just approached the Government for permission only to place extra orders for cylinders while the private hospitals have already arranged for the oxygen cylinders. This delay in approach itself expounds the loss of reasonable care of the HeathONE towards the needs of the COVID Patients in the Recovery Centre.³¹

II. The oxygen in the CRF gone ran out on July 7, 2019.³² The patients died out of lack of oxygen on July 8, 2019.³³ The HealthONE a service provider in procuring the things for CRF had failed in acquiring oxygen. Then how can they trust upon the normal public of their capacity to arrange oxygen on their own within a night. There is no logic in reasoning of the duty bound HealthONE in intimating patients about the lack of Oxygen and to arrange them upon their own capacity within a night. This clearly shows the breach of legal duty, and the plea of contributory negligence, if any doesn't hold.

³⁰ Merchant SH. and Quadry JS. A textbook of Hospital pharmacy, 4th ed. Ahmadabad: B.S. Shah Prakakshan; 2001.

Parthasarathi G, Karin N-H, Nahata MC. A textbook of Clinical Pharmacy Practice-essential concepts and skills, 1st Edition. Chennai: Orient Longman Private Limited; 2004.

Nand P, Khar RK. A text Book of Hospital and Clinical Pharmacy Theory & Practice, 14thEdition. Birla Publication Pvt. Ltd. Delhi.

³¹ Lines 4 to 6 of Para 14 of the Moot Proposition.

³² Line 1 and 2 of Para 17 of the Moot Proposition.

³³ Line 1 and 2 of Para 18 of the Moot Proposition.

III. The State haven't responded to the request of the HealthONE and maliciously propounded that no death had occurred due to lack of oxygen.³⁴ This clearly expounds the status of state in masking the negligent act of them in not arranging oxygen for the CRF thereby breaching their Statutory duty

**ISSUE 4: WHETHER THE STATE CAN BE MADE VICARIOUSLY LIABLE FOR
THE NEGLIGENCE ACT?**

[4.1]ARTICLE 300(1) OF THE CONSTITUTION

24. 300. (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

- (1) The first part provides for the form and the cause-title in a suit and says that a State (omitting any reference to the Government of India) may sue or be sued by the name of the State, and*
- (2) that a State may sue or be sued in relation to its affairs in like cases as the corresponding provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted; and*
- (3) that the second part is subject to any provisions which may be made by an Act of the legislature of the State concerned, in due exercise of its legislative functions, in pursuance of powers conferred by the Constitution.*³⁵

25. The United Kingdom that that rule had become outmoded in the context of modern developments in state craft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up. Section 2(1) of the Act provides

³⁴ Line 9 of Para 18 of the Moot Proposition.

³⁵ State of Rajasthan v. Vidhyawati AIR 1962 SC 933

that the Crown shall be subject to all those liabilities, in tort, to which it would be subject if it were a private person of full age and capacity, in respect of torts committed by its servants or agents, subject to the other provisions of the Act. As already pointed out, the law applicable to India in respect of torts committed by a servant of the Government was very much in advance of the common law, before the enactment of the Crown Proceedings Act, 1947, which has revolutionised the law in the United Kingdom, also. It has not been claimed before us that the common law of the United Kingdom before it was altered by the said Act with effect from 1948, applied to the Rajasthan Union in 1949, or even earlier.

State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the oldfeudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India. Now that we have, by our Constitution, established a Republican form of Government, and one of the objectives is to establish a Socialistic State with its varied industrial and other activities, employing a large army of servants, there is no justification, in principle, or in public interest, that the State should not be held liable vicariously for the tortious act of its servant.

26. When the rule of immunity in favour of the Crown, based on common law in the United Kingdom, has disappeared from the land of its birth, there is no legal warrant for holding that it has any validity in this country, particularly after the Constitution.

(As the cause of action in this case arose after the coming into effect of the Constitution, in our opinion, it would be only recognising the old established rule, going back to more than 100 years....)³⁶

In England it was recognised that the King could not be sued. In illustrating the doctrine that the “Queen can do no wrong” Prof. Dicey gives what he describes as an “absurd example”, “if Queen were herself to shoot the Prime Minister through the head”, he says, “no court in England could take cognizance of the act”. The basis for it in England was both substantive and procedural. The former flowed from the divine right of the Kings and the latter from the feudal principle that the King could not be sued in his own courts. Yet it did not mean that he

³⁶ State of Bihar v. Abdul Majid [(1954) SCR 786]

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was above law. The true meaning of the expression “that King can do no wrong” meant “that the King has no legal power to do wrong”³⁷

*No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. From sincerity, efficiency and dignity of State as a juristic person, propounded in nineteenth century as sound sociological basis for State immunity the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government on a par with any other juristic legal entity. **Any watertight compartmentalization of the functions of the State as “sovereign and non-sovereign” or “governmental and non-governmental” is not sound.***

It is contrary to modern jurisprudential thinking. The need of the State to have extraordinary powers cannot be doubted. But with the conceptual change of statutory power being statutory duty for sake of society and the people the claim of a common man or ordinary citizen cannot be thrown out merely because it was done by an officer of the State even though it was against law and negligent. Needs of the State, duty of its officials and right of the citizens are required to be reconciled so that the rule of law in a Welfare State is not shaken.

*In **Welfare State**, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, **there is no rationale for the proposition that even if the officer is liable the State cannot be sued.***

27. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.

³⁷ N. Nagendra Rao & Co. v. State of A.P. (1994) 6 SCC 205

[4.2] HISTORY OF SOVEREIGN IMMUNITY

Federal of Torts Claims Act was enacted in America in 1946. Crown Proceedings Act was enacted in England in 1947. As far back as 1956 the First Law Commission in its Report on the liability of the State in tort, after exhaustive study of the law and legislations in England, America, Australia and France, concluded:

In the context of a Welfare State it is necessary to establish a just relation between the rights of the individual and the responsibilities of the State. While the responsibilities of the State have increased, the increase in its activities has led to a greater impact on the citizen. For the establishment of a just economic order industries are nationalised. Public utilities are taken over by the State. The State has launched huge irrigation and flood control schemes. The production of electricity has practically become a Government concern. The State has established and intends to establish big factories and manage them. The State carries on works departmentally. The doctrine of laissez-faire - which leaves everyone to look after himself to his best advantage has yielded place to the ideal of a Welfare State - which implies that the State takes care of those who are unable to help themselves.

The Commission after referring to various provisions in the Legislation of other countries observed:

The old distinction between sovereign and non-sovereign functions or governmental and non-governmental functions should no longer be invoked to determine the liability of the State. As Professor Friedman observes:

'It is now increasingly necessary to abandon the lingering fiction of a legally indivisible State, and of a feudal conception of the Crown, and to substitute for it the principle of legal liability where the State, either directly or through incorporated public authorities engages in activities of a commercial, industrial or managerial character. The proper test is not an impracticable distinction between governmental and non-governmental functions, but the nature and form of the activity in question'.

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28. In light of the above authorities cited, it is humbly submitted in relation to the facts of the case, that,

- I. The one of the defendants, HealthONE is in the footing of the authorised agent of the state in procuring the required materials for the functioning of the CRF. Hence in that capacity of the agent-owner relationship, the state can be made vicariously liable for the tortious act of the HealthONE.³⁸
- II. The defence of Sovereign Immunity can no longer hold good in the concept of Welfare State. The Welfare State is a concept different from the rule of the king where the people's welfare is the prime aim of the State. After the rise of the Constitution in India, no authority is rendered supreme than the law itself. It is the rule of the law in the State which is enshrined under the Article 14 of the Constitution of India.
- III. Though the s. 74 of the NDM, Act 2005, grants immunity to the actions of the State, the provisions stands in conflict with the concept of Welfare State which is basic structure of our Constitution. The Article 300(1) of the Constitution grants immunity to the state for the acts which are excluded by the Act of the Legislature made in line with the Constitution. When there is a conflict between the Act made by the Legislature and the Constitution, the Constitution which is the supreme law of the land (*Suprema lex*) shall prevail.³⁹

³⁸ Line 4 of para 12 of the Moot Proposition.

³⁹ C. Masilamani Mudaliar & Ors. v. The Idol Of Sri Swaminatha swami Thirukoil & Others, 1996 AIR 1697.

PRAYER

Various authorities were cited humbly, in light of the facts of the case upon which the arguments were submitted with utmost reverence for the Issues raised before this Hon'ble Court and is prayed with utmost humbleness before this Hon'ble Court to affirm the submissions of the Plaintiffs and pass order /orders, to confirm that,

- I. The Negligence in the treatment given by the Covid Recovery Facility is proved and HeathOne(one of the defendants) had failed to establish a reasonable care to the plaintiffs.
- II. The State of Badalpur who is also a joint tortfeasor, who has adopted the HealthONE for services is vicariously liable for the Negligent act of its agent.
- III. The Compensation claimed by the plaintiffs is reasonable for the pecuniary loss & for the mental agony suffered by the Plaintiffs.
- IV. The State of Badalpur is liable for Rupees 10 Crores to the plaintiffs severally, with interest of 12% per annum.

AND/OR pass any other order/orders as this Hon'ble Court deems fit and proper in the circumstances of the given case and in the light of Justice, Equity and Good Conscience and thus renders justice.

And for this act of kindness and justice the PLAINTIFF shall be duty bound and forever pray

All of which is submitted with utmost reverence

Place: Badalpur

Date: April, 2022.

S/d_____

COUNSEL FOR THE PLAINTIFF