
**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 DEFENDANT

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BOOKS

1. Ratanlal & Dhirajlal, Law of Torts, (24th Edn., 2002, edited by Justice G.P. Singh), pp.4418
2. Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith, p.246.
3. Charlesworth & Percy on Negligence (10th Edn., 2001)

ONLINE DATABASE

1. SCC OnLine
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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] SUIT IS NOT MAINTAINABLE

[1.2] ALTERNATIVE REMEDIES NOT EXHAUSTED - NATIONAL CONSUMER
DISPUTE REDRESSAL COMMISSION

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

[2.1] SOVEREIGN FUNCTION OF THE STATE

[2.2]HEALTHONE NOT LIABLE

[2.3] DISASTER MANAGEMENT ACT,2005

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

[3.1] NO NEGLIGENCE

**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?

The defendants humbly submit that the present petition is not maintainable under section 9¹ of CPC and the due procedure has also not been followed. Further, the alternative remedies such as the National Consumer Dispute Redressal Commission are not exhausted. Finally the present suit is not maintainable in the eyes of law.

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

It is most humbly submitted that the defendant does not owe a legal duty to the plaintiff as this is sovereign function of the state and the Company HealthONE is only a medical service provider which can't be made liable individually. Finally, there is immunity available for the legal process during times of disaster under the Disaster Management Act, 2005. Finally considering the unpredictable situation, there is no legal duty that the defendant owes to the plaintiff.

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

. It is humbly submitted that The level of Standard of Care cannot be set higher and is to be adjudged upon the facts and the circumstances of the case. In this present unforeseeable pandemic situation, the State had took all possible reasonable care to safeguard its people and the company employed by the State also rendered such standard of care to the patients. But the shortage of oxygen had happened due to sudden rise in demand for it, and is error of judgment in this case in procuring the oxygen for the Covid Recovery Facility.

¹ Section 9: Courts to try all civil suits unless barred.

The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

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

It is humbly submitted before this Hon'ble Court that the second part of Article 300(1) of the Constitution itself grants partial immunity to the State to be sued for its act, if it had made such legislation in its competence in line with the provisions of law, granting such immunity. The section 74 of the National Disaster Management Act, 2005 is such piece of legislation which grants immunity to the state for the act done by it during the disaster(herein the COVID -19 Pandemic). The Concept of Welfare State doesn't abolish the concept of "King can do no wrong" since the State is in the capacity of the king, bound with the moral duty to safeguard its people from a disaster. Hence, the act done by the state comes under the Sovereign Function of the State.

ISSUE 1: WHETHER THE SUIT IS MAINTAINABLE OR NOT?

1. The defendants humbly submit that the present petition is not maintainable as the due procedure under section 9 of CPC has not been followed [A]. Further, the alternative remedies such as the National Consumer Dispute Redressal Commission is not exhausted[B].

[1.1] SUIT IS NOT MAINTAINABLE

2. The term "jurisdiction" has not been defined in the Code. The word (jurisdiction) is derived from Latin terms "juris" and "dido" which means "I speak by the law." Stated simply, "jurisdiction" means the power or authority of a court of law to hear and determine a cause or a matter. It is the power to entertain, deal with and decide a suit, an action, petition or other proceeding.² In other words, by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.³
3. In the classic decision of Dhulabhai v. State of M.P.⁴, after considering a number of cases, Hidayatullah, C.J. summarised the following principles relating to the exclusion of jurisdiction of civil courts: Where a statute gives finality to orders of special tribunals, the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit.
4. The process of filing of suit in this case is service of notice to the defendant. Section 80⁵ of the Code of Civil Procedure, 1908 states that only after the expiry of two months from the date of service of notice to the government officials, a plaint can be filed in the Court of law. The main intention of the Legislative in the insertion of this section and adding this process in the filing of suit is to make sure that the Government or the Public Officer knows the reasons, demands or the concern of the Plaintiff for which the suit shall be instituted. By knowing the distress of the Plaintiff, the Public official can act upon it and rectify the situation. The time period of two months is also provided for the same reason. Prior notice has to be given before instituting a civil

² Concise Oxford English Dictionary (2002) at p. 768;

³ Official Trustee v. Sachindra Nath, AIR 1969 SC 823 at p. 827:

⁴ AIR 1969 SC 78: (1968) 3 SCR 662.

⁵ Section 80: Notice [(1)] [Save as otherwise provided in sub-section (2), no suits 3 [shall be instituted] against the Government (including the Government of the State of Jammu and Kashmir)] or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been 4 [delivered to, or left at the office of]

**[1.2] ALTERNATIVE REMEDIES NOT EXHAUSTED - NATIONAL CONSUMER DISPUTE
REDRESSAL COMMISSION**

5. It is humbly submitted that the expression 'consumer' as defined in Section 2(1)(d)(ii) of the Consumer Protection Act, 1986 includes persons getting or eligible for medical treatment in Government hospitals and that the expression 'services' as defined in Section 2(1)(o) of the Act includes services provided in the Government hospitals also. The said question has been considered in the recent decision of this Court in Indian Medical Association v. V.P. Shantha⁶. From this it is clear that when there is a separate commission to enquire into the consumer disputes, High Court is not the right platform to file the case.
6. In view of the said decision the only question which needs to be considered is whether the non-availability of facilities for treatment has resulted in denial of his fundamental right guaranteed under Article 21 of the Constitution Even though there is shortage of hospital beds, Thupden was shifted to covid recovery facility, Badlapur and proper care was provided to him as the doctors monitored his health condition constantly⁷ inspite of the fact that Thupden being a 50 year old person with type 2-diabetes, as he falls under the high risk category for Covid 19. The fundamental right of right to Health was not declined to Thupden on any basis as the doctors in the covid recovery facility treated him well. This too proves that there was no negligence⁸.

⁶ AIR1996SC550

⁷ Moot proposition para 16

⁸ Moot proposition para 16

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

7. It is most humbly submitted that the defendant does not owe a legal duty to the plaintiff as this is sovereign function of the state [A] and the Company HealthONE is only a medical service provider which can't be made liable individually [B]. Finally, there is immunity available for the legal process during times of disaster under the Disaster Management Act, 2005

[2.1] SOVEREIGN FUNCTION OF THE STATE

8. The doctrine of sovereign immunity holds that the government cannot be sued or held legally responsible for its actions or the actions of its branches, departments, agencies and employees. Thus, the doctrine of sovereign immunity done in the exercise of sovereign function is a defence. In the case of *Kasturi Lal v State of Uttar Pradesh*⁹, the judgement was based on two-fold points mentioned below.

1) the act was done in the purported exercise of statutory power

2) the act was done in the exercise of a sovereign function

9. Thus, in this case the government has exercised its powers. There is statutory power provided by 2A of epidemic diseases act 1897 and section 74 of the disaster management act protects the government against any suit or proceedings.

10. Union of Indus being a country with 135 crore population, has approximately 45,000 hospitals and 25,000 thousand public hospitals¹⁰. In such a scenario the government should consider all measure to meet the acute shortage of medical infrastructure and to provide health care facilities to every citizen, even though the state is duty bound it can't provide health facilities for everyone and so private players like HealthONE were employed for providing adequate supplies was one such measure.

11. The main reason for relaxing the restrictions after the 1st wave is *to revive the economy*¹¹ by reopening the offices and to recover from the losses suffered by majority, opening public transportations etc.

12. Government has made various efforts through social media and other platforms by way of awareness with advertisements to make sure that information is duly passed

⁹ AIR 1965 SC 1039

¹⁰ Moot proposition para 11

¹¹ Moot proposition para 13

public. Free vaccination camps were also organized to cover the senior citizens of the country.¹² The subject matter of public health, sanitation hospitals and dispensaries comes under the State List under the schedule 7 of the Constitution¹³ and the State of Badlapur should take an active role in arranging the oxygen supply COVID pandemic is a first of its kind and even though precautions were taken the second wave was not foreseeable¹⁴.

[2.2]HEALTHONE NOT LIABLE

13. No negligence on the part of Company as they have approached the Government to place additional orders for oxygen cylinders¹⁵. No liability can be placed on the Company as they don't have any obligation towards the Plaintiffs as it was working for the Government alone.¹⁶
14. These health care providers were clearly involved by the state particularly for Covid services. And these services are provided to work in par with the public sector capacity. Besides these health care service providers must strictly adhere to all the guidelines and protocols as given by the state government. Thus, it can be clearly established that, although private health care service providers are involved in providing essential service during COVID, they are clearly acting under the governments guidance and policy. HealthONE in the present case is acting in the capacity of servant and government being the masters are guiding and control the working of the service provider. Thus, HealthOne is not an independent contractor but a servant. Thus, a master - servant relationship is established between HealthOne and the Government, and a master is liable for the acts of the servant, servant is directly not liable for his acts

[2.3] DISASTER MANAGEMENT ACT,2005

15. It is submitted that once Covid-19 is declared as a "Notified Disaster/Disaster" and even otherwise as per Section 2(d) of the DMA 2005, Covid-19 Pandemic is a "Disaster" and therefore all the provisions including Section 12 of the DMA 2005 shall be applicable and come into play.

¹² Moot proposition para 14

¹³ Moot proposition para 3

¹⁴ Moot proposition para 22

¹⁵ Moot proposition para 14

¹⁶ Moot proposition para 21

16. Relying upon the decision of this Court in the case of Bhavnagar University v. Palitana Sugar Mill (P) Ltd.,¹⁷ it is submitted that when the language used in the section/provision is plain and unambiguous, no words shall be added, altered or modified unless it is plainly necessary to do so to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statute. It is submitted that in the present case the language used in Section 12¹⁸ of the DMA 2005 is plain and unambiguous and therefore the word "shall" shall be read as "shall" and the same should be construed as mandatorily to be provided.
17. The decision of this Court in the case of Swaraj Abhiyan v. Union of India¹⁹, it is submitted that as held by this Court, a plea of financial inability cannot be an excuse for disregarding statutory duties. Reliance is also placed on the decisions of this Court in the cases of Municipal Council, Ratlam v. Vardichan²⁰, and Khatri (2) v. State of Bihar²¹, and it is submitted that as observed the State may have its financial constraint and its priorities in expenditure, the law does not permit any government to deprive its citizens of constitutional rights on a plea of poverty. It is submitted therefore that the plea taken by the Central Government that the prayer of the Petitioner for the payment of ex gratia compensation for loss of life due to Covid-19 pandemic to the aggrieved families is beyond the fiscal affordability may not be accepted. It is submitted that the fiscal affordability/financial constraint cannot be a ground not to fulfil statutory obligation under the DMA 2005 and the constitutional obligation as provided Under Article 21 of the Constitution of India.
18. The Government claimed on social media platforms that “no lives were lost due to a shortage of oxygen” and this claim was made to reduce the chaos among the public and to reduce the illegal storing of necessary medical supplies like mask etc. by the people.

¹⁷ (2003) 2 SCC 111 (paras 25 & 26),

¹⁸ 12 Guidelines for minimum standards of relief. —The National Authority shall recommend guidelines for the minimum standards of relief to be provided to persons affected by disaster, which shall include,—

(i) the minimum requirements to be provided in the relief camps in relation to shelter, food, drinking water, medical cover and sanitation;

(ii) the special provisions to be made for widows and orphans;

(iii) ex gratia assistance on account of loss of life as also assistance on account of damage to houses and for restoration of means of livelihood;

(iv) such other relief as may be necessary.

¹⁹ (2016) 7 SCC 498 (paras 120 to 123)

²⁰ (1980) 4 SCC 162;

²¹ (1981) 1 SCC 627

As per the Section 74²² of the Disaster Management Act, 2005 immunity is provided against any legal process. Therefore, the Defendants submits that there is no legal duty towards the plaintiff and hence they can't be made liable.

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

[3.1] NO NEGLIGENCE

19. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant alleged with negligence acted in accord with the general and approved practice is enough to clear him of the allegation.

- I. when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial.
- II. when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

*A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment.*²³

*Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake: the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance.*²⁴

²² **Section 74: Immunity from legal process** —Officers and employees of the Central Government, National Authority, National Executive Committee, State Government, State Authority, State Executive Committee or District Authority shall be immune from legal process in regard to any warning in respect of any impending disaster communicated or disseminated by them in their official capacity or any action taken or direction issued by them in pursuance of such communication or dissemination.

²³ Jacob Mathew v. State of Punjab

²⁴ Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith, p.246.

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20. The standard of care must be the same at all times. The line of standard of care must not be raised depending on the facts and the circumstances of the case. The degree of standard of care can be stable or can be lowered. But setting a higher degree of standard would lead to injustice and lead to unilateral decisions.

A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society.²⁵

While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks.²⁶

21. The essential components of negligence, as recognised, are three: “duty”, “breach” and “resulting damage”, that is to say:²⁷

- (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.

Demarcating the line between negligence and error of judgment, Lord Fraser of Tullybelton in his speech observed:

Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made

²⁵ Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith, p.247.

²⁶ *Ibid.*,

²⁷ Charlesworth & Percy on Negligence (10th Edn., 2001), para 1.23.

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*by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having. And acting with ordinary care, then it is negligent. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligent.*²⁸

*A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil.*²⁹

*The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligence.*³⁰

*As there is no specific treatment for TEN, error of judgment in the process of diagnosis does not amount to deficiency in service, considering that the disease TEN is a rare occurring in 1 case out of 1.3 per million per year.*³¹

22. Since, the oxygen requirement for the COVID patients doesn't come under the category of therapy to cure the disease. It is only a facilitation to maintain the patients and will not be covered under the curtain of negligence of treatment rendered to the patients.

23. In this regard it would be imperative to notice the views rendered in **Jacob Mathew v. State of Punjab**, [(2005) 6 SCC 1], where the court came to the conclusions:

- (i) Mere deviation from normal professional practice is not necessarily evidence of negligence.
- (ii) Mere accident is not evidence of negligence
- (iii) An error of judgment on the part of a professional is not negligence per se.

²⁸ Bolam v. Friern Hospital Management Committee, (1957) 2 All ER 118.

²⁹ Jacob Mathew v. State of Punjab (2005) 6 SCC 1

³⁰ Reiterated in Spring Meadows Hospital v. Harjol Ahluwalia, (1998) 4 SCC 39.

³¹ Malay Kumar Ganguly v. Sukumar Mukherjee & Ors AIR 2010 SC 1162.

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(iv) Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of res ipsa loquitur.

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

- I. The HealthONE had approached the Government for permission to place extra orders for cylinders while the private hospitals have already arranged for the oxygen cylinders.³² The HealthONE had established a reasonable standard of care in foreseeing the consequences of the lack of oxygen and the rise in demand for the oxygen. Hence, the HealthONE had made such all efforts to take reasonable care upon their patients.
- II. The plea of plaintiffs, if any, for not foreseeing the consequences of the situation by the State of Badalpur is not maintainable as the mere error of judgement cannot be alleged as the negligent act.

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

[4.1]ARTICLE 300(1) OF THE CONSTITUTION

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.

- I. *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*
- II. *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*

³² Lines 4 to 6 of Para 14 of the Moot Proposition.

III. *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.*³³

[4.2] HISTORY OF SOVEREIGN IMMUNITY

History of Sovereign Immunity:³⁴

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

³³ State of Rajasthan v. Vidhyawati AIR 1962 SC 933

³⁴ N. Nagendra Rao & Co. v. State of A.P. (1994) 6 SCC 205

test is not an impracticable distinction between governmental and non-governmental functions, but the nature and form of the activity in question'.

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

- I. The second part of the Article 300(1) states that the State cannot be sued if provisions which granting the immunity to the state was enacted in the competence of Legislature in line with the principles of the Constitution of Indus.
- II. Section 74 of the The National Disaster Management Act, 2005 grants immunity of the State to be sued for its act during the circumstances of the disaster herein the pandemic caused by the virus(COVID-19). The constitutionality of Section 74 of the National Disaster Management Act, 2005 was not tested before any Court of Law and hence the Hon'ble Court can presume that the provision is in accordance with the principles of the Constitution.

Though the concept of Welfare State is prevailing in the Country of Indus, the phrase of " King can do no wrong" shall prevail because the King is morally bound to safeguard its people from the disaster. The act such performed in light of exercising such moral obligation would still be covered under the sovereign function of the State and cannot be questioned before any Court / Tribunal.

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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 Defendants and pass order /orders that,

- I. The Standard of Care established by the HealthONE is reasonable according to the facts and circumstances of the case, and no negligent act was found.
- II. The State established a reasonable care upon the safeguarding of the people and the act performed by the State is a Sovereign Function of the State, which cannot be called in question before the Hon'ble Court.
- III. The Compensation claimed by the plaintiffs is not reasonable and the suit is dismissed as to costs.

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 DEFENDANTS shall be duty bound and forever pray

All of which is submitted with utmost reverence

Place: Badalpur.

S/d _____

Date: April, 2022.

COUNSEL FOR THE DEFENDANTS