

Plea Moved in Bombay High Court Challenging The De-facto Imposition of 'Aarogya Setu' in Passport Office, Mumbai

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A petition has been moved in the Bombay High Court, challenging the de-facto imposition of Aarogya Setu by officials of Passport Seva Kendra, Mumbai.

The petition has been filed by one Tanya Mahajan (an architect by profession) through **Software Freedom Law Centre, India and Advocate Aditi Saxena.**

The Case of the Petitioner

It is the case of the Petitioner that while the Respondents (officials of Passport Seva Kendra, Mumbai) maintain that the use of Aarogya Setu is voluntary on their website, it has been made mandatory in practice by the Respondents and is infact a de-facto imposition of the use of the mobile application.

The plea states that on account of absence of Aarogya Setu in her mobile, the Petitioner is being denied entry and service by officials of Passport Seva Kendra, Mumbai.

The Plea has also claimed that the de-facto imposition of Aarogya Setu by the Respondents affects the right to privacy of the Petitioner and goes against the principles laid down by the Supreme Court in **Justice K.S. Puttaswamy vs. Union of India [(2017) 10 SCC 1]**.

It has been contended that there must be a law in existence to justify an encroachment on privacy.

The Plea further contends that as per MHA guidelines, Aarogya Setu app has been made voluntary in nature and, and while the Respondents, on their website, maintain that Aarogya Setu is voluntary, and the website only "advises" to install the mobile application, **still it has been made mandatory in practice by officials of Passport Seva Kendra, Mumbai.**

Notably, it has been argued that the act of the Respondents is contradictory to the stand taken by the Central Government in the High Court of Karnataka in **Anivar A Aravind v Ministry of Home Affairs (Writ Petition (GM-RES) No. 7483/2020)**, where it has stated on record that Aarogya Setu is not mandatory in nature pursuant to the Ministry of Home Affairs Guidelines.

It may be noted that in the above-mentioned case, the High Court of Karnataka had ordered that State or Central Government or any of their agencies or state

instrumentalities cannot refuse a benefit or a service to a citizen who does not have Aarogya Setu installed in their device.

It has also been stated in the plea that Aarogya Setu App collects location information, health data and personal information of users and such **de-facto mandatory collection and processing of information cannot be carried out without an enabling law.**

The plea argues that the de-facto imposition violates the personal autonomy of the citizen and same is in violation of the law declared by the Supreme Court in **Maneka Gandhi vs. the Union of India (1978 AIR SC 597).**

Prayers of the Plea

Direction has been sought for the Respondent authorities **to make use of Aarogya Setu application by citizens voluntary** and not to deny any service to the petitioner for not installing the Aarogya Setu application.

Further, pending the hearing and final disposal of this matter, it has been prayed before the Court that Respondents be directed to allow the entry of the Petitioner in the Passport Seva Kendra, Malad without Aarogya Setu installed in her mobile device.

Court's Order

The plea was listed for hearing on Wednesday (09th December 2020) and High Court sought the response of the Central government.

The Bench of **Justice Ujjal Bhuyan and Justice Abhay Ahuja** issued notice asking respondents to file their reply before the next date.

The matter has been posted for further hearing on Thursday (07th January 2021).

Notably, *LiveLaw* had recently reported the order passed by the CIC wherein it was observed: "*None of the CPIOs(Central Public Information Officers) were able to explain anything regarding who created the App, where are the files, and the same is extremely preposterous*".

In fact, the Central Information Commission on 27th October had issued show-cause notices to the Central Public Information Officers(CPIOs) of the Ministry of Electronics and Information Technology, National Informatics Centre and National E-Governance Division(NeGD) to show reasons as to why penalty u/s 20 of the Right To Information Act should not be imposed on them for *prima facie obstruction of information and providing an evasive reply on an RTI application related to Arogya Setu App*.

Following the controversy generated by the Central Information Commission pulling up the central government authorities for not sharing information about the 'Aarogya

Setu App', the Ministry of Electronics and Information Technology (MeitY) had issued a clarification statement

The Ministry had issued a statement on Wednesday evening stating that the app was developed via a public-private partnership in "record time" of 21 days to tackle COVID-19 and that the names of all persons associated with its development and management are available in the public domain.

Aarogya Setu: Mandatory or Optional?

The Guidelines issued by the Ministry of Home Affairs on May 01st, had made the use of Aarogya Setu App Mandatory by stating

"Use of Aarogya Setu app shall be mandatory for all the employees, both private and public. It shall be the responsibility of the Head of the Respective Organization to ensure 100% coverage of this app among the employees".

However, the guidelines issued by the Union Ministry of Home Affairs for the fourth phase of lockdown **from May 18 to May 31**, had diluted the mandatory condition for the use of 'Aarogya Setu'.

The directive in the guidelines issued on Sunday, May 17, had stated,

"With a view to ensuring safety in offices and workplaces, employers on best effort basis should ensure that Aarogya Setu is installed by employees having compatible mobile phones" (emphasis supplied)

Bail Conditions involving the installation of Aarogya Setu App

While on one hand, various High Courts, including the Madhya Pradesh High Court and Jharkhand High Court, have been asking the Bail applicants to download the Aarogya Setu App in their mobile phones as a bail condition, on the other hand, some High Courts have questioned the mandatory use of download the Aarogya Setu App.

On 17th May, in almost all the matters where the bail was granted, the Additional Sessions Judge at Patiala House Court had directed the prisoners to download the Aarogya Setu app and keep their GPS and Bluetooth open as a mandatory bail condition.

The Delhi High Court, in April 2020, had requested all the officers and officials of the court to download the Aarogya Setu application to check the status of the spread of COVID19 virus in their respective areas.

Till now, at least in more than 2000 bail applications, the Madhya Pradesh High Court has asked the Bail Applicants to install **Aarogya Setu App** in their mobile phones

(source - <https://indiankanoon.org/>)

Questions on the Mandatory use of Aarogya Setu App

It may be noted that the High Court of Kerala, in May 2020 had orally raised doubts about the practicality of the mandatory condition imposed on employers to make their employees download 'Aarogya Setu', the contact tracing app developed by the National Informatics Centre amid the COVID-19 pandemic.

"There are valid concerns about the mandatory condition on the employers. Many have no smartphones. How do you propose to implement this?", asked a single bench of Justice P Gopinath.

Not just that, the High Court of Kerala had also sought a statement from the Central Government on the data privacy safeguards of the 'Aarogya Setu' amid the COVID-19 pandemic.

The Court had asked whether the Central Government can guarantee that the information collected by the Aarogya Setu app would not be misused.

Notably, the Airport Authority of India (AAI) had told the Karnataka High Court that use of Aarogya Setu Application by passengers is optional and not mandatory (in August 2020).

In September 2020, while hearing a PIL against Deputy Collector, Margao's order making usage of Aarogya Setu App mandatory for entering the Old Collectorate

building at Margao, the High Court of Bombay at Goa had asked the State government to file an affidavit indicating that usage of the said app is no longer mandatory in light of a statement made by the Advocate General of Goa Devidas Pangam to that effect.

Recently, the Karnataka High Court has clarified that in absence of any legislation, neither the State government, nor the Central Government or its agencies and instrumentalities can deny any benefit or services to a citizen only on the ground that he has not installed Aarogya Setu application on his cell phone.

A division bench of **Chief Justice Abhay Oka and Justice Ashok S Kinagi** issued the clarification while hearing a petition filed by Anivar A Aravind who has challenged the mandatory use of Aarogya Setu application for accessing public services.

It may be noted that in May 2020, Speaking at a webinar organized by Daksh, an advocacy group, Former Supreme Court Judge, **Justice BN Srikrishna** had said that mandating the use of Aarogya Setu app "causes more concern to citizens than benefit."

<https://www.livelaw.in/news-updates/bomaby-high-court-imposition-of-arogya-setu-app-passport-office-167099?infinitemscroll=1>