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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C)3031/2020

RAKESH MALHOTRA Petitioner

Through: Petitioner in person.

versus

GOVERNMENT OF NATIONAL CAPITAL
TERRITORY OF INDIA AND ORS Respondents

Through: Mr. Rahul Mehra, Sr. Advocate with
Mr. Satyakam, ASC, and Mr.
Chaitanya Gosain and, Advocate for
GNCTD.

Mr. Chetan Sharma, ASG with Ms.
Monika Arora, CGSC and Mr.
Shriram Tiwary, Advocate for R-3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

ORDER
20.04.2021

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1. At the outset, it is pointed out that the appearance of Mr. Rahul Mehra, learned senior counsel representing the GNCTD and Mr. Satyakam, ASC has not been correctly recorded in our last order dated 19.04.2021.
2. The correct position may be recorded. Mr. Satyakam, ASC states that he is instructing. Mr. Rahul Mehra, learned senior counsel on behalf of the GNCTD.
3. We have heard the learned Additional Solicitor General, Mr. Chetan

Sharma, petitioner-in-person, Mr. Rakesh Malhotra, Mr. Rahul Mehra, Learned Senior Counsel appears alongwith Mr. Satyakam on behalf of respondent Nos. 1 & 2 as well as two senior officers of the Central Government, namely, Ms. Roli Khare, Director and Mr. Nipun Vinayak, Joint Secretary, Ministry of Health and Family Welfare at substantial length.

4. In terms of our order passed yesterday, the Central Government has filed an affidavit. Mr. Mehra states that though all efforts were made to file the affidavit on behalf of the GNCTD, the same could not be completed and, therefore, the same has not been filed today. Let the affidavit be filed by the GNCTD by 1:00 PM on 22.04.2021. The same shall be circulated to all the others present in the proceedings.

5. We have perused the affidavit filed on behalf of the Central Government, filed by Mr. Rajender Kumar, Under Secretary, Ministry of Health and Family Welfare. The affidavit has, firstly, dealt with the aspect of availability of COVID beds, as made available by the Central Government in the NCT of Delhi. It discloses that in a meeting held on 09.04.2021, it was decided that 500 ICU bedded DRDO COVID Care Hospital be established in Delhi Cantt. It is stated that 250 ICU beds have been operationalised by DRDO and another 250 beds shall be operationalised by 22.04.2021. It has been further decided to provide 25 medical officers and 75 paramedics to this COVID care centre from Central Armed Paramilitary Forces.

6. The Central Government has also called upon the States and Union Territories to provide their requirements for Ventilators in the States, so as to consider the supply of Ventilators as per the availability at the earliest. It

is further stated that as per the demand of the GNCTD, 763 ventilators have been supplied by the Government of India. In addition to that, Safdarjung Hospital has been provided with 105 ventilators, Ram Manohar Lohia Hospital with 5 ventilators, LHMC with 5 ventilators, Ayush Hospital with 2 ventilators, ESIC Hospital with 10 ventilators and the DRDO facility has been provided with 500 ventilators.

7. The availability of beds for COVID patients, as on 19.04.2021 in the named Central Government run hospitals has also been provided in paragraph 8 of the affidavit. The same add up to 1432 beds. These are apart from 250 beds that the DRDO would make available, 250 beds in LHMC and 36 in Safdarjung Hospital, which are also being planned. She points out that in other hospitals and facilities – other than those detailed in the affidavit, 2105 beds have been made available by the Central Government in the NCT of Delhi, and with the addition of these beds, the current COVID beds allocated stand at about 4091 bed. The complete break up of these COVID beds, should be indicated in the affidavit to be filed by the Central Government on 22.04.2021 by 01:00 p.m. The same should contain details of ICU/ Non ICU beds, and beds with/ without oxygen, and with/ without ventilator.

8. Mr. Mehra has submitted that last year, when the pandemic was raging, the Central Government had made 4,112 beds available for COVID patients in its hospitals and facilities at Delhi. He states that the number of COVID positive patients are four times presently than the peak figures of last year. He submits that the Central Government should allocate more beds in its hospitals and facilities for COVID patients.

9. Ms.Roli Khare, Director, Ministry of Health and Family Welfare has stated that the Central Government is endeavoring to make more beds available. She states that presently the hospitals of the Central Government are occupied by non-covid patients in need of critical care, such as patients who require dialysis, or suffering from cancer and other serious disease. Considering the fact that the number of COVID patients, who are now needing hospitals is far greater than the numbers which were turning up last year – even during the peak of the pandemic, the Central Government should urgently look to allocate more beds among their hospitals for COVID patients. We direct the Central Government to look into the aspect of bed allocation for COVID patients keeping in view the prevailing circumstances, and report in this regard on the next date of hearing i.e. 22.04.2021.

10. The other aspect on which we have heard submissions, is the aspect of availability of medical Oxygen in the NCT of Delhi. On this front, the situation is rather alarming. We have been informed during the course of hearing that the availability of Oxygen – as we pass this order, has dropped dramatically in Hospitals. The situation is such, that the Oxygen pressure has been reduced, to keep it going longer, with the result that serious patients, who are in need of Oxygen have suffered drastic fall in their Oxygen levels, which is turning out to be one of the major causes of fatality of COVID patients.

11. Dr.Nipun Vinayak, Joint Secretary, Ministry of Health and Family Welfare has explained to us that the Department for Promotion of Industries and Internal Trade(DPIIT) is looking into the aspect of diversion of Oxygen from industrial use for medical use in view of the urgent need of Oxygen. He submits that allocations of Oxygen have been made on the basis of the

demands made by the States, and on the basis of the formula evolved by the experts about the requirement of Oxygen for patients suffering from COVID. He states that the allocation for Delhi is 378 MT per day.

12. On the other hand, Mr.Mehra submits that there is grave dearth of medical Oxygen in Delhi's hospitals, and the requirement according to him is 700 MT of medical Oxygen per day. He submits that there is non-compliance of the order passed by us yesterday, whereby we required M/s INOX to honor its contract with the GNCTD and Delhi hospital and to supply 140 MT of Oxygen to Delhi. He states that the reason for non-compliance is stated to be the possible law and order situation that may be created, in case the M/s INOX were to transport the Oxygen from Uttar Pradesh to Delhi, where the manufacturing unit of INOX is situated.

13. Mr. Vinayak has also informed us of the industries, which are permitted to continue with the use of Oxygen. He submits that apart from those industries, all others have been directed not to use Oxygen, so that the same could be made available for medical use in the country. Amongst the permitted industries, we find that the Steel and Petro-Chemical industries are also included.

14. Looking to the serious and emergent situation, we call upon the Central Government to seriously consider issuing appropriate orders in respect of the Steel and Petro-Chemical industries, so that a balance can be maintained between the needs of the people at large – who are suffering from COVID and are serious, and the needs of the industries. After all, if more and more people are going to suffer seriously from COVID – which in turn may result in extended lockdown and closures, the purpose of full production of Steel and Petroleum products would also be of no avail, as

their consumption is bound to fall in that scenario. We, therefore, expect the Central Government to urgently hold a meeting with all stakeholders including from the Steel and Petro-Chemical industries, so that sufficient portion of the Oxygen produced by these industries could be diverted for medical needs for the period required to tide over the prevailing medical emergency.

15. Mr.Vinayak has also pointed out that the Central Government had sanctioned funds in December, 2020 to set up Pressure Swing Adsorption(PSA) plants for production of oxygen throughout the country. For the NCT of Delhi, eight such plants were sanctioned. He states that only one has become operational till date, and two of the hospitals, namely, Satyawadi Raja Harish Chandra Hospital and Vardhaman Mahavir Medical College & Safdarjung Hospital have not yet provided the site clearance where the PSA plant could be installed. Two of the hospitals have now provided the site clearance and the equipment would be installed by 30.04.2021. We direct the respondents to ensure that the remaining hospitals – who have not acted in response to the said scheme of the Central Government, act immediately. Compliance be reported on the next date.

16. Looking to the number of COVID positive patients all over the country, and the pattern which is emerging with regard to the spread of the viral infection and the severity with which it is impacting people in different States and regions, we direct the Central Government to review the allocation of Oxygen on a dynamic basis i.e. on a day to day basis, so that its utilization is achieved in the most efficient manner.

17. Another aspect highlighted by Mr.Vinayak is with regard to the efficient usage of Oxygen. He points out that the State of Kerala has led by

example in this regard, and the use of Oxygen by Kerala is most efficient, which should be followed by all.

18. As we pass this order, we are informed that the Oxygen supplies in various Covid hospitals in Delhi, including Sir Ganga Ram Hospital, and Max Hospital are about to get exhausted in the next about 4-8 hours. The decision taken by the Central Government to divert supplies from industrial use for medical use, for some obscure reason, has been sought to be implemented only from 22.04.2021.

19. We do not find any justification for the same. The need for oxygen is now. Any delay in this regard would lead to loss of precious lives. We, therefore, direct the Central Government to implement the said decision forthwith, and make available oxygen to hospitals which are running out of their supplies, lest there is grave loss of life suffered by patients being treated thereat.

20. Since M/s INOX has not complied with our last order dated 19.04.2021, we direct issuance of Notice of Contempt to M/s INOX returnable on 22.04.2021. Notice be served through email. We direct the Managing Director/ Owner of M/s INOX to personally remain present during the hearing on the next date of hearing. The State of UP, through the Chief Secretary should also remain present during the hearing. Notice shall also be issued to him.

21. On the aspect of ramping up of the testing facilities for Covid-19 through the RT-PCR test, there are certain aspects which need to be addressed by the Central Government, and its instrumentalities. We are informed that the equipment for setting up RT-PCR test labs are imported, and medical equipment/ machines for which import orders have been placed,

are being dealt with routinely at Customs Ports. It is essential that all such medical machines/ equipments, medicines, etc. which are imported should be handled and cleared at top priority by the Customs. We direct the Central Government to issue necessary directions in this regard forthwith.

22. For the purpose of setting up of Covid testing facilities, the entrepreneurs/ doctors have to obtain clearance from the Indian Council for Medical Research (ICMR). It has been brought to our notice that the procedure for such clearances is also highly time consuming. We do not wish to, in any way, impinge on the authority of ICMR, and we do not expect the ICMR to relax its standards in the matter of granting its permissions and clearances. However, looking to the present day situation, we direct the ICMR to give top priority for such clearances so that the RT-PCR Labs could be set up or expanded without any delay.

23. Another aspect that has been brought to our notice, which is also resulting in delay in preparation of RT-PCR Test Reports, is the Software devised for uploading of the Test results on the website. The patients who undergo the RT-PCR test,s are required to provide their Aadhar Cards. Despite that being the position, the testing agencies are required to fill up detailed forms online, which take up to 15 minutes per form. We, therefore, direct the Central Government, and the ICMR, to review the form in which the information is required to be uploaded by the testing agencies, so as to reduce their burden and wastage of time, as this appears to be acting as a bottleneck in the matter of preparation of reports.

24. We have also noticed reports in newspapers about the critical medicines required for the treatment of serious Covid-19 patients falling in short supply, and also being sold at a premium in the black market. It

appears that the requisite drugs are being hoarded by some unscrupulous persons/ dealers or retailers. We direct the Central Government, and its agencies, particularly the Drug Controller of India, to issue necessary directions in this regard to all the licensees, and the Government should undertake checking on a regular basis to unearth all such cases of hoarding which is leading to scarcity of drugs in the market for the needy patients. Strict penal action should be taken against those indulging in such practices.

25. The affidavit filed by the Central Government discloses that – so far as Remdesivir Drug is concerned, the Central Government has supplied 10.40 lakh vials to all the States and Union Territories during the last 9 days (between 11th and 19th April), out of which 40,132 vials have been supplied to Delhi. Meanwhile, DGCI has granted immediate permission to license holders for manufacture of the Remdesivir at 20 additional sites, adding production capacity of 35.3 vials/ month. It is stated that this would ramp up the production capacity for manufacturing this drug to around 74.10 lakh vials/ month.

26. The Central Government should dynamically review the distribution of Remdesivir in the States and Union Territories on a daily basis, on the basis of the need, assessed on the basis of the serious active Covid patients, who need to be administered the said Drug. This is essential to maximise the efficient use of the said Drug.

27. There are a number of other drugs which are being used for treatment Covid-19 patients, such as *Tocilizumab*, *Favipiravir*, *Ivermectin*, *Dexamethasone*, *Methylprednisolone*, *Dalteparin*, *Enoxaparin*, *HCQ* and *Baricitinib*. As per news reports, there are shortages of some, if not all, of the aforesaid drugs. Looking to the emergent situation, we direct the Central

Government to immediately reach out to the manufacturers/ patent holders/ licensees so as to forthwith ramp up the production capacities of the above, and all such other medications, as are essential for treatment of Covid positive patients. We may take note of the fact that the Patents Act provides for Compulsory Licenses under Section 84, and Special Provision for Compulsory Licenses or Notifications by the Central Government, under Section 92. Section 100 provides the power of the Central Government to use inventions for purposes of the Government.

28. Looking to the present day situation, there can be no doubt that a case is made out for exercise of its power by the Central Government/ Controller under the aforesaid provisions of law. At the same time, the interests of the Patent holders/ licensees should be kept in mind, since it on account of their investments, inventions and hard work that such like medicines are made available to the public at large. The best course would be encourage the existing manufacturers to ramp up their production on a war footing. They should also be encouraged to grant voluntary licenses to other entities to manufacture the requisite drugs. However, if such efforts do not fructify soon enough, the Government/ Controller should not hesitate to invoke their jurisdiction and powers under the aforesaid provisions of the Patents Act, since the lives of thousands of people are being lost each day in the country due to COVID. The lives of the people take priority over everything else. Even if such like powers are exercised, the patent holders/ manufacturers can be adequately compensated by fixation of fair license fee. The Central Government should swing into action in terms of this order in this regard without any delay, and report progress on the next date of hearing.

29. Another aspect that we may take note of is that as per one of the

reports, as many as about 44 lakhs vaccines have been wasted out of the 10 crores vaccines allocated to different States. This is because of the restriction with regard to the age, or category of people who are entitled to take the vaccine. According to the present dispensation, people who are above 45 years of age are entitled to take the vaccine. The Government has recently announced that from 01.05.2021, all above the age of 18 years would be entitled to take the vaccine. In our view, wastage of even a single dose of vaccine, when the same is proving to be life-saving, would be a criminal waste. We are informed that each vial of the vaccine has 10 doses. Once the vial is opened, it has to be either fully consumed, or the remainder goes waste. It should be possible for the Government(s) to devise ways and means so as to register volunteers who may be below the age group of 45 years, and above the age of 18 years – who could be called upon to take the residual doses of vaccine, in case, there are doses left unutilised after, say, 05.00 P.M on each day. That would ensure that all the doses are fully utilised, and not wasted. We may observe that this flexibility is available in other countries such as United States of America. For this purpose, the Government should modify their mobile COVIN application appropriately, urgently. We direct the Government to look into this aspect forthwith and report status on the next date.

30. List on 22.04.2021.

VIPIN SANGHI, J

REKHA PALLI, J

APRIL 20, 2021

N.Khanna/ K.D.