

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

MONDAY, THE 10TH DAY OF MAY 2021 / 20TH VAISAKHA, 1943

WP(C).No.10659 OF 2021(S)

PETITIONER:

ADV. SABU P. JOSEPH, AGED 46 YEARS,
SON OF T. A. JOSEPH, VICE-CHAIRMAN -
LEGAL CELL, HUMAN RIGHTS FORUM,
REG. NO. 186/IV/19, REGISTERED OFFICE AT
B.NO. XX-638, CLASSIC TOWER, A.M. ROAD,
PERUMBAVOOR, 683 542, ERNAKULAM DISTRICT.

BY ADVS.SRI.C.N.SREEKUMAR
SMT.MANJU PAUL
SHRI.SURESHKUMAR.C

RESPONDENTS:

- 1 STATE OF KERALA REPRESENTED BY THE CHIEF SECRETARY, GOVERNMENT OF KERALA, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM 695 001.
- 2 DIRECTOR OF HEALTH SERVICES, DIRECTORATE OF HEALTH SERVICES, GENERAL HOSPITAL JUNCTION, THIRUVANANTHAPURAM 695 035.
- 3 INDIAN COUNCIL FOR MEDICAL RESEARCH, RAMALINGASWAMI BHAVAN, P.O. BOX NO. 4911, ANSARI NAGAR, NEW DELHI 110029, REPRESENTED BY ITS SECRETARY AND DIRECTOR GENERAL.
- 4 UNION OF INDIA, REPRESENTED BY ITS SECRETARY, HEALTH AND FAMILY WELFARE, NIRMAN BAVAN, NEW DELHI 110011.
- ADDL.5 KERALA PRIVATE HOSPITALS ASSOCIATION HAVING ITS REGISTERED OFFICE AT KPHA HEAD QUARTERS, ASHIRBHAVAN ROAD, KACHERIPPADY, ERNAKULAM, KOCHI 682018, REPRESENTED BY ITS PRESIDENT, HUSSAIN KOYA THANGAL.

ADDL. 6 STATE HEALTH AGENCY REPRESENTED BY EXECUTIVE DIRECTOR, ARTECH MEENAKSHI PLAZA, 5TH AND 8TH FLOOR, OPP. GOVT. WOMEN AND CHILD HOSPITAL, THYCAUD, THIRUVANANTHAPURAM-695014

ADDL. 7 NATIONAL HEALTH MISSION REPRESENTED BY THE EXECUTIVE DIRECTOR, NRHM BUILDING, GENERAL HOSPITAL, DIRECTORATE OF HEALTH SERVICES, JAI VIHAR, KANNUKUZH, THIRUVANANTHAPURAM-695035

ADDL. 8 KERALA MEDICAL SERVICES CORPORATION LIMITED REPRESENTED BY THE EXECUTIVE DIRECTOR, CV RAMAN PILLAI ROAD, NEAR WOMEN AND CHILDREN HOSPITAL, THYCAUD, THIRUVANANTHAPURAM-695014

ADDL. 9 THE INDIAN MEDICAL ASSOCIATION (IMA) KERALA REPRESENTED BY ITS PRESIDENT, HEADQUARTERS, ANAYARA P.O, THIRUVANANTHAPURAM-695029

ADDL. 10 QUALIFIED PRIVATE MEDICAL PRACTITIONERS ASSOCIATION REPRESENTED BY ITS PRESIDENT, FLOOR V-E/F, VALLAMATTAM ESTATE, RAVIPURAM, M.G. ROAD, KOCHI-682015

ADDL. 11 CATHOLIC HEALTH ASSOCIATION OF INDIA REPRESENTED BY THE EXECUTIVE DIRECTOR, PASTORAL ORIENTATION CENTRE, CIVIL LINE ROAD, PALARIVATTOM, KOCHI-682028

ADDL R5 IS IMPEADED VIDE ORDER DATED 04/05/2021 IN IA 3/21 AND ADDL. R6 TO R11 ARE SUO MOTU IMPEADED VIDE ORDER DATED 04/05/2021 IN WPC 10659/2021

ADDL. 12 MUSLIM EDUCATIONAL SOCIETY, BANK ROAD, CALICUT REPRESENTED BY ITS PRESIDENT Dr. P. A. FAZAL GAFOOR

IMPEADED AS PER ORDER DATED 10/05/2021 IN IA 6/2021

**R3 & R4 BY SRI. P. VIJAYAKUMAR, ASG
R5 BY ADV. SRI. K. RAMAKUMAR (SR.)
R5 BY ADV. SRI. T. RAMPRASAD UNNI
R5 BY ADV. SRI. K. ANAND
R9 BY ADV. DR. S. GOPAKUMARAN NAIR (SR.)
R9 BY ADV. SRI. SOORAJ ELANJICKAL**

R9 BY ADV. SRI.K.ARJUN VENUGOPAL
R9 BY ADV. SHRI.ASWIN KUMAR M J
R1 & R2 BY ADV.SRI.K.V.SOHAN, STATE ATTORNEY
R6 TO R8 BY ADV.SRI.M.AJAY
R11 BY ADV.SRI.JIJO PAUL KALLOOKKARAN
R12 BY SRI.BABU KARUKAPPADATH

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10.05.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 10th day of May 2021

The COVID-19 pandemic has poignantly demonstrated that health is not the business of a few – all must come together.

2. With the crisis expected to deepen before it improves, there are major foundational dimensions to health system and people's access to it.

3. The pandemic brings into focus two truths: First, health for all without unbearable financial burden is imperative; and Second, strong health systems to respond to evolving and continuing health crisis is unexpendable.

4. The pandemic is a wake up call for the Government, that it carries primary responsibility of its citizens' health as part of social contract, particularly that of the most vulnerable and marginalized sections.

5. The Government must, meaningfully and transparently, engage the whole of the society in their responses; especially because myriad issues are thrown up by the COVID scenario.

6. The need for a systematic approach to the complex challenges and for better understanding the relationship between population health and its economic consequences have been

recognised as the basis towards sustainable solutions.

7. The 'second wave' of the pandemic brings back renewed focus on the content to right to life as the most acme component of Article 21, read with Article 47 of the Constitution of India.

8. In **Paschim Banga Khet Mazdoorsamity & Ors. v. State of West Bengal & Anr.** ((1996) 4 SCC 37), the Hon'ble Supreme Court explicated thus in paragraphs 9 and 16 thereof:

“9. The Constitution envisages the establishment of a welfare State at the federal level as well as at the state level. 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 under taken by the Government in the welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. 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.

16. 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. [See : *Khatri (II) v. State of Bihar*, 1981 (1) SCC 627 at p. 631]. 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.”

9. Internationally, there can be little cavil that the right to life has been recognised as the most crucial element of meaningful life and its expanse and depth has found reflection in various Covenants and Instruments: namely, The Universal Declaration of Human Rights (1948); The International Covenant on Economic, Social and Cultural Rights (1966); The International Covenant on the Elimination of all Forms of Racial Discrimination (1965); The Convention on the Rights of Persons with Disabilities (2006) and others.

10. The soul of the afore, especially in the time of a global pandemic, is the right of a citizen to: (a) Non discriminatory access to health service; (b) Adequate Medical Treatment; and (c) Affordable treatment.

11. The General Comment No.14, E/C.12/2000/4 dated 11.08.2000 of the **COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**, Twenty second Edition, Geneva, 25 April – 12 May 2000, Agenda No.3, provides an illuminating essay on the Right to Health as follows:

“The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

(a) Availability. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary

depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.

(b) Accessibility. Health facilities, goods and services⁶ have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

(i) **Non-discrimination:** health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.

(ii) **Physical accessibility:** health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.

(iii) **Economic accessibility (affordability):** health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

(iv) **Information accessibility:** accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of

information should not impair the right to have personal health data treated with confidentiality.

(c) Acceptability. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) Quality. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.”

12. With all this said, the content of right to health is different in its very concept and tenor during a public health emergency than it is in a non-pandemic scenario.

13. If the citizens and patient rights discourses cannot pierce the argument that only people who can afford, may go to better hospitals, then such rights become futile when one needs it most.

14. The *leit motif* of this case is not adversarialism but inclusiveness.

15. The petitioner, in public interest, seeks that all hospitals in Kerala – in the public or private sector – be directed to provide affordable, if not free, treatment to all citizens without discrimination.

16. We have heard Sri.C.N.Sreekumar, learned counsel for the petitioner; Sri.K.V.Sohan, learned State Attorney appearing for

the Government of Kerala and its functionaries; Sri.P.Vijayakumar, learned Assistant Solicitor General, appearing for the Union of India; Sri.K.Ramakumar, learned Senior Counsel, instructed by Sri.K.Anand, learned counsel appearing for the additional fifth respondent; Dr.S.Gopakumaran Nair, learned Senior Counsel, instructed by Sri.Sooraj T.Elenjikal, learned counsel appearing for the additional ninth respondent - Indian Medical Association (IMA); Sri.M.Ajay, learned Standing Counsel appearing for additional respondents 6 to 8; Sri.Jijo Paul Kallookkaran, learned counsel appearing for the additional eleventh respondent; and Sri.Babu Karukappadath, learned counsel appearing for the additional twelfth respondent. Since this is a matter of public concern, we have also heard Sri.Mohammed Shah, Sri.Ajith Joy, Sri.V.Philip Mathews, Sri.Dinesh R.Shenoy, Sri.M.R.Hariraj and Sri.Achuth Kailas, learned counsel appearing for various persons/entities who intend to come on record, but could not on account of the lock-down in force in the State of Kerala as on today.

17. The petitioner projects various concerns, the main among them being the despondency faced by a citizen when he is denied health care assistance for want of sufficient hospital beds and infrastructure. He points out that the number of active cases in Kerala

is insidiously climbing every day and that admission and care in a Government Hospital/Facility is increasingly becoming difficult. He continued that in such a situation, a COVID-19 patient, who is in need of emergent care would have no choice between a Government facility and a private one and hence would be compelled to seek admission in the latter, thus exposing him/her to unimaginable financial burden. He then argued that in the global pandemic scenario it would be grossly unethical to let private health facilities charge as they please and thus prays that this writ petition be allowed, since otherwise it will lead to unconscionable profiteering.

18. We must say with great amount of appreciation that the response of the State to the afore apprehensions of the petitioner was to inform us that a Government Order has been issued, bearing No. G.O.(Rt)1066/2021/H&FWD dated 10.05.2021, whereby, the cost of the treatment for COVID-19 has been rationalised.

19. Sri.K.V.Sohan, learned State Attorney, read extensively from the aforementioned order and informed us that 50% of all hospital beds in the Government, Private (including Private Medical Colleges), Co-operative and ESI Hospitals, has been ordered to be exclusively reserved for treatment of COVID-19 patients requiring hospitalisation. He then showed us that the order also notifies the

rates for regulating the prices to be charged by the private hospitals and nursing homes in providing quality care 'to directly walk-in' COVID-19 patients. He explained that the rates mentioned in this order are applicable to all citizens who seek medical assistance in a private hospital/facility, other than the beneficiaries under the Karunya Arogya Suraksha Padhathi (KASP) and 'Government referred patients'. He submitted that there are certain exclusions mentioned in the rates specified in the order and that these will be governed by the Maximum Retail Price (MRP) as notified from time to time by the manufacturers or the Governmental agencies; and that any notification in future to be issued by the Union of India or the State of Kerala with respect to any drug/consumables/diagnostics will also be made applicable to the rates mentioned in this order in public interest.

20. Sri.K.V.Sohan further submitted that the rate for the Reverse Transcription Polymerase Chain Reaction (RTPCR) test will be as regulated by the Government, through order dated 30.04.2021 and that other tests will be governed by order dated 10.05.2021.

21. After saying as afore, the learned State Attorney addressed one of the major concerns of the petitioner, with respect to the consumables, including PPE kit, the burden of which will have to

be borne by a patient. He said that as per the new Government Order, the hospitals can only charge two PPE kits for a General Ward/Room and five for an Intensive Care Unit (ICU) bed per day and that this has been agreed to by the various Associations of private hospitals. He added to this by saying that the rates to be charged for the PPE kits shall not exceed the MRP declared by the manufacturer or the rates to be fixed by the Government from time to time. Sri.Sohan closed his submissions by showing us that specified Grievance Redressal System has been incorporated in the new order and that any violation of the terms of the said Order by any private hospital will be visited with penal consequences, including fine upto ten times of the rates mentioned therein.

22. Sri.K.Ramakumar, learned Senior Counsel, appearing for the fifth respondent, submitted that a counter affidavit has been placed on record, wherein, several suggestions have been made by his client, but conceded that these have been brought to the notice of the Government. The learned Senior Counsel submitted that there are several niggling concerns in the private sector, including infrastructural costs, as also the large financial outlay required for capital improvement, electricity, water charges and such other and, therefore, that the rates now notified by the Government in the new

Order dated 10.05.2021 may not be sufficient or practicable. However, to a pointed question from this Court, the learned Senior Counsel submitted that his clients are willing to allow the new Government Order operate for a few days, to await any issues that may present can come out in the open, which can then be allayed or rectified by the competent Authorities or by this Court at the relevant time. The learned Senior Counsel concluded his submissions by praying that his clients be given an opportunity to approach the Government to place before them all their concerns with respect to the rates mentioned in the new Government Order and requested that this Court direct them to consider the same within a time frame.

23. Dr.S.Gopakumaran Nair, learned Senior Counsel, appearing for the IMA, submitted that counter pleadings have been filed explaining the nuances of the Pricing Policy required to be borne in mind for the private sector and argued that standardized regulatory rates may not be feasible in all cases. He, however, conceded that since the Government has come out with a new order as mentioned above, it must certainly be put to operation for a few days to ascertain its efficacy and worth in the best interests of all the stake holders.

24. Sri.Mohammed Shah, Sri.Ajith Joy, Sri.V.Philip Mathews and M.R.Hariraj, learned counsel, brought to our notice the apodictic issues faced by the COVID-19 patients. Sri.V.Philip Mathews requested that Government be directed to regulate the cost of drugs, asserting that the MRP does not always reflect the true price. He impressed upon us that most of the hospitals, if not all, buy drugs and consumables much below the MRP and hence, if they are allowed to charge the same on the patients, they would still obtain large profits.

25. Sri.Mohammed Shah and Sri.Ajith Joy drew us to the travails of an ordinary citizen who approaches private hospitals for treatment, saying that the costs are prohibitive and very often unable to be honoured. Sri.M.R.Hariraj submitted that he is appearing for an Association by name 'Justice Brigade' and said that there is over all satisfaction with the new Government Order, but voiced two specific apprehensions. For the first, he submitted that appointment of the District Medical Officer (DMO) and the Grievance Officer at the first instance may not be feasible, since during the pandemic times they may be busy with other imperative duties. For the second, he pointed out that there are various patients who have already suffered large and unconscionable bills and prayed that they be given an opportunity of approaching the grievance mechanisms appropriately under the

sanction of the Government Order dated 10.05.2021 and the provisions of the Kerala Clinical Establishments (Registration and Regulation) Act 2018 and its Rules.

26. Sri.Babu Karukappadath, learned counsel appearing for the Muslim Educational Society and Sri.Jijo Paul Kallookaran, appearing for the Catholic Hospitals Association of India, made their submissions in support of the Government Order now issued and said that their member hospitals will fully abide by the rates fixed therein. Sri.Jijo Paul Kallookaran, however, requested that Government be directed to pay the members of his client Association the amounts due to them under the KASP at the earliest, pleading that these rates are already subsidized and any further delay in payment of the same, would stifle their smooth functioning.

27. Sri.Babu Karukapadath then requested that, even though his client accepts the Government Order dated 10.05.2021 in its entirety, liberty may be reserved to them to bring to the notice of this Court or the competent Authority of the Government, if any further modifications are required to the same. He said that he is making this submission only because, once the order is operated, it would then reveal whether any problems or issues would require to be rectified in future.

28. The contentions of all the parties being so recorded, we have examined the order of the Government dated 10.05.2021 very closely.

29. We must say upfront that we are more than pleased with the Government Order, since it provides specific mechanisms for grievance redressal and unequivocally fixes the ambit of the tariff that can be charged by the hospitals/nursing homes in the private sector. For clarity and complete reading, we deem it apposite to extract the rates specified in the new Government Order as under:

Bed Category	Rate in INR per day (Non-NABH)	Rate in INR per day (NABH)	Inclusions	Exclusion
General WARD	Rs.2645	Rs.2910	a. Registration charges b. Bed Charges c. Nursing and Boarding Charges d. Surgeons, Anesthetists, Medical Practitioner, Consultant Charges e. Anesthesia, Blood Transfusions, Oxygen f. medicines and Drugs g. Pathology and radiology tests: Medical procedures include essential Radiological imaging and diagnostic tests such as X-ray, USG, Hematology, pathology etc. h. Pre and Post Hospitalization expenses: Expenses incurred for consultation, diagnostic tests and medicines before admission of the patient in the same hospital and cost of diagnostic tests and medication up to 15 days after discharge from the hospital for the same ailment.	a. High-End Investigations* like C.T. Chest/HRCT Chest b. PPE Kits c. Costly Medications like i. Remdesivir ii. Tocilizumab
HDU	Rs.3795	Rs.4175		
ICU	Rs.7800	Rs.8580		
ICU WITH VENTILATOR	Rs.13800	Rs.15180		

30. We find the afore rates to be very reasonable, because it includes almost all the components of basic hospitalization, including nursing and doctors' charges, bed charges and essential medical expenses. The exclusions provided therein are justified because, the cost of high-end investigations like C.T.Chest/HRCT Chest and medicines like Remdesiver and Tocilizumab are certainly ones that will have to be borne by the patients on actuals. The order further makes it clear that these medicines and tests can be administered and done by the hospitals only on the actual cost incurred and what is more relevant is that consumables and PPE kits have been allowed to be charged only on MRP (which can only mean that the price at which they procure it) and that too with a cap of two per day for a General Ward and five in an ICU ward.

31. That said, we must also record our great appreciation for the order because, for the first time, it makes the Kerala Clinical Establishments (Registration and Regulation) Act, 2018 ('the Act' for short), applicable as far as COVID-19 treatment is concerned, making it indubitable that private hospitals require to abide by its provisions, particularly, Section 39 read with Rule 19 of the Kerala Clinical Establishments (Registration and Regulation) Rules, 2018 (hereinafter referred to as the 'Rules'). The conjoint effect of the Act

and the Rules is that the hospitals will have to now publish the rates of their services, as required under Section 39 of the Act and Rule 19 of the Rules and any violation of the same will visit them with penal consequences mentioned therein.

32. At this time, we also deem it necessary that the rates of the drugs administered in the hospitals be published by them under the mandate of the Drugs (Prices Control) Order, 2013, because, as is evident from the said Order, any violation of it would invite prosecution under the Essential Commodities Act, as also under Section 149 of the Code of Criminal Procedure. Even though Government Order dated 10.05.2021 does not mention this, we feel that, through our order, this provision be also made applicable.

33. As we have already said, Government Order dated 10.05.2021 covers the field almost entirely and we commend the Government for the manner in which it has approached the situation. However, there are few aspects, which we had mentioned to the learned State Attorney when this matter was heard earlier, including as to the establishment of a Toll Free number for the entire State, to have access to the facility for a citizen in the case of an emergency; as also the appointment of Sectoral Magistrates to oversee private hospitals. To this, Sri.K.V.Sohan, learned State Attorney, submitted

that Government is considering a Toll Free number and that 'Incident Commanders' have already been appointed to oversee the treatment facilities in each private hospital providing COVID-19 treatment under the provisions of the Disaster Management Act. We certainly find this to be satisfactory and do not deem it necessary to issue any further orders on that aspect.

34. We had also earlier suggested that Government must take over unused hospitals, which was responded to by Sri.Sohan saying that this is also in the contemplation of the Government and necessary action in this regard will be taken.

35. The sole remaining concern in our mind is with respect to the First Line Treatment Centres (FLTCs) for COVID-19, run and operated by private hospitals or agencies, since we see that Government Order dated 10.05.2021 does not specifically take this into account. However, we can always draw support from the tariff extracted above, because an FLTC generally has to provide only the facilities and requisites of a General Ward, which is covered by the said order. We must say that this suggestion of ours has been accepted by all the learned counsel at the Bar and in particular by the learned State Attorney, who submitted that even though FLTCs have not been specifically brought under the ambit of the new order, he

would welcome fixing of rates applicable to General Ward in such centres also.

36. The most important concerns and issues being so taken care of, during the course of discussion and interaction at the Bar, a doubt arose in our mind as to how a citizen below the poverty line or a person who is unable to even afford the rates shown in the Government Order dated 10.05.2021, would be able to cope, if he/she is forced to go to a private hospital in case of an emergency. Sri.M.Ajay, learned counsel appearing for respondents 6 to 8 and the learned State Attorney submitted that in such scenario an out-of-the-box thought is necessary because, normally, citizens below the poverty line or who cannot afford private hospitals would only route their request for hospitalisation through the District Programme Monitoring and Support Unit (DPMSU), which has been set up for the purpose of referring Government sponsored patients and those under the beneficial ambit of KASP. Sri.Sohan, learned State Attorney, then suggested - which we certainly appreciate - that in the event a hapless citizen is forced to go to a private hospital in an emergency, he/she or bystander/s can be given an option of requesting the said hospital to inform the DPMSU immediately and seek that they be either considered as a Government sponsored patient or to be

brought *ex post facto* under the mandate of the KASP, if eligible as per the criteria. This suggestion now made at the Bar certainly allay most of our apprehensions in this regard.

37. All the above being so taken care of, a question was raised at the Bar by the petitioner as to whether the bills issued by private hospitals prior to the Government Order dated 10.05.2021 can be referred to the grievance mechanism mentioned therein, for redressal. The learned State Attorney submitted that though the rates mentioned in the Government Order are prospective, any genuine complaint of over charging, profiteering and exploitative tendencies can be considered by the said mechanism, since it operates under the relevant applicable Statutes. We record this submission.

In summation, we order this writ petition with the following directions:

(a) The Government Order, bearing No.G.O.(Rt)1066/2021/H&FWD dated 10.05.2021, shall be implemented by the Government and by the officers/officials concerned forthwith and the hospital admissions of patients suffering from COVID-19 in private hospitals after the date of the order would be strictly governed by the rates and the conditions mentioned therein.

(b) All private hospitals in the State of Kerala, as regards 50% beds reserved for COVID-19 patients, would be bound be enjoined to offer treatment to such patients strictly as per the rates stipulated in the aforementioned Government Order and any violation thereof will be scrupulously dealt with by the Authorities concerned, as prescribed therein and as per the applicable Statutes.

(c) The Government shall make sure that the Grievance Redressal mechanisms, mentioned in paragraphs 2 and 3 of the 'General Instructions' in the Government Order dated 10.05.2021, are implemented forthwith and that the State Level Grievance Authority is also in place immediately.

(d) The Incident Commanders appointed by the Government, under the provisions of the Disaster Management Act, shall ensure that the terms and conditions of the Government Order dated 10.05.2021 are followed and implemented in its letter and spirit, by all private hospitals; and that any violations or infraction thereof is brought to the notice of the DMO or such other competent Authority without any avoidable delay.

(e) As stipulated in the Government Order dated 10.05.2021, every private hospital in the State of Kerala will display the rates of the services to be given to the public and in particular to a COVID-19

patient, as required under Section 39 of the Kerala Clinical Establishments (Registration and Regulation) Act, 2018 read with Rule 19 of the Kerala Clinical Establishments (Registration and Regulation) Rules, 2018 and will also publish the price list of the drugs required for treatment, under the provisions of the Drugs (Prices Control) Order, 2013. This shall be done forthwith.

(f) The Government shall consider setting up of a Toll Free number for the State of Kerala, so that a citizen in distress can access that number and obtain the best available options for treatment.

(g) The Government shall consider augmenting the hospital beds and wards to the existing availability from time to time, depending upon the number of COVID-19 patients reported; and for this purpose, they will also consider taking over suitable auditoriums/halls/hostels and such other, so that maximum number of deserving patients would obtain treatment without the burden of having to pay even as per the provisions of the Government Order dated 10.05.2021.

(h) If any private establishment is running a First Line Treatment Centre for COVID-19, they would be bound to do so strictly as per the rates mentioned in the Government Order dated 10.05.2021 as applicable to the general wards and no violations of

this will be permitted by any of the Authorities under the various statutes and the said order.

(i) Every patient or his/her bystander/s would be entitled to inform the private hospital to which the patient is admitted in an emergency, that he/she is either below the poverty line or unable to afford the rates mentioned in the Government Order dated 10.05.2021; in which event, the said hospital will be obligated to bring the same to the notice of the appropriate District Programme Monitoring and Support Unit, so that the said Authority can take an apposite decision whether the patient, subject to his/her eligibility, be considered either as a Government referred one or to be brought *ex post facto* under the ambit of the KASP. We, however, make it clear that this shall be done by the competent Authorities after strictly verifying the credentials and eligibility of the patients as per the applicable conditions. Needless to state, if, for any reason, a private hospital fails or refuses to do so, the patient or the bystanders will be at liberty to approach the DPMSU directly, in which event also, the afore procedure will be complied with, without reservation.

(j) No private hospital shall be entitled to charge for drugs, consumables - including PPE kits - essential instruments, like oxymeter etc., more than the cost price at which it is procured by

them (notwithstanding the MRP); and we direct the Incident Commanders and the DMO to constantly watch this, by verifying the purchase bills and the expenses charged on to the patients from time to time.

(k) As regards consumables like the PPE Kit are concerned, even though the Government Order dated 10.05.2021 has capped the numbers that can be charged to the patient, we make it clear that the hospitals will be entitled only to charge the actuals (and not MRP if the actual procurement price is lower) on a *pro rata* sharing and nothing more, within the said limit. To paraphrase and as an illustration, merely because the Government Order permits five PPE kits for an ICU bed, it shall not be charged unless *pro rata* sharing would be to that extent, depending upon the number of patients available.

(l) We leave liberty to the private hospitals to approach the Government for any concerns that they may have including with respect to the reduction of their capital cost and expenditure like electricity, water, etc., and it will be upto the Government to consider the same, taking note of the fluctuating circumstances presented by the COVID-19 pandemic situation.

(m) Finally, we reserve liberty to every COVID-19 patient to file complaint/s before the Grievance Redressal mechanism mentioned in the Government Order dated 10.05.2021, with respect to the bills issued by private hospitals prior to it; in which event, the Authority concerned will deal with them from the stand point of over charging, profiteering and exploitative tendencies, however, without reference to the rates mentioned in the said Government Order. A decision in this regard shall be taken by the Authority concerned at the earliest, but not later than one month from the date on which it is made.

After we dictated this part of the judgment, Sri.Ajith Joy, learned counsel, brought to our notice that Kerala has presently only 2857 ICU beds, while the occupancy, as on today, is 2528. He, therefore, voiced an apprehension that the number of ICU beds may run out in the next few days, going by the number of active cases being reported. He added that Government has now issued a 'Patient Care Order' dated 09.05.2021, wherein, the Authorities have been directed to exhort private hospitals to increase their ICU bed capacity and prayed that necessary directions be issued in this regard also.

Sri.K.V.Sohan, learned State Attorney, responded to this by saying that Government is doing everything possible to persuade

private hospitals to do so and that they will even be incentivised appropriately from time to time for this purpose. He assured this Court that some progress on this will be attempted in the next few days.

After saying so, Sri.K.V.Sohan brought to our notice that the Government of Kerala has approached the Central Government with a request that the present allocation of medical oxygen be increased to 400 Metric Tonnes from the present 219 Metric Tonnes. Sri.Sohan submitted that the active cases in Kerala is 4.25 lakhs as on day and continually rising and, therefore, that unless the oxygen supply is enhanced, the situation faced by various other States earlier would befall us also.

The learned Assistant Solicitor General, Sri.P.Vijayakumar, submitted that if a request has been made by the Government of Kerala to the Central Government, same will be carefully considered; explaining that there is a mechanism in place, which is dynamic, whereby the allocation to States are being monitored and continuously altered on a day to day basis, depending upon the requirement. He submitted that he will be able to inform this Court about the progress in this regard in the next week or so.

We record the afore submissions made by the learned State Attorney and the learned Assistant Solicitor General and since the directions in this judgment and the above undertakings made by the Government would require monitoring by this Court for its effective implementation, we deem it requisite to list this matter for verification of compliance in two weeks time, so that, by then, we will also know how the Government Order dated 10.05.2021 has worked and whether it requires any modifications; further to enable this Court to decide whether there is enhancement of the number of ICU and other beds as also the allocation of oxygen to the State of Kerala.

The Registry is thus directed to list this matter on 26.05.2021 for verification of compliance.

Since, as we have said above, this is not an adversarial litigation, we leave liberty to any party to approach this Court for an earlier posting and also to file appropriate applications for directions/clarifications, if any, in future.

sd/-

Devan Ramachandran, Judge

sd/-

Dr.Kauser Edappagath, Judge

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT P1 TRUE COPY OF THE DAILY BULLETIN DATED 25.04.2021 ISSUED BY COVID-19 OUTBREAK CONTROL AND PREVENTION STATE CELL, HEATH AND FAMILY WELFARE DEPARTMENT.

RESPONDENT'S EXHIBITS:

EXHIBIT R5 (a) TRUE COPY OF ORDER NO.96/2020/HNQA/SHA DT.13.07.2020 ISSUED BY THE GOVT. OF KERALA ALONG WITH GUIDELINES FOR PARTNERSHIP WITH PRIVATE SECTOR IN IMPLEMENTATION OF COVID-19 TREATMENT IN PRIVATE HEALTH CARE INSTITUTIONS UNDER KASP.

EXHIBIT R5 (b) TRUE COPY OF G.O.(RT)NO.1246/2020/H&FWD DT. 06.07.2020 ISSUED BY THE GOVT. OF KERALA.

ANNEXURE R9(a) A TRUE COPY OF THE PROPOSAL SUBMITTED BY THE IMA TO THE STATE GOVERNMENT