

IN THE HIGH COURT OF KARNATAKA

CIVIL WRIT JURISDICTION

W.P. C. 6435 OF 20202

IN THE MATTER OF :

MOHAMMED ARIF

... **PETITIONER**

VERSUS

UNION OF INDIA & ANR.

... **RESPONDENTS**

CORAM : CHIEF JUSTICE AND ASHOK S.KINAGI

5th MAY 2021

1. Today, the learned Advocate General makes a statement that the State Government has decided to appoint a Commission under the Commissions of Inquiry Act, 1952 for inquiring into the incident in Chamarajanagar District of the death 24 COVID patients allegedly due to lack of oxygen supply. He states that the said action has been taken in view of the observations of this Court in the earlier order. We may note here that paragraph no. 7 of the order dated 4th May 2021 records that the Court proposes to hear the learned Advocate General of the said issue. The State Government has already made a choice of a retired Judge of this Court as the Commissioner by issuing an order. Propriety demanded that the State Government ought to have placed before the Court its proposal to appoint the Commission before actually passing an order appointing the Commission.

2. We direct the Secretary of the Karnataka State Legal Services Authority to supply a copy of the report filed by the Chairman of the District Legal Services Authority at Chamarajanagar to the learned Advocate General. Considering what is stated in the report, it is necessary to ensure that the material documents are not tampered with. Hence, we direct the Chief Secretary of the State to immediately take into his custody the entire record of the concerned hospital at Chamarajanagar regarding supply of oxygen to the said hospital till and inclusive of the date of the incident as well as the relevant record available in the Office of the Deputy Commissioner at Chamarajanagar regarding the supply of the oxygen to the District. The case papers of the patients who have died should be also taken into custody. We also direct the Chief Secretary to seize the record concerning the supply of oxygen to Chamrajnagar District maintained by the Office of the Deputy Commissioner at Mysuru, till and inclusive of the date of the incident at Chamarajanagar. We make it clear that though the record will remain under the custody of the Chief Secretary, the officer who has been appointed by the State Government to inquire into the incident will be given access to the said record.

3. Firstly, we are dealing with the issue of adequate supply of oxygen to the State of Karnataka. By the order dated 29th April, 2021, we had directed the Government of India to immediately take a decision of enhancing the cap of 802 Metric Tonnes (MT) per day imposed by the Government of India as far as the State of Karnataka is concerned. The said order records that the estimate of the requirement of oxygen in the State of Karnataka as of 30th April, 2021 was of 1,471 MT per day. After noting this factual aspect in paragraph 18 of the order, a direction was issued to the Central Government to take a decision on the issue of increasing the cap on the quantity of oxygen. The decision was directed to be taken till Monday, 3rd May, 2021. But, only a marginal increase has been granted by the Government of India by increasing the cap from 802 MT to 865 MT per day with effect from 1st May, 2021. Yesterday, we passed a detailed order again

directing the Central Government to consider the request of the State Government to increase the cap on the supply of oxygen.

4. This Court, while passing orders on 29th April, 2021 and 4th May, 2021, has reminded both the Government of India and the State Government that it is the obligation of both the Governments to ensure that proper medical treatment is provided to all those who are infected with COVID-19 in view of the right to health being an integral part of the fundamental rights guaranteed under Article 21 of the Constitution of India. The order dated 4th May, 2021 also takes a note of two shocking incidents reported by the media. One was of the death of 24 patients in a Government hospital in Chamarajanagar District within a span of 24 hours and the death of 8 to 9 patients in Kalburgi District. The allegation is that the said patients died as there was no supply of oxygen to the concerned hospitals. It is also noted in our last order that a contention was raised that 10 major hospitals in the city of Bengaluru have exhausted their oxygen supply. It must be mentioned that the city of Bengaluru is recording more than 20,000 new positive cases every day for last few days. The city has highest number of daily positive cases in the entire country.

5. In our order dated 29th April, 2021, we have recorded the estimation made by the State Government of the requirement of oxygen in the State. As per the said estimation made on 29th April, 2021, as on 30th April, 2021, the requirement of oxygen of the State was of 1,471 MT per day as against the cap imposed by the Government of India of 802 MT per day. It is, therefore, necessary to make a reference to the figures of the total active cases and daily positive cases reported in the State of Karnataka officially published by the State Government.

Date	Total Active cases	Daily New Cases
28.04.2021	3,49,496	35,024
29.04.2021	3,82,690	48,296
30.04.2021	4,05,068	40,990
01.05.2021	4,21,436	37,733
02.05.2021	4,44,734	44,438
03.05.2021	4,64,363	44,631

Thus, as of 28th April, 2021, the active cases in

the State were 3,49,496 and by 3rd May, 2021, the said figure had taken a huge jump to 4,64,363 cases. Even daily new cases have substantially increased.

6. Now, we come to the requirement of the medical oxygen of the State which is placed on record. The requirement estimated on 29th April, 2021 is already referred above. A letter was addressed by the Additional Chief Secretary to the State Government, Health and Family Welfare Department on 30th April, 2021 to the Commerce Secretary, Department of Industrial Policy and Promotion, Ministry of Commerce and Industries, Government of India. The relevant portion of the said letter reads thus: "As per GOI norms, oxygen demand for the State of Karnataka is projected assuming that 17% of the total active cases will require oxygenated beds and 3% will require ICU Beds. cases are increasing. The State is also seeing increase Based on this norm, requirement is likely to go up to 1,792 MT by 5th May in the case the Active Covid Cases reach 3.95 lakh. As per the same norms, considering the minimum requirement the State would be at least 1162 MT on 5th May. As on yesterday, we are having 349496 active and 35,000 daily Covid-19 cases, but the surge is going on and everyday active in positivity rate and hence number of active cases is destined to grow." (emphasis added) Thus, the projection of requirement of oxygen of 1,792 MT per day as of 5th May, 2021 was made on the footing that COVID active cases may reach 3.95 lakhs, whereas on 3rd May, 2021, the figure of total active cases had actually reached 4,64,323. Further statement made is that the minimum requirement of the State as on 5th May, 2021 would be 1,162 MT.

7. As against this, the cap on the supply of oxygen to the State of Karnataka till 30th April, 2021 was 802 MT per day which was marginally increased to 865 MT per day from 1st May, 2021. Today, in the afternoon, the learned Additional Solicitor General of India states that now it will be increased by further quantity of 100 MT per day. Thus, the cap put by the Central Government for the State of

Karnataka will be 965 MT per day. We again repeat that based on the estimate of 3.95 lakh active cases as on 5th May, 2021, the State's projected requirement was of 1,792 MT per day. But, as on 3rd May, 2021, the total active cases have gone above 4,60,000.

8. In today's written submissions, the State Government has given the figures of the quota utilized by the State Government. The main difficulty expressed by the learned Advocate General is that out of the quota of 865 MT per day, as on 1st May, 2021, 30 MT was to be taken from a steel plant in Vishakhapatnam, a total of 80 MT from two plants in Odisha and 20 MT from a plant in Kerala. It is pointed out by the learned Advocate General that for procuring the quota from far away places like Vishakhapatnam and Odisha, airplanes are required to be sent carrying four tankers to the respective places. It takes about 48 hours to fill the tankers and it may take a minimum of 48 hours to reach the requisite destination in the State of Karnataka. That is the reason why the State could not utilize the quota allotted at Vishakhapatnam and Odisha. In any case, the written submissions show that on 3rd May, 2021, the State utilized 772.71 MT of oxygen and the rest of the quota could not be utilized as it was difficult to procure the same from far away places like Vishakhapatnam and Odisha.

9. It is not a case made out by the Government of India that the projected requirement stated by the Government of Karnataka in its letter dated 30th April, 2021 is on the higher side. As the correctness of the estimation made by the State Government in the said letter is not disputed by the Government of India, prima facie, the Government of India was under an obligation to act upon the request of the State Government to increase the quota. As noted earlier, the estimation is of a minimum 1,162 MT per day as of 5th May, 2021 and maximum of 1,792 MT per day as of 5th May, 2021 based on the number of active COVID cases being 3,95,000. As the active cases as on that day were more than 4,60,000, there is a

strong justification for the demand of oxygen of 1,792 MT per day as of 5th May 2021.

10. Now we come to the order of the Apex Court dated 30th April, 2021. There is a detailed discussion on oxygen allocation and availability from paragraph 24 onwards. In Clauses (vi), (vii), (viii) and (x) of paragraph 24, certain figures have been incorporated. In Clause (x) of paragraph 24, it is mentioned that as on 28th April, 2021, the need of oxygen to the State of Karnataka was 770 MT. We may specifically record here that in paragraph 69, the Apex Court has made it very clear that the figures mentioned in the order were based on the submission of Union of India. In fact, in paragraph 69, the Apex Court has clarified that the data and submissions reproduced are not its endorsement or acceptance. The operative part is in paragraph 69. As regards specific allocation to States, the order of the Apex Court is only in respect of Delhi. However, what is material is clause (ii) of paragraph 69, which reads thus:

"J CONCLUSION 69. The present order has primarily considered the submissions (written and oral) of the UOI. These submissions have been reproduced here as a matter of public record and to contextualize the clarifications that are being sought by our Court in order to serve its dialogic role. We reiterate, for abundant caution, that the data and submissions reproduced above are not its endorsement or acceptance. In terms of the above discussion, we hereby pass the following directions: (i) The UOI shall ensure, in terms of the assurance of the Solicitor General, that the deficit in the supply of oxygen to the GNCTD is rectified within 2 days from the date of the hearing, that is, on or before the midnight of 3 May 2021; (ii) The Central Government shall, in collaboration with the States, prepare a buffer stock of oxygen for emergency purposes and decentralize the location of the emergency stocks. The emergency stocks shall be created within the next four days and is to be replenished on a day to day basis, in addition to the existing allocation of oxygen supply to the States;"

(Emphasis supplied)

11. The direction of the Apex Court is that a buffer stock of oxygen shall be created by the Central Government in collaboration with the States for the emergency

purposes and decentralize the location of emergency stocks. This buffer stock was to be created within 4 days from 30th April, 2021. Thus, in addition to the requirement of the States, the direction of the Apex Court was to create a buffer stock, which could be used in case of emergency. As on today, the Government of India has not offered any explanation why this buffer stock has not been created in the State of Karnataka. The reason is that the allocation of the oxygen falls short of the minimum requirement of the State of Karnataka and therefore, the available stock cannot be used for creating a buffer. Thus, the purport of the order of the Apex Court is that every State must get adequate oxygen supply as per its requirements and in addition thereto, a buffer stock has to be created for taking care of the emergency.

12. As noted in yesterday's order, there are some districts in the State which do not have bottling plants and therefore, cylinders filled with oxygen are required to be transported from adjacent districts. If buffer stocks as directed by the Apex Court would have been created, the incident which occurred in Chamarajanagar could have been avoided. Prima facie, from the material placed on record, it appears that Chamarajanagar depended only on filled oxygen cylinders sent by Mysuru District.

13. Thus, the scenario which emerges is that notwithstanding the facts and figures on record, not only that the buffer stock has not been created for the State of Karnataka, but the bare minimum requirement of oxygen is not provided. We may note here that Bengaluru City is reporting highest number of positive cases in the country for last several days.

14. Now coming back to the requirement of the State of Karnataka, even if the bare minimum requirement as projected by the State Government as on 5th May,

2021 is considered, it is of 1,162 MT per day. As we have observed earlier, it has to be ideally much more than 1,792 MT per day as on that day.

15. In the circumstances, we have no option but to issue a mandatory direction to the Government of India to immediately re-consider the representation made by the State Government on 30th April, 2021. We direct the State Government to immediately submit additional representation to the Government of India setting out the projected requirement of oxygen of the State for at least 1 week. The representations shall be considered by the Government of India within a maximum of 4 days from today. As an interim measure, we direct the Government of India to increase the cap on supply of oxygen to the State of Karnataka with immediate effect up to 1,200 MT per day. Depending upon the decision taken by the Government of India on the representation dated 30th April, 2021 and further representation which may be made by the State of Karnataka, the Court will consider of passing further orders in the next week as far as the quota of oxygen is considered. We make it clear that the standing counsel for the Government of India, who is present through video conference will have to immediately communicate this order to the Government of India. The reason being that there are number of reported incidents in the State of Karnataka of death of Covid-19 patients due to non- availability of oxygen. For upholding the rights of citizens under Article 21 of the Constitution of India, this is the minimum requirement of the State which the Government of India will have to comply with.

16. As regards the quota of Remdesivir drug, in yesterday's order, we have already referred to the requirement of the State of 44,500 vials per day and as per the existing quota, the State is getting only 15,857 vials per day. However, the learned Additional Solicitor General assures the Court that a decision of the Government of India is expected within two days on the issue of increase in the quota of

Remdesivir drug to the State. Considering the gravity of the situation and the fact that today's supply of the said drug is nearly 1/3rd of the State's requirement, the Government of India shall take a positive decision as assured within 2 days.

17. Considering the gravity of situation in the State of Karnataka, we expect the Central Government to consider of allowing the State Government to use the entire quantity of the oxygen manufactured in the State itself as getting oxygen from far away places from other States takes four to five days. It is however for the Central Government to consider the said aspect considering the grave situation in the State of Karnataka. Some of the members of the Bar were at pains to point out that as far as the State of Maharashtra is concerned, going by the distribution of oxygen made by Central Government as of 30th April, 2021, the State Government was permitted to use the entire production of oxygen made within the State. Our attention was invited in this behalf to pages 26 and 27, which is a part of Annexure-R2 of the State Government's submissions dated 5th May 2021.

18. The learned Additional Solicitor General pointed out that the State can use Pressure Swing Absorption (PSA) units for manufacturing oxygen. The learned Advocate General states that he will seek necessary instructions in this behalf and make a statement on 6th May, 2021. As regards a rational method for distribution of availability of oxygen quota in the State, he states that the State Government will come out with the guidelines tomorrow.

19. A memo has been placed on record based on press release by the Hon'ble Prime Minister's Office regarding permission to set up 591 oxygen plants in district government hospitals. When this group of matters is heard in the next week, the State Government will make a statement on this aspect. As rightly pointed out by learned counsel appearing for the petitioner in

W.P.No.8619/2020, this will be a very crucial step towards preparedness to face further waves of COVID-19. Therefore, the State Government will respond in the next week whenever these petitions are listed.

20. It is pointed out across the Bar that considering the fact that there are large number of COVID cases reported in many districts, it is necessary to provide COVID related Helplines to the citizens on par with the facility available in the City of Bengaluru. We direct the State Government to implement the said suggestion. The availability of the helpline in each District shall be given a wide publicity.

21. As regards the issue of food security to the sections of the society which have become vulnerable due to partial lockdown declared by the State Government, our attention is invited by the learned counsel appearing for the parties to the various orders passed by this Court starting from 30th April, 2020 to 16th July, 2020. The benefits under the said orders shall be extended to this class of the society. The learned Advocate General assured the Court that State Government will look into the issue and will come out with an appropriate decision before the court at the earliest.

22. As the number of COVID cases in the districts are on the rise, the State Government will have to come out with the existing and projected requirement of each District of number of beds of different categories and the present availability of beds. A suggestion is made across the Bar is that as far as the assessment of requirement of beds is concerned, the same may be left to the District Authorities constituted under the Disaster of Management Act, 2005.

23. Now we come to the issue of the incident that occurred at Chamarajanagar District. In the first part of the order passed today, we have recorded our strong

displeasure about the manner in which the State Government has acted when it comes to appointment of a Commission under the Commissions of Inquiry Act, 1952.

24. There is a report submitted by the Karnataka State Legal Services Authority, which contains proceedings of the meeting of the State Level Monitoring Committee constituted by the Karnataka State Legal Services Authority, which is headed by Hon'ble Justice Shri A.N. Venugopala Gowda, a former Judge of this Court of which even Hon'ble Justice Shri K.N. Keshavanarayana, a former Judge is a member. It will be appropriate if this committee inquires into the incident at Chamarajanagar. We have already passed an order about taking over the custody of the relevant records. We direct the Chief Secretary, who is having the custody of the record, to allow the Committee headed by Hon'ble Justice Shri A.N. Venugopala Gowda to look into the record. On a formal request made by the Member Secretary of the Karnataka State Legal Services Authority, the Chief Secretary will permit the Committee headed by Hon'ble Justice Shri. A.N. Venugopala Gowda to peruse the entire records. We request the Committee headed by the Hon'ble retired Judge to submit a report to this Court preferably by 11th May, 2021. Needless to add that the officers of the State Government will render necessary co-operation to the said Committee as the ultimate object of the said Committee will be to make a fact finding inquiry so that the report of the inquiry can be very useful for the State Government to ensure that such unfortunate incidents do not occur in the State hereinafter.

25. A copy of the notification dated 5th May, 2021 issued by the State Government appointing the Commission of Inquiry is taken on record. A copy of the order dated 5th May, 2021 regarding seizure of the records as per the directions issued in the morning, is also placed on record by the learned Advocate General. We

make it clear that the records shall be in the custody of the Chief Secretary of the State.

26. For further hearing the petitions shall be listed on 6th May, 2021 at 10.30 a.m.