

Rakesh Malhotra vs Government Of National Capital ... on 4 August, 2020

Author: Hima Kohli

Bench: Hima Kohli, Subramonium Prasad

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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 3031/2020

RAKESH MALHOTRA

..... Petitioner

Through: In person.

versus

GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF
DELHI & ORS.

.... Respondents

Through : Mr. Satyakam, ASC for R-1/GNCTD

with Dr. Nutan Mundeja, DHS, GNCTD.

Mr. Chetan Sharma, ASG with

Mr. Anurag Ahluwalia, CGSC, Mr. Abhigyan

Siddhant, Mr. Amit Gupta and Mr. Shaurya Jain,

Advocates for MoHFW, ICMR and NCDC with

Dr. Sujeet Singh, Director, NCDC and

Dr. Nivedita Gupta, Scientist F, ICMR.

Mr. Sanjeev Sharma, Advocate for applicant in

C.M. APPL. No. 12106/2020

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

% 04.08.2020 HEARD THROUGH VIDEO CONFERENCING C.M. No. 12106/2020 (by the applicant for directions)

1. On 27.7.2020, taking note of the affidavits/Status Reports filed by the Delhi Govt., ICMR, NABL and NCDC and after hearing the submissions made by the respective counsel for the aforesaid the Departments/Agencies, it was directed that ICMR, NCDC and Delhi Govt. may file fresh Status Reports before the next date of hearing.

2. Mr. Anurag Ahluwalia, learned CGSC appearing for the ICMR states that since ICMR has decided not to issue a fresh advisory for the present, no Status Report needs to be filed. He further states on behalf of the NCDC that a brief Status Report was filed yesterday. The same is not on record for the obvious reason that yesterday was a holiday. However, learned counsel states that the Status Report of the Delhi Govt. covers the stand of the NCDC as well.

3. As for the Delhi Govt., Mr. Satyakam, learned ASC refers to the common order dated 27.7.2020, passed by a co-ordinate Bench in W.P.(C) No.3250/2020 entitled Court on Its Own Motion vs. State of NCT & Ors. and W.P.(C) No. 3376/2020 entitled K.K. Sharma vs. Govt. of NCT of Delhi to urge that the issue being considered by this court has now attained finality and therefore, no further proceedings need to be taken by this court. He cites State of UP vs. Braham Dutt Sharma, 1987 (2) SCC 179, to submit that once the present petition was disposed of on 04.5.2020, by taking note of the submissions made by him regarding the measures taken by the Delhi Govt. to expedite receipt of reports for testing of COVID-19 infection, no further orders ought to be passed merely on the strength of a miscellaneous application moved thereafter by an intervenor (C.M. No. 12106/2020) praying inter alia for issuing several directions. He particularly draws the attention of this court to the prayers made in the said application, which it is submitted are fairly wide and virtually amount to a fresh petition. Learned ASC states that neither the petitioner, nor the applicant in C.M. APPL. No. 12106/2020 have pointed out any error apparent on the face of the record for this Court to review the order passed on 04.4.2020. He submits that this Court may drop the present proceedings for the reason that even on merits, it is apparent that the Delhi Govt. has made sincere efforts to bring down the COVID-19 infection in the city and ensure that there are adequate kits available for testing. He also seeks to refer the averments made in the latest Status Report.

4. Per contra, Mr. Rakesh Malhotra, the petitioner, who appears in person submits that it is evident that on a perusal of the order sheets in the instant case that the intervention application had been owned by him and he had appeared on the very first date, when the said application was listed before this Court i.e., on 09.6.2020 to support the same and had said that it needed to be examined in the light of spike of cases in Delhi. The petitioner refers to para 6 of the order passed on 11.2.2020 and states that even on the said date, Mr. Satyakam, learned ASC had drawn the attention of this court to the order dated 08.6.2020 passed in W.P.(C) No. 3250/2020 (erroneously mentioned as W.P.(C) No. 3252/2020 in the order) pleading that it was a suo motu petition that was taken up by a coordinate Bench, which had already directed private and public hospitals to upload the data of real time vacancy of beds for giving admission to COVID-19 patients. Mr. Malhotra submits that taking note of the aforesaid submission made by learned ASC and on perusing the order dated 08.6.2020, this Court had itself made it clear that the aforesaid aspect was not going to be examined in the present proceedings.

5. We have considered the submissions made by learned ASC and have perused the common order dated 27.7.2020, passed by the co-ordinate Bench in W.P.(C) Nos. 3250/2020 and 3376/2020.

6. A glance at the first two paras of the aforesaid order reveals that the focus of the court in the suo mottu petition was in relation to the manner in which COVID-19 patients were required to be hospitalized and the treatment available to them including helpline numbers and availability of bed, Ambulances etc. The second petition which is a PIL, was filed for issuing directions to the Govt. to ensure that the Govt. and private hospitals in the city do not refuse emergent medical care to persons during the COVID-19 pandemic and admission is not denied to asymptomatic and symptomatic COVID-19 patients. Further, the petitioner had sought directions to the Govt. to ensure that hospitals do not force front line health workers to wear used PPEs and they do not charge high amount for supplying PPEs to patients. It was in the light of the relief sought in the

aforesaid petitions that the coordinate Bench has made observations from para 6 onwards after taking note of the stand taken by the GNCTD in its affidavit that has been extracted in the said order. The tone and tenor of the aforesaid order makes it clear that the court was examining the preparedness of the Delhi Govt. to deal with the COVID-19 pandemic on several aspects including, providing adequate helpline numbers, sufficient numbers of ambulances, ensuring availability of RAT kits and testing through RAT at Govt. hospitals and Govt. dispensaries, availability of data relating to real time updation of beds at Govt. hospitals, setting up of Delhi Plasma Bank, pricing of the RT-PCR tests and increase in COVID-19 testing through introduction of RAT.

7. As against the above, the focus of the orders passed by this court over the past couple of months has been on ramping up of testing in Delhi not just through RAT, but also through RT-PCR, CBNAAT and true NAT and the steps taken in that direction by all the agencies under the guidance of the ICMR. In the course of the orders passed by this Bench, several developments have taken place in Delhi, with the number of cases increasing exponentially. The steps taken by GNCTD to keep abreast of the situation and deal effectively with COVID-19 infection by amongst others, ramping up the testing have been a matter of consideration. The orders passed have noted the constitution of a Committee by the Lt. Governor, GNCTD to make recommendations on all aspects of COVID-19 infection and for charting the way forward, flagging of the difficulties faced by private laboratories for conducting the RT-PCR test and referring them to the Delhi Govt. and very same Committee for quick resolution. This Court has taken note of the Advisories issued by the ICMR and the consequent orders passed by Delhi Govt. from time to time for increasing testing in Delhi, both in the private and public sectors. The advisories of the ICMR dated 14.6.2020 and 23.6.2020 were issued while this court was seized of the matter.

8. Perusal of the orders passed in the instant proceedings would show that this Court has passed various directions to the Delhi Government to ramp up the number of tests undertaken to detect the spread of the infection. On 11.06.2020, directions were given to the Delhi Government to permit all private hospitals in Delhi who are equipped with a lab to undertake COVID- 19 tests to do testing for patients who had to undergo emergent surgeries because such patients had to wait to undergo test for COVID-19 at labs other than those which are situated within the premises of the hospital. In the same order, this Court had directed the private laboratories to file affidavits as to the difficulties faced by them on account of bureaucratic red-tapism. Pursuant to the said order, several laboratories filed affidavits pointing out difficulties which were addressed by this Court in orders dated 18.06.2020 and 22.06.2020 and the Delhi Government assured that the difficulties faced by the private laboratories would be adequately addressed. On 16.07.2020, when this Court found that the number of RT-PCR tests had reduced drastically, Delhi Government and ICMR were directed to give their response. On going through their response, it was found that almost 50% capacity of the RT-PCR test was not being utilized and the focus was primarily testing through RAT whereas RT-PCR is the gold standard test. The Delhi Government was directed to respond on this aspect in the order dated 27.07.2020. A perusal of the above would show that this Court has been constantly monitoring as to how the testing of COVID-19 infection is being conducted to ensure that there is speedy and accurate detection of the spread of the COVID-19 pandemic and steps are taken to arrest its spread.

9. In the above background, the resistance of the Delhi Government to this Court monitoring the progress made in ramping up the testing, is incomprehensible when admittedly, this is not an adversarial litigation and it is purely in the interest of the citizens of Delhi that all government departments and agencies act in tandem and work collectively to deal with the COVID-19 pandemic for larger public good. The technical plea taken by the GNCTD on the maintainability of an application in a disposed of matter would have engaged this Court had it been a routine litigation between two private parties. This is not so here. Reliance placed by the learned ASC on the decision in the case of Braham Dutt Sharma (*supra*), is therefore found to be misplaced. In the said case, the respondent before the Supreme Court (writ petitioner in the High Court) had initially challenged the correctness of the order of the State of Uttar Pradesh dismissing him from service by filing a writ petition in the High Court. The High Court allowed the writ petition and quashed the order of dismissal of the petitioner from service on the ground that he had not been afforded a reasonable opportunity of defend himself. Two years after the order in the writ petition, the petitioner had filed a miscellaneous application before the High Court challenging an order fixing his pension which had been permitted by the High Court. It is in these facts the Supreme Court observed that no application can be entertained to revive the proceedings in respect of subsequent events after two years. The said proposition may be applicable to inter-se disputes between the parties but cannot be made applicable to public interest litigation that too when the High Court is monitoring the implementation of its directions given to various authorities.

10. It is well settled that in public interest litigations, the High Court can monitor the steps taken by the respondents/authorities to ensure that its directions are being implemented in letter and spirit. The history of the instant case which has been elaborated hereinabove shows that this court in the instant writ petition is monitoring the steps taken by the authorities for conducting tests for identifying COVID-19 patients to ensure that the pandemic does not spread. The present petition is not in the nature of adversarial litigation and has been filed for a specific purpose and to serve public cause. The jurisdiction of the High Court to continuously monitor the situation even in a disposed of petition cannot be curtailed by taking such a technical plea.

11. We therefore decline to close the matter as requested and now proceed to examine the Status Report filed by the Delhi Government. The said Status Report records that the Delhi Government has neither discouraged nor inhibited the scope of the RT-PCR testing and has in fact conducted 524481 RT-PCR tests till 30.07.2020, which works out to 27604 RT-PCR tests per million (i.e. double of the national average of 13647 tests per million). It has been further stated that a resident of Delhi can get himself tested through RT-PCR by following the protocol laid down by the ICMR; that RAT testing is a complementary testing to RT-PCR as it helps early detection of disease.

12. The Status Report records that in the report dated 20.06.2020, an expert panel comprising of members of the Niti Ayog, AIIMS, ICMR and NCDC have suggested that a roadmap for strengthening of the COVID-19 survey and Delhi Government has revised its response plan and reviewed the Containment Zones and factored in the cluster analysis undertaken by the Department of Health and Family Welfare, GNCTD. For the purpose of redesigning the Containment Zones, technical support was taken from NCDC and the quantum of testing efforts was increased substantially both, in terms of RAT and RT-PCR. RAT tests were ramped up from 18760 between

11.06.2020 to 28.06.2020 to 81194 from 21.06.2020 to 30.06.2020. Similarly, as against 66394 RT-PCR tests conducted between 11.06.2020 to 20.06.2020, 74227 RT-PCR tests were conducted from 21.06.2020 to 30.06.2020. It is stated by learned ASC that the aforesaid tests are in consonance with the strategy adopted by the Delhi Government and the testing has been conducted in terms of the Advisories dated 14.06.2020 and 24.06.2020 issued by the ICMR.

13. Dr. Gupta, Scientist F appearing for the ICMR states that the ICMR is satisfied with the extent of testing being done by the Delhi Government by adopting RT-PCR and RAT testing. Simply because 60% of the reports of RAT tests are negative, is not reason enough for a person to undergo RT-

PCR testing unless and until after being declared as negative in the RAT test, the said person has symptoms that are visible to the attending doctor, for undergoing RT-PCR testing. Dr. Gupta clarifies that the recommendation for undergoing the RAT test is for Containment Zones/Hotspots and Health Care settings in certain circumstances specified in the Advisory dated 14.06.2020 issued by ICMR. For other areas, the guidelines of the ICMR apply for undertaking the RT-PCR test, as per the particular groups identified in the Advisory.

14. The ICMR Guideline of 18.05.2020 that holds good for RT-PCR testing, are extracted below:

1. All symptomatic (ILI symptoms) individuals with history of international travel in the last 14 days.
2. All symptomatic (ILI symptoms) contacts of laboratory confirmed cases.
3. All symptomatic (ILI symptoms) health care workers/frontline workers involved in containment and mitigation of COVID 19.
4. All patients of Severe Acute Respiratory Infection(SARI).
5. Asymptomatic direct and high-risk contacts of a confirmed case to be tested once between day 5 and day 10 of coming into contact.
6. All symptomatic ILI within hospots/containment zones.
7. All hospitalised patients who develop ILI symptoms.
8. All symptomatic ILI among returnees and migrants within 7 days of illness.
9. No emergency procedure (including deliveries) should be delayed for lack of test. However, sample can be sent for testing if indicated as above (1-8), simultaneously.

15. We are further informed that out of three laboratories that ICMR has recently inaugurated, one of them situated in Noida, can help in ramping up RT-PCR testing in Delhi, if so required.

16. Mr. Ahluwalia, learned CGSC, clarifies that only private laboratories and hospitals require accreditation for undertaking the RAT and not the State run hospitals or laboratories. He states that NABL is required to give accreditation to private laboratories that propose to do RAT testing, whereas private hospitals need accreditation from NABH.

17. Learned ASC states on instructions that the number of RAT tests conducted by the Delhi Government between 11.06.2020 to 31.06.2020, have all been conducted in the Containment Zones/Hotspots and the Health Care settings and the RT-PCR tests have also been conducted strictly in accordance with the guidelines issued by the ICMR. Further, on enquiring Dr. Mundeja, she informs us that the second round of sero surveillance is being conducted by the Delhi Government between 01.08.2020 to 07.08.2020. Dr. Surjeet Singh, Director NCDC, who is present in the hearing states that this time, NCDC is not a part of the said sero surveillance.

18. We have enquired from Delhi Government to clarify that if the mandate of ICMR that RAT is to do RAT testing only in Hotspots/Containment Zones and Health Care settings, then where is the need to do RAT testing at other places in Delhi. Mr. Satyakam, learned ASC states that the understating of the Delhi Government of the Advisories issued by the ICMR have been spelt out in para 16 to 19 of the Status Report and if the ICMR does not agree with it, the court may clarify the position.

19. It is not for this Court to issue any clarification. Since it is the stand of the Delhi Government that it is being guided by the ICMR which is a part of the Expert panel, it is directed to seek necessary clarifications from the ICMR on this aspect right away and strictly adhere to the same instead of drawing its own conclusions.

20. After the Delhi Government obtains necessary clarifications from the ICMR with regard to the manner of implementation of its Advisories for deploying the RAT tests and the RT-PCR tests in different part of Delhi, a fresh Status Report shall be filed. In the event ICMR proposes to issue a fresh Advisory in the meantime, it may file the same on an affidavit.

21. List on 19.08.2020.

HIMA KOHLI, J SUBRAMONIUM PRASAD, J AUGUST 04, 2020 ap/pst/hsk/kk