

ITEM NO.1 COURT 5 (Video Conferencing) SECTION XIV

**S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS**

SPECIAL LEAVE PETITION (CIVIL) Diary No(s).11622/2021

(Arising out of impugned final judgment and order dated 01-05-2021 in WP(C) No. 3031/2020 and 04-05-2021 in WP(C) No. 3031/2020 passed by the High Court of Delhi at New Delhi)

UNION OF INDIA

Petitioner(s)

VERSUS

RAKESH MALHOTRA & ANR.

Respondent(s)

Date : 05-05-2021 These petitions were called on for hearing today.

CORAM :

**HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE M.R. SHAH**

**Mr. Jaideep Gupta, Sr. Adv. (A.C.)
Ms. Meenakshi Arora, Sr. Adv. (A.C.)
Mr. Kunal Chatterji, AOR
Mr. Mohit Ram, AOR
Mr. Avnish Kumar Sharma, Adv.**

For Petitioner(s) **Mr. Tushar Mehta, SG
Ms. Aishwarya Bhati, ASG
Mr. Rajat Nair, Adv.
Mr. Kanu Agrawal, Adv.
Mr. Amit Mahajan, Adv.
Mr. Prashant Singh B, Adv.
Mr. Raj Bahadur Yadav, AOR
Mr. Gurmeet Singh Makkar, AOR
Mr. B. V. Balaram Das, AOR**

For Respondent(s) **Mr. Rahul Mehra, Sr. Adv.
Mr. Gautam Narayan, AOR
Mr. Satyakam, Adv.
Ms. Asmita Singh, Adv.
Mr. Adithya Nair, Adv.**

**Mr. Rakesh Malhotra, In Person
Mr. Tungesh, Adv.**

**UPON hearing the counsel the Court made the following
O R D E R**

- 1 These proceedings have arisen from two orders of the Division Bench of the High Court of Delhi dated 1 May 2021 and 4 May 2021. By the first of these orders, the High Court directed the Central Government to ensure that the Government of National Capital Territory of Delhi¹ receives its allocated supply of 490 MT “positively today, by whatever means”. The Central Government was directed to arrange tankers so that the allocation made to Delhi could be fulfilled. The High Court directed that if the order is not implemented, the concerned officers of the Government shall remain present during the hearing on 3 May 2021.
- 2 By the second order of the High Court, the Central Government has been directed to show cause as to why contempt action should not be initiated not only for non-compliance with its order dated 1 May 2021, but also of the order passed by this Court in the meantime on 30 April 2021 (which was released and uploaded on the website of the Supreme Court of India on 2 May 2021) .
- 3 At this stage, it may be material to note that the order of this Court dated 30 April 2021, followed upon a comprehensive hearing on diverse aspects of the management of the COVID-19 pandemic.
- 4 By the order of this Court dated 30 April 2021, certain specific directions were issued in regard to the supply of oxygen to the NCT of Delhi. Paragraphs 27, 28 and 29 of the order are extracted below for convenience of reference:

“27 Submissions have also been made on the issue of supply of oxygen by Mr Rahul Mehra, learned Senior Counsel appearing for the Government of National Capital Territory of Delhi. Mr Rahul Mehra submits that the GNCTD is facing an acute shortage of the supply of oxygen as it had been

¹“GNCTD”

allocated a substantially lower quantity of oxygen as against its projected demand. Mr Mehra pointed out that initially as on 15 April 2021, the projected demand of GNCTD for 20 April 2021 was 300 MT/day, for 25 April 2021 it was 349 MT/day, and for 30 April 2021 it was 445 MT/day. However, due to a surge in cases, the projected demand was revised by GNCTD on 18 April 2021 to 700MT/day and this was immediately communicated to the Central Government. Despite the increase in projected demand, the supply of oxygen to GNCTD has continued in terms of the allocation order dated 25 April 2021, in which 490 MT/day were allocated. As against this as well, the manufacturers have only been able to supply 445 MT/day. Mr Mehra has clarified that as on the date of the hearing their demand was 700MT/day, however their projected demand for the coming days is stated to be 976 MT/day as the GNCTD has planned an increase in medical infrastructure, including beds with oxygen cylinders and beds for patients in intensive care unit.

- 28 Opposing his submission, the Solicitor General and Ms Dawra stated that no revised projections have been received from GNCTD till date. The Solicitor General has also sought to highlight that the government of GNCTD has failed to offtake the allocated quantity of oxygen from the supply point.
- 29 Having heard the submissions of both counsel on the issues pertaining to supply of oxygen to GNCTD, we note that the Central Government (on page 63) in its affidavit dated 23 April 2021 has admitted that the projected demand for GNCTD as of 20 April 2021 had increased by 133% from 300 MT/day to 700 MT/day. According to the figures of allocation given in the affidavit dated 23 April 2021 and the presentation given by Ms Dawra, the existing allocation of GNCTD remains at 490 MT/day. This situation must be remedied forthwith. The situation on the ground in Delhi is heart rending. Recriminations between the Central Government (which contends that GNCTD has not lifted its allocated quantity) and GNCTD (which contends that despite its projected demand the quantity allocated has not been enhanced) can furnish no solace to citizens whose lives depend on a thin thread of oxygen being available. On the intervention of the Court during the hearing, the Solicitor General states that he has instructions to the effect that GNCTD's demand of medical oxygen will be met and that the national capital will not suffer due to lack of oxygen. We issue a peremptory direction in those terms. In the battle of shifting responsibility of supplying/off-taking of oxygen, lives of citizens cannot be put in jeopardy. The protection of the lives of citizens is paramount in times of a national crisis and the responsibility falls on both the Central Government and the GNCTD to cooperate with each other to ensure that all possible measures are taken to resolve

the situation. Learned Senior Counsel for GNCTD has assured the court after taking instructions at the 'highest' level that the issue will be resolved completely in a spirit of co-operation. During the course of the hearing, the Solicitor General has assured that henceforth he will ensure that the deficit of oxygen is rectified and supply is made to the GNCTD according to their projected demand (which may be revised in the future) on a day by day basis. We accept his submission and direct compliance within 2 days from the date of the hearing, that is, on or before midnight of 3 May 2021."

5 In the operative order, the following directions were issued:

"(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."

6 When the High Court of Delhi was seized of the proceedings on 4 May 2021, it was argued on behalf of the Central Government that:

(i) The compliance affidavit would be filed before this Court in regard to the steps which have been taken to fulfill the terms of the directions issued by the Court in its order dated 30 April 2021; and

(ii) This Court has not directed the supply of 700 MT of Liquid Medical Oxygen² per day to the NCT of Delhi.

7 The High Court held that neither of these submissions could be accepted. In the view of the High Court, the order of this Court mandates that a supply of 700 MT of LMO per day has to be effected to the NCT of Delhi as against which the producers of oxygen have been able to supply 445 MT per day.

8 Aggrieved by the directions of the High Court initiating contempt proceedings against two of its officers, the Union of India is in appeal.

²"LMO"

9 At the outset, Mr Tushar Mehta, learned Solicitor General, has submitted that the Central Government accepts its obligation to comply with the order of this Court dated 30 April 2021, accepting the interpretation that the order mandates the supply of 700 MT of LMO per day to the NCT of Delhi. However, it has been submitted that the exercise of the contempt jurisdiction was not warranted for a variety of reasons. Firstly, it has been submitted that an expert group was constituted by the Central Government consisting of (i) Dr V K Paul, Member of the NITI Aayog; (ii) Dr Randeep Guleria, Director, AIIMS; (iii) Director General of ICMR; and (iv) Director General of Health Services for computing the requirement of oxygen across India on a rational basis. The expert group determined that the oxygen requirement would be calculated on the following basis:

- (i) For 50% of non-ICU beds at the rate of 10 litres per minute;
- (ii) For 100% of ICU beds at the rate of 24 litres per minute.

10 On this basis, it has been submitted that the optimal demand of NCT of Delhi should be in the range of 415.43 MT/day and that the demand of 700 MT of LMO per day, as claimed, appears to be contrary to its optimal requirements. The basis of the above computation is on the following premises:

"I. Calculation sheet for Oxygen Requirement for Non-ICU beds:

- i) Total number of Non-ICU beds -16272 (as per GNCTD);
- ii) As per the GOI formulae 50% of these require oxygen: i.e. 8136 non-ICU beds require oxygen;
- iii) The Oxygen requirement in liters for these non-ICU beds is @ 10 liter/Minute
- iv) Thus for 1 minute the oxygen requirement for 8136 non-ICU beds comes out to be 81360 liter/Minute [8136 * 10= 81360]
- v) On the aforesaid calculation the oxygen requirement of 1

day comes out to be 11,71,58,400 liters [81360 * 60(min in 1 hr) X 24(hrs in 1 day) = 11,71,58,400]

- vi) The aforesaid demand of 11,71,58,400 liters of oxygen comes out to be **152 MT** of oxygen as per the following formulae.
 - a) 1 Metric ton = 770000 litres
 - b) Conversion of litres to Mt for 1 Day = $117158400 \div 770000 = \mathbf{152.15 \text{ MT}}$

II. *Calculation sheet for Oxygen Requirement for ICU beds :*

- i) Total number of ICU beds 5866;
- ii) The Oxygen requirement in liters for these ICU beds as per GOI Norms is @ 24 litre/minute;
- iii) Thus for 1 minute the oxygen requirement for 5866 ICU beds for 1 minute comes out to be 1,40,784 litre/Minute [5866 * 24= 1,40,784]
- iv) On the aforesaid calculation the oxygen requirement of 1 day for ICU beds comes out to be 20,27,28,960 litres [1,40,784 * 60 * 24 = 20,27,28,960]
- v) The aforesaid demand of 20,27,28,960 liters of oxygen for a day comes out to be **263.28 MT** of oxygen as per the following formulae.
 - a) 1 Metric ton = 770000 litre
 - b) Conversion of litre to MT for 1 day - $20,27,28,960 \div 770000 = \mathbf{263.28 \text{ MT}}$

III. *The total oxygen requirement of NCT of Delhi comes out to be:*

Demand for Non- ICU beds 152.15 + demand for ICU beds 263.28 = **415.43 MT**
(emphasis in original)

- 11 The second submission which has been urged by the Solicitor General is that progressively, an effort has been made by the Central Government in good faith to increase the stock of medical oxygen which is available for distribution across the country and as a result of those efforts presently, about 9000 MT of medical grade oxygen is available in the pool for distribution across the country. As a result of this, it has been submitted that the availability of oxygen to NCT of

Delhi which stood at 433 MT on 3 May 2021 has increased to 555 MT on 4 May 2021 and today, until 12 noon, a total quantity of 351.56 MT has reached NCT of Delhi. The cycle for measurement of supplies commences from midnight and ends at midnight on the following day. There is in other words no intentional violation so as to warrant invocation of the power to punish for contempt.

- 12 The third submission which has been urged by the Solicitor General is that if a comparison is drawn with the requirements for the City of Mumbai, it emerges that at the peak of its oxygen requirement when Mumbai had an active case load of 92,000 on 10 April 2021, the oxygen consumption was about 275 MT LMO each day. Hence, it has been urged that Mumbai was able to manage with a total requirement of 275 MT MLO with a proper institutional framework in place through which oxygen handling and storage capacity was taken care of in a planned manner.
- 13 The fourth submission which has been urged by the Solicitor General is that if a proper audit is conducted of the requirement of oxygen for the NCT of Delhi by a broad-based committee consisting of officers drawn from GNCTD, the Central Government and experts drawn from public hospitals in NCT of Delhi and from the private sector, a scientific assessment can be made of the actual requirement of NCT of Delhi on the basis of which an allocation can be made.
- 14 In other words, it has been urged that increasing the oxygen allocation to 700 MT will only result in the reduction of allocation to another critically affected area of the country and this has to be arrived at on a scientific rationale.
- 15 Apart from the Solicitor General, we have interacted, on the video conferencing platform in open court, with Mr Piyush Goyal, Additional Secretary in the Union Ministry of Home Affairs. Mr Goyal has indicated the steps which have been taken by the Central Government for augmenting the supply of oxygen to NCT of

Delhi. The Court has been apprised of the following steps taken:

- (i) The virtual control room which takes care of the entire country has been specifically augmented in the case of NCT of Delhi by engaging with the officers of GNCTD as well as officers of the Central Government;
- (ii) A quantity of 140 MT which was imported, arrived at Mundra port and was dispatched to the NCT of Delhi, where it has arrived yesterday for being allocated and supplied;
- (iii) Apart from the imported supplies, an additional quantity of 80 MT initially was sourced from the State of Gujarat which has been progressively enhanced to 102-103 MT per day; and
- (iv) Arrangements have been made with the Railways for a complement of four trains to carry the stock of oxygen from supply points in various regions to NCT of Delhi on a schedule which will ensure the adequate availability of oxygen.

16 We may also note at this stage that Mr Rahul Mehra, learned Senior Counsel appearing on behalf of GNCTD, has furnished the following data in regard to the quantity of oxygen which has been allocated to NCT of Delhi since 28 April 2021. The figures which have been indicated before the Court are as follows:

- 28 April 2021 - 431.26 MT
- 29 April 2021 - 409.38 MT
- 30 April 2021 - 324.63 MT
- 1 May 2021 - 422.04 MT

- 2 May 2021 - 447.59 MT
- 3 May 2021 - 433.09 MT
- 4 May 2021 - 555.01 MT

17 The data which has been provided by the Senior Counsel for GNCTD suggests that there has been an increase in the availability of oxygen between 2, 3 and 4 May 2021, though the quantity of 700 MT which was prescribed in the order of this Court dated 30 April 2021 is yet to be achieved.

18 Mr Piyush Goyal, learned Additional Secretary, drew the attention of the Court to the fact that there was a drop in the supply on 30 April 2021 as a result of the non-availability of a specified source of supply.

19 At the outset, it needs to be clarified that the reason why this Court has been persuaded to take up these proceedings during the pendency of the contempt proceedings in the High Court is because recourse to the contempt jurisdiction against two officers (one of whom, Ms Dawra, has tested COVID-19 positive but continues to attend to her duties while in isolation) will not in itself resolve the problem which is confronting NCT of Delhi. At this stage, when the country is faced with a serious pandemic, the effort of the Court must be to facilitate problem solving by the active engagement and cooperation of all stakeholders. The High Court of Delhi has been engaging with the situation virtually on a day to day basis and has been considering diverse aspects of the matter. The contempt notice is an expression of its anguish. The issue of the availability of oxygen for NCT of Delhi has to be resolved bearing in mind the availability of oxygen in the country so that suitable arrangements are made for allocation, transportation from the point of supply and distribution within the city. The Union Government cannot be oblivious to the urgent need and demand for oxygen to

meet the requirements of the NCT of Delhi. It is with that end in view that this Court by its order dated 30 April 2021 directed the allocation of 700 MT of oxygen per day to NCT of Delhi. The effort to persuade the High Court that there was in fact no such direction by this Court was an evident attempt at legal disingenuity and has been correctly rejected. The Solicitor General has not pressed such a submission in these proceedings.

- 20 After hearing the submissions of the learned counsel as well as of Mr Jaideep Gupta and Ms Meenakshi Arora, learned Senior Counsels, who have appeared as *amicus curiae*, it appears to the Court that the problem has four dimensions.
- 21 The first aspect of the problem is the methodology or formula which is being employed by the Union Government for computing the requirement of oxygen to the States and the Union Territories. As we have noted earlier, the formula which has been arrived at by the expert group is on the basis of a certain requirement of oxygen per minute for ICU and non-ICU beds and the patient load. It is on the basis of this formula that an allocation is being made for diverse areas of the country. In view of the experience which has been gained since the formula was adopted, it would be necessary for the Central Government to look at the formula afresh and to determine as to whether it needs to be altered having regard to the specific requirements of areas such as NCT of Delhi which have been seriously affected by the second surge of the pandemic. For instance, one aspect which needs to be underlined is that the requirement of oxygen is tagged to the number of beds, both ICU and non-ICU beds. Apart from the requirement of oxygen in a formal institutional framework, oxygen is also being made available to individuals who are unable to get beds in hospitals. Hence, it would not be adequate to make an assessment of the quantity of oxygen required based exclusively on the formula which has been used thus far by the Central Government. While we have underscored this aspect, this is certainly a matter

which would need to engage the fresh attention of a body of experts who may determine whether any change or modifications are required to meet the exigencies of a rapidly deteriorating situation.

- 22 The second aspect of the matter is the requirement of managing the resources of oxygen so as to optimize the availability of the NCT of Delhi. This would be dependent on the efficiency of the supply chain and a proper distribution of oxygen from the supply points up to the hospitals. Another aspect under this sub-head, which has already been emphasized by the order of this Court dated 30 April 2021 is the requirement of building up proper stocks of oxygen so that in the event of an emergency, alternate buffer stocks are available to prevent deaths due to the disruption of supplies.
- 23 The third aspect which needs to be emphasized is the actual availability of oxygen. We are inclined to reflect further on the submission which has been urged on behalf of the Union of India by the Solicitor General that some modalities may be put into place to carry out a scientific audit of the requirement of the NCT of Delhi. Whether the audit results in revealing a higher requirement than what has been indicated in the order of this Court dated 30 April 2021 will be seen. At this stage, it has emerged before the Court that efficient administrative modalities were placed into operation by the Municipal Corporation of Greater Mumbai during the second wave of the COVID-19 pandemic. In order to enable the GNCTD as well as the Central Government to have the benefit of these shared experiences, there has been a consensus before us that a team of officers comprised both of GNCTD as well as the Central Government will engage in the next three days with the officials and medical experts of the Municipal Corporation of Greater Mumbai as well as the team of expert private doctors set up by the Government of Maharashtra and derive inputs from the modalities which were followed for augmenting the oxygen

supply to Mumbai. Based on these experience, steps can be taken in close collaboration between the Central Government and GNCTD for replicating the administrative arrangements which were arrived at in Mumbai to the extent they may be found to be feasible in their application to NCT of Delhi.

- 24 The Court will also hear submissions on whether a scientific audit can be conducted by broad-based team consisting of officers of GNCTD, Central Government as well as the experts drawn from public and private sector health institutions in NCT of Delhi.
- 25 In the meantime, until the above exercise is carried out, the directions which are contained in the order of this Court dated 30 April 2021 must be duly implemented. It is *prima facie* not expedient at this stage to take recourse to the coercive arm of the law by invoking the contempt jurisdiction against the two officials of the Central Government and an opportunity should be granted to the Central Government to place before this Court a plan specifically indicating the manner in which the requirement of the NCT of Delhi of 700 MT in terms of the order of this Court dated 30 April 2021 will be complied with, pending further directions of this Court. In order to furnish an opportunity to the Central Government to place a tabulated statement before this Court, we adjourn the proceedings to 11.00 am tomorrow when this Bench will assemble for its regular assignment of work. We accordingly direct that by 11.00 am tomorrow, the Central Government shall place a comprehensive plan before this Court indicating the manner in which the direction for the allocation of 700 MT of LMO to Delhi shall be complied with. The plan shall indicate:

- (i) Sources of supply;
- (ii) Provisions for transportation; and

- (iii) All other logistical arrangements necessary to ensure the fulfillment of the requirement of NCT of Delhi in terms of the order of this Court.
- 26 This plan would remain in operation pending further orders of this Court when the Court would take up the wider submissions both in relation to GNCTD as well as for the rest of the country.
- 27 In view of the above directions, we stay the operation of the contempt notice which has been issued by the High Court of Delhi on 4 May 2021. However, we clarify, as we did in terms of our previous order, that the stay which has been granted of the contempt proceedings shall not operate as an order of restraint on the High Court continuing to monitor the issues which have arisen before it.
- 28 In order to enable the Central Government to place a comprehensive plan for allocation, supply and distribution of oxygen to meet the requirements of GNCTD, we direct that a meeting shall be held this evening between the Chief Secretary, Principal Secretary, Health of GNCTD with a team of officers of the Central Government. The meeting may be held consistent with the COVID-19 protocols on a virtual platform.
- 29 List the Special Leave Petitions tomorrow (6 May 2021) at 11.00 am.

(SANJAY KUMAR-I)
AR-CUM-PS

(SAROJ KUMARI GAUR)
COURT MASTER