

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P. (C) No.262 of 2022
With
W.P. (C) No.261 of 2022

M/s. Dr. S. Sharan's Testing Center, Ranchi Petitioner.
[In W.P.(C) No.262/2022]
M/s. MicroPraxis Labs, Ranchi Petitioner.
[In W.P.(C) No.261/2022]

-Versus-

1. The State of Jharkhand, through its Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, Nepal House, Doranda, Ranchi.
2. Jharkhand Rural Health Mission Society, through its Mission Director, Namkum, Ranchi.
3. The Union of India, through its Secretary, Ministry of Health and Family Welfare, Nirman Bhawan, New Delhi-110001.
4. Indian Council of Medical Research, through its Director, Department of Health Research, Ministry of Health & Family Welfare, Government of India, V. Ramalingaswami Bhawan, Ansari Nagar, New Delhi-110029.

..... Respondents.
[In W.P.(C) No.262/2022]

1. The State of Jharkhand, through the Principal Secretary, Department of Health, Medical Education and Family Welfare, Nepal House, Doranda, Ranchi.
2. The Additional Chief Secretary, Department of Health, Medical Education and Family Welfare, Nepal House, Doranda, Ranchi.
3. The Union of India, through its Secretary, Ministry of Health and Family Welfare, Nirman Bhawan, New Delhi.

..... Respondents.
[In W.P.(C) No.261/2022]

CORAM : HON'BLE MR. JUSTICE RAJESH SHANKAR

For the Petitioner(s): Mr. Sumeet Gadodia, Advocate
[In W.P.(C) No.262/2022]
Mr. Rajendra Narayan, Advocate
[In W.P.(C) No.261/2022]
For the State : Mr. Jagdeesh, A.C. to S.C.I
[In W.P.(C) No.262/2022]
Mr. Sreenu Garapati, S.C.III
[In W.P.(C) No.261/2022]
For UOI : Mr. Prashant Vidyarthi, CGC
[In both cases]

Order No.07

Date: 28.03.2022

1. With the consent of the parties, both these writ petitions are taken up together and are being disposed of by this common order.
2. The present writ petitions have been filed for quashing the order as contained in memo no.42 (HSN) dated 20.01.2022 passed by the Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, whereby rate of RT-PCR test for Covid-19 chargeable by private laboratories in the State of Jharkhand as well as the rate for home visit to collect samples for RT-PCR test have been re-fixed.

Further prayer has been made for declaring that the said respondent has no authority or jurisdiction to fix the rate of RT-PCR test with respect to private laboratories unless and until the respondent- State of Jharkhand is ready to subsidize the difference between the rates fixed by it and the rate prescribed by the Indian Council for Medical Research.

3. The learned counsel for the petitioners submits that with the outbreak of novel Coronavirus (COVID-19) across the country, the respondent-ICMR laid down certain guidelines for conducting RT-PCR tests in private laboratories and the said guidelines were notified by the Ministry of health & Family Welfare, Government of India vide its order dated 21st March, 2020 in exercise of powers conferred under Clause (i) and (l) of Section 10(2) of the Disaster Management Act, 2005. In view of the said guidelines laboratory test was permitted to be conducted by such laboratory, which has acquired certificate of accreditation issued by the National Accreditation Board for Testing and Calibration Laboratories (for short "NABL"). It was provided in the said guidelines that the maximum cost for testing of sample by way of RT-PCR method should not exceed Rs.4,500/-. The petitioner- M/s. Dr. S. Sharan's Testing Centre, Ranchi was issued Certificate of NABL on 10.08.2020 whereas the petitioner- MicroPraxis Labs, Ranchi was issued the said certificate on 3rd July, 2020. They have also been recognized by ICMR as the proved laboratories for carrying out RT-PCR test in the State of Jharkhand. Pursuant thereto, even the respondent-State of Jharkhand through the Jharkhand Rural Health Mission Society vide its letter no.1517(MD) dated 18.08.2020 and letter no.IDSP/2020/154-182 dated 6th July, 2020 issued to the petitioners, respectively, granted approval/clearance to them for collection and testing of Covid-19 samples at their laboratories through RT-PCR mode. The respondent-ICMR vide its communication dated 25th May, 2020 indicated, inter alia, that upper ceiling of Rs.4,500/- prescribed by it earlier for diagnosis or each Covid-19 sample may not be applicable in the prevailing circumstances in view of reduction in prices of testing commodities and, accordingly, advised all the State Governments/Union Territories Administrations to negotiate with private laboratories and to fix mutually agreeable prices for sample testing being sent by the government and also for private individuals desirous of testing by these labs. It is further submitted that vide order

dated 14.12.2020, the Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, Government of Jharkhand, Ranchi however unilaterally determined an amount of Rs.400/- towards each RT-PCR sample testing and an amount of Rs.200/- towards home visit for each sample collection but the petitioners and other private laboratories did not challenge the said unilateral exercise of the said respondent, as the rates determined by it were still workable and economically feasible. However, the Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, Government of Jharkhand vide impugned order dated 20.01.2022 has again re-fixed/revised the rate of RT-PCR test @ Rs.300/- per sample and for Home Visit collection @ Rs.100/- per sample. It is also submitted that the aforesaid order of re-fixation of rate for testing of samples through RT-PCR method and rate of each home visit for collection of samples has unilaterally been passed by the Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, Government of Jharkhand without any negotiation with private laboratories including the petitioners- laboratories. It is further submitted that rates of re-fixation for RT-PCR testing and home visit for collection of samples as decided by the Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, Government of Jharkhand vide order dated 20.01.2022 is not only contrary to the guidelines issued by Respondent-ICMR whereby it was advised to negotiate with private labs for arriving at an agreed rate, but is also wholly unworkable being economically unprofitable to private laboratories since the same has been arrived at without properly examining the price of input and overhead charges. It is also submitted that the cost which is being incurred by the petitioners for carrying out RT-PCR test is Rs.350/- per test and, further the expenses incurred by the petitioners towards home visit for collection of samples is Rs.150/- per collection. If the petitioners are compelled to carry out RT-PCR test including home visit for collection of sample at the rates determined vide order dated 20.01.2022, they will have no option but to shut down their pathological laboratories. It is further submitted that the State of Jharkhand in exercise of its executive power cannot legislate/issue direction in respect of the field which is exclusively reserved to Central Government and thus, passing of the order dated 20.01.2022 by way of executive instruction is wholly without

jurisdiction. The rate of RT-PCR test being conducted in the State of Jharkhand is the lowest as compared to other States. Apart from purchase of ICMR approved kits, the petitioners have to bear other financial obligations in order to continue the testing of Covid-19, such as electricity cost, salary of the employees, salary of collection boys, extraction unit, face masks, hand gloves, medical vials, insurance of machineries, rent of the premises, logistic expenditure including employment of data analyst, cost of software, cost of machines, salary of staff and other miscellaneous expenditure. Thus, the reduction in price is putting additional burden on the petitioners to meet other financial obligations which will finally result in termination of employees working with them and will also hamper the streamlined function as well as efficiency of the petitioners' labs. The petitioners are dedicated to prevent the spread of Covid-19 and are not rendering the said service only for financial gain, yet the State should strike a balance between the rate of RT-PCR test and the amount required for private labs to conduct such tests with ease, as it cannot be expected from the private labs to bear the cost of test from their own pocket.

4. It is further submitted that the impugned order passed by the Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, Government of Jharkhand is also in the teeth of the judgment of the Hon'ble Supreme Court rendered in the case of ***Shashank Deo Sudhi Vs. Union of India & Ors., reported in (2020) 5 SCC 134***, wherein the private laboratories have been permitted to continue to charge for testing of COVID-19 from persons who are able to make payment of testing fee as fixed by ICMR. It has been held that private laboratories are entitled to charge towards testing of COVID-19 at the rate determined by respondent- ICMR. It is further submitted that other States have provided opportunity to the private laboratories to give their consent and the prices have been reduced only after taking their consent, however, the State of Jharkhand has reduced the price without obtaining consent of the private laboratories including the petitioners. The break-up provided by the respondents in their counter affidavit is feasible only when the laboratories purchase the testing kits in bulk quantity, however, it is difficult for the laboratories situated in the State of Jharkhand to purchase huge quantity of testing kits as the numbers of samples collected here are relatively less as compared to other big cities.

5. On the contrary, learned counsel for the State of Jharkhand submits that the revised rate has been approved by the Health Minister, Government of Jharkhand and the said exercise has been undertaken after regular departmental review from time to time owing to declining price of essential Kits and Consumables like VTM (Viral Transport Media) kits, RNA Extraction Kits and RT-PCR Test (Amplification) Kits which are generally used in COVID-19 RT-PCR testing. It is further submitted that in view of the increased availability of Kits in the market and since more companies have started manufacturing RNA Extraction Kits, the cost of reagents/kits has come down. The Government of Delhi has already reduced the rate of RT-PCR test to be done @ Rs.300/ plus Rs.200/- extra for collecting samples from home. The Government of Andhra Pradesh has also reduced the rate of the RT-PCR test as Rs.350/- which is inclusive of the costs of Covid-19 tests, viral transport medium (VTM) kit and personal protective equipment (PPE) kit. It is further submitted that the Government of Haryana has also revised the upper cap of rates for COVID-19 testing @ Rs.2,99/- for samples collected at private hospitals/labs and their designated collection centres after due consideration on the said matter and as per advice of the experts, taking into account the cost of kits and consumables. At the beginning stage of COVID-19 pandemic, there was a global crisis of testing kits and reagents as well as keeping in view of imported kits and efforts involved in carrying out the test, ICMR, Government of India, New Delhi suggested the upper limit of a single test as Rs.4,500/- and thus the Government of Jharkhand also fixed the rate of RT-PCR test @ Rs.4,500/- for ICMR approved NABL certified laboratory. However, subsequently, due to varied options of testing materials/kits including indigenous ones, the prices were getting competitive and as such ICMR withdrew the upper ceiling of Rs.4,500/- per RT-PCR test. Accordingly, the Government of Jharkhand fixed the rate of testing as Rs.2,400/- per test including costs involved in picking and transportation of samples, documentation and reporting. The Government of Jharkhand again revised the RT-PCR testing rate for ICMR-approved NABL Certified Private Labs @ Rs.1,050/- and True Nat testing rate @ 1,250/- (inclusive of GST/Taxes, documentation and reporting in the State of Jharkhand) vide order as contained in letter no.366 (HSN), dated 15.10.2020 which was further revised and fixed @ Rs.800/- and

@ Rs.1,100/- respectively vide order as contained in letter no.462 (HSN), dated 1.12.2020 after due consideration of the matter and advice of experts, taking into account continuous reduction in the price of RT-PCR test kits, V.T.M. kits, TrueNat confirmatory kits, Rapid Antigen kits as well as comparing with the rate fixed by neighboring States like Bihar and Odisha. The Govt. of Jharkhand vide letter no.495 (HSN) dated 14.12.2020 further revised the rate of testing and fixed @ Rs.400/- for each RT-PCR test including PPE cost and all the taxes for all ICMR-approved NABL certified Laboratory as also the additional charge of Rs.200/- was fixed for collecting the samples by home visit with due consideration of reducing prices of testing kits and reagents (VTM kits, RNA Extraction Kits and Amplification Kits) and comparing the testing rates with the rates of other States like Odisha and Haryana. The said rate continued from December, 2020 to 19 January, 2021. Presently, the Government has 8 functional RT-PCR Labs which are performing COVID-19 test for which the Government procures the VTM Kits, RNA Extraction kits and RT-PCR Testing Kits. The rate of VTM kits was Rs.12.70/-, whereas the cost of RT-PCR testing kit was Rs.41.50/- and RNA extraction cost was Rs.128/- in the month of December, 2020, however, these rates have constantly declined to Rs.6/- for VTM kit, Rs.18/- for RT-PCR testing kit and Rs.44/- for RNA extraction kit in the month of December, 2021. At present total costing of RT-PCR test is Rs.232/- per sample. The private laboratories, including the petitioners, have accepted the revised rates of RT-PCR test on earlier occasions without any objection which amounts to waiver and acquiescence and as such they may not be allowed to take U-turn from their stand.

6. Heard the learned counsel for the parties and perused the materials placed on record. The petitioners are aggrieved with the decision of the Additional Chief Secretary, Department of Health, Medical Education & Family Welfare, Government of Jharkhand whereby the rate of RT-PCR test chargeable by private laboratories in the State of Jharkhand including the rate of home visit for collection of samples, has been re-fixed.
7. Thrust of the argument of the learned counsel for the petitioners is that the said decision has been taken in contravention of the guidelines issued by the ICMR vide communication dated 25.05.2020, which provides that determination of rates is to be undertaken only upon

mutual discussion and negotiation with private laboratories where such testings are being carried out. Further ground taken by them is that the rate fixed for testing vide Memo No.42 (HSN) dated 20.01.2022 is wholly unworkable being economically unviable to the private laboratories.

8. To appreciate the contention of the learned counsel for the parties, it would be appropriate to refer the letter dated 25.05.2020 issued by the ICMR addressed to the Chief Secretaries of all the States/Union Territories, which reads as under:-

"I congratulate you all for tremendous efforts being made to contain the Corona virus by adopting trace, track, test, isolate, quarantine and treat the infected persons to break the chain and save precious lives. In this endeavour, ICMR has been proactively reaching out to you in facilitating scaling up of testing facilities. As of now, there are 428 Government and 182 private labs for COVID 19 testing, spread across almost all states and UTs of the country. ICMR has been making sincere efforts to provide testing kits and reagents through the 16 distribution depots created at various ICMR Institutes.

2. At the beginning of COVID19 pandemic, there was a global crisis of testing kits and reagents as India was heavily reliant on imported products for molecular detection of viruses. As such, in-mid March, 2020, no rates for RT-PCR test for Corona virus was available for reference in the country. Keeping in view the cost of imported kits and efforts involved in carrying out the test, ICMR suggested the upper limit of a single test as INR 4,500 vide its letter dated 17/3/2020.

3. In this intervening period all out efforts have been made to facilitate local companies by bring them to locally manufacture swabs, viral transport media and RNA indigenous diagnostic kits are being approved on fast-track for RT-PCR Nat based test for COVID19 has also been validated and included as a testing of district hospitals/ PHCs. Inclusion of other alternate platforms like CBNAAT/Genexpert and Abott HIV viral load testing machines, are further improving the situation. To sum up, concerted efforts have been made to ramp up the testing infrastructure along with indigenous validation and production of testing kits for RT-PCR tests.

4. Now, testing supplies are also stabilizing and many of you have started procuring such kits mot market. Due to varied options of testing materials/ kits including indigenous ones, the care becoming competitive and are undergoing reduction. As you are fully aware, COVID19 has been declared as a pandemic and ICMR continuously advocates aggressive testing of ILI symptomatic persons for which RT-PCR test is considered as Gold Standard.

5. In this backdrop and keeping in view the evolving prices of the testing commodities, the earlier suggested upper ceiling of INR 4,500 vide letter dated 17/3/2020 may not be applicable now and therefore all State governments/ UT Administrations are advised to negotiate with private labs and fix up mutually agreeable prices for samples being sent by the government and also for private individuals desirous of testing by these labs.

6. Let me reiterate that aggressive timely testing is the standard protocol for containing the virus as well as to provide treatment to save precious human lives. I take this opportunity to convey my best wishes to you and your entire team involved in this fight against COVID19."

9. Thus, by way of the aforesaid letter, the ICMR informed the State Governments/UT administrations that the earlier price fixed for testing would not be applicable and also advised to fix prices for sample testing after negotiation with private labs.

10. The respondent-State of Jharkhand has though contended before this Court that the price so fixed for testing is genuine and even profitable for the private laboratories since the total cost of testing comes to Rs.232/- per sample, however, have not denied the averment of the petitioners that no negotiation was carried out with the private laboratories before fixing the impugned price of testing. So far as the claim of the State of Jharkhand that earlier also the price for testing was fixed without any negotiation which was accepted by the petitioners and now they have taken U-turn and have objected the manner of fixing the price of testing, learned counsel for the petitioners have explained that earlier the price so fixed was manageable for the petitioners and thus they decided not to object the said fixation, however, the present price for testing is not workable since apart from the cost of testing there are several other overhead expenses that have to be incurred by the private laboratories which have not been taken into consideration by the State of Jharkhand. Had there been any negotiation with the petitioners and other private laboratories, they would have appraised the government about the same sufficiently explaining that it was not possible to do the testing at the price so fixed.
11. This Court is of the considered view that the ICMR, while issuing the guidelines dated 25.05.2020, was presumed to have been aware of the fact that several factors were needed to be considered before determination of price for testing and as such it advised the State Governments and Union Territories to negotiate with the private laboratories before fixing the price of sample testing of Covid-19 through RT-PCR method, so as to fix a feasible price for such testing.
12. It is evident from letter no.IDSP/2020/154/206(HSN) dated 29.6.2020 that once such negotiation was done by the Government of Jharkhand with the private laboratories in terms with the guidelines of ICMR dated 25.5.2020 by inviting fresh rates of RT-PCR test from them and the rate of testing of RT-PCR was fixed @ Rs.2,400/- per test including costs involved in picking and transporting the samples, documentation and reporting having found the said rate as minimum. However, on this occasion, the rate of testing has been fixed by the Government of Jharkhand unilaterally.
13. That apart, it cannot be ignored that the petitioners have made considerable investment to be equipped for RT-PCR Test and any

decision of the State Government fixing the rate of RT-PCR has civil consequence and as such the principle of natural justice also demands affording opportunity of hearing to the private laboratories who are undertaking the RT-PCR test that too when the claim of the petitioners is that the respondents while fixing the rate of RT-PCR test have totally ignored the incidental charges which have to be borne by the private laboratories rather they have taken into consideration only the cost of testing.

14. In the case of ***Asha Sharma Vs. Chandigarh Administration & Others, reported in (2011) 10 SCC 86***, the Hon'ble Supreme Court has held as under:-

"14. Action by the State, whether administrative or executive, has to be fair and in consonance with the statutory provisions and rules. Even if no rules are in force to govern executive action still such action, especially if it could potentially affect the rights of the parties, should be just, fair and transparent. Arbitrariness in State action, even where the rules vest discretion in an authority, has to be impermissible. The exercise of discretion, in line with principles of fairness and good governance, is an implied obligation upon the authorities, when vested with the powers to pass orders of determinative nature. The standard of fairness is also dependent upon certainty in State action, that is, the class of persons, subject to regulation by the Allotment Rules, must be able to reasonably anticipate the order for the action that the State is likely to take in a given situation. Arbitrariness and discrimination have inbuilt elements of uncertainty as the decisions of the State would then differ from person to person and from situation to situation, even if the determinative factors of the situations in question were identical. This uncertainty must be avoided."

15. In the case of ***Manohar S/o Manik Rao Anchule Vs. State of Maharashtra and Another, reported in (2012) 13 SCC 14***, the Hon'ble Supreme Court has held as under:-

"25. Thus, the principle is clear and settled that right of hearing, even if not provided under a specific statute, the principles of natural justice shall so demand, unless by specific law, it is excluded. It is more so when exercise of authority is likely to vest the person with consequences of civil nature."

16. In light of the above decisions, it is clear that issuance of prior show-cause notice and granting reasonable opportunity of hearing are essential elements of all administrative decision-making process. If the statute conferring the power is silent with regard to giving a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of grave nature, the administrative or quasi-judicial authorities are bound to observe the compliance of natural justice unless such compliance of natural justice is excluded by any specific law.
17. In view of the aforesaid facts and circumstance, without commenting on the merit of the claim of the parties, it seems appropriate to direct the Additional Chief Secretary, Department of Health, Medical

Education & Family Welfare, Government of Jharkhand to make negotiation with the petitioners as well as other private laboratories who are eligible for testing of Covid-19 so as to fix the price for RT-PCR Test chargeable by the private laboratories in the State of Jharkhand including re-fixation of the rate for home collection of samples.

18. Accordingly, the order as contained in memo no.42(HSN) dated 20.01.2022 passed by the respondent no.1 is hereby quashed. The respondent no.1 is hereby directed to make negotiation with the concerned private laboratories including the petitioners equipped with RT-PCR test for Covid-19 so as to arrive at mutually agreeable rate of the same including charge of home visit for collecting samples. The rates fixed vide order dated 14.12.2020 for testing and collecting samples from home will be effective till the new rate is fixed by the process mentioned above.
19. These writ petitions are disposed of with the aforesaid observations and directions.
20. Pending I.As. also stand disposed of.

Sanjay/

(Rajesh Shankar, J.)