

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRA

&

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

MONDAY, THE 21<sup>ST</sup> DAY OF JUNE 2021 / 31ST JYAISHTA, 1943

WA NO. 746 OF 2021

AGAINST THE ORDER/JUDGMENT IN WP(C) 10997/2021 OF HIGH  
COURT OF KERALA, ERNAKULAM

APPELLANT/S:

- 1 DEVI SCANS (P) LTD  
KUMARAPURAM, TRIVANDRUM - 695011, REPRESENTED BY  
ITS MANAGING DIRECTOR, MR. NISARUDEEN.
- 2 JEEVA SPECIALTY LABORATORY  
M.G. ROAD, THRISSUR, KERALA - 680004, REPRESENTED  
BY ITS MANAGING PARTNER, MR. C. BALACHANDRAN.
- 3 MEDIVISION SCAN AND DIAGNOSTIC RESEARCH CENTRE  
PVT LTD  
GROUND FLOOR, MERCY ESTATE, M.G. ROAD, RAVIPURAM,  
KOCHI - 682016, REPRESENTED BY ITS DIRECTOR, MR.  
BERLY CYRIAC.
- 4 R-CELL DIAGNOSTICS AND RESEARCH CENTRE  
27/29E, FCC BUILDING,  
NEAR FEDERAL BANK TOWER, ARAYIDATHUPALAM,  
KOZHIKODE, KERALA - 673016, REPRESENTED BY ITS  
MANAGING PARTNER, MR. RUSSEL MOHAMMED.
- 5 SAROJ DIAGNOSTIC LABORATORY  
OLIVE ARCADE, MALAPARAMBA JUNCTION, NEAR ASCENT  
ENT HOSPITAL, KOZHIKODE, KERALA - 673009,  
REPRESENTED BY ITS PROPRIETOR, MR. ARUN JYOTHISH  
K.C.
- 6 AZA DIAGNOSTIC CENTRE  
STADIUM PUTHIYARA ROAD, OPPOSITE TO SABHA SCHOOL,  
CALICUT, KERALA - 673004, REPRESENTED BY ITS  
PARTNER, MR. JAVED ISLAM.
- 7 ASWINI DIAGNOSTIC SERVICE  
CHINTHAVALAPPU JUNCTION, JAIL ROAD, CALICUT -  
673004, REPRESENTED BY ITS PARTNER, MR. A  
GEERISHAN,

WA NO. 746 OF 2021

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- 8 JANATHA DIAGNOSTICS  
TIRURANGADI P.O, CHEMMAD,  
MALAPPURAM DISTRICT - 676306, REPRESENTED BY ITS  
GENERAL MANAGER, MR. ABDUL BASHEER
- 9 DANE DIAGNOSTICS PVT.LTD  
18/757, RC ROAD, NEADSHADIMAHAL, PALAKKAD -  
678014, KERALA, REPRESENTED BY ITS DIRECTOR,  
DR.M. SUSHAMA.
- 10 CENTRAL LABORATORIES  
BUND ROAD, KUNJANI, THRISSUR - 680612,  
REPRESENTED BY ITS MANAGING DIRECTOR, MR. ABILASH  
K.S.  
BY ADVS.  
PAUL JACOB (P)  
SHERU JOSEPH  
P.RAVINDRAN (SR.)

**RESPONDENT/S:**

- 1 STATE OF KERALA  
REPRESENTED BY ITS PRINCIPAL SECRETARY, HEALTH  
AND WELFARE DEPARTMENT,  
ROOM NO. 603, 6TH FLOOR, ANNEXE II, SECRETARIAT,  
THIRUVANANTHAPURAM - 695001,
- 2 UNION OF INDIA  
REPRESENTED BY ITS SECRETARY,  
HEALTH AND FAMILY WELFARE,  
NIRMAN BHAVAN, NEW DELHI - 110011
- 3 INDIAN COUNCIL FOR MEDICAL RESEARCH  
V.RAMALINGASWAMI BHAWAN, P.O BOX NO. 4911, ANSARI  
NAGAR, NEW DELHI-110 029, REPRESENTED BY ITS  
SECRETARY AND DIRECTOR GENERAL
- 4 KERALA MEDICAL SERVICES CORPORATION LTD.  
THYCAUD P.O., THIRUVANANTHAPURAM-14, REPRESENTED  
BY ITS MANAGING DIRECTOR.
- 5 SANDOOR MEDICAIDS PRIVATE LTD  
8-2-326/5, ROAD NO.3, BANJARA HILLS, HYDERABAAD-  
500 034, REPRESENTED BY ITS MANAGING DIRECTOR.
- 6 NATIONAL ACCREDITATION BOARD FOR TESTING AND  
CALIBRATION LABORATORIES  
NABL HOUSE, PLOT NO.45, SECTOR 44, GURUGRAM,  
HARYANA-122 003,

WA NO. 746 OF 2021

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REPRESENTED BY ITS CEO.

BY ADVS.

ADVOCATE GENERAL

SHRI.P.VIJAYAKUMAR, ASG OF INDIA

SRI.P.NARAYANAN, SENIOR GOVT. PLEADER

**OTHER PRESENT:**

R1- SRI.K.GOPALAKRISHNA KURUP,ADVOCATE GENERAL

R1- SRI.P.NARAYANAN,SENIOR GOVERNMENT PLEADER R2-

SRI.P.VIJAYAKUMAR,ASSISTANT SOLICITOR GENERAL OF

INDIA R3 - SRI.M.AJAY,

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON  
15.06.2021, THE COURT ON 21.06.2021 DELIVERED THE  
FOLLOWING:

**JUDGMENT**

Anil K.Narendran, J.

The appellants are diagnostics laboratories and research centres in Kerala conducting various kinds of COVID-19 tests including RT-PCR tests (Reverse Transcription-Polymerase Chain Reaction tests). They have approached this Court in W.P. (C)No.10997 of 2021, a writ petition filed under Article 226 of the Constitution of India, seeking a writ of certiorari to quash Ext.P7 order dated 08.02.2021 and Ext.P10 order dated 30.04.2021 of the 1<sup>st</sup> respondent State refixing the rate of RT-PCR tests chargeable by the private laboratories in Kerala and also Ext.P11 order dated 01.05.2021 of the 1<sup>st</sup> respondent issued under Section 20 read with Sections 24 and 65 of the Disaster Management Act, 2005 in order to ensure strict adherence of the prevailing rate for RT-PCR test, as revised from time to time, by the private laboratories in Kerala. The petitioners have also sought for a writ of mandamus commanding the 1<sup>st</sup> respondent to issue necessary guidelines/ directions/orders to defray the expenses and reimbursement to the private laboratories the loss suffered by them, below the rate fixed in Ext.P7 order dated

08.02.2021 of the 1<sup>st</sup> respondent, and to have the same paid by the end of each month, on furnishing accounts to the appropriate authority; a declaration that the 1<sup>st</sup> respondent has no authority or jurisdiction to fix the rates for RT-PCR test with respect to private laboratories, otherwise than in accordance with law, unless and until they are ready to subsidise the lesser amount than that prescribed by the 4<sup>th</sup> respondent Indian Council for Medical Research (ICMR) for COVID-19 tests. The petitioners have also sought for an interim stay of operation and implementation of Ext.P10 order dated 30.04.2021 and Ext.P11 order dated 01.05.2021 of the 1<sup>st</sup> respondent and all further proceedings pursuant thereto, pending disposal of the writ petition.

2. On 07.05.2021, the learned Senior Government Pleader filed a statement on behalf of the 1<sup>st</sup> respondent State, opposing the reliefs sought for in W.P.(C)No.10997 of 2021. By the impugned order dated 07.05.2021, the learned Single Judge declined the interim reliefs sought for in the writ petition, and the said order reads thus;

*"Prima facie*, it appears that the Government has ordered the rate of RT-PCR test after conducting a market survey and market study through the Kerala Medical Services Corporation Ltd. (KMSCL). It is discernible from the statement filed by the respondents that cost of PCR test including swab collection would come to Rs.135/- to Rs.240/- only. It is also stated that the charges in many of the other States in the Country like Haryana, Telangana and Utharakhand are within the same range. Therefore, I do not find any reason to pass an interim order in this writ petition."

Aggrieved by the order dated 07.05.2021 of the learned Single judge, declining the interim reliefs sought for in W.P.(C)No.10997 of 2021, the appellants are before this Court in this writ appeal filed under Section 5 of the Kerala High Court Act, 1958.

3. On 02.06.2021, when this writ appeal came up for admission, this Court admitted the matter on file. The learned Senior Government Pleader took notice for the 1<sup>st</sup> respondent State; the learned Assistant Solicitor General of India (ASGI) took notice for respondents 2, 3 and 6; and the learned Standing Counsel took notice for the 4<sup>th</sup> respondent KMSCL. Service of notice on the 5<sup>th</sup> respondent was dispensed with, for the time being. The learned ASGI was directed to get instructions from the

3<sup>rd</sup> respondent ICMR as to whether the individual States have been given authority to fix the rate of RT-PCR test.

4. On 09.06.2021, when this writ appeal came up for consideration, the learned ASGI sought adjournment to get instructions, in terms of the order of this Court dated 02.06.2021. During the course of arguments, the learned Senior Counsel for the appellants relied on a communication dated 25.05.2020 of the 4<sup>th</sup> respondent ICMR, addressed to the Chief Secretaries of all the States. The learned Senior Counsel submitted that the appellants shall place on record a copy of that communication, along with an application to accept additional document. The learned Advocate General submitted that, along with a memo filed by the learned Senior Government Pleader, certain documents are being placed on record, as bench-mark.

5. On 10.06.2021 and 11.06.2021 heard the learned Senior Counsel for the appellants, the learned Advocate General for the 1<sup>st</sup> respondent State, the learned ASGI for respondents 2, 3 and 6 and also the learned Standing Counsel for the 4<sup>th</sup> respondent KMSCL. On 11.06.2021, the learned ASGI submitted that a copy of order dated 11.03.2021 issued by the Ministry of

Home Affairs and order dated 21.03.2021 issued by Ministry of Health and Family Welfare, are being placed on record, along with a memo. At the request of the learned Senior Counsel for the appellants, learned Advocate General and also the learned Standing Counsel for KMSCL, the matter was adjourned and further arguments were heard on 15.06.2021.

6. The issue that arises for consideration in this appeal is as to whether any interference is warranted on the order of the learned Single Judge dated 07.05.2021 in W.P.(C)No.10997 of 2021, whereby the interim reliefs sought for, i.e., stay of operation of Ext.P10 order dated 30.04.2021 and Ext.P11 order dated 01.05.2021 of the 1<sup>st</sup> respondent State and all further proceedings pursuant thereto, were declined.

7. The learned Senior Counsel for the petitioners would contend that Ext.P10 order dated 30.04.2021 of the 1<sup>st</sup> respondent State, refixing the rate for RT-PCR test for COVID-19 is one issued in violation of the principles of natural justice and also the law laid down by this Court in Ext.P6 judgment dated 14.01.2021 in W.P.(C)No.255 of 2021. After referring to Ext.P4 order of the Apex Court dated 13.04.2020 in W.P.(C).No..... of

2020 [Diary No.10816 of 2020], the learned Senior Counsel would contend that ICMR is the competent authority for fixing rate for RT-PCR test and as such, the 1<sup>st</sup> respondent has absolutely no authority to exercise that power. Relying on Ext.P8 cost certificate dated 12.01.2021 issued by Cost Accountants and also Annexure IV cost certificate dated 20.05.2021, the learned Senior Counsel would contend that the refixation of rate for RT-PCR test at Rs.500/- in Ext.P10 order dated 30.04.2021 cannot be sustained. In Ext.P8 cost certificate dated 12.01.2021, the total cost per RT-PCR test is shown as Rs.1,560/- and that shown in Annexure A4 cost certificate dated 20.05.2021 is Rs.912/-.

8. The learned Senior Counsel, relying on Annexure AI extract of rates for RT-PCR test in different States, would point out that, except few States like Odisha, Maharashtra, Haryana, Telangana, Utharakhand, Punjab and Assam, all other States have fixed rate for RT-PCR test above Rs.500/-. It appears that the States which have fixed the rate for RT-PCR test at Rs.500/- or less are subsidising the private laboratories. KMSCL is procuring RT-PCR test kits in large volume and therefore, the competitive price offered to KSMCL by various companies cannot

be the basis for fixation of rate for RT-PCR test by private laboratories.

9. The learned Advocate General, relying on the judgment of the Apex Court in **Welcom Hotel v. State of Andhra Pradesh [(1983) 4 SCC 575]**, **Union of India v. Cynamide India Limited [(1987) 2 SCC 720]** and **Sai Bhaskar Iron Limited v. A.P. Electricity Regulatory Commission [(2016) 9 SCC 134]** would contend that the fixation/revision of the rate for RT-PCR test for COVID-19 by the 1<sup>st</sup> respondent State is a legislative function and as such the principles of natural justice have no application. In such matters, the scope of interference in judicial review is very limited. The learned Advocate General would rely on the provisions under Article 162 of the Constitution of India, which deals with the extend of executive power of the State; the provisions under Section 86 of the Travancore – Cochin Public Health Act, 1955 and also Section 81 of the Madras Public Health Act, 1939, which deals with the rule making power of the State for the prevention, treatment and control of certain diseases. The learned Advocate General would also rely on various provisions under the Disaster

Management Act, 2005, including Section 72 of the said Act, which provides for overriding effect of the provisions under that Act, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the said Act. The learned Advocate General would also point out the provisions under the Epidemic Diseases Act, 1897 and that under the Kerala Public Health Ordinance, 2021. The learned Advocate General would submit that in Ext.P7 order dated 08.02.2021 and Ext.P10 order dated 30.04.2021 the 1<sup>st</sup> respondent State refixed the rate for RT-PCR test, taking into consideration various aspects including the inputs given by KMSCL. In addition to the 1<sup>st</sup> respondent State, other States have also fixed/revised the rate for RT-PCR test for COVID-19.

10. Per contra, the learned Senior Counsel for the appellants would point out the provisions under the Section 3 of the Essential Commodities Act, 1955, which deals with the powers of the Central Government to control production, supply, distribution, etc. of essential commodities and also the Schedule of that Act, as per which, 'drugs' is also an essential commodity

as defined under Section 2A of the said Act. As per Explanation to item No.1 of the Schedule, for the purpose of the Schedule, 'drugs' has the meaning assigned to it in clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940. The learned Senior Counsel would point out that as per sub-clause (iv) of clause (b) of Section 3 of the Drugs and Cosmetics Act, 'drug' includes such devises intended for internal or external use in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals as may be specified from time to time by the Central Government, by notification in the Official Gazette, after consultation with the Drugs Technical Advisory Board constituted under Section 5 of the said Act.

11. On the legislative competence of the State Legislature, in order to attract the provisions under Article 162 of the Constitution of India, the learned Advocate General would rely on Entry 6 of List III – State List in Schedule VII of the Constitution of India, which deals with public health and sanitation; hospitals and dispensaries. On the other hand, the learned Senior Counsel for the appellants would point out Entry 19 of List III – Concurrent List in Schedule VII of the Constitution of India, which

deals with drugs and poisons, subject to the provisions of Entry 59 of List I with respect to opium.

12. The learned Standing Counsel for the 4<sup>th</sup> respondent KMSCL would submit that the fixation/revision of the rate for RT-PCR test for COVID-19 by the 1<sup>st</sup> respondent State is perfectly legal, in view of the directions contained in Annexure III letter dated 01.07.2020 of the Secretary, Department of Health and Family Welfare and the Secretary, Department of Health Research and Director General of ICMR, produced along with the statement filed in W.P.(C)No.10997 of 2021, on behalf of the 1<sup>st</sup> respondent. The learned Standing Counsel would also rely on the provisions under Article 162 of the Constitution of India. In addition to the 1<sup>st</sup> respondent State, other States have already fixed the rate for RT-PCR test for COVID-19 at Rs.500/- and even less than Rs.500/-. In Ext.P7 order dated 08.02.2021 and Ext.P10 order dated 30.04.2021, the 1<sup>st</sup> respondent State refixed the rate for RT-PCR test, taking into consideration various aspects including the inputs given by KMSCL.

13. The learned ASGI would point out the order dated 11.03.2020 of the Government of India, Ministry of Home Affairs,

Disaster Management Division, whereby, in exercise of the powers conferred under Section 69 of the Disaster Management Act, 2005, the Union Home Secretary, who is the Chairman of the National Executive Committee, delegated its power under clauses (i) and (l) of sub-section (2) of Section 10 of the Disaster Management Act to the Secretary, Ministry of Health and Family Welfare, Government of India to enhance the preparedness and containment of novel corona virus (COVID-19) and other ancillary matters connected thereto, with effect from 17.01.2020. In exercise of the delegated powers under the said order dated 11.03.2020, the Secretary, Ministry of Health and Family Welfare, Government of India, vide order dated 21.03.2020, notified the guidelines laid down by ICMR for COVID-19 testing in private laboratories in India. The aforesaid orders dated 11.03.2020 and 21.03.2020 are placed on record along with the memo filed by the learned ASGI dated 11.06.2021.

14. The appellants are diagnostics laboratories and research centres in Kerala, conducting various kinds of COVID-19 tests including RT-PCR test. As per G.O. (Rt.)No.726/2020/H&FWD dated 16.04.2020 the 1<sup>st</sup> respondent

State issued instructions for testing COVID-19 using GeneXpert/True NAT-beta-CoV in the private sector. On 19.05.2020, ICMR issued revised guidelines for testing COVID-19 using True NAT. Thereafter, the 1<sup>st</sup> respondent by G.O. (Rt.)No.939/2020/H&FWD dated 26.05.2020, modified the order dated 16.04.2020 and fixed the minimum cost of RT-PCR test as Rs.4,500/- and that of Screening test as Rs.1,500/-. As per the said order, the maximum cost of Step I True NAT test assay will be Rs.1,500/- and that for Step II confirmatory assay will be Rs.3,000/-. It is pertinent to note that, vide ICMR letter dated 17.03.2020, the minimum cost of RT-PCR test was already fixed as Rs.4,500/-.

15. The Director General of ICMR, by DO letter No.ECD/COVID-19/Misc./2020 dated 25.05.2020 informed all the States/UT Administrations that concerted efforts have been made to ramp up the testing infrastructure along with indigenous development, validation and production of testing kits for RT-PCR tests. Testing supplies are stabilising and many States have started procuring testing kits from local market. Due to varied options of testing materials/kits, including indigenous ones, the

prices are becoming competitive and are undergoing reduction. In that backdrop and keeping in view the evolving prices of testing commodities, the earlier suggested upper ceiling of Rs.4,500/-, vide ICMR letter dated 17.03.2020, may not be applicable and therefore, all State Governments/UT Administrations were advised to negotiate with private laboratories and fix mutually agreeable prices for samples being sent by the Government and also for private individuals desirous of testing COVID-19 by those laboratories. On 19.06.2020, the 1<sup>st</sup> respondent held a meeting with all private laboratories in Kerala conducting COVID-19 tests. Based on the discussions and detailed analysis, the 1<sup>st</sup> respondent by G.O.(Rt.)No.1236/2020/H&FWD dated 02.07.2020 (Ext.P1 order) revised the rates of various tests for Covid-19 as follows;

| Type of Test                                                     | Price per Test |
|------------------------------------------------------------------|----------------|
| RT-PCR (Open System) Test                                        | Rs.2,750/-     |
| Xpert NAT Test                                                   | Rs.3,000/-     |
| True NAT Test Step I                                             | Rs.1,500/-     |
| True NAT Test Step II (only for those tested positive in Step I) | Rs.1,500/-     |

16. Thereafter, the 1<sup>st</sup> respondent by G.O. (Rt.)No.1935/2020 /H&FWD dated 21.10.2020 (Ext.P2 order)

refixed the rates for COVID-19 tests, considering the availability of ICMR approved test kits at lower costs, since many industries started producing test kits at competitive prices. It is stated in Ext.P2 order that KMSCL, through bidding process, collected the charges for COVID-19 tests from ICMR and State approved laboratories. The revised rates of various tests for COVID-19 fixed in Ext.P2 order are as follows;

| Type of Test         | Price per Test |
|----------------------|----------------|
| RT-PCR (Open System) | Rs.2,100/-     |
| True NAT Test        | Rs.2,100/-     |
| Antigen Tests        | Rs.625/-       |
| GeneXpert            | Rs.2,500/-     |

It is stated in Ext.P2 order that the cost fixed as above is inclusive of all personal protective equipment, swabbing charges and any other charges related to the test.

17. In April, 2020, one Shashank Doe Sudhi filed a writ petition before the Apex Court, under Article 32 of the Constitution of India, as a Public Interest Litigation, seeking a direction to the Central Government to provide free of cost testing facility of COVID-19 by all testing laboratories, whether private or Government. The petitioner has also challenged the

letter dated 17.03.2020 issued by ICMR, Department of Health Research, insofar as it fixed Rs.4,500/- for screening and confirming COVID-19. In that writ petition, the Apex Court issued Ext.P3 interim order dated 08.04.2020 [**Shashank Doe Sudhi v. Union of India and others (2020) 5 SCC 132**], with the following directions;

7.1. The tests relating to COVID-19, whether in approved Government laboratories or approved private laboratories, shall be free of cost. The respondents shall issue necessary direction in this regard immediately.

7.2. The tests relating to COVID-19 must be carried out in NABL accredited laboratories or any agencies approved by WHO or ICMR.

18. Seeking modification of Ext.P3 interim order dated 08.04.2020, I.A.No.48266 of 2020 was filed before the Apex Court. By Ext.P4 order dated 13.04.2020, the Apex Court clarified and modified Ext.P3 interim order as follows;

(i) Free testing for COVID-19 shall be available to persons eligible under Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana as already implemented by the Government of India, and any other category of economically weaker sections of the society as notified by the Government for free testing for COVID-19, hereinafter.

(ii) The Government of India, Ministry of Health and Family Welfare may consider as to whether any other categories of the weaker sections of the society, e.g., workers belonging to low income groups in the informal sectors, beneficiaries of Direct Benefit Transfer, etc. apart from those covered under Ayushman Bharat Pradhan Mantri Jan Aarogya Yojana are also eligible for the benefit of free testing and issue appropriate guidelines in the above regard also within a period of one week.

(iii) The private Labs can continue to charge the payment for testing of COVID-19 from persons who are able to make payment of testing fee as fixed by ICMR.

(iv) The Government of India, Ministry of Health and Family Welfare may issue necessary guidelines for reimbursement of cost of free testing of COVID-19 undertaken by private Labs and necessary mechanism to defray expenses and reimbursement to the private Labs.

(v) Central Government to give appropriate publicity to the above, and its guidelines to ensure coverage to all those eligible.”  
(underline supplied)

19. One Ajay Agarwal filed W.P.(C)No.1292 of 2020, another writ petition before the Apex Court, under Article 32 of the Constitution of India, as a Public Interest Litigation, praying that there should be a nation-wide cost related regulation for treatment of COVID-19 patients at private/corporate hospitals. The petitioner has also sought for revision of the rates fixed for

COVID-19 tests. In that writ petition, the Apex Court issued notice to State Governments, including the 1<sup>st</sup> respondent State. The learned Senior Counsel for the appellants would point out that the appellants have filed intervention application in W.P. (C)No.1292 of 2020 pending before the Apex Court.

20. The 1<sup>st</sup> respondent by G.O.(Rt.)No.12/2021/H&FWD dated 01.01.2021 (Ext.P5 order) refixed the rates for COVID-19 tests, considering drastic increase in availability and accessibility of testing kits and also the rates for COVID-19 tests offered by laboratories in other States. The revised rates of various tests for COVID-19 fixed in Ext.P5 order are as follows;

| Type of Test         | Price per Test |
|----------------------|----------------|
| RT-PCR (Open System) | Rs.1,500/-     |
| Xpert NAT            | Rs.2,500/-     |
| True NAT Test        | Rs.1,500/-     |
| RT-LAMP              | Rs.1,150/-     |
| Rapid Antigen        | Rs.300/-       |

21. Challenging the revision of rates in Ext.P5 order dated 01.01.2021 of various tests for COVID-19, the appellants herein had approached this Court in W.P.(C)No.255 of 2020, contending that such a revision was made unilaterally, without affording them an opportunity of being heard. That writ petition was

disposed of by Ext.P6 judgment dated 14.01.2021, with a direction to the 1<sup>st</sup> respondent State to consider their grievance against Ext.P5 order dated, including that contained in the representation (e-mail) dated 31.12.2020, and to take a decision within a period of 3 weeks from the date of receipt of a certified copy of that judgment.

22. A reading of Ext.P6 judgment would show that, relying on Ext.P4 order of the Apex Court dated 13.04.2020 [Ext.P3(a) order in W.P.(C)No.255 of 2020], whereby it was ordered that the private laboratories can continue to charge payment for testing of COVID-19 from persons who are able to make payment of testing fee as fixed by ICMR, the appellants herein raised a contention that the State Government have no authority to pass Ext.P5 order dated 01.01.2021 [Ext.P6 order in W.P.(C)No.255 of 2020] reducing the maximum charges further. Even ICMR does not have any authority to fix the testing fee, but for the clarification in clause (iii) of Ext.P4 order dated 13.04.2020 that private laboratories can continue to charge payment for testing COVID-19 from persons who are able to make payment of testing fee as fixed by ICMR. The Government has taken such a decision in

Ext.P5 order, without ascertaining the views of the appellants or giving them an opportunity of hearing, even though they had submitted a representation (e-mail) dated 31.12.2020 [Ext.P5 in W.P.(C)No.255 of 2020].

23. In the statement filed in W.P.(C)No.255 of 2020, the 1<sup>st</sup> respondent State justified its stand in refixing the rates of various tests for COVID-19, contending that the rates were refixed after considering various factors including cost of re-agents and kits required for the test and the rates prevailing in other States. The Secretary, Department of Health and Family Welfare, Ministry of Health and Family Welfare; and the Secretary, Department of Health Research and Director General of ICMR, Ministry of Health and Family Welfare had, in the letter dated 01.07.2020 [Annexure R1(a) in W.P.(C)No.255 of 2020], while issuing instructions relating to testing, asked the State Governments to finalise the rates for RT-PCR test by the private laboratories. The orders fixing and refixing the rates for the tests were issued thereafter. The rates were revised gradually after a meticulous market analysis through KMSCL, with due regard to the cost involved. Furnishing a comparative chart showing the

costs for different tests from January, 2020 to January, 2021, it was pointed out that, the orders reducing the charges were issued taking into consideration the cost of kits, consumables, etc. In the statement, it was pointed out that the State Government have every authority to fix the rates of COVID-19 tests and ICMR has given the authority to State Governments to finalise the rate for RT-PCR test for private laboratories.

24. In Ext.P6 judgment in W.P.(C)No.255 of 2020, this Court held that, though the writ petitioners are challenging the authority of the State Government as well as ICMR, the contentions raised by them require consideration by the State Government as admittedly, their views were not ascertained before fixing/reducing the rate from Rs.2,100/- to Rs.1,500/-. Ext.P1 order dated 02.07.2020 of the 1<sup>st</sup> respondent State fixing the rates for COVID-19 tests were issued after a meeting was held with them on 19.06.2020. As per Ext.P6 judgment, till a decision is taken as directed above, the petitioners shall be permitted to realise charges in accordance with Ext.P2 order dated 21.10.2020. In the said judgment, the question of jurisdiction raised by the writ petitioners was left open.

25. Pursuant to the direction contained in Ext.P6 judgment in W.P.(C)No.255 of 2020, the 1<sup>st</sup> respondent State conducted a personal hearing on 28.01.2021. Before the 1<sup>st</sup> respondent, relying on Ext.P8 cost certificate dated 12.01.2021 issued by Cost Accountants, the appellants herein contended that the total cost per test for RT-PCR (with an average of 100 tests per day) is Rs.1,516/-. They offered Rs.2,000/- per test as their rock-bottom negotiable rate. The 1<sup>st</sup> respondent by Ext.P7 order dated 08.02.2021 re-fixed the maximum rate chargeable for RT-PCR test for COVID-19, including all expenses such as sample collection, consumables, protective equipment, printing, delivery of results, data entry and all such ancillary expenses at Rs.1,700/- per test. The above rate was for the patients availing the testing services from the Government approved laboratories. As per Ext.P7 order, rates for other tests shall continue at the same levels as fixed in Ext.P5 order dated 01.01.2021.

26. In Ext.P7 order dated 08.02.2021 of the 1<sup>st</sup> respondent re-fixing the maximum rate chargeable for RT-PCR test for COVID-19, it is stated that the Government had fixed the rates and reduced it gradually after doing a thorough market

analysis through its procurement agency, KMSCL. Though KMSCL is getting the price advantage of bulk purchase, there is massive price reduction in the market for test kits and consumables due to multiple competent players with ICMR approval, which is equally applicable for the private sector. The unit rate specifically mentioned by the private laboratories during the personal hearing, regarding Automated RNA extraction kits, are for the most expensive kits available in the market, and henceforth a general approach based on those rates cannot be accepted. The statement of private laboratories regarding the investment for NABL accreditation and other capital expenditures cannot be factored only to the cost per test of RT-PCR, since the laboratories are also doing other multiple investigations through their facilities.

27. After two months, the 1<sup>st</sup> respondent by Ext.P10 order dated 30.04.2021 revised the cost per test for RT-PCR as Rs.500/-, with immediate effect. In Ext.P10 order, it is stated that, the 1<sup>st</sup> respondent after conducting a thorough market analysis through its procurement agency KMSCL fixed the rate of RT-PCR test through approved private laboratories as Rs.1,500/-,

as per Ext.P5 order dated 01.01.2021. Against this, the private laboratories approached this Court and as per the directions in Ext.P6 judgment dated 14.01.2021 in W.P.(C)No.255 of 2020, the Government heard the writ petitioners and issued Ext.P7 order dated 08.02.2021, whereby the rate for RT-PCR test through private laboratories was revised to Rs.1,700/-. Meanwhile, the Government, with a view to increase the number of RT-PCR tests, decided to explore the possibility of procuring the service of mobile RT-PCR laboratories of private agencies to do the services such as visiting the identified sites, to collect the samples of the identified segments, to do testing and data transfer to the Lab Diagnosis Management System, etc. The rates arrived at by KMSCL for doing RT-PCR tests, through static and mobile RT-PCR laboratories, is Rs.448.20/- per test. In the meantime, as part of airport surveillance strengthening, KMSCL and the District Administration engaged private static laboratories for doing RT-PCR tests in the same rates of Rs.448.22/- per test.

28. In Ext.P10 order, it is stated further that, there are 10 static laboratories in private sector, across the State, which are doing RT-PCR tests, including sample collection and biomedical

waste management, along with LDMS Portal updation in 24 Hrs., at Rs.448.20/- per test. As per the latest market rates of VTM, RNA extraction kits, PCR test kits and consumables arrived through market analysis, the direct cost for kits and consumables (excluding HR and other overheads) shall be in the range of Rs.135/- to Rs.240/- per test. The cost per RT-PCR test through private laboratories in other States like Haryana, Telangana and Uttarakhand with similar or lesser case load is Rs.500/- and that in Odisha it is Rs.400/-. The 1<sup>st</sup> respondent State, after examining the current market rates of VTM, RNA Extraction kits, PCR test kits and other consumables for RT-PCR test and comparing the cost per test for RT-PCR in private laboratories in other States, the cost per RT-PCR test agreed by the 10 static laboratories engaged in airport surveillance and 10 mobile RT-PCR laboratories deployed across the State, revised the cost per test for RT-PCR to Rs.500/-, with immediate effect.

29. Ext.P10 order was followed by Ext.P11 order dated 01.05.2021 of the 1<sup>st</sup> respondent State, issued under Sections 24 and 65 of the Disaster Management Act, 2005. The operative portion of that order reads thus;

"Therefore, in exercise of the powers conferred under Section 20 read with Sections 24 and 65 of the Disaster Management Act, 2005, the undersigned, in the capacity as the Chairman, State Executive Committee of the Kerala State Disaster Management Authority, in the interest of containment of COVID-19, disaster management and reducing mortality during the surge, hereby issue the following orders with immediate effect:

1. The private laboratories shall perform RT-PCR tests for the detection of COVID-19 at the revised rate (Rs.500/- per test) fixed by Government of Kerala without turning away any person seeking to undergo RT-PCR test for COVID-19. The prevailing rate, as revised from time to time by the Government of Kerala shall be adhered to.
2. No private laboratory in the State shall charge in excess for any of the tests to detect COVID-19 beyond the rates fixed by the Government of Kerala from time to time, in that respect.
3. The rates chargeable by private laboratories for various tests to detect COVID-19 fixed by Government of Kerala shall be effectively publicised from time to time by the Health Department for the knowledge of all stakeholders, including the people at large.
4. Any private laboratory that denies RT-PCR testing/any of the other tests for COVID-19 at the rates fixed by the Government of Kerala or that charges in excess of the rates fixed by the Government of Kerala shall be deemed to have committed offences under the

provisions of the Disaster Management Act, 2005, the Kerala Epidemic Diseases Ordinance, 2020 and other relevant provisions in law and action shall be initiated against such laboratory accordingly. The District Disaster Management Authority, Police and other agencies including health involved in regulating the affairs of such private laboratories shall initiate stringent, lawful steps for the same.”

30. As already noticed, the 1<sup>st</sup> respondent by Ext.P7 order dated 08.02.2021 re-fixed the maximum rate chargeable for RT-PCR test for COVID-19, including all expenses such as sample collection, consumables, protective equipment, printing, delivery of results, data entry and all such ancillary expenses at Rs.1,700/- per test. In Ext.P7 order it was made clear that, the rates for other tests shall continue at the same levels, as fixed in Ext.P5 order dated 01.01.2021. In Ext.P7 order, the 1<sup>st</sup> respondent noticed that, there is massive price reduction in the market for test kits and consumables due to multiple competent players with ICMR approval, which is equally applicable for the private sector. The unit rate specifically mentioned by the private laboratories, during the personal hearing, regarding Automated RNA extraction kits are for the most expensive kits available in the market, and henceforth a general approach based on those

rates cannot be accepted. The statement of private laboratories regarding the investment for NABL accreditation and other capital expenditures cannot be factored only to the cost per test of RT-PCR, since the laboratories are also doing other multiple investigations through their facilities.

31. Though Ext.P7 order of the 1<sup>st</sup> respondent re-fixing the maximum rate chargeable for RT-PCR test for COVID-19 including all expenses at Rs.1,700/- per test is one dated 08.02.2021, the petitioners have not chosen to challenge that order before this Court till the filing of W.P.(C)No.10997 of 2021, which is one filed on 03.05.2021, after the issuance of Ext.P10 order dated 30.04.2021, whereby the 1<sup>st</sup> respondent revised the cost per test for RT-PCR as Rs.500/-, with immediate effect. In that writ petition, the petitioner challenged Ext.P7 order dated 08.02.2021 of the 1<sup>st</sup> respondent, along with Exts.P10 and P11 orders.

32. In the statement filed on behalf of the 1<sup>st</sup> respondent in W.P.(C)No.10997 of 2021, it is stated that there were complaints that the rate for RT-PCR test in the State of Kerala is the highest in the Country. The rate for RT-PCR test is only Rs.450/- in Punjab and only Rs.500/- in Maharashtra, Haryana

and Utharakhand, as per Annexure I news item published in Malayala Manorama daily dated 02.06.2021, produced along with that statement. The maximum rate for RT-PCR test in Odisha is only Rs.400/-, as per Annexure II news item published in Hindu daily dated 13.12.2020. Similar rates are fixed in the National Capital Territory of Delhi. In a Public Interest Litigation seeking a direction to reduce RT-PCR rates in the State of Kerala, at par with other States like Orissa and Haryana, a Division Bench of this Court orally appreciated the stand of the 1<sup>st</sup> respondent State in reducing the RT-PCR rate, while closing that writ petition [Annexure A9 judgment dated 04.05.2021 in W.P.(C) Nos.10806 of 2021 and 10853 of 2021]. Majority of accredited laboratories in State of Kerala including Doctors' Diagnostic Research Centre, which has branches throughout the State, are accepting the rate fixed in Ext.P10 order. Only few laboratories, 10 in number, challenged Ext.P10 by filing the writ petition.

33. In paragraphs 6 to 12 of the statement filed in W.P.(C) No.10997 of 2021, the 1<sup>st</sup> respondent has explained the basis for refixation/revision of the rate for RT-PCR test by various orders, including Exts.P7 and P10. The 1<sup>st</sup> respondent has also produced

Annexure III letter dated 01.07.2020 of the Secretary, Department of Health and Family Welfare, Ministry of Health and Family Welfare and the Secretary, Department of Health Research and Director General of ICMR, Ministry of Health and Family Welfare [Annexure R1(a) in W.P.(C)No.255 of 2020], whereby the State Governments are asked to finalise the rates for RT-PCR test by the private laboratories.

34. In Annexure AI extract of rates for RT-PCR tests in different States, produced along with this writ appeal, the cost per RT-PCR test in Haryana, Telangana and Utharakhand is Rs.500/-, which is the rate pointed out in the statement filed in W.P.(C) No.10997 of 2021 by the 1<sup>st</sup> respondent. As per Annexure AI, the rate in Odisha is only Rs.400/- and that in Punjab is only Rs.450/-. Therefore, it is an admitted fact that at least in three other States the cost for RT-PCR test is only Rs.500/- and in two States the cost is less than Rs.500/-.

35. As already noticed hereinbefore, one of the contentions raised by the learned Advocate General is that the fixation/revision of the rate for RT-PCR test by the 1<sup>st</sup> respondent State is a legislative function and as such the principles of natural

justice have no application. In W.P.(C)No.255 of 2020, relying on Ext.P4 of the Apex Court dated 13.04.2020, the appellants herein contended that the State Government have no authority to pass Ext.P5 order dated 01.01.2021 reducing the maximum charges for RT-PCR tests further. Per contra, in the statement filed in W.P. (C)No.255 of 2020, it was contended that the State Government have every authority to fix the rates of COVID-19 test and ICMR has given authority to the State Governments to finalise the rate for RT-PCR test for private laboratories. In Ext.P6 judgment, while disposing of W.P.(C) No.255 of 2020, this Court had left open the question of jurisdiction raised by the writ petitioners. Therefore, the legal contentions raised by both sides referred to hereinbefore at paragraphs 7 to 13, relying on various statutory provisions, the provisions under Article 162 of the Constitution of India and also the relevant entry in List I and List III of Schedule VII of the Constitution require detailed consideration in the writ petition, which is pending before the learned Single Judge, for deciding the question as to whether there is violation of principles of natural justice while issuing Ext.P10 order dated 30.04.2021 of the 1<sup>st</sup> respondent revising the cost per test for RT-PCR as

Rs.500/-. In the impugned order dated 07.05.2021 in W.P. (C)No.10997 of 2021, while declining the interim reliefs sought for, the learned Single Judge noticed that the charges for RT-PCR test in many other States like Haryana, Telangana and Utharakhand are within the same range.

36. In the above circumstances, we find no reason to interfere with the reasoning of the learned Single Judge in the impugned order dated 07.05.2021, declining the interim reliefs sought for in W.P.(C)No.10997 of 2021, in exercise of the appellate jurisdiction under Section 5 of the Kerala High Court Act, 1958.

In the result, this writ appeal fails and the same is accordingly dismissed; however leaving open the legal and factual contentions raised before us by both sides, which have to be raised in an appropriate manner, before the learned Single Judge.

**Sd/-**  
**ANIL K. NARENDRA**  
**JUDGE**  
**Sd/-**  
**ZIYAD RAHMAN A.A.**  
**JUDGE**

bkn/-

**APPENDIX OF WA 746/2021**

PETITIONER ANNEXURE

|                  |                                                                                                         |
|------------------|---------------------------------------------------------------------------------------------------------|
| ANNEXURE A1      | TRUE EXTRACT OF RATES OF RT PCR RATES OF DIFFERENT STATES IN INDIA ACQUIRED FROM PUBLIC INTERNET DOMAIN |
| ANNEXURE A2      | TRUE QUOTATION ISSUED BY THE 4TH RESPONDENT DATED 11.02.2021.                                           |
| ANNEXURE A3      | TRUE COPY OF RESULTS TO ANNEXURE A2 ISSUED BY THE 4TH RESPONDENT DATED 04.03.2021.                      |
| ANNEXURE A4      | TRUE COPY OF THE COST STATEMENT ISSUED BY REGISTERED COST ACCOUNTANTS, M/S ANKARATH CHUNGATH AND CO.    |
| ANNEXURE A5      | TRUE COPY OF THE IMPEADING PETITION FILED IN WPC NO.10659 OF 2021.                                      |
| ANNEXURE A6      | TRUE COPY OF THE REPRESENTATION DATED 19.05.2021 TO THE 1ST RESPONDENT.                                 |
| ADDL.ANNEXURE A7 | TRUE COPY OF THE COMMUNICATION DATED 25.05.2020 AND ISSUED BY THE 3RD RESPONDENT.                       |
| ADDL.ANNEXURE A8 | TRUE COPY OF THE REPRESENTATION DATED 31.05.2021 AND ISSUED BY THE PRIVATE LABORATORIES.                |
| ADDL.ANNEXURE A9 | TRUE COPY OF THE JUDGMENT DATED 04.05.2021 IN W.P(C).NO.10806/2021 AND CONNECTED MATTER.                |