

IN THE HON'BLE HIGH COURT OF KERALA

(Special Original Jurisdiction)

Writ Petition (Civil) No: _____ of 2020

Balu Gopalakrishnan : Petitioner

-Vs-

State of Kerala & others : Respondents

**WRIT PETITION [CIVIL] FILED UNDER ARTICLE 226 OF
THE CONSTITUTION OF INDIA**



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K / 673 / 19
K / 99 / 04

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COUNSEL FOR THE PETITIONER

IN THE HON'BLE HIGH COURT OF KERALA

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Dated this the 15th day of April, 2020.



Jaykar KS
Counsel for Petitioner

IN THE HON'BLE HIGH COURT OF KERALA

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SYNOPSIS

'We are not expendables for the State to play with'

The Petitioner is a lawyer by profession and is concerned about the manner in which the data regarding the COVID - 19 patients in the State are collected, stored, analysed and retrieved. At the outset, it is placed on record the yeoman services of the machinery put at work for curbing the COVID - 19 virus in the State. It is also commendable to see that, the whole government machinery as well as the citizens are co-operating wholeheartedly in the fight against the deadly virus and that we have achieved better results than the national average till date.

The 3rd Respondent is an IT company based out of the USA, owned by a non resident Keralite. The 1st Respondent had entered into a contract with the 3rd Respondent wherein the data of suspected and actual patients of the COVID - 19 virus will be collected using government machinery and is uploaded to the 3rd Respondent's web server on a daily basis. The 3rd Respondent in turn will provide actual data to the State machinery after analysis, for better understanding and treatment of the pandemic.

The Petitioner's only concern is whether the data stored in the web server of the 3rd Respondent is safe and whether it can be used by the company for monetary gains. Even if there is a non disclosure agreement between the parties, how can a violation of the agreement be penalty enforced upon a foreign company and whether it will be effective. The 1st Respondent being the State, cannot feign ignorance of the perils of data theft and answer questions flimsily and callously. More than 1.5 lakh sensitive medical



B

information of the COVID -19 patients are with the 3rd Respondent, uploaded on a daily basis, till today.

Data is the new commodity which is valued more than any other in the free market. If information as sensitive are stored in private 3rd party web servers, it is a minimum civility on part of the State to inform and seek consent from those persons from whom the data is collected and also appraise him of the possible misuses. This was conveniently looked apart. The government agencies are well equipped to deal with the storage of data. Hence the big question: why did the State prefer the 3rd Respondent for storage of sensitive information.

Dated this the 15th day of April, 2020.



Jaykar KS
Counsel for Petitioner

Case laws referred to:

Justice K. S. Puttaswamy (Retd) and another Vs. Uol
Swami Ramdev vs Juggernaut Books Pvt Ltd & Ors on 29 September, 2018
Anuradha Bhasin vs Union Of India on 10 January, 2020
T. K. Saravanan vs The State Of Tamil Nadu on 5 September, 2019
Shayara Bano vs Union of India & Ors. (2017) 9 SCC 1

Statutes referred to :

- Constitution of India.
- Information Technology Act, 2000.

Dates and events :

25.03.2020 : Date of execution of the contract between the 1st and 3rd
Respondents

Dated this the 15th day of April, 2020.

A handwritten signature in blue ink, appearing to be "Jaykar KS", written in a cursive style.

Jaykar KS
Counsel for Petitioner

IN THE HON'BLE HIGH COURT OF KERALA

(Special Original Jurisdiction)

Writ Petition (Civil) No: _____ of 2020

PETITIONER:

Balu Goplalakrishnan
S/o A. B. Gopalakrishnan,
PJRRRA - G2, Silent Nagar,
Pothujanam Road, Medical College P.O.,
Thiruvananthapuram, Kerala - 695 011.

-Vs-

RESPONDENTS:

1. State of Kerala,
Represented by Principal Secretary,
Department of Electronics & Information Technology,
1st Floor , Main Block, Secretariat,
Statue, Thiruvananthapuram, Kerala - 695 001.
2. Union of India,
Represented by Secretary,
Ministry of Electronics & Information Technology,
Electronics Niketan, 6, CGO Complex,
Lodhi Road, New Delhi - 110 003.
3. Sprinklr,
Represented by its CEO,
29 W 35th St, New York, NY 10001, United States;
Having its regional office at Divyasree Technopolis,
3rd Floor, East Wing, Opp. HAL Airport Road,
Yemalur, Bengaluru, Karnataka - 560 037.

**WRIT PETITION (CIVIL) FILED UNDER ARTICLE 226 OF
THE CONSTITUTION OF INDIA**

- I. The address for service of notices and processes on the Petitioner is that of his counsel M/s Jaykar K. S, Sreeparvathy P and Dileep. K, Advocates, 'Luminous Legal Partners', #42/632 C, 2nd floor, above S. B. I, Ayyapankavu Jn, Chittoor Road, Ernakulam - 682 018.
- II. The address for service of notices and processes on the respondents are as shown above.



STATEMENT OF FACTS

1. This writ petition is filed challenging the action, taken by the State of Kerala, for the manner of collecting the data of COVID – 19 patients in the State and its transfer, storage, analysis and retrieval. Furthermore the data regarding the beneficiaries of the public distribution system (PDS) of the State are also allegedly stored with the 3rd Respondent. The Petitioner is a lawyer / politician, who is concerned about the breach and leaking of sensitive medical data at the hands of the 3rd Respondent. The affected parties are COVID – 19 patients, who are under home or hospital quarantine, against whom legal wrongs are done and who cannot approach this hon'ble court on their own because of their state of medical quarantine. Respondent No: 1 and No: 2 are the Union and State ministries involved in Information Technology affairs in the country. The 1st and 2nd Respondents are the authorities to frame the IT policies in the country and stake holders in the IT policies to be taken by the different departments, is therefore to be construed as "State" within the meaning of Article 12 of the Constitution, thus being amenable to Writ jurisdiction of this Hon'ble Court, and hence are necessary parties. Respondent No: 3 is the private 3rd party IT vendor, against whom reliefs are sought and hence a necessary party.

2. The whole world is recently gripped in the COVID – 19 pandemic, which has brought the lives of the people to a standstill. The impact of the virus attack is of unprecedented scale and governments across the globe are battling it with all the resources at their disposal. We are yet to revive from the disaster and this writ petition is filed to rectify a wrong done by the 1st Respondent, in its actions taken as part of the COVID – 19 actions. The 1st Respondent is doing a commendable job in curtailing the COVID -19 pandemic. In fact, the pandemic started out in our State, but was effectively managed by the 1st Respondent. One of the tools for curbing the pandemic is the real time data, of the infected patients and those under observation. This data becomes the foundation on which the treatment plan is chalked out. So it becomes imperative that the use of Information Technology tools is necessary and effective for the curb of the disease. In recent times, when the country has jumped leaps and bounds in IT infrastructure, the efficient use of the same is the best option for helping the fight against a virus that is threatening the very existence of humankind.



But with the great achievements, come graver risks. The IT industry is no exception to viruses greater than the pandemic now we are facing. The IT and ITES have become the backbone of our very existence that, humans are considered as commodities and the data regarding such commodities are real time money.

3. As part of its fight against the virus, the State had started to collect sensitive medical information from suspected and positive COVID – 19 patients across the State. The government servants were instructed to collect data on a mobile application and upload the same to a web server belonging to the 3rd Respondent. The mobile application was also developed and supplied by the 3rd Respondent. The data thus collected contains very sensitive medical information of the patients under observation and treatment. Such data was instructed to be uploaded to <https://kerala-field-covid.sprinklr.com/>. It can be seen that the web server belonged to the 3rd Respondent and the data got uploaded to the web server of the 3rd Respondent directly.

4. There was a big hue and cry in the political circles in the State. Many other reasons contingent to the data breach issue was that :

- a. The 3rd Respondent has a dubious track record of cases filed against it in the USA, specifically regarding data theft;
- b. The need for a foreign entity is questioned when, the Indian State entities like the C-DIT and NIC are doing an exceptional job;
- c. The 3rd Respondent has a data sharing clause in its terms of use in the company web site;
- d. Even if the Chief Minister, in his press statement states that, the data will be stored in Indian servers, there is no clarity how the disclosure or sharing of data in the 3rd Respondent's website can be overlooked;
- e. In the contract made by the State with the 3rd Respondent, it is abundantly clear that, all rights and responsibilities with regards to the data uploaded to the 3rd Respondents web server vests with the State of Kerala

5. When there were discussions related to data theft, the 1st Respondent had submitted that, the data is now being transferred to a government of Kerala website and not to that of the 3rd Respondent. An investigation into the



matter by this Petitioner revealed that, the data is still getting transferred to the 3rd Respondent's server and the url: *housevisit.kerala.gov.in* is just a façade, while the landing server still belongs to the 3rd Respondent. Wouldn't such a statement made by the Chief Minister of the 1st Respondent amount to cheating the public of the state by providing false information. At the outset, it has to be seen why the 1st Respondent resorted to such a statement. It was only because the manner in which the data was transferred to a 3rd party server itself, would amount to breach of sensitive information. The 1st Respondent is privy to the same and hence made this false statement to save its skin at the moment. But there was no sincerity to the statements made by the Chief Minister and was done only to pacify the resentments amongst the general public. This act is unbecoming on part of the Chief Minister of the 1st Respondent as a responsible State machinery.

6. The data which is aggregated and supplied to the 3rd Respondent is a valuable commodity in the data market which could fetch millions of dollars. So it is a question as to why it was done so. The 1st Respondent cannot feign ignorance to the above fact. It has the best of the IT minds in the country and advisors par excellence. The transfer of data was done by a State and not by any layman. It is a concerted decision taken collectively by a team of experts and not by a single individual, taking into consideration of all pros and cons of the action. So why?

7. That the statements made by the Chief Minister, the Minister for Finance, Kerala State and the IT Secretary were deceiving. The data trade context is privy to all the above offices and it becomes criminal on their side to defend the actions done by them. When the State is passing through a medical emergency, when the people are battling the COVID -19 pandemic on an unprecedented scale, when salaries are attached, when all enterprises are locked down due to it, when people are distracted from the daily happenings, when the press reports only the gravest news and with all caution, it is sheer cowardice on part of the responsible persons to trade sensitive information, contrary to the policies of the State. The fact as to who had benefitted from the transaction, is a matter to be investigated. When such trade offs happen, instituted by persons in power, the common man becomes a guinea pig at the hands of shady corporates who benefit and utilise data, thereby manipulating the lives of the citizenry.



8. That, the 1st Respondent is an entity which has challenged the NPR registry before the hon'ble Apex Court and one of the grounds taken was that 'sensitive information of the citizens will be collected by the Union Government'. The petition also contexts that the NPR register 'deviated from Constitutional values' and hence not to be implemented. It fails in all imagination, as to the act of the 1st Respondent, how the transfer of sensitive information will be as per the so called Constitutional values.

The Petitioner is in the circumstances left without any remedy except to invoke the jurisdiction of this Hon'ble Court under Article 226 of the Constitution of India. The reliefs prayed for herein are essential and necessary and may be granted on the following among other: -

GROUNDS

- A. That, there is no :
- i. informed consent at the time of collection of data that the same would be transferred to the 3rd Respondent;
 - ii. Individuals are not told about crucial aspects such as potential misuse of the information;
 - iii. Individuals are not told about the commercial value of the information, the storage of information in a private player's database server and that the information supplied could be used by the private entity at their convenience;
 - iv. That there is no option to the individual to opt out of the survey.
- All the above leading to violation of Articles 14 and 21 of the Constitution of India.

- B. That, in *Justice K. S. Puttaswamy (Retd) and another Vs. Uoi*, it has been held by the apex court that the essence of rule of law is to preclude arbitrary action. it is based on kindered features, which are as follows:
- (i) absence of arbitrary powers on the part of authorities;
 - (ii) equality before law;

The above theories were propounded to safeguard the people from the arbitrary hands of the State. But here is a case where the State is taking illegal measures to transfer sensitive medical information to a third party entity. This is a clear misuse of arbitrary power of the State.



- C. That, whether the deprivation of a private right will balance the competing right or the public interest. Here the concept of legitimate goal of the State has to be taken into consideration. The collection of data and its synthesis is a cardinal step in curbing the virus. But if the data collected can be misutilised against the donor, then the competing right will fade into the background. Here is a case where the donor has no idea why the data is collected or its subsequent use. Hence, the implied consent argument will also not hold good. Also to be seen that the legitimate goal must be of sufficient importance to warrant overriding a constitutionally protected right or freedom and also that such a right impairs freedom as little as possible.
- D. That, even if the contract with the 3rd Respondent is cancelled by the State, the question remains as to the retention of the data by the 3rd Respondent. It is noted that the 3rd Respondent had agreed for transfer of data to any server the 1st Respondent wishes. But taking into consideration the manner in which the problem was dealt with as on date by the 1st Respondent, and the plethora of lies and falsities executed by its men, the common man has no confidence with the statements made by the 1st Respondent's spokesmen.
- E. That, if the 1st Respondent is trying to retract its steps by undoing the contract, then the specific act will prove that it has done some wrong and is clearing the footmarks, lest some grave misappropriation comes into light. As of today, the data of quarantined persons are getting uploaded to the 3rd Respondent's website on a daily basis. Apart from the verbal juggleries, no concrete action are being taken by the 1st Respondent to undo what it has done.
- F. The 2nd Respondent is the authority which should concur with such decisions of the State. It is a sad truth that the 2nd Respondent was never consulted before executing the alleged agreement and their concurrence was never sought for. The 1st Respondent feels that such important decisions which need the concurrence of the Union government can be given a go by and decisions made by it will prevail. The 1st Respondent has no regards for the federal system of governance and the concurrence it has to take while dealing with matters of national importance.



G. The actions done by the 1st Respondent is in clear violation of the provisions of the 'Information Technology Act, 2000'. The Act provides for securing sensitive information and the manner in which it can be transmitted. The 1st Respondent, with all legal paraphernalia, entered into an illegal contract in a haphazard manner. The contract exposes the information of common laymen into the hands of a private entity. It was the bounden duty of the State to protect it's individuals, rather it chose to expose them to the vagaries of a 3rd party. The confidence reposed on a State is shattered and any amount of soothsaying will not help repose back the same.

For these and other grounds to be urged at the time of hearing, it is most humbly prayed that this Honourable Court may be pleased to grant the following



RELIEFS

- i) Issue a writ in the nature of mandamus or any other appropriate writ or order commanding the 1st Respondent to sever all contracts with the 3rd Respondent company;
- ii) Issue a writ in the nature of mandamus or any other appropriate writ or order directing the 1st respondent to appoint a government IT agency to store, analyse and make available a dashboard for COVID – 19 patients with regards to their treatment;
- iii) Issue a writ in the nature of mandamus or any other appropriate writ or order directing the 2nd Respondent to conduct a forensic audit to bring out the foul play in the IT contract entered into by the 1st and 3rd Respondents;
- iv) Grant such further and other reliefs as are just, proper and necessary or may be prayed for and this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

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INTERIM RELIEF PRAYED FOR

For the reasons stated in the writ petition as verified by the accompanying affidavit, it is humbly prayed that this Hon'ble Court may be pleased to issue an interim order directing the 1st Respondent to stop uploading of sensitive data into the web servers of the the 3rd Respondent, pending disposal of the Writ Petition.

Dated this the 15th day of April, 2020.



Jaykar KS
Counsel for Petitioner

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Balu Gopalakrishnan : Petitioner

-Vs-

State of Kerala & others : Respondents

AFFIDAVIT FILED BY THE PETITIONER

I, Balu Gopalakrishnan, S/o A. B. Gopalakrishnan, aged 41, PJRRA – G2, Silent Nagar, Pothujanam Road, Medical College P.O., Thiruvananthapuram, Kerala – 695 011, do here by solemnly affirm and state as follows:

1. I am the Petitioner in the above Writ Petition and I know the facts of the case.
2. The contentions and averments in the Writ Petition are true and correct.
3. I have not filed any earlier petitions seeking similar relief in respect of the same subject matter. I have no personal interest in the above case. But large number of people of the State of Kerala are affected by the problem at large.
4. It is most respectfully submitted that there is no authoritative pronouncement by Supreme Court or High Court on the question raised and that the result of the litigation shall not lead to any undo gain to me or to anyone associated with me.

All the facts stated above are true and correct, to the best of my knowledge, information and belief.

Dated this the 15th day of April, 2020.

DEPONENT

Solemnly affirmed and signed before me by the deponent who is personally known to me on this is the 15th day of April, 2020 in my office at Thiruvananthapuram.

Sandeep. T. George
Advocate, Thiruvananthapuram
K / 1387 / 1998

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S/o A. B. Gopalakrishnan,
PJRRRA - G2, Silent Nagar,
Pothujanam Road, Medical College P.O.,
Thiruvananthapuram, Kerala - 695 011.

-Vs-

RESPONDENTS:

1. State of Kerala,
Represented by Principal Secretary,
Department of Electronics & Information Technology,
1st Floor , Main Block, Secretariat,
Statue, Thiruvananthapuram, Kerala - 695 001.
2. Union of India,
Represented by Secretary,
Ministry of Electronics & Information Technology,
Electronics Niketan, 6, CGO Complex,
Lodhi Road, New Delhi - 110 003.
3. Sprinklr,
Represented by its CEO,
29 W 35th St, New York, NY 10001, United States;
Having its regional office at Divyasree Technopolis,
3rd Floor, East Wing, Opp. HAL Airport Road,
Yemalur, Bengaluru, Karnataka - 560 037.

MEMO FILED UNDER SECTION 8 OF THE KERALA HIGH COURT ACT

I am the counsel appearing for the Petitioner in the above case. The case pertains to an illegal contract entered into by the 1st and the 3rd Respondents, which are still in force. The sensitive medical data are still being uploaded and stored in the 3rd Respondent's web server on a daily basis. The case pertains to matters of national security and hence it is prayed that the above case may be posted before the vacation court for urgent orders.

Dated this the 15th day of April, 2020.



Jaykar KS
Counsel for Petitioner