

BEFORE THE HON'BLE HIGH COURT OF KERALA AT ERNAKULAM

WRIT PETITION (CIVIL) No. _____ OF 2020
(Before the Vacation Court)

Kabeer C alias Aneera Kabeer : Petitioner

Vs

State of Kerala and others : Respondents

PETITIONER:

Kabeer C alias Aneera Kabeer

RESPONDENTS:

1. State of Kerala
represented by its Secretary
Department of Social Justice
Secretariat , Thiruvananthapuram -695 001

2. Director,
Department of Social Justice
Thiruvananthapuram -695 001

3. State Police Chief
Police Headquarters
Vazhuthacaud,
Thiruvananthapuram
695010

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MEMORANDUM OF WRIT PETITION (CIVIL) UNDER ARTICLE 226 OF THE
CONSTITUTION OF INDIA.

- I. Address for service of all notices and process to the petitioner is that of her counsel **Ms. Thulasi K.Raj**, Advocate, "Indusree," Mosque Road, SRM Road, Kochi -18.
- II. The address for service of all notices and other processes on the Respondents are as shown above.

STATEMENT OF FACTS

1. The petitioner is a transgender person. She has been involved in mobilising persons in the transgender community (hereinafter 'the community') for the purpose of achieving equal opportunities for the community. The petitioner is excommunicated from her parental home several years before, for revealing her transgender identity. She has suffered serious social disadvantages on the basis of her sexual identity. She has been verbally abused, discriminated against and excluded from equal opportunities throughout her life. The Petitioner identifies her gender identity as female, and has also undergone a sex reassignment surgery on 11.01.2020 and changed her name to Aneera Kabeer.
2. This Public Interest Litigation is filed *inter alia* seeking to ensure the distribution of food ration, medicines, access to medical treatment etc. to the transgender community in Kerala. Transgender persons have been specifically discriminated against in the grant of relief measures during lockdown to curb the spread of Covid-19 and the transgender community in Kerala including the petitioner continuously suffer a violation of Articles 14, 15 and 21 of the Constitution.
3. Historically, the members of the transgender community in Kerala have been victims of discrimination. They have been subjected to systemic stigma and



exploitation. They also are economically, socially and politically backward. Social and political participation of transgender persons is limited. Very often, they were excommunicated from their families and birth places and were abandoned by their family members. The petitioner too, is a person who is excommunicated from her family after revealing her self-identified gender identity. The petitioner is recognised as a transgender person by the state government and has an identity card issued by the Social Justice Department of the state. A copy of the identity card of the petitioner is produced herewith and marked as **Exhibit P1**.

4. On the national level, the Twelfth five-year plan (2012-2017) had recommended the “empowerment of the transgender community by advocating that line Ministries support their education, housing, access to healthcare, skill development, employment opportunities and financial assistance.” After persistent demand, in 2019, a law was enacted called Transgender Persons (Protection of Rights) Act. The legislation was subject to severe criticism by legal academics and transgender activists alike, pointing out various infirmities.
5. The judgement of the Hon’ble Supreme Court in *NALSA v. Union of India*, (2014) 5 SCC 438 was the first authoritative pronouncement in the issue of recognition of transgender identity and securing their rights. The Court held that all transgender persons have a right to self-determine their gender identity as male, female or transgender and non-recognition of their gender identity violates Articles 14 and 21 of the Constitution of India. The Supreme Court after an elaborate consideration of the plight of the community and the relevant law held that the transgender persons have the right to legally recognition of their identity. The Supreme Court also held that social security and welfare schemes should be made available to transgender persons.
6. At the state level, for a long time in Kerala history, the transgender people were forced to hide their identity and lead their lives with the state failing to recognise their identity and autonomy. In the recent years, the government of Kerala has recognised the plight of transgender people in Kerala and started



pro-active measures to eliminate the disparities. A survey titled 'Transgender Survey Kerala 2014-15' was submitted to the Director, Department of Social Justice during the said year. In the survey, it was found that 54% of the respondents had a monthly income of less than Rs.5000/- and 58% of Transgender students drop out before completing 10th grade. Recognising the disadvantages faced by the transgender community, the State of Kerala formulated a State Policy for the Transgender Persons in Kerala. A copy of the 'State Policy for the Transgender Persons in Kerala, 2015' is produced herewith and marked as **Exhibit P2**. Ext. P2 notes various disabilities and disadvantages faced by the Transgender people in Kerala and documents their employment and educational status.

7. Presently it is Due to the Covid-19 pandemic, the country is on a nationwide lockdown since 25.03.2020. Since then, the transgender community has been facing a severe lack of access to essential food supply, medicines and treatment. They also face a threat of torture at the hands of police authorities. Most persons from the transgender community have no other livelihood options other than begging and sex work and due to the lockdown, they have been completely without any form of livelihood or earnings. The ones who are working in petty shops or other small contractual employment are also not having any earnings or income since the lockdown. The various issues faced by the Transgender community in Kerala are listed briefly below:

(a) Lack of access to ration and community kitchens

Due to the restrictions accompanied by the lockdown, persons like the petitioner are forced to stay indoors without sufficient access to ration and essential supplies. A major problem faced by the members of the community is lack of ration cards. Even though the general policy of the state seems to be universalisation of ration without insisting for ration cards, the same is not implemented at the grass root level. The petitioner had a personal experience of having visited the Civil Supplies Office in Palakkad after the lockdown where she was refused ration on the ground that she has no ration card. Since several members of the community do not have ration cards, lack of access to food grains becomes a larger problem. Due to permanent exclusion and ostracization from their families, they have no access to family ration cards where their names might have been shown. The Transgender Persons are also discriminated in the matter of distribution of other food essentials.

(b) Lack of access to medicines and medical treatment

The right to medicines and access to medical treatment is denied to a large extent to the transgender persons. Several of the persons have undergone sex reassignment surgery and hormonal treatment for which hormonal medication is mandatorily prescribed. They are facing an acute shortage of medication, in particular hormonal medicines. Due to this, they are unable



to continue their hormone therapy causing serious physical and psychological distress. The number of HIV positive cases among the community is also very high, for which adequate medical attention is essential. Many members of the trans community are also elderly and suffering from health issues like heart ailments, diabetes, cancer etc. and they need medicines and treatment which they cannot afford during this time.

(c) Inability to pay rent and threat of eviction

Many persons in the community live as tenants and are unable to pay rent due to abrupt loss of their employment. They also face a threat of eviction especially from private landlords. Due to the general stigma against transgender people, ordinarily, they find it difficult to find places to stay. Sufficient safeguards are absent to prevent illegal evictions of members of the community. Eviction leads to homelessness and severe misery. They seek urgent reliefs against the threat of eviction and rehabilitation.

(d) Prohibition against torture and degrading treatment

Even during the present times, the members of the community who were forced to resort to begging for daily survival and are on the streets are being harassed by police officers. They are still looked down upon by officers of the state and are not provided with equal treatment. Stigma against the community persists on large scale and has increased steeply during the Covid lockdown and in fact has worsened. The Transgender community is harassed as they are seen as spreading the corona virus.

(e) Social unemployment allowance

Abrupt loss of employment and income has made it difficult for the community to find means of survival post 25 March 2020. The state government is required to devise urgent measures by which financial security is guaranteed to the members of the community, and in particular to those unemployed and those receiving abysmally low income. They need cash support in the form of a social security pension or allowance or a one-time cash payment which is being given to others such as migrant workers or construction workers for their loss of livelihood.

8. Several news reports have raised concern about the conditions of living of transgender community in the country after the declaration of the national lockdown. A copy of the news report by Shawn Sebastian in DownToEarth dated 01.04.2020 is produced herewith and marked as **Exhibit P3**. A copy of the news report dated 06.04.2020 in *The Hindu* by Kenneth Rosario is produced herewith and marked as **Exhibit P4**.



9. The refusal by the state government to provide adequate food, medical and other facilities to the transgender persons amount to violation of their fundamental rights under Articles 14, 15, 19 and 21 of the Constitution of India.

10. It is also submitted that the Petitioner has filed WP(C) No. 29247/19 before this Hon'ble Court earlier for implementation of the transgender policy and seeking reservation for transgender people in public employment under the state. The said case is pending. The instant case is, however, a different cause of action.

In the above circumstances the petitioner does not have any equal and efficacious remedy than approaching this Hon'ble Court under the following among other:

GROUNDS

A. In NALSA (supra), the Supreme Court categorically identified that the members of the transgender community as a vulnerable group subject to systematic stigma, discrimination and exploitation. The court also made positive directions to the state to initiate measures for social integration and equality. The problems suffered by the members of the community is a direct effect of the lockdown. A reading of Articles 14 and 15 of the Constitution will show that the state is under an obligation not to discriminate against its citizens on the ground of sex. In *Navtej Singh Johar v Union of India* (2018) 10 SCC 1, the apex court interpreted the term 'sex' under Article 15(1) to include sexual orientation. Therefore, discrimination against transgender persons stands prohibited by Article 15(1).

B. In the matter of rent, many persons in the community are unable to pay rent due to the loss of employment as a result of the lockdown. Forced eviction has led to homelessness and unsafe conditions of living for the community. Private landlords have been discriminating against transgender persons solely on the basis of their sexual identity. This is a violation of Article 15(2) of the Constitution prohibiting private discrimination.

C. In NALSA (supra), the apex court categorically noted the plight of members of the transgender community in the country. The relevant paragraphs of the judgment are extracted below:

"34. ...Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Rights of transgenders, pure and simple, like Hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity.

"55. Petitioners have asserted as well as demonstrated on facts and figures supported



by relevant materials that despite constitutional guarantee of equality, Hijras/transgender persons have been facing extreme discrimination in all spheres of the society. Non-recognition of the identity of Hijras/transgender persons denies them equal protection of law, thereby leaving them extremely vulnerable to harassment, violence and sexual assault in public spaces, at home and in jail, also by the police.

Sexual assault, including molestation, rape, forced anal and oral sex, gang rape and stripping is being committed with impunity and there are reliable statistics and materials to support such activities. Further, non- recognition of identity of Hijras /transgender persons results in them facing extreme discrimination in all spheres of society, especially in the field of employment, education, healthcare etc. Hijras/transgender persons face huge discrimination in access to public spaces like restaurants, cinemas, shops, malls etc. Further, access to public toilets is also a serious problem they face quite often. Since, there are no separate toilet facilities for Hijras/transgender persons, they have to use male toilets where they are prone to sexual assault and harassment. Discrimination on the ground of sexual orientation or gender identity, therefore, impairs equality before law and equal protection of law and violates Article 14 of the Constitution of India....

.....60. TGs have been systematically denied the rights under Article 15(2) that is not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC..."

During the Covid-19 pandemic, persons of the community are subject to severe discrimination and lack of access of facilities. The lockdown restrictions have a particularly disproportionate impact on them. This impact must be appropriately considered by the state government with a view to take positive measures to secure them safe and adequate living conditions.

- D. Article 21 guarantees the right to life and personal liberty. The right to life has been expanded to include a variety of positive obligations the state is bound to extend to its citizens. It is now widely accepted that the right to life is beyond "mere animal existence" as notably said by the US Supreme Court in *Munn v. Illinois*, 94 U.S. 113 (1876). The right to life under Article 21 includes within its fold variety of rights as held in the historic judgment in *Maneka Gandhi v. Union of India*, AIR 1978 SC 597. Moreover, the right to life includes a right to livelihood as held by the apex court in *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545. The ratio that emerges out of these judgments make out a substantive case for the protection of transgender community in the state.



- E. The National Food Security Act was passed in 2013. It imposes obligations on state and central governments jointly to ensure adequate supply of food grains. It has been also held that there exists a right to free ration even without ration cards in *Swaraj Abhiyan v. Union of India* (2016) 7 SCC 498 that “As far as the present case is concerned, there is no doubt that provision of food grains as per the provisions of the NFS Act is a statutory obligation on the State.” It was further held:

“In this context, it would be inappropriate for the State Governments to deprive any household in drought affected areas of the requisite food grains merely because they do not have a ration card. We find substance in the contention of learned counsel for Swaraj Abhiyan that in grave and emergent situations such as those in the drought affected areas, the requirement of a ration card for obtaining food grains can only be considered a procedural requirement and that requirement should be substituted with a valid identity card or any appropriate proof of residence that is acceptable to the functionaries in the State Governments, who need to construe such a condition open-handedly and without being tight-fisted.”

An analogy will show that during Covid-19 epidemic, the ration card requirement should not be strictly adhered to, especially in the case of transgender persons in the state. This is especially so in view of the spirit of the National Food Security Act.

P R A Y E R

Hence, it is respectfully prayed that this Hon’ble Court may be pleased:

- i. To issue a writ of mandamus directing the 1st respondent to ensure adequate distribution of food rations, vegetables and essentials to Transgender persons in Kerala from Civil Supplies Offices and other outlets without insisting for production of ration cards as long as the threat of Covid-19 persists;
- ii. To issue a writ of mandamus directing the 1st respondent to ensure adequate medicines, including HIV and hormone therapy medicines from primary health centres, government hospitals and dispensaries to the Transgender persons in Kerala as long as the threat of Covid-19 persists;
- iii. To issue a writ of mandamus directing the 1st respondent to ensure unemployment allowance to the Transgender persons as long as the threat of Covid-19 persists;
- iv. To issue a writ of mandamus directing the 1st respondent to ensure cooking facilities, access to community kitchens, free LPG cylinders and rehabilitation for Transgender persons in Kerala as long as the threat of Covid-19 persists;



- v. To issue a writ of mandamus directing the Respondents to provide social security and financial support to transgender persons for as long as the threat of COVID-19 persists;
- vi. To issue a writ of mandamus directing respondent no.3 to take steps to ensure that the Transgender persons in Kerala are not subject to torture at the hands of various police officers and that Transgenders living in rented premises are not evicted by private landlords due to non-payment of rent;
- vii. To issue a writ of mandamus directing the 1st respondent to prohibit forced evictions of Transgender persons from their places of residence.
- viii. To issue such other orders, directions or writs as may be prayed for and that this Hon'ble Court may deem fit under the facts and circumstances of the case.

Dated this the 8th day of May, 2020.



Counsel for the petitioner

INTERIM RELIEF

For the reasons stated in the accompanying writ petition it is respectfully prayed that this Hon'ble Court may be pleased to give an interim direction To take urgent provisional measures for distribution of medicines, medical care and free ration to persons who belong to the transgender community, without insisting for ration cards, in the interest of justice and equity.

Dated this the 8th day of May, 2020.



Counsel for the petitioner

Petitioner