

**BEFORE THE HONOURABLE HIGH COURT OF
KERALA AT ERNAKULAM.**

WP© No. OF 2020

PETITIONER

Ramesh Chennithala,

VS

RESPONDENTS

- 1) State of Kerala rep. by Chief Secretary, Secretariat,
Thiruvananthapuram.-695 001
- 2) The State Police Chief, Police Head quarters,
Thiruvananthapuram. 695 001.

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

The address for service of all notices and process of the
petitioner is that of his Counsel T.ASAF ALI,(

The address for service of notices, process to the respondents is as shown in the cause title.

STATEMENT OF FACTS

1) The Petitioner is the MLA representing Harippad Assembly Constituency and Leader of Opposition in the Kerala Legislative Assembly. The Petitioner had served as Minister for Rural Development in 1986 to 1987 and also as Minister of Home and Vigilance in the last United Democratic Front (UDF) Government for the period from 2014 to 2016. He also had served as Member of Parliament representing Kottayam Parliament constituency 4 times.

2) The 1st Respondent is the Chief Secretary representing Govt. Of Kerala and 2nd Respondent is the State Police Chief, who issued Exhibit P1, Circular without any authority.

3) On 29th January 2020, the 1st Indian test positive case for COVID-19 was detected to a medical student who had arrived in Kerala from Wuhan, China. On 11th March,2020 World Health Organization(WHO) declared COVID-19 outbreak as pandemic. By August 15,2020 there were about 14,891 confirmed COVID-19 patients under surveillance in the state in government care and in isolation at their homes and the reported COVID death as

on 15th August 2020 is 146. State government introduced and implemented various preventive measures to combat deadly epidemic COVID-19, which includes mapping the movements of COVID-19 positive patients and to detect the identity of those with whom they interacted with, and isolating anyone in the chain with symptoms and strictly observing social isolation and imposing complete ban of public congregations including all kind of prayers at all place of worships in the state. The above said measures of the government were made possible with satisfactory results due to the active co-operation of all sections of people in the society.

4) This Writ Petition is filed as Public Interest Litigation(PIL) for and on behalf of those positive COVID-19 pandemic patients who are now undergoing quarantine at their homes as well as at various hospitals, whose Call Data Records (CDR) are being collected by police on the strength of a Circular dated 11th August 2020 issued by 2nd respondent. True copy of the Circular issued by the 2nd Respondent is produced herewith which may be marked as **EXHIBIT P-1**. The 2nd Respondent has issued the above Circular whereby it has been *inter alia* directed the Additional Director General of Police(Intel.) and Police Head Quarters to take up the matter with BSNL and Vodafone for

prompt collection of CDRs. Relevant extract in the Circular in so far as the CDR collection is as follows:-

"05. ADGP INT and HQ will take up the matter with the BSNL for getting the CDRs promptly. They will also take up the matter with VODAFONE as in some places they are delaying in sending of CDRs".

A careful scrutiny of Exhibit P-1 would prove that the police in the state had started collection of CDRs of COVID-19 pandemic positive patients in massive numbers from telecom companies, even prior to the issuance of Exhibit P-1 and without the consent or knowledge of COVID-19 positive patients. Exhibit P-1 does not disclose the legal authority on the strength of which the 2nd respondent issued Exhibit P-1 Circular, whereby it has been directed the ADGP(Intel) and H.Q. to ensure collection CDRs of COVID-19 positive patients from BSNL and Vodafone, the act of which is illegal, unfair, unjust, arbitrary, fanciful and oppressive and hence it is in total violation of the fundamental rights of privacy of COVID-19 patients guaranteed under Article 21 of the Constitution of India, causing substantial loss and injury to them. It is submitted that the state is under constitutional obligation to ensure that the fundamental right of every citizens including those who are undergoing home isolation in connection with

suspected and positive of COVID-19 patients are protected in connection with any measures, particularly when they are in a very vulnerable situation, unable to give consent and whose voluntariness or understanding is compromised due to their situational condition. At present they are not in a position to have resort to any legal remedies of their own for the injuries suffered by them on account of the illegal acts of the respondents. The Petitioner, being a responsible public functionary as the Leader of Opposition in the Legislative Assembly is acting *bonafide* to espouse their cause before this Hon'ble Court for remedial legal measures.

5) It is trite law that either the 1st Respondent or any of its officials have no right or authority to collect CDRs of the COVID-19 pandemic positive patients, who are in quarantine either at their residence or elsewhere, whose right of privacy guaranteed by the Constitution would be suffered by them following the breach of confidentiality and hence the above actions taken pursuant Exhibit P1, is illegal void and unenforceable. It is understood that CDRs of COVID-19 positive patients are being collected by police purported to be for the purpose of their contact tracing of the positive patients, and stored by an unknown agency, that too without anonymising CDRs, which is

against the guidelines issued by Govt. of India and also the guidelines issued by this Hon'ble Court in the interim Common Order dated 24th April 2020 made in WP© Temp.No.148 of 2020 and other connected cases. The petitioner reasonably believes that in the event of collecting CDRs of COVID-19 positive patients and stored with a third party as entrusted by police, there are every chances misuse by undesirable elements for their commercial gain and personal pecuniary advantage. It is submitted that for the sole purpose of contact tracing of COVID-19 positive patients, the tower location of the mobiles of the COVID-19 positive patients would serve the purpose, and no CDR details are necessary. It is very surprising to note that why the 1st respondent is keeping silent on the illegal access of CDRs by police on the strength of a non-existing self usurped power, which is not legally sustainable.

6) It would appear that Exhibit P1 Circular was issued by exercising the powers vested with govt. under Kerala Epidemic Disease Ordinance 2020 under the cover of health emergency. Constitution Bench of the Supreme Court in **Justice Puttuswamy(Retd.) and another vs Union of India and Others (2017 (10)SCC 1: 2017 KHC 6577** ruled in para 153 that

..A statutory right can be modified, curtailed or annulled by a simple enactment of the Legislature. In other words, statutory rights are subject to the compulsion of legislative majorities. The purpose of infusing a right with a constitutional element is precisely to provide it a sense of immunity from popular opinion and, as its reflection, from legislative annulment. Constitutionally protected rights embody the liberal belief that personal liberties of the individual are so sacrosanct that it is necessary to ensconce them in a protective shell that place them beyond the pale of ordinary legislation. To negate a constitutional right on the ground that there is an available statutory protection is to invert constitutional theory. As a matter of fact, legislative protection is in many cases, an acknowledgment and recognition of a constitutional right which needs to be effectuated and enforced through protective laws. For instance, the provisions of S.8(1)(j) of the Right To Information Act,2005 which contain an exemption from the disclosure of information refer to such information which would cause an unwarranted invasion of the privacy of the individual. But the important point to note is that when a right is conferred with an entrenched constitutional status in Part, 3, it provides a touchstone on which the validity of executive decision making can be assessed and the validity of law can be determined by judicial review. Entrenched constitutional rights provide the basis of evaluating the validity of law. Hence, it would plainly unacceptable to urge that the existence of law negates the rationale for a

constitutional right or renders the constitutional right unnecessary.

7) It is submitted that the in Justice *Puttuswami*'case (supra), the Hon'ble Supreme Court over ruled the law laid down by its earlier 4 Bench majority judgment rendered in *ADM Jabalpur vs Shivakant Shukla* (AIR SC 1976 1207). Relevant portions of the judgment in Justice Puttuswamy case(supra) is extracted below:-

"119 The judgments rendered by all the four Judges constituting the majority in ADM, Jabalpur are seriously flawed. Life and personal liberty are inalienable to human existence. These rights are, as recognized in Kesavananda Bharati 17, primordial rights. They constitute rights under Natural law. The human element in the life of the individual is integrally founded on the sanctity of life. Dignity is associated with liberty and freedom. No civilized State can contemplate an encroachment upon life and personal liberty without the authority of law. Neither life nor liberty is bounties conferred by the State nor does the Constitution create these rights. The right to life has existed even before the advent of the Constitution. In recognising the right, the Constitution does not become the sole repository of the right. It would be preposterous to suggest that a democratic Constitution without a Bill of Rights would leave individuals governed by the State without either the existence of the right to live or the means of enforcement of the right. The right to life being inalienable to each individual, it existed prior

to the Constitution and continued in force under Article 372 of the Constitution. Khanna, J. was clearly right in holding that the recognition of the right to life and personal liberty under the Constitution does not denude the existence of that (2017) 10 SCC 1 (1973) 4 SCC 225 ::23:: MSR,J & KL,J WP(PIL) 75 of 2020 right, apart from it nor can there be a fatuous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the State on whose mercy these rights would depend. Such a construct is contrary to the basic foundation of the Rule of Law which imposes restraints upon the powers vested in the modern State when it deals with the liberties of the individual. The power of the Court to issue a writ of habeas corpus is a precious and undeniable feature of the Rule of Law.

Relying on the law laid down by the Supreme Court in Justice Puttuswamy case (supra), an unreported judgment of the Telengana High Court in **Writ Petition(PIL) No. 75 of 2020 Ganta Jai Kumar, S/o.G.Vinod Kumar vs State of Telangana, Rep. by Chief Secretary and others.** held that even in an health emergency or war emergency it is not an excuse to trample on the rights under Art.21 of the Constitution. Relevant portion of the said judgment is extracted below:-

"57. This above decisions of the Supreme Court are a complete answer to the plea of the Advocate

General that because there is a medical emergency or a war emergency, anything can be done by the State including arbitrarily restricting the right to health conferred under Art.21 on a citizen of the State. An emergency of any sort is not an excuse to trample on the rights under Art.21 and the Courts have the power to see that the State will act in a fair, just and reasonable manner even during emergencies. Whether the State has done so or not is judicially reviewable in the light of the law laid down by the Supreme Court."

8) It is submitted that Exhibit P-1 is vague and worded in a very deceptive manner which does not disclose the purpose for which CDRs of COVID-19 positive patients are required by police. Collection of CDRs of COVID-19 positive patients by police is an illegal expansion of police powers, which is nothing but a infraction to the right of privacy individuals. From the above, it is evident that there is no informed voluntary consent also obtained from COVID-19 positive patients undergoing quarantine before collecting CDRs that too in a deceptive manner on the strength of a vague Exhibit P-1 Circular, which does not disclose need and use of CDRs, manner of storing of CDRs and the agency which is authorized to store CDRs collected etc.

9) As a rejoinder to the public wrath and widespread protest emanated against Exhibit P1, the police has issued a Press Note

justifying the issuance of Exhibit P1, wherein it has been stated that as per the law laid down by the Apex Court in Justice **Puttuswamy's case (supra) and in Mr. 'X' vs Hospital 'Z', 1998(8) SCC 296: 1998 KHC 1256** the collection of CDRs of COVID-19 positive patient pursuant to Exhibit P1 is legally justified. True copy of the Police Press Release dated 14-8-2020 is produced herewith which may be marked as **EXHIBIT P2.** True English version of Exhibit P2 is produced herewith which may be marked as **EXHIBIT P2(a).** It is submitted that the law laid down by the Apex Court in Justice Puttuswamy;s case (supra) negates the authority of the 2nd respondent in collecting CDRs of COVID-19 positive patients in an arbitrary manner as narrated above pursuant to Exhibit P2. It is further submitted that the law laid down by the Apex Court in the above decisions is not at all applicable to the facts of the instant case. It has been further stated in Exhibit P2 that the govt. has every power to act in pursuance of Exhibit P1, by exercising the powers vested with government under section 4(2)(j) of Kerala Epidemic Disease Ordinance, 2020. It is needless to state that the law laid down by the Apex Court in *Justice Puttuswamy's case*(supra) in an unequivocal terms made it clear that any law made by the legislature shall be in consonance with constitutional principles.

9) It is submitted that to preserve the details of CDR is a matter of privacy of an individual under law, which is liable to be protected from unauthorized access by any authority or third party. If security of CDR is breached, the individuals whose CDR details was inappropriately accessed or used for gain by third party, will have to face a number of potential harms. COVID-19 positive patients who are undergoing quarantine and whose CDRs are being accessed illegally by police on the strength of Exhibit P1 will have to experience social or psychological harm due to disclosure of CDR details to strangers. It is trite law that the indiscriminate collection of CDRs of COVID-19 positive patients undergoing quarantine under the pretext of tracking their movements as preventive measure amounted to an infraction of the fundamental right guaranteed under Article 21 of the Constitution of India., In the instant case, the 2nd respondent has acted with proven *malafide* in violation of constitutional provisions against the best interest of COVID-19 positive patients in as much as the requirements of CDR is not at all necessary for tracking the movements of COVID-19 positive patients. It is evident that the 2nd respondent has acted illegally without any authority of law.

10) Being highly aggrieved by the Exhibit P1 Circular issued in violation of the constitutional provisions and in consequence of which facilitated the subordinates of 2nd respondent to access the CDRs of COVID-19 positive patients in an unfair and arbitrary manner. Since the COVID-19 positive patients whose CDRs are being accessed illegally and who were and were and are now in home isolation, are now in a very vulnerable situation, unable to resort to any legal remedies of their own on account of their present situation. The Petitioner, being a responsible public functionary is acting *bonafide* to espouse the cause of COVID-19 positive patients whose CDRs are being illegally accessed by police on the strength of Exhibit P1, Circular, approaching this Hon'ble Court for remedial legal measures. In the circumstance, the Petitioner has no other effective and efficacious other alternative remedy than to approach this Hon'ble Court by invoking the extraordinary jurisdiction under Article 226 of the Constitution of India for the following among other

GROUND S

A) The 2nd Respondent has exceeded his authority and power and issued Exhibit P1 Circular, whereby it has been directed ADGP(Int.) and H.Q. to ensure the collection of CDRs of positive COVID 19 patients who are now in quarantine, from

BSNL and Vodafone through police machinery, the act of which is highly illegal, arbitrary, unfair, oppressive and unconstitutional which is liable to be quashed.

- B) The 2nd Respondent has committed serious illegality in issuing Exhibit P1 Circular in a deceptive manner without even disclosing the purpose of collecting CDRs and without disclosing the power, if any, derived for issuing a Circular of the nature of Exhibit P1 directing the subordinates of the 2nd respondent ensure the collection of CDRs from BSNL, Vodafone etc. It is submitted that the decision to retrieve CDRs of infected persons of COVID-19 positive under the pretext of drawing up route map of COVID-19 positive is unjustifiable inasmuch as tracing route map of COVID-19 patients is possible by taking tower location of patients, without accessing CDRs.
- C) It is very pertinent to note that CDRs will be permitted to collect in connection with the investigation of grave nature of criminal cases in which threat to national security issues, financial crimes and other similar nature of crimes affecting national security are allowed only after obtaining permission from Home Department subject to review by the Review Committee constituted under Rule 16 of the Indian Telegraph(Amendment) Rules, 2007.
- D) It is submitted that a mobile tower normally covers an area of about 500 meters in radius. In several cases however service provider mentions the latitude and longitude within the mobile towers' radius from where the calls were made. In addition to that, by using GPS App, the police can easily pin point the location of the person within 500 meters area. This

being so, collection of CDRs of COVID-19 positive patient by police on the basis of Exhibit P-1 is arbitrary, illegal, unfair, and violative of Article 21 of the Constitution of India, which is liable to be quashed.

E) Exhibit P1 does not provide anything for protecting CDRs collected from suspect and positive COVID-19 patients from being exploited and misused against their wishes for the commercial gain of the third parties.

F) The 2nd Respondent has exceeded his power and authority and acted in total violation of mandatory Constitutional provision and issued Exhibit P1 Circular

For these and other grounds to be advanced at the time of hearing, it is most respectfully prayed that this Hon'ble Court may be pleased to grant following:

RELIEFS

- i) To call for the records relating to the issuance of Exhibit P1 Circular No.T5/40634/2020/PHQ dated 11th August 2020 issued by the 2nd Respondent and a Writ of certiorari or any other appropriate writ or order may be issued quashing Exhibit P1 as *ultra vires*, unconstitutional, null and void and unenforceable in law;

- ii) Writ of Mandamus or other appropriate writ, order or direction commanding the 2nd Respondent and their subordinates restraining them from collecting CDRs of COVID-19 positive patients undergoing quarantine and under treatment from any service providers in pursuance of Exhibit P1; AND
- iii) To Grant such other order or direction, as this Hon'ble Court may deem fit and proper to meet the ends of justice;

INTERIM RELIEFS PRAYED FOR

For the reasons stated in the writ petition(civil) and in the accompanying affidavit , it is most respectfully prayed that pending disposal of the above Writ Petition(Civil), this Hon'ble Court may be pleased issue an interim order directing Respondents 1, and his subordinates restraining them from collecting CDRs of COVID-19 positive patients undergoing quarantine and under treatment from any service providers in pursuance of Exhibit P1 until the final decision of this Writ petition.

Dated this the 17th August 2020

RAMEMSH CHENNITHALA MLA
(Petitioner)

T.ASAF ALI
Counsel for the Petitioner