

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR
&
THE HONOURABLE MR.JUSTICE MURALI PURUSHOTHAMAN
TUESDAY, THE 21ST DAY OF FEBRUARY 2023 / 2ND PHALGUNA, 1944
WP(C) NO. 24896 OF 2022

PETITIONER:

SAM JOSEPH, AGED 41 YEARS
S/O. K.J. JOSEPH, KUDAKUTHIYANICKAL HOUSE, OLD
MARTHOMA CHURCH ROAD, PERUMBAVOOR, ERNAKULAM.

BY ADV RAJESH VIJAYAN

RESPONDENTS:

- 1 THE STATE OF KERALA
REPRESENTED BY THE ADDITIONAL CHIEF SECRETARY,
DEPARTMENT OF HOME, GOVERNMENT SECRETARIAT,
STATUE P.O, THIRUVANANTHAPURAM – 695001.
- 2 THE DISTRICT POLICE COMPLAINTS AUTHORITY,
ERNAKULAM, COLLECTORATE, KAKKANAD, PIN - 682030,
REPRESENTED BY VICE CHAIRMAN.
- 3 THE STATE POLICE CHIEF,
POLICE HEAD QUARTERS, VAZHUTHAKAD,
SASTHAMANGALAM P.O, THIRUVANANTHAPURAM – 695010.
- 4 STATION HOUSE OFFICER,
PALARIVATTOM POLICE STATION, KOCHI CITY,
ERNAKULAM, PIN – 682001.

BY ADV SHRI.V.TEKCHAND, SENIOR G.P.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 21.02.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JUDGMENT

Dated this the 21st day of February, 2023

S. MANIKUMAR, C.J.

Petitioner in this writ petition claims to be a public spirited person and an active social worker. He has filed this writ petition, challenging the illegal detention of transgenders at Palarivattom Police Station, on account of wearing black dress to express protest during the visit of the Hon'ble Chief Minister of Kerala.

2. Reliefs sought for in this writ petition are as under:

(i) to issue a Writ of Mandamus to the 2nd respondent who is the competent authority u/s 110(3) of the K.P. Act, 2011, for conducting an inquiry into the professional misconduct of the officers concerned and taking action in accordance with law,

(ii) to make a declaration to the effect that the arrest and detention for waving black flags in protest is per se illegal and unconstitutional and direct the State Government to grant adequate compensation for the persons booked for waving black flag in front of the Chief Minister and Ministers in protest;

(iii) to issue an order to 3rd respondent to place the details of the cases in which persons who have been arrested and detained for having waved the black flag in protest to Ministers for the last 3 years;

3. Mr. Rajesh Vijayan, learned counsel for the petitioner, submitted that transgenders here have not committed any

offence under any law for the time being in force. Waving black flag or wearing black mask or dress by any citizen is an innocuous non-offence in a democratic country like India to show dissent to any political executive. It is submitted by the petitioner that the illegal detention on account of such an act by police officers is violative of Articles 14, 19 and 21 of the Constitution and even makes out a serious offence under Section 220 of the Indian Penal Code, 1860. Therefore, the detinue is liable to be compensated by the State.

4. On the other hand, the police officers being the protectors of law, have committed offences under sub-sections (b) & (d) of Section 18 of the Transgender Persons (Protection of Rights) Act, 2019. Sections 18(b) & 18(d) of the Transgender Persons (Protection of Rights) Act, 2019 read as under:

“Section 18(b): whoever, denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

Section 18(d): whoever harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender

person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.”

5. It is further submitted by the petitioner that the fourth respondent – Station House Officer, Palarivattom Police Station, is liable to explain under Section 32(1) of the Kerala Police Act, 2011 about his arbitrary and illegal act, which adversely affected the body and reputation of the transgenders and others who were booked illegally. Section 32(1) reads as under:

“Section 32(1)- Police officers liable to explain,-

(1) Any person or his representative in interest shall have the right to seek and be informed of the reason for any police action which adversely affected his body or property or reputation.

(2) A Police Officer while performing any act which is likely to endanger or adversely affect the body, property or reputation of any person, shall, as is reasonably practicable under each particular circumstance, maintain records of his actions which are done under any law or order of the State Police Chief which governs such acts as may be prescribed by any law governing such act or as ordered by the State Police Chief:

Provided that nothing in this section shall prevent the denial of furnishing information to any person on the ground that it will be prejudicial to the interest of an ongoing investigation, or trial or security of the State.”

6. In support of the reliefs sought for, petitioner has raised the following grounds:

A. Petitioner has a fundamental duty under Articles 51A(e) and (h) of the Constitution to promote the spirit of common brotherhood amongst all the people of India transcending sectional diversities, and to develop humanism and the spirit of inquiry and reform, respectively.

B. According to the petitioner, any violation of Section 8(6) of the K. P. Act, 2011 would amount to an offence of dereliction of duty, as contemplated in Section 114(a) of the K.P.Act, 2011. Sections 8(6) and 114(a) read as under:

“Section 8(6)- Rights of the public at a police station. Any citizen shall have the right to know whether any particular person is in custody at the police station.”

“Section 114, Dereliction of duty by a police officer. Whoever, being a police officer. (a) violates or neglects to obey any legal provision, procedure, rule or regulation applicable to members of the police force under this Act, shall on conviction, be punished with imprisonment for a term which may extend to three months or with fine or with both.”

C. Section 143 IPC also won't attract for the following reasons:

- i) the black flag can be waived by persons below 5 persons.
- ii) the aggrieved must be in the exercise of lawful power or legal obligation be he a public servant or any person.
- iii) there must be criminal force contemplated in the illustrations given under S 350 IPC. The essence of Section 143 IPC is a combination of 5 or more persons united in the purpose of committing a criminal offence and the consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit.

7. A detailed statement is filed on behalf of the third respondent – State Police Chief, wherein it is stated that on 11.06.2022, respondent No.4 has performed his official duty and taken steps to prevent commission of a cognizable offence during the visit of a 'Z+' category protectee. In the statement, it is averred that the rights of the transgender persons were not infringed by the police in any ways. The fourth respondent has denied all the allegations raised by the petitioner, with respect to the violation of rights of two transgender persons, as per Sections 18(b) and (d) of the Transgender Persons (Protection of Rights) Act, 2019. Relevant portions of the statement read thus:

“(i) It is most respectfully submitted that the allegation levelled by the petitioner is not true and against the facts. It is categorically stated that the transgenders were taken in custody not for wearing black dress as alleged by the petitioner. But they were trying to intrude the motorcade of Hon’ble Chief Minister of Kerala; they were removed and taken into brief Police custody by the 4th respondent. The alleged incident had happened on 11.6.2022 at 16.00 Hrs in connection with the inauguration of Karikkinos Cancer Research Centre, first floor (called upper area) of Kaloor Metro Station, Ernakulam. The Hon’ble Chief Minister of Kerala was the Chief Guest of the above inauguration programme and is a Z-plus category protectee. Tight security arrangements were made by the 4th respondent with a view of prevent untoward incidents, especially in light of intelligence inputs that political protesters may go beyond peaceful protests.

(ii) It is further submitted that on 11-6-2022, upon the arrival of the Hon'ble Chief Minister, two persons, who appeared like transgender tried to intrude the motorcade of Hon'ble Chief Minister which were parked in front of Kaloor Metro Station. When the Police officers deployed, attempted to prevent them, they claimed that they are transgender persons and police has no right to prevent them; they willfully created a ruckus with an intention to seek attention from Media. The transgender persons were repeatedly persuaded to go away from the vicinity of the protectee's motorcade, but in vain; they remained there and tried to intrude into the motorcade shouting slogans against the CM, who was on the first floor function place. They shouted that 'Pinarayi Vijayan should not be allowed to go from here'. At that time, seeing this incident, people started gathering and moving traffic stopped which could potentially create a big traffic block and also impede the movement of the protectee's motorcade. As their action posed a certain threat to the motorcade security system and the public carriage way, respondent 4 was compelled to remove and arrest them as a preventive action at around 16.10 hrs. Both the persons who were transgenders were lodged in the Ernakulam Vanitha Police Station and they were released at 17.55 hrs. that is within 1 hour, 45 minutes. This event was recorded in the General Diary of Palarivattam Police Station. The name and addresses of the transgender persons are (1) Anna Raju, age 33, D/o Raju, Kadalikkattil House, Kalamassery and (ii) Avanthika, age 27, D/o Luka Joseph, Panakuzhiyil House, Mannakkanad, Kottayam respectively.

(iii) It is pertinent to note that, on 14.06.2022, that is, after 3 days of the above incident, Anna Raju committed an offence within the same police station limits which is registered as Crime No.602/2022, u/s 153, 34 IPC and Section 6 of Kerala Prevention of Damage to Private property & Payment of

Compensation Act, 2019, of Palarivattom Police Station. The case is that Anna Raju and another companion burned the CPI(M) flag, at Palarivattom South Janatha road and the video footage of burning of the said flag was uploaded and broadcast live on Facebook. This led to a serious law and order issue between Congress and CPI(M) activists all over the State. The accused in the second incident were arrested and enlarged on bail by the learned jurisdictional Magistrate and later, a charge sheet was filed before the Court on 21-06-2022.

(iv) The transgenders were arrested by the 4th respondent in accordance with legal procedures, due to the peculiar situation and circumstances. It was a preventive step under provisions of Section 151 Cr.P.C. The police ensured a peaceful handling of the situation by invoking provisions under 151 Cr.P.C. A true copy of Inspection memo is produced herewith and marked as Annexure R3(d).

(v). It is submitted that Police has been initiating preventive action not against waving of black flags in peaceful protests but for attempting to obstruct public carriage way and a security categorized protectee's motorcade.

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(vi). The rights of transgender persons were not infringed by the police in any ways. The petitioner alleged that rights of the two transgender persons were violated as per Sections 18(b) and (d) of the Transgender Persons (Protection of Rights) Act, 2019 which is totally baseless and incorrect.

“Section 18. Offences and penalties – whoever, -

(a) compels or entices a transgender person to indulge in the act of forced or bonded labour other than any compulsory service for public purposes imposed by Government;

(b) denies a transgender person the right of passage to a public place or obstructs such person from using or having access to a public place to which other members have access to or a right to use;

(c) forces or causes a transgender person to leave household, village or other place of residence; and

(d) harms or injures or endangers the life, safety, health or well-being, whether mental or physical, of a transgender person or tends to do acts including causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine.

The police took action to quell a very natural and predictable commotion, and their actions had nothing to do with the offences the petitioner alleged they had committed. Regardless of anyone's gender identity, the same course of action would have been followed. Under any circumstances, it is the official responsibility of a police officer to keep peace and tranquility in an area, and in this case, they have carried out their legal obligations in accordance with the rules of law.

(vii) The individuals who were detained in accordance with Section 151 of the Criminal Procedure Code were deliberately attempting to cause a commotion while disobeying all security precautions, and they were trying to obstruct the State's Chief Minister. Section 151 of Cr.P.C. reads as under:

(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.

Therefore, it is submitted that the police acted legally in accordance with the established legal guidelines.”

8. In the reply affidavit filed by the petitioner on 31st January, 2023, it is contended as under:

“3. The embellished statement filed by the IGP and Commissioner of Police, Kochi City on behalf of the 3rd respondent conflicts and contradicts with the facts and law, especially the substance of the information recorded on 11/6/2022 in the General Diary in accordance with S. 154(1) CrPC.

(a) The substance reads as "At 16.10 hrs, the transgenders who had come to protest in the meeting of the Hon'ble Chief Minister were removed from the spot and taken to Woman Police Station".

(b) “Coming to protest in the meeting of the Chief Minister" is not a "cognizable offence" defined in S.2(c) of the CrPC. The 1st Schedule of the CrPC doesn't show that such an act is cognizable offence.

(c)The "arrest memo" shows that the arrest has been made u/s 151 CrPC.

To attract a preventive arrest u/s 151 CrPC, there must be two pre-requisites, viz.,

(i) the police officer knew that the offender had a design to Commit a "cognizable offence" and

(ii) that the commission could not be otherwise prevented.

(i) Mohammed Ali v. Sri. Ram Swarup, AIR 1965 All 16.

(ii) Medha Patkar v. State of M. P., 2008 CrLJ 47(58,59) DB.

(iii) Ahmed Noorbhai Bhatti v. State of Gujarat, (2005) 3 SCC 647.

The arrest of the transgenders in the instant case is devoid of such circumstances consisting of a specific cognizable offence.

4. The second frivolous and vexatious case Cr. No. 602/2022 of Palarivattom Police Station was registered u/s 153, 34 IPC (S. 6 of the Kerala Private Property Damages Act, 2019 with monstrous punishment of 10 year's imprisonment for burning "illegal flags" defiantly set up on public place, though not in the FIR.). There was neither a 'damaging act' u/s 2(a) nor a 'private property' u/s 2(c) contemplated under the Act, 2019. The place of occurrence and the location in particular, in column no 5(1) (ii) in the FIR of Cr.No.602/2022 is South Janatha Road which is a Government land where the illegal flagpole is set up. The case reflects excessive prejudice against the accused. Section 120(d) of the Kerala Police Act, 2011 prohibits setting up such illegal flags on public place without the permission of the local authority. Further it is an offence of trespass into Government land causing nuisance under Section 120(f) of KP Act, 2011, made punishable with imprisonment for one year. Section 7(a) of The Kerala Land Conservancy Act, 1957 also punishes trespass into Government land with imprisonment for five years. It is cognizable and non-bailable offence. The honourable court has repeatedly directed the respondent officials to remove the flags of political parties illegally installed on public roads, which was allegedly burnt by the transgenders. It cannot be said to be a provocation to cause rioting under any stretch of imagination. Rather, it appears to be a parallel law enforcement which our police officers dare not to enforce the law u/s 120(d), (f) Kerala Police Act, 2011, Section 7(a) of the Kerala Land Conservancy Act,

1957 and comply with the directions of the honorable court in the following judgments:

1)WPC No. 22750/2018 Order dated 19/1/2022.

2)WPC No. 8238/2020 dated 17/3/2020.

In fact, the District Police Chief, Kochi City under section 66 of the Kerala Police Act, 2011 should have promised reward and awarded the same to the altruistic transgenders for the excellent services rendered for the prevention of offence and the maintenance of law and order in the removal of illegal flags from the government land.

5. The Exhibits of Despatch Register extracts are merely created for the purpose of showing that the documents have been despatched to the Writ Petitioner after 16 days contrary to the stipulation of 2 days shown in the Proviso to section 7(1) of the RTI Act, 2005 and section 8(6) of the KP Act, 2011. Neither the Petitioner was ever asked to pay the prescribed fee under Section 7 of the RTI Act nor was given the documents as it is falsely claimed.

6. The term 'security' refers to a condition of not being threatened, especially physically, psychologically, emotionally, or financially. In the legal field, it is recognised as freedom from apprehension. Security coverings are issued in India to persons who are known to pose a high-risk danger. Various levels of protection are granted to various persons based on information provided by the intelligence branch. In democracy, according to the Constitution every individual is an important person whose freedom from apprehension is to be rated as equally as that of the so called VIP. The famous adage is worth saying that "Your Liberty To Swing Your Fist Ends Just Where My Nose Begins." The liberty of the illegally arrested and detained transgenders cannot be held to ransom for the illusory freedom from apprehension of the security personnel or the VIP. The fundamental rights of the illegally detained transgenders have been grossly trampled upon."

9. Heard the learned counsel for the parties and perused the material on record.

10. Material on record discloses that the Hon'ble Chief Minister is a 'Z+' category protectee. According to the State Police Chief, the transgenders were taken custody for not wearing black dress. According to the police, on 11.06.2022, upon arrival of the Hon'ble Chief Minister, two persons, who appeared as transgenders, tried to intrude the motorcade, which were parked in front of Kaloor Metro Station.

11. It is further contended that when the police officers attempted to prevent them, they claimed that they were transgender persons and the police has no right to prevent them. It is also contended that they willfully created a ruckus, with an intention to seek the attention of the media.

12. The transgender persons were repeatedly persuaded to go away from the vicinity of the protectee's motorcade, but in vain. According to the police, they tried to intrude into the motorcade, shouting slogans against the Hon'ble Chief Minister.

13. It is further contended that as their action posed certain threat to the motorcade system and public carriage way, Station House Officer, Palarivattom Police Station, Kochi City,

Ernakulam, respondent No.4, was compelled to remove and arrest the transgenders as a preventive action, around 16:10 hrs. According to the police, action is taken under Section 151 Cr.P.C. They were taken to Ernakulam Vanitha Police Station and released at 17:55 hrs, i.e. within 45 minutes. According to the police, the fact is recorded in the general diary of Palarivattom Police Station.

14. It is also the further contention of the State Police Chief that on 14.06.2022, i.e. after 3 days of the above incident, one Anna Raju committed offence under Section 153 r/w. Section 34 of the IPC and Section 6 of the Kerala Prevention of Damage to Private Property and Payment of Compensation Act, 2019. Consequently, Crime No.602/2022 was registered at the Palarivattom police station. Prosecution case is that Anna Raju and another accused burned the CPI(M) Flag at Palarivattom South Janatha road and its video footage was uploaded and broadcast live on social media. The accused were arrested and enlarged on bail by the learned Magistrate and later a charge sheet was filed before the court on 21.06.2022.

15. Thus, it is the case of the 3rd respondent police that preventive action was necessary and hence, the arrest.

16. While adverting to the violations of rights of transgenders, it is relevant to consider sub-sections (b) and (d) of Sections 18 of the Transgender Persons (Protection of Rights) Act, 2019, extracted supra. Action which occasioned the police to arrest the transgenders does not fall within the ambit of any violation, as defined under the Act.

17. Section 151 of the Code of Criminal Procedure, 1973, dealing with arrest to prevent the commission of cognizable offence, reads as under:

“151. Arrest to prevent the commission of cognizable offences:- (1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

(2) No person arrested under sub-section (1) shall be detained in custody for a period of exceeding twenty-four hours from the time of his arrest unless his further detention is required or authorised under any other provisions of this Code or any other law for the time being in force.”

18. Though the petitioner has refuted the facts stated in the counter affidavit/statement of the 3rd respondent and further

contended that, to attract Section 151 Cr.P.C, there must be two requisites, viz., (i) that the police officer knew, the offender had a design to commit a “cognizable offence”, and (ii) that the commission could not be otherwise preventive, we are of the view that the abovesaid contentions are questions of fact, and cannot be adjudicated in a writ petition.

19. In the light of the above discussion, this Court is of the view that the petitioner has not made out a case for issuance of a writ of mandamus or any directions, as prayed for.

In the result, writ petition is dismissed. No costs.

sd/-
S. MANIKUMAR
CHIEF JUSTICE

sd/-
MURALI PURUSHOTHAMAN
JUDGE

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APPENDIX

PETITIONER'S EXHIBITS:

- Exhibit P1 TRUE COPY OF THE PAPER REPORT CAME IN MALAYALA MANORAMA ONLINE DATED 11.06.2022.
- Exhibit P2 TRUE COPY OF THE APPLICATION FILED WITH THE SHO. PALARIVATTOM DATED 16.06.2022.
- Exhibit P2(a) TRUE COPY OF THE ENGLISH TRANSLATION OF EXHIBIT P2.

RESPONDENTS' ANNEXURES:

- Annexure R3(a) TRUE COPY OF RELEVANT PAGES OF GENERAL DIARY ENTRY DATED 11-06-2022 OF PALARIVATTOM POLICE STATION ALONG WITH ITS ENGLISH TRANSLATION
- Annexure R3(b) TRUE COPY OF FIR DATED 14-06-2022 ALONG WITH ITS ENGLISH TRANSLATION
- Annexure R3(c) TRUE COPY OF ARREST MEMO
- Annexure R3(d) TRUE COPY OF INSPECTION MEMO
- Annexure R3(e) TRUE COPY OF THE COVERING LETTER TO THE PETITIONER ALONG WITH ITS ENGLISH TRANSLATION
- Annexure R3(f) TRUE COPY OF THE CONCERNED PAGE OF DISPATCH REGISTER ALONG WITH ITS ENGLISH TRANSLATION

// true copy //

P.S. to Judge