

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/WRIT PETITION (PIL) NO. 38 of 2020**

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NIRJHARI MUKUL SINHA

Versus

UNION OF INDIA

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Appearance:

MS MEGHA JANI(1028) for the Applicant(s) No. 1,2

for the Opponent(s) No. 3,4,5

ADVANCE COPY SERVED TO GOVERNMENT PLEADER/PP(99) for the
Opponent(s) No. 2

MR DEVANG VYAS(2794) for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**

and

HONOURABLE MR. JUSTICE ILESH J. VORA**Date : 26/02/2021****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1 The order passed by this Court dated 21.12.2020 reads thus;

'1. We have heard Ms. Megha Jani, the learned counsel appearing for the writ applicants and Ms. Shah, the learned Government Pleader for the State-respondents.

2 By this writ application filed in public interest, the writ applicants have prayed for the following reliefs;

"(A) That the Hon'ble Court, in exercise of its writ jurisdiction under Article 226,

(I) Declare that there is need to make law that specifically deals with exclusionary practice against women on the basis of their menstrual status;

(ii) frame guidelines in the meanwhile for enforcement of fundamental rights of women preventing and prohibiting exclusionary practice against women on the basis of the menstrual status;

(B) That a writ of or a writ in the nature of mandamus or any other appropriate writ, order or direction be issued commanding Respondent Authorities to issue guidelines, make rules, issue advisories, do surprise checks, create appropriate mechanism and to take such other actions, steps as may be necessary to ensure that no educational institutions, hostels and living spaces for women studying, working and others, private or public, by whatever name called, follow social exclusion of women on the basis of their menstrual status;

(C) That a writ of or a writ in the nature of mandamus or any other appropriate writ, order or direction be issued commanding Respondents to spread awareness, effectively, through every possible medium, by allocating necessary funds for the same and by undertaking an awareness building on an aggressive basis inter alia, stating that menstruation is a normal physiological phenomenon which is experienced by every woman during her reproductive phase, that the same does not make her impure, polluting, inadequate and unequal and does not require her exclusion in any form at any place, be it private or public;

(D) That a writ of or a writ in the nature of mandamus or any other appropriate writ, order or direction be issued commanding the Respondents to forthwith stop social exclusion of women on the basis of the menstrual status at Respondent No.5 and any and every other institution run/managed/administered by them with immediate effect;

(E) That pending the hearing and final disposal of the petition, Respondent No. 3,4 and 5 be directed to stop following exclusionary practice against women on the basis of their menstrual status in all their institutions with immediate effect;

(F) That pending the hearing and final disposal of this petition, the Respondent Authorities be directed to collect data with respect to educational institutions, hostels and common living spaces for women whether studying, working and others, private and public, run within the State of Gujarat and place the same before the

Hon'ble Court.

(G) That pending the hearing and final disposal of this petition the Respondent Authorities be directed to issue guidelines and instructions to all educational institutions, hostels and common living spaces for women whether studying, working and others, private and public, run within the State of Gujarat requiring them not to follow any exclusionary practice in any form whatsoever against women on the basis of their menstrual status; (H) For such other and further reliefs as the circumstances may require."

3 This public interest litigation is the outcome of a very unfortunate incident that was reported by the media on 14th February, 2020. We are talking about the incident that occurred with 68 girls in a hostel run by the respondent No.5 herein being forced to undergo a strip test. It was reported that 68 undergraduate girls were paraded through the college into the restroom and forced to individually remove their undergarments to prove that they were not menstruating. The incident in question took place after the hostel rector complained to the principal that some of the girls had been violating their religious norms, specifically for the menstruating females. It is the case of the writ applicants that the practice which is being followed and encouraged of exclusion of women on the basis of their menstrual status is violative of human, legal and fundamental rights of women, more particularly, those as enshrined under Articles 14, 15, 17, 19 and 21 respectively of the Constitution. It is argued that the Articles, referred to above, of the Constitution ensure of securing justice, equality and liberty to all the citizens of this Country.

4 We are of the view that what has been brought to our notice by way of this writ petition in public interest is something extremely important and deserves to be considered at the end of this Court.

5 Ms. Shah, the learned Government Pleader, would submit that the issues raised in this litigation requires immediate attention, and the State shall assist this Court in the best possible manner.

6 Post this matter on 20th January, 2021 for further hearing before this Bench (Coram: J.B. Pardiwala & Ilesh J. Vora, J.J.).

7. *In the meantime, Ms. Jani shall serve one set of her entire paper-book to Mr. Devang Vyas, the learned Addl. Solicitor General of India, who would be appearing for the Union of India. Mr. Vyas, the learned Addl. Solicitor General of India is also requested to assist this Court in this important public interest litigation.*

8 *In view of the above, the connected civil application, for fixing the date, stands disposed of..”*

2. Later, on 20th January, 2021, this Court passed the following order;

“1. Pursuant to our order dated 21st December, 2020, Ms. Manisha Luvkumar Shah, the learned Government Pleader assisted by Ms. Gupta, the learned AGP appearing for the State-respondents and Mr. Devang Vyas, the learned Addl. Solicitor General of India appearing for the Union of India, have made few submissions as regards the subject matter of this litigation filed in public interest. It is submitted on behalf of the State Government that a report has been prepared, a copy of which, shall be furnished to all the other learned counsel appearing in this litigation for the purpose of assisting this Court in adjudicating this litigation. It is clarified that this report is a preliminary report and as and when some more information is required, the same shall be furnished to this Court. Mr. Vyas, the learned Addl. Solicitor General of India would submit that the subject matter of this litigation is very important and the Union still endeavour, in all possible manner, to assist this Court. Mr. Vyas would submit that he may be given some time to deliberate on the various issues raised in this litigation with the concerned authorities and revert to this Court by way of some report that may be of some assistance to this Court. He prays for four weeks time in the matter.

2 Ms. Megha Jani, the learned counsel appearing for the writ applicant, once again, makes a request to this Court to issue notice to the three private respondents, I.e, the respondents Nos.3,4 and 5 respectively. According to Ms. Jani, having regard to certain reliefs prayed for in this writ application, the presence of the

private respondents is also necessary.

3. We shall consider this request at an appropriate time. The deliberations in this particular matter are at a very preliminary stage, and we are of the view that they need to be deliberated very seriously/ There are many larger issues involved in this litigation which will have a far reaching effect and implications on the society at large, more particularly, the new generation.

4. Post this matter on 26th February, 2021. To be taken up at 11:00 A.M. We request all the learned counsel to keep themselves free and convenient on that date to address this Court..”

3. The matter was taken up for further hearing today. Ms. Megha Jani, the learned counsel appearing for the writ applicants has put forward the following contentions for the consideration of this Court;

(i) The social exclusion of women on the basis of menstrual status is violative of the Articles 14, 15, 17 and 21 respectively of the Constitution of India;

(ii) Article 17 of the Constitution prohibits “untouchability”. Ms. Jani seeks to lay much stress and emphasis on the second part of Article 17, which says “its practice in any form is forbidden”. In other words, treating a menstruating women differently amounts to a practice of “untouchability”, which is otherwise forbidden in law. To put it more succinctly, although “untouchability” is abolished, yet its practice in any form leading to “untouchability” is also forbidden in law.

(iii) The State Government needs to enact an appropriate legislation as regards the subject matter, and at the same

time, this Court may also consider to frame guidelines like the one framed by the Supreme Court in the case of ***Vishaka & Ors. vs. State of Rajasthan & Ors.***, AIR 1997 SC 3011;

(iv) Menstruation itself works as a traumatic experience at the onset of the same.

(v) Various taboos don't talk about menstruation. Therefore, the subject of menstruation should be a part of the curriculum of the sex education in the school.

4. Ms. Jani would submit that although menstruation is a physiological phenomenon, a natural part of reproductive cycle experienced by every woman, yet it has always been associated with taboos and myths, which exclude women from their daily course of live. The myths are based on an assumption that a woman is impure and would pollute during her menstruation. She is, therefore, kept in isolation, excluded from the daily activities; not allowed to touch water; not allowed to cook; not allowed touch vessels; required to use a separate bedding; remain in a separate earmarked place and certainly not visit the temples or participate in any religious ceremony or rituals.

5. She would further submit that the incident which occurred at Bhuj is an indicator of the fact that there could be many other institutions, hostels and other common houses, spaces for women following and imposing such exclusionary practices. The fact remains that the exclusionary practices in one form or the other is very much a part of social fabric of our

country and affect large number of women in the most discriminatory and inhuman way.

6. She would submit that the exclusionary practices like excluding a woman from touching water, vessels, entering kitchen, entering sleeping quarters, entering temples and/or forcing any woman to stay in isolation during the period of her menstruation is violative of human, legal, and fundamental rights of women, more particularly those under Articles, 14, 15, 17, 19 and 21 of the Constitution as also of the promise of securing justice, equality and liberty to all the citizens declared in the Preamble to the Constitution.

7. Ms. Jani invited the attention of this Court to the observations made by the Supreme Court in the case of ***Indian Young Lawyers Associations & Ors. vs. State of Kerala & Ors.***, reported in (2019) 11 SCC 1. A few paragraphs from the concurring judgment of Dr. D.Y. Chandrachud, J. are quoted below;

“323. Article 17 is enforceable against everyone- the State, groups, individuals, legal persons, entities and organized religion- and embodies an enforceable constitutional mandate. It has been placed on a constitutional pedestal of enforceable fundamental rights, beyond being only a directive principle, for two reasons. First, “untouchability” is violative of the basic rights of socially backward individuals and their dignity. Second, the framers believed that the abolition of “untouchability” is a constitutional imperative to establish an equal social order. Its presence together and on an equal footing with other fundamental rights, was designed to “give vulnerable people the power to achieve collective good”[Politics and Ethics of the Indian Constitution, Rajeev Bhargava (Ed.), Oxford University

Press (2008), at p. 15]. [Article 17](#) is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation. [Article 17](#), along with other constitutional provisions [Articles 15(2) and 23 of the Constitution of India], must be seen as the recognition and endorsement of a hope for a better future for marginalized communities and individuals, who have had their destinies crushed by a feudal and caste- based social order.

357. Our society is governed by the Constitution. The values of constitutional morality are a non-derogable entitlement. Notions of “purity and pollution”, which stigmatize individuals, can have no place in a constitutional regime. Regarding menstruation as polluting or impure, and worse still, imposing exclusionary disabilities on the basis of menstrual status, is against the dignity of women which is guaranteed by the Constitution. Practices which legitimise menstrual taboos, due to notions of “purity and pollution”, limit the ability of menstruating women to attain the freedom of movement, the right to education and the right of entry to places of worship and, eventually, their access to the public sphere. Women have a right to control their own bodies. The menstrual status of a woman is an attribute of her privacy and person. Women have a constitutional entitlement that their biological processes must be free from social and religious practices, which enforce segregation and exclusion. These practices result in humiliation and a violation of dignity. [Article 17](#) prohibits the practice of “untouchability”, which is based on notions of purity and impurity, “in any form”. [Article 17](#) certainly applies to untouchability practices in relation to lower castes, but it will also apply to the systemic humiliation, exclusion and subjugation faced by women. Prejudice against women based on notions of impurity and pollution associated with menstruation is a symbol of exclusion. The social exclusion of women, based on menstrual status, is but a form of untouchability which is an anathema to constitutional values. As an expression of the anti-exclusion principle, [Article 17](#) cannot be read to exclude women against whom social exclusion of the worst kind has been practiced and legitimized on notions

of purity and pollution. [Article 17](#) cannot be read in a restricted manner. But even if [Article 17](#) were to be read to reflect a particular form of untouchability, that article will not exhaust the guarantee against other forms of social exclusion. The guarantee against social exclusion would emanate from other provisions of Part III, including Articles 15(2) and 21. Exclusion of women between the age groups of ten and fifty, based on their menstrual status, from entering the temple in Sabarimala can have no place in a constitutional order founded on liberty and dignity.

358 The issue for entry in a temple is not so much about the right of menstruating women to practice their right to freedom of religion, as about freedom from societal oppression, which comes from a stigmatized understanding of menstruation, resulting in “untouchability”. [Article 25](#), which is subject to Part III provisions, is necessarily therefore subject to [Article 17](#). To use the ideology of “purity and pollution” is a violation of the constitutional right against “untouchability”.

8. Ms. Jani would submit that over a period of time, there has been enactment of various laws that aim at enabling women and preventing gender discrimination. There is however no specific law which provides for abolition of untouchability of menstruating women. Appropriate directions in the circumstances are required to be issued to the Respondents to consider making such an enactment.

9. Ms. Jani also submitted that a special provision is also required to be made in view of the Convention on Discrimination on all form of Discrimination against Women (CEDAW).

10. It is further submitted that the Social exclusion of women

on the basis of their menstrual status is incidental to the proclamation of menstrual status of women. Women have a right over their bodies. The menstrual status of a woman is an attribute of her privacy and person. Requiring a woman and/or following practices that require a woman to reveal her menstrual status is infringement of her right to privacy. She further submitted that the exclusion affects the victimized woman's dignity, results in denial of equal opportunities in the fields of education, work, religion and everydayness of life, instills a feeling of being inadequate and unequal. Such a state of mind is likely to affect mental health of women infringing right to health, resulting in violation of fundamental Rights.

11. Menstruation has been stigmatised in our society. This stigma has built up due to the traditional beliefs in impurity of menstruating women and our unwillingness to discuss it normally. We don't know what may have been the reason that forced the holy men to refer to menstruating women as "unclean". But all religious (excluding Sikhism) refer to menstruating woman as "ritually unclean". The practices mentioned may not be the norm in every household. The degree of following the rules and the practices followed varies from family to family. It depends on their beliefs and how strongly they hold traditional practices.

12. In India, past many decades, mere mention of the topic has been a taboo and even to this date the cultural and social influences appear to be a hurdle for the advancement of knowledge on the subject. Culturally in many parts of India, menstruation is still considered to be dirty and impure. The

origin of this myth dates back to the Vedic times and is often been linked to Indra's slaying of Vritras. For, it has been declared in the Veda that the guilt, of killing a brahmana- murder, appears every month as menstrual flow as women had taken upon themselves a part of Indra's guilt. Further, in the Hindu faith, women are prohibited from participating in normal life while menstruating. She must be "purified" before she is allowed to return to her family and day to day chores of her life. However, scientifically it is known that the actual cause of menstruation is ovulation followed by missed chance of pregnancy that results in bleeding from the endometrial vessels and is followed by preparation of the next cycle. Therefore, there seems no reason for this notion to persist that menstruating women are "impure." (vide article authored by Suneela Garg & Taru Anand)

13. Many girls and women are subject to restrictions in their daily lives simply because they are menstruating. Not entering the "puja" room is the major restriction among the urban girls whereas, not entering the kitchen is the main restriction among the rural girls during menstruation. Menstruating girls and women are also restricted from offering prayers and touching holy books. The underlying basis for this myth is also the cultural beliefs of impurity associated with menstruation. It is further believed that menstruating women are unhygienic and unclean and hence the food they prepare or handle can get contaminated. According to study by Kumar and Srivastava in 2011, the participating women also reported that during menstruation the body emits some specific smell or ray, which turns preserved food bad. And, therefore, they are not allowed

to touch sour foods like pickles. However, as long as the general hygiene measures are taken into account, no scientific test has shown menstruation as the reason for spoilage of any food in making.

14. Such taboos about menstruation present in many societies impact on girls' and women's emotional state, mentality and lifestyle and most importantly, health. Large numbers of girls in many less economically developed countries drop out of school when they begin menstruating. This includes over 23% of girls in India. In addition to this, the monthly menstruation period also creates obstacles for the female teachers. Thus, the gender-unfriendly school culture and infrastructure and the lack of adequate menstrual protection alternatives and/or clean, safe and private sanitation facilities for female teachers and girls undermine the right of privacy. There are health and hygiene issues also to consider relating to girls and menstruation. Over 77% of menstruating girls and women in India use an old cloth, which is often reused. Further, 88% of women in India sometimes resort to using ashes, newspapers, dried leaves and husk sand to aid absorption. Poor protection and inadequate washing facilities may increase susceptibility to infection, with the odor of menstrual blood putting girls at risk of being stigmatized. The latter may have significant implications for their mental health. The challenge, of addressing the socio-cultural taboos and beliefs in menstruation, is further compounded by the fact the girls' knowledge levels and understandings of puberty, menstruation, and reproductive health are very low.

15. Having regard to the aforesaid, we propose to issue the following directions;

(i) Prohibit social exclusion of women on the basis of their menstrual status at all places, be it private or public, religious or educational;

(ii) The State Government should spread awareness among its citizens regarding social exclusion of women on the basis of their menstrual status through various mediums like putting up posters at public places, including it in school curriculum, using audio visual mediums like radio, entertainment/news channels, short films etc. The first and foremost strategy in this regard is raising the awareness among the adolescent girls related to menstrual health and hygiene. Young girls often grow up with limited knowledge of menstruation because their mothers and other women shy away from discussing the issues with them. Adult women may themselves not be aware of the biological facts or good hygienic practices, instead passing on cultural taboos and restrictions to be observed. Community based health education campaigns could prove worthwhile in achieving this task. There is also need to spread awareness among the school teachers regarding menstruation.

(iii) Empowerment of women through education and increasing their role in decision-making can also aid in this regard. Women and girls are often excluded from decision-making due to their lower literacy levels *per se*. Increasing the education status of women plays an important role in improving the health status of the community at large and overcoming the cultural taboos, in particular.

(iv) Sensitization of health workers, Accredited Social Health Activists and Anganwadi Workers regarding menstruation biology must also be done so that they can further disseminate this knowledge in the community and mobilize social support against busting menstruation related myths. Adolescent Friendly Health Services Clinics must also have trained manpower to address these issues.

(v) The State Government should hold campaigns, drives, involve NGOs and other private organizations to spread such awareness;

(vi) The State Government should include the issue of social exclusion of women on the basis of their menstrual status in all existing campaigns/schemes that aims at menstrual hygiene;

(vii) The State Government should allocate necessary funds for the implementation of the directions;

(viii) The State Government should prohibit all educational institutions, hostels and living spaces for women-studying working and others, private or public, by whatever name called, from following social exclusion of women on the basis of their menstrual status in any manner;

(ix) The State Government should undertake surprise checks, create appropriate mechanism and to take such other actions, steps as may be necessary to ensure its compliance including imposition of appropriate penalty against the erring institution.

16. However, before issuing appropriate directions, as referred to above, we seek response of the State Government as well as the Union of India. We clarify that the aforesaid is just a prima facie consideration of the issue in question. We are conscious of the fact that we are dealing with a very delicate issue and, therefore, it is necessary for this Court to hear all the respondents and other stake holders. The aforesaid should not be construed as if this Court has made up its mind one way or the other. A healthy and meaningful debate or deliberations is necessary in the present litigation.

17. Let notice be issued to the respondents, returnable on 30th March, 2021.

18. The respondents shall be served directly through E-mail. Regular direct service is also permitted.

(J. B. PARDIWALA, J)

(ILESH J. VORA, J)

Vahid