

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.11.2015

CORAM

The Hon'ble MR.SANJAY KISHAN KAUL, CHIEF JUSTICE

AND

The Hon'ble MRS.JUSTICE PUSHPA SATHYANARAYANA

W.P.No.15046 of 2015

K.Prithika Yashini (Transgender)

.. Petitioner

-VS-

The Chairman,
Tamil Nadu Uniformed Services Recruitment Board,
P.T. Lee Chengalvarya Naicker Building,
No.807, 2nd Floor,
Anna Salai,
Chennai-600 002.

.. Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari or in the nature of writ permit the petitioner to admit the examination under the category of female and to quash the rejection order by the respondent.

For Petitioner : Ms.Bhavani Subbarayan

For Respondent : Mr.P.H.Arvinth Pandian
Addl. Advocate General
assisted by
Mr.STS.Moorthy
Government Pleader

* * * * *

ORDER

(Order of the Court was made by The Hon'ble Chief Justice)

A notification was published on 08.02.2015 for the recruitment of Sub Inspectors. The scheme of recruitment was in

three stages, i.e. a written objective examination, followed by physical endurance test and viva-voce. There were large number of candidates who applied, numbering more than 1,85,000 for 1087 posts. Thus, on declaration of the results of the written examination, different cut off marks were prescribed for different categories, keeping in mind the ratio 1:5 for going to the next stage of physical endurance test and thereafter, 1:2 ratio for viva-voce.

2. In order to maintain transparency in the written examination process, albeit an objective one, the model key answers were published, inviting objections and thereafter, final key answers were also published.

3. The difference in the bench mark for recruitment required specification of gender of the candidate as male or female. There was absence of any column for third gender, though this aspect now stands enunciated by the judgment of the Hon'ble Supreme Court in ***National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438***, which carves out the category of the third gender for the purpose of safeguarding and enforcing properly their rights guaranteed under the Constitution. The operative portion of the judgment reads as under:-

"135. We, therefore, declare:

135.1. Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

135.2. Transgender persons right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

135.3. We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

135.4. The Centre and State Governments are directed to operate separate HIV serosurveillance centres since hijras/transgenders face several sexual health issues.

135.5. The Centre and State Governments should seriously address the problems being faced by hijras/transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma, etc. and any insistence for SRS for declaring one's gender is immoral and illegal.

135.6. The Centre and State Governments should take proper measures to provide medical care to TGs in the hospitals and also provide them separate public toilets and other facilities.

135.7. The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

135.8. The Centre and State Governments should take steps to create public awareness so that TGs will feel that they are also part and parcel of the social life and be not treated as untouchables.

135.9. The Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life.

136. We are informed an expert committee has already been constituted to make an in-depth study of the problems faced by the transgender community and suggest measures that can be taken by the Government to ameliorate their problems and to submit its report with the recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this judgment and implemented within six months."

4. The aforesaid judgment came to be pronounced on 15.04.2014, while the notification for the present examination is dated 08.02.2015. Thus, one would have expected that the notification could have taken care of the directions contained in the aforesaid judgment, more specifically in paragraphs **135.2 and 135.3**. This did not happen.

5. The petitioner, who falls under the category of the third gender, filed the writ petition for being permitted to the examination under the category of female, claiming that she was born as a male and named as K.Pradeep Kumar. She continued her education through

the school and the college and obtained Bachelor's Degree in Computer Applications (BCA) in 2011 and also enrolled for post graduation in the same subject and passed the said examination in first class in 2012. She claimed to have noticed some changes in herself, specifically the physical features and thus, she realised that she was not a normal male, but had female characteristics in her genes.

6. The parents found it difficult to accept her situation and she had to leave the house for the said reason and went through sex re-assignment surgery in Chennai. She was issued a certificate as transgender by the State Government.

7. It is the case of the petitioner that she is finding difficulty to sustain herself in the community without any job and in that process, applied for the recruitment as Sub Inspector. The application of the petitioner was, however, rejected on the ground that her case did not fall within the directions of the judgment of the Hon'ble Supreme Court. This was despite the fact that orders were passed in her favour in W.P.No.7210 of 2015, directing the educational authorities to change and alter her name as Prithika Yashini. Her repeated representation had not borne fruit.

8. From the counter-affidavit filed by the respondent, it is noticed that the petitioner obtained favourable interim orders on 21.05.2015 to participate in the written examination. The petitioner secured 28.50 marks, while the cut off for MBC Women was 42.00 marks and thus, the petitioner was not called to the second stage of physical endurance test. Once again, the petitioner obtained favourable orders dated 27.07.2015 to proceed further in the selection test process.

9. On examination of the case of the petitioner qua the category she would be required to be recruited as there being no separate category, it was found that the petitioner qualified the horizontal reservation minimum bench mark of OC Women of Ministerial quota, which is 25.50, against which the petitioner had obtained 28.50 marks. It was this which persuaded the Court to grant interim orders in favour of the petitioner. The physical efficiency test had been taken by the petitioner with the bench mark as that for a female.

10. The petitioner qualified in the physical measurement test, but in the physical endurance test, she was stated to have been disqualified qua 100 metres running, having failed to obtain the minimum time required to be taken, though she qualified in the long

jump and cricket ball throw. The petitioner completed the distance of 100 metres in 18.61 seconds, as against the bench mark of 17.50 seconds, i.e. a delay of 1.11 seconds.

11. The petitioner was once again permitted to go to the third stage of viva-voce as per the interim orders dated 07.09.2015. The sole defence raised is that the petitioner has failed to meet the requirement of 100 metres run by 1.11 seconds, which is the bench mark for females.

12. We have given our thought to the matter. The discrimination suffered by the transgenders would be difficult for any of the other two genders to realise. The present case is one where the petitioner was categorised as man, though she was a female. She had undergone sufferance of an exit from her house without parental protection. It is in these difficult circumstances that the petitioner has been endeavouring to eke out a living.

13. There can be various physical changes and mental effects arising from the situation in which the petitioner finds herself. The respondent failed to provide for the third gender in the application Form and thus, the petitioner had to rush to the Court to assert her rights. The next stage was to find out as to what bench mark should

apply to the petitioner and thus, benefit was given to the petitioner accordingly, in which she was successful. We do not think that in the physical endurance test, a difference of 1.11 seconds should come in the way of the petitioner in being considered for recruitment. We hasten to add that she will have to meet the bench mark of the recruitment process, but the case cannot be knocked out in the middle, as was sought to be done by the respondent.

14. There is stated to be no other transgender as a candidate in the selection for recruitment as Sub Inspector, an aspect conceded by the learned Additional Advocate General. Thus, even if one person is recruited under this category, it would be the petitioner. The counter-affidavit of the respondent shows that there are two other transgenders serving as police constables and the petitioner would be really the third one. The social impact of such recruitment cannot be lost sight of, which would give strength to the case of transgenders. The petitioner must reach the finishing line and not be stopped and disqualified in the middle.

15. We are sure that by the time the next recruitment process is carried out, the respondent would have taken corrective measures for including the third gender as a category.

16. We are, thus, of the view that the petitioner is entitled to be recruited to the post of Sub Inspector and for declaration of her result with the hope that she would carry out the duties with dedication and commitment to advance the cause of other transgenders.

17. The writ petition is accordingly allowed, leaving the parties to bear their own costs. We appreciate the case canvassed by the learned counsel for the petitioner and the fair stand of the learned Additional Advocate General.

(S.K.K., CJ.) (P.S.N., J.)
03.11.2015

Index : Yes
Internet : Yes
bbr

To

The Chairman,
Tamil Nadu Uniformed Services Recruitment Board,
P.T. Lee Chengalvarya Naicker Building,
No.807, 2nd Floor,
Anna Salai,
Chennai-600 002.

The Hon'ble Chief Justice
and
Pushpa Sathyanarayana, J.

bbr

W.P.No.15046 of 2015

03.11.2015