

MANU/TN/0759/2014

Equivalent Citation: 2014(3)CTC497, 2014(2)LLN511(Mad.), 2014-4-LW364, (2014)4MLJ12

IN THE HIGH COURT OF MADRAS

W.P. No. 587 of 2014 and M.P. Nos. 1 and 2 of 2014

Decided On: 17.04.2014

Appellants: **Nangai**
Vs.

Respondent: **Superintendent of Police**

Hon'ble Judges/Coram:

S. Nagamuthu, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Ms. Kiruba Munusamy

For Respondents/Defendant: P.H. Arvind Pandian, Additional Advocate General, Assisted by R. Rajeswaran, Special Government Pleader, K.M. Vijayan, Senior Counsel and P. Wilson, Senior Counsel/Addl. Solicitor General of India, for Amicus Curiae

Case Note:

Service - Termination - Challenge thereof - Present petition filed against order whereby Respondent terminated Petitioner's service by labelling her as transgender - Whether termination of Petitioner from service on basis of transgender was maintainable - Held, Petitioner was born as female and recognised by society as female, though she chose to identify herself as female for all purposes - Treating Petitioner as Transgender on basis of medical declaration and forcing her to accept said sexual identity would surely be infringement of Petitioner's fundamental rights - On record that Petitioner was female in legal parlance and was also eligible for appointment as Woman Police Constable - Therefore, termination of Petitioner from service was not maintainable - Petition allowed. [paras 39 and 40]

ORDER

S. Nagamuthu, J.

1. What is 'Sex' and 'Gender'? In the Indian context, "who is a 'male' and who is a 'female'?" Is it a sin to be born as a 'Transsexual'?" "Would it not be violative of Articles 14, 15, 16, 19 and 21 of the Constitution of India to deny employment to a transsexual?" The petitioner herein identifies herself as a female. But, the police department has terminated her from service by labelling her as a "Transgender". Before proceeding further, let me caution myself that anything said in this order should not have, even remotely, a semblance of tendency to hurt the feelings and sentiments of the transsexuals. I make it clear that every observation made and every conclusion arrived at in this order is only for the limited purpose of deciding the issues involved in this writ petition. This is neither a research paper nor a thesis concerning all the issues of the transsexuals. This order is confined only to the legal status of the petitioner's sex.

2. None, at the time of the birth of the petitioner as a female child, would have anticipated that after 24 years she would be discarded and humiliated by labelling her of a different sex. She was born on 26.08.1989 in a private Hospital in Ariyalur District. In the contemporaneous medical records, it was recorded that she was a female child. In the Birth Register, her birth was registered on 29.08.1989 as a female under the provisions of "The Registration of Births and Deaths Act, 1969". She was named after a female. She was recorded as a female in the family card, census record and in all the other Government records. She joined a Girl's Elementary School, then in a Girl's Higher Secondary School and lastly in a Women's College. In all the records in the Schools, College and the University, she was recorded as a female. She was known and fully recognized by the society as a female. Her gait, get-up, gesture and demeanour were all that of a female. The society did not doubt her sex at all. She actively participated in sports activities for women. She won a number of medals and prizes in various sports events as detailed below:

Sl. No.	Name of the Sport(s) Event	Level/Sports event held at	Organised by/ Represented	Place/position secured
1	Volley Ball	Inter - University, All India South Zone Volley Ball Tournament, 2007 at Vijayawada	Represented Bharathidasan University	Participated
2	Shot Put	22nd Tamil Nadu Junior State Athletic Championship 2008 held at Ariyalur	Organised by Perambalur District Athletic Association	First
3	Net Ball (Women)	All India Inter-University Tournament held at Punjabi University, Patiala	Association of Indian Universities	Third
4	Volley Ball	South West Zone Tournament held at Kannur	Represented Bharathidasan University	Participated
5	Athletics	All India Tournament held at Kottayam	Represented Bharathidasan University	Participated
6	Shot Put	Kings 24th Tamil Nadu Junior Inter District Athletic Championship 2009	Thanjavur District Athletic Association	Second
7	Javelin Throw	Dual Athletic Meet 2009 held at Chennai	Chennai District Athletic Association and Sri Lanka Athletic Association	First
8	Javelin Throw	Athletic Meet 2009 held at University of Madras	Association of Indian Universities	Second
9	Athletics	--	Sports Development Authority of Tamil Nadu [SDAT]	Best Sports Person [District Level] for the year 2010 Award
10	Athletics	XXXV National Sports Festival for Women Group III, held at Chennai - Represented State of Tamil Nadu	Sports Development Authority of Tamil Nadu	Participated
11	Shot Put	83rd Tamil Nadu State Senior Athletic Championship held at Chennai	Tamil Nadu Athletic Association	Second
12	Javelin Throw	83rd Tamil Nadu State Senior Athletic Championship held at Chennai	Tamil Nadu Athletic Association	Second
13	Shot Put	Inter Collegiate Athletic Meet, 2010-2011 held at Dr.Sivanthi Aditanar College of Physical Education	Tamil Nadu Physical Education and Sports University, Chennai	First

3. In the year 2010, she came out of the College with flying colours as a Graduate in Bachelor of Science (Physical Education).

4. "The Tamil Nadu Uniformed Services Recruitment Board, Chennai", conducted selection process for direct recruitment to the post of Grade II Police Constable

(Women) for the year 2009-2010. The petitioner applied for the same. She emerged successful in the selection process. She was selected by the Board and allotted to Karur District. The Superintendent of Police, Karur District issued an order of appointment by his proceedings in Na. Ka. No. A2/24481/2010 dated 18.01.2011. She was directed to report on 31st January 2011 in the "Police Recruit School" at Vellore. Accordingly, she commenced her training on 01.02.2011.

5. While she was undergoing training, the Principal, Police Recruit School, Vellore, deputed all the Women Recruit Police Constables including the petitioner to the Government Hospital and Medical College, Vellore for medical check up. The petitioner appeared for the medical check up on 22.03.2011 and 23.03.2011. Here started her agony.

6. On examination, the medical officer made a remark in the Out Patient slip of the petitioner as "TRANS GENDER". The said medical officer further opined that the petitioner should undergo Endocrinological examination for Genetic study (Sex determination) at Government Hospital, Chennai. Accordingly, the petitioner was sent to the "Rajiv Gandhi Memorial Government General Hospital, Chennai", on 10.05.2011 for Endocrinological and Chromosome studies for biological sex evaluation. She was subjected to various medical procedures/check up on 10.05.2011. Blood sample was taken from her at Egmore Maternity Hospital for Chromosome Test. After these medical examinations, the Professor and Head of the Department of Urology, Madras Medical College and Rajiv Gandhi Government General Hospital, Chennai, in his report dated 02.07.2011 made the following observation:

- 1.** This person's chromosomal study showed male pattern - 46XY.
- 2.** External genitalia is ambiguous with both gonads seen descended.

Diagnosis:

Disorder of Sexual Differentiation

Partial Androgen Insensitivity Syndrome

Male Pseudohermaphroditism

Based on the above opinion of the Urologist, the Chairman, Medical Board, Government Vellore Medical College Hospital in his report dated 26.08.2011 observed as follows:

She is a Trans Gender by birth.

7. In the mean while, the petitioner had to be on medical leave for a total period of about 121 days in eight spells. From 26.07.2011, according to the respondents, she did not participate in the training whereas, according to the petitioner, she was not allowed. While so, on the report of the Principal, Police Recruit School, Vellore, the Director General of Police, by his proceedings in Na.Ka. No. 420/16352/Appointment. 1(1)/11 dated 25.11.2011 directed the Principal, Police Recruit School, Vellore, to issue a show cause notice citing the following:

- (i) Failure to disclose that the applicant is a trans gender and appearing under Women Quota concealing this fact.

(ii) Failure to take part in final exam and pass.

(iii) Unauthorised absence from _____ to _____.

8. Based on the same, the Principal, Police Recruit School, Vellore by his proceedings in Na.Ka. No. D3/2638/2011 dated 28.12.2011 requested the Superintendent of Police, Karur District, who is the appointing authority, to take further action. The Superintendent of Police, Karur District, by his proceedings in Na.Ka. No. A4/14591/2012 dated 11.07.2012 issued a show cause notice calling upon the petitioner to explain as to why she should not be terminated from service. The petitioner duly submitted her explanation also. Ultimately, the Superintendent of Police, Karur, by his proceedings in Na.Ka. No. 14591/2012 dated 08.04.2013, terminated the petitioner from service on the aforesaid grounds. Challenging the same the petitioner is before this court with this writ petition.

9. This writ petition came up for admission on 08.01.2014 on which date, the learned Government Advocate took notice for the respondents. The matter was adjourned for few hearings at his request. When it came up for hearing on 21.03.2014, since the records had not been produced by the Superintendent of Police, Karur District, as directed earlier, and on considering the seriousness of the allegations made, which prima facie appeared to the court to have caused infringement of her fundamental rights guaranteed under Article 21 of the Constitution of India, this court was forced to issue a direction to the learned Special Government Pleader to ensure that the original records were before this court on 24.03.2014. The Superintendent of Police, Karur District, was directed to file counter also. Accordingly, on 24.03.2014, the then Superintendent of Police, Karur District, appeared and produced the original files. The learned Additional Advocate General Mr. P.H. Arvind Pandian argued on behalf of the State defending the impugned order. The argument remained inconclusive. The matter was further adjourned.

10. The Superintendent of Police, Karur District, thereafter, filed his counter on 02.04.2014. After having gone through the counter and having considered the plight of the petitioner and the complex legal issues involved in this matter, this court requested Mr. K.M. Vijayan, the learned Senior Counsel and Mr. P. Wilson, the learned senior counsel/Additional Solicitor General of India, to assist this court as Amicus Curiae. The matter thereafter came up for hearing on 10.04.2014 and again finally on 11.04.2014.

11. In the counter affidavit filed by the 1st respondent it is contended that since the petitioner was medically declared as a Transgender and since the petitioner did not disclose that she is a transgender, she was terminated from service as she is not eligible for appointment as Woman Police Constable.

12. I have heard Ms. Kiruba Munusamy, the learned counsel for the petitioner and Mr. P.H. Arvind Pandian, the learned Additional Advocate General for the respondents and Mr. K.M. Vijayan, the learned senior counsel and Mr. P. Wilson, the learned senior counsel/Additional Solicitor General of India, acting as Amicus Curiae. I have also gone through the records.

13. In this Writ petition, the following core questions have arisen for consideration:

(1) Whether the petitioner is a "female" and whether she is eligible for appointment as a "Woman Police Constable"?

(2) Whether the termination of the petitioner from service on the ground that she is a Transgender is sustainable?

14. Article 14 of the Constitution of India, guarantees to any person equality before law and equal protection of laws. Article 15, prohibits discrimination against any citizen on grounds of only religion, race, caste, sex or place of birth or any of them. Article 16(2) guarantees equality of opportunity in matters of public employment and it further directs that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. But, the founders of the Constitution while employing the word "Sex" in these provisions, would not have visualised that in the course of the working of the Constitution, a dispute would arise in respect of the sex of an individual and therefore, they, perhaps, did not deem it necessary to define the term "Sex".

15. There are several enactments, both Civil and Penal, which also deal with sex. In some enactments, the classification is between "Male and Female"; in some others, it is between "Boy and Girl"; and in few others, it is between a "Son and Daughter". For example, The Child Marriage Restraint Act, 1921 defines a child to mean a person who, if a male, has not completed twenty one years of age, and if a female, has not completed eighteen years of age. But, there is no definition of the terms "male" or "female". The Hindu Minority and Guardianship Act, 1956, while defining the terms "natural guardian of a Hindu minor" states that in the case of a boy or an unmarried girl the father, and after him, the mother and in the case of an illegitimate boy or an illegitimate unmarried girl, the mother, and after her, the father and in the case of a married girl, the husband, is the natural guardian. Here also, the terms "boy" and "girl" have not been defined. "The Preconception and Pre-Natal Diagnostics Techniques Act, 1994" also does not indicate the elements which differentiate a "female" and a "male". The Prohibition of Child Marriage Act, 2006 also defines a child to mean a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. The Right of Children to Free and Compulsory Education Act, 2009 also defines a child to mean, a male or female child of the age of 6 to 14 years. This Act has also not defined as to who is a male or who is a female. The Hindu Succession Act, 1956 defines the term "heir" to mean any person, male or female, who is entitled to succeed to the property of an intestate under this Act, Elsewhere in the said Act, the terms "son and daughter", have been used. Section 8 deals with "General rules of succession in the case of males" and Section 14 deals with "Property of a female Hindu to be her absolute property". Section 15 deals with "General rules of succession in the case of female Hindus". But, nowhere the said Act has defined the terms "male", "female", "son" and "daughter".

16. The Indian Penal Code 1860 deals with "Gender" which states that the pronoun "he" and its derivatives are used of any person, whether male and female" (Vide Section 8). Section 10 states the word "man" denotes a male human being of any age and the word "woman" denotes a female human being of any age. But, these terms "male" or "female" have not been defined in the Code. The General Clauses Act, 1897 also, does not define these terms. There are several such enactments which have freely used these terms, but without any provision to define the same.

17. All these years, the courts have been called upon to deal with the laws relating to males and females and adjudicate upon the issues without there being any legal definition for these terms. But, the Courts in India have been successful in enforcing

the laws relating to the terms such as "male" and "female", "man" and "woman" and "son" and "daughter". All these statutory laws and the customary laws have recognized only male sex and female sex and accordingly applied both civil laws as well as penal laws. But, unfortunately, from the time immemorial, there is a third sex and the people belonging to the third sex have not been recognized and treated as normal human beings with dignity.

18. People of third sex are called in several names, like Transsexuals, Transgenders, Hijras, Alis, Aravanis, Thirunangais, etc. Several Studies have been conducted and a number of research papers have been submitted by Scholars on the issues relating to the Transsexuals. The term "Sex", as it has been understood all along, is that which operates within the classic binary biological model, in which, the human beings are clearly divided into either male or female. Transsexuals do not fit in with the said classification in the domestic Indian laws. As per the researches conducted across the world, now it is well known that transsexuals are those who establish a permanent identity with the gender opposite to the gender identified at birth. As per the researches, the transsexualism is a form of human diversity in sexual formation, in which an individual seeks to alter the individual's sexually differentiated body in order to bring it into sexual harmony with the individual's innate sexual identity or brain sex.

19. In other words, a child, identified by birth to be of one sex, in due course of time, due to some natural changes, which happen biologically and psychologically between the age of 8 and 14, starts identifying himself/herself to be of a different sex in a wrong body. Thus, there is no sexual harmony between the individual's self-identity and the identity given to the individual by birth. It is this group of people, who remain male to female (MTF) and female to male (FTM). They are known in different names such as Inter-sex, Transgenders, Transsexuals, Transvestites, etc. As it is popularly known, "Transgenders" are the Male to Female (MTF) group of people. "Transsexual" is the larger term which includes transgenders, transvestites, intersex, etc., None of these group of transsexuals, either FTMs or MTFs, fit in themselves within the binary classification of sex. They feel completely neglected by the society and the Government.

20. The petitioner is one such neglected person. At this juncture, it may be useful to refer to a similar case of a girl by name "Pinky Pramanic". Pinky is an Indian who won ASIAD Gold Medal in Sprinting in the Asian Games. She was charged for committing rape of another girl. She was charged that she is a male. But, Pinky asserted that she is a woman always. She further claimed that she is also recognized as a woman by the society. But, she was kept in a male prison. She was taken by the Investigator to a private nursing home to examine her gender. It was alleged that the police prepared a video print of her gender test and leaked out the same. The Calcutta High Court and the Cyber Crime Bureau took action on the ground that it was a violation of her privacy. On examination, the Doctor gave opinion that she had external characteristics of both male and female. Based on this opinion, the police did not accept the claim of her that she is a female and instead forced a sexual identity on her by labelling her as a male.

21. Shanthy Soundararajan, a girl from Pudukkottai District, won a Silver Medal in 800 meters race in Doha Asian Games held on 15th, December, 2006. She was striped of the medal after declaring that she was not a female as per the medical examination. She said in a press interview,

I cannot forget what I had to go through after my Asian Games Medal was taken back. I hail from a poor family and no one would give me a job. My entire family suffered as people began looking at me with a jaundiced eye treating me like a cheat.

This heart rending statement would have made many to shed tears. In the instant case, like the Asian Games' Management, the Tamil Nadu Uniformed Services Board has played a spoiling role inadvertently, to declare the petitioner herein as a "Transgender" and to deny her employment.

22. These instances relating to transsexuals only go to show that the rights of transsexuals are not adequately taken care off by the State and the Society, though we have successfully crossed 66 years after the advent of the Universal Declaration of Human Rights, 1948, to which India is a party and after 64 years of the coming into force of the Constitution of India which guarantees a bulk of fundamental rights in Part-III, which includes no discrimination on the basis of sex, right of equality and equal protection of laws, freedom of speech and expression and right to life including right to keep privacy. Thus, the transsexuals are the neglected lot for no fault on their part.

23. Why does this transsexualism occur? What are the causes? In this regard we may say that there is no consensus even among medical, psychological, psychiatry, genetical and the other scientific communities. A cursory reading of the subject would reveal that there are a number of theories about the cause for transsexualism. Biologists claim that it is because of the chromosomal aberrations. It is well known that if an individual has XX chromosomes, she is a female and if an individual has got XY chromosomes, he is a male. However, there are also persons with XXY and YYX Chromosomes. These are chromosomal aberrations. Some people by physical characteristics may be females though they may have XY Chromosomes indicating male characters. Similarly, there are people who are males by physical characteristics, but they have XX chromosomes indicating female characters. According to the medical community, these biological differences cause Transsexualism. There are other theories which say that imbalances or fluctuations in hormones or use of certain medications during pregnancy may cause transsexualism. There are also theories to say that transsexualism is, pure and simple, a psychological disorder. The Brain Bank in Netherlands Studies say that there is a "brain sex" difference between Men and Women and transsexual people have the brain sex of the gender to which they identify themselves. Thus, it is manifest that there is no consensus among various theories as to how the transsexualism happens in human beings. Similarly, there is no recognised or universally accepted mode drawing a line differentiating transsexuals from the other sexes.

24. It is in this fluid situation, we, in India, have recognized only the binary classification of the human beings as "males" and "females" and accordingly apply the laws. When there is I no classification in any law as third sex (Trans-I sexual) and when the transsexuals do not fall within the classification of "male" or "female", "Would it be justifiable in law, to label them as third sex as claimed by the medical, psychological, genetical and the scientific communities and to deny them the basic human rights?" None can answer this question in the affirmative. If these transsexuals are not treated either as males or females, while applying the laws, since there is no special law recognising the transsexuals as third sex providing them with special rights, the transsexuals will be reduced into mere animals. In this country, fortunately, even animals have been given certain statutory protections, such

as, The Wild Life Protection Act, 1972, The Prevention of Cruelty to Animals Act, 1960, etc. Thus, it was all along a challenge to the legal community to reconcile the position of the transsexuals and to bring them within the binary classification of male or female so as to ensure them all rights which are available for males and females.

25. As I have already pointed out, as of now, there is no law in this country prescribing the mode to determine the sex. Before entering the sex of the child in the medical records, there is no law prescribing that the child should be subjected to any kind of medical test to find out whether medically the child has XX or XY Chromosomes and then to assign sexual identity to the child irrespective of the physical characteristics of the child. It is customary that as soon as the child is born, the Doctors identify the child only by means of the physical characteristics and accordingly, they assign the sexual identity to the child.

26. The Registration of Births and Deaths Act, 1969 also does not make any provision insisting upon any medical examination to find out whether the child has got XX or XY Chromosomes so as to identify the sex of the child medically and then to enter the same in the birth register. Here also, entry is made only based on the physical characteristics of the child. When the child grows, the society closely watches the child and recognises its sex. If once it is so accepted either as male or female by the society, then, for all the purposes, the child is treated as male or female as the case may be. At the time when the child is admitted in the school, there is no law prescribing that the child should undergo any type of medical examination to ensure its sexual identity. Similarly, at the time of entering into the college, or higher educational institution, there is no law prescribing that the individual should undergo any medical examination to prove his/her sexual identity. For the purpose of the election of our representatives, either to the Parliament or the State Assemblies also, there is no law prescribing that the candidate should undergo medical examination to ascertain his/her sexual identity and then enter the same in the affidavit filed in support of the nomination paper. There are certain posts reserved exclusively for women. Before appointing the women as against those reserved vacancies, there is no law prescribing that such women should undergo medical examination and establish their sexual identity. From these factual scenarios, it is crystal clear that in the absence of a law in this country prescribing the mode for determination of the sex of an individual, the twin tests upon which sex is determined are (1) physical characteristics found at the time of birth of the child and (2) recognition of his/her sex by the society at large. Applying these two tests, an individual, for all practical purposes, in this country, is identified either as a male or a female. While deciding the property rights under the personal laws like The Hindu Succession Act, only applying these two tests, the courts have been adjudicating upon the rights by accepting the sexual identity of an individual. No court, to my knowledge, had ever sent any individual for medical examination to determine the sex of the said individual.

27. When that is the settled position, I do not understand as to why the petitioner was directed to undergo the medical examination to determine her sex. The medical experts have opined that she is a transgender because of the presence of XY chromosomes. As I have already pointed out, only on this medical ground, if we were to identify an individual as a male in a female body, then, we may have to apply the same yardstick in every matter for any purpose such as for making necessary entry in the birth register, for employment purposes, for the purpose of election, etc. This, in my considered opinion, will only create chaos and confusion in the society which is otherwise having peaceful existence for several centuries.

28. It may be true that in medical terms an individual may not fit in within the definition of either male or female, and, therefore, medically the individual may be classified as transsexual, but, legally, the individual should be classified either as a male or as a female and not as a transsexual. Since, hitherto there was no special law made creating a third gender, it remained impossible to classify them as a third sex in the legal parlance. Therefore, there was a legal compulsion for the courts and the authorities to treat these medically declared transsexuals either as males or females for the purposes of ensuring equality and all the other rights including the basic human rights.

29. It is at this stage, the historic judgment of the Hon'ble Supreme Court in National Legal Services Authority v. Union of India and Others in W.P.(civil) No. 400 of 2012 dated 15.04.2014 has come as a boon for transgenders. The National Legal Services Authority constituted under The Legal Services Authorities Act, 1987, took up the cause of the trans-genders and filed the said writ petition seeking legal declaration of third gender identity than the one assigned to them as male or as female at the time of birth contending that the non-recognition of the third gender violates Articles 14 and 21 of the Constitution of India. The Hon'ble Supreme Court of India has made an in-depth study of the agonies of the transgender persons, the treatment meted out to them at the hands of the society and the law enforcing authorities and finally, the Hon'ble Supreme Court has issued certain directions to safeguard the interest of the transgenders. I have the benefit of closely reading the entire judgment to have proper understanding of the same. In para 109 of the judgment, the Hon'ble Supreme Court has clarified that the said judgment is all about transgender community namely, hijras, etc. For better understanding, let us have a look into para 109 of the judgment which reads as follows:

109. Therefore, we make it clear at the outset that when we discuss about the question of conferring distinct identity, we are restrictive in our meaning which has to be given to TG community i.e. hijra etc., as explained above.

30. In para 107 of the said judgment, the Hon'ble Supreme Court has explained the term "Transgender" and has further held that the said judgment is not concerned with the wider meaning for the expression "Transgender". Para 107 of the said judgment reads as follows:

107. At the outset, it may be clarified that the term 'transgender' is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor 'transgender'. Etymologically, the term 'transgender' is derived from two words, namely 'trans' and 'gender'. Former is a Latin word which means 'across' or 'beyond'. The grammatical meaning of 'transgender', therefore, is across or beyond gender. This has come to be known as umbrella term which includes Gay men, Lesbians, bisexuals, and cross dressers within its scope. *However, while dealing with the present issue we are not concerned with this aforesaid wider meaning of the expression transgender.*

(Emphasis supplied)

31. In para 108 of the judgment, the Hon'ble Supreme Court has observed that in India Transgender community comprises of Hijaras, Eunuch, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. The Hon'ble Supreme Court went on to describe these transgender people in the following manner (vide para 108)

108. It is to be emphasized that Transgender in India have assumed distinct and separate class/category which is not prevalent in other parts of the World except in some neighbouring countries. In this country, TG community comprise of Hijaras, enunch, Kothis, Aravanis, Jogappas, Shiv-Shakthis etc. In Indian community transgender are referred as Hizra or the third gendered people. There exists wide range of transgender-related identities, cultures, or experience --including Hijras, Aravanis, Kothis, jogtas/Jogappas, and Shiv-Shakthis (Hijras: They are biological males who reject their masculinity identity in due course of time to identify either as women, or 'not men'. Aravanis: Hijras in Tamil Nadu identify as 'Aravani'. Kothi: Kothis are heterogeneous group. Kothis can be described as biological males who show varying degrees of 'femininity'. Jogtas/Jogappas: They are those who are dedicated to serve as servant of Goddess Renukha Devi whose temples are present in Maharashtra and Karnataka. Sometimes, Jogti Hijras are used to denote such male-to-female transgender persons who are devotees of Goddess Renukha and are also from the Hijra community. Shiv-Shakthis: They are considered as males who are possessed by or particularly close to a goddess and who have feminine gender expression). The way they behave and acts differs from the normative gender role of a men and women. For them, furthering life is far more difficult since such people are neither categorized as men nor women and this deviation is unacceptable to society's vast majority. Endeavour to live a life with dignity is even worse. Obviously transvestites, the hijra beg from merchants who quickly, under threat of obscene abuse, respond to the silent demands of such detested individuals. On occasion, especially festival days, they press their claims with boisterous and ribald singing and dancing. (A Right to Exist: Eunuchs and the State in Nineteenth-Century India Laurence W. Preston Modern Asian Studies, Vol. 21, No, 2 (1987), pp. 371-387).

32. From the above observations of the Hon'ble Supreme Court, more particularly, in para 107 of the said judgment, it is crystal clear that Hon'ble Supreme Court was concerned only with transgenders who are males to females (MTFs). In the said judgment, the Hon'ble Supreme Court, as I understand, has not dealt with the other categories of transsexuals such as Female to Male (FTMs), Gays, Lesbians and bisexuals. In the instant case, we are concerned with a girl who has been medically proved to be FTM category. Therefore, as per the principles laid down in the said judgment by the Hon'ble Supreme Court, I have to examine the position of female to male transsexuals (FTMs).

33. The Hon'ble Supreme Court in para 129 of the judgment has finally declared as follows:

129. We, therefore, declare:

- (1) Hijras, Eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by the Parliament and the State Legislature.
- (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.

(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.

(4) Centre and State Governments are directed to operate separate HIV Sero-surveillance Centres since Hijras/Transgenders face several sexual health issues.

(5) 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.

(6) 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.

(7) Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

(8) 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.

(9) 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.

34. As has been held by the Hon'ble Supreme Court in the above judgment, the male to female (MTFs) are to be treated as a Transgender for the purpose of safeguarding their rights under Part-III of the Constitution of India and the laws made by the Parliament and the State Legislatures. The other transsexuals such as Females to Males (FTMs) will not have the benefit of the classification as third genders. Therefore, even after the said judgment, there is a legal compulsion that these Females to Males (FTMs) are to be brought within the binary classification as male or female. If they are not brought under this binary classification, then, they will be deprived of the fundamental rights under Part-III of the Constitution of India. If an individual, who is born as a female, is declared as a transsexual by the medical community, on that score, the individual cannot be kept out of the binary classification. Irrespective of the opinion of the medical, psychological, genetical and other scientific communities, these medically declared transsexuals are to be treated by the legal community only by the sexual identity given to them by birth and recognised by the society. If we have to treat this group of medically declared transsexuals as outside the purview of the female sexual identity, then, the State will not be in a position to provide employment and other opportunities by treating them as females or as males.

35. At this juncture, we may again have a look into sub-para (2) of Para 129 of the judgment of the Hon'ble Supreme Court in National Legal Services Authority v. Union of India and Others case (cited supra) wherein the Hon'ble Supreme Court has declared that the trans-gender persons have right to decide their self identified gender and the Governments have to grant legal recognition of their gender identity

such as male or female or as third gender. The Hon'ble Supreme Court has affirmed that this right flows from Article 19(1)(a) of the Constitution of India. In my considered opinion, in the case of Females to Males (FTMs) also, such fundamental right is available to them and therefore, it is for them to chose and express their identity either as females or males or as transsexuals.

36. In the case on hand, as I have already recapitulated, Pinky Pramanic choose to declare herself as a female for ever. So was Shanthi Soundararajan. The petitioner herein also has declared her gender identity only as a "Female" notwithstanding the declaration made by the medical community that she is a trans-gender. Her sexual identity as female by birth and recognised by the society and her own self-identity as female should be recognised by the Government. Therefore, the petitioner should be treated as a female for all purposes, such as, employment, property rights, etc. Unless laws are made recognising this Female to Male (FTMs) as third genders providing certain special rights, such identification by the individual as third gender thereby exercising her freedom of expression will not be beneficial to her.

37. Article 21 of the Constitution of India guarantees life and personal liberty. The term "life" has received very liberal interpretation at the hands of the Hon'ble Supreme Court which includes right to privacy and the right to lead a dignified life. By compelling an individual, who has been recognised all through as a female, like the petitioner, to undergo medical examination so as to declare her as a transsexual will be a gross violation of the right to privacy which falls within the ambit of Article 21 of the Constitution of India. Such kind of forcible declaration will have a lot of repercussions in her personal life. As I have already discussed, as of now, there is no social recognition of these transsexuals. Even many of the parents of the transsexuals do not treat them on par with the other human beings. They are thrown out of their families. The agonies suffered by them are unimaginable. These kinds of transgenders, I regret to state, often indulge in either begging or in prostitution. Only few State Governments in this country have taken steps to alleviate their agonies. Therefore, I have to necessarily hold that in the absence of a legislation, compelling an individual to expose to medical examination to declare medically his/her sex identity itself is violative of Article 21 of the Constitution of India.

38. It was also argued before this court that it will be difficult for the authorities to provide facilities for these transsexuals, for example, they cannot use Toilets meant for either women or men; there is likelihood of allegation that the girl by birth who has been declared as a transsexual having manly qualities may molest a fellow female, etc. Of course, there are these kinds of practical difficulties, but, on that score, the courts cannot allow these people (FTMs) being treated inhumanely denying them any right including the basic human rights. It is for the authorities concerned to take note of these difficulties and provide separate facilities for these medically declared transsexuals as directed by the Hon'ble Supreme Court in the above judgment.

39. Though Mr. K.M. Vijayan, the learned Senior Counsel and Mr. P. Wilson, the learned senior counsel/Additional Solicitor General of India made extensive arguments citing various judgments of the Hon'ble Supreme Court of India, and foreign Courts to impress upon this court that treating these transsexuals differently will be violative of Articles 14, 15, 16, 19(1)(a) and 21 of the Constitution of India, I am of the view that there is no need for me to have an elaborate discussion on that in view of the recent judgment rendered by Hon'ble Supreme Court in National Legal Services Authority v. Union of India and Others case cited supra wherein the Hon'ble

Supreme Court has made a thorough analysis of the relevant provisions of the Constitution of India, various judgments of the Hon'ble Supreme Court and Foreign courts and has upheld the rights of the transgenders under Articles 14, 15, 16, 19(1) (a) and 21 of the Constitution of India. Therefore, it is suffice for me to hold that treating the petitioner as not a female on the basis of medical declaration that I she is a transsexual and forcing her to accept the said sexual identity will surely be an infringement of the rights of the petitioner guaranteed under Articles 14, 15, 16, 19(1)(a) and 21 of the Constitution of India. As I have already pointed out, the petitioner was born as a female, recognised by the society as a female, she choose to identify herself as a female for all purposes. Therefore, I hold that she is a female in the legal parlance and thus, she is eligible for appointment as a Woman Police Constable.

40. Though there are other grounds stated in the impugned order like unauthorised absence, etc., going by the peculiar situation in which the petitioner was placed during the turmoil period, I am of the view that the said absence, assuming to be true, is liable to be condoned. Similarly, the allegation that the petitioner did not disclose that she is a transgender at the time when she got appointment is untenable because she has never admitted that she is a transgender. Thus, looking at from any angle, the impugned order of termination from service is unsustainable and, therefore, it is liable to be set aside. Thus, I answer both the questions (vide para No. 14) in favour of the petitioner.

41. Before concluding this order, I wish to record my appreciation for the excellent assistance rendered by the Amicus Curiae Mr. K.M. Vijayan, the learned senior counsel and Mr. P. Wilson, the learned senior counsel/Additional Solicitor General of India and Mr. P.H. Arvind Pandian, the learned Additional Advocate General, by their scintillating arguments by making reference to lot of research papers, articles, and judgments of various courts on this complex issue which made the task of this court easy. In the result, the writ petition is allowed in the following terms:

- (i) The petitioner is declared as a female for all purposes and she has got right to retain such sexual/gender identity.
- (ii) The petitioner has liberty to chose a different sexual/gender identity as a third gender in future based on the medical declaration, if there is any law put in place recognising FTMs as a third gender.
- (iii) The impugned order of termination from service issued by the Superintendent of Police, Karur District is hereby set aside.
- (iv) The respondents are directed to issue consequential order within a period of six weeks from today permitting the petitioner to join duty as Grade II Police Constable (Woman) with continuity of service.

No costs. Consequently, connected MPs are closed.

Note: With a view to preserve the right of privacy of the petitioner, it is directed that the press, electronic media and law journals shall not disclose her name and instead, they shall mention the name of the petitioner as "Nangai"

© Manupatra Information Solutions Pvt. Ltd.