

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL
WRIT PETITION CRIMINAL No. 1794 of 2018

Rano & othersPetitioners

Vs.

State of Uttarakhand and others.....Respondents

Mr. P.C. Petshali and Mr. Kaushal Sah Jagati, Advocates for the petitioners.

Mr. Subhash Tyagi Bhardwaj, Dy.A.G. for the State.

With

WRIT PETITION CRIMINAL No. 1785 of 2018

Rajni Rawat Kinnar Petitioner

Vs.

State of Uttarakhand and others.....Respondents

Mr. Abhishek Verma, Advocate for the petitioner.

Mr. Subhash Tyagi Bhardwaj, Dy.A.G. for the State.

Coram: Hon'ble Rajiv Sharma, ACJ.

Hon'ble Manoj Kumar Tiwari, J.

Dated: 28th September, 2018

Rajiv Sharma, ACJ (Oral)

Since common questions of law and facts are involved in the above titled writ petitions, hence the same are being taken up together and adjudicated by this common judgment.

2. Petitioners are transgenders and have sought protection to their lives and liberty. According to the averments made in the writ petitions, the private respondents are interfering in their area of operation. Though, the issue in the petitions is with regard to life and liberty, but the Court can take judicial notice of the fact that the life of transgender is miserable. They have absolute right to maintain dignity and necessary steps are required to be taken to bring

them into main stream. In view of the this, we have enlarged the scope of writ petitions for ameliorating the difficulty faced by them with the consent of parties.

3. Their Lordships of the Hon'ble Supreme Court in AIR 2014 SC 1863, in the case of "National Legal Services Authority vs. Union of India & others", have held the word "person" in Article 14 of the Constitution of India is not restricted to male and female and it includes even Hijras/Transgender persons and such persons who are neither male nor female are also entitled to equal protection of laws and equality in all spheres. Discrimination on ground of sexual orientation or gender identity impairs equality. Their Lordships have further held that transgenders being discriminated on ground of sex are entitled to benefits as Socially and Educationally Backward class citizens including reservation in public employment. Their Lordships have also held that gender identity is part of right to dignity as well as personal autonomy and self expression. The discrimination between citizens on ground of gender identity is impermissible. Their Lordships have declared that Hijras, Eunuchs be treated as third gender. Their Lordships have issued directions to Union and States to give them legal recognition. It was also held that Rule of law does not mean mere public order and human rights are moral, pre-legal rights. Their Lordships have also held that in absence of Municipal law protecting their rights, International conventions have to be recognized and followed to protect them from discrimination. Their Lordships have held as under:-

"49. The Indian law, on the whole, only recognises the paradigm of binary genders of male and female, based on a person's sex assigned by birth, which permits gender system, including the law relating to marriage, adoption, inheritance, succession and taxation and welfare

legislations. We have exhaustively referred to various articles contained in the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, 1966, the International Covenant on Civil and Political Rights, 1966 as well as the Yogyakarta Principles. Reference was also made to the legislations enacted in other countries dealing with rights of persons of transgender community. Unfortunately, we have no legislation in this country dealing with the rights of transgender community. Due to the absence of suitable legislation protecting the rights of the members of the transgender community, they are facing discrimination in various areas and hence the necessity to follow the international conventions to which India is a party and to give due respect to other non-binding international conventions and principles. The Constitution-makers could not have envisaged that each and every human activity be guided, controlled, recognised or safeguarded by laws made by the legislature. Article 21 has been incorporated to safeguard those rights and a constitutional court cannot be a mute spectator when those rights are violated, but is expected to safeguard those rights knowing the pulse and feeling of that community, though a minority, especially when their rights have gained universal recognition and acceptance.

53. Article 51, as already indicated, has to be read along with Article 253 of the Constitution. If Parliament has made any legislation which is in conflict with the international law, then Indian courts are bound to give effect to the Indian law, rather than the international law. However, in the absence of a contrary legislation, municipal courts in India would respect the rules of international law. In *Kesavananda Bharati v. State of Kerala*, it was stated that in view of Article 51 of the Constitution, the Court must interpret language of the Constitution, if not intractable, in the light of the United Nations Charter and the solemn declaration subscribed to it by India. In *Apparel Export Promotion Council v. A.K. Chopra*, it was pointed out that domestic courts are under an obligation to give due regard to the international conventions and norms for construing the domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. Reference may also be made to the judgments of this Court in *Githa Hariharan v. RBI*, *R.D. Upadhyay v. State of A.P.* and *People's Union for Civil Liberties v. Union of India*. In *Vishaka v. State of Rajasthan*, this Court under Article 141 laid down various guidelines to prevent sexual harassment of women in workplaces, and to enable gender equality relying on Articles 11, 24 and General Recommendations 22, 23 and 24 of the Convention on the Elimination of All Forms of Discrimination against Women. Any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions e.g. Articles 14, 15, 19 and 21 of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee. Principles discussed hereinbefore on TGs and the international conventions, including Yogyakarta Principles, which we have found not inconsistent with the various

fundamental rights guaranteed under the Indian Constitution, must be recognised and followed, which has sufficient legal and historical justification in our country.

54. Article 14 of the Constitution of India states that the State shall not deny to “any person” equality before the law or the equal protection of the laws within the territory of India. Equality includes the full and equal enjoyment of all rights and freedom. Right to equality has been declared as the basic feature of the Constitution and treatment of equals as unequals or unequals as equals will be violative of the basic structure of the Constitution. Article 14 of the Constitution also ensures equal protection and hence a positive obligation on the State to ensure equal protection of laws by bringing in necessary social and economic changes, so that everyone including TGs may enjoy equal protection of laws and nobody is denied such protection. Article 14 does not restrict the word “person” and its application only to male or female. Hijras/transgender persons who are neither male/female fall within the expression “person” and, hence, entitled to legal protection of laws in all spheres of State activity, including employment, healthcare, education as well as equal civil and citizenship rights, as enjoyed by any other citizen of this country.

59. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution-makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one’s self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of “sex” under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression “sex” used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male nor female.

60. TGs have been systematically denied the rights under Article 15(2), that is, not to be subjected to any disability, liability, restriction or condition in regard to access to public places. TGs have also not been afforded special provisions envisaged under Article 15(4) for the advancement of the socially and educationally backward classes (SEBC) of citizens, which they are, and hence legally entitled and eligible to get the benefits of SEBC. State is bound to take some affirmative action for their advancement so that the injustice done to them for centuries could be remedied. TGs are also entitled to enjoy economic, social, cultural and political rights without discrimination, because forms of discrimination on the ground of gender are violative of fundamental freedoms and human rights. TGs have also been denied rights under Article 16(2) and discriminated against in respect of employment or office under the State on

the ground of sex. TGs are also entitled to reservation in the matter of appointment, as envisaged under Article 16(4) of the Constitution. State is bound to take affirmative action to give them due representation in public services.

68. Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of the right to dignity and freedom guaranteed under our Constitution.

69. Article 21, as already indicated, guarantees the protection of "personal autonomy" of an individual. In *Anuj Garg v. Hotel Assn. of India* (SCC p. 15, paras 34-35), this Court held that personal autonomy includes both the negative right of not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in. Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.

75. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude hijras/transgenders from their ambit, but the Indian law on the whole recognise the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett Principle of "biological test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "psychological test" instead of "biological test". Binary notion of gender reflects in the Penal Code, 1860 for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NREGA, 2005, etc. Non-recognition of the identity of hijras/transgenders in the various legislations denies them equal protection of law and they face widespread discrimination.

76. Article 14 has used the expression "person" and Article 15 has used the expression "citizen" and "sex" so also Article 16. Article 19 has also used the expression "citizen". Article 21 has used the expression "person". All these expressions, which are "gender neutral" evidently refer to human beings. Hence, they take within their sweep hijras/transgenders and are not as such limited to male or female gender. Gender identity as already indicated forms the core of one's personal self, based on self-identification, not on surgical or medical procedure. Gender identity, in our view, is an integral part of sex and no citizen can be discriminated on the ground of gender identity, including those who identify as third gender.

87. There is thus a universal recognition that human rights are rights that "belong" to every person, and do not depend on the specifics of the individual or the relationship between the right-holder and the right-grantor. Moreover, human rights exist irrespective of the question whether they are granted or recognised by the legal and social system within which we live. They are devices to evaluate these existing arrangements: ideally, these arrangements should not violate human rights. In other words, human rights are moral, pre-

legal rights. They are not granted by people nor can they be taken away by them.

99. The concepts of justice social, economic and political, equality of status and of opportunity and of assuring dignity of the individual incorporated in the Preamble, clearly recognise the right of one and all amongst the citizens of these basic essentials designed to flower the citizen's personality to its fullest. The concept of equality helps the citizens in reaching their highest potential.

125. The rule of law is not merely public order. The rule of law is social justice based on public order. The law exists to ensure proper social life. Social life, however, is not a goal in itself but a means to allow the individual to live in dignity and development himself. The human being and human rights underlie this substantive perception of the rule of law, with a proper balance among the different rights and between human rights and the proper needs of society. The substantive rule of law "is the rule of proper law, which balances the needs of society and the individual". This is the rule of law that strikes a balance between society's need for political independence, social equality, economic development, and internal order, on the one hand, and the needs of the individual, his personal liberty, and his human dignity on the other. It is the duty of the Court to protect this rich concept of the rule of law."

4. Their Lordships of the Hon'ble Supreme Court in the same judgment have given directions in Paragraph No.129. Their Lordships of the Hon'ble Supreme Court, as per "Direction No.3" of Paragraph No.129 have directed the Centre and 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 employments. Their Lordships in "Direction No.5" have directed the Centre and State Governments to seriously address the problems being faced by Hijras/Transgenders such as fear, shame, gender dysphoria, social pressure, depression, suicidal tendencies, social stigma etc. Their Lordships in "Direction No.6" have directed the Centre and State Governments to take proper measures to provide medical care to transgenders in the hospitals and also provide them separate public toilets and other facilities. Their

Lordships in “Direction No.7” have directed the Centre and State Governments to frame various social welfare schemes for their betterment.

5. The State Government, till date, has not implemented the directions issued by their Lordships of the Hon’ble Supreme Court in AIR 2014 SC 1863, in the case of “National Legal Services Authority vs. Union of India & others”, in Paragraph No.129 of the judgment.

6. No reservation has been provided for public employment and in educational institutions. No proper measures have been provided for medical care to transgenders. No social welfare schemes have been framed for the betterment of the transgenders.

7. According to International Journal of Applied Research under the caption “Marginalization of transgenders community: A sociological analysis”, transgender in an umbrella term, coined in the US, used to include people whose lifestyles appear to conflict with the gender norms in society. It includes many types of people and lifestyles. “Transgender” is a term used to describe individuals who exhibit gender-nonconforming identities and behaviours, or in other words, those who transcend typical gender paradigms. They are members of a marginalized and vulnerable population. They face psychosocial and health problems than other social groups. They frequently experience discrimination in access to health care, education, employment etc. They are alienated from family and society. They feel insecure. Most members are driven to begging and pushed furthermore towards the margins.

8. The Court can take judicial notice of the fact that immediately transgender is born, he/she separated from the family and forcibly taken by groups of Hijras,

Eunuchs and transgenders. All the transgenders have a right to be recognized as such and also have a right to self-perceived gender identity. There should not be any discrimination against any transgender in any matter relating to public employment as well as recruitment, promotion etc. No transgender persons should be separated from his/her parents or family immediately on the ground of being transgender. Every transgender has a right to live in a house with his/her parents. The State Government is required to frame social welfare schemes and programmes for transgenders. All human beings are born free and equal in dignity and rights. There should not be any discrimination on the basis of sexual orientation. Every individual has a right to life. Transgenders have a right to privacy. They are required to be protected from exploitation. They have a right to work. The State Government is required to take all necessary steps to provide habitable, accessible, culturally appropriate houses to the transgenders including right to education. They are required to be provided separate facilities in public utility buildings including toilets. Transgenders are required to be rehabilitated. Transgenders face severe and pervasive discrimination within the society.

9. The State of Odisha has framed a scheme for Promotion of Transgender Equality & Justice. The scheme speaks of medical assistance to the parents of transgenders. Pre and Post Matric Scholarship, Personality Development, Skill Upgradation Training, Self Employment, the role of District Administration, role of block/ULB Administration and Budget Provision & Utilization.

10. Accordingly, the writ petition is disposed of by issuing following mandatory directions:-

- A. The Senior Superintendent of Police, Dehradun is directed to provide necessary protection to the petitioners in both the petitions.
- B. We direct the State Government to provide reservation in admission in educational institutions and for public appointments to the transgenders by framing a scheme within a period of six months from today.
- C. The State Government is directed to frame various social welfare schemes/programmes for the betterment of transgenders within a period of six months from today.
- D. The State Government is also directed to create public awareness to enable transgenders to come into the main stream and also to take measures to regain their respect and place in the society.
- E. The State Government is also directed to frame a scheme of housing for transgenders by giving suitable accommodation to them within six months from today.
- F. The State Government is also directed to provide financial assistance to the parents of transgenders and also to give scholarship to transgenders upto post-graduate level in order to assimilate them in the main stream.
- G. The State Government is directed to constitute a welfare board for the upliftment of transgenders in the State of Uttarakhand, within a period of six months from today. The representation shall be given to transgenders in the board.

- H. The State Government is also directed to provide free medical access to transgenders in all the hospitals.
- I. We also direct that transgenders shall have free access to public institutions, public places, playgrounds, roads including educational institutions, malls, market places, hospitals, hotels, restaurants etc.
- J. The respondent-State is also directed to provide separate toilets to transgenders in every public utility buildings including hospitals, bus stations, railway stations etc. within a period of six months from today.
- K. We direct the State Government to ensure that no transgender is separated from the parents and family and we also suggest the State Government to frame law/scheme to ensure that no transgender is separated from the parents/guardians and family within a period of three months from today.
- L. Criminal cases shall be registered against the persons who forcibly remove transgender from their parents/guardians and family.
- M. All the transgenders in the State of Uttarakhand are ordered to be registered by the District Magistrates to recognize them as such.
- N. There shall not be any discrimination to transgenders qua employment or occupation. They should not be treated unfairly. They have absolute right, as enshrined under Article 21 of the Constitution of India to maintain privacy and to live with dignity.

11. Pending application, if any, also stands disposed of.

(Manoj Kumar Tiwari, J.) (Rajiv Sharma, ACJ.)
28.09.2018

NISHANT