

Reserved Judgment

Judgment reserved on 14.05.2019

Date of Delivery on 31.05.2019

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (Criminal) No. 28 of 2019

Ms. X

.....Petitioner

Vs.

State of Uttarakhand and Others

.....Respondent

Present:- Ms. X, petitioner, present in person.

Mr. G.S. Sandhu, Government Advocate and Mr. P.S. Bohra, Additional
Government Advocate for the State.

Hon'ble Ravindra Maithani, J.

The journey passing through the Criminal Tribes' Act, 1871, to the decision in the case of National Legal Services Authority Vs. Union of India, (2014) 5 SCC 438 (hereinafter referred to as 'NALSA's case) appears to have yet not ended. The Criminal Tribes' Act was enacted for the registration, surveillance and controls of certain tribes and eunuchs. The broader term 'Transgender' (TG) and their rights have been interpreted, widely discussed and upheld in the NALSA's case. Those whose 'brain sex' was not in conformity with their 'biological sex' got an expression of freedom, autonomy, identity and dignity by the NALSA's case. The NALSA's case, in fact, legally as well as for all practical purposes ends all kind of humiliation, agony, anguish, trauma, distress, etc. that could have been faced by TGs. But, this Court is faced with a situation, where the petitioner, a transsexual woman, who has undergone gender reassignment surgery (GRS)

claims that she is 'she', but State is not recognising it. The petitioner is still raising her voice against the might of the State on the strength of her rights upheld in the NALSA's case and subsequent to it, in the cases of K.S. Puttaswamy and Another Vs. Union of India and Others, (2017) 10 SCC 1 and Navtej Singh Johar and Others, (2018) 10 SCC 1.

2. Before proceeding further, it would be apt to look at the facts at a glance. In the instant case, an FIR was filed by the petitioner, which was registered as FIR No. 311 of 2018 under Sections 377 and 385 IPC. There are allegations of rape also. The petitioner claims that she has identified herself as 'she'. She has undergone GRS, therefore, she should be treated as a female. The instant petition has been filed for directing the State Government to treat and consider the petitioner as female, in accordance with law.

3. During the course of hearing, at one stage, a Joint Secretary to the Government of Uttarakhand filed an affidavit deposing, therein, that the petitioner has been diagnosed with 'gender identity disorder' and based on some medical evidence, investigation was carried out under Section 376 and 377 IPC, but at a later stage, the Investigating Officer of the case, filed a report in the Court and based on reading of the DNA of the petitioner, biologically declared that the petitioner is not 'she', but is 'he'. Thereafter, the Secretary, Home, State of Uttarakhand has also

filed another affidavit and in paragraph 8 of it, deposed as hereunder:-

“8. That it is submitted that the Government of Uttarakhand is committed to comply with the orders of Hon’ble Apex Court in letter and spirit as pronounced in order dated 15.04.2014 in National Legal Services Authority Vs. Union of India and others. In this context, Government of Uttarakhand is committed to protect the right of transgender person to decide their self-identified gender. As such, petitioner is well within her right to determine her gender.”

(Emphasis supplied)

4. After investigation, chargesheet under Section 377 IPC has been filed in the case.

5. Heard petitioner in person, learned Government Advocate and Additional Government Advocate for the State and perused the records.

6. The petitioner in person would argue that:-

(i) In view of the judgment in NALSA’s case, she has identified herself as ‘she’.

(ii) She had also undergone GRS and the Doctor conducting the surgery has given a certificate to her that she may be addressed as a “female”.

(iii) State in an affidavit, paragraph 8 as quoted hereinbefore, has also accepted that the petitioner has right of self-determination of her gender.

(iv) Based on the FIR filed by the petitioner, the chargesheet ought to have been filed under Section 376 IPC.

(v) Upon a query having been made by the petitioner, the Ministry of Social Justice and Empowerment has also confirmed that in a case like the instant one, the petitioner's right to self identification gender is to be respected. Relevant portion of the letter, as placed by the petitioner before the Court, is as hereunder:-

File No.P.13011/3(3)/2015-DP-III

Government of India

Ministry of Social Justice & Empowerment

Department of Social Justice & Empowerment

.....

“To,

[REDACTED]

[REDACTED]

[REDACTED]

Subject: Information sought under Right to Information (RTI) Act, 2005.

Madam,

Please refer to your online application dated 26.03.2018 transferred from MHA for furnishing information under the RTI Act.

2. Regarding the treatment of transgender persons as Female by the Police Officials in light of Paragraph 129(2) of the judgment of the Hon'ble Supreme Court of India National Legal Services Authority Vs. Union of India, it is informed that as per para 129(2) of the judgment the “Transgender persons” right to decide their self-identified gender was upheld and the centre and State Governments are directed to grant legal recognition of their gender identify such as male, female or as third gender”. Therefore, right to self-identified gender is upheld.

3. It is further informed that the Ministry has introduced a Bill in the Lok Sabha titled “The Transgender Persons (Protection of Rights)

Bill 2016” for welfare of Transgender Persons. The said bill has been passed by the Lok Sabha on 17.12.2018 and the Bill is now pending with the Rajya Sabha.”

4.

Yours faithfully

[Redacted signature block]

(vi) The petitioner should be treated as a female by the State Government.

7. On the other hand, on behalf of the State, learned Government Advocate and Additional Government Advocate would argue that:-

(i) If “biological sex” of a person differs with the gender determined by the person, it would require a declaration from the competent authority.

(ii) If a person determines his or her gender, it cannot be accepted unless Parliament enacts a law in this behalf.

(iii) If it is left at the will of a person to determine gender, it would create havoc in the society.

(iv) The Transgender Persons (Protection of Rights) Bill, 2018 is yet to be passed by the Parliament.

(v) Whatever certificate has been given to the petitioner by the Doctor conducting GRS cannot make the petitioner a woman.

(vi) The provision of section 375 IPC gets attracted only if sexual assault is upon a woman and in this case, it is argued

that since the biological sex of the petitioner is not woman, the provisions of Section 375 IPC are not attracted.

8. This Court need not go in a detailed discussion, as to what is sex and what is gender. Sex has its attribute at birth. It is based on biological categorization, whereas gender is social exposure of biological sex. Both are not one, but are interrelated. For long, this binary notion of gender has denied dignity or a life of honour to TGs. The trauma and agony, which TGs' face has been discussed and elaborated in detail in the NALSA's case. Reference has been made to the principles as laid down in the case of Corbett Vs. Corbett, 1970 (2) All ER 33. To make a little more elaboration, it would not be out of place to note as to what was held in the case of Corbett. In the Corbett's case, certain factors were categorized to assess the sexual condition of an individual. It was observed as hereunder:

“I must now deal with the anatomical and physiological anomalies of the sex organs, although I think that this part of the evidence is of marginal significance only in the present case. In other cases, it may be of cardinal importance. All the medical witnesses accept that there are, at least, four criteria for assessing the sexual condition of an individual. These are- (i) Chromosomal factors. (ii) Gonadal factors (i.e., presence or absence of testes or ovaries). (iii) Genital factors (including internal sex organs). (iv) Psychological factors. Some of the witnesses would add- (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are thought to reflect the balance between the male and female sex hormones in the body).”

And the court held as hereunder:-

“.....The question then becomes what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large. Having regard to the essentially heterosexual character of the relationship which is called marriage, the criteria must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage. In other words, the law should adopt, in the first place, the first three of the doctors' criteria, i.e. the chromosomal, gonadal and genital tests, and, if all three are congruent, determine the sex for the purpose of marriage accordingly, and ignore any operative intervention.....”

9. The Corbett case was decided on the basis of 'biological sex' and not 'psychological sex' or 'brain sex'. It was based on biological test. In the NALSA's case, Hon'ble Supreme Court while making reference to cases under various jurisdictions, held as hereunder:-

“37. The judgments referred to above are mainly related to transsexuals, who, whilst belonging physically to one sex, feel convinced that they belong to the other, seek to achieve a more integrated unambiguous identity by undergoing medical and surgical operations to adapt their physical characteristic to their psychological nature. When we examine the rights of transsexual persons, who have undergone SRS, the test to be applied is not the “biological test”, but

the “psychological test”, because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo “gender dysphoria” which may lead to mental disorder. Discrimination faced by this group in our society, is rather unimaginable and their rights have to be protected, irrespective of chromosomal sex, genitals, assigned birth sex, or implied gender role. Right of transgenders, pure and simple, like hijras, eunuchs, etc. have also to be examined, so also their right to remain as a third gender as well as their physical and psychological integrity. Before addressing those aspects further, we may also refer to few legislations enacted in other countries recognizing their rights.”

(Emphasis supplied)

10. Hon’ble Supreme Court in the NALSA’s case did not accept principle of ‘biological test’, rather preferred to follow the psyche of the person in determining sex and gender. It has been categorically held in paragraph 81, which is as hereunder:-

“81. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize 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 Indian Penal Code, for example, Section 8, 10, etc. and also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity

of Hijras/Transgenders in the various legislations denies them equal protection of law and they face wide-spread discrimination.”

(emphasis supplied)

11. What is important to note here is that the Hon’ble Supreme Court did not consider ‘psychological test’ in determining gender alone of a person, but also for determining sex of the person, ‘Psyche test’ has been upheld by the Hon’ble Supreme Court instead of ‘biological test’. If a person psychologically feels different than what his “biological sex” is and determines himself as per his psyche, his sex would be determined accordingly, in view of the judgment in the NALSA’s case. In paragraph 135(2) of the NALSA’s case, Hon’ble Supreme Court has given unfettered right to the TG persons’ to determine their gender. It is as hereunder:-

“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.”

(Emphasis supplied)

12. It is true that transgender persons (Protection of Rights) 2019, Bill is in making and it is also true that there is no statute, which would prescribe any procedure for any declaration confirming the self-identified gender or sex of TG persons’, but the question is as to whether in the absence of any such statute, the directions in the case of NALSA will not come into force? What is the effect of NALSA’s case? While rendering its judgment,

Hon'ble Supreme Court was conscious of this situation when in paragraph 53, it was held as hereunder:-

“53.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.....”

(emphasis supplied)

And in paragraph 60 of the judgment, Hon'ble Court observed as hereunder:-

“60. The 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 recognized and followed, which has sufficient legal and historical justification in our country.”

(Emphasis supplied)

13. There is no enactment, which would prescribe any procedure to confirm the determined sex and gender of TGs. Hon'ble Supreme Court has upheld the right of TGs' to determine sex and gender. Till any legislation is made, definitely the law laid down by the Hon'ble Supreme Court would be the law of the land. It will have, if not more, equal force of an enactment that might be made by legislature. TGs' right to determine their gender and sex cannot wait for any legislation now. It is the law

declared by the Hon'ble Supreme Court. If any statute is to be awaited for this purpose it would be further adding to the agony of TGs'. It would be nothing but denying TGs' the fullest form of right to life and liberty and most important it would be defiance of the directions of the Hon'ble Supreme Court in NALSA's case.

14. Not only this, the judgment in NALSA's case has been upheld by the Hon'ble Supreme Court in another landmark judgment, of right to privacy, in the case of K.S. Puttaswamy (*supra*). In paragraph 96 of the judgment, it was observed as hereunder:-

“96. NALSA indicates the rationale for grounding of a right to privacy in the protection of gender identity within Article 15. The intersection of Article 15 with Article 21 locates a constitutional right to privacy as an expression of individual autonomy, dignity and identity. NALSA indicates that the right to privacy does not necessarily have to fall within the ambit of any one provision in the chapter on fundamental rights. Intersecting rights recognise the right to privacy. Though primarily, it is in the guarantee of life and personal liberty under Article 21 that a constitutional right to privacy dwells, it is enriched by the values incorporated in other rights which are enumerated in Part III of the Constitution.”

15. In the case of Navtej Singh Johar (*supra*), while discussing the judgment in the NALSA's case, Hon'ble Supreme Court observed in paragraph 10 as hereunder:-

“10. The aforesaid judgment, as is manifest, lays focus on inalienable “gender identity” and correctly connects with human rights and the

constitutionally guaranteed right to life and liberty with dignity. It lays stress on the judicial recognition of such rights and an inextricable component of Article 21 of the Constitution and decries any discrimination as that would offend Article 14, the “fon juris” of our Constitution.”

16. In the case of Arun Kumar and another Vs. Inspector General of Registration and Others, WP(MD) No.4125 of 2019, the Madras High Court, Madurai Bench has, *inter alia*, held that in the light of the march of law, the expression ‘bride’ occurring in Section 5 of the Hindu Marriage Act, 1955 will have to include within its meaning not only a woman, but also a transwoman.

17. In view of the foregoing discussion, this Court is of the view that after the judgment of Hon’ble Supreme Court in the NALSA’s case, petitioner’s right to determine her sex and gender has to be respected and honoured. The petitioner has identified herself as a ‘female’, therefore, ‘she’ has to be treated as a female for all the purposes, whatsoever without any further confirmation from any authority.

18. The petitioner is a ‘female’.

19. The writ petition is allowed accordingly.

(Ravindra Maithani, J.)