

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION (STAMP) NO.104 OF 2021

Anjali Guru Sanjana Jaan,
Age : 42 years, Occupation : Household,
R/o Bhadli Bk., Tq. & Dist.Jalgaon.

...PETITIONER

-VERSUS-

1. The State of Maharashtra.
Through its Principal Secretary,
Rural Development Department,
Mantralaya, Mumbai.
2. The State Election Commission,
Amarprem Building,
Near Gokhale College,
Shimpoli Road, Mumbai.
3. The District Collector,
Jalgaon.
4. The Tahasildar,
Jalgaon.
5. The Returning Officer,
Elections to Grampanchayat, Bhadli Bk.,
Taluka and District Jalgaon.

...RESPONDENTS

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Shri A.P. Bhandari, Advocate for the petitioner.
Shri S.B.Pulkundwar, AGP for respondent Nos.1, 3 and 4.
Shri A.B. Kadethankar, Advocate for respondent Nos.2 and 5.

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CORAM: RAVINDRA V. GHUGE, J.

**DATE :- 02nd January, 2021
(VACATION COURT)**

Oral Judgment :

1. Not on the Board. Mentioned. Taken on the Production Board.
2. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
3. The petitioner, undisputedly a transgender, is aggrieved by the rejection of her nomination form by the Returning Officer vide the impugned order dated 31.12.2020. The petitioner has decided to choose the female gender and hence, had tendered her nomination form for contesting the election from the ward reserved for women-general category. The reason for rejecting the nomination form is that the petitioner is a transgender. It is stated that there is no reservation for the transgender category in the present Village Panchayat elections.
4. The petitioner relies upon Section 4(2) of the Transgender Persons (Protection of Rights) Act, 2019 and also places reliance upon the judgment delivered by the Honourable Supreme Court in the matter of ***National Legal Services Authority vs. Union of India and others, AIR 2014 SC 1863 : (2014) 5 SCC 438.***
5. The learned AGP and the learned advocate representing the State Election Commission submit that they would not argue beyond the provisions of law and would not make submissions, which are contrary to the law laid down by the Honourable Supreme Court in ***National Legal***

Services Authority (supra). It is stated that the Returning Officer is likely to be unaware of this law and must have been in a dilemma while deciding the issue of acceptance of the nomination form of the petitioner.

6. The learned advocate for the petitioner makes a categorical statement, on instructions, that this is the first occasion wherein, the petitioner has opted for a right to a self perceived gender identity and has selected a female gender for all purposes during her lifetime. He submits that the petitioner, henceforth, shall not switch over to the male gender under any circumstances anytime in future during her lifetime.

7. The Honourable Supreme Court has dealt with the issue of the rights of the transgender persons in ***National Legal Services Authority (supra)*** and has observed in paragraphs 53, 61, 66, 67 and 71 to 75 as under:-

“53. *Indian Law, on the whole, only recognizes 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 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. Constitution makers could not have envisaged that each and every human activity be guided, controlled, recognized 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.”

“61. 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.”

“66. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. 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 generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. 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 or female."

"67. 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."

"71. Principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.

72. Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and

recognize those rights.

Article 21 and the transgenders.

73. *Article 21 of the Constitution of India reads as follows:
“21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law.”*
Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person’s life meaningful. Article 21 protects the dignity of human life, one’s personal autonomy, one’s right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 (paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes “expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings”.
74. *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 right to dignity and freedom guaranteed under our Constitution.*
75. *Article 21, as already indicated, guarantees the protection of “personal autonomy” of an individual. In Anuj Garg v. Hotel Association of India (2008) 3 SCC 1 (paragraphs 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.*

(Emphasis supplied)

8. Finally, the Honourable Supreme Court has concluded in paragraphs 131 to 135 as under :-

- “131. *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.*
132. *By recognizing TGs as third gender, this Court is not only upholding the rule of law but also advancing justice to the class, so far deprived of their legitimate natural and constitutional rights. It is, therefore, the only just solution which ensures justice not only to TGs but also justice to the society as well. Social justice does not mean equality before law in papers but to translate the spirit of the Constitution, enshrined in the Preamble, the Fundamental Rights and the Directive Principles of State Policy into action, whose arms are long enough to bring within its reach and embrace this right of recognition to the TGs which legitimately belongs to them.*
133. *Aristotle opined that treating all equal things equal and all unequal things unequal amounts to justice. Kant was of the view that at the basis of all conceptions of justice, no matter which culture or religion has inspired them, lies the golden rule that you should treat others as you would want everybody to treat everybody else, including yourself. When Locke conceived of individual liberties, the individuals he had in mind were independently rich males. Similarly, Kant thought of economically self- sufficient males as the only possible citizens of a liberal democratic state. These theories may not be relevant in today’s context as it is perceived that the bias of their perspective is all too obvious to*

us. In post-traditional liberal democratic theories of justice, the background assumption is that humans have equal value and should, therefore, be treated as equal, as well as by equal laws. This can be described as 'Reflective Equilibrium'. The method of Reflective Equilibrium was first introduced by Nelson Goodman in 'Fact, Fiction and Forecast' (1955). However, it is John Rawls who elaborated this method of Reflective Equilibrium by introducing the conception of 'Justice as Fairness'. In his 'Theory of Justice', Rawls has proposed a model of just institutions for democratic societies. Herein he draws on certain pre-theoretical elementary moral beliefs ('considered judgments'), which he assumes most members of democratic societies would accept. "[Justice as fairness [...]] tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretations. Justice as fairness is a political conception in part because it starts from within a certain political tradition. Based on this preliminary understanding of just institutions in a democratic society, Rawls aims at a set of universalistic rules with the help of which the justice of present formal and informal institutions can be assessed. The ensuing conception of justice is called 'justice as fairness'. When we combine Rawls's notion of Justice as Fairness with the notions of Distributive Justice, to which Noble Laureate Prof. Amartya Sen has also subscribed, we get jurisprudential basis for doing justice to the Vulnerable Groups which definitely include TGs. Once it is accepted that the TGs are also part of vulnerable groups and marginalized section of the society, we are only bringing them within the fold of aforesaid rights recognized in respect of other classes falling in the marginalized group. This is the minimum riposte in an attempt to assuage the insult and injury suffered by them so far as to pave way for fast tracking the realization of their human rights.

134. *The aforesaid, thus, are my reasons for treating TGs as 'third gender' for the purposes of safeguarding and enforcing appropriately their rights guaranteed under the Constitution. These are my reasons in support of*

our Constitution to the two issues in these petitions.

135. *We, therefore, declare:*

135(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.*

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

135(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.*

135(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.*

135(7) *Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.*

135(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.*

135(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.”*

(Emphasis supplied)

9. The Government of India has introduced the Transgender Persons (Protection of Rights) Act, 2019 and has permitted a transgender person to have a right to be recognized and such transgender is permitted to have a right to self perceived gender identity. In the present case, the petitioner has opted for the female gender as her self perceived gender identity and makes a solemn statement, which is recorded as the statement made to the Court, that henceforth in her lifetime she would not switch over to the male gender driven by opportunism and would continue to opt for the female gender, in future, save and except if there is a reservation provided for transgender in public life.

10. It is quite apparent that the Returning Officer was handicapped insofar as the knowledge of law was concerned, while deciding the fate of the nomination form of the petitioner. No other contesting candidate has taken any objection against the petitioner. It is the Returning Officer, who was circumspect about the nomination form of the petitioner and hence, opted to reject the form believing that the petitioner can neither be a male nor a female and the ward has been reserved for women general category. There is no ward reserved for the transgender.

11. In view of the above, this Writ Petition is allowed. The impugned order is quashed and set aside. Since the nomination form of the petitioner is otherwise complete in all respects, the same stands

accepted and she is permitted to contest the election from the ward and category which she has opted for in her nomination form.

12. Rule is made absolute in the above terms.

13. Since this judgment has been dictated in the open court in the late hours of the day, and since it is informed that the internet facility in the High Court has collapsed momentarily, the parties need not wait for this judgment to be uploaded on the High Court website and shall proceed to act on this order.

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(RAVINDRA V. GHUGE, J.)