IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.4779 of 2022

(In the matter of an application under Articles 226 and 227 of the Constitution of India.)

Kantaro Kondagari @ Kajol .... ***Petitioner***

-versus-

State of Odisha and others .... ***Opposite Parties***

Appeared in this case:-

For Petitioner : Mr. Omkar Devdas, S. Dash, A. Suhail and P. Ray

For Opp. Parties : Mr. K.K. Nayak, Learned Addl. Standing Counsel

Appeared in this case:-

CORAM:
JUSTICE A.K. MOHAPATRA

JUDGMENT

Date of hearing : 13.05.2022 / date of judgment : 20.05.2022

A.K. Mohapatra, J.

1. This matter is taken up through Hybrid Arrangement (Virtual /Physical Mode).

2. Heard Mr. Omkar Devdas learned counsel for the petitioner as well as Mr. K.K.Nayak learned counsel for the State. Perused the records.

3. The present writ petition has been filed by the petitioner with a prayer for a direction to the opposite parties to sanction family pension in favour of the petitioner, who is a transgender (women) and unmarried daughter of late Balaji Kondagari within a stipulated period of time.

4. The gist of the petitioner's case, in brief, is that father of the petitioner late Balaji Kondagari was a Government servant working in Rural Development Department under Executive Engineer RW Division, Rayagada. After the death of late Balaji Kondagari, his wife Smt. Binjama Kondagari was sanctioned and disbursed with the family pension. On 11.07.2020, Smt. Binjama Kondagari expired due to old age related health issues. Thereafter the present petitioner applied for family pension under Rule 56 of the Odisha Civil Services (Pension) Rules, 1992 for sanction of family pension in her favour to the Executive Engineer RW Division, Rayagada. It is further stated that the present petitioner and her sister come under the category of unmarried daughter, widow or divorced daughter and as such eligible to get family pension.

5. So far Rule 56(1) Odisha Civil Services (Pension) Rules, 1992 is concerned, the same provides for pension to specific class of family members of deceased Government employee entering into Government service and was holding a post in a pensionable establishment on or before 01.01.1964 and family pension to specific class of family members of the deceased Government servant, who was a Government servant and retired / died on or before 31.12.1963. Further the Pension Rules, 1992 under Rule 56(5)(d) provides that family pension is also payable in case of any unmarried daughter even after attaining the age of 25 years till her marriage or death whichever is earlier subject to condition that the monthly income of the daughter does not exceed Rs.4,440/- per month from employment in Government, semi

Government, statutory bodies, corporation, private sector, self-employment shall be eligible to receive family pension.

6. On perusal of the pleadings in the writ petition, it was also found that the Rural Development Department/Executive Engineer, RW Division, Rayagada vide letter No.2855 dated 29.06.2021 written to the Principal Accountant General (A&E), Odisha, Bhubaneswar after scrutinizing the application of the present petitioner found her eligible to receive family pension and accordingly recommended the case of the petitioner for sanction of family pension amounting to Rs.8,995+TI per month in favour of the petitioner. The said letter further reveals that the family pension shall be payable to the petitioner w.e.f. 12.07.2020 and shall be subject to the provisions of Rule 56(5) of the Odisha Civil Services (Pension) Rules, 1992 and further it was stipulated that the petitioner shall get family pension till her marriage or death whichever is earlier. On further careful scrutiny of the letter under reference it is found that the authority has recommended the case knowing fully well that the petitioner is a transgender (daughter).

7. It is also contended by leaned counsel for the petitioner that the authorities have not considered the application of the petitioner for grant of family pension although the Rule 56 of Orissa Civil Services (Pension) Rules, 1992 which provides for payment of family pension to the unmarried daughter. It is also submitted by learned counsel for the petitioner that since the petitioner belongs to transgender community, the authorities are treating the petitioner in a discriminatory manner and not sanctioning the family pension as is due and admissible to her after the death of her parents. He further submits that such conduct of the authorities are in gross violation of the pension rules as provided under rule 56(5)(d) which states that in case of an unmarried daughter even

after attaining the age of 25 years till her marriage or death whichever is earlier subject to condition that the monthly income of the daughter does not exceed four thousand four hundred and forty per months from the employment in Government, Semi Government, statutory bodies, corporation, private sector, self-employment shall be eligible to receive family pension.

8. It is further contended by leaned counsel for the petitioner that the petitioner is a transgender (Women) and vide certificate dated 02.12.2021 issued by the District Magistrate under Rule 5 of the Transgender Persons (Protection of Rights) Rules, 2020 and read with Section 6 of the Transgender Persons (Protection of Rights) Act, 2019 has been given legal recognition as being a transgender (women). The authorities have ealt the case of the petitioner in a discriminatory manner and they have failed to apply the provisions of law as provided under the aforesaid Rules, 2020.

9. In course of argument, learned counsel for the petitioner relies upon the judgment of the Supreme Court of India in the case of ***NALSA vrs. Union of India*** : reported in (2014) 5 SCC 438 wherein the Hon'ble Supreme Court of India has recognized the right of the transgender community as citizens of the country at par with other citizens. It is alleged by learned counsel for the petitioner that the petitioner has been treated in a way which is in violation of Articles 14 and 21 of the Constitution of India.

10. In the judgment of the Hon'ble Supreme Court in **NALSA vrs. Union of India** (supra), has observed that Article 1 of the Universal Declaration of human rights, 1948, states that all human being are born free and equal in dignity and rights. Article 3 of the Universal

Declaration of Human Rights states that everyone has a right to life, liberty and security of person. Article 6 of the International Covenant on Civil and Political Rights, 1966 affirms that every human being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life. Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights, 1966 provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment/ punishment. Further it has also been observed in the aforesaid judgment with reference to Paragraph-21 of the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (dated 24.01.2008) specifically deals with protection of individuals and groups made vulnerable by discrimination or marginalization. Para-21 of the Convention states that State are obliged to protect from torture or ill-treatment all person regardless of sexual orientation or transgender identity and to prohibit, prevent and provide redress for torture and ill-treatment in all contests of State custody or control. Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights state that no one shall be subjected to "arbitrary or unlawful interference with his privacy, family, home or correspondence." The aforesaid principles have been adopted by many countries including India. Further, the above referred principles adopted by many countries are aimed to protect human rights of transgender people since it has been noticed that transgenders/transsexuals often face serious human rights violations, such as harassment in workplace, hospital, places of public conveniences, marketplaces, theatres, railways stations, bus-stands and so on.

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In the aforesaid reported judgment of Hon'ble Supreme Court of India in the case of **NALSA** (supra), the Hon'ble Supreme Court has also analyzed Article-14 vis-à-vis rights of transgender in India in Paragraph-61 of the judgment reported in (2014) 5 SCC 438, which is quoted herein below:-

xx xx xx xx

"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 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. Hiraj/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."

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11. Further in the context of discriminatory and arbitrary treatment meted out to transgender citizen of India, the Hon'ble Apex court in paragraph-67 in the case of **NALSA vrs Union of India** (supra) has observed as follows:-

xx xx xx xx

"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, culture 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."

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12. In the context of the right of a person to have the gender of his/her choice, the Hon'ble Supreme court in the case of **NALSA** (supra) in paragraph-106 has observed as follows:-

xx xx xx xx

> "106. The basic principle of the dignity and freedom of the individual is common to all nations, particularly those having democratic set-up. Democracy requires us to respect and develop the free spirit of human being which is responsible for all progress in human history. Democracy is also a method by which we attempt to raise the living standard of the people and to give opportunities to every person to develop his/her personality. It is founded on peaceful co-existence and cooperative living. If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspect of self-determination, dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity."

xx xx xx xx

13. After analyzing the factual scenario and the law both the International and India, the Hon'ble Supreme Court of India in paragraph-135, which contains the declaration of law relating to the transgender in India, specifically in 135.2, which is relevant for the purpose of the present case has been quoted herein below:-

xx xx xx xx

"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."

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14. At this stage, learned counsel for the petitioner submits that the family pension has already been sanctioned by the competent authority in favour of the petitioner vide letter No.2855 dated 29.06.2021 under Annexure-3. However, he submits that the Principal Accountant General (A&E), Odisha, Bhubaneswar-Opposite Party No.5 has not been taking any step for disbursal of the family pension in favour of the petitioner. It is further contended that the petitioner has already approached the Opposite Party No.5 by filing a representation which was received by the Executive Engineer, Rural Works Division, Rayagada-Opposite Party No.4 on 31st of March, 2021.

15. Learned counsel for the State, on the other hand, submits that it appears that the matter is not processed and the same is pending before the Accountant General (A&E), Odisha, Bhubaneswar for consideration. He further submits that in the event this Court directs the authorities to consider and disburse the family pension within a stipulated period of time as the competent authority i.e. Ex. Engineer, R W division has already recommended the case of the petitioner, the same shall be considered by the opp. Parties in the light of the law laid down by the Hon'ble Supreme Court of India.

16. In view of the aforesaid factual position and the analysis of law laid down by the Hon'ble Supreme Court of India and taking into

consideration the submissions made by the respective parties, this Court is of the considered view that the petitioner as a transgender has every right to choose her gender and accordingly, she has submitted her application for grant of family pension under Section 56(1) of Odisha Civil Services (Pension) Rules, 1992. Further such right has been recognized and legalized by judgment of the Hon'ble Apex Court in **NALSA's Case** (supra) and as such, the law laid down by the Hon'ble Supreme Court is binding on all. Therefore, the present writ petition filed by the petitioner deserves to be allowed and the same is hereby allowed. The Principal Accountant General (A&E), Odisha, Bhubaneswar (Opposite Party No.5) is directed to process the application of the petitioner as expeditiously as possible preferably within a period of six weeks from the date of communication of certified copy of this order. The Opposite Party No.5 is further directed to immediately calculate, sanction and disburse the family pension as is due and admissible to the petitioner within the aforesaid stipulated period of time.

Accordingly, writ petition is allowed. However, there shall be no order as to cost.

(A.K. Mohapatra)
Judge

Jagabandhu.P.A.