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2024 SCC OnLine Mad 1624 : (2024) 3 Mad LJ 684

In the High Court of Madras

(BEFORE G.K. ILANTHIRAIYAN, J.)

Rakshika Raj ... Petitioner;

Versus

State of Tamil Nadu, represented by the Chief Secretary and Others ... Respondents.

W.P. No. 6967 of 2022 and W.M.P. No. 7002 of 2022

Decided on April 8, 2024

Advocates who appeared in this case :

For Petitioner : Ms. N.S. Tanvi

For Respondents : Mr. E. Vijay Anand Additional Government Pleader

Prayer: Writ Petition filed under Article 226 of Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus, to call for the records and quash G.O.Ms. No. 28, Backward Classes, Most Backward Classes & Minorities Welfare (BCC) Department dated 06.042015 issued by the 2n[d] respondent and consequently direct the respondents to provide for horizontal reservation to the transgender community in compliance of the judgment of the Hon'ble Supreme Court of India in *NALSA* v. *Union of India*, (2014) 5 SCC 438.

The Order of the Court was delivered by

G.K. ILANTHIRAIYAN, J.:— This Writ Petition has been filed challenging the G.O.Ms. No. 28, Backward Classes, Most Backward Classes & Minorities Welfare (BCC) Department dated 06.04.2015 issued by the second respondent, thereby included in the list of Most Backward Classes “Transgender or Eunuch (Thirunangai or Aravani) in SI. No. 36C of Schedule IV in G.O.Ms.85 Backward Classes, Most Backward Classes in the State for reservation of seats in Educational Institutions and appointments or posts in the services under the State form the date of issue of the order.

2. Heard the learned counsel on either side and perused the materials available on record.

3. The petitioner is a Transgender and had registered with the Tamil Nadu Transgender Welfare Board. She was also issued with an identity card. She is qualified with B.Sc Nursing and got registered with the Tamil Nadu Nurses and Midwives Council. Though the reservation was accorded for transgender, it was provided under the category Most Backward Class (herein after called as “MBC”) and provided vertical reservation, treating the transgender community as a caste, instead of

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horizontal reservation by treating transgender as gender identity. The Government Order impugned in this writ petition was passed on the basis of the recommendation issued by the Tamil Nadu Backward Classes Commission and the Judgment of the Hon'ble Supreme Court of India, in the case of *NALSA* v. *Union of India*, (2014) 5 SCC 438 and the Hon'ble Supreme Court of India recognized the legal identification for the transgender as third gender and directed the State to take necessary steps to treat the transgender community as social and educationally backward classes of citizens.

4. Thereafter, G.O.Ms. No. 28, Backward Classes, Most Backward Classes & Minorities Welfare (BCC) Department dated 06.04.2015 passed for the following reasons:—

"(i) The Hon'ble Supreme Court, after hearing the State has taken judicial notice of their social and educational backwardness.

(ii) Transgenders are most backward in educational, social and economic fronts in the state.

(iii) Transgenders are comparable to orphans; their caste and community from which they emerge cannot be fixed, in general, since the vedic period.

(iv) They (transgenders) were identified as a criminal tribe, as observed by the Supreme Court and hence fit to be treated on par with Most Backward Classes.

(v) They are far worse than Scheduled Castes but without the stigma of traditional practice of untouchability.

(vi) Their present social, educational and economic status is likely to improve by their inclusion in the Most Backward Classes."

5. It has been challenged on the following grounds:—

"(a) It is in violation of Articles 14, 15, 16, 19 and 21 of the Constitution of India.

(b) It is in violation of the Judgment of the Hon'ble Supreme Court of India in the case of NALSA *v.* Union of India, *(2014) 5 SCC 438 which recognized that the transgenders are a third gender identity.*

(c) It is manifestly arbitrary because it is treating a gender as a caste.

(d) It has no logical or legal basis. It is also a classic case of unequals being treated equally thereby violating Article 14 of the Constitution of India.

(e) The Hon'ble Supreme Court of India held that when any legislation by the State is manifestly arbitrary, it is in violation of Article 14 of the Constitution of India and it has to be struck down.

(f) Those who identify as transgender will be treated as an MBC man.

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Treatment of all transgenders as men is discriminatory.

(g) The petitioner belongs to Scheduled Caste and because of the impugned Government Order, she will now be treated as an MBC candidate. Therefore, it is in violation of Articles 14, 16 and 21 of the Constitution of India.

(h) As directed by the Hon'ble Supreme Court of India the State of Karnataka rightly provided 1% horizontal reservation to transgenders in the State."

6. A perusal of the counter filed by the respondents and the submissions made by the learned Additional Government Pleader appearing for the respondents revealed that in the light of the Judgment passed by the Hon'ble Supreme Court of India in the case of *NALSA* v. *Union of India*, (2014) 5 SCC 438, the second respondent passed an order which is impugned in this writ petition and ordered to provide horizontal reservation to the transgender community and added in the list of MBC and accordingly amended and they are eligible to avail 20% reservation provided for MBC and Denotified communities in the State.

7. Subsequently, the Government passed another order in G.O.Ms. No. 90, Social Welfare and Nutritious Meal Programme Department, dated 22.12.2017 and clarified that the third gender candidates who do not possess any community certificate, may be considered under MBC as per G.O.Ms. No. 28, Backward Classes, Most Backward Classes and Minorities Welfare Department, dated 06.04.2015. The third gender candidates who belong to Scheduled Caste/Scheduled Caste (Arunthathiyar)/Scheduled Tribe communities and possess community certificate may be considered as per their respective community. The third gender candidates who belong to the communities other than Scheduled Caste/Scheduled Caste (Arunthathiyar)/Scheduled Tribe communities and possess community certificate may be considered as per their own community as MBC whichever is advantageous to them as per their option and once the individual exercises option for community selection it should be crystallized and this option should not be changed in future. In view of this order, the petitioner may not have any grievance and she can very well apply as per her community.

8. The learned Additional Government Pleader appearing for the respondents relied upon the order passed by the Hon'ble First Bench of this Court in W.P. No. 31091 of 2013 in respect of direction sought by the transgender woman seeking permission to appear in all the examination under the category of female and transman under the category of male and create a separate class or group for transgender people in all education and employment opportunities. The Hon'ble First Bench of this Court, by an order dated 05.07.2016, directed the respondents to look into the issue in consultation with all the relevant

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departments and take a decision in this behalf within a period of six months, on the ground that instead of giving reservation as part of MBC category, it may be useful by giving a percentage or a post-based reservation, i.e., at least one post be made available in different categories.

9. He also relied upon the interim order passed by the Hon'ble First Bench of this Court in W.P. Nos. 6052 of 2019 and batch dated 09.01.2024. This Court directed the State to consider the request to provide horizontal reservation to the transgenders.

10. A perusal of the Judgment of the Hon'ble Supreme Court of India reported in (2014) 5 SCC 438 in the case of *National Legal Services Authority* v. *Union of India*, in which the transgenders sought for recognition of their identity as third gender over and above male and female. The non-recognition of the identity as a third gender, denies them the right of equality before the law and equal protection of law guaranteed under Article 14 of the Constitution and violates the rights guaranteed to them under Article 21 of the Constitution of India. The relevant portion is extracted hereunder:—

> *"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*

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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.

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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.

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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.

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76. Self-identified gender can be ether male or female or a third gender. Hijras are identified as persons of third gender and are not identified either as male or female. Gender identity as already indicated, refers to a person's internal sense of being male, female or a transgender, for example Hijras do not identify as female because of their lack of female genitalia or lack of reproductive capability. This distinction makes them separate from both male and female genders and they consider themselves neither man nor woman, but a "third gender". Hijras, therefore, belong to a distinct soco-religious and cultural group and have, therefore, to be considered as a "third gender, apart from male and female. State of Punjab has treated all TGs as male which is not legally sustainable. State of Tamil Nadu has

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taken lot of welfare measures to safeguard the rights of Tgs, which we have to acknowledge. Few States like Kerala, Tripura, Bihar have referred TGs as "third gender or sex". Certain States recognize them as "third category". Few benefits have also been extended by certain other States. Our neighbouring countries have also upheld their fundamental rights and right to live with dignity.

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82. Article 14 has used the expression "person" and the 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."

Finally the Hon'ble Supreme Court of India declared as follows:—

"(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 ctizens 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-survellance 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.

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(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."

11. Thus, it is clear that there is gender right to decide their self-identified gender as male, female or third gender. Accordingly, both the State and Central Governments were directed 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. Despite such clear determination that transgender identity is a gender identity, the respondents ought not to have treated the transgender as caste under MBC category. As per the impugned order, if the petitioner choose to assert her identity as a transgender person, she has to forego the constitutional protections which she as a Scheduled Caste person. Therefore, it is manifestly arbitrary. Like every other person in India, the degree of discrimination faced by an individual is an intersection of their gender identity and caste identity. The discrimination faced by a Dalit woman is the result of intersecting identities of being a woman from the Dalit caste. This will be lesser than the discrimination faced by an upper caste woman. Similarly, the discrimination faced by a transgender Dalit person is worse than the discrimination faced by an upper caste transgender person. Therefore, any reservation provided to the transgender will not be effective unless this intersection of these identities is addressed.

12. Though subsequent Government Order was passed by the respondents in G.O.Ms. No. 90, Social Welfare and Nutritious Meal Programme Department, dated 22.12.2017, the grievance of the petitioner was not addressed. Further, the implementation of the Judgment passed by the Hon'ble Supreme Court of India has not been done properly. As declared by the Hon'ble Supreme Court of India, transgender is a third gender identity and they are entitled for reservation. Therefore, it is a gender identity and only horizontal reservation can be granted to give effect to the directions issued by the Hon'ble Supreme Court of India.

13. As per G.O.Ms. No. 90, Social Welfare and Nutritious Meal Programme Department, dated 22.12.2017, it provides as follows:—

"a. Transgenders who do not possess any community certificate may be considered under MBC.

b. Transgenders who belong to SC/SC (Arunthathiyar)/ST

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communities will be considered as per their respective community.

c. *Transgenders who belong to communities other than SC/SC(A)/ST and possess community certificate will be considered as per their own community or as MBC whichever is advantageous to them.*

d. *Those "third gender candidates" who identify as "female" can be considered as against 30% reservation for women and for the 70% General Category reservation.*

e. *Those "third gender candidates who identify as male or third gender can compete in the 70% General Category."*

14. Thus, a trans person will be classified as MBC and if they belongs to SC/SC (Arunthathiyar)/ST, they will get the benefit of their community certificate instead of being MBC. However, in both these scenarios of being either MBC or SC/SC (Arunthathiyar)/ST, the trans person will have to be clubbed with either the women of that class or the men of that class. Hence, they don't get protection for their transgender identity. That apart, G.O.Ms. No. 90 Social Welfare and Nutritious Meal Programme Department, dated 22.12.2017 was provided by way of executive instructions. The implementation of an Act cannot be limited by way of executive instructions. Therefore, when the amendment to the Act does not restrict the classification to trans persons belonging to communities other than SC/SC (Arunthathiyar)/ST, it cannot be limited by way of G.O.Ms. No. 90 Social Welfare and Nutritious Meal Programme Department, dated 22.12.2017.

15. Further, as held by the Hon'ble Supreme Court of India, the discrimination against the transgender community is a violation of the right to equality under Article 15(1) and 16(1), since there can be no discrimination on the basis of sex. Transgender community as a whole has been discriminated and is thus a socially and educationally backward class and hence, States were directed to provide reservation to the third gender.

16. Once the transgender identity is a gender identity like man or woman, it is manifestly arbitrary and in violation of Article 14 to give woman horizontal reservation and treat transgender persons similar to men. Therefore, if once gender identity is given horizontal reservation, it follows that the transgender communty, being a socially and educationally backward community discriminated on the basis of gender identity, should also be entitled to similar reservation. In fact, the State of Karnataka implemented the Judgment passed by the Hon'ble Supreme Court of India and provided 1% horizontal reservation for all transgenders persons in public employment and accordingly, amended the Karnataka Public Servants Conditions of Service Act to

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provide for 1% horizontal reservation across all community reservations like SC, ST, MBC etc.,

17. In view of the above discussion, the impugned Government Order is liable to be struck down for being manifestly arbitrary and thereby, violative of Article 14, 15, 16, 19 and 21 of Constitution of India. Accordingly, G.O.Ms. No. 28, Backward Classes, Most Backward Classes & Minorities Welfare (BCC) Department dated 06.04.2015 issued by the second respondent, is hereby quashed. The second respondent is directed to provide horizontal reservation to the transgender community in compliance of the Judgment of Hon'ble Supreme Court of India in *NALSA* v. *Union of India*, (2014) 5 SCC 438, within a period of twelve weeks from the date of receipt of a copy of this order.

18. Accordingly, this writ petition stands allowed. Consequently, connected Miscellaneous petition is closed. There shall be no order as to costs.

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