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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.10.2022

CORAM

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P. No.26506 of 2022 and
W.M.P.Nos.25572 & 25574 of 2022

S.Tamilselvi ... Petitioner

Vs.

1.The Secretary to Government,
Health and Family Welfare Department,
St. George Fort,
Chennai – 600 009.

2.The Director of Medical Education,
The Directorate of Medical Education,
Kilpauk, Chennai – 600 010.

3.The Secretary,
(Selection Committee)
Directorate of Medical Education,
No.162, Periyar E.V.R. High Road,
Kilpauk, Chennai – 600 106. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorarified Mandamus calling for the records on the file of the 3rd respondent in prospectus issued for the Post Basic (Nursing) Course and Post Basic Diploma in Psychiatry Nursing Course for the academic year 2022-2023 and quash the same as illegal as far as not categorizing transgenders under special category and further

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direct the 3rd respondent to admit the petitioner in Post Basic B.Sc.(Nursing) Course for the academic year 2022-2023 under special category as transgender.

For Petitioner : Mrs.Reshmi Christy

For Respondents : Mr.U.M.Ravichandran
Special Govt. Pleader [R1 & R2]
: Ms.M.Sneha
Standing Counsel [R3]

O R D E R

The prayer sought for herein is for a writ of certiorarified mandamus calling for the records on the file of the 3rd respondent in prospectus issued for the Post Basic (Nursing) Course and Post Basic Diploma in Psychiatry Nursing Course for the academic year 2022-2023 and quash the same as illegal as far as not categorizing transgenders under special category and further direct the 3rd respondent to admit the petitioner in Post Basic B.Sc.(Nursing) Course for the academic year 2022-2023 under special category as transgender.

2. The petitioner claims to be a transwomen and claims that she completed SSLC during the academic year 2010-11 and Higher Secondary during the year 2016-17. She also claims that she came to

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know that due to chromosomal aberration that she was drifting towards femininity though being born as a male. When she was crossing the age between 18 to 20, she had completely changed herself into a female without any conscious knowledge. Thereafter she could not concentrate her studies and after her parents coming to know that she transformed to a transgender women she was left in lodge by the parents of the petitioner as they did not accept her owing to social impact. Left with no other alternative than to seek her own clan of transgender, she came to Chennai. Thereafter she underwent sexual re-assignment surgery on 24.06.2015 and ever since then she had been living as a female. After the sex re-assignment surgery, she had changed her name from the erstwhile birth name S.Santhosh Kumar to the present name S.Tamilselvi which was also published in the Tamil Nadu Government Gazette on 08.11.2017.

3. While so, the 3rd respondent issued prospectus for the year 2018-19 for the course of Diploma in Nursing Course for Women. She applied by submitting her application. The petitioner had also applied for the course of Diploma in Nursing Course for Women as a transgender. She has submitted an application under the communal category of MBC also.

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Though communal reservation was provided for the said courses, there was no separate reservations provided horizontally for the third gender viz., transgender. Since the petitioner was not selected, she approached this Court by filing a writ petition in W.P.No.24750 of 2020, where, this Court passed an order on 18.09.2018 directing the respondents therein to keep one seat vacant in Diploma in Nursing Course for Women for the academic year 2018-19 under special category as Transgender.

4. During the pendency of the said writ petition, the respondents therein had given seat for the said course in Government Medical College, Vellore for the year 2018-19 to the petitioner under special category i.e. Transgender. Thereafter, the petitioner completed the said course successfully in 2021.

5. While so, now the 3rd respondent published the prospectus in online for the year 2022-2023 for the course of Post Basic B.Sc. (Nursing) and Diploma in Psychiatry Nursing Course.

6. The petitioner applied for the said course by submitting her application for the course of Post Basic B.Sc. (Nursing).

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7. Since the petitioner applied under MBC quota as she belongs to MBC and 20% seats are earmarked for MBC students, the petitioner was so expecting for her name would be considered and selected for admission based on the marks she obtained in the qualifying examination.

8. However, the respondents published the provisional merit list for 2022-2023 for eligible candidates, however the name of the petitioner had been included in the Female non-service candidates under rank 280.

9. Even though in the year 2018-19 the petitioner, of course pursuant to the orders of this Court, having been considered as third gender viz., Transgender and accordingly she was considered and seat was given and she completed the Diploma course also, after few years now, once again the petitioner's candidature had been considered and placed only as a female candidate and accordingly she has been ranked at 280.

10. Therefore, at this juncture, challenging the said action on the part of the respondents treating the petitioner as only a female candidate

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instead of transgender candidate, the petitioner has approached this Court seeking the aforestated prayer in this writ petition.

11. Heard Mrs.Reshmi Christy, learned counsel appearing for the petitioner, who, by relying upon the earlier orders passed by this Court including the Division Bench judgment of this Court made in W.P.No.15046 of 2015 dated 03.11.2015 in the matter of *K.Prithika Yashini Vs. The Chairman, Tamil Nadu Uniformed Services Recruitment Board*, has submitted that, insofar as the special status to be given to the transgender is concerned, that issue had been considered first by the Hon'ble Supreme Court in the matter of ***National Legal Services Authority Vs. Union of India and others (2014) 5 SCC 438*** followed by the said decision of the Division Bench dated 03.11.2015.

12. Despite these orders having been passed and subsequently so many orders have been passed, once again the petitioner has been treated by the respondents in the present admission to the course concerned as a female candidate and accordingly, she has been placed as a female non-service candidates in the provisional merit list at Sl.No.280.

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13. Otherwise if the petitioner had been treated as Transgender, definitely she would have been in place 1 or atleast place 2 or 3, if any other transgender like the petitioner had applied and in that case the petitioner would have been in a position to get a seat in the course called B.Sc. (Nursing), for which, the petitioner applied under Transgender quota.

14. Since such a quota has not been given and the petitioner has not been treated as Transgender, an order of direction to the respondents to treat the petitioner as Transgender and accordingly calculate her *inter se* merit and she shall be considered in the third category viz., transgender category and on merits the seat to be allotted to the petitioner is to be given. For the said purpose, the petitioner has moved this writ petition, the learned counsel would contend.

15. On the other hand, Mr.U.M.Ravichandran, learned Special Government Pleader appearing for the respondents 1 and 2 would submit that, insofar as the prospectus issued by the respondents is concerned, there has been no special reservation for third gender candidates and the petitioner either has to be treated as a male or female and in the present

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case is concerned, since 40 seats are available for which the present admission process is taken place, out of which 10 seats earmarked for male candidates and 30 seats earmarked for women candidates and out of the 30 seats since the petitioner has to be treated as a female, she has been placed at Sl.No.280 based on the marks she obtained, therefore accordingly her name has been included and list was published.

16. The learned Special Government Pleader would add further that, insofar as the dictum of the Hon'ble Supreme Court reported in *2014 (5) SCC 438* as cited supra followed by the Division Bench judgment cited supra, such a special reservation has not been given to the transgender candidates, because, the transgender candidates are very minimal in number throughout the State. Therefore, if for such transgender category, some reservations are earmarked by the State Government and though the seats are allotted or earmarked for the third gender candidates, if no such applicants come forward to take the seat, then the seat will go a waste and therefore such reservation is not made as per the practice which are in vogue. Therefore the learned Special Government Pleader would submit that, based on the law declared by the Hon'ble Supreme Court as well as the Division Bench of this Court,

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suitable orders can be passed in this case also, based on which, further action would be taken by the respondents.

17. Almost in similar line, Ms.M.Sneha, learned Standing Counsel appearing for the 3rd respondent made submissions.

18. I have considered the said rival submissions made by the learned counsel appearing for the parties and have perused the materials placed before this Court.

19. The issue as to whether the third gender viz., transgender shall be given a special treatment in educational institutions and employment opportunities are concerned, it was first decided the Hon'ble Supreme Court in the matter of *National Legal Services Authority* case (cited supra). The Hon'ble Supreme Court in the said case has given a set of directions to both Centre and State Governments concerned that what action shall be taken to treat the third gender viz., transgender as a special category. The operative portion of the judgment of the Hon'ble Supreme Court in para 135, in fact, has been extracted in the Division Bench judgment in *Prithika Yashini* case (cited supra). The relevant

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portion of the Division Bench judgment dated 03.11.2015 is extracted herein.

> *"3. The difference in the bench mark for recruitment required specification of gender of the candidate as male or female. There was absence of any column for third gender, though this aspect now stands enunciated by the judgment of the Hon'ble Supreme Court in National Legal Services Authority v. Union of India and others, (2014) 5 SCC 438, which carves out the category of the third gender for the purpose of safeguarding and enforcing properly their rights guaranteed under the Constitution. The operative portion of the judgment reads as under:-*
>
> *"135. We, therefore, declare:*
>
> *135.1. Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by 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. The Centre and State Governments are*

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directed to operate separate HIV serosurveilance centres since hijras/transgenders face several sexual health issues.

135.5. The 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. The 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. The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

135.8. The 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. The 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.

136. We are informed an expert committee has already been constituted to make an in-depth study of the problems faced by the transgender community and suggest

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measures that can be taken by the Government to ameliorate their problems and to submit its report with the recommendations within three months of its constitution. Let the recommendations be examined based on the legal declaration made in this judgment and implemented within six months."

4. The aforesaid judgment came to be pronounced on 15.04.2014, while the notification for the present examination is dated 08.02.2015. Thus, one would have expected that the notification could have taken care of the directions contained in the aforesaid judgment, more specifically in paragraphs 135.2 and 135.3. This did not happen."

20. In the same judgment, the Division Bench after having exhaustively discussed the issue has passed the following orders:

"15. We are sure that by the time the next recruitment process is carried out, the respondent would have taken corrective measures for including the third gender as a category.

16. We are, thus, of the view that the petitioner is entitled to be recruited to the post of Sub Inspector and for declaration of her result with the hope that she would carry out the duties with dedication and commitment to advance the cause of other transgenders."

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21. Therefore it was a direction given by the Hon'ble Supreme Court in *National Legal Services Authority* (cited supra), where, a direction was given that 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. Further direction also was given that, 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 appointments.

22. Five years after the said judgment, the Parliament has come forward to enact a law called 'the Transgender Persons (Protection of Rights) Act, 2019 (in short 'The said Act').

23. *Inter alia* in the said Act, Section 4 recognises that a transgender person shall have a right to be recognised as such, in accordance with the provisions of the Act. Thereafter what are the obligations of the Government have been mentioned at Section 8 of the Act and the obligation of educational institutions to provide inclusive

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education to transgender persons has been mentioned at Section 13. A National Council for transgender persons also has been provided under Section 16 to be established and any violation would be punishable one under Section 18 of the Act. The appropriate Government also may frame rules under Section 22.

24. Though the said Act has come into effect with effect from 10.01.2020 and already orders have been passed by the Hon'ble Supreme Court, where, in para 135.3 direction has been given that reservation shall be given in cases of admission in educational institutions and for public appointments, the prospectus which are in question here, though has been issued by the State Government, no such reservation for third gender candidates have been provided.

25. Since there has been reservation only for female and male candidates, the 3rd respondent Selection Authority has prepared the merit list consisting of male and female and insofar as the petitioner's candidature is concerned, since she has been considered only as a woman based on the certificate issued by the authority concerned, where, the petitioner has undergone the re-assignment surgery from male to female,

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the respondents probably treated the petitioner only as a female instead of transgender.

26. That is the reason why the respondents i.e. the 3rd respondent while issuing the provisional merit list for eligible female non-service candidates included the name of the petitioner at Sl.No.280 based on the *inter se* merit i.e. the mark obtained by her.

27. Had there been the special reservation as directed by the Hon'ble Supreme Court provided to the transgender, certainly the petitioner would have been in a top position and would be in a position to get admission in the course concerned.

28. Assuming that, the reason cited by the respondents for not giving the special reservation for transgender, because, only minimal transgenders are living in the State and therefore if a particular percentage of seats for transgender category is reserved, sometimes that may not be taken by the transgender for want of candidates is concerned, atleast a provisional note could have been made that, even though special reservation has not been made horizontally for transgender candidates if

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there is any transgender candidate who makes application and would be otherwise eligible to be considered on merits that is the minimum eligibility mark obtained by the transgender candidate, that candidate would be treated as a special candidate under the special category of transgender or third gender and accordingly transgender candidate would be considered for admission. Atleast this kind of special note could have been appended to the notifications or prospectus issued by the respondent, even that kind of special note was missing in the said notification/prospectus.

29. It is also to be noted that, followed by the judgment of the Hon'ble Supreme Court referred to supra as well as the Division Bench judgment, subsequently, in the very case of the petitioner itself for 2018-19 admission some directions have been given by this Court to reserve one seat in the transgender category as a special reservation and in that seat, the petitioner had been admitted and she completed the course.

30. When that being so, the non-inclusion of the petitioner in the special category meant for transgender for the purpose of calculating the merit for admission to the course of B.Sc. (Nursing) etc., for which the

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present notification was issued, is not a mere omission, it is against the judgments given by the Hon'ble Supreme Court as well as this Court and also against the provisions of the 2019 Act.

31. Therefore, this Court has no hesitation to hold that the petitioner would be entitled to get a special reservation for third gender viz., transgender category for admission in the said course for which the prospectus in question has been issued by the respondents. In that view of the matter, this Court is inclined to dispose of this writ petition with the following orders:

> That there shall be a direction to the respondents to treat the petitioner as the third gender/transgender and accordingly she shall be placed in a special category i.e. transgender category for the purpose of admission to the course concerned for which the present merit list has been issued by the 3rd respondent only for female and male candidates. Apart from the petitioner, if any other transgender candidate made application for the very said course, a separate category of merit list shall be prepared by the 3rd respondent consisting of only the transgender

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candidates and based on the *inter se* merit among the transgender candidates, if more than one candidate is available i.e. more than the petitioner, based on the in*ter s*e merit admission shall be given to those transgender candidates. The needful as indicated above shall be immediately undertaken by the respondents especially the 3rd respondent and accordingly the selection shall go on including the name of the petitioner under the special category i.e. transgender category.

32. With these directions, this Writ Petition is ordered accordingly. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

11.10.2022

Index : Yes

Speaking order : Yes

Note : Issue order copy on **12.10.2022**

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To

1.The Secretary to Government,
Health and Family Welfare Department,
St. George Fort,
Chennai – 600 009.

2.The Director of Medical Education,
The Directorate of Medical Education,
Kilpauk, Chennai – 600 010.

3.The Secretary,
(Selection Committee)
Directorate of Medical Education,
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Kilpauk, Chennai – 600 106.

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R.SURESH KUMAR, J.

Sgl

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