PRAVIN DASHARATH PANDIT

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 15033 OF 2022

State of Maharashtra & Ors. .. Petitioners
Vs.
Arya Vijay Pujari .. Respondent

WITH
WRIT PETITION NO. 15037 OF 2022

State of Maharashtra & Ors. .. Petitioners
Vs.
Nikita Narayan Mukhyadal .. Respondent

Mr. A. A. Kumbhakoni, Advocate General with Mr. P. P. Kakade, Govt. Pleader with Ms. R. A. Salunkhe, AGP with Ms. Sneha Bhange for petitioners/State.

Mr. Kranti L. C i/by Mr. Kaustubh Gidh a/w Ms. Neha Philip for respondent in WP/15033/2022.

Mr. Shreyas Barsawaade for respondent in WP/15037/2022.

Mr. Vijendra Mishra, Law Officer, DGP Office present.

CORAM: DIPANKAR DATTA, CJ. &
ABHAY AHUJA, J.

DATE : DECEMBER 9, 2022

P.C.:

1. Writ Petition No. 15033 of 2022 and Writ Petition No. 15037 of 2022 are at the instance of the State of Maharashtra through the Principal Secretary, Home Department. In Writ Petition No. 15033 of 2022, orders dated 14th November, 2022 and 18th November, 2022 passed by the Maharashtra Administrative Tribunal, Mumbai

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(hereafter "the Tribunal", for short) in Original Application No. 1121 of 2022 (Arya Vijay Pujari vs. State) are under challenge. In Writ Petition No. 15037 of 2022, the subject matter of challenge is an order dated 29th November, 2022 passed by the Tribunal in Original Application No. 1203 of 2022 (Nikita Narayan Mukhyadal vs. State) is challenged.

2. Arya and Nikita are transgenders. They intended to offer their candidature for appointment on the post of Police Constable in the Maharashtra Police Force pursuant to advertisements dated 6th November, 2022 and 9th November, 2022 issued by the petitioner no.3. While they attempted to submit their applications online, they found that there was no option for transgenders. The format had a clause for indicating whether an aspirant is a male or a female candidate. Arya and Nikita tried their level best to have the format changed. Having failed in such attempt, they approached the Tribunal with their respective original applications. By the impugned orders, the Tribunal while acknowledging that Arya and Nikita, as transgenders, do have the right to participate in the selection process in the light of the decision of the Supreme Court in **National Legal Services Authority vs. Union of India & Ors.**, reported in (2014) 5 SCC 438, has directed the Home Department to not only allow Arya and Nikita to participate in the selection process for appointment on the post of Police Constable in the Maharashtra Police Force by creating an appropriate option to facilitate identification of such of the aspirants who are transgenders, it has taken a step further to direct that in respect of recruitment to all posts in

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the Home Department, such option should be created for the transgenders.

3. Aggrieved thereby, the State is before us taking exception to the orders passed by the Tribunal primarily on the ground that recruitment rules for the post of Police Constable do not provide for transgenders to apply and, therefore, the orders of the Tribunal are contrary to such rules.

4. We heard Mr. Kumbhakoni, learned Advocate General for the petitioners yesterday as well as heard him now.

5. Yesterday, we had made it abundantly clear that the failure and/or negligence and/or omission on the part of the State of Maharashtra to frame recruitment rules providing an avenue for transgenders to offer their candidature for appointment on the post of police constable cannot be urged as a valid ground to have the impugned orders passed by the Tribunal interdicted by us.

6. At the outset, we are informed by Mr. Kumbhakoni that the State or its officers are not opposed to transgenders obtaining employment in the police force. He further informs us that the petitioners have heeded to wise counsel upon being conveyed the observations of the Court, and have since taken a decision to frame recruitment rules by 31st March, 2023, providing an avenue for transgenders to apply for appointment on the post of police constable as well as the procedure for selection. He further informs us that since nearly 14,06,000/- applications have been received, it would require at least another three months'

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time to scrutinize the applications as well as to conduct the physical examination test for the candidates, who are found eligible to take such test, to qualify and then participate in the written examination. He also submits that those aspirants who qualify in the physical examination test would be required to undertake a written examination of 100 marks and such of those aspirants who secure more than 40% marks in the written examination would ultimately be considered for selection and appointment as police constable. It is his submission that since it would take some time for the State to frame the recruitment rules for the transgenders, the State is agreeable to have the written test for the transgender candidates like Arya and Nikita conducted first, whereafter they would be asked to appear for the physical examination test.

7. Mr. Kumbhakoni also argues that the impugned orders to the extent of issuing general direction for appointment on posts other than the posts which are sought to be filled up by the present process being beyond the scope of the original applications, the Tribunal grossly erred in the exercise of its jurisdiction in so directing. According to him, the Tribunal cannot pass any order as if it were hearing a public interest litigation.

8. Arya and Nikita are represented by Mr. Kranti and Mr. Barsawaade, learned advocates, respectively.

9. Mr. Kranti has referred to us Office Memorandum dated 20th April, 2020 issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions,

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Department of Personnel and Training and the Transgender Persons (Protection of Rights) Rules, 2020 (hereafter "the 2020 Rules", for short), notified vide notification No.G.S.R.592(E) dated 25th September, 2020. Our attention has been drawn to rule 11 (2) of the 2020 Rules in terms whereof the appropriate Government is under an obligation to formulate a comprehensive policy on the measures and procedures necessary to protect transgender persons in accordance with the provisions of the Transgender Persons (Protection of Rights) Act, 2019 within two years from the date of coming into force of the 2020 Rules, i.e., two years from 25th September, 2020. It is the contention of Mr. Kranti that although two years have passed by, the State Government has been in deep slumber; it is yet to frame the requisite rules in terms of the mandate contained in rule 11(2) of the 2020 Rules. Mr. Kranti also contends that the impugned orders passed by the Tribunal do not merit any interference since the Tribunal has only reminded the State Government of its obligations and the requirement of the rule of law to comply with the statutory mandate in force.

10. Mr. Barsawaade has adopted the submissions of Mr. Kranti.

11. Having heard the parties at some length and on consideration of the materials on record, we are of the view that the writ petitions having been instituted against interim orders passed by the Tribunal, it would be inappropriate to express any opinion on the merits of the rival claims lest it has an effect on the Tribunal either way. In our further view, interest of justice would be sufficiently served if, while

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encouraging the Tribunal to decide the original applications on its own merits as early as possible, certain final directions are issued for taking the entire process of selection and appointment of police constables to its logical conclusion, subject to further orders to be passed by the Tribunal on the limited question that would survive for its consideration as regards reservation for transgenders and/or any other connected question.

12. Mr. Kumbhakoni is right in his contention that the Tribunal has travelled beyond the scope of the original applications. In such view of the matter, we set aside the general direction contained in paragraph 9 of the order dated 14th November, 2022 and paragraph 3 (sic, 4) (i) and (ii) of the order dated 18th November, 2022 to the extent the Tribunal has directed creation of third option for transgenders in the application form in respect of all recruitments in the Home Department. We clarify that such direction shall be confined, for the present, only to the selection process that is under way for appointment as police constables.

13. Secondly, we direct the State Government to frame appropriate rules in the light of the statutory mandate contained in rule 11(2) of the 2020 Rules as expeditiously as possible but positively by 28th February, 2023.

14. Thirdly, since we have been informed that the process of scrutiny of applications in excess of 14 lakh as well as conducting the physical examination test for the candidates found eligible would take at least three months, it is

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directed that so long the rules are not framed and the physical examination tests of Arya and Nikita are conducted in terms of such rules, the State shall not proceed to conduct the written examination for all aspirants.

15. We, however, do not agree with the suggestion given on behalf of the State by Mr. Kumbhakoni that Arya and Nikita could be directed to undertake the written examination first before the physical examination test. That would obviously result in tinkering with the recruitment rules, which this Court would be loath to direct.

16. Since the State by a general order has extended the time limit for submission of applications by all genders till 15th December, 2022, we grant liberty to Arya and Nikita to apply for the post of police constable through off-line mode by 15th December, 2022.

17. Since it has been assured on behalf of the State by Mr. Kumbhakoni that appropriate modification in the application format would be made so that other transgenders including Arya and Nikita can also offer their candidature for selection on the post of police constable online, we also encourage the State to make such modification so that online applications can be made by Arya and Nikita, if they so choose, and other transgenders, who have not approached the Tribunal, by 15th December, 2022. We also record the assurance of Mr. Kumbhakoni that the changes would be made by close of 13th December, 2022 so as to facilitate submission of applications by all transgenders by 15th December, 2022.

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18. This order substantially takes care of prayers 10(a) (i) and (iii) in both the original applications. We make no observations with regard to prayer 10(a)(ii) as well as prayer (b), which are left to be decided by the Tribunal in accordance with law.

19. With the aforesaid directions, the writ petitions stand disposed of. No costs.

20. We encourage the Tribunal to decide the original applications on its own merits as early as possible.

(ABHAY AHUJA, J.) **(CHIEF JUSTICE)**

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