

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

ORIGINAL APPLICATION NO 1121 OF 2022

DISTRICT : SATARA

Arya Vijay Pujari)...**Applicant**

Versus

The State of Maharashtra & Ors)...**Respondents**

Shri Kranti L.C i/b Shri Kaustubh Gidh learned advocate for the Applicant.

Ms Swati Manchekar, learned Chief Presenting Officer for the Respondents.

CORAM : Justice Mridula Bhatkar (Chairperson)

DATE : 25.11.2022

ORDER


1. The Circulation is taken by the learned counsel for the applicant. Though by earlier order dated 18.11.2022, this Tribunal has directed the Home Department that the third option for transgender in their on-line application is to be made available to enable the transgenders to apply for the post of Police Constable by 23.11.2022, however, till today neither the order of this Tribunal has been complied with nor it is challenged before the Hon'ble High Court. Thus, the order of the Tribunal is frustrated. Learned counsel for the applicant submits that the last date of acceptance of the application form is 30.11.2022 and at least the department



should be directed to accept the application form and the website should be operative.

2. In reply, learned C.P.O submitted that the Respondent, Home Department wants to challenge the order of this Tribunal before the Hon'ble High Court, mainly on the ground of administrative difficulties faced by the Respondent-State and she also relied on the directions given by the Hon'ble Supreme Court in the case of **Shanavi Ponnusamy Vs. Ministry of Civil Aviation & Anr, W.P (C) No. 1033/2017 dated 8.9.2022**. She submitted that it is the Central Government and not the State Government who has to take the policy decision first, pursuant to the decision of the Hon'ble Supreme Court in the case of **NATIONAL LEGAL SERVICES AUTHORITY Vs. UNION OF INDIA & ORS, (2014) 5 SCC 438**.

3. Learned counsel for the applicant while opposing the non-compliance of the order of the Tribunal and considering the order and directions given by the Hon'ble Supreme Court dated 8.9.2022 in the case of Shanavi Ponnusamy's case submitted that the Central Government way back on 20.4.2020 by Office Memorandum on the subject of inclusion of third gender in other category in the application form in recruitment to various posts under the Central Government has directed all the Ministries, Department of Government of India to modify the relevant recruitment rules providing for inclusion of transgender as a separate category of gender so as to make the said rules in conformity with the provisions of The Transgender Persons (Protection of Rights) Act, 2019. Learned counsel for the applicant further submitted that the Government of India has made it applicable not only to a particular wherein also include physical standards are also mentioned.



4. Learned counsel for the applicant relied on the following case laws:-

- (i) Judgment of the Hon'ble Supreme Court in National Legal Services Authority Vs. Union of India & Anr, (2014) 5 SCC 438.
- (ii) Judgment of the Hon'ble High Court of Judicature at Madras in K. Prithika Yashini (Transgender) Vs. The Chairman, Tamil Nadu Uniformed Services Recruitment Board, 2016-4-L.W 594.
- (iii) Learned counsel for the applicant relied on the Recruitment Rules dated 12.11.2022 for appointment to the post of Police Constable of State of Bihar. He relied on clause no 4.4 (g) of the said Rules, wherein the physical standard for transgender or third gender are of the same like female.

5. The State has right to challenge the order of the Tribunal. However, in view of the very specific directions given by the Hon'ble Supreme Court in **NATIONAL LEGAL SERVICES AUTHORITY'S case (supra)**, and as pointed out by the learned counsel for the applicant certain paragraphs from the judgment of NALSA are required to be highlighted to reiterate the point of gender as well as sex discrimination which in fact is prohibited in the Constitution of India.

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“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.

68. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live with dignity and equal status with other genders.....

81. Articles 14, 15, 16, 19 and 21, above discussion, would indicate, do not exclude Hijras/Transgenders from its ambit, but Indian law on the whole recognize the paradigm of binary genders of male and female, based on one's biological sex. As already indicated, we cannot accept the Corbett principle of "Biological Test", rather we prefer to follow the psyche of the person in determining sex and gender and prefer the "Psychological Test" instead of "Biological Test". Binary notion of gender reflects in the Indian Penal Code, for example, Section 8, 10, etc. and Page 85 85 also in the laws related to marriage, adoption, divorce, inheritance, succession and other welfare legislations like NAREGA, 2005, etc. Non-recognition of the identity of Hijras/Transgenders in the various legislations

denies them equal protection of law and they face wide-spread discrimination.

83. We, therefore, conclude that discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution, and hence we are inclined to give various directions to safeguard the constitutional rights of the members of the TG community.

6. In the judgment of **Shanavi Ponnusamy Vs. Ministry of Civil Aviation & Anr**, the Hon'ble Supreme Court has directed that the provisions of the 2019 Act need to be implemented in letter and spirit by formulating appropriate policies. The Union Government must take the lead in this behalf and provide clear guidance and enforceable standards to all other entities, including, those of the Union Government, State Governments and establishments governed by the 2019 Act. It is further stated that the Union Government shall adopt suitable measures after collaborating with the National Council and place a policy on the record before the next date of listing, which is now fixed on 6.12.2022. I rely on the Central Government's Office Memorandum dated 20.4.2020 has directed all the Government Offices to allow transgenders/other sex to participate in all the process of recruitment. It is necessary to point out that the directions were given in NALSA (supra) independently to the Central Government as well as the State Government. The Respondents in Shanvai Ponnusamy's case is the Ministry of Civil Aviation, which come under the Central Government. However, 'Police' is the subject in the State List in Seventh Schedule (VII) of the Constitution of India at Serial no. 2 and so also Sr. No. 41, is the State Public Service Commission. Thus, the State Government is fully empowered to draw its own policy and take decisions in such matters.

7. It is further to be noted that the Government of Bihar has carried out the necessary modification in the Recruitment Rules and issued the advertisement for the post of Constables on 12.11.2022, wherein the relevant clause 4.4 (g) is reproduced below:-

4.4 अभ्यर्थियों का शारीरिक मापदण्ड - ऊँचाई, सीना और वजन के लिए कोई अंक देय नहीं होगा | परंतु विहित अर्हताएँ पूरी नहीं करने वाले अभ्यर्थी असफल घोषित किए जाएंगे |
(घ) किन्नर /कोथी /हिजडा / ट्रांसजेन्डर (थर्ड जेन्डर) अभ्यर्थियों के लिए शारीरिक मापदण्ड तथा शारीरिक दक्षता परीक्षा का मापदण्ड पिछड़े वर्ग की महिला अभ्यर्थियों के समान होगा. |

8. In the case of K. Prithika Yashini (Transgender) (supra), the option was not given to the third gender for the recruitment to the post of Sub-Inspector. The Hon'ble Madras High Court has relied on the judgment of the Hon'ble Supreme Court in the case of NATIONAL LEGAL SERVICES AUTHORITY Vs. UNION OF INDIA & ORS. Though the judgment was pronounced in April, 2014, where there was no policy for the transgender^s framed by the Government of Tamil Nadu. The Hon'ble Madras High Court held that the petitioner is entitled to be recruited to the post of Sub-Inspector and allowed the Writ Petition with the following ratio:-

"9. On examination of the case of the petitioner qua the category she would be required to be recruited as there being no separate category, it was found that the petitioner qualified the horizontal reservation minimum bench mark of OC Women of Ministerial quota, which is 25.50 against which the petitioner had obtained 28.50 marks. It was this which persuaded the Court to grant interim orders in favour of the Petitioner. The physical efficiency test had been taken by the petitioner with the bench mark as that for a female."

It was further observed as under:-

"12. We have given our thought to the matter. The discrimination suffered by the transgenders would be difficult for any of the other two genders to realize. The present case is one where the petitioner was categorized as man, though she was a female. She had undergone

sufferance of an exit from her house without parental protection. It is in these difficult circumstances that the petitioner has been endeavouring to eke out a living.

13. There can be various physical chances and mental effects arising from the situation in which the petitioner finds herself. The respondent failed to provide for the third gender in the application Form and thus, the petitioner had to rush to the Court to assert her rights. The next stage was to find out as to what bench mark should apply to the petitioner and thus, benefit was given to the petitioner accordingly, in which she was successful. We do not think that in the physical endurance test, a difference of 1.11 seconds should come in the say of the petitioner in being considered for recruitment. We hasten to add that she will have to meet the bench mark of the recruitment process, but the case cannot be knocked out in the middle, as was sought to be done by the respondent.”

9. Learned C.P.O, at the end of dictation of the order has requested to mention that this Court has passed this order sitting Singly in this matter of Division Bench. The Member (Admin) is on leave and hence not available. It is very unprecedented request made by the learned C.P.O which is never made so in other matters when the Division Bench matters are decided sitting Singly at the interim stage. However, it is my duty to satisfy the State questioning the powers of the Member (J) in passing interim orders under the Administrative Tribunals Act. Section 5(6) of the Administrative Tribunals Act pertains to the composition of the Tribunal and its Benches thereof. There is always assignment of the matters to the Single Bench and Division Bench. The Chairperson has the power to decide which subjects are to be assigned to the Single Bench or Division Bench. Accordingly, I have issued the order on 25.5.2021 after consultation with my brother Member (J) & Member (A) and have assigned the subjects.

10. In ~~the~~ of Shri Parasram Thakur (supra), the Hon'ble Bombay High Court has referred to relevant portion as follows:-

"2. The Joint Registrar of the Tribunal has submitted a report dated November 23, 2021. In such report, after quoting paragraph 5 of our order dated November 17, 2021, the Joint Registrar says as follows:-

"In this regard, I am to state that as per Order No. 1/32/87-JA dated 20.1.1992, passed by Hon'ble Mr Justice V.S Malimath the then Chairman, Central Administrative Tribunal, in situations when a Division Bench is not available for dealing with urgent cases for 'Admission' and 'Grant of Interim Orders', and the urgency is such that, the matter cannot be deferred until a Division Bench become available, the Single Member is authorized to take up such urgent cases for 'Admission' and 'Grant of Interim Orders' subject to the condition that if the Single Member is not inclined to admit the matter, he/she shall refer the matter, for being placed before the appropriate Division Bench as soon as the same becomes available. It is further submitted that on 13.10.2021, Division Bench was not available. A copy of the aforesaid order and the Cause List dated 13.10.2021 is enclosed herewith for ready reference."

11. Thus, in the present case interim order was already passed on 18.11.2022. This is another interim order in that order.

12. Learned counsel for the applicant has produced copy of the Notification dated 6.7.2021 issued by the Government of Karnataka, whereby the Recruitment Rule is amended by providing reservation to transgender candidate. I have gone through Rule 9 of the said Recruitment Rules and it shows that not only the transgenders are allowed to participate in the process of recruitment in the Police Department, but they are provided reservation in all the services of the State of Karnataka.

13. Learned counsel for the applicant has also produced the advertisement dated 27.11.2022 issued by the Tamil Nadu Uniformed Services Recruitment Board, wherein specifically a class is created for transgender thereby allowing them to participate and

the physical standard for physical test for female and transgender are the same.

13 Considering the submissions of the learned counsel for the applicant and the learned C.P.O, I am inclined to extend the date of acceptance of the Application Form for transgenders till 8.12.2022.

13 S.O to 23.12.2022.

Sd/-

**(Mridula Bhatkar, J.)
Chairperson**

**Place : Mumbai
Date : 25.11.2022
Dictation taken by : A.K. Nair.**