

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL  
MUMBAI BENCH**

**ORIGINAL APPLICATION NO 1203 OF 2022**

**DISTRICT : PUNE**

Nikita N. Mukhyadal )...**Applicant**

**Versus**

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

Shri Shreyas Barsawade, learned advocate for the Applicant.

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

**CORAM : Justice Mridula Bhatkar (Chairperson)  
Smt Medha Gadgil (Member) (A)**

**DATE : 29.11.2022**

**ORDER**

1. The Circulation is taken by the learned counsel for the applicant. The applicant who is a transgender wants to fill up the applicant in the third category for the post of Police Constable pursuant to the advertisement dated 9.11.2022, issued by Pimpri Chinchwad Police Commissionerate. The last date for submission of application form is 30.11.2022. Learned counsel for the applicant submits that only two options are made available by the Respondents, i.e., Male & Female and no third option is made available for transgender of the other sex. Learned counsel for the applicant prays that the Respondents be directed to make the third



option open for the transgender and allow the applicant to apply in the third category of transgender.

2. Learned P.O opposes the Original Application on administrative grounds.

3. We have earlier passed order dated 14.11.2022 in the case of Arya Vijay Pujari Vs. The State of Maharashtra, wherein we have relied on the judgment of the Hon'ble Supreme Court in the case of **NATIONAL LEGAL SERVICES AUTHORITY Vs. UNION OF INDIA & ORS, (2014) 5 SCC 438**. In the said case by another order dated 25.11.2022, we have made the legal position and the view taken by this Tribunal explicitly clear on this point. So we reproduce the concerned paragraphs from the said order dated 25.11.2022.

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.

"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'

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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.

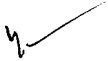
68. Articles 15(2) to (4) and Article 16(4) read with the Directive Principles of State Policy and various international instruments to which Indian is a party, call for social equality, which the TGs could realize, only if facilities and opportunities are extended to them so that they can also live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

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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."

11. 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.

12. 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.

4. In view of the above, we extend the date of acceptance of the application form till 8.12.2022 and direct the Respondent-State to

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make the option available to the applicant by 4.12.2022, as the last date of acceptance of application form is 8.12.2022.

5. S.O to 23.12.2022.

Sd/-

  
**(Medha Gadgil)**  
**Member (A)**

Sd/-

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

**Place : Mumbai**

**Date : 29.11.2022**

**Dictation taken by : A.K. Nair.**