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Status: Pending

Case Number: **WP 14909/2023**
(KAHC010352102023)

Classification: **EDN RES**

Date of Filing: **10/07/2023**
17:38:55

Petitioner: **MUGIL ANBU**
VASANTHA

Pet. Advocate: **CLIFTON D**
ROZARIO

Respondent: **STATE OF**
KARNATAKA

Resp. Advocate:

Filing No.: **WP 14886/2023**

Judge: **ASHOK S.KINAGI**

Last Posted For:
PRELIMINARY HEARING

Last Date of Action:
22/08/2023

Last Action Taken:
ADJOURNED

Next Hearing Date:

Tentatively case may be listed
on (likely to be listed on):
10/01/2024 (Computer
Generated Date)

Daily Orders: WP 14909/2023

1	ASHOK S.KINAGI	<u>22/08/2023</u>
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Heard the learned counsel for the petitioner, learned counsel for respondent Nos.3 and 4 and also learned Additional Advocate General Sri. Vikram Huilgol on interim prayer.

2. Learned counsel for the petitioner submits that the petitioner is a transgender person, had applied for 3 year LL.B course at respondent No.3 – University for which the petitioner appeared for 3 year LL.B entrance test. The petitioner despite being a transgender person was not given any affirmative action either in the application process or in the admission process. Respondent No.3 failed to publish either the rank list of the students, cumulative final provisional or the admission list, despite which the admissions have been undertaken for the course. The respondents have failed to implement the Karnataka State Policy on Transgenders, 2017 (hereinafter referred to as 'the Policy of 2017') and allied rules, in violation of the petitioner's right under Articles 14, 15 and 21 of the Constitution and failed to grant reservation to the petitioner in admission to the course.

3. He further submits that the petitioner is a transgender person as defined under Section 2(g) of Transgender Persons (Protection of Rights) Act of 2019 (hereinafter referred to as 'the Act of 2019') and having declared themselves as transgender person by virtue of affidavit of declaration and the petitioner was issued identity card by the Government by virtue of Aadhaar card. The petitioner is entitled to the protection and guarantees available under the Act of 2019 and Transgender Persons (Protection of Rights) Rules of 2020 (hereinafter referred to as 'the Rules of 2020'). He submits that respondent Nos.1 and 2 have not taken any effective steps to protect the rights and interest of the transgender person. He submits that the Hon'ble Apex Court has taken judicial note to the need for possible action on the part of the State to protect the rights of transgender person.

4. Further, in order to buttress his arguments, he has placed reliance on the judgment of the Hon'ble Apex Court in the case of NALSA Vs. Union of India reported in (2014) 5 SCC 438. He submits that despite direction, the respondents have failed to provide the policy of reservation to the transgender person in educational institutions. Respondent No.3 has not provided reservation to the transgender person under socially and educationally backward class for the purpose of admission in respondent No.3-University. Action of respondent No.3 in not providing reservation to the transgender person is contrary to the judgment of the Hon'ble Apex Court and the respondents have failed to implement the Policy of 2017, the Act of 2019 and the Rules of 2020. He submits that action of respondent Nos.3 and 4 are manifestly arbitrary as the admission process suffered from lack of transparency and they have violated the petitioner's right against the discrimination on the basis of their gender under article 15(1) by denying that educational on par with other protected groups.

5. He submits that the denial of reservation to the petitioner in admission to respondent No.3 amounts to violation of their constitutional rights. He submits that education of transgender persons and their participation in the educational institutions must be encouraged to secure their rights despite which the respondents have failed to secure the rights of the petitioner.

6. In order to buttress his argument, he has placed reliance on the orders passed by the other High Courts, High Court of Madras in W.P No.26628/2017 dated 29.11.2017 and also order passed by Division bench of High Court of Uttarakhand in W.P No.1794/2018 dated 28.09.2018 and also order passed by the High Court of Judicature Madras in W.P No.26506/2022 and connected matters dated 11.10.2022.

7. He further submits that in the application for admission the petitioner has shown the gender as others and respondent Nos.3 and 4 have not taken into consideration. He submits that transgender candidate should be treated as special candidate under the special category of transgender or 3rd gender and transgender candidate must be considered for admission.

8. In the instant case, respondent Nos.3 and 4 have denied the admission of the petitioner. Hence, he submits that action of respondent Nos.3 and 4 in denying the admission to the petitioner under the special category is arbitrary and erroneous and prays to issue direction to 3rd respondent to offer admission to the petitioner in 3 years LL.B course.

9. Learned Additional Advocate General submits that respondent-State is taking steps to effectively implement the Act and rules framed and has produced communication dated 18.08.2023.

10. Learned counsel for respondent Nos.3 and 4 submits that respondent Nos.3 and 4 provided the intake reservation i.e., total number of seats available are 120 and seats reserved for following candidates i.e., Scheduled Castes-15%,

Scheduled tribes- 7.5%, OBC-27% and EWS-10% and 5% of the total intake is reserved horizontally for persons with disabilities (PWD) and 30% to the total intake is reserved horizontally for women and 25% of the total intake is reserved horizontally for the Karnataka students. He submits that the petitioner has not applied for admission under the said category.

11. He submits that no reservation is provided by respondent Nos.3 and 4 for the transgender persons. He submits that all general category seats are already filled up and the petitioner has approached this Court at a belated stage and already admission process is over.

12. He submits that powers are vested with the executive council to form reservation and executive council of respondent No.3- University in its 95th Meeting on 21.03.2021 approved NLSIU inclusion and Expansion Plan 2021-25. The said plan is a comprehensive and overarching scheme evolved by the plenary governing bodies of the respondent-University to ensure equality of access and opportunity to participate in the respondent-University's programmes to all section of the community. He submits that the plan is framed after consideration of the all relevant aspects and issues and the legal framework. The said decision is also in line with the prevalent position in other similarly situated educational institutions such as IIT, IIMS etc., and also other State Higher Educational Institutions in the state of Karnataka. He further submits that as per the judgment of Hon'ble Apex Court in NALSA (supra), the Center and State governments have to take steps as per the said decision and he further placed reliance on the order passed by the Divisional Bench of this Court in the case of Master. Balachandra Krishnan vs. State of Karnataka reported in ILR 2021 KAR 1245 as per the said decision it is not open for the respondent - University to travel beyond the decision of the Executive Council and offer a reservation. He submits that University is bound to strictly adhere to the decision of the Executive council. He submits that the petitioner's claim for admission into the respondent-University by now created a quota for transgender persons is untenable. Hence, further submits that the petitioner cannot claim reservation for admission to 3 years LL.B. course in 3rd and 4th respondent - University.

13. He also submits that the petitioner after having participated in the process of admission, now the petitioner cannot challenge the seat matrix. The petitioner is estopped to challenge the seat matrix. Hence, prayed to reject the interim prayer.

14. Perused the records and considered the submissions of the learned counsel for the parties.

15. The petitioner is desirous of studying Law due to the discrimination they have faced so as to advance the cause of social justice. The petitioner had approached Mumbai High Court in W.P (L) No.9961/2023 to get their name change in their documents. The Division Bench of Mumbai High Court has taken a judicial note of the petitioner's desire to study Law, while calling the matter as 'a case of a denial of human beings, self identity and self identification'. The Hon'ble D.B of Bombay High Court placing a reliance on the NALSA (supra) case issued a Mandamus directing the respondent No.1 therein to suitably to modify the plan available at Alumni application form for transcript February 2022 and to make it flexible to include the request by the Alumni for the change of particulars such as name and genders in their records and documents.

16. It is not in dispute that the petitioner is a transgender person and applied for admission to 3 year LL.B course in the respondent Nos.3 and 4 - University. While submitting the application, the petitioner mentioned gender as 'others' i.e., transgender and the same was accepted by the respondents and permitted the petitioner to participate in the entrance exam. The respondents No.3 and 4 have not provided any reservation to the transgender person. The respondent Nos.3 and 4 could have shown leniency to the transgender person who is longing for admission into the 3rd respondent. The respondents are guilty of not implementing the order of the Hon'ble Apex Court by providing a separate reservation for them. The transgender person rarely approach the Court seeking to consider their candidature for admission in the educational institution and employment. This kind of claim has to be considered with compassion and benevolence. The Hon'ble Apex Court in the case of NALSA (supra), has held in para 129 as under:

"129. We, therefore, declare:

(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 State Governments to take steps to treat them socially and educationally backward classes of citizens and extend all kinds of reservations in cases of admission in educational institutions and for public appointments.

(4) Central and State Governments are directed to operate separate HIV Sero-surveillance 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.

(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 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."

(emphasis supplied)

17. The Hon'ble Apex Court directed the Centre and State governments to take steps to treat them socially and educationally backward classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments. Admittedly the state government has not taken any steps for providing reservations to the transgender persons. The action of the respondents in not implementing the statutory scheme of the Act of 2019 and the Rules of 2020 violates the fundamental rights of the petitioner.

18. Right to equal protection under the law is extended to 'every person' which includes the male, female and third gender within its ambit. So the transgender is also entitled to legal protection under the Constitution of India in all the spheres of State activity. The triumvirate exist between Articles 14, 19 and 21 of the Constitution of India. All these Articles have to be read together. Any law interfering with personal liberty of a person must satisfy a triple test (i) it must prescribe a procedure (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation and (iii) it must be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with the personal liberty must also be right and just and fair and not arbitrary. If the procedure prescribed does not satisfy the requirement of Article 14, it would be no procedure at all within the meaning of Article 21.

19. Section 13 of the Act of 2019 reads as under:

"13. Every educational institution funded or recognised by the appropriate Government shall provide inclusive education and opportunities for sports, recreation and leisure activities to transgender persons without discrimination on an equal basis with others."

20. As per Section 13 of the Act of 2019, it is obligatory of every educational institution funded or recognized by the appropriate Government to formulate welfare schemes for transgender persons.

21. Rule 10 of the Rules of 2020 reads as under:

"10. Welfare measures, education, social security and health of transgender persons by appropriate Government.-(1) The appropriate Government shall constitute a welfare board for the transgender persons for the purpose of protecting their rights and interests of, and facilitating access to schemes and welfare measures framed by the Government.

(2) The appropriate Government shall review all existing educational, social security, health schemes, welfare measures, vocational training and self-employment schemes to include transgender persons to protect their rights and interests and facilitate their access to such schemes and welfare measures framed by that Government.

(3) The appropriate Government shall formulate educational, social security,

health schemes and welfare schemes and programmes as specified in Annexure II in a manner to be transgender sensitive, non-stigmatising and non-discriminatory to transgender persons.

(4) The appropriate Government shall take adequate steps to prohibit discrimination in any Government or private organisation, or private and public educational institution under their purview, and ensure equitable access to social and public spaces, including burial grounds.

(5) The appropriate Government shall create institutional and infrastructure facilities, including but not limited to, rehabilitation centre referred to in sub-section (3) of Section 12 of the Act, separate human immunodeficiency virus sero-surveillance centres, separate wards in hospitals and washrooms in the establishment, within two years from the date of coming into force of these rules to protect the rights of transgender persons.

(6) The appropriate Government shall carry out an awareness campaign to educate, communicate and train transgender persons to avail themselves of the benefits of welfare schemes, educate and train transgender persons on their rights; eradicate stigma and discrimination against transgender persons and mitigate its effects.

(7) The appropriate Government shall also provide for sensitisation of institutions and establishments under their purview, including-

(a) sensitisation of teachers and faculty in schools and colleges, changes in the educational curriculum to foster respect for equality and gender diversity;

(b) sensitisation of healthcare professionals;

(c) sensitisation programmes in workplaces;

(d) sensitisation programmes for complaints officers.

(8) All educational institutions shall have a committee which shall be accessible for transgender persons in case of any harassment or discrimination, with powers to ensure that transgender students do not have to be affected by the presence of the persons bullying them, including teachers.

(9) The appropriate Government shall create institutional and infrastructure facilities, including but not limited to, temporary shelters, short-stay homes and accommodation, choice of male, female or separate wards in hospitals and washrooms in the establishment within two years from the date of coming into force of these rules to protect the rights of transgender persons."

22. The Rules of 2020 provides that appropriate Government shall review all schemes of existing educational, social security, etc., to include transgender persons to protect their rights, interests and facilitate their access to such schemes and welfare measures framed by the Government.

23. Generally, providing reservation to the transgender category is within the domain of the State. However, in the instant case, the State has no power to frame any legislation in respect of respondent No.3 and 4 University in view of law laid down by the Division Bench of this Court in the case of Master. Balachandra Krishnan (supra). It is the executive council of respondent - University has to frame the policy for reservation to the transgender candidates. The Hon'ble Apex Court in the case of NALSA (supra), held that the transgender persons have a right to reservation owing to the fact that they "are a socially and educationally backward class" with regard to reservation and directed the Centre and State to take steps to treat them (transgender persons) as socially and educationally backward classes of citizen. The petitioner has produced the copy of Minutes of Conference on 'Human Rights of LGBTQI challenges and forwarded held on 26.02.2020 at the international training center, national law school of Indian University, Bengaluru. It was discussed that transgender persons not getting the benefit of reservation. After deliberation it was recommended to introduce horizontal reservations within caste, tribe, and other categories of reservation for transgender persons in furtherance of NALSA (supra) judgment, wherein it was decided to relax qualifying marks, and age in addition to reservation. In the instant case, the executive council of respondent Nos.3 and 4 have not provided any reservation to the transgender person. The action of respondents No.3 and 4 is in violation of the judgment passed by the Hon'ble Apex Court in the case of NALSA (supra) and Section 13 of the Act of 2019. Further the respondents 3 and 4 submit that NLSIU Inclusion and Expansion Plan 2021-25 does not provide for a quota for transgender persons. The respondent University has not placed the said Plan of 2021-25 on record. The respondents are constitutionally obligated to take positive steps to realize the rights of the petitioner and other transgender persons as the respondents have failed in their obligation. The respondents have deprived the petitioner's right against the discrimination on the basis of their gender under Article 15(1) of the

Constitution of India by denying them education on par with other protected groups and also violation of Article 21 of the Constitution of India which not only protects the petitioner's right to live with dignity, but also they are able to fully enjoy their rights including the Right to Education. Further Article 38 of the Constitution of India mandate to secure a social order and to promote the welfare of the people which the respondents have failed to implement. The non grant of reservation to the transgender person in admission test is patently violative of article 14, 19 and 21 of the Constitution. The Hon'ble High Court of Judicature, Madras directed to admit the transgender person into the course of BSMS and directed the State Government to issue guidelines on the 'determination of the community'. The Hon'ble High Court of Uttarakhand in the case of Rano & Ors., vs. State of Uttarakhand & Ors., directed the State Government to provide reservation for transgender persons in the educational institutions.

24. As the matter requires detailed consideration, accordingly the petitioner has made out a prima facie case for grant of interim order. Accordingly, I proceed to pass the following :

ORDER

Respondent No.3 is directed to admit the petitioner in 3 year LL.B course of the academic year 2023-24, if petitioner is eligible. The admission of the petitioner is subject to the outcome of the writ petition.

For filing statement of objections by the State, call after four weeks.

Last Updated On: 2023-08-24 17:20:46

2	ASHOK S.KINAGI	<u>21/08/2023</u>
	<p>Learned counsel for respondent No.3 filed an application in I.A.No.1/2023 to amend the statement of objections filed on 07.08.2023.</p> <p>Learned counsel for the petitioner submits no objections to allow the application.</p> <p>Accepting the reasons assigned in the application, same is allowed. Respondent No.3 is permitted to carry out amendment in the statement of objections dated 07.08.2023, and to furnish an amended statement of objections.</p> <p>Learned counsel for respondent No.3 filed the amended statement of objections. Same is placed on record.</p> <p>For consideration of interim prayer, call on 22.08.2023.</p> <p>Last Updated On: 2023-08-22 10:08:11</p>	
3	ASHOK S.KINAGI	<u>07/08/2023</u>
	<p>Learned counsel for respondents No.3 and 4 filed the statement of objections. Same is placed on record.</p> <p>Learned High Court Government Pleader seeks time to file the statement of objections.</p> <p>A week's time is granted to file the statement of objections.</p> <p>List this matter on 21.08.2023.</p> <p>Last Updated On: 2023-08-07 17:16:54</p>	
4	ASHOK S.KINAGI	<u>31/07/2023</u>
	<p>Learned counsel for respondent Nos.3 and 4 seeks time to file statement of objections.</p> <p>One week's time is granted to file statement of objections.</p> <p>Re-list the petition on 07.08.2023.</p> <p>Last Updated On: 2023-07-31 14:55:30</p>	
5	SACHIN SHANKAR MAGADUM	<u>24/07/2023</u>

	<p>, Learned HCGP is directed to accept notice for respondent Nos.1 and 2. Sri.Adithya Narayana, learned counsel is directed to accept notice for respondent Nos.3 and 4. List this matter in the preliminary hearing on 31.07.2023 to consider the interim prayer. The petitioner shall intimate the next date of hearing to the respondents.</p> <p>Last Updated On: 2023-07-25 10:35:55</p>
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6	SACHIN SHANKAR MAGADUM	<u>18/07/2023</u>
	List this case on 24/07/2023	
	Last Updated On: 2023-07-19 12:46:23	